The Past and Present of Russian International Arbitration Law and their Implications Outside Russia

An Appraisal of the Russian Arbitration Reform under the New York Convention

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Abstract

The 2016 Russian arbitration law reform introduced a licensing system for Russian arbitral institutes. Prior to the reform, Russian law had struggled to combat potential abuse by parties that owned their own arbitral institutes, which could appoint arbitrators that would decide disputes in favour of the institutes' owners. The reform also introduced new rules for the arbitrability of Russian corporate and procurement disputes. These disputes must be arbitrated in licensed institutes, and most must be arbitrated with a Russian seat, for the arbitral award to be enforceable in Russia.

This thesis analyses whether the licensing system for Russian arbitral institutes makes it possible for the Russian government to exert pressure on arbitral institutes. The subordination of arbitral institutes to the Russian government through the licensing system creates the risk that the government can pressure arbitral institutes to appoint arbitrators that will decide disputes in line with government policy where an arbitration touches on government interests.

This thesis further analyses the framework for the enforcement of arbitral awards under the New York Convention. It investigates whether a court would be able to refuse enforcement of an arbitral award where it suspects that the Russian government has exerted pressure on the arbitral institute that administered the arbitration.

This thesis concludes that the regime under the New York Convention does not allow a court to refuse enforcement of an arbitral award in such circumstances. This thesis suggests a means of mitigating the risk of enforcing an award that has been issued in an arbitration administered by a Russian licensed arbitral institute in circumstances where

the Russian government is suspected to have exerted pressure on the arbitral institute. The suggested means of doing this is to invoke the principles of reciprocity under the New York Convention to refuse enforcement of arbitral awards resolving those disputes that the Russian arbitration reform's rules on arbitrability shepherd into Russian-seated arbitration within a licensed institute.

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Abbreviations

DIS	German Arbitration Institute
e.g.	For example
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
et al	And others
HKIAC	Hong Kong International Arbitration Centre
i.e.	In other words
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
ILA	International Law Association
LJ	Lord Justice
NCO	Non-Commercial Organisation
NGO	Non-Governmental Organisation
RAA	Russian Arbitration Association
RAC	RSPP Arbitration Centre
RIMA	Russian Institute of Modern Arbitration
RSPP	Russian Union of Industrialists and Entrepreneurs
UNIDROIT	International Institute for the Unification of Private Law
USSR	Soviet Union
VIAC	Vienna International Arbitration Centre

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Chapter I – Introduction

This thesis analyses the vulnerability of the international regime for arbitration to abuse by the legal system at the seat of arbitration. The seat of arbitration is a legal fiction and is not necessarily where the physical hearings take place.[1] It is the legal place of the arbitration, the courts and arbitration law of which govern the arbitral proceedings.

Before going any further, it is necessary to clarify what is meant by 'abuse'. This thesis is concerned with abuse by the seat of arbitration in the sense of 'the exercise of a right for an end different from that for which the right was created, to the injury of another person'.[2] This thesis is not concerned with the distinction between assistance and interference by the courts at the seat in an arbitration, which measures whether a court decision has a positive or negative impact on the efficiency of an arbitration.[3]

The concept of abusive court decisions in the context of arbitration has been explored by investor-state arbitral tribunals. In *Frontier Petroleum*, the tribunal described abuse as

[1] See on this: Gary Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International 2014) 1538-1540; Loukas Mistelis, 'Setting Aside of Arbitral Awards and Forum Shopping in International Arbitration: Delocalisation, Party Autonomy and National Courts in Post-Award Review' in Franco Ferrari (ed), *Forum Shopping in the International Commercial Arbitration Context* (Seller 2013) 227; Loukas Mistelis, 'Arbitral Seat: Important Features and the Role of Law' (2012) 23(2) *American Review of International Arbitration* 407; Loukas Mistelis, 'Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri"' (2007) 17(2) *American Review of International Arbitration*; Tatsuya Nakamura, 'The place of arbitration in international arbitration – its fictitious character and lex arbitri' (2000) 15(10) *Mealey's International Arbitration Review* 23; Noah Rubins, 'The arbitral seat is no fiction: a brief reply to Tatsuya Nakamura's Commentary, "The place of arbitration in international arbitration – its fictitious nature and lex arbitri"' (2001) 16(1) *Mealey's International Arbitration Review* 23

[2] B.O. Iluyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law' (1975) 16 *Harvard International Law Journal* 47, 48 as cited in G. Kaufmann-Kohler, 'Commercial Arbitration Before International Courts and Tribunals – Reviewing Abusive Conduct of Domestic Courts' (2013) 29(2) *Arbitration International* 153, 169. See also Alexandre Kiss, 'Abuse or Rights' in *Encyclopedia of Public International Law* (Max Planck Institute 2006)

[3] G. Carbone, 'The Interference of the Court at the seat with International Arbitration' [2012](1) *Journal of Dispute Resolution* 217

a lack of good faith, holding that a decision contravenes good faith where it involves 'the use of legal instruments for purposes other than those for which they were created'.[4] In *Saipem*, an investor-state arbitral tribunal held that the revocation of an arbitral tribunal's jurisdiction by the Bangladeshi courts of the seat constituted an abuse - though 'the revocation an arbitrator's authority can legitimately be ordered in case of misconduct… [courts of the seat] cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated to with such misconduct'.[5] In particular, this thesis focuses on abuse by the seat in pursuing a protectionist agenda: [6] e.g. where the courts at the seat annul an arbitral award issued against a local party solely for the purpose of relieving the local party of its obligations, and depriving the foreign party of its rights, under the award.

The question arises as to whether the international regime for arbitration can offer any relief to parties against such cynical manoeuvring by national legal systems. The international regime for arbitration is based upon the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which regulates the enforcement and recognition of both arbitration agreements and arbitral awards outside the seat of arbitration. The Convention obliges courts outside the seat ("courts of enforcement") to give effect to arbitral awards and arbitration agreements subject to narrow exceptions;

[4] *Frontier Petroleum v Czech Republic* IIC 465 12/11/2010 at [300]

[5] *Saipem v Bangladesh* Final Award ICSID Case No. ARB/05/07 30/06/2009 at [159]

[6] Alan O. Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 66(1) *The University of Chicago Law Review* 1, 3 provides a useful legal definition of 'regulatory protectionism': 'any cost disadvantage imposed on foreign by a regulatory policy that discriminates against them or that otherwise disadvantages them in a manner that is unnecessary to the attainment of some genuine, nonprotectionist regulatory objective'. From this definition of 'regulatory protectionism' it is possible to derive a definition for protectionism in the context of annulment – annulment decisions made against foreign parties by the supervisory court of arbitration that discriminate against them or that otherwise disadvantage them in a manner that is unnecessary to the attainment of some genuine, nonprotectionist supervisory objective. This definition of protectionism in the context of annulment dovetails with the definition of 'abuse' relied upon in this thesis: abuse constitutes the exercise of a right for a purpose other than that for which it is intended; protectionist annulments are those annulments that disadvantage a foreign party in a manner that does not attain a legitimate supervisory purpose.

at the same time, the Convention does not impose any restrictions on how the courts at the seat interact with an arbitration.

Without imposing obligations on the courts at the seat, the New York Convention is unable to directly prevent abuse by the seat of arbitration. However, the New York Convention does offer some relief against abusive annulment decisions by giving courts of enforcement discretion to enforce annulled arbitral awards. Where the courts at the seat have abusively annulled an arbitral award, the international regime for arbitration under the New York Convention allows a court of enforcement to give the award creditor a remedy through enforcement of the annulled award.

The position of a court of enforcement is different where improper interference with an arbitration leads not to an abusive annulment decision but to an improper arbitral award. Here, the relevant remedy is not enforcement but refusal to enforce. Under the New York Convention, courts of enforcement are not obliged to refuse enforcement where an award has been annulled as they enjoy a general discretion to enforce arbitral awards. However, courts of enforcement may only refuse enforcement where one of the limited defences to enforcement under the Convention is applicable. If it is possible for a State to interfere with an arbitration so as to affect the contents of an arbitral award, a court must be able to justify the refusal to enforce the award under one of the defences to enforcement contained in the Convention.

It is against this backdrop that the present thesis examines the 2016 reform of Russian arbitration. At present there are a handful of books providing a review of the Russian

arbitration reform. *Международный коммерческий арбитраж: учебник*[7] is an in-depth exposition of the law of arbitration after the reform. A similar English-language work is *Arbitration in Russia.*[8] A more technical work on the subject is *Комментарий к Федеральному закону «Об арбитраже (третейском разбирательстве) в российской федерации»*[9], an article-by-article analysis of the black letter law of the reform as it was initially implemented in 2016. More analytical works that discuss the reform are *Russian Arbitration Law and Practice*[10] and the Russia Report in the 2020 *ICCA International Handbook on Commercial Arbitration*,[11] which discuss the impact of the reform and place it within the broader historical context of Russian arbitration's development. There are also many articles that consider the results of the reform.[12]

This thesis seeks to contribute to the existing literature by discussing the reform in light of how it interacts with the international regime for arbitration under the New York Convention. The focus of this thesis is whether the introduction of a licensing system for

[7] O. Yu. Skvortsov, M. Yu. Savransky, G. V. Sevastyanov, *Международный коммерческий арбитраж* (Третейский суд 2018)

[8] Andrey Kotelnikov, Sergey Anatolievich Kurochkin, Oleg Skvortsov, *Arbitration in Russia* (Kluwer Law International 2019)

[9] O. Yu. Skvortsov, M. Yu. Savransky, *Комментарий к Федеральному закону «Об арбитраже (третейском разбирательстве) в российской федерации»* (Статут 2016)

[10] Hiroshi Oda, *Russian Arbitration: Law and Practice* (Oxford University Press 2020)

[11] Boris Karabelnikov, 'National Report for Russian Federation (2020)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020) supp No. 110

[12] See e.g: Vladimir Khvalei, 'Три нуля и три минуса арбитражной реформы' (Zakon.ru, 18 September 2014) <https://zakon.ru/blog/2019/9/18/tri_nulya_i_tri_minusa_arbitrazhnoj_reformy> accessed 25/04/20; A I Muranov, 'О «третейских новеллах» в двух законах РФ, принятых в декабре 2018 г.: неизящная стилистика ограничений и расширения дискредитации власти' [2018](2) *Вестник международного арбитража* 144; Oleg Skvortsov and Leonid Kropotov, 'Arbitration Changes in Russia: Revolution or Evolution?' (2018) 35(2) *Journal of International Arbitration* 253; Aleksandr Muranov, 'Ловкость формулировок – и никакого разрешения от правительства. Как Минюст программирует голосование в совете по «совершенствованию третейского разбирательства»' (Zakon.ru, 21 January 2019) <https://zakon.ru/blog/2019/1/21/lovkost_formulirovok_-_i_nikogo_razresheniya_ot_pravitelstva_kak_minyust_programmiruet_golosovanie_v> accessed 25/04/20; Vladimir Khvalei, 'Why Arbitration Reform in Russia Failed?' (2019) 11 *Arbitration.ru* 4

arbitral institutes in Russia subjugates Russian arbitration to the Russian government to such a degree that the government can exert pressure on arbitral institutes to appoint arbitrators who can be relied upon to resolve disputes in line with government policy. This thesis then considers whether the international regime for arbitration under the New York Convention provides courts of enforcement with the necessary tools to address a situation in which the Russian government has exerted influence over a Russian arbitration in such a manner.

This thesis takes a primarily doctrinal approach to its subject matter, setting out the relevant rules of the international and Russian regimes for arbitration and discussing how they interact with each other. However, as Russian court practice in the area of international arbitration does not always accurately reflect the black letter law or scholarship, some aspects of Russian arbitration law in this thesis will be addressed through a more epistemological approach. This will involve looking behind the black letter rule or legal theory cited by the Russian courts for their interpretation of Russian arbitration law where the cited rule or theory does not justify the courts' conclusions. This allows for consideration of whether there is an unspoken rationale underlying certain Russian court judgments.

Russian international arbitration law is a vast topic, which could not feasibly be tackled in a single thesis; even an exhaustive analysis of the 2016 reform alone would go far beyond the capability of the present work. In particular, this thesis does not seek to provide a political or economic analysis of the Russian arbitration reform. Economic and political factors will not be discussed any further than is necessary to understand the topics of this thesis, which are set out in more depth below. Furthermore, this thesis is not

concerned with the history of Russian arbitration and how that history has contributed to international arbitral practice. Rather this thesis is concerned with the licensing system for arbitral institutes and the rules on arbitrability introduced under the 2016 reform, and what these could mean for courts outside Russia.[13]

The reform has created a strict regulatory framework for Russian arbitral institutes, which takes the form of a licensing system implemented by the Ministry of Justice. A key question for this thesis is whether the new licensing system makes it possible for the Russian government to put pressure on arbitral institutes through the licensing system. If the Russian government is able to do so, this will mean that arbitral institutes can be coerced into influencing the outcome of an arbitration by appointing arbitrators who can be relied upon to decide the dispute in line with government policy.

Prior to the reform, the Russian courts had faced the problem of non-independent arbitral institutes that were funded by one of the parties to an arbitration. Where a non-independent institute administered an arbitration involving the company upon which it depended for funding, there was a risk that the institute would appoint arbitrators who would decide in favour of the institute-affiliated party. Applying rules identical to those for refusing enforcement under the New York Convention, the Russian courts failed to justify the annulment of, or refusal to enforce, such awards.

[13] For a relatively in-depth English language analysis of the pre-reform regime for Russian arbitration as well as some exploration of the history of arbitration in Russia, see: Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure* (Juris 2012); Aleksey Aleksandrovich Kostin and Dmitry Leonidovich Davydenko, 'Russia' in Kaj Hober and Yarik Kryvoi, *Law and Practice of International Arbitration in the CIS Region* (Kluwer Law International 2017). For a discussion of key Russia-related arbitrations that have influenced the development of international arbitral practice see: V. V. Veeder, 'Lloyd George, Lenin, and Cannibals: The Harriman Arbitration – The 1999 Freshfields Lecture' 16(2) *Arbitration International* 115; V. V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' 47 *International and Comparative Law Quarterly* 747

This thesis will argue that a court of enforcement will face similar difficulty should the reform allow the government to exert influence over Russian arbitral institutes. The government would stand in the shoes of those parties upon which non-independent arbitral institutes had relied for funding: whereas arbitral institutes previously depended on companies for funding in order to survive, now arbitral institutes depend on government licenses. Where the Russian courts were unable to justify the annulment of, or refusal to enforce, awards issued by non-independent institutes under rules that were materially identical to those contained in the New York Convention, it is argued that courts of enforcement will do no better under the Convention itself if faced with an award issued by a licensed institute that has had pressure exerted upon it by the Russian government.

A further factor that will be considered in this thesis is the reform's new rules on arbitrability. These rules shepherd politically sensitive disputes into Russian-seated arbitration within licensed institutes by holding that awards issued outside such arbitrations are unenforceable before the Russian courts. A non-Russian party to a dispute with a Russian party is thus put in a position where she must choose between submitting their dispute to an arbitration which may be vulnerable to Russian government influence, or foregoing any chance of enforcing an award in the other party's home State where there are most likely to be seizable assets.

Finally, this thesis will suggest a means by which a court of enforcement might refuse to enforce awards issued in those arbitrations most vulnerable to Russian government influence. It will argue that awards resolving those disputes that the post-reform rules on arbitrability shepherd into a Russian seat and licensed institute should not be enforced under the New York Convention for a lack of reciprocity. This justification for this is that

the Russian rules on arbitrability violate the New York Convention by only making disputes arbitrable where resolved in Russia-seated arbitration. Where a Russian court refuses to enforce foreign awards in violation of its Convention obligations, foreign courts are entitled to refuse enforcement of Russian awards in equivalent circumstances – in this case, foreign courts can refuse enforcement of Russian awards resolving similar disputes to those that the Russian courts consider inarbitrable when arbitrated outside Russia.

In summary, the overall argument of this thesis is that the Russian reform risks enabling the Russian government to exercise influence over arbitral institutes and thus the arbitrations those institutes administer. The result of such influence would be to affect the contents of resulting arbitral awards. Due to the difficulty of applying one of the defences under the New York Convention to such awards, courts of enforcement would struggle to justify a refusal to enforce. The risk of government influence over arbitral institutes is compounded by the new rules of arbitrability that shepherd disputes into arbitrations that are vulnerable to government influence. Courts of enforcement should refuse, on the basis of a lack of reciprocity, to enforce awards resolving those disputes that the rules on arbitrability shepherd into vulnerable arbitrations.

The chapters of this thesis are structured into three main groups. Chapters II and III set out the relevant hard and soft rules of the international regime for arbitration under the New York Convention. Chapters IV and V describe Russian arbitration law before and after the reform. Chapters VI and VII bring the arguments in the prior chapters to bear upon one another, illustrating how the international regime for arbitration is ill-equipped to deal with the risk of Russian government influence of licensed arbitral institutes.

Chapter II discusses the New York Convention itself. It begins with a brief outline of the theories of arbitration that informed the Convention's drafting, and continue to inform the interpretation of the New York Convention by national courts. It then goes on to provide an interpretation of those Convention provisions upon which the conclusions of this thesis rely. In particular, the chapter will consider the proper interpretation of the New York Convention defences to enforcement and the role reciprocity under the Convention.

Chapter III explains how courts of enforcement have previously dealt with perceived abuse by the courts at the seat under the New York Convention. It focuses on those cases where award creditors have argued that the courts of the seat have annulled an arbitral award to benefit a local (often government or State-owned) award debtor. It explains how courts of enforcement have gravitated towards an approach by which they consider the validity of the annulment decision under their domestic rules for recognising foreign judgments, describes the evidentiary burden placed upon an award creditor alleging abuse by the seat, and considers how this burden may be met.

Chapter IV discusses the pre-reform problems in Russian arbitration law that served as stimuli for those post-reform rules most relevant to this thesis. Firstly, it discusses the problems posed by non-independent arbitral institutes, and the difficulties experienced by the Russian courts when faced with the argument that such institutes were influencing the outcomes of arbitrations in favour of the institute-affiliated parties. Secondly, it discusses the problems that had arisen in the area of arbitrability, where the Russian courts had interpreted ambiguously drafted statutory provisions to continually restrict the range of disputes that could be submitted to arbitration.

Chapter V analyses the relevant rules of the Russian post-reform regime for arbitration. It describes the licensing system for arbitral institutes under the Russian reform, highlighting the lack of effective safeguards to prevent the Russian government from exerting influence on arbitral institutes through the licensing system. It further discusses the post-reform rules on arbitrability, and how they shepherd politically sensitive disputes into Russia-seated arbitrations conducted within licensed institutes.

Chapter VI will explain the interaction between the Russian regime and the international regime for arbitration. It will argue that the international regime for arbitration under the New York Convention is incapable of providing a remedy against the kind of abuse made possible by the Russian reform. It will suggest that courts of enforcement invoke the principle of reciprocity to refuse enforcement of Russian arbitral awards resolving those disputes that are shepherded into Russia-seated arbitration within a licensed institute by the post-reform rules on arbitrability.

Finally Chapter VII will conclude with a brief summary of the arguments and findings made in the previous chapters.

Chapter II – The New York Convention

1. Introduction

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is widely considered 'the cornerstone of international commercial arbitration'.[14] Though this quote comes from 2003, the Convention has continued to play a preeminent role in the field of international commercial arbitration over the last 17 years and remains the most important legal instrument in this area of law.

Drafted in 1958, the majority of the world's States, and all of the world's major trading States, have become party to the Convention. As of 20 June 2020, the Convention has 164 contracting parties. The most recent addition is Tonga, which acceded to the Convention in June 2020. The New York Convention is an unprecedented success in private international law, with more Contracting States than any other treaty.

This thesis considers whether the international regime for arbitration under the New York Convention is capable of addressing situations where the legal system at the seat of arbitration abuses its supervisory role. In particular it will consider the recent reform of Russian arbitration law, and whether the post-reform Russian regime for arbitration makes possible a new form of abuse that the Convention is ill-equipped to address.

[14] Julian Lew, Loukas Mistelis, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 21

In order to answer this question, it is necessary to first understand the international regime for arbitration under the New York Convention. This chapter provides a doctrinal analysis of the international regime for arbitration and an interpretation of those provisions of the Convention most relevant to the thesis question. These interpretations will provide the basis upon which this thesis will ground its conclusions about the adequacy of the regime under the New York Convention for addressing abuse by the legal system at the seat. This chapter will also outline the theoretical models of arbitration that exist alongside, and have developed under, the New York Convention.

The following sections will set out the historical background to the New York Convention. First will be a brief description of the Convention's predecessors, the Geneva instruments, discussing the problems that had arisen under them. The chapter will then go on to outline the drafting history of the New York Convention. This background information on the preceding regime under the Geneva instruments and the drafting of the New York Convention is crucial to the interpretation of the Convention. This chapter will then give a brief outline of the Convention's provisions before providing a more in-depth interpretation of those provisions most relevant to the topic of this thesis.

2. The International Regime for Arbitration Prior to the New York Convention

Prior to the creation of the New York Convention, the most important instruments for international commercial arbitration were the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. Both of these instruments had been created under the auspices of the League of Nations' Economic Council, and at the insistence of the business community as represented by the International Chamber of Commerce.

The Geneva Protocol provided for the enforcement of international arbitration agreements, though it restricted the ambit of its provisions to arbitration agreements entered into between nationals of Contracting States. The Protocol limited its provisions on the enforcement of arbitral awards to those awards issued within the same jurisdiction as the court before which enforcement is sought. Its scope was defined by reference to the nationalities of the parties and the arbitral award.

The contemporary national regimes for the enforcement of arbitral awards in different States ranged from non-existent, to requiring an action on the award to obtain an enforceable judgment in its country of origin; in some States foreign awards were even treated the same as foreign court judgments for the purposes of enforcement.[15] In light of this variation in the treatment of foreign arbitral awards, the Geneva Convention was created to impose some kind of uniformity.

[15] See Ernest Lorenzen, 'Commercial Arbitration – Enforcement of Foreign Awards' (1935) 45 *Yale Law Journal* 39

The Geneva Convention was comprised of 11 articles; however, only articles 1, 2 and 4 are of relevance to the present thesis. Articles 1 and 4 provided for the obligation to enforce foreign awards and set out the formal and substantive prerequisites that an award creditor must comply with to successfully request enforcement. Article 2 provided for the exceptions to the obligation to enforce.

i. The Obligation to Recognise and Enforce Foreign Arbitral Awards

Article 1

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called " a submission to arbitration ") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 4

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1 paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 1 provided for the obligation on Contracting States to recognise and enforce foreign arbitral awards. This obligation was conditional upon the award meeting the requirements set out in subsections (a) through (e) of the same article. To successfully apply for recognition and enforcement, an award creditor must also have provided the necessary documentation as stipulated in article 4.

Articles 1 and 4 represented the substantive and formal prerequisites for the recognition and enforcement of foreign awards under the Geneva Convention. Under article 1 there were eight distinct requirements for the substantive validity of an arbitral award; under article 4 there were seven distinct formal requirements that an award creditor must have complied with in order to claim for the recognition and enforcement of a foreign arbitral award.

The court of enforcement determined whether the requirements of article 1 had been fulfilled. However, many of these requirements necessitated appraisal under a law other than the national law of the court of enforcement. The formal requirements for requesting enforcement under the Convention, as set out in article 4, assisted the court of enforcement in determining whether those requirements that were considered under a foreign law had been fulfilled. Articles 4(1) and (2) provided for the mandatory production of certain documents; article 4(3) provided for documents that the court of enforcement could request from an award creditor if it so wished.

Those documents that were subject to mandatory production under articles 4(1) and (2) relate to those requirements, the fulfilment of which was to be judged under the law of the seat of arbitration. These documents were an authentic award and proof that the award was perfect under the law of the seat of arbitration. The Convention thus sought to prevent error by a court of enforcement in the application of the law of the seat by placing upon the award creditor the burden of proving the existence of a genuine award that was perfect under the law of the seat.

The documents for which the court of enforcement could order production under article 4(3) related to those requirements, the fulfilment of which is governed by the Convention itself, the law of the seat, or by an unspecified law in the case of proving the validity of the arbitration agreement. The court of enforcement could require proof that the arbitration agreement was valid, the arbitration had been in compliance with the parties' agreement, and that the award fell within the scope of the Convention. The Convention placed the burden on the party claiming enforcement to both prove their rights under the award, and to disprove the existence of any possible recourse against the award at the seat.

A major issue created by the Convention's evidentiary burden was that of double exequatur. The Convention preconditioned a claim for recognition and enforcement on proving that the award was no longer open for recourse at the seat. Unfortunately, 'in many places the 1927 Convention was interpreted to mean that an award had to be judged 'final' in its place of origin before it could be enforced abroad',[16] meaning that an award creditor had to obtain exequatur at the seat before enforcing an award abroad. The Convention created a time-inefficient and burdensome system for enforcement, undermining arbitration's ability to provide an expedient alternative to litigation.

[16] Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (Cambridge University Press 2015)128

ii. The Exceptions to the Obligation to Recognise and Enforce Foreign Awards

> Article 2
>
> Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:
>
> (a) That the award has been annulled in the country in which it was made;
>
> (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
>
> (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.
>
> If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

The Convention extended the obligation to enforce awards to courts outside the seat and subjected this obligation to a defined list of exceptions. Article 2 of the Convention provided for the defences to the recognition and enforcement of a foreign award. Of the three defences in article 2, those in subsections (b) and (c) pertained to circumstances where the tribunal's decision was procedurally flawed. Subsection (b) applied where one party had been deprived of their ability to effectively put forward their case either due to lack of time to prepare, or to lack of proper representation. Subsection (c) applied where the tribunal had exceeded the jurisdiction bestowed upon it by the parties.

Subsection (a) stood apart from the defences under subsections (b) and (c). Its defence did not necessarily relate to any flaw in the arbitration itself. Rather, it mandated a refusal to enforce where the courts at the seat had annulled the award. It thus reinforced the primacy of the law of the seat in controlling the fate of an award under the Convention.

The use of the mandatory modal verb 'shall' in article 2 denied courts any choice in whether to enforce an award where there was a defence under subsections (a), (b), or (c). There was also no allowance for enforcement where an award debtor had waived their right to resist by knowingly neglecting to complain of a procedural irregularity during the arbitration. The Convention thus took an extreme position in ensuring the procedural propriety of an arbitration, arguably over-arming an award debtor to escape her obligations under an award.

A further issue with article 2 was the absence of any direction on the allocation of the burden of proof. Unlike the requirements for the recognition and enforcement of an award (for which article 4 set the burden of proof on the party seeking enforcement or recognition of the award) the article 2 simply required that the court should be satisfied that one of the exceptions to recognition and enforcement existed.

The looseness of this formula allowed for multiple possible interpretations: it allowed for both the situation where the award creditor must disprove the applicability of any defence alleged by the award debtor, and the situation where the award debtor must furnish proof that she has a defence. Furthermore, article 2 did not specify whether the court could raise a defence of its own motion. Article 2 described what must be proved without describing the procedure to be followed in doing so.

Similar problems arose under the application of article 2 as under articles 1 and 4. Firstly, the reference to the finality and unimpeachability of an award at the seat led to the requirement of double exequatur. The result was that the Convention operated as a treaty for the *de facto* mutual recognition of foreign court decisions enforcing locally issued arbitral awards, and not for the mutual recognition of the arbitral awards themselves. This was reinforced by the mandatory language of article 2, which gave courts of enforcement no discretion to enforce where an exception to recognition and enforcement was made out.

Secondly, the Convention's ability to facilitate the international recognition and enforcement of arbitration awards was undermined its rules on the allocation of the burden of proof. Whereas article 4 placed onerous obligations on award creditors to prove the unimpeachability of their award, article 2 did not specify who bore the burden of proof concerning the exceptions to recognition and enforcement: this allowed courts to place upon award creditors both the burden of proving their entitlement to enforcement under articles 1 and 4, and disproving any defences under article 2.

These problems undermined the Geneva instruments' ability to provide for an arbitration-friendly international regime. Arbitration was too closely bound to the law of the seat, and award creditors were disadvantaged by the provisions on the burden of proof. The New York Convention sought to overcome the problems that had arisen under the Geneva instruments - any interpretation of the New York Convention must take this into account so as to ensure that New York Convention is not read in a manner that prevents it from resolving that issues under the Geneva instruments which the New York Convention was drafted to resolve.

3. The Creation of the New York Convention

With the end of the Second World War, the Western world sought to increase international trade in an effort to revive its economy. Increased trade was also seen as a means of stabilizing a war-ravaged world: 'the victorious countries – especially the United States – made a deliberate choice to reintegrate the world economy. The crises, autarky, and beggar-thy-neighbour economic policies of the previous decade were blamed as causes of the war'.[17]

At the same time, seismic changes were taking place at the geopolitical level. State boundaries were being redrawn and a new generation of States was emerging out of colonisation. With the increasing volume of trade came an increasing number of disputes; with the increasing number of States came an increasing number of jurisdictions within which these disputes might fall.

Whereas, for example, British awards had previously been enforced under domestic or imperial law within the British Empire, or through extraterritorial jurisdiction in the Ottoman Empire and China, the enforceability of British awards now depended on international law as 'the reciprocal concessions of equal sovereigns'.[18] As summarized by Marike Paulsson, '[r]elations among national systems were no longer the exclusive preserve of a handful of industrialized countries. The arbitral process, to be effective, would

[17] Thomas Hale, *Between Interests and Law: The Politics of Transnational Commercial Disputes* (Cambridge University Press 2015)128

[18] ibid 101

have to insert itself into a far more numerous and complex array of national legal systems'.[19]

It is against this backdrop that calls arose for the revision of the international legal regime governing arbitration. Before discussing the history of the New York Convention's drafting process, and the different roles played by different political, legal, and commercial institutions in this process, it would first be helpful to outline the two main theories of international arbitration. Much of the debate at the time of the Convention's drafting, as well as the modern debate around how the Convention should be interpreted, is informed by these theories of international arbitration.

a. The Theories of International Arbitration

The different theories of international arbitration describe the different relationships between arbitration and the law of the seat.[20] Emmanuel Gaillard has explained that it is 'because there are several visions, several competing philosophies of international arbitration, that the controversies on a number of apparently purely technical topics remain so vivid'.[21] This section will briefly outline the territorial and delocalized theories of international arbitration, which informed much of the debate around the drafting of the New York Convention.

[19] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 4

[20] In this, references to the theory of international arbitration concern the different theories concerning the relationship between arbitration and national legal systems. It is to be distinguished from the discussion concerning the contractual or jurisdictional nature of arbitration – for a discussion of this latter theoretical debate, see Born (n 1) 217-31

[21] Emmanuel Gaillard, 'The Representations of International Arbitration', *Journal of International Dispute Settlement* (2010) 1(2) 271, 272

i. The Territorial Theory

'The traditional theory of territoriality is based on the general principle of international law that a state is sovereign within its own borders and that its law and its courts have the exclusive right to determine the legal effect of acts done (and consequently of arbitral awards made) within those borders'.[22] The territorial theory considers that the seat of the arbitration thus has unbridled power in determining the fate of an arbitration.

The territorialist theory asserts that an arbitration must necessarily be located within the territory of a particular State in order to lead to a binding award. Poudret and Besson liken the relationship between the arbitral award and the law of the seat in international arbitration to that between State laws and the Kelsenian Grundnorm in national legal systems.[23]

Under the territorialist model of international arbitration, the law of the seat is the legal basis for the binding power of an arbitral award: where an award relies on the law of the seat for its binding power, the award's nonconformity with that law will deprive it of this binding power. An annulment as a ruling by the court at the seat that determines the nonconformity of the award under its law, thus strips an award of its binding power.

[22] Roy Goode, 'The Role of Lex Arbitri in International Commercial Arbitration' (2001) 17(1) *Arbitration International* 19, 24

[23] Jean-François Poudret, Sébastien Besson, Stephen Berti, and Annette Fonti, *Comparative Law of International Arbitration* (2nd edn, Thomson Sweet & Maxwell 2007) ch 2

The seat can be chosen expressly by the parties, designated by an authority empowered to do so by the parties,[24] or may be implied by the terms of the parties' agreement. Once the seat of arbitration has been established within the territory of a particular legal system, that legal system has control over the arbitration. For the territorialist 'every arbitration is a national arbitration, that is to say subject to a specific system of national law'.[25]

Territorialism does not recognise *international* arbitration in the sense of an arbitration existing beyond national laws. Though domestic legislation may provide different rules to govern 'national' and 'international' arbitration, these categories are themselves created by the national law of the seat. It is the national law of the seat itself that defines 'national' and 'international' arbitration and determines the consequences when an arbitration falls within either category. The use of the word 'international' in this context is irrelevant and does nothing to raise the status of an arbitration beyond the national law that christened it as such.

In all cases, it will ultimately fall to the legal system at the seat to decide whether to give legal effect to the parties' arbitration agreement, to assist the arbitral process, and to give binding force to the arbitrators' award. Where an arbitration takes place without a seat, the ensuing award is nothing more than the expert opinion of the arbitral tribunal, lacking the binding power to resolve the parties' dispute unless voluntarily carried out by the award debtor.

[24] E.g. an arbitral institute

[25] Francis Mann, 'Lex Facit Arbitrum' in Pieter Sanders, *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff 1967) 159

ii. The Delocalised Theory

The delocalized theory of international arbitration developed in response to the territorialist theory. Proponents of delocalisation consider that territorialism permits the excessive control of an arbitration by the legal system at the seat. In the past, many States' arbitration laws were so restrictive as to hobble arbitration as an effective form of dispute resolution. Laws such as the English Arbitration Act 1698, the French Code of Civil Procedure 1806, and the German Code of Civil Procedure of 1879 provided for extensive judicial control of the arbitral process and for merits-based review of arbitral awards.

It was not until the English Arbitration Act 1979 that the 'case stated procedure', by which an English court could review an English arbitral award for error of fact or law, was abolished. Under section 21 Arbitration Act 1950 an English arbitral tribunal's findings on points of law or fact were subject to review by an English judge, effectively turning the tribunal into a court of first instance within the English court system.

In light of the restrictions imposed by national laws, international arbitration sought to liberate itself from national legal systems. The territorialist theory was uniquely ill-suited to achieving such liberation as it predicated an arbitral award's binding power on the approval of the legal system at the seat. It was necessary to develop a rival theory - the delocalised theory.

The delocalised theory does not consider the legal system at the seat to be the sole source of an arbitral award's binding power: 'unlike a national judge, an arbitrator has no *lex fori* […] his authority derives, at least in first instance, from party agreement and his

ultimate responsibility is not to a State but to the parties'.[26] Perhaps the most famous exposition of the delocalized theory was given by Emmanuel Gaillard in the *Salini* case:

> An international arbitral tribunal is not an organ of the state in which it has its seat in the same way that a court at the seat would be. The primary source of the Tribunal's powers is the parties' agreement to arbitrate. An important consequence of this is that the Tribunal has a duty vis a vis the parties to ensure that their arbitration agreement is not frustrated. In certain circumstances, it may be necessary to decline to comply with an order issued by a court at the seat, in the fulfilment of the Tribunal's larger duty to the parties.
>
> Of course, this is not to say that a contract, including an arbitration agreement, has a validity that is independent of any legal order. Indeed, a contract derives its binding force from its recognition by one or more legal orders. However, an agreement to submit disputes to international arbitration is not anchored exclusively in the legal order at the seat of the arbitration. Such agreements are validated by a range of international sources and norms extending beyond the domestic seat itself.[27]

The delocalised theory thus rejects the idea that an arbitral award's legal effect relies entirely on the conformity of the arbitration with the law of the seat. Instead, it predicates an arbitral award's binding power on the arbitration's conformity with the parties'

[26] Arthur Taylor von Mehren, 'International Commercial Arbitration: The Contribution of the French Jurisprudence' (1968) 46(5) *Louisiana Law Review* 1045, 1057

[27] *Salini Costruttori v. Ethiopia*, Award, 7 December 2001, ICC Case No. 10623 paras. 128-9 reported in (2003) 21(1) *ASA Bulletin* 82

agreement. Where an award's binding power is independent of the law of the seat, the only requirement for its efficacy is that it meet the requirements of a court of enforcement.

Where the enforcement of an arbitral award is requested at the seat, the courts at the seat can refuse to enforce it; but these courts have no more privileged a position than other courts of enforcement, and a declaration of unenforceability at the seat is territorially limited. The delocalised theory does not recognise *erga omnes* judgments concerning the validity of an arbitral award.

In the words of the French Cour de Cassation, an arbitral award rendered in a particular State 'is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside'.[28] It falls to the courts of each enforcement jurisdiction to pronounce on the enforceability of the award under their reading of the relevant international treaty (e.g. the New York Convention) or national law.

b. The Drafting of the New York Convention

As with the creation of the Geneva Treaties, the ICC was the primary instigator for the New York Convention. Taking the initiative, the ICC's Committee on International Commercial Arbitration prepared a Draft Convention. In the background report for the Draft Convention of 1953, the ICC Committee on International Commercial Arbitration harshly criticised the Geneva Convention's 'main defect, which consists in the enforcement

[28] *Hilmarton Ltd. v. Omnium de traitement et de valorization - OTV*, Cour de Cassation [Supreme Court], 23 March 1994 reported in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration *1995 - Volume XX* (Kluwer Law International 1995) [5]

of only those award that are strictly in accordance with the rules of procedure laid down in the law of the country where the arbitration took place'.[29]

In its report, the Committee vehemently defended the view that such national restrictions could not meet the needs of its users. According to the report 'there could be no progress without full recognition of the conception of international awards', international awards 'correspond[ing] precisely to an economic requirement… [on which] the development of international trade depends'.[30]

What the Committee meant by an international award was an award, the validity of which is based on party autonomy and not national law. As was discussed earlier in this chapter,[31] one of the problems that had arisen under the Geneva instruments was the extremely close connection between an arbitration's validity and the law of the seat, which had led to the requirement of double exequatur. The ICC sought to sever this connection and grant arbitration greater autonomy by framing the source of arbitration's validity as party autonomy. The ICC Committee portrayed the recognition of party autonomy as a valid source of private international law as a necessity - 'it would be hard to imagine the sense of frontier and of sovereignty disappearing, economically to start with and later politically, without the simultaneous establishment of international forms of procedure along similar lines'.[32]

[29] *Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration* (ICC Publication No. 174, 1953)

[30] ibid 32

[31] pp. 13-21

[32] ibid 32

Article III of the Draft Convention, provided as follows:

> To obtain the recognition and enforcement mentioned in the preceding article, it will be necessary…
> (b) that the composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place.[33]

This wording is a clear departure from that of the Geneva Convention article 1(c), which required that the arbitration should have been in accordance with the parties' agreement *and* the law of the seat. The Draft Convention gave clear priority to party autonomy, relegating the law of the seat to the position of default rules where the parties had not made express provision for the procedure of their arbitration.

Ironically, however, the Draft Convention failed to meet the revolutionary demands of the Committee's own report. Article IV of the Draft Convention provided for a defence against enforcement where the 'the competent authority to whom application is made establishes… (e) that the award the recognition or enforcement of which is sought, has been annulled in the country in which it was made'. Where a State allows annulment of an award for non-compliance with provisions of its national arbitration law, the Draft Convention required foreign courts to refuse enforcement of that award. In the words of Marike Paulsson, 'the ICC's bark had been far worse than its bite'.[34]

[33] ibid 35

[34] Paulsson (n 19) 6

Otherwise, the Draft Convention fixed the most egregious flaws of the Geneva instruments. It placed the burden of invoking a defence to enforcement on the award debtor, thus overcoming the problems that had arisen under article 2 of the Geneva Convention. It also provided a less onerous burden on award creditors in terms of the evidential requirements for enforcement, thus resolving the issues that had arisen under articles 1 and 4 of the Geneva Convention.

Even though the Draft Convention was less revolutionary than the rhetoric that had accompanied it, the Draft Convention elicited a great deal of backlash. ECOSOC, which represented the States from which the ICC's Committee had demanded arbitration's independence, rejected the concept of an international award and formed their own ad hoc Committee on the Enforcement of International Arbitral Awards.

The ECOSOC Committee's Draft Convention was reactionary, representing a rebuttal to the ICC's concept of international awards. Telling in this regard is the fact that the ECOSOC Committee adopted for the title of their draft - the 'Convention on the Recognition and Enforcement of Foreign National Arbitral Awards'. The ECOSOC's report explicitly stated that international arbitral awards 'referred to arbitration between States',[35] evidencing the 'marked opposition to recognizing autonomy of the will as a valid source of private international law'[36] that the ICC report had sought to overcome.

[35] ECOSOC, *Draft Convention on the recognition and enforcement of foreign arbitral award* (E/2704, 1955) 5

[36] Cited in Hale (n 17) 132

The ECOSOC Draft also threatened to maintain the system of double exequatur, the Committee reporting that '[i]n order to properly safeguard the rights of the losing party, the Committee decided to reintroduce the requirement of finality'.[37] Thus ECOSOC resisted both the proposed changes to the relationship between arbitration and the law at the seat, and to the relevant threshold for an award creditor to prove their entitlement to enforcement.

The ECOSOC Draft was sent to a number of States and inter- and non-State organizations for consideration. Despite its failings, the ECOSOC Draft Convention managed to attract enough attention to bring States together to discuss creating a new treaty for arbitration. On the basis of the comments and observations received, ECOSOC organized the Conference on International Commercial Arbitration at the United Nations Headquarters in New York. This was the Conference that would give birth to the New York Convention.

The result of the Conference was a compromise between the ICC and ECOSOC Draft Conventions. Where the ICC Draft Convention had come from a private institution and the ECOSOC Draft Convention had been prepared by the delegates of States, the New York Conference provided a forum for industry and States to collaborate on a single text. The resulting compromises are evident in the text of the New York Convention.

An example of the kind of compromise struck at the Conference can be seen in the Convention's scope. At the Conference the ECOSOC Draft Convention was criticized for overemphasizing the location at the seat in establishing the scope of the Convention. On

[37] ECOSOC (n 35) 9

the other hand, the ICC Draft Convention failed to provide an easy means of determining whether an award fell under the Convention's scope.

ICC Draft Convention Article I	ECOSOC Draft Convention Article I
The present Convention shall apply to the enforcement of arbitral awards arising out of commercial disputes between persons subject to the jurisdiction of different States or involving legal relationships arising on the territories of different States	1. Subject to paragraph 2 of this Article, this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which such awards are relied upon, and arising out of differences between persons whether physical or legal. 2. Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State…

Comparison of ECOSOC and ICC Draft Convention Scopes

The final text of article I of the New York Convention compromises by providing a basic territorial rule (i.e. the Convention applies to foreign awards) but allows States to apply the Convention to domestically issued awards where they consider such awards non-domestic.

The New York Convention is an imperfect instrument - a chimera constructed from the competing demands of the business, State, and legal communities. This chimerical nature is both its weakness and its strength. Its ability to accommodate a plurality of interests has made it the most successful instrument of private international law in terms of the number of Contracting States; however, compromise runs throughout its provisions.

A further issue with the drafting of the New York Convention was the inclusion of article II on arbitration agreements. Initially delegates had decided to create an annexed protocol for arbitration agreements. However, the Dutch delegate, Pieter Sanders, convinced the Conference to include provisions on arbitration agreements in the main text as article II. The consolidation of rules governing arbitral awards and arbitration agreements into a single instrument was a step forward in simplifying the regime for international arbitration. However, article II was something of an afterthought: even the Convention's title failed to mention arbitration agreements, remaining the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards'.

4. Overview of the New York Convention's Provisions

The New York Convention is composed of sixteen articles in total. The first seven articles provide for the substantive rules and conflicts of laws rules that comprise the international regime for arbitration agreements and awards. The latter nine articles govern issues such as accession, denunciation, and the housekeeping associated with such acts; the latter nine articles also include article XIV, which provides for reciprocity between Contracting States to the Convention.

The remainder of this chapter will briefly outline the functions and provisions of the first seven articles and article XIV, before conducting a more in-depth analysis of those articles that are of particular relevance to this thesis. Due to its unique drafting history, article II will be discussed after articles I-VII, and before article XIV.

Article I

This article sets out the scope of the Convention. Under article I(1) the Convention applies to 'arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'. It also allows for the application of the Convention to 'arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.

Article I(2) makes special mention of 'permanent arbitral institutions' which at the time of drafting were primarily arbitral institutions in Eastern Bloc countries. Arbitral institutes in the Eastern Bloc were created under domestic Chambers of Commerce and

were more closely associated with their States than the arbitral institutions found in the West, as there was no private sector from which arbitral institutes could arise. This article was included so that Eastern Bloc arbitral institutes would not be excluded from the Convention and would be able to render internationally effective awards in East-West disputes.

Finally, article 1(3) provides an exclusive list of reservations that are available to States: namely, the reservation that a State will only apply the Convention to awards arising out of disputes considered commercial under the law of that State, and the reservation that a State 'may on the basis of reciprocity declare that it will apply the Convention to… awards made only in the territory of another Contracting State'.

Article III

This article provides the core obligation of States under the New York Convention – '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them…'. Article III also plays an important taxonomic role: it distinguishes between the conditions for the recognition and enforcement of foreign arbitral awards, which are governed by the subsequent articles of the Convention, and the procedure for recognition and enforcement, which is governed by the law of the court of enforcement.

However, the Convention does impose one restriction on national enforcement procedures, article III providing that '[t]here shall not be imposed substantially more onerous conditions or higher fees' when enforcing awards under the Convention than when enforcing domestic awards.

Article IV

This article stipulates the formal requirements for requesting recognition and enforcement under the Convention. The requirements are less onerous than under the Geneva instruments. An award creditor must supply a duly authenticated original award or a duly certified copy of it, and the original arbitration agreement or a duly certified copy of it.

These minimal requirements evidence the policy of easy enforcement under the Convention. Where the Geneva instruments made the claimant supply formal proof that the substantive requirements for enforcement had been met, the New York Convention only requires a copy of the award, and of the arbitration agreement.

Article V

This article provides the defences to enforcement. Article V is divided into two subsections, the first contains those defences that must be invoked and proved by the award debtor; the second contains those defences that may be raised by the court of its own motion and for which there no explicit allocation of the burden of proof.

The former category includes the defences of incapacity, invalidity of the arbitral award, lack of proper notice, lack of a fair chance for the award debtor to present his or her case, the award being made in excess of jurisdiction, the improper composition of the arbitral tribunal, and the award not being binding at the seat or having been set aside by a competent authority. The latter category includes the defences of lack of arbitrability under

the law of the enforcement State, and of violation of the public policy of the enforcement State.

Article VI

This article allows a court to adjourn its decision on enforcement where an award debtor has requested the annulment of the award before a competent authority. Under article VI, a court of enforcement may, at its discretion, require security from the award debtor in deciding to adjourn enforcement proceedings.

Article VII

This article has two important functions, which are split unevenly between its two subsections. Its first function is to regulate the relationship between the Convention and other international instruments. The first half of article VII(1) provides that the Convention 'shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by Contracting States'.

This circumvents the usual position where later treaties take precedence over previous ones, allowing States to join the Convention without prejudicing prior international obligations. The exception to this is found in article VII(2), which explicitly states that upon joining the Convention, the Geneva instruments 'shall cease to have effect between Contracting States'.

The second function is found in the latter half of article VII(2) and is known as the more-favourable-right provision. Article VII(2) states that the Convention does 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'. Article VII therefore allows award creditors to take advantage of any more favourable rights to enforcement that exist outside the Convention.

Article II

This article attempts to provide a comprehensive set of rules for the recognition and enforcement of arbitration agreements. It provides the formal and substantive requirements for the recognition and enforcement of arbitration agreements, as well as the exceptions to recognition and enforcement. Article II thus singlehandedly attempts to achieve for arbitration agreements that which articles III-V achieve for arbitral awards.

Article II(1) provides the obligation for States to 'recognize an agreement in writing under which the parties undertake to submit to arbitration any or all differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'. Unpacking this dense formula, we find that article II(1) contains the general obligation to recognise arbitration agreements, the formal requirements for recognition, and the substantive requirements for recognition.

The formal requirement that the agreement be 'in writing' is expanded in article II(2) to include the situations where the agreement is found in the relevant contract, is signed by

both parties, or is found in an exchange of letters or telegrams. The substantive requirements found in article II(1) are that there is a 'defined legal relationship, whether contractual or not', and that the subject matter is 'capable of settlement by arbitration' (i.e. arbitrable).

Article II(3) provides for the obligation on States to recognise the arbitration agreement where one of the parties so requests, as well as to refuse jurisdiction, and to refer the parties to arbitration. Article II(3) also contains the exceptions to recognition, where the court 'finds that the said agreement is null and void, inoperative or incapable of being performed'.

Article XIV

This article provides that no Contracting State may 'avail itself of the [Convention] against other Contracting States except to the extent that it is itself bound to apply the Convention'. The significance of this article is dealt with in detail later in this chapter.

5. Analysis of the Relevant Provisions

This thesis focuses on the question of whether the regime under the New York Convention equips courts of enforcement to protect parties against abuse by the legal system at the seat of an arbitration. This question is considered in light of the recent Russian reform of arbitration. In order to assess whether the New York Convention equips courts of enforcement to counterbalance abuse by the courts at the seat it is necessary to undertake a closer analysis of certain Convention provisions.

Of particular relevance to this thesis are articles V, I(3), and XIV. Article V is relevant as it provides the grounds upon which a court of enforcement is entitled to refuse enforcement and also governs whether a court of enforcement may enforce an award notwithstanding a defence against enforcement. Article V is therefore relevant to question of whether a court is capable of enforcing or refusing enforcement of an award in response to perceived abuse by the legal system at the seat of arbitration.

Article I(3) and article XIV both refer to the principle of reciprocity. Depending on their proper interpretation, these articles may allow a court of enforcement to refuse the enforcement of a foreign award under the Convention where the courts of the State in which the award was issued would not have enforced a similar award issued in the State of enforcement. These provisions may allow a form of self-help by States in policing the application of the Convention by other States. One of the arguments made later in this thesis is that courts of enforcement outside Russia should rely on reciprocity to refuse enforcement of awards resolving those disputes that the reform shepherds in Russian seated arbitration through the new rules on arbitrability under Russian law.

a. The Rules of Interpretation Under the Vienna Convention

The rules of interpretation set out in articles 31-33 of the Vienna Convention on the Law of Treaties 1969 are applicable to the New York Convention as it is a treaty. Though the New York Convention predates the Vienna Convention, the Vienna Convention merely codified the pre-existing position in customary international law. The application of the rules of interpretation laid out in the Vienna Convention to the New York Convention is therefore not anachronous.

While there is a wealth of literature on the New York Convention,[38] there is relatively little literature explicitly applying the rules of interpretation under the Vienna Convention to it.[39] This section briefly considers the rules of interpretation under the Vienna Convention. The following section will then apply these rules to articles I(3), V, and XIV of the New York Convention

> Article 31
>
> General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> …

[38] For an exemplary list of publications on the New York Convention see 'New York Convention Bibliography' (newyorkconvention.org) <http://www.newyorkconvention.org/publications/bibliography> accessed 05/06/19

[39] A notable exception is Paulsson (n 17); van den Berg also mentions the rules of interpretation under the Vienna Convention, but does not explicitly apply them in interpreting the New York Convention in Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law 1981)

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

…

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

The primary rules of interpretation in the Vienna Convention are found in article 31. Article 31(1) states that treaty provisions are to be interpreted in line with good faith, the ordinary meaning of the words, and the context in which the provisions appear. Article 31(1) does not prioritise any one of these three tenets of treaty interpretation but portrays them as aspects of a single exercise. According to Gardiner:

> [A treaty] is to be read selecting the ordinary meaning for the words used. However, finding the ordinary meaning typically requires making a choice from a range of possible meanings. Context is the next textual guide, with good faith and the treaty's object and purpose as further aids.[40]

This process is guided both by the ordinary meaning of the words in the treaty, and teleologically by the object and purpose of the treaty in question. While navigating by these two points of reference, good faith provides that decision-makers must not allow their interpretation to become excessively formalistic to the prejudice of the treaty's purpose, nor excessively teleological to the detriment of the agreed wording of the provision in question.

[40] Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 222

Article 32 seeks to give greater certainty to the interpretations that arise from the application of article 31(1) by providing supplementary means of interpretation. The supplementary means of interpretation mentioned under article 32 include the travaux préparatoires and the circumstances in which the treaty was signed, and are not exhaustive.

With respect to the travaux préparatoires, no indication is given of how far back in the negotiating history a decision-maker may look, nor of what kinds of documents might be considered relevant. Dörr offers three criteria that should be met before a document may be considered supplementary material as travaux préparatoires.[41] It must be capable of objective assessment by the decision-maker; it must be able to indicate a common understanding between the negotiating parties and have been openly available during negotiations; and it must relate directly to the treaty at hand (i.e. 'it must be part of its negotiation process and purport to shed light on its substance').[42]

These rules prevent the admittance of any document that would give undue weighting to the views of one of the negotiating parties to the prejudice of others, or which would allow a decision-maker to impose his or her own subjective views on the proper interpretation of the parties' agreed provisions.

A further limitation to the supplementary means of interpretation under article 32 are that they may only be used to confirm an interpretation reached under article 31, or to clarify an interpretation reached under article 31 where the result is ambiguous, manifestly absurd, or unreasonable. Though the roles of confirmation and clarification are not

[41] Oliver Dörr, 'Article 33' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 621-624

[42] ibid 623

particularly well defined with respect to each other,[43] it is clear from article 32 that supplementary means must play a subordinate role in merely supporting an interpretation reached under the rules of interpretation in article 31.

Where a treaty has been concluded in a number of authentic languages, the problem of interpretation is further complicated. Differences in the wording and syntax of the different versions may arise due to the unique grammar and lexicon of each language. Article 33 sets out a number of steps to be taken in resolving such issues.

Firstly, under article 33(1) it is possible to designate a particular language as the prevailing version. If this has not been done, the decision-maker should assume that the different versions have the same meaning. If there is overlap in the semantics of the words used in different languages, the range of permissible interpretations should be limited to this common ground.

Where the different texts are incapable of being reconciled through these steps and the rules of interpretation under articles 31 and 32 have not yielded a particular result, the decision-maker must choose the interpretation most in line with the object and purpose of the treaty. In doing so, the decision-maker is given wider discretion than when interpreting the text of the treaty under article 31. The decision-maker may 'not only depart from the equality of all authentic versions… but also from the general rule of interpretation… according to which the telos of a treaty is one among a number of equally important means

[43] '"[C]onfirm" entails the option of not confirming and the possibility of transforming the exercise into one where the preparatory work leads to a revisiting of the application of the general rule to find a permissible interpretation, which is then confirmed. The investigation may also lead to the conclusion that there is an ambiguity that has hitherto gone unnoticed, such that the exploration of the preparatory work is transformed from a potential confirming role to one of determining the meaning.' ibid 629

of interpretation'.[44] In reconciling different versions, the guiding principle is therefore to give effect to the purpose of the treaty itself.

[44] ibid 649

b. Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article V contains an exhaustive list of the grounds upon which a court can rely when refusing recognition and enforcement of an award under the New York Convention. Article V begins by stating that a court may refuse recognition and enforcement where one of the conditions set out in the further two subsections has been met.

The first subsection contains those defences that must be raised and proved by the award debtor. These defences are: that the arbitration agreement is defective; that the procedure of the arbitration was defective; that the arbitral award was made in excess of jurisdiction or went beyond the dispute submitted to arbitration; that the tribunal was improperly composed; and that the arbitral award has been annulled or has not become binding at the seat. The New York Convention departed from the Geneva instruments in placing the burden of proof explicitly on the award debtor who must prove a defence in resisting the recognition and enforcement of the award.

The second subsection contains those defences that a court of enforcement may raise ex officio. The defences under the second subsection are: that the underlying disputes are

not capable of settlement by arbitration under the laws of the enforcement State; and that the award is contrary to the public policy of the enforcement State.

There are two matters concerning article V of relevance to the present thesis. The first is the proper interpretation of the article V(2) defences of inarbitrability and public policy: these defences are widely drafted and without proper limitations placed upon them through interpretation they could undermine the more narrowly drafted provisions of the Convention, such as those concerning the obligation to enforce awards or the allocation of the burden of proof. The second is the question of whether article V obliges a court to refuse enforcement or whether courts of enforcement retain discretion to enforce where a defence has been made out. This is relevant to the issue of how courts of enforcement might address an abusive annulment decision by the courts of the seat - if they have such discretion, they will be able to enforce the award regardless of annulment.

i. The Article V(2) Defences

The article V(2) defences are distinguishable from the defences under article V(1) on two bases. The first basis is that article V(2) provides for defences that a court can raise *ex officio*. The second basis is that where the defences under article V(1) ensure the parties' rights in the arbitral process, the defences under article V(2) are intended to protect the integrity of the court of enforcement's legal order. The article V(2) defences operate as a '"safety-valve" which allows [States] to protect their public interests'.[45]

Though he was speaking in relation to the subcategory of illegal contracts, Lord Justice Waller's comments in *Soleimany* do much to describe the function of public policy from the perspective of States - 'The court declines to enforce [an award for public policy]… not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused.'[46]

The arbitrability defence under article V(2)(a) allows legal orders to provide limits to which types of dispute may be resolved by arbitration. The public policy defence under article V(2)(b) allows a court to refuse enforcement of an award where enforcement would undermine the fundamental principles of the court's legal order. Taken together these defences allow a State to set the outer limits of arbitration.

[45] David Quinke, 'Article V(2)(a)' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958* (2nd edn, C.H. Beck 2019) 395

[46] *Soleimany v Soleimany* [1998] 3 W.L.R. 811 12

Properly characterised, they are both manifestations of a State's public policy.[47] As Van den Berg puts it:

> Article V(2)(a) according to which a court may refuse enforcement on its own motion of an award if the difference is not capable of settlement by arbitration under its law, may be considered superfluous as the question of the non-arbitrable subject matter is deemed to form part of the general concept of public policy.[48]

However, as argued by Bantekas these defences do not overlap so much as they complement each other in allowing a court of enforcement to protect its legal system's public policy.[49]

Arbitrability determines which disputes may go to arbitration. The arbitrability of a dispute will be apparent as soon as its subject matter has been determined either by the arbitral tribunal, or by the courts when they are asked to refer the parties to arbitration. The public policy defence is concerned with ensuring that a court of enforcement is not obliged

[47] Brekoulakis argues that arbitrability is not a manifestation of public policy, but rather a reflection of the procedural limits of arbitration as a contractually based form of dispute resolution (Stavros Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern', in Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law 2009). Properly analysed his argument is not that arbitrability is not related to public policy, but rather that it is solely concerned with procedural and not substantive public policy. This argument has some force when considering the inarbitrability of insolvency disputes, where creditors not party to the arbitration agreement would not have access to the arbitration; however, family law disputes are not arbitrable despite the fact that it would be an easy matter to have both parties conclude an arbitration agreement. For a defence of the public policy nature of arbitrability under Russian law, see: Victoria Barausova, 'The Law Governing Arbitrability: Problems and Proposals' [2017](2) *Вестник Международного Коммерческого* 136; Andrey Kotelnikov, Sergey Kurochkin, and Oleg Skvortsov, *Arbitration in Russia* (Kluwer Law International 2019) 113-4

[48] van den Berg (n 39) 368

[49] Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 *Australian Year Book of International Law* 193

to enforce an award that offends the fundamental principles of its law. Public policy falls to be determined after the award has been issued, when it is presented for enforcement.

It is at this point that some clarification of terminology is in order with respect to the term 'public policy'. Yves Derains concisely sets out the three concepts that are commonly referred to as 'public policy':

> In domestic law, public policy forms a set of rules that parties may not contract out of. In private international law, public policy known as "international public policy" enables the judge to exclude the foreign law that would otherwise be applicable when it infringes on social or legal concepts considered to be essential in his legal system. In this connection it is known as "overriding public policy". Private international law also contains concepts of "mandatory rules" sometimes described more accurately as "public policy" or "laws of immediate application". These are laws "whose observation is essential for safeguarding the political, social and economic organization of the country".[50]

Of these three categories of public policy, the first and third categories constitute sets of substantive rules out of which parties cannot contract; the second category refers to a conflict of laws principle. For the purpose of article V(2), the conflict of laws principle is irrelevant as article V(2) contains conflict of laws rule that mandates the application of the court of enforcement's national law. It is the first and third categories, the substantive rules that form a State's public policy, that are relevant to article V(2).

[50] Yves Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in P. Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 227-8

The first category is domestic public policy, which consists of those rules that a State will insist upon where *only* its legal order is concerned. The third category is international public policy, which consists of those rules of such importance that a State will insist upon their application *whenever* its legal order is concerned. The scope of domestic public policy is wider than that of international public policy, which is composed of only the most important rules of public policy.

Different States will set different outer limits to arbitration, and the Convention does not provide guidance on how the article V(2) defences might be invoked by a court of enforcement. The absence of any restriction on the definition of public policy and arbitrability has long been noted as a cause for concern. The French delegate to the New York Conference attempted to remove the arbitrability defence altogether;[51] whereas the Japanese delegate to that same Conference noted that 'to permit too wide an interpretation of public policy would be to defeat the purpose of the Convention'.[52]

It is clear that the article V(2) defences should not be interpreted so as to allow States to avoid their obligations under the Convention simply by mentioning 'public policy' or 'arbitrability'. To do so would make the obligation under article III entirely optional, and would defeat the purpose of the Convention. However, as the text of the Convention is silent on how the article V(2) defences should be limited, it is necessary to turn to the purpose and context of the treaty under article 31 of the Vienna Convention.

[51] UN Conference on International Commercial Arbitration, *Comparison of Drafts Relating to Articles III, IV and V of the Draft Convention* (E/CONF.26/L.33/Rev.1, 1958); UN Conference on International Commercial Arbitration, *France: Amendment to Article 4 as proposed by the Netherlands* (E/CONF.26/L.32, 1958)

[52] UN Conference on International Commercial Arbitration, *Summary Record of the 11th* Meeting (E/CONF.26/SR.11, 1958) 7

By interpreting the public policy and arbitrability defences in good faith and with consideration of the purpose of the Convention, it is clear that the article V(2) defences must be subject to certain restrictions. The purpose of the Convention is to facilitate the recognition and enforcement of arbitral awards across the world. In order to achieve this, the Convention must be able to balance the parties' need for certainty and uniformity in the treatment of arbitral awards against the concern of States that their legal orders should not be undermined by the compulsory enforcement of arbitral awards that are antithetical to their core values.

Under an excessively strict interpretation of article V(2), too few States would be willing to become parties to the Convention thereby limiting the efficacy of the Convention due to the limited number of Contracting States. Under an excessively expansive interpretation of the article V(2) defences, the Convention becomes incapable of compelling the enforcement of arbitral awards. In striking the correct balance it must be borne in mind that the purpose of the Convention is the global facilitation of the recognition and enforcement of arbitral awards, and not the protection of State interests. Article V(2) provides *exceptions* to the general rule under article III. As exceptions, the interpretation of the article V(2) defences should be restricted so as to best serve the overarching aim of facilitating the recognition and enforcement of awards.

It is generally accepted that article V(2) should only concern international public policy as opposed to domestic public policy.[53] However, there is disagreement as to the

[53] See Judith Gill and David Baker, 'The Public Policy Exception Under Article V(2)(b) of the New York Convention: Lessons From Around the World' (2016) 18(2) *Asian Dispute* Review 74. This is also supported in Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) *Arbitration International* 249 and *Report on the Public Policy Exception in the New York Convention* (International Bar Association 2015)

contents of international public policy for the purposes of the Convention, and international public policy has been interpreted by different commentators in different ways.

Some commentators take the stance that international public policy in this context merely means that States should take a less restrictive approach than they would when dealing with a domestic dispute in their courts. As individual national courts do not have the power to define international rules of policy, they will necessarily apply their own national public policy albeit in a more limited form: 'public policy concerned in the framework of the control of the award can only be national, but this does not exclude that this public policy be adapted to arbitration and take into account universal concerns'.[54]

Others have argued that international public policy for the purposes of the Convention should be construed as transnational public policy that 'establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations'.[55] Gaillard has defended the application of transnational public policy from the perspective of the tribunal:

> [t]he application of one set of rules over another cannot simply be justified by the fact that the rules in question have a mandatory character in the legal order in which

[54] Bernard Hanotiau and Olivier Caprasse, 'Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention' (2008) 25(6) *Journal of International Arbitration* 721

[55] Margaret Moses, 'Public Policy under the New York Convention: National, International, and Transnational' in Katia Fach Gomez, Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019). See also Jacob Dolinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws', (1982) 17 *Texas International Law Journal* 16

they are adopted: as far as arbitrators are concerned, no law is, a priori, more legitimate than another.[56]

However, the international commercial arbitration textbook edited by Gaillard and Savage takes a different view:

It is equally clear that article V, paragraph 2(b) refers to the host country's conception of international public policy, and not to a 'genuinely international public policy' rooted in the law of the community of nations. The latter concept is only of relevance to international arbitrators who, having no forum, are required to apply only genuinely transnational concepts.[57]

Gaillard thus recognises that in the context of national court procedures to enforce an award, transnational law will gain little traction with judges that have sworn an oath to uphold their State's law.

The subjugation of transnational public policy to the reality of State Realism is perhaps best reflected in the trajectory of the International Law Association's research into the public policy defence under the Convention. Though the International Law Association (ILA) Committee initially sought to establish the notion of truly international public policy,

[56] Emmanuel Gaillard, *Legal Theory of International Arbitration (*Martinus Nijhoff 2010) 120–21

[57] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 997

it retreated from this position when it failed to reach agreement on the exact rules encompassed by such international public policy.[58]

The consensus is thus overwhelmingly in favour of international public policy in the sense of Derains' laws of immediate application. However, this does not get us much further in determining the contents of such public policy. Where transnational public policy theoretically offers a corpus of concrete rules to be applied by national courts, international public policy rules will be different in each State, and '[m]oreover, what constitutes a violation of public policy is largely a question of fact and is to be decided on an ad hoc basis'.[59]

Some assistance may, however, be derived from the International Law Association's Recommendations. Recommendation 1(d) states that:

> The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; and (iii) the duty of the State to respect its obligations towards other States or international organisations.[60]

[58] See further Pierre Mayer, 'Recommandations de l'Association de droit international sur le recours a l'ordre public en tant que motif de refus de reconnaissance ou d'execution des sentences arbitrales internationales' [2002](4) *Revue de l'Arbitrage* 1061

[59] van den Berg (n 39) 376

[60] Mayer and Sheppard (n 53) 257

Despite the vagueness of this advice, in the area of public policy where uniformity is an impossible dream, it will have to suffice for the purpose of interpreting the public policy defence under the Convention.

A second limitation that must be read into the defences of arbitrability and public policy comes from a contextual reading of the article V(2) defences. The article V(2) defences must not be used in such a way as to undermine or rewrite the other rules of the Convention. An obvious illegitimate interpretation would be one that allows a State to rely on either arbitrability or public policy to refuse enforcement of all foreign awards.

For the purpose of this thesis it suffices to focus on two potential illegitimate interpretations of the article V(2) defences. The first is to interpret arbitrability so as to undermine the principles upon which the New York Convention rests by disallowing disputes to go to international arbitration while allowing them to go to domestic arbitration. The second is to interpret the article V(2)(b) defence of public policy as allowing an award debtor to avoid the allocation of the burden of proof under article V(1) - article V(1) explicitly allocates the burden of proving a defence on the award debtor, but article V(2) does not. Many situations will fall under both article V(2)(b) and an article V(1) defence.

Arbitrability as a general concept can be broken down into two aspects – subjective arbitrability and objective arbitrability. The former concerns those parties that are 'categorically prohibited from submitting their disputes to arbitration';[61] the latter concerns

[61] Quinke (n 45) 397

those disputes in which there is 'a specific interest of the enforcing country that [they] are to be decided only by domestic courts'.[62]

Arbitrability for the purposes of article V(2)(a) is objective arbitrability. and concerns those disputes that a State insists be resolved by its national courts. Though States are entitled to insist that certain disputes go before their domestic courts, they may not insist that certain disputes only go to domestic arbitration. As Quinke puts it:

> If a Contracting State allows domestic arbitration in a certain subject matter and disallows international arbitration in the same, this prohibition may only be justified by the differences between international and national arbitration proceedings – and allowing this justification would run afoul of the very policy underlying the NYC, namely that international arbitration is not per se an inappropriate method of dispute resolution.[63]

It would thus be a misinterpretation of the defence of arbitrability if a State were to only recognise a dispute as arbitrable where it is submitted to domestically seated arbitration while prohibiting that same dispute from going to foreign-seated arbitration. In doing so, the State would be insisting that the disputes can only be arbitrated where its legal system acts as the arbitration's primary supervisor. As the New York Convention is based on the premise that arbitration is a legitimate means of dispute resolution in its own right,

[62] Dirk Otto and Omaia Elwan, 'Article V(2)' in Herbert Kronke, Patricia Nacimiento, Dirk Otto, and Nicola Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 348

[63] Quinke (n 45) 404

such an interpretation of the arbitrability defence would undermine the core principles of the Convention.

The Russian arbitration reform has created new rules for arbitrability that have precisely this effect. These new rules only allow Russian procurement disputes and certain Russian corporate disputes to be arbitrated where they are submitted to arbitration seated in Russia. Though this topic will be dealt with more thoroughly in chapter V of this thesis, it is worth noting at this point that such arbitrability rules constitute violations of the New York Convention.

Turning to the second form of misinterpretation, article V(2) does not contain any provision for who carries the burden of proof. As public policy is commonly understood to encompass both issues of substance and procedure, there is 'overlap between the due process [defence] of article V(1)(b) and the public policy [defence] of article V(2)(b)'.[64] A party might therefore rely on the same facts in arguing for a defence under both articles V(1)(b) and V(2)(b).

Some commentators and courts have adopted the position that since article V(1) specifically governs matters of procedural irregularity, an award debtor should not be allowed to rely on the more general article V(2)(b) where the grounds for resisting the enforcement of the award fall within one of the article V(1) defences.[65]

[64] Andrés Jana, Angie Armer, Johanna Klein Kranenberg, 'Article V(1)(b)' in Herbert Kronke, Patricia Nacimiento, Dirk Otto, and Nicola Christine Port (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International 2010) 235

[65] See Otto and Elwan (n 62) 367

However, this position overlooks the fact that articles V(1) and V(2) protect the interests of different persons. The article V(1) defences protect the interests of the award debtor; as stated in *Soleimany* the public policy defence operates to protect the integrity of the court of enforcement's process. They are therefore capable of operating simultaneously, and award debtors 'often invoke both [defences] in the hope of increasing their chances of a favourable outcome'.[66]

Arbitrator bias could give rise to either an article V(1)(b) or an article V(2)(b) defence. Article V(1) explicitly states that an award debtor must prove her defence on the facts. Article V(2) states that a court may refuse enforcement where it is satisfied that the public policy defence is engaged, not explicitly requiring the award debtor to prove such engagement on the facts. A court of enforcement should not allow an award debtor to escape the burden of proof under article V(1)(b) by electing to rely on article V(2)(b).[67]As article V(1) specifically addresses the allocation of the burden of proof for defences of procedural irregularity, it should be considered *lex specialis* and article V(2)(b) must not be used to evade its provisions.[68]

[66] Jana, Armer, and Klein Kranenberg (n 64) 235

[67] Different considerations are at play where the court raises the issue of due process for the purpose of the public policy defence under article V(2)(b). However, it is generally accepted that a court should only raise the public policy defence of its own motion where there is a strong *prima facie* case that there has been a violation of public policy (see the *ILA Report* (n 58) Recommendation 3(c)). As such the court should not raise the public policy of its own motion defence unless there is sufficient evidence of a violation even without further submissions by the award debtor.

[68] This has been explicitly advocated in one Hong Kong case where the court stated that 'it is only right that [the party relying upon article V(2)(b)] should bear the onus of establishing that ground' (*Hebei Import & Export Corp. v Polytek Engineering Company Ltd*, Court of Final Appeal of the Hong Kong Special Administrative Region, 10 of 1998, 9 February 1999 in Albert Jan van den Berg *Yearbook of Commercial Arbitration XXIV* (Kluwer Law International 1999) 652, para. 668; see also Jana, Armer, and Klein Kranenberg (n 64 234-240

The argument that an award debtor alleging arbitrator bias should be bound by allocation of the burden of proof under article V(1)(b) is reinforced by the discussion of the Geneva instruments earlier in this chapter.[69] The inadequate rules on the allocation of the burden of proof under the Geneva instruments was one of the major motivations for creating the New York Convention. Whereas article 2 of the Geneva Convention did not specify who bore the burden of proof for the defences to enforcement, article V(1) of the New York Convention specifically places them upon the award debtor.

Were article V(2)(b) to be interpreted in such a way as to allow an award debtor to avoid proving her defence on the facts, this would undermine one of the primary purposes of creating the New York Convention. This thesis considers the extent to which the New York Convention is able to address different forms of abuse by the State at the seat of an arbitration. One of the forms of abuse that this thesis will focus on is the exertion of influence over arbitral institutes so as to, for example, push for the appointment of specific arbitrators that can be relied upon to resolve the dispute in a specific manner.

In such a situation, an award debtor may wish to resist the award under one of the article V(1) defences. However, as will be discussed in Chapter IV, they would need to be able to prove their defence which will likely prove exceedingly difficult. The allocation of the burden of proof for the article V(1) defences thus undermines the Convention's ability to combat abuse where it is effected through an arbitral institute.

[69] pp. 13-21

ii. The Discretionary Nature of Article V

A major debate that has taken place around article V concerns the proper interpretation of the word 'may'. Some commentators take the position that 'may' should be interpreted as giving courts residual discretion to enforce where one of the article V defences has been established; others have argued that courts of Contracting States to the Convention have no discretion to enforce where an article V defence has been established.[70] The most contentious issue within this debate is whether a court of enforcement retains a discretion where there is a defence under article V(1)(e) (i.e. the award has been set aside at the seat).

On one side of the debate are Albert van den Berg, one of the foremost commentators on the New York Convention, and Pieter Sanders, one of the delegates present at the New York Convention Conference, who reject the discretionary nature of article V with respect to annulled awards.[71] On the other side of the debate, Jan Paulsson and Emmanuel Gaillard,

[70] Hill points out that the use of 'discretion' in the literature on article V of the New York Convention has been indiscriminate. He notes that it is used simply to note that a court of enforcement is not obliged to refuse enforcement in every single case in which an article V defence has been made out by an award debtor. Hill considers that the term 'discretion' is misleading as it gives the impression that courts of enforcement act on subjective views of fairness, whereas they actually act on the basis of established legal principles (Jonathan Hill, 'The Exercise of Judicial Discretion in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958' (2016) 36(2) *Oxford Journal of Legal Studies* 304). However, special mention should be made of the article V(1)(e) defence that an award has been set aside at the seat. In applying this defence, the principles that a court applies are determined by the theory of international arbitration to which that court subscribes. As a result, different courts adopt approaches that range from always deferring to annulment decisions to never deferring to annulment decisions. Courts are entirely free to determine the contents of the rule under article V(1)(e) in accordance with their subjective understanding of the relationship between an arbitration and its seat. The use of the term 'discretion' with respect to article V(1)(e) in international arbitration literature is therefore not entirely void of sense. This thesis will continue to use the term 'discretion' in line with its general use in international arbitration literature on article V.

[71] See Pieter Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 *Netherlands International Law Review* 43; Albert Jan van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2010) 27(2) *Journal of International Arbitration* 179

two of the foremost practitioners and academics in international arbitration, have advocated in favour of a court of enforcement's discretion to enforce an annulled award.[72]

This controversy has arisen out of diverging views on the relationship between an arbitration and its seat, which were discussed earlier in this chapter,[73] and out of the difference in the wording of the official language versions of the New York Convention. The official languages are English, Spanish, French, Russian, and Chinese. The English text of article V says, 'may be refused… only if', using the permissive modal 'may'. The Spanish uses 'solo se podrá denegar… si', 'podrá denegar' having a permissive connotation.[74] The Russian uses 'может быть отказано… только если', which uses the permissive modal 'мочь'. The Chinese version of the New York Convention uses the conditional '唯有', which means 'only if' as well as the word '得', which in this context means 'is able to' and has a permissive connotation.[75]

The French text, however, uses the future indicative 'ne seront… que si' instead of the conditional 'ne pourront être refusées… que si'. The French text has the meaning 'shall not… unless', stating that a court cannot refuse enforcement in the absence of a defence, but saying nothing about the court's potential to enforce regardless of whether an award debtor has established a defence. The difference between the French and the other official

[72] Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14(1) *ICSID Review* 16; Jan Paulsson, 'The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention' (1996) 7(2) *American Review of International Arbitration* 99

[73] pp. 23-28

[74] See Jan Paulsson, 'May or Must Under the New York Convention: An Exercise in Syntax and Linguistics' (1998) 14(2) *Arbitration International* 227

[75] Note that this verb can also have the meaning 'must'; however, this usage is colloquial and would not be expected in a treaty

language versions of the Convention is one of nuance: the French version implies that a court of enforcement does not have discretion; the other versions imply that it does.

One means of determining which interpretation should be given precedence is to consider whether one of the interpretations is at odds with the purpose or context of the Convention under article 31 of the Vienna Convention. The New York Convention Mission Statement declares the purpose of the Convention is the simple, global enforcement of arbitral awards. This would seem to favour allowing courts discretion in the enforcement of awards where an article V defence has been made out. Where the purpose of the Convention is the enforcement of awards, an interpretation that would stop a court from enforcing an award would undermine this purpose.

However, the question arises whether such discretion might undermine the simplicity of the Convention's enforcement mechanism. The dictionary defines 'simple' as 'easily understood'. An interpretation of article V providing discretion to enforce would make it harder to predict how an arbitral award will be treated by a court of enforcement and prevents an easy understanding of how the Convention operates in practice.

Furthermore, those who argue in favour of discretion on the basis of the Convention's pro-enforcement bias do not fully engage with the fact that article V is a necessary counterbalance to the obligation to enforce. It plays a crucial role in distinguishing which awards should benefit from the Convention. To interpret the Convention's pro-enforcement bias as overriding the article V defences would be to undermine the efficacy of those defences as a means of ensuring the quality of the awards enforced under the Convention.

A further argument against judicial discretion in the application of the article V defences is based on the idea that the Convention should create a full regime for the control of arbitral awards.[76] However, context undermines the idea that the Convention was intended to create such a regime for arbitral awards.

Article VII is a more-favourable-rights provision that allows an award creditor to rely on the provisions of a national law or another applicable treaty where those provisions would allow the enforcement of an award that would be refused under the New York Convention. From this it should be clear that the Convention does not seek to replace national laws, but merely to impose a global pro-enforcement minimum that can only be supplanted by even more pro-enforcement rules.[77]

Where a treaty has been concluded in a number of authentic languages and an issue of interpretation arises from the different versions, article 33(4) of the Vienna Convention states that any differences of meaning that remain after applying the rules of interpretation in articles 31 and 32 should be resolved by adopting the meaning that best reconciles the texts, having regard to the object and purpose of the treaty. In Paulsson's words:

> [F]our of the five official languages of the Convention clearly leave room for judicial discretion. Only the French text contains a hint of a contrary intention, but it is not

[76] I.e. one that includes absolute obligations to refuse or enforce according to whether certain criteria have been met

[77] This view of the New York Convention is supported in Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Kluwer Law International 2009) 689

explicit. Should this singular nuance in the French text govern our understanding of the terms of Convention?[78]

This analysis is buttressed by the fact that in the English, Russian, and Chinese texts there is good reason to read article V as permissive.[79] The words 'may', 'может', and '得'[80] can be contrasted with the words 'shall', 'признает', and '应' in article III.[81] The choice of mandatory words across these languages in article III, and the choice of permissive words in article V, implies that the drafters of the Convention intended that article V should be interpreted in light of this distinction. Where the French version is alone in implying a lack of discretion, it is reasonable to take the position that courts retain a discretion to enforce where an article V defence has been established.

Finally, it might be pointed out that the Geneva Convention had specifically stated that awards 'shall' be refused enforcement where one of the defences under article 2 had been made out. The wording in the New York Convention thus departs from its predecessor, indicating a conscious decision to do so. Furthermore, the use of the permissive modal verb 'may', which allows courts to come to their own conclusions as to the enforceability of awards where a defence has been made out, is consistent with other Convention provisions

[78] Paulsson (n 74) 229; the analysis that the French text can be read as providing discretion is supported by Erica Stein as reported in Peter Plachy, Peter Kim, Vincent Reynaud, and Sean Tan, 'Columbia Arbitration Day 2018 The Way Forward: International Arbitration Meets a New Global Reality' (2018) 29(2) *American Review of International Arbitration* 193

[79] I am unable to analyse the Spanish text as I do not understand Spanish

[80] Note that Paulsson incorrectly states that the Chinese version uses the words '可以' (n 74) 299

[81] Darwazeh relies on the distinction between the compulsory and permissive language in the New York Convention in justifying the residual discretion to enforce annulled awards. Nadia Darwazeh, 'Article V(1)(e)' in Herbert Kronke, Patricia Nacimiento, Dirk Otto, and Nicola Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 301, 309-10

(such as the scope of the Convention in article I) which strike a compromise between territorialism and delocalisation.[82]

The interpretation of article V that affords courts of enforcement discretion to enforce an annulled award finds support in the UNCITRAL Guide on the New York Convention.[83] The ICCA Guide, on the other hand, merely reports the difference in wording of the different official languages of the Convention without coming down in favour of any one interpretation.[84]

Courts of enforcement have discretion to enforce annulled awards. Where courts of enforcement have such discretion under the Convention, the Convention can provide a remedy to award creditors who have had their awards abusively annulled by the courts of the seat - for example, where the court of the seat annul an award to protect the interests of a local or State-owned enterprise. Whether this remedy is in fact available to any particular award creditor turns on whether the relevant court of enforcement recognises and uses its discretion under the Convention. This question is inextricably linked to the different theories of arbitration, and in particular the different theoretical models of international arbitration, which are discussed in the following chapter.

[82] pp. 33-34

[83] UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations 2016) 125

[84] *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (ICCA 2011) 85

iii. Summary

A proper interpretation of article V leads to three conclusions of relevance to the present thesis topic. The first conclusion is that the open-ended defence of arbitrability under article V(2)(a) must not be applied by national courts, or defined in national laws, in such a way as to undermine the underlying principles of the Convention. In particular, States must not use national rules on arbitrability to disallow disputes from going to arbitration abroad while allowing them to go to domestically seated arbitration. Otherwise, States could use the Convention as a one-way means of exporting their awards while refusing to enforce foreign awards. This would contravene the Convention's purpose of supporting the circulation of arbitral awards and would violate the Convention's underlying principle that arbitration is a legitimate means of dispute resolution in its own right, .

The second conclusion is that award debtors should not be allowed to invoke the defence of public policy under article V(2)(b) to escape the allocation of the burden of proof under article V(1). Due to the open-ended nature of the public policy defence, it is capable of encompassing diverse situations, such as arbitrator bias, which otherwise falls under the defence in article V(1)(b). Where article V(1) explicitly places the burden of proof on the award debtor and article V(2)(b) does not, award debtors should be allowed to escape the burden of proof by tactically invoking article V(2)(b).

The third is that article V does not impose an obligation on courts to refuse enforcement where a defence has been made out. In particular, courts have discretion under the Convention to enforce an award notwithstanding a defence under article V(1)(e) where the award has been annulled. As will be discussed in the final section of this chapter, whether

a court of enforcement will exercise its discretion to enforce an annulled award will depend on the theoretical model of arbitration to which it subscribes.

c. Reciprocity under the New York Convention

Reciprocity in international law is defined as 'the status of a relationship between two or more States under which a certain conduct by one party is in one way or another juridically dependent upon that of the other party'.[85] Reciprocity thus describes the mutuality of obligations between States in international law. Technically speaking, reciprocity lies at the heart of all treaty law inasmuch as treaties impose obligations upon all their Contracting States: where all Contracting States are subject to the treaties' terms there is a mutuality of obligation.

Beyond this formal definition of reciprocity in international law, reciprocity also describes the sociological and psychological factors that give international rules of law their binding power. Where public international law lacks a central authority capable of forcing States to comply with their obligations, reciprocity can explain why States observe rules of international law. By agreeing the contents of, and observing, international legal rules, States seek to ensure the compliance of other States with those same rules. Reciprocity is the motivation for both the creation and observance of international law rules.

The importance of reciprocity is particularly visible in treaty formation. During the negotiations leading up to the adoption of a treaty, States vie with each other over the drafting of the treaty's rules. A State does so in the hope that the final draft will impose obligations, the observance of which by other States is most beneficial to that State, and the observance of which is least onerous to that State.

[85] Bruno Simma, 'Reciprocity' in *Encyclopedia of Public International Law* (Max Planck Institute 2008) para. 2

Often, whether a State accedes to a treaty will be decided by whether it stands to gain from the mutual obligations under the treaty in question. A State's decision to become a Contracting State to a treaty is thus premised on the idea of reciprocity. Without reciprocal treatment by other Contracting States to a treaty, a State is deprived of the benefit it seeks to obtain by observing the treaty's obligations – namely the observance of those same obligations by other Contracting States.

Many treaties incorporate reciprocity clauses, 'establish[ing] equivalence of the mutual advantages to be derived from the performance of [the treaty]'.[86] Reciprocity clauses make the application by one State the measure by which another State will itself apply a treaty. Where one State fails to meet its obligations, or interprets its obligations in a restrictive manner, other States will be entitled to similarly fail to meet or restrict their obligations. Reciprocity acts as a potential means of policing States' observance of their obligations under a treaty, as '[t]he possibility of a State reciprocating in kind… provides a powerful argument for observance of the law'.[87]

Within the world of private international law, reciprocity will often concern the equal treatment by States of the nationals of other States. For example, reciprocity might factor into the enforcement of foreign court judgments. Enforcement of a foreign court decision in favour of a national of the foreign forum might be refused on the basis that a similar judgment made against a national of the foreign forum in favour of a national of the enforcement forum would not be enforceable before the foreign court – in a 19th century U.S. Supreme Court case, enforcement of a French court decision against a U.S. citizen

[86] ibid para. 11

[87] ibid para. 14

was refused on the basis that the French courts would not have enforced an equivalent U.S. decision.[88]

By imposing a requirement of reciprocity in private international legal relations, States seek to achieve two practical goals.[89] First, they seek to establish equality between their nationals and the nationals of other States. There is disparity where a national of State A is unable to enforce a judicial decision from State A against a national of State B in State B, but a national of State B is able to enforce an equivalent judgment by the courts of State B against a national of State A in State A. The national of State A is forced to choose between recourse to its own courts or enforcement before the courts of State B, while the national of State B is not confronted with a similar dilemma. By refusing recognition of judgments by the courts of State B for lack of reciprocity, State A creates parity between the parties.

Secondly, the refusal by State A to enforce the decisions of State B may pressure State B into enforcing decisions from State A. If State B considers the enforceability of its court judgments in State A of sufficient value to its nationals, it may be persuaded to allow nationals of State A to enforce the decisions of their courts in State B. Reciprocity thus gives States leverage to pressure other States into affording rights to their nationals by withholding those rights from the nationals of those other States.

[88] *Hilton v. Guyot*, 159 U.S. 113 (1895)

[89] Young-Joon Mok, 'The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958' (1989) 21 *Case Western Reserve Journal International Law* 123, 136

Within the context of the New York Convention, these rationales for reciprocity lose much of their force. The use of the term 'reciprocity' in relation to the New York Convention 'may even lead to confusion… [as it is] not to be understood in its ordinary sense in international law'.[90] Unlike the Geneva instruments, the scope of the New York Convention is not defined by reference to the parties' nationalities. The Convention imposes the obligation to enforce arbitral awards that have been made in a foreign State – the obligation to enforce is thus determined on the basis of the award's nationality and not the award creditor's nationality.

As will be discussed in relation to article I(3) and article XIV, reciprocity under the New York Convention cannot take account of the award creditor's nationality. Where reciprocity only applies according to the seat of the arbitration, the rationales for reciprocity in private international law do not apply. Where a court refuses enforcement of an arbitral award for a lack of reciprocity by the State of the seat of arbitration, there is no guarantee that the award creditor will be a national of the State of the seat.

Where, for example, State A refuses to enforce awards relating to competition disputes and State B reciprocates by refusing to enforce awards relating to competition disputes issued in State A, State A's nationals can simply arbitrate their competition disputes in State C to gain enforcement of a resulting award in State B. It is thus not possible to achieve parity between the nationals of State B and State A with respect to the enforcement of awards relating to competition disputes before each other's courts.

[90] van den Berg (n 39) 14

For the same reason, State B will find it difficult to pressure State A into enforcing awards relating to competition disputes. Where State B refuses the enforcement of awards from State A resolving competition disputes, the only disbenefit to State A is that it might become less attractive as a venue for competition disputes. State B is unable to prevent the nationals of State A enforcing awards relating to competition disputes where they have arbitrated outside State A – 'the non-recognition of an arbitral award does not (legally) affect the [State] where the arbitration proceedings were held and is therefore not a means by which pressure might be applied'.[91]

Apart from those States that actively court arbitration and vie to be chosen as seat, reciprocity has little bite as a disincentive for States to refuse enforcement. Furthermore, States that do actively court arbitration are unlikely to be the same States seeking to restrict their obligation to enforce awards under the Convention, as to do so would prejudice their reputation as arbitration-friendly jurisdictions. There is thus misalignment between the States against which reciprocity is an effective threat, and the States against which an effective threat is required.

Moreover, Born considers it 'arguably unjust for an individual litigant to be denied recognition of an otherwise valid and enforceable award… this sacrifices the parties' rights to more generalized foreign policy concerns'.[92] To this effect, reciprocity has fallen out of favour in the enforcement of foreign court judgments. The above-cited U.S. case has come under recent criticism by the District Court of Washington,[93] and the most recent U.S.

[91] Ulrich Haas and Heiner Kahlert, 'New York Convention' in Frank-Bernd Weigard and Antje Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration* (3rd edn, OUP, 2019) para 21.64

[92] Born (n 1) 2974

[93] *Societe Damenagement et de Gestion de Labri Nautique v Marine Travelift Inc.* 324 F.Supp.3d 1004

Restatement of Foreign Relations Law states that the rule requiring reciprocity 'is no longer followed in the great majority of State and federal courts'.[94]

There is also the problem that in many cases it may be difficult for a court of enforcement to accurately determine whether the courts of a foreign State are abiding by their Convention obligations. Ehle rejects the idea that national courts should conduct 'reciprocity due diligence' in light of both 'the practical difficulty of verifying if reciprocity is actually granted', and the fact that it would undermine the 'purpose of the Convention to promote and facilitate'[95] the enforcement of arbitral awards.

Reciprocity arguably threatens to undermine the Convention. First, it complicates the enforcement of arbitral awards by asking courts to undertake complex investigations into the application of the Convention by other States. This makes enforcement less predictable for parties, as they must predict how courts will view another courts' application of the Convention. Secondly, 'reciprocity [does not] help us… to distinguish the wheat from the chaff'[96] but sacrifices both good and bad arbitral awards to foreign policy.

There is a certain logical fallacy to using reciprocity to police the observance of a treaty by States. Reciprocity permits Contracting State A to renege on its obligations under a treaty where Contracting State B has already done so. The end result is to further reduce compliance with the treaty: '[h]ere reciprocity reveals its Janus-face [serving] as a

[94] *Restatement (Third) of Foreign Relations Law* (1987) (American Law Institute, 2019) §481

[95] Bernd Ehle, 'Article I' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958* (2nd edn, C.H. Beck 2019) 78-9

[96] 'Reciprocity and the Recognition of Foreign Judgments' (1927) 36(4) *Yale Law Journal* 542, 548

propelling force in the making and application of the law, and also [triggering] the breakdown of international order'.[97]

Haas and Kahlert point out that the application of reciprocity to Contracting States' obligations under the Convention would lead to States 'return[ing] the insult' when their awards are refused enforcement;[98] while Marike Paulsson warns courts against drawing 'subjective value judgments and speculations as to the intentions and reliability of foreign judges'.[99] This would lead to the Convention's piecemeal application as the enforceability of an award in any given case would depend on the States involved, undermining the Convention's purpose of simplifying and facilitating the enforcement of arbitral awards.

Nevertheless, Dasteel argues that reciprocity is a powerful tool in preventing an excessively individualized application of the Convention by States – 'absent the ability of contracting states to require reciprocity, there could be asymmetrical enforcement requirements under the New York Convention'.[100] Dasteel sees such individualization as antithetical to the purpose of the Convention's pursuit of uniformity in the enforcement of arbitral awards, making reciprocity a necessary mechanism for policing the Convention's application.

It is against the backdrop of these considerations that courts and commentators have considered the potential role of reciprocity under the New York Convention. The two

[97] Simma (n 85) para 16

[98] Haas, Kahlert (n 91) para 21.70

[99] Paulsson (n 19) 38

[100] Jeffrey H Dasteel, 'Is it Time to Awaken the New York Convention's Dormant General Reciprocity Clause?' (2015) 26 *American Review of International Arbitration* 539, 542

articles most relevant to this issue are articles I(3) and XIV. The following sections will argue that reciprocity has a useful role under the New York Convention, though it should only be invoked in limited circumstances to preserve the uniformity of the Convention's application.

i. Article I(3)

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

Article I(3) is often called the reciprocity reservation. It is clear from its wording that article I(3) allows States to limit their application of the Convention to only those awards made in other Contracting States. Article I(1) describes the Convention's scope in terms of foreign awards, not discriminating between awards made inside and outside Contracting States. Article 1(3) allows States to distinguish between awards made inside and outside Contracting States and only enforce the former.

A point of controversy that has arisen amongst commentators is whether the phrase 'on the basis of reciprocity' adds anything to the proper interpretation of article I(3). The majority of commentators do not consider these words to carry any import, and read article I(3) as only allowing a State to limit the application of the Convention to awards issued in another Contracting State.[101] This is the interpretation adopted in an early decision by the

[101] Paulsson (n 19) 37; (n 84) 29; Loukas A Mistelis and Domenico di Pietro, 'New York Convention, Article I [Scope pf Application] in Loukas A Mistelis (ed). *Concise International Arbitration* (2nd edn, Kluwer Law International, 2015) 3-7; Hans Bagner, 'Article I' in Herbert Kronke, Patricia Nacimiento et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International 2010) 19 – 36; van den Berg (n 39) 13

District Court of Southern Ohio, [102] which was subsequently lauded for avoiding needless litigation over whether foreign States are applying the Convention properly.[103]

However, some commentators consider that the words 'on the basis of reciprocity' might provide for reciprocity in a broader sense. Haas and Kahlert point out that these words could 'allow for a different interpretation in the sense that reciprocity must be examined in detail for each individual case'. [104] Similarly, Ehle considers it at least 'debatable whether a national court of enforcement can rely on the mere formality that the State in which the arbitral award was issued is a Contracting State'.[105] If one reads article I(3) as allowing the consideration of this broader sense of reciprocity, a court of enforcement whose State has declared the article I(3) reciprocity reservation would be entitled to inquire into the application of the Convention by the Contracting State in which an award was made.

Those commentators that suggest a broader reading of reciprocity under article I(3) focus on the words 'on the basis of reciprocity'. However, the overall construction of article I(3) undermines this interpretation. If the drafters had intended article I(3) to allow for such a reading of reciprocity, they would have ensured that the words 'on the basis of reciprocity' qualified the act of enforcement – e.g. 'may declare that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards'. However, the

[102] *Fertilizer Corporation of India v IDI Management*, 517 F.Supp. 948

[103] Robert B von Mehren, 'The Enforcement of Arbitral Awards under Conventions and United States Law' (1983) 9 *Yale Journal of World Public Order* 343, 351

[104] Haas and Kahlert (n 91) para 21.69

[105] Ehle (n 95) 78

wording of article I(3) does not do this, instead allowing States to 'declare on the basis of reciprocity'.

It is therefore the declaration itself and not the application of the Convention that takes place against the backdrop of reciprocity.[106] Presumably 'on the basis of reciprocity' merely clarifies the rationale of such a declaration as demanding that other States also be bound by the Convention if they are to benefit from it. Van den Berg similarly considers the phrase 'on the basis of reciprocity' more superfluous than significant.[107] The plain meaning of article I(3) is therefore to limit a declaring State's application of the Convention to award issued in other Contracting States.

Neither the purpose of article I, which determines the scope of the Convention, nor the requirement to interpret the Convention in good faith militates against this conclusion. Furthermore, the drafting history of article I(3) offers no reason to interpret the provision as allowing States to review the application on the Convention by each other. The phrase 'on the basis of reciprocity' was adopted with little to no deliberation, suggesting that the delegates did not consider it particularly significant.[108] Article I(3) must therefore be read only as allowing States to restrict the application of the Convention to awards rendered in other Contracting States.

[106] The Russian and Chinese versions of the Convention are also constructed in such a way that 'on the basis of reciprocity' is syntactically connected to the act of declaration, and not the act of enforcement

[107] van den Berg (n 39) 14

[108] UN Conference on International Commercial Arbitration, Summary Record of the 21st Meeting (E/CONF.26/SR.21, 1958) 15

ii. Article XIV

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

The ordinary meaning of article XIV is that '[n]o state can… demand what it itself is not prepared to grant'.[109] This reflects a broader concept of reciprocity than that under article I(3). Despite the apparent simplicity of article XIV's drafting, the precise scope of its application is controversial.

Quigley, an early commentator of the New York Convention, took the view that article XIV 'gives States a defensive right to take advantage of another State's reservation',[110] such as the reservation that a State will only apply the Convention to disputes considered commercial under its domestic law. Similarly, the same commentator considered that article XIV 'presumably will also cover the case where the courts of a State have placed a restrictive interpretation upon its obligations under the Convention'.[111]

In the past, a number of national laws provided for such reciprocity under the Convention. The New Zealand Arbitration Act 1982 section 13(1) expressly provided that the Governor-General could 'direct that no Convention award made in [a country affording

[109] Patricia Nacimiento, 'Article XIV', in Herbert Kronke, Patricia Nacimiento , et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 545

[110] Leonard V Quigley, 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1961) 70 *Yale Law Journal* 1061, 1074

[111] ibid 1074

less favourable treatment to New Zealand awards] shall be enforceable'. Equally a 1982 decision by the Spanish Supreme Court held that 'the principles of "negative reciprocity" as incorporated in article 953 of the Spanish Code of Civil Procedure can be invoked against the enforcement of a foreign arbitral award'.[112]

US courts have been inconsistent in the interpretation of article XIV. The District Court for the Southern District of New York held that a 'reciprocity argument is wholly without merit and is not a ground stated in the Convention upon which enforcement can be denied'.[113] Similarly, the District of Western Ohio seemed to reject an interpretation of article XIV that would allow courts to refuse enforcement of an arbitral award for a lack of reciprocity, holding that Quigley's interpretation of article XIV was 'not determinative';[114] though it nevertheless felt the need to go on and find that India, the State at the seat of arbitration in that case, was 'not engaged in a devious policy to subvert the Convention by denying non-Indians their just awards'.[115]

On the other hand, the Court of Appeals for the Fifth Circuit more recently held that under article XIV 'other countries must respect the rights of U.S. citizens under the Convention only to the extent that the United States implements the Convention within its own borders'.[116] This is in line with a previous decision by the same court, in which it held that '[o]ur decision in this case could jeopardize the international arbitration agreements of

[112] 'Spain No. 8, X v. Naviera Y S.A., Tribunal Supremo [Supreme Court], Not Indicated, 3 June 1982', in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1986 – Volume XI (Kluwer Law International, 1986) 527

[113] *La Societe Nationale v Shaheen Natural Resources* 585 F. Supp. 57

[114] *IDI* (n 102) 953

[115] ibid 953

[116] *Beiser v Weyler*, 284 F.3d 665 [17]

United States citizens who are not parties to this case',[117] implicitly acknowledging that other Contracting States had a right to reciprocate where a U.S. court applied the Convention restrictively.

Commentators are split on the matter of whether article XIV should be interpreted to allow a substantive analysis of how the Convention is applied by the Contracting State in which the award was issued. Born argues that 'at least some scrutiny of Contracting States' reservations to the Convention and how Contracting States' courts actually apply the Convention is appropriate and arguably necessary' in the application of article XIV.[118] Nacimiento, however, argues that such an analysis of other Contracting States' application of the Convention 'would conflict with the objective of the Convention to simplify the recognition and enforcement of arbitral awards'.[119]

Nacimiento's argument is powerful with respect to the interpretation of article I(3), which is vague as to whether it contemplates substantive reciprocity. However, in the context of article XIV, which specifically refers to reciprocal rights between Contracting States, this argument has little force. Nacimiento's concern is at best a plea for restricting article XIV's application, and does not speak to whether article XIV incorporates a broad reading of reciprocity into the Convention.

A more convincing argument restricting the operation of article XIV is based on waiver. Haas and Kahlert argue that 'where the NYC expressively permits recourse to the

[117] *McDermott v Lloyds* 944 F.2d 1199 [21]

[118] Born (n 1) 2977

[119] Nacimiento (n 109) 547

respective national law for recognition and enforcement, uniform international standards have been waived intentionally';[120] similarly, Kölbl argues that where a Contracting State has failed to declare the commercial reservation it has 'considered itself bound by the Convention without any restrictions'[121] and is prevented on the basis of waiver from relying on article XIV to invoke the commercial reservation against an award where the State at the seat had declared the reservation.

This analysis is derived from the argument that where the Convention itself gives States leave to resort to their national law, one cannot characterise their doing so as reneging upon their obligations under the Convention. Article XIV states that reciprocity is measured by 'the extent that [a State] is bound' by the Convention – where the Convention approves of the application of national law, a State does not go outside the bounds of the Convention by applying national law.

A major benefit of the waiver analysis is that it prevents excessive fragmentation of the rules under the Convention. Should Contracting States mimic each other's national laws with respect to the limitations placed on arbitration, this would lead to a total lack of uniformity under the Convention: depending on the seat, different awards would in effect be subject to different regimes before the same court of enforcement. The waiver analysis provides States with a margin of appreciation in applying their national laws under those provision of the Convention that invite them to do so. Where Contracting States act within this margin of appreciation, they do not give other Contracting States cause for complaint such as to trigger article XIV.

[120] Haas and Kahlert (n 91) para 21.71

[121] Angela Kölbl, 'Article XIV' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958* (2nd edn C.H. Beck 2019) 557

State A would not be entitled to refuse enforcement of an award from State B resolving an intellectual property dispute on the basis that State B does not enforce such awards. By acceding to the Convention, which allows for the application of State B's rules on arbitrability, State A has waived the right to protest State B's application of those rules.

It should be noted that this margin of appreciation is not unlimited. Where a national law violates the Convention, the application of that national law will trigger article XIV as the State applying the law will not be acting within the bounds of the Convention. In waiving their right to protest the application of national law under the Convention, Contracting States do not also waive the right to protest a breach of the Convention where that breach arises from the application of national law.

A further issue as to article XIV's operation has been raised by Born. Born points out that '[a]rticle XIV is not textually confined to awards rendered in a foreign state's territory', and thus might be read to allow to refuse enforcement of 'awards made in favour of nationals of states that have not ratified or do not apply the Convention'.[122] This view must be rejected. As discussed earlier in this chapter,[123] the New York Convention departed from the position of the Geneva instruments which defined their scopes by reference to the nationality of the parties to an arbitration. If a Contracting State could refuse enforcement of an award on the basis that the award creditor was not the national of a Contracting State, this would effectively reintroduce the nationality criterion which the drafters of the New York Convention had intended to exclude. This cannot be correct.

[122] Born (n 1) 2977

[123] pp. 13-21

Finally, there is debate around whether private parties are entitled to raise article XIV in enforcement proceedings. Article XIV is phrased in terms of the respective rights of Contracting States, leading some to question whether an award debtor can invoke it directly. The Canadian New Brunswick Court of Queen's Bench refused to allow an award debtor to resist enforcement under article XIV, holding that:

> Art. XIV says a Contracting State cannot avail itself of the Convention against other Contracting States, except to the extent it is itself bound to apply the Convention. This is not a case involving Contracting States, but rather two private commercial entities.[124]

Born adopts the position that article XIV is not drafted in such a way as to allow parties to invoke it themselves. He compares the article XIV to article I(3), finding that the latter is drafted in such a way that parties may invoke it and concluding that the former was drafted so as to preclude party invocation.[125] The exact wording Born is referring to in article I(3) is unclear, as article I(3) does not explicitly refer to the parties. Furthermore, article I(3) is concerned with the ability of Contracting States to declare reservations under the Convention, and in doing so determine the extent of their Convention obligations – this is not dissimilar to article XIV which determines the extent of a Contracting State's obligations by reference to the actions of other Contracting States.

[124] *M.A. Industries Inc. v. Maritime Battery Ltd*., New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Fredericton, Not Indicated, 19 August 1991' [11], in Albert Jan Van den Berg (ed), *Yearbook Commercial Arbitration 1993 – Volume XVIII* (Kluwer Law International, 1993) 354 – 357

[125] Born (n 1) 2976

A more convincing argument is made by Haas and Kahlert, who point to the fact that 'Article XIV is systematically grouped with other provisions relating to public international law at the end of the Convention'.[126] This argument is also adopted by both Ehle and Nacimiento.[127] A distinction might therefore be drawn between article I(3), which is grouped with those provisions that afford rights to private parties, and article XIV, which is grouped with those provisions that govern the public international law aspects of the Convention. This would also explain why article I(3) is maintained as a separate reciprocity provision despite the inclusion of the more general article XIV.[128]

However, an early commentator took the view that '[a]rticle XIV can be taken as a declaration of… public policy' such that the court might 'sua sponte, or at the prompting of the opponent… of an arbitration agreement or award falling under the Convention, refuse to apply the Convention'.[129] This argument is not without some basis.

Article V(2)(b) does not explicitly allow a party to raise the public policy defence to resist enforcement of an award but allows a court to refuse enforcement if it finds that enforcement would violate its public policy. Nonetheless parties frequently invoke article V(2)(b) themselves. Furthermore, if reciprocity is considered an aspect of a State's public policy then an award debtor is no less entitled to raise it in resisting enforcement than she would be in raising any other aspect of public policy.

[126] Haas and Kahlert (n 91) para 21.76

[127] Kölbl (n 121) 557; Nacimiento (n 109) 548

[128] Nacimiento (n 109) 547-8

[129] John P McMahon, 'Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States' (1971) 2 *Journal of Maritime Law & Commerce* 735, 759-60

However, as discussed in relation to article V(2)(b), there is a high bar for making out a defence of public policy under the Convention. Article V(2)(b) exists to allow States to protect the fundamental principles that underpin their legal systems – such principles include the right to a fair trial and the protection of vulnerable parties. It is submitted that reciprocity, which denies others those rights that they are not prepared to give, does not rank alongside these lofty, fundamental principles. It would therefore be inappropriate to allow a party to invoke article XIV through article V(2)(b).

In considering the relationship between a State's public policy and its international obligations, the ILA referred to the appropriateness of invoking public policy where the enforcement of an award would put a State in violation of its international obligations.[130] The ILA did not sanction the application of article V(2)(b) where a State seeks to insist on the observance of its own rights by other States.

On its proper interpretation, article XIV requires implementation in national law to allow an award debtor to invoke it in resisting the enforcement of an arbitral award. This is the view advocated by both UNCITRAL Guide and the American Law Institute's most recent Restatement on international arbitration.[131]

[130] Pierre Mayer and Audley Sheppard (n 53) 262-3

[131] UNCITRAL (n 84) 328; *Proposed Final Draft of the Restatement (Third) of the U.S. Law of International Commercial and Investor-State Arbitration* (American Law Institute 2019) §4.5

iii. Summary

The above analysis illustrates that article I(3), despite being frequently referred to as the reciprocity reservation, does not contemplate reciprocity in the sense of allowing Contracting States to limit their observance of the Convention's rules to mirror the extent to which other Contracting States observe them. Instead, it contemplates a more limited reciprocity, which simply requires that an arbitral award be issued in another Contracting State for the Convention to apply to that award.

Article XIV, on the other hand, contemplates a broader concept of reciprocity. Such reciprocity should only be invoked where a State's refusal to enforce foreign awards amounts to a violation of the Convention. This is because the Convention permits the application of national law when considering, for example, arbitrability, and other Contracting States have waived their right to protest the application of national law when the Convention provides for its application.

Furthermore, article XIV is drafted in terms of the rights of States themselves. It is therefore not open to parties to directly invoke article XIV to resist the enforcement of an award. Article XIV must have been implemented in national legislation for parties to rely on a lack of reciprocity by the State at the seat to resist the enforcement of an arbitral award.

Though reciprocity can assist in the policing of the Convention, its application does not come without risk. Where Contracting States invoke reciprocity too lightly, this will lead to the piecemeal application of the Convention. Furthermore, there is the technical

issue of proving a lack of reciprocity and the risk that courts will incorrectly condemn the application of the Convention by their foreign counterparts. To avoid its overuse and the resultant dissolution of the New York Convention regime, reciprocity should only be available in the face of a clear-cut breach of the Convention.

Finally, it is worth noting that reciprocity does not discriminate between good and bad awards. Where a court refuses enforcement of a valid award for lack of reciprocity, it does injustice to the award creditor. Quite aside from the question of whether it is fair to involve private parties in the conflict of States, the New York Convention does not take into account the nationality of parties but of awards - it is likely that an innocent award creditor from a third State will suffer for the conduct of the State at the seat. Unless reciprocity can target the nationals of the State in violation of its Convention obligations, it is unclear whether it can effectively police the application of the Convention by States as it will not be able to place pressure on them through their nationals.

6. Summary

The New York Convention is a major step forward from its predecessors, the Geneva instruments. The Geneva instruments lent legitimacy to international arbitration, obliging States to recognise arbitration agreements and arbitral awards; the New York Convention has given shape to the modern international regime for arbitration through both substantive and conflict of laws rules for the recognition and enforcement of arbitration agreements and arbitral awards.

Whereas the Geneva instruments placed the burden of proving an award's perfection on the award creditor seeking enforcement; the New York Convention assumes the enforceability of arbitral awards, and article V(1) places the burden of proof in showing the imperfection of the award upon the award debtor seeking to resist enforcement. Courts of enforcement must ensure that the burden of proof remains with the award debtor, and not allow award debtors to rely on article V(2)(b) so as to escape having to establish their defence on the facts.

Though this has improved the international regime for arbitration in general, the strict rules on the allocation of the burden of proof has posed a problem in certain situations – in particular where an award debtor argues that the arbitral institute has appointed an arbitrator who is not impartial. As will be discussed in chapter IV, award debtors in Russia struggled to challenge arbitral awards issued within arbitrations administered by arbitral institutes owned by the award creditor.

These non-independent arbitral institutes would appoint one of the arbitrators to the tribunal. When the institute-affiliated party won, the award debtor would argue that the institute-appointed arbitrator was not impartial. Award debtors struggled to find evidence of impartiality beyond the fact that the institute had appointed the relevant arbitrator, and the institute-affiliated party had won. The recent reform of Russian international arbitration subordinates Russian arbitral institutes to the Russian government, giving rise to the question of whether Russian arbitral institutes could be pressured by government to appoint particular arbitrators to decide politically sensitive disputes.

Another point made in this chapter is that the Convention sets a minimum standard for the enforcement of arbitration agreements and arbitral awards. States are given discretion whether or not to go beyond this minimum standard and article V is drafted in such a way that courts are allowed to enforce an arbitral award even where an article V defence is established. In relation to the defence under article V(1)(e) that an arbitral award has been annulled, this discretion has become a battleground for the rival theoretical models of international arbitration. The following chapter will consider in further depth the theory and caselaw that has developed under article V(1)(e), focussing on those cases where a party has argued before the court of enforcement that the State of the seat has illegitimately interfered with their arbitration.

A further point made in this chapter is that the underlying principles and purpose of the Convention dictate that its provisions should not be interpreted in a manner that undermines the core principles underlying the Convention. In particular, the requirement that a treaty be interpreted in good faith and in accordance with the purpose of the treaty means that arbitrability must not be used to undermine the core tenet of the Convention -

that international arbitration is a proper form of dispute resolution, the legitimacy of which is not derived from its subordination to a national legal system. It would therefore be an abuse of the arbitrability defence to impose a mandatory seat of arbitration.

As will be discussed in chapter V, the Russian reform has imposed a mandatory Russian seat of arbitration for certain Russian corporate disputes and procurement disputes. Where such disputes are arbitrated outside of Russia, the Russian courts will invoke article V(2)(a) to refuse enforcement of any resulting award. This thesis will go on to argue that by doing so, Russian international arbitration law is in violation of the New York Convention.

Finally, the New York Convention allows States to invoke the principle of reciprocity under article XIV. Where another State is in default of its obligation to enforce arbitral awards under the Convention, other States may refuse to enforce awards issued in that seat on the basis of reciprocity. Article XIV cannot be directly invoked by an award debtor as a defence to enforcement; in order for article XIV to be invoked in enforcement proceedings, it must be implemented in national law. In chapter VI, this thesis will that reciprocity should be incorporated into national law, and invoked to refuse the enforcement of those Russian awards resolving disputes subject to the above-mentioned new Russian rules on arbitrability. This is justified on the above-mentioned basis that the new Russian rules on arbitrability violate Russia's obligations under the New York Convention by only recognising the arbitrability of certain disputes where they are arbitrated with a Russian seat.

Chapter III – Abuse by the Seat and the New York Convention

1. Introduction

This thesis considers the ability of courts in New York Convention States to address abuse by the legal system at the seat, defined as the exercise of the seat's supervisory functions for purposes other than ensuring an arbitration's fairness and integrity. This thesis will go on to discuss the recent reform of Russian arbitration law, and whether it undermines the ability of courts of enforcement to counteract such abuse by the legal system at the seat. However, before embarking upon a discussion of Russian arbitration law, it is first necessary to consider how courts of enforcement have previously addressed arguments of abuse by the legal system at the seat of arbitration. By seeing how courts have addressed this issue in the past, it will be possible to assess whether they can continue to do so in the face of regimes such as that introduced under the Russian reform.

This chapter will describe how courts of enforcement acting under the New York Convention have sought to protect against perceived abuse by the legal system at the seat of arbitration. The caselaw on this subject is primarily concerned with situations where the legal system at the seat has annulled an arbitral award. The reason for this is that courts of enforcement only become involved with an arbitration after the arbitral award has been issued and when it is presented to them for enforcement; once an award has been issued, the primary means by which the legal system at the seat can intervene is by annulling the award. In many respects this chapter is a further discussion of article V(1)(e) of the New York Convention, considering how this provision has been applied in practice.

Courts of enforcement are able to enforce annulled awards due to the discretion left to them by article V(1)(e) of the New York Convention. As courts of enforcement enforce annulled arbitral awards pursuant to this discretion, they have had to develop their own rules for determining in which circumstances they will enforce an annulled award. How courts have approached their discretion to enforce an annulled award is inextricably linked to the different theoretical models to arbitration that exist within the larger territorialist and delocalised theories discussed in the previous chapter.[132]

An analysis of the cases in which courts have considered the enforcement of an annulled award shows that courts of enforcement are able to protect against abuse by the courts at the seat under the Convention. However, courts of enforcement have indicated they are unwilling to do so in all but the most extreme cases and place a demanding burden of proof upon parties arguing such abuse.

Notably in the *Yukos* case, discussed later in this chapter, the Dutch courts accepted the argument that the Russian courts had annulled a number of arbitral awards in abusive proceedings on the basis of inferences drawn from circumstantial evidence of bias. The Dutch court thus required the award debtor to disprove the inference that the annulment decision it sought to rely upon had been improperly made. This can be contrasted with the situation where an award debtor argues that the relevant arbitrators were biased, as under the New York Convention a court of enforcement is not entitled to make the award creditor prove the procedural propriety of the arbitration.

[132] pp. 13-21

The distinction between the lack of any direction as to how a court must approach the enforcement of an arbitral award pursuant to its general discretion under the New York Convention, and the explicit allocation of the burden of proof on the award debtor in resisting enforcement under article V(1) is crucial to this thesis. As will be explained in chapter IV, the allocation of the burden of proof under the Russian national law equivalent of article V posed a problem for Russian courts in addressing the problem of arbitrators that had been appointed by non-independent arbitral institutes. In chapter V it will be argued that courts of enforcement will similarly struggle to refuse enforcement of awards in the wake of Russian reform where it has been argued that the Russian government has exerted influence over a Russian arbitral institute to appoint a specific arbitrator who decides the dispute in line with government policy.

2. Soft Law Under Article V(1)(e) of the New York Convention

The preceding chapter discussed the interpretation of the black letter provisions of the New York Convention most relevant to this thesis' appraisal of the recent Russian reform of international arbitration law. This black letter analysis of the Convention does not present a complete picture of the Convention, or of the practice of courts applying the Convention.

In particular, though the preceding chapter describes how courts applying article V(1)(e) have a discretion to enforce an annulled arbitral award, the existence of a discretion does not mean that any court will in fact enforce such an award. This section acts as a further exploration of article V(1)(e), albeit through a theoretical and not doctrinal lens. This section will explore the different theoretical models that inform how courts of enforcement will approach their discretion to enforce an annulled arbitral award under article V(1)(e) of the New York Convention.

As briefly discussed in the previous chapter,[133] the different theories of international arbitration describe different relationships between the legal system at the seat and an arbitration. This in turn provides crucial context both for what, if anything, constitutes abuse by the seat, and whether an enforcement court might enforce an award where it considers that it has been annulled in abusive proceedings.

This chapter will briefly revisit the two different theories of international arbitration – the territorialist and delocalised theories – before going on to examine the different theoretical models of international arbitration within these two broad theoretical camps.

[133] pp. 13-21

Within each camp, there are two main models which will be discussed in this section – the objective and subjective territorialist models within the territorialist camp, and the pluralist and autonomist models within the delocalised camp. These models will be considered in light of whether they acknowledge the concept of abuse by the seat of arbitration, defined as the exercise of its supervisory jurisdiction for an improper purpose. This chapter will then go on to discuss the approach that courts of enforcement have developed in enforcing annulled awards on the basis that the annulment proceedings were abusive.

a. The Territorialist Theory

The territorialist theory subordinates the legal efficacy of an arbitration to the law of the arbitration's seat. This theoretical theory has serious practical implications for the status of awards annulled at their seat. Most States allow parties to challenge awards that have been issued in locally seated arbitrations in annulment procedures before the national courts. Under the territorialist theory, annulment procedures create an *erga omnes* effect that precludes the enforcement of the award by courts outside the seat. An arbitral award annulled by the courts at the seat effectively ceases to exist.

Though territorialists acknowledge the right of a court of enforcement to review an arbitral award, they posit that it can only do so where the award exists (i.e. has not been annulled at the seat). The review by the court of enforcement is thus subsidiary to the review by the court at the seat. When asked to enforce an award that has been annulled at the seat, a territorialist court of enforcement should refuse.

The primacy of the legal system at the seat forms the common basis upon which proponents of the territorialist theory build their particular models. The legal system at the seat is the source of obligations in an arbitration, with both the tribunal and court of enforcement operating downstream of the seat – where the source is cut off, the tribunal and court of enforcement have no role to play.

Though all proponents of the territorialist theory stress the importance of the seat in international arbitration, they differ in their justification for the subordination of arbitration to the legal system at the seat. Emmanuel Gaillard has described two competing models

within the broader territorialist camp – the objective territorialist model and the subjective territorialist model.[134]

The objective territorialist model is characterized by a total focus on the right of sovereign legal systems to control whatever occurs within their borders. For the objective territorialist, the seat is determined by asking which legal system has effective control over an arbitration. The subjective territorialist model differs in that the seat is determined on the basis that the parties have agreed that a particular State should be the seat. For the subjective territorialist, the seat is established on the basis of the parties' agreement, and the effective control over an arbitration by the legal system at the seat has contractual roots.

The practical effect of the territorialist theory of international arbitration is to restrict courts' discretion under article V(1)(e) of the New York Convention. By closely linking the legitimacy of an arbitration to the seat, the territorialist theory compels a court of enforcement to defer to the courts of the seat where the latter has found an arbitral award to be defective in annulment provisions. Deference in this context means that a court of enforcement must not enforce an annulled award, thus rendering any discretion to enforce provided by article V(1)(e) devoid of any practical relevance.

[134] Gaillard (n 56) 15-21

i. The Objective Territorialist Model

The archetypal exposition of the objective territorialist model is given by Mann in his seminal 'Lex Facit Arbitrum'.[135] Mann argues for the total subordination of arbitration to the legal system at the seat. Though the topic of his article is whether arbitrators have discretion in determining the law applicable to the merits, Mann built his argument upon the relationship between arbitration and the law of the seat. Underlying Mann's argument is an entire theoretical model of international arbitration.

Mann's argument relies on two basic tenets. The first tenet is that arbitration, as an exercise of private rights, depends on the recognition of a legal system for its legal efficacy. The second tenet is that States have the exclusive right to determine the legal effects of actions within their territories. Read together, these tenets lead to the following formula: an arbitration, as an exercise of private rights, relies for its legal effect on recognition by the legal system of the State where the arbitration takes place.

Having established that arbitration must be subordinate to the law of the seat, Mann reverses this formula to conclude that an arbitration's seat is the legal system that has total control over it. As each State has control over what happens within its territory and an arbitration's legal location is the seat, then that State has control over that arbitration.[136] This will inevitably be the State chosen in the parties' agreement. However, this is purely fortuitous: as far as the State is concerned, it is merely exercising its sovereignty, and not acting at the behest of the parties.

[135] Mann (n 25)

[136] One must distinguish legal location from geographical location, as it is possible to choose an English seat but conduct hearings elsewhere

The parties' ability to choose the seat under Mann's model is thus coincidental and not premised on the importance of private autonomy in arbitration. This aspect of Mann's reasoning is exemplified by how Mann decides which State has effective control over an arbitration:

> Certainly the State where the arbitrator resides or of which he is a national has no comparable degree of control [to the State in which the arbitration takes place]. If there is a single arbitrator, it is true, the jurisdiction of his home State may to some extent assert itself…[137]

Mann abandons this line of thought due to fact that a tribunal might be composed of arbitrators from multiple States, meaning that no one State could control the entire tribunal on the basis of the arbitrators' nationalities. Mann thus goes through a process of elimination in determining which State has the most complete and effective control over an arbitration, weighing each State's ability to control an arbitration and ruling out States with lesser control. This process of elimination is incongruous with a formula based on party autonomy, which allows for a positive determination according to the parties' agreement.

Once the seat has been established, the arbitration can only exist in such a form that complies with the law of the seat. Where the procedures contemplated by the parties' agreement do not comply with this law, the arbitration will be invalid in the eyes of the legal system at the seat and therefore incapable of leading to a binding award. Were an award to remain binding despite invalidity under the law of the seat, it would be beyond

[137] Mann (n 25) 161

the control of the State. For Mann this would be 'intolerable [as] the country at the seat could not override whatever arrangements the parties have made'.[138]

Mann goes so far in integrating international arbitration into the legal system at the seat as to equate the arbitrator to a national judge on the basis 'that both of them are subject to the local sovereign'.[139] Mann notes that the contractual mandate of an arbitrator, as a form of private obligation, requires recognition by the legal system where it is performed – since the arbitrators perform their obligations within an arbitration, it makes sense to locate their performance in the same jurisdiction in which the arbitration is located. The arbitrators' mandate is therefore given effect by the legal system at the seat.

Mann attaches little weight to the fact that arbitrators are creatures of contract who act at the request of the parties, viewing arbitration as fully integrated into the legal system at the seat and more akin to a preliminary instance court than an alternative to litigation. Under this model it would be as incomprehensible for the court at the seat to be unable to annul an arbitral award as for an appellate court to be unable to overturn a lower instance decision.

Mann's exposition of the objective territorialist model of arbitration predates the New York Convention, however Álvarez Zárate and Valenzuela Bernal have offered an example of how this model might survive under the Convention. They view article V(1)(e) through the lens of State sovereignty, arguing that the Convention leaves the sovereignty

[138] ibid 161

[139] ibid 162

of the State at the seat untouched. Therefore 'arguments that support the recognition of annulled awards clearly ignore basic public international law principles'.[140]

The objective territorialist model is uniquely ill-suited to combatting abuse by the seat of arbitration. It is premised on the idea that the world is made up of 'sovereign States, all of them "die hard territorialists" each of them claiming judicial monopoly[; a] vacated award has therefore to be judged in accordance with its home jurisdiction's decision'.[141]

Where the objective territorialist model is premised on the absolute power of the State at the seat, there are no restrictions on how that State may control an arbitration seated within its territory. Should the court at the seat issue a biased annulment decision, then as long as the biased decision survives appeal and remains a valid decision within the legal system at the seat, the award is deprived of its validity under the law of the seat and therefore its binding power.

Pieter Sanders, one of the delegates to the New York Convention, advocated this position, holding that where an award has been annulled 'there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility',[142] as per the adage of *ex nihilo nil fit.*

[140] José Manuel Álvarez Zárate, Camilo Valenzuela Bernal, 'The Latin American Experience Interpreting the New York's Sovereign Spaces', in Katia Fach Gomez, Ana M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 206

[141] Phillip Wahl, 'Enforcement of Foreign Arbitral Awards Set Aside in their Country of Origin – The Chromalloy Case Revisited' (1999) 16(4) *Journal of International Arbitration* 131, 136-7

[142] Sanders (n 71) 109-10

This position is attractive in its simplicity; however, its failure to grapple with situations where the courts at the seat have annulled an award in unfair proceedings makes it difficult to accept. Objective territorialists have argued that where a party agrees to seat an arbitration in the home State of her contractual counterpart, she has willingly run the risk of abusive supervision by the courts at the seat. According to Schwartz:

> [I]t is not for the [court of enforcement] to save [parties] from choices imprudently made… nor does it serve the cause of international arbitration particularly for the courts of one country to disregard the legitimate right of another country to determine the rules governing arbitration conducted on its territory.[143]

Similarly, Gharavi argues that where one party had agreed to seat an arbitration in the home State of the other party, she had voluntarily submitted herself to the risk of local court bias and should not be saved:

> [The award creditor] either did not fight for the seat of arbitration or found itself confronted to the objection and inflexibility of [the award debtor] on the question... The risk was then obvious that [the] courts could or would privilege the [award debtor], annul the award and block its enforcement worldwide through article V(1)(e) of the New York Convention.[144]

[143] Eric A. Schwartz, 'A Comment on Chromalloy Hilmarton, à l'americaine' (1997) 14(2) *Journal of International Arbitration* 125, 134

[144] Hamid Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002) 130

This position must be rejected for two reasons. Firstly, as Rivkin has stated, though 'foreign courts should not "bail out" [corporations that have made poor decisions], it is equally true that those same courts should not disregard the legitimate rights of any party to enforcement of an award'.[145] The fact that it is the courts at the seat that have deprived an award creditor of her rights is poor justification for a foreign court of enforcement to overlook potential abuse by giving effect to the annulment decision in refusing enforcement of the award.

Secondly, this argument cannot be reconciled with the underlying policies of the New York Convention. In a situation where an arbitral award has been annulled in circumstances where the courts at the seat are suspected to have intervened to support a local party, the objective territorialist model would give greater deference to the court decision subject to suspicion than the valid award. This is difficult to reconcile with the Convention, which seeks to facilitate the enforcement of arbitral awards and says nothing of court judgments. Approaching article V(1)(e) as though a court of enforcement has no power to enforce an annulled award does not further the underlying principles of the Convention itself.

Despite its drawbacks, the laws of some States contain provisions that support the objective territorialist model of arbitration. The Italian Civil Code makes it compulsory for a court to refuse the enforcement of a foreign award where the award has been set aside at the seat.[146] However, such provisions cannot always be taken at face value. The Dutch

[145] David Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience', in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 543

[146] Italian Civil Procedure Code §840

Code of Civil Procedure contains a similar provision;[147] however, as will be discussed in the following section, the Dutch courts have enforced an annulled arbitral award where they considered that the courts at the seat had set aside the award in biased proceedings.[148]

Moreover, other courts have adopted an objective territorialist interpretation of their national laws. Article 1061 of the German Civil Procedure Code on the enforcement of foreign awards states that enforcement may be refused where an award has been annulled at the seat; however, the German courts have interpreted this in mandatory terms, and they will not look behind an annulment decision.[149] Article 1061(3) states that where a foreign award that has already been enforced is subsequently set aside at the seat, the award debtor may apply to have the judgment enforcing the award set aside. The German courts have also interpreted this article in mandatory terms and will always set aside an enforcement judgment in such circumstances.[150]

[147] Dutch Code of Civil Procedure article 1076(1)(A)(e)

[148] *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)*, Gerechtshof, Amsterdam, 200,005,269, 28 April 2009 reported in Albert Jan van den Berg, *Yearbook Commercial Arbitration 2009 – Volume XXXIV* (Kluwer Law International 2009)

[149] Stefan Kröll, 'The Concept of Seat in the New York Convention and the Autonomy of Arbitral Award, in Stavros Brekoulakis and Julian Lew (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016) 83-4; Günther J. Horvath, 'What Weight Should be given to the Annulment of an Award under the Lex Arbitri' (2009) 26(2) *Journal of International Arbitration* 249, 262-6; Klaus Sachs, 'The Enforcement of Awards Nullified in the Country of Origin: The German Perspective' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 552-6

[150] Darwazeh (n 81) 329-30

ii. The Subjective Territorialist Model

The objective territorialist model focuses solely on the power of individual States, concluding that where an arbitration is seated in a State's territory then that State is entitled to complete control over the arbitration. Where the courts at the seat annul an award, then there is no award for other States to enforce. However, this model ignores the rights of other States to attach to an annulled award whatever legal significance they deem fit.

The subjective territorialist model takes this right into consideration - '[t]he question for consideration […] is not whether the courts of an enforcing state must respect the [court at the seat's] judgment - which plainly is not the case - but rather whether as a matter of policy they should'. [151] Subjective territorialism takes the position that a court of enforcement is not obliged to defer to the courts at the seat under a legal rule, but that it should do so as a matter of policy. The most commonly advanced policies for deferring to judgments of the legal system at the seat are comity, the right of award debtors to a single forum in which to attack defective awards, and party autonomy.[152]

With respect to comity, the argument is that courts should recognise and enforce the judgments of other courts in order to ensure mutual respect between legal systems, and to avoid situations where different courts reach different conclusions with respect to the same dispute. To ignore an annulment decision of the court of the parties' chosen seat 'runs

[151] Goode (n 22) 28

[152] The counter-arguments to these are addressed later in this Chapter when discussing the pluralist model

diametrically contrary to the very nature of the principles of international private law that… foreign decisions are given the greatest possible international recognition'.[153]

The second reason advanced for courts of enforcement to defer to the courts at the seat is to provide a single forum in which to attack an arbitral award. According to Goode, '[t]he territorial approach… has the great merit of subjecting the question of validity to a single decision at the court of origin'.[154] Without the ability to set aside an award at the seat, an award debtor may be forced to resist a defective award in every jurisdiction in which she has assets.

The third, and most convincing, reason for deferring to annulment decisions advanced by subjective territorialists is party autonomy. Sampliner has stated that disregarding decisions by the courts at the seat of arbitration 'can effectively pre-empt the parties from choosing the rules applicable to their arbitration'.[155] Where the parties have chosen a seat, they have agreed for that jurisdiction's law to govern their arbitration. The proposition that parties pay attention to national law when choosing their seat is supported by the 2018 Queen Mary Survey, respondents to which stated that national arbitration law was the third most important factor in deciding where to seat their arbitrations.[156]

[153] Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin' (2009) 26(2) *Journal of International Arbitration* 267, 288

[154] Goode (n 22) 34

[155] Gary H. Sampliner, 'Enforcement of Nullified Foreign Awards – Chromalloy Revisited' (1997) 14(3) *Journal of International Arbitration* 141, 158

[156] *International Arbitration Survey: The Evolution of International Arbitration* (Queen Mary University 2018) 9-12

When the parties choose a seat that provides for expansive judicial review of an arbitration, the parties intend to incorporate such judicial review into their arbitration agreement. According to Park, judicial review of an arbitration 'constitutes a form of risk management designed to safeguard against perverse arbitrators and shameless intermeddlers'.[157] Where a foreign court enforces an award annulled by the parties' chosen courts, the court of enforcement deprives the parties of the benefit of this risk management mechanism and refuses to recognise the parties' arbitration agreement in its entirety.

This problem is compounded where an arbitral tribunal has been recomposed following an annulment decision to issue a second award. Without reference to the annulment decision there is no basis upon which a court of enforcement can differentiate between the legitimacy of the two awards. The enforcement of the second award may be pre-empted by the prior enforcement of the first, annulled award. This has in fact happened in the *Hilmarton* and *Putrabali* cases, when French courts gave precedence to annulled awards as they had been presented for enforcement first.[158]

Reisman has offered a further justification of the subjective territorialist model based on what he considers an implicit distribution of power under the New York Convention itself. According to Reisman, '[t]he regime in Article V is both an enforcement mechanism and a policy statement about the proper scope of arbitral control'.[159]

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[157] William W. Park, *The Arbitration of International Business Disputes* (2nd edn, Oxford University Press 2006) 358

[158] *PT Putrabali Adyamulia (Indonesia) v. Rena Holding*, Cour de Cassation [Supreme Court], First Civil Chamber, 29 June 2007 reported in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2007 – Volume XXXII* (Kluwer Law International 2007); *Hilmarton* (n 28)

[159] W Michael Reisman and Brian Richardson, 'An Interpretation of the Architecture of International Commercial Arbitration', in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years*, (Kluwer Law International 2012) 24

For Reisman, the regulation of arbitration must walk a fine line between making the arbitral tribunal a first instance decision-maker, subject to appeal before the court at the seat, and allowing arbitrators too much freedom and thus creating moral hazard. Reisman sees article V(1)(e) as the New York Convention's response to this dilemma, creating a two-tier system composed of '"primary" or "venue" jurisdictions and "secondary" or "enforcement" jurisdictions'.[160] An annulment decision of the court of primary jurisdiction has an extraterritorial, nullifying effect, whereas decisions of courts in secondary jurisdictions have a territorially restricted effect.

Reisman acknowledges that States are usually entitled to come to their own conclusions with respect to the enforceability of arbitral awards, but argues that article V(1)(e) of the New York Convention should be interpreted as imposing a treaty obligation on courts of secondary jurisdictions to defer to judgments from the primary jurisdiction. He justifies this allocation of power on the basis that award debtors must be afforded a means of attacking defective awards so as to save them from having to defend themselves in every jurisdiction where they have assets.

However, Reisman's attempt to impose the territorialist theory of international arbitration on the New York Convention is undermined by the language of the Convention itself. The defence under article V(1)(e) allows, but does not compel, courts of so-called secondary jurisdiction to refuse enforcement where the award has been annulled in a court of primary jurisdiction. Furthermore, the article VII more-favourable-right provision allows States to legislate their way out of what Reisman considers the mandatory

[160] ibid 25

distribution of jurisdiction under the Convention by neglecting to provide annulment at the seat as grounds for refusing enforcement of an award under their national laws.

Reisman attempts to overcome the mismatch between his view of international arbitration and the wording of the Convention by superimposing the subjective territorialist model on the Convention itself, interpreting the Convention through the lens of the policy reasons in favour of mandatory deference to the courts at the seat by courts of enforcement. His logic is circular – he seeks to rely on the Convention to illustrate the correctness of the subjective territorialist model but relies on the policies underlying this same model in determining the correct interpretation of the Convention.

Despite the weaknesses in Reisman's interpretation of the New York Convention, his model has had a profound impact on the arbitration law of the U.S. The terminology of 'primary' and 'secondary' jurisdictions under the New York Convention was first adopted by the US Court of Appeals for the Second Circuit in the 1997 *Toys "R" Us* U.S.-seated arbitration case,[161] and has since become a fixture of US international arbitration law.

The subjective territorialist model accepts that individual States *can* enforce an annulled award but hold that courts of enforcement *should* defer to decisions by the courts at the seat. This approach involves a balancing of the policies for and against deferring to the courts at the seat, generally coming down in favour of the former. However, the subjective territorialist model is capable of contemplating situations in which the reasons

[161] *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc*., Court of Appeals, Second Circuit, United States of America, 10 September 1997, 126 F.3d 15

for deferring to the courts at the seat are less compelling than those against, and in which a court of enforcement might refuse to so defer.

One reason for denying effect to a decision of the courts at the seat is that the decision is unfair. Subjective territorialists are capable of accepting inherent limits to the supervisory discretion of the courts at the seat, the transgression of which will lead to courts of enforcement disregarding an offending decision. Park admits that judgments of the court at the seat should only be recognized 'on condition that there be no serious procedural irregularity or violation of public policy'.[162] Sampliner further suggests that decisions by the court at the seat might be ignored where they are 'arbitrary or clearly erroneous'.[163] A similar rule has also been advocated in Australia more recently.[164]

This is in fact the position adopted in the US Restatement (Third) of International Commercial Arbitration, §41.4(b) of which states:

> [E]ven if a Convention award has been set aside by a competent authority, a court of the United States may recognize or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court, or in other extraordinary circumstances.[165]

[162] Park (n 157) 363

[163] Sampliner (n 155) 161

[164] Matthew Barry, 'The Role at the seat in International Arbitration: Theory, Practice, and Implications for Australian Courts' (2015) 32(3) *Journal of International Arbitration* 289

[165] *Restatement* (n 131) §41.4

According to the commentary, the reference to extraordinary circumstances seeks to fill lacunae in the law of judgments. Such circumstances may include situations where the courts of a State are subject to acute system-wide deficiencies but the judgment in question would otherwise qualify for recognition under U.S. law, or where the court has set aside an award due to the tribunal's application of a party-chosen, internationally accepted procedure instead of an idiosyncratic rule of the law of the seat.

The imposition of conditions on the extraterritorial effect of judgments by the courts at the seat separates subjective and objective territorialism. Van den Berg, one of the most prominent modern territorialist voices, straddles the gap between subjective and objective territorialism in this regard: on the one hand, van den Berg argues that '[w]hen an award has been set aside in the country of origin, it has become 'nonexistent';[166] but on the other hand he accepts that '[i]f corruption or fraud on the part of the court setting aside an award in the country of origin is convincingly proven, the award should not be refused'.[167]

Van den Berg attempts to avoid rooting the latter statement in a theory of international arbitration. Instead he relies on the fact that under article V(1) the award debtor must adduce proof to make out a defence, concluding that where the annulment decision was obtained through corruption or fraud then the respondent 'fails to submit proof in the sense that the document purporting to evidence the setting aside has been obtained by illegal means'.[168]

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[166] Albert Jan van den Berg, 'The Efficacy of Award in International Commercial Arbitration', in Julian Lew and Loukas Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International 2007) 129

[167] Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) 29(2) *ICSID Review* 263, 281

[168] ibid 281

Van den Berg focuses on a purely procedural issue under the Convention in order to avoid articulating substantive rules that condition the relationship between the courts at the seat and arbitration. Even where van den Berg does not explicitly impose legal limits on the power of the courts at the seat over an arbitration, he does so in practical terms by refusing effect to abusive decisions by the courts of the seat under the Convention. At one and the same time, van den Berg purports to argue the absolute right for the courts at the seat to control an arbitration seated within its territory and imposes a test that is external to the law of the seat for giving effect to annulment decisions of the courts of the seat. Van den Berg is best viewed as a subjective territorialist.

b. The Delocalised Theory

Delocalisation is, simply put, the opposite of territorialism. Territorialism derives the binding power of an arbitral award from the legal system at the seat. Delocalisation refuses to derive the binding power of an arbitral award from any single national legal system. Different models of delocalisation identify different sources for an award's binding power.

The delocalised theory of arbitration relies on the permissive wording of article V(1)(e) of the New York Convention to allow enforcement of an award despite its annulment at the seat. Alternatively, the delocalised theory finds a basis in article VII, the more-favourable-right provision of the New York Convention, which allows national courts to enforce an award where there is an applicable enforcement regime that is more favourable to the award creditor than that found in the Convention.

The pluralist model derives an award's binding power from any national legal system willing to lend its coercive power to an award through enforcement. Under the pluralist model, an award's binding power does not require the validation of the arbitration under the law of the seat; courts of enforcement may *ex post* validate the arbitration by granting the arbitral award enforcement.

The autonomist model, on the other hand, does not derive an arbitral award's binding power from any national legal system, but from a transnational legal system that regulates arbitration. This does not mean that national systems must enforce an award that is valid under this transnational legal system, but that an award's validity is independent of its enforceability.

Both of these models have implications for a court of enforcement's approach to article V(1)(e) of the New York Convention, and the potential enforceability of an annulled arbitral award. By severing the territorial connection between an arbitral award and the legal system at the seat, courts that subscribe to a delocalised theoretical model of international arbitration are free to disregard annulment decisions.

i. The Pluralist Model

The pluralist model shares the same basic premise as the subjective territorialist model – that each State is entitled to give whatever effect it wishes to an arbitral award. Where the two models diverge is in the significance to be attached to decisions by the court at the seat of arbitration. Whereas the subjective territorialist model holds that deference should be given to decisions by the court at the seat as a general rule, the pluralist model does not.

The starting point for pluralism is 'that the binding force of an international award may be derived from the contractual commitment to arbitrate in and of itself'.[169] Once one accepts that the binding nature of arbitration is a matter of contract law, it becomes clear that different courts may attach different legal significance to an award just as they would to a contract. This is what Paulsson calls 'plurilocalisation', which he describes 'as the perception that a multiplicity of legal orders may ensure the efficacy of arbitration'.[170] Under this model the seat does not have a monopoly on the validation of an arbitration, but ranks equally alongside the other legal systems that may be called upon to enforce an award.

The focus of a court of enforcement's analysis should be the award: '[t]he parties agreed on the arbitration agreement, the rules of arbitration, and in many instances, the arbitrators',[171] and the court is being called to give effect to that agreement. Pluralists therefore disagree with subjective territorialists on the weight to be attached to comity and

[169] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30(2) *The International and Comparative Law Quarterly* 358, 368

[170] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 38

[171] Thomas H Webster, 'Evolving Principle in Enforcing Awards Subject to Annulment Proceedings' (2006) 23(3) *Journal of International Arbitration* 201, 223

the need for a single forum in which award debtors can attack awards, and the equivalence of respecting annulment decisions and respecting party autonomy.

Pluralists do not attach the same weight to the benefits of comity. Commentators point out that decisions concerning arbitral awards are not judgments on the merits of a case, but rather judgments upon a prior adjudication which are ancillary in nature. For these commentators 'it makes little (or no) sense to give effect to an ancillary judgment based on comity analysis… [rather] it seems more logical to pay respect to the initial adjudication.'[172] Furthermore, commentators from civil law States point out that 'comity is not even widely accepted in non-common law states'.[173]

Even those who do acknowledge the potential benefits of comity in this context point out that international arbitration is concerned with private dispute resolution, and comity must 'at some point yield to the underlying reality of why parties chose international arbitration in the first place'[174] – the removal of their disputes from court jurisdiction.

Pluralists do not consider it necessary for award debtors be afforded a single forum in which to attack awards. Though there is a valid concern that an award creditor under a defective award may be able to pursue an award debtor's assets across the world, the threat only manifests where there is a court with unusually low standards for enforcement. An

[172] Maxi Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgement Route' the Wrong Road' (2013) 4(3) *Journal of Dispute Settlement* 587, 610

[173] Min Kyu Lee, 'Enforcement of Annulled Arbitral Awards in Korea: Where are We and Where Should We Go?' (2018) 19 *Journal of Korean Law* 205, 227

[174] Webster (n 171) 224

award debtor's 'interests can be adequately protected at the enforcement stage by virtue of the grounds for refusal of enforcement of article V of the New York Convention'.[175]

Where an award is clearly defective, it can be assumed that courts will not enforce it. Where an award is not clearly defective, then why should the views of the courts at the seat prevail over those of courts of enforcement - '[c]ompared to a state that often does no more that host the arbitral proceedings… the enforcement state and its courts arguably have a stronger title to determine the validity of the award'.[176] It is the court of enforcement, and not that of the seat, that is being asked to lend its coercive power to the award - its views should therefore be given the greater weight.

Paulsson points out that deference to the courts at the seat is capable of leading to mischief in and of itself, by allowing courts to interfere with an otherwise valid arbitration:

> [W]hy should the predicament of a hypothetical party which might face the task of recovering amounts unduly paid cause us greater concern than the frustration of countless real parties whose recovery under perfectly valid awards is delayed and even destroyed by spurious challenges?[177]

Finally, pluralists do not believe that a refusal to defer to the judgments of the court at the seat undermines party autonomy. Pluralists dispute the underlying premise that the

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[175] Luca Radicati di Bronzolo, 'A Pro-Arbitration Critique of Michael Reisman's 'Architecture of International Commercial Arbitration' in Albert Jan van den Berg, *Arbitration: The Next Fifty Years* (Kluwer Law International 2012) 98

[176] Barry (n 164) 299

[177] Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (1998) 6(2) *Asia Pacific Law Review* 1, 15

choice of seat evidences a desire by the parties to subject their arbitration to the legal system of the State at the seat. Rather, they argue that 'the place of arbitration is chosen largely for convenience of the parties or as a neutral site'.[178] Pluralists thus believe that subjective territorialists attach excessive significance to the parties' choice of seat in relying on that choice to justify deference by the courts of enforcement to the courts of the seat.

Furthermore, rules applied by the courts at the seat 'and in particular their application by the courts, may be difficult to gauge in advance'.[179] Notably in the *PEMEX* case a Mexican court applied a law retroactively to annul an award.[180] It could hardly be argued that at the time of concluding their arbitration agreement, the parties had in mind laws that did not yet exist.

Finally, to pay too close attention to the role of the court at the seat of arbitration is to undermine the overriding purpose of the parties in agreeing to arbitration - to escape the jurisdiction of the courts: '[p]recisely because the choice of arbitration is largely dictated by the desire to escape adjudication by domestic courts… it is unjustified to read into the choice at the seat a blind acceptance of local annulment standards and decisions'.[181] To subjugate the parties' arbitration to the whims of the courts at the seat on the basis that the parties chose the seat is to impose State authority in the guise of party autonomy.

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[178] Linda Silberman, 'The New York Convention After Fifty Years: Some Reflections on the Role of National Law' (2009) 38 *Georgia Journal of International and Comparative Law* 28, 30

[179] Radicati di Bronzolo (n 175) 95

[180] *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX – Exploración y Produssión,* United State District Court, Southern District of New York, Case No. 10 Civ. 206 (AKH), 27 August 2013

[181] Luca Radicati di Bronzolo, 'The Enforcement of Annulled Awards: Further Reflections in Light of Thai-Lao Lignite' (2014) 47 *American Review of International Arbitration* 47, 58

It should be noted that the pluralist model does not refuse decisions by the courts at the seat any role at all, but rather rejects the subjective territorialist notion that the default position should be for courts of enforcement to defer to the courts at the seat. A prominent pluralist view on the role of the courts at the seat has been espoused by Paulsson, who argues that judgments by the courts at the seat should be given extraterritorial effect only where they have applied internationally accepted rules of arbitration.

Paulsson suggests a formula for courts of enforcement to apply when judging whether they should recognise an annulment decision.[182] Paulsson distinguishes between two different categories into which grounds for annulment fall.[183] The first category is that of 'local standard annulments': these are region-specific, and do not reflect internationally accepted norms. Examples of such grounds for annulment are mistake of fact, mistake of law, or the violation of a rule forbidding women to sit as arbitrators. The other category of grounds for annulment is that of 'international standard annulments'. These are the same grounds as are found for refusing enforcement under articles V(1)(a)-(d) of the New York Convention.

According to Paulsson, annulments based on local standard annulment grounds should not be recognised by courts outside the seat unless the parties have specifically provided as such in their arbitration agreement. On the other hand, Paulsson says that annulments based on international standard annulment grounds should generally be recognised by courts outside the seat; though even where an arbitral award has been

[182] This is not an essential element of the pluralist model itself, but rather a suggestion by Paulsson on how enforcing legal systems might best exercise their discretion in enforcing an annulled award.

[183] Paulsson *(*n 177)

annulled pursuant to an international standard annulment, courts of enforcement are not obliged to refuse recognition.

An example of where a court of enforcement should ignore an international standard annulment is where the enforcement jurisdiction has a higher threshold for establishing the international standard annulment grounds – to refuse enforcement in such circumstances would be to import the lower threshold of the legal system at the seat to the legal system of enforcement. Another example is where the court at the seat has not observed fair procedure in the conducting the annulment hearings. This is the position advocated by Born, who states that international standard annulments should only be recognized after 'careful review of the proceedings resulting in that decision'.[184]

Paulsson's approach limits the refusal to enforce under article V(1)(e) to situations that would also engage the defences found in articles V(1)(a)-(d) of the New York Convention. Articles V(1)(a)-(d) describe the fundamental requirements for an arbitral award's validity, and limiting refusal to enforce to the situations envisaged by these articles would reflect the pro-enforcement policy underlying the New York Convention. Commentators that favour this approach argue that it is:

> counter-intuitive to imagine that the Convention… would have surreptitiously introduced an obligation not only to recognize foreign judgments, but specifically those judgments that potentially interfere with arbitration because they set aside awards, regardless of the grounds for doing so.[185]

[184] Born (n 1) 3623-3646

[185] Radicati di Bronzolo (n 175) 83-4

However, Paulsson's approach is not without problems. Commentators have argued that the New York Convention should not be interpreted as inviting courts to look behind each other's judgments – 'neither the text nor the legislative history… allows courts to examine the reasons for annulment, whether these are national or international'.[186] Furthermore, Paulsson's approach risks courts of different States making themselves 'the guardians or arbiters of the international acceptability of the laws of another country'.[187] The distinction between local and international standard annulments thus risks causing friction between the courts of enforcement and the courts at the seat.

Furthermore, in the absence of a treaty mandating this approach, it would be adopted 'unilaterally, and therefore progressively, by the various States'.[188] Until such time as the vast majority of States adopt this position, its application by individual States would only cause inconsistency and unpredictability in the application of the Convention. Van den Berg has argued that the rare case where an award is annulled on outlandish grounds is a worthwhile price for predictability in the application of the Convention.[189]

It should be noted that Paulsson's approach has been adopted in the European Convention 1961, article IX of which restricts the grounds upon which an annulment decision by the courts at the seat may rely if the annulment is to have extraterritorial effect.

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[186] Reyadh Seyadi, 'Enforcement of arbitral awards annulled by the court at the seat' (2018) 84(2) *Arbitration* 128, 139

[187] Andrew Rogers, 'The Enforcement of Awards Nullified in the Country of Origin' in Albert Jan van den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 551

[188] Pierre Mayer, 'The French Approach as a Starting Point for General Reflections on the Recognition of Foreign Award Judgments' in Andrea Menaker, *International Arbitration and the Rule of Law* (Kluwer Law International 2017) 706, 714

[189] Albert Jan van den Berg, 'Enforcement of Annulled Awards?' (1998) 9(2) *The ICC International Court of Arbitration Bulletin* 15

Where few States have chosen to join the European Convention, it is questionable whether its rules should be injected into the New York Convention regime through soft rules.

The pluralist model is essentially the subjective territorialist model but without the assumption that a court of enforcement should usually defer to judgments by the courts at the seat. The pluralist model is equally well-posed to acknowledge annulment decisions by the courts at the seat that pursue illegitimate aims, such as the insulation of a local party from liability under an arbitral award. Pluralism may even be more capable of addressing suspected abuse by the seat, as it does not start from the assumption that deference should be given to decisions of the courts at the seat. There are therefore fewer obstacles for an award creditor to overcome in convincing a pluralist court to ignore an annulment decision by the courts at the seat and to enforce her award.

ii. The Autonomist Model

The autonomist model is predicated on the idea that an arbitration derives its authority and validity from a legal order that is autonomous from national legal orders. Different commentators have offered different justifications for the existence of such an autonomous order. Lew argues that such a source has emerged from 'a slow process of assimilation and convergence of… the commercial community and the state, which have together provided the bedrock of ideas and beliefs upon which international arbitration is based.'[190]

Brekoulakis, on the other hand, considers that the international arbitration community is itself capable of providing the foundation of an autonomous source of validity for arbitration. He considers that theories of international arbitration have, up until now, failed to depart from legal formalism by trying to root arbitration within one or multiple national legal systems. Brekoulakis considers the international arbitration community as one of the 'horizontal, transnational and specialized non-state communities, which are strongly connected and affiliated on the basis of common activities and interests',[191] and which are capable of generating normative rules to govern their members. He points to the fact that most awards are voluntarily complied with as evidence of the arbitration community's ability to generate binding obligations without resort to national legal systems.

[190] Julian Lew, 'Achieving the Dream: Autonomous Arbitration' (2002) 22(2) *Arbitration International* 179, 184

[191] Stavros Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36(4) *Fordham International Law Journal* 745, 757

However, by far the most prominent conception of an autonomous order that provides for the binding authority of arbitral awards is that put forward by Gaillard. Gaillard's *Legal Theory of International Arbitration* sets out a vision of an autonomous, transnational arbitral legal system.[192] In constructing this legal system, Gaillard applies the logic of customary international public law to international arbitration law.[193]

Gaillard argues that where a sufficient number of States have adopted the same position in their national arbitration laws, this is evidence of a transnational rule. Just as public law derives customary rules from the concerted actions of States, Gaillard derives his transnational rules from the concerted adoption of similar rules in national arbitration laws.

An important aspect of customary rule creation in public international law is that it puts the content and existence of rules beyond the reach of the individual States that are bound by them. Once a customary rule has been born from the actions of States, those same States are not able unmake the rule by changing their behaviour – the rule obtains an existence independent of the States that created it.

Similarly, once a transnational arbitration rule has come into existence it cannot be unmade by States changing their laws. It is with this in mind that Gaillard speaks of 'freedom gained' under an autonomous arbitral legal order as opposed to 'freedom granted'

[192] Gaillard (n 56)

[193] The classical judicial description of custom formation in public international law comes from the International Court of Justice in *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands)* [1969] ICJ 1 : 'not only must the acts amount to settled practice, but they must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law'.

by national laws.[194] States are able to give and take the freedom to arbitrate by changing their national laws; however, once freedom has been gained by the creation of a transnational rule it cannot be taken away. Gaillard thus divorces the existence and content of transnational rules from the States that generate them, preventing regression in international arbitration law where States subsequently enact restrictive laws.

The transnational rules divorce the legitimacy of an arbitral award from all national legal systems. Autonomists derive the validity of an arbitral award from the conformity of the arbitration with the rules of the transnational legal order. This allows for truly international arbitration, unhampered by the limited, domestic perspective of national laws and courts. The annulment of an award by the court at the seat will thus be irrelevant to an autonomist, as the award's validity is judged not under the law of the seat, but under the transnational rules. This overcomes two potential problems: it renders unusual or unexpected annulment grounds in the arbitration laws of States irrelevant, and it protects arbitral awards from abusive annulment by the judiciary at the seat.

The autonomist model of arbitration has found favour with the French courts, which pay no regard to annulment decisions by the courts at the seat. The French caselaw on the enforcement of annulled awards began with the *Norsolor* case in 1984,[195] in which the French Cour de Cassation enforced an award that had been annulled in Vienna.

The legal bases for the French courts' approach are article 1520 of the French Code of Civil Procedure, which does not consider annulment at the seat grounds for refusing

[194] ibid 101

[195] *Société Pabalk Ticaret Limited Sirketi v Société Norsolor*, Cour de Cassation, 09 October 1984. See Gaillard (n 72) 20-1

enforcement of an award, and article VII of the New York Convention, which allows the application of national law where it better supports the enforcement of an award. As a result, the French courts will always apply article 1520 to annulled awards under article VII, disregarding the annulment decision.

In the infamous Hilmarton case,[196] the French Supreme Court enforced an award that had been annulled by the Geneva Court of Appeal. After the annulment proceedings, the dispute was remitted back to the arbitral tribunal in Vienna, which issued a second arbitral award. As the first arbitral award had already been recognised in France, the second award could not be enforced due to *res judicata*. Justifying this outcome, the French Cour de Cassation went beyond a formal reference to article VII, ascribing theoretical significance to the French enforcement of annulled awards - 'the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside'.[197]

A similar situation arose in the *Putrabali* case, in which the French courts enforced an arbitral award that had been set aside by the English courts. After annulment, the English courts remitted the dispute to the arbitral tribunal, which issued another award. The annulled award was presented for enforcement after the tribunal had issued the latter award, but before the latter award had been presented for enforcement. The latter award was then presented for enforcement, meaning that the enforcement of both awards was pending before the French courts.

[196] *Hilmarton* (n 28)

[197] ibid [5]

The case made it to the French Cour de Cassation, which ordered that the annulled award be recognised under article VII and the French Code of Civil Procedure.[198] The Cour de Cassation again elaborated on the theory underlying French international arbitration, implicitly validating the autonomist model of international arbitration: '[a]n international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought'.[199]

Gaillard relies on these remarks of the French Cour de Cassation to support the autonomist model of international arbitration.[200] Others have noted that though the French courts are capable of determining the contents of French law, they are not capable of creating an autonomous arbitral order. According to Paulsson, were the French courts to impose a duty to mitigate damages because they have been told to do so by the Man in the Moon, 'that does not make the Man in the Moon a universal lawgiver… [i]t means only that the French courts recognize a duty to mitigate damages'.[201] Similarly, the French courts' rule of not deferring to annulment decisions by the courts of the seat on the basis of an autonomous arbitral order does not impose such an order upon the world.

Autonomists have lauded the French approach of focussing on the arbitral award and disregarding decisions by the courts at the seat. From the perspective of the autonomist model, those models of international arbitration under which a court of enforcement defers

[198] *PT Putrabali* (n 158)

[199] ibid [2]

[200] Gaillard (n 56) 61-3

[201] Paulsson (n 169) 43

to an annulment decision 'focus essentially on the decision of the court of the place of arbitration, and simply forget that there was an award in the first place'.[202] Radicati di Bronzolo considers the French approach that only considers whether the award is valid under generally accepted international standards as 'the ultimate goal of the New York Convention [which] reflects the reality of dispute resolution in today's international commercial dealings'.[203]

However, there are serious problems where the annulment of an award leads to a second award. As in the Hilmarton and Putrabali cases, the French courts have no means of distinguishing between the first and second award for the purposes of enforceability. This leads to 'a foot race, the court being quite indifferent to the result that is enforced'.[204] In the words of Mayer, 'first come, first served… is not a very convincing principle'.[205]

Seen through the autonomist lens, the court at the seat is unable to affect the enforceability of arbitral award as it lacks the authority to do so. Though the courts at the seat could frustrate an arbitration prior to the tribunal rendering its decision, once the award has been issued the courts at the seat have no ability to prevent enforcement abroad. The autonomist model is therefore agnostic as to abusive annulment decisions by the courts at the seat, as it pays no regard to any annulment decisions.

[202] Philippe Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' (2008) 24(2) *Arbitration International* 277, 291-292

[203] Radicati di Bronzolo (n 181) 47-61

[204] Richard W. Hulbert, 'When the Theory Doesn't Fit the Facts A Further Comment on Putrabali' (2009) 25(2) *Arbitration International* 157, 170

[205] Mayer (n 188) 712

c. Summary

The different theories of international arbitration describe different relationships between arbitration, the courts at the seat, and courts of enforcement. This discussion has focused on the question of enforcing annulled arbitral awards under article V(1)(e) of the New York Convention because it is only once an award has been issued that a court of enforcement has occasion to involve itself in an arbitration.

Of the four models of international arbitration described, the more extreme objective territorialist and autonomist models do not engage with the question of abusive annulment decisions by the seat. Objective territorialism is incapable of acknowledging abuse because it gives the State at the seat total discretion in controlling arbitration. Autonomism does not consider the question of abusive annulment decisions by the seat because it refuses the courts of the seat any role in determining the validity of an arbitral award.

The two moderate models are both capable of acknowledging abusive annulments by the seat. These models admit that courts of enforcement may, or should, defer to the courts at the seat, but that they are under no obligation to do so. Under these models, whether an annulment decision from the seat is abusive is a factor to be considered when a court of enforcement decides whether to defer to the courts at the seat. The next section will look at cases in which courts have addressed the question of abuse by the seat where deciding whether to enforce annulled awards, outlining the principles that courts have developed in deciding to enforce annulled awards where the award creditor argues abuse by the seat.

3. Courts' Approach to Abuse under the New York Convention

The U.S., English, and Dutch courts have addressed the question of abuse by the seat under the New York Convention in a number of cases. The cases explored in this section give an insight into how courts of enforcement have grappled with arguments of abuse by the seat. From these cases, one can see the various legal tests that have been offered by national courts when determining whether to give effect to a decision by the courts of the seat where that decision is argued to be abusive. This section will first consider the U.S. caselaw on this issue, before analysing how the approach of the English and Dutch courts. This section will conclude by explaining how these different courts have gravitated toward applying the rules for the recognition of foreign judgments to annulment decisions in considering whether to enforce annulled awards, and have set a high evidential threshold for proving abuse by the seat.

a. The U.S. Caselaw

Parties have asked the U.S. courts to enforce annulled award on numerous occasions, and over time the U.S. courts have refined the relevant test for granting enforcement. In *Chromalloy*,[206] the U.S. courts adopted a broad approach to the enforcement of annulled awards, describing the test for whether to defer to the courts of the seat as being whether the foreign award would have been annulled under U.S. arbitration law. However, in subsequent decisions, the U.S. courts have rephrased the relevant question to being whether the annulment decision, and not the award, deserves recognition under U.S. law.

[206] Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 907, 90-08 (D.D.C. 1996)

i. Chromalloy

Chromalloy concerned a contract for the supply of parts, maintenance, and repairs by the American company, Chromalloy, for helicopters belonging to the Egyptian Air Force. The contract contained an agreement providing for arbitration with an Egyptian seat, and which also contained the following provision: '[t]he decision of the [arbitral tribunal] shall be final and binding and cannot be made subject to any appeal or other recourse'.

Egypt sought to terminate the contract by giving notice to Chromalloy's representatives in Egypt. Chromalloy rejected Egypt's termination and commenced arbitral proceedings in accordance with the arbitration agreement. During the arbitral proceedings, one of the issues discussed was whether the law applicable to the merits was the administrative or civil law of Egypt. The tribunal decided that the relevant law was Egyptian civil law; though the tribunal also stated that the outcome of the arbitration would have been the same had they applied Egyptian administrative law.

The tribunal found in favour of Chromalloy, and Egypt subsequently sought to annul the award. The Egyptian court annulled the award on the basis that the tribunal had incorrectly chosen to apply Egyptian civil law to the dispute instead of administrative law. Despite the Egyptian annulment decision, Chromalloy sought enforcement of the award before the U.S. courts. In a highly controversial decision, the District Court of Columbia allowed the enforcement of the award. The District Court justified its decision to enforce the annulled award on two sets of legal findings – one set under the New York Convention, and one set under national law.

The first finding under the New York Convention was that the word ‘may’ in article V gave a court of enforcement discretion as to whether to enforce an award where one of the article V defences had been made out. Even though the award had been annulled in Egypt, the District Court found that it was not required to refuse enforcement under article V(1)(e) of the New York Convention.

The second finding under the Convention was that article VII mandates that the Convention ‘shall not’ deprive an award creditor of any other rights to enforcement they might enjoy outside the Convention. On this basis, the District Court considered itself obliged to apply U.S. law to the validity of the arbitral award.

The District Court compared the permissive ‘may’ of article V with the mandatory ‘shall not’ of article VII. Addressing the conflict between the two provisions – article V providing for a refusal to enforce and article VII providing for enforcement – the District Court decided that the mandatory language of article VII overpowered the permissive language of article V. The District Court decided the proper course of action was to apply U.S. national law where it would allow the enforcement of the award, even though Egypt had established a defence under article V(1)(e) of the New York Convention.

The District Court applied section 10 of the U.S. Federal Arbitration Act, which provides the grounds for the annulment of awards arising out of U.S.-seated arbitrations. The District Court stated that the grounds for annulment applied by the Egyptian courts (i.e. application of the incorrect law by the arbitrators) was not listed under the grounds for annulment under section 10. Furthermore, none of the other section 10 grounds applied.

The District Court therefore found that 'as a matter of U.S. law the award [was] proper'[207] and was enforceable under the Federal Arbitration Action, which it considered applicable through article VII of the New York Convention. On this reasoning, the *Chromalloy* decision shows the District Court following the autonomist jurisprudence of France, using article VII to consider a foreign award under its national rules and refusing to take the annulment decision into consideration.

However, there is a serious flaw in the District Court's reasoning. Section 10 is part of Chapter 1 of the Federal Arbitration Act. Chapter 1 only applies to U.S.-seated arbitrations. The award in *Chromalloy* was a foreign arbitral award, making the provisions cited by the District Court inapplicable as a matter of U.S. law. Though article VII allows for the application of national law rules to the enforcement of an arbitral award, such rules must be applicable to foreign awards. Article VII is unable to justify the application of rules for the annulment of domestically rendered awards to the enforcement of a foreign award; it is only able to justify the application of national law rules on the enforcement of foreign awards to the enforcement of a foreign award.

A minority of commentators have defended the District Court's application of section 10 to an Egyptian award. Some have argued that that U.S. courts had applied section 10 to the enforcement of foreign awards before the U.S. adopted a separate regime for international awards when it acceded to the New York Convention. Rivkin argues that section 10 remained applicable to foreign awards for the purposes of article VII.[208] Others have supported *Chromalloy* on the basis that section 10 embodies general principles of U.S.

[207] ibid [12]

[208] Rivkin (n 145)

arbitration law, which can be applied in the form of national policy.[209] However, the better, majority view is that that District Court misapplied the Federal Arbitration Act in order to justify enforcement of the annulled award.[210]

The District Court made two further findings under national policy in support of its decision. The first of these findings was that the parties had agreed in their contract that there would be no recourse against the award. The District Court laid great stress on the wording of the arbitration agreement, stating that Egypt had sought to violate its 'solemn promise to abide by the results of the arbitration'[211] by initiating proceedings to annul the award. The District Court further found a congressional policy consistent with binding Egypt to the terms of its arbitration agreement.

An alternative, or supplementary, legal basis for the Chromalloy decision is therefore that the District Court applied contractual estoppel to give effect to the parties' agreement that the award should be final.[212] However, this reading of Chromalloy is no less controversial than that based on Section 10 of the Federal Act. Commentators point out that the District Court gave effect to a waiver of annulment procedures despite the fact that

[209] Born (n 1) 3629-31

[210] Ray Y Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of *Chromalloy*' (1999) 17 *Boston University International Law Journal* 141; Schwartz (n 143); Sampliner (n 155); Richard W Hulbert, 'Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone' (1998) 13(1) *ICSID Review* 124; Marc J Goldstein, 'Annulled awards in the U.S. Courts: How Primary is "Primary Jurisdiction"?' (2014) 25 *American Review of International Arbitration* 19

[211] *Chromalloy* (n 206) [15]

[212] Goldstein (n 210); Christopher R Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 *American Review of International Arbitration* 451

Egyptian law, which was the law applicable to the arbitration agreement, does not allow for such waiver. [213]

The second finding under national policy was that in the US there is a 'public policy in favour of final and binding arbitration of commercial disputes… supported by treaty, by statute, and by case law'.[214] Citing *Tahan v Hodgson,*[215] the District Court stated that 'the requirements for enforcement of a foreign judgment [include] that the original claim does not violate U.S. public policy'.[216] The District Court found that the annulment decision violated the U.S. policy in favour of final and binding arbitration, and thus refused to recognise the annulment decision by enforcing the arbitral award.

This broadly phrased policy alarmed commentators, with van den Berg wondering if it amounted to a 'public policy of refusing enforcement of foreign judgments' whenever doing so would prejudice an award's enforcement. [217] However, the prevalent view amongst commentators is that the policy in *Chromalloy* is limited to refusing recognition of foreign annulment decisions where they are based on grounds not found under section 10 of the Federal Arbitration Act.[218]

[213] Gharavi (n 144) 100; Georgios C Petrochilos, 'Enforcing Awards Annulled in Their State of Origin under the New York Convention' (1999) 48(4) *The International and Comparative Law Quarterly* 856; Chan (n 210)

[214] *Chromalloy* (n 206) [18]

[215] *Tahan v. Hodgson,* 662 F.2d 862, 864 (D.C. Cir. 1981)

[216] *Chromalloy* (n 206) [17]

[217] van den Berg (n 189) 19

[218] Stephen T Ostrowski and Yuval Shany, '*Chromalloy*: United States Law and International Arbitration at the Crossroads' (1998) 73 *New York University Law Review* 1650; Hulbert (n 210)

Even this narrower interpretation of the policy referred to by the District Court came under heavy criticism. Chan points out that the cases cited by the District Court spoke of a policy of allowing disputes to go to arbitration (i.e. a policy in favour of expanding arbitrability).[219] The District Court relied on this policy for the purpose of enforcing a foreign award. The District Court did not address the fact that it was repurposing the policy in this way, seemingly extending it into 'a blanket policy in favour of arbitration'[220] that applied regardless of the context in which it was raised.

None of the legal reasoning offered by the District Court in *Chromalloy* holds up under scrutiny. For this reason, many commentators view the Chromalloy decision as one in which the District Court attempted to protect an award creditor against an abusive annulment decision without explicitly criticising the courts at the seat.[221] Commenting on *Chromalloy*, Sampliner notes that the Egyptian courts had a propensity to 'nullify arbitral awards in favour of foreign parties against Egyptians or its government for seemingly arbitrary reasons'.[222] Van den Berg points out that the District Court's failure to explicitly hang *Chromalloy* on the issue of abuse was due to the fact that 'Egypt had argued before [the District Court] that any judicial finding regarding the *bona fides* of Egypt's judicial system would be construed by an important military ally as a hostile act of foreign policy'.[223]

[219] Chan (n 210)

[220] Chan (n 210) 176

[221] Ostrowski and Shany (n 218); R. Chan (n 210); Sampliner (n 155)

[222] Gary H Sampliner, 'Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin' (1996) 11 *Mealey's International Arbitration Report* 21, 22-3

[223] van den Berg (n 189) 19

The court 'wanted to have it both ways',[224] not commenting on the independence of a strategic ally's judiciary but refusing to give effect to what was perceived as an abusive decision by the Egyptian courts. *Chromalloy* is a wonderful case study for the difficulties that courts of enforcement face when considering potentially abusive decisions by the courts at the seat. Though a court of enforcement may have the discretion to enforce an annulled award under New York Convention article V(1)(e), doing so may strain relations between the State of enforcement and the State at the seat.

The District Court did not want to give Egypt cause for complaint by casting aspersion on its judiciary, and so attempted to take the French approach to annulled awards by applying U.S. law under article VII of the New York Convention. The District Court also put forward other justifications on the basis of national policy in an attempt to further justify its decision. As will be seen from the U.S. caselaw following *Chromalloy*, the District Court's New York Convention reasoning has been rejected, and its national policy reasoning limited.

[224] Ostrowski and Shany (n 218) 182

ii. Baker Marine

Baker Marine was the first case to consider *Chromalloy*.[225] It involved a contract between Baker Marine, Danos, and Chevron for the provision of barge services in support of oil exploration activities in Nigeria. A dispute arose and was submitted to arbitration seated in Nigeria. Baker Marine received two awards in its favour, but they were both annulled by the Nigerian courts. Baker Marine sought enforcement in the U.S. but was denied at first instance.

Baker Marine appealed to the Second Circuit Court of Appeals. Relying on *Chromalloy*, Baker Marine made two arguments. The first argument was that the lower instance court had failed to give effect to article VII of the New York Convention as the Nigerian courts had annulled the awards on grounds not listed in Section 10 of the Federal Arbitration Act.

The Court of Appeals refused to apply the U.S. Federal Arbitration Act to a Nigerian award. Citing *Volt Information Sciences,*[226] the Court held that the '"primary purpose" of the Federal Arbitration Act is "ensuring that private agreements to arbitrate are enforced according to their terms"'.[227] The parties' agreement had provided for Nigerian-seated arbitration and 'nothing suggest[ed] that the parties intended United States domestic arbitral law to govern their dispute'.[228] The Court did not consider it appropriate to

[225] *Baker Marine v Chevron,* 191 F.3d 194 (2d Cir. 1999)

[226] *Volt Information Services Inc v Board of Trustees,* 489 U.S. 468, 479 (1989)

[227] *Baker Marine* (n 225) [5]

[228] ibid [5]

undermine the parties' choice of seat by ignoring the judgments of the courts at the seat. Furthermore, citing van den Berg in footnote 3 of its decision, the Court of Appeals stated that the 'mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularity', and deprive award debtors of the ability to attack a defective award once-and-for-all before the courts at the seat.

The *Baker Marine* decision signalled a volte-face from *Chromalloy's* interpretation of the relationship between the Federal Arbitration Act and article VII of the New York Convention. The Court of Appeals explicitly rejected the notion that U.S. law might adopt the French approach, criticising the mechanical application of domestic law to foreign awards.

The second argument put forward by Baker Marine was that the U.S. courts are entitled to enforce annulled awards due to the permissive language of article V(1)(e), and therefore the lower court had been wrong to find that it would be improper to enforce an annulled award.

The Court rejected this argument on the basis that 'Baker Marine ha[d] shown no adequate reason for refusing to recognise the judgments of the Nigerian court',[229] which Born interprets as capturing scenarios where 'the Nigerian courts had favoured the award debtors during the annulment proceeding'.[230] The Court therefore departed from the *Chromalloy* analysis that the U.S. policy in favour of arbitration was sufficient to enforce

[229] ibid [7]

[230] Born (n 1) 3632

an annulled award. Instead it held that there must be an adequate reason to ignore the annulment decision itself.

iii. Spier

Spier came only a few months after *Baker Marine*.[231] *Spier* involved a consulting contract between Mr. Spier and the Italian skiwear manufacturer Technica. A dispute arose between the parties and was referred to Italian-seated arbitration. The arbitral tribunal issued an award in favour of Mr Spier, which was then annulled by the Italian courts. Spier sought enforcement before the New York District Court but was denied.

Spier advanced much the same two arguments that Baker Marine had advanced. Spier first argued that the threshold issue was whether or not the award would be annulled under U.S. law. However, the District Court held that the Italian court, as the court at the seat, was free to set aside or modify an award in accordance with its domestic arbitral law.

Drawing a comparison with Baker Marine, the District Court refused to consider the annulment decision through the prism of the Federal Arbitration Act as the parties had 'contracted in a foreign state that their disputes would be arbitrated in that foreign state; the governing agreements make no reference to United States law; and nothing suggests that the parties intended United States domestic arbitral law to govern their disputes'.[232] The District Court thus followed the Court of Appeals of the Second Circuit in *Baker Marine*, rejecting the argument that *Chromalloy* compelled U.S. judges to only recognise annulments based on grounds found within Section 10 of the Federal Arbitration Act.

[231] *Martin Spier v Calzaturificio Technica, S. p. A.*, 71 F. Supp. 2d 279 (S.D.N.Y 86 Civ. 3447 (CSH) 1999)

[232] ibid 288

Spier's second argument was that the permissive wording of article V(1)(e) of the New York Convention allowed the District court to enforce the arbitral award notwithstanding the annulment decision by the courts at the seat. The District Court adopted a similar position to that of the Court of Appeals in *Baker Marine*, holding that 'Spier has shown no adequate reason for refusing to recognize the judgments of the Italian courts',[233] and distinguishing *Spier* from *Chromalloy* on the basis that the latter had involved a waiver of recourse against the award by the Egyptian government.

Though Spier adds little to the Court of Appeal's analysis in *Baker Marine*, it displays the development of a concrete set of rules governing those situations in which the U.S. courts will enforce annulled awards. The position under *Baker Marine* and *Spier* is that a U.S. judge should defer to the courts at the seat but can enforce the award if there is an adequate reason to refuse recognition of the annulment decision. The U.S. courts thus adopted a subjectivist territorialist view of international arbitration, under which abuse by the seat can displace the default policy of deference to the courts at the seat.

[233] ibid 288

iv. Termorio

In the *Termorio* case, the Court of Appeals for the District of Columbia showed how high the U.S. courts set the bar for refusing recognition of an annulment decision by the courts at the seat.[234] The case arose out of a power purchase agreement between Termorio, a wholly owned Columbian subsidiary of an Oregon corporation, and the Columbian State-owned electrical utility, Electranta.

A dispute arose and was submitted to Columbian-seated ICC arbitration in conformity with the parties' arbitration agreement. Termorio received an arbitral award in its favour. Electranta applied for the award to be annulled, and the Columbian courts did so on the basis that Columbian arbitration law did not expressly permit the use of the ICC arbitral rules in arbitration. Termorio sought the enforcement of the award before the U.S. courts. The District Court of the District of Columbia refused enforcement.

Termorio appealed, arguing that article V(1)(e) gave the US courts discretion to enforce the award despite the Columbian annulment decision, and that the Columbian annulment decision did not warrant recognition. In rejecting Termorio's appeal, the Court of Appeals cited van den Berg in support of the view that 'a principal precept of the New York Convention [is that] an arbitration award does not exist… if it has been lawfully "set aside" in the State in which the award was made'.[235]

[234] *Termorio S.A v Electranta S. P.*, 487 F.3d 928 (D.C. Cir 2007)

[235] ibid 15

The Court hedged this statement, expounding Reisman's views on the distribution of jurisdiction under the New York Convention but acknowledging a narrow exception to the rule that annulled awards must be refused enforcement: 'a secondary [jurisdiction court] *normally* may not enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary [jurisdiction]'.[236] The Court of Appeals thus recognised the discretion to enforce an annulled award under article V(1)(e), but limited it to a 'narrow public policy gloss' that would only apply where an annulment decision is 'repugnant to fundamental notions of what is decent and just in the United States'.[237]

Having set out the test for the enforcement of an annulled award, the Court considered the facts of the case before it. The Court found that 'the parties… agreed to be bound by Columbian law' and that '[t]he Consejo de Estado, Columbia's highest administrative court is the final expositor of Columbian law [and as such] we are in no position to pronounce the decision of that court wrong'.[238]

The Court assessed the decision as though from the perspective of a Columbian lower court, finding itself bound by the Consejo de Estado. Had the Court looked at the merits of the annulment decision, it would have been in a position to consider whether political factors, such as the protection of Columbia's State-owned energy company, had informed the Consejo's ruling. By limiting itself to the questions of jurisdiction and validity under Columbian law, the Court refused to engage with the possibility that the annulment had been abusively issued to immunize the local party from liability under the award.

[236] ibid 14 (emphasis my own)

[237] ibid 21

[238] ibid 21

The Court of Appeals distinguished *Termorio* from *Chromalloy* on the basis that *Chromalloy* involved a waiver of recourse against the award by the parties. However, it seems unlikely that the Court of Appeals would have enforced the award had the parties agreed to waive recourse against the award if the Consejo de Estado ruled such a waiver ineffective. Others have come to the same conclusion in holding that '[i]t seems reasonably likely… that, if it had been necessary to do so, the D.C. Circuit would have expressly disapproved of *Chromalloy*'.[239]

The *Termorio* case has been roundly criticised by commentators as 'a poisonous case',[240] in which a U.S. court rubberstamped the Colombian State's 'heads I win, tails you lose fraud upon its commercial counterparty'.[241] Electranta challenged the use of ICC rules only after it had already lost in arbitration, and commentators believe 'the [Consejo de Estado] was looking very hard for a reason to set the award aside'.[242] Those that do support the Court of Appeals' decision in *Termorio* do so on the basis of their general support of the objective territorialist model of international arbitration, and not on the facts of the case itself.[243]

Despite the criticism of *Termorio*, the 2017 case of *Thai-Lao* indicates its enduring influence on U.S. arbitration law. In *Thai-Lao*, the 'primary/secondary' terminology used

[239] Jonathan Blackman, Ellen London, 'Respecting Awards Annulled at the Seat of Arbitration: The Road from Chromalloy to Termorio' (2008) 63(3) *Dispute Resolution Journal* 70, 75

[240] Fernando Mantilla-Serrano, 'Case Note: Termorío S.A.E.S.P. et al. v. Electranta S.P. et al.' (2008) 25(3) *Journal of International Arbitration* 397, 405

[241] Goldstein (n 210) 26

[242] Koch (n 153) 289

[243] M B Holmes, 'Enforcement of Annulled Arbitral Awards: Logical Fallacies and Fictional Systems' (2013) 73(3) *Arbitration* 244

in *Termorio* was adopted by the Court of Appeals for the Second Circuit in justifying the vacatur of an enforcement decision which had been issued prior to the arbitral award being annulled by the courts at the seat.[244]

Silberman argues that the Court of Appeals was incorrect in failing to find the Columbian annulment decision to be in violation of U.S. public policy as it was based on a 'parochial' ground that 'is inconsistent with international arbitration principles [and therefore] "repugnant to the public policy of the United States"'.[245] The *Termorio* case took the reasoning of *Spier* and *Baker Marine* to an extreme. A Columbian State-owned entity had reneged upon its arbitration agreement by invoking unclear and backward provisions of contemporary Columbian law.

Born rejects the Court's conclusion that 'a "principal precept" of the New York Convention was to render annulled awards non-existent'[246] as an improper imposition of the objective territorialist model upon the Convention. In fact, by acknowledging the discretion to enforce an annulled award by applying a public policy gloss to article V(1)(e) the Court of Appeals actually espoused a subjective territorialist view of arbitration. However, the degree of deference afforded to the Columbian Consejo de Estado by the Court of Appeals is reminiscent of Mann's objective territorial insistence that the local courts should be the final arbiter of what is 'legal' for a domestically seated arbitration.

[244] *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic,* No. 14-597, 2017 WL 3081817 (2d Cir. July 20, 2017)

[245] Silberman (n 178) 34

[246] Born (n 1) 3633

The Court of Appeals refused to review the merits of the Consejo de Estado's annulment decision, applying 'a purely formal test in which no consideration is given to the conditions and grounds relied upon to annul the award'.[247] An annulment decision must be visibly, procedurally repugnant to justify the enforcement of the annulled award by a U.S. court under the test set under *Termorio*.

[247] Mantilla-Serrano (n 240) 402

v. PEMEX

PEMEX is the only case apart from *Chromalloy* in which an award annulled at the seat has been enforced by the U.S. courts. The case involved contracts between PEMEX, a subsidiary of the Mexican State-owned oil company, and COMMISA, the Mexican subsidiary of a U.S. company. Under the contract, COMMISA was to build and install two offshore natural gas platforms in the Gulf of Mexico. The contracts included arbitration clauses providing for Mexican-seated arbitration, and clauses allowing PEMEX to effect administrative rescission of the contracts in the event of breach by COMMISA.

A dispute arose between the parties as to alleged breaches of their respective obligations, and on 29 March 2004 PEMEX notified COMMISA that it intended to effect administrative rescission of the contracts. The parties attempted conciliation but without success. On 1 December 2004, COMMISA commenced arbitration. On 16 December, PEMEX notified COMMISA that it was proceeding to rescind the contracts.

COMMISA challenged PEMEX's rescission through *amparo* proceedings before the Mexican courts, which allow for a challenge to the validity or constitutionality of acts of government authorities. COMMISA argued that PEMEX had acted in a public capacity and that the laws allowing administrative rescission were unconstitutional, and therefore the rescissions had been ineffective.

On 17 May 2006, the Sixth Collegiate Court on Administrative Matters found that PEMEX had been acting in a public capacity and referred the constitutionality point to the Supreme Court. The Supreme Court found that the laws on administrative rescission were

constitutional and referred the matter back to the Sixth Collegiate Court, which found that PEMEX had followed the necessary procedure in its rescission. The courts' analysis was restricted to the constitutionality and procedural validity of PEMEX's rescissions, and not the merits of whether COMMISA had been in breach so as to entitle PEMEX to rescind.

In the arbitral proceedings, PEMEX attempted to challenge the arbitral tribunal's jurisdiction three times. In 2006, PEMEX argued that the arbitration clause did not cover the dispute, that COMMISA had not exhausted alternative remedies prior to arbitration, and that COMMISA had waived its right to arbitrate by pursuing the *amparo* proceedings. In March 2007, PEMEX argued that the Mexican Supreme and Eleventh Collegiate Court decisions had created *res judicata* by holding the rescissions proper. In October 2007, PEMEX argued that the rescissions, as acts of a public authority, could not be arbitrated. The arbitral tribunal rejected all of PEMEX's arguments and proceeded to issue an award in COMMISA's favour on 16 December 2009.

In the meantime, Mexico had passed two laws of relevance to the *PEMEX* case. The first was the Organic Law of Federal Court in Tax and Administrative Matters, effective from 7 December 2007, which established the new Tax and Administrative Court with exclusive jurisdiction over, *inter alia*, administrative rescission disputes. The Tax and Administrative Court had a short 45-day time limit for bringing claims. The second law of relevance to *PEMEX* was the Law of Public Works and Related Services, effective from 28 May 2009, section 98 of which provided that disputes relating to administrative rescission were inarbitrable.

PEMEX challenged the award before the Mexican Eleventh Collegiate Court for the Federal District, which annulled the arbitral award on 21 September 2011 on public policy grounds. It justified its decision by reference to two legal sources. The first was a 1994 Supreme Court decision, which held that administrative rescissions are acts of public authority. The Collegiate Court reasoned that such acts are intended to protect the public interest, and therefore it would be improper to refer them to arbitration which is designed to settle private disputes.

The second legal source was public policy. The Collegiate Court held section 98 up as an example of the contemporary Mexican public policy of protecting the economy and public expenditure by not allowing the arbitration of disputes arising out of public projects. The Collegiate Court tried to avoid explicitly applying section 98 retroactively, instead using the amorphous concept of public policy as a vehicle to articulate the same prohibition on the arbitration of administrative rescission disputes.

Despite the Mexican annulment decision, COMMISA sought enforcement of the award before the U.S. courts. The District Court for the Southern District of New York considered the underlying question as being '[w]hich is to be given primacy, the award or the nullifying judgment?'.[248] Summarising the prior caselaw on the enforcement of annulled awards in the U.S., the District Court adopted the test from *Termorio* in asking whether the annulment decision '"is repugnant to fundamental notions of what is decent and just in the United State" or, stated another way, if the judgment "violated any basic notions of justice in which we subscribe"'.[249]

[248] *PEMEX* (n 180) [1]

[249] ibid [58]

The District Court ordered the enforcement of the award, relying on three findings to support its decision. The first of these findings was that COMMISA had a legitimate expectation that the dispute was arbitrable. The District Court noted that the law regulating PEMEX's operation as a State authority allowed it to enter into arbitration agreements and drew attention to the fact that it was not until 2009 that PEMEX argued the dispute was not capable of settlement by arbitration. The District Court further pointed to article 1116 of the North American Free Trade Agreement which allows the arbitration of administrative acts by the Mexican authorities where the Mexican authorities interfere with a U.S. person's investment in Mexico.

The Court concluded that both COMISSA and PEMEX had reasonably assumed that the dispute was arbitrable at the time of contracting and at the time of the arbitration. The annulment decision therefore deprived COMMISA of its legitimate expectations under Mexican law in such a way that was repugnant to U.S. policy.

The second finding the District Court relied upon was that the annulment decision gave retroactive effect to section 98 of the Law of Public Works and Related Services. The District Court assessed the legal sources upon which the Collegiate Court had based its decision – the 1994 Mexican Supreme Court decision and section 98. The District Court first found that the 1994 Mexican Supreme Court decision was of minimal relevance to the issue of arbitrability. Having rejected the 1994 decision as a legitimate basis for the annulment, the District Court concluded that the Collegiate Court had grounded its decision solely on section 98, thus giving it retroactive effect. Such retroactive application of the law was repugnant to U.S. public policy.

Finally, the District Court found that by annulling the award, the Mexican courts had left COMMISA without a forum in which to sue PEMEX. The Organic Law of Federal Court in Tax and Administrative Matters had reallocated jurisdiction over administrative rescission disputes to the newly constituted Tax and Administrative Court. This Court had a 45-day time limit from the time of rescission. COMMISA was therefore out of time to bring a claim before the Mexican courts. Thus the Mexican Collegiate Court had attempted to preclude COMMISA from ever realising its rights.

The District Court pointed out that these factors had operated 'to favour a state enterprise over a private party… flout[ing] a basic principle of justice: where a sovereign has waived its immunity and has agreed to contract with a private party, a court should treat the private party and the sovereign as equals'.[250] By annulling the award and precluding COMMISA from bringing a claim in the Mexican courts, the Mexican State had exempted itself from liability. The District Court concluded that the Mexican annulment decision violated basic notions of justice.

The District Court decision was reviewed and approved by the Court of Appeals for the Second Circuit in 2016.[251] The Court of Appeals did not disturb the District Court's three findings but buttressed them by emphasizing that they were to be considered under U.S. law, holding that the annulment 'resulted in a retroactive application of Section 98 as a matter of *United States* law'.[252] The Court of Appeals also made a fourth finding by considering that the annulment decision, in combination with the deprivation of a forum in

[250] ibid [67]

[251] *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX – Exploración y Produssión*, No. 13-4022 (2d Cir. Aug. 2, 2016)

[252] ibid [51] (emphasis in the original)

which COMMISA could bring a claim, had resulted in the taking of private property by a government without compensation (i.e. an unlawful expropriation).

The Court of Appeals further refined and clarified the legal question to be posed when considering whether to enforce an annulled award. The question articulated in *Baker Marine* and *Termorio,* and by the District Court was whether a US court should recognise the foreign annulment decision. However, these decisions did not provide clearly defined rules to be applied in answering this question.

Baker Marine did not refer to any decisions on the enforcement and recognition of foreign judgment to elaborate the rule for determining whether to recognise a foreign annulment, but simply referred to public policy. *Termorio* referred to the foreign judgment decision of *Tahan v Hodgson*, but ambiguously stated that US courts do not have an 'unfettered discretion to impose [their] own considerations of public policy'.[253]

Citing *Ackermann*,[254] the Court of Appeals clarified the test in *Termorio*, stating that:

> "[T]he standard is high, and infrequently met"; "a judgment that 'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights or personal liberty or of private property is against public policy." The exception accommodates uneasily two competing (and equally important) principles: [i] "the goals of comity and res judicata that underlie the

[253] *Termorio* (n 234) [14]

[254] *Ackermann v Levine*, 788 F. 2d 830, 837 (2d Cir. 1986)

doctrine of recognition and enforcement of foreign judgments" and [ii] "fairness to litigants".[255]

A few commentators have argued that the U.S. courts were wrong in their analysis of Mexican law, emphasizing the risks associated with allowing courts to look behind each other's decisions.[256] However, commentators have generally praised *PEMEX* for 'moving away from the blind deference to foreign annulments' [257] that the Court of Appeals for the District of Columbia had shown in *Termorio*.

Though both the District Court and the Court of Appeals stated they were not reviewing the application of Mexican law by the Mexican courts, they refused to accept at face value both the Mexican Collegiate Court's reliance on the 1994 Mexican Supreme Court case, and its statement that it was not retroactively applying section 98 of the Law of Public Works and Related Services. This contrasts with the degree of deference given to the Consejo de Estado in *Termorio*; Silberman and Scherer have stated that had this less deferential approach been adopted in *Termorio,* it 'should have led [the District Court] to enforce the annulled Columbian award.[258]

More importantly, the Court of Appeals clarified that the test applicable to the enforcement of annulled award is to 'analyse the issue primarily from a judgment

[255] *PEMEX* (n 246) [41]

[256] Jennifer Cabrera, Dante Figueroa, and Herfried Wöss, 'The administrative contract, non-arbitrability, and the recognition and execution of awards annulled in the country of origin: the case of *Commisa v Pemex*' (2016) 32(1) *Arbitration International* 125

[257] Radicati di Bronzolo (n 181) 55

[258] Linda Silberman and Maxi Scherer, 'Forum Shopping and Post-Award Judgments' in Franco Ferrari (ed), *Forum Shopping in the International Commercial Arbitration Context* (Sellier European Law Publishers, 2013) 325

recognition framework, and not an arbitration policy framework'.[259] Though it did refer to the pro-enforcement bias of the New York Convention, the Court of Appeals did not explicitly rely on a policy argument in reaching its decision. Silberman has applauded the 'adoption by the Court of Appeals… of a 'judgments framework' as a means to evaluate a set-aside [as] desirable [and for providing] criteria and guidance for such assessments'.[260] *PEMEX* thus clarified the U.S. legal position with respect to the enforcement of annulled awards, replacing the vague references to policy with more concrete, structured rules on the recognition of foreign annulment decisions.

[259] Debevoise & Plimpton, Client Update: U.S. Second Circuit Affirms Decision Enforcing Annulled Arbitral Award, 12 August 2016, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjpv7-sx_ToAhVFZcAKHRP6BA8QFjAAegQIARAB&url=https%3A%2F%2Fwww.debevoise.com%2F~%2Fmedia%2Ffiles%2Finsights%2Fpublications%2F2016%2F08%2F20160812_us%2520_second_circuit_affirms_decision_enforcing_annulled_arbitral_award.pdf&usg=AOvVaw2YelKngY52EJ4yvmnojOK0> accessed 19/04/20

[260] Linda Silberman and Nathan Yaffe, 'The US Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the *PEMEX* Decision' (2017) 40(3) *Fordham International Law Journal* 799, 809

vi. The Judgment Framework

The U.S. courts' approach to the enforcement of annulled awards has narrowed over time. In *Chromalloy*, the District Court of Columbia relied on both articles V and VII of the New York Convention in enforcing the award. Subsequent US caselaw has abandoned the article VII analysis of *Chromalloy*. The American Law Institute's most recent Restatement explicitly provides that 'Chapter 1 of the [Federal Arbitration Act] does not constitute [an alternate regime for the enforcement of foreign awards]'[261] such as to be applicable under article VII.

However, US courts have adopted the article V(1)(e) analysis of *Chromalloy* inasmuch as the subsequent caselaw on the enforcement of annulled awards maintains the courts' discretion to enforce an award notwithstanding its annulment at the seat. U.S. courts have refined the test for exercising this discretion, moving from an ill-defined policy test to a test based on the rules for the recognition of foreign judgments.

Baker Marine held that adequate reasons were necessary for the enforcement of an annulled award. *Spier* required adequate reasons not to recognise an annulment decision. *Termorio* stated that an annulment decision must simply be lawful under the law of the seat, seeing the discretion to enforce as a narrow public policy gloss. Finally, *PEMEX* directed U.S. courts to apply the rules for the recognition of foreign judgments to annulment decisions, allowing U.S. courts to look behind foreign decisions in extreme cases. This progression represents the gradual sophistication of the U.S. courts' approach to the enforcement of annulled awards, which has matured into a set of defined rules.

[261] *Restatement* (n 131) §4.5

This judgment-oriented framework for the recognition of annulled arbitral awards is not the invention of the U.S. courts. In 2006, Park suggested applying the rules for the recognition of foreign money judgments to annulment decisions, stating that there was no reason why cases of abuse by the seat 'cannot be disposed of within comity's flexible framework'.[262] The judgment framework has found favour with moderates from both sides of the territorialist-delocalised debate. Subjective territorialists see the judgment framework as a necessary safeguard to prevent abuse by the courts at the seat;[263] pluralists that have advocated the judgment framework have done so in recognition of the difficulties produced by always ignoring annulment decisions,[264] or otherwise place it within a broader network of rules for choosing whether to enforce an annulled award.[265]

Despite its broad appeal with both courts and commentators, the judgment framework is not without its critics. Those who subscribe to the autonomist model of international arbitration reject it for ascribing too much significance to the seat and failing to recognise the truly international nature of arbitration under the New York Convention.[266] Those that subscribe to the objective territorialist model reject it for not going far enough in deferring to the seat of arbitration.[267]

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[262] Park (n 157) 363

[263] Park (n 157) ch 2; Barry (n 164); Tom Childs, 'Enforcement of International Arbitral Awards: Should a Party be Allowed Multiple Bites at the Apple?' (2015) 26(2) *American Review of International Arbitration* 269; Jonathan Mance, 'Arbitration: a Law unto itself?' (2016) 32(2) *Arbitration International* 223

[264] Mayer (n 188); Silberman (n 178)

[265] Koch (n 153); Born (n 1); Radicati di Bronzolo (n 175) (though note Radicati di Bronzolo prefers the autonomist model in his more recent article (n 181))

[266] Radicati di Bronzolo (n 181); Alessandra Sardu, 'The Fate of the Award Annulled in the Country at the Seat' (2016) 17(2) *Global Jurist* 1

[267] Holmes (n 243)

More specific criticisms of the judgment framework have been put forward by van den Berg and Scherer. Van den Berg argues that the judgment framework commits violence upon the wording of article V(1)(e) of the New York Convention – 'the text of [a]rticle V(1)(e) does not include the words 'unless the decision… cannot be recognized in the country where recognition and enforcement of the award are sought'.[268] He further points out that the judgment framework risks turning courts of enforcement into *de facto* appellate courts for the courts of the seat, and creating a blacklist of countries in which the judiciaries are considered deficient.

As pointed out by Silberman and Scherer, van den Berg's arguments are unconvincing. With respect to his argument concerning the wording of article V(1)(e), they consider '[t]he fact that the judgments approach is not explicitly provided for in the Convention is of little significance'.[269] Where courts have residual discretion to enforce annulled awards under the permissive wording of article V(1)(e), then courts may construct any such rules as they deem appropriate for exercising that discretion.

With respect to van den Berg's argument on the impropriety of courts ruling on other courts' judgments, they remark that '[c]ourts have long employed the judgment recognition framework to non-arbitration related judgments'.[270] The application of these same principles in the arbitration context is no more problematic than in other contexts.

[268] van den Berg (n 39) 191

[269] Silberman and Scherer (n 258) 329

[270] ibid 329

Moreover, the relatively small number of cases in which annulled awards are presented for enforcement makes it highly unlikely that the judgment framework will result in the wholesale blacklisting of legal systems. Some commentators have even suggested that such scrutiny might have a beneficial effect by incentivising arbitration-hostile courts to 'embrace internationally recognised standards'.[271]

Scherer's criticism is not specific to the application of the judgments framework to annulment decisions. Her criticism is of applying the judgments framework to foreign decisions determining the effect of an arbitral award generally. She argues that judgments on awards by the courts at the seat are ancillary judgments: they are not judgments on the merits, but judgments on a prior adjudication.[272] She points out that other forms of ancillary judgment, such as foreign judgments recognising the judgments of third States, are not considered under the rules applicable to the recognition of foreign judgments. Courts should instead consider the original judgment.

Scherer argues that giving effect to foreign judgments concerning the validity of an arbitral award would lead to forum shopping by parties. Award creditors would rush to jurisdictions that are more liberal in enforcing awards in order to secure a judgment in their favour that they can then have recognised before further courts of enforcement. Similarly, award debtors would rush to jurisdictions that are more prone to refusing the enforcement of arbitral awards in order to secure a judgment in their favour that they can have recognised before further courts of enforcement.

[271] Radicati di Bronzolo (n 175) 99

[272] Scherer (n 172)

However, Scherer admits that the application of the judgment framework to annulment decisions from the seat 'does not generate the same objections' as its application to other forms of judgments on arbitral awards.[273] There is no risk of forum shopping as the seat is a predetermined location. Furthermore, even where other ancillary judgments are not recognised under national law, the recognition of annulment decisions is provided for under article V(1)(e) of the New York Convention.

One final criticism of the judgment framework is that it relies on the various sets of rules for recognizing foreign judgments in individual States. Even if multiple States adopt the judgments framework, there is no guarantee that they will reach similar results with respect to any given arbitral award. However, Silberman argues that 'looking at transnational recognition and enforcement practices comparatively, one finds a basic similarity of frameworks in various countries'.[274] Any fears of systemic inconsistencies under the judgment framework approach are thus overstated.

The judgment framework is a compromise solution. It coexists uneasily with the idea of arbitration as an independent means of resolving disputes. On the one hand, it admits that arbitration should be subordinate to the control of national courts, implying an acceptance of the view that arbitration must be subject to court control to prevent its abuse. On the other hand, it recognises that the courts themselves are fallible, and may exercise their powers arbitrarily or abusively.

[273] ibid 627

[274] Silberman (n 178) 33

Where the judgment route recognises both institutions as capable of abuse, it is difficult to see why an annulment decision should be given precedence over the arbitral award where the parties have actively chosen to remove their dispute from the courts to arbitration. Furthermore, even where the judgment framework is less objectionable when applied to annulment decisions by the courts at the seat than when applied to other judgments on arbitral awards, it is still objectionable to apply the judgment framework to an annulment decision as a form of ancillary judgment. The judgment route is unsatisfactory from the perspective of international arbitration theory.

Despite its objectionable theoretical underpinnings, the judgment route is nonetheless suitable for the practicalities of enforcing annulled awards. Where a court addresses abuse by the seat through the lens of subjective territorialism or pluralism, it must be able to justify its choice to give effect to the arbitral award. Practically speaking, this is the same as justifying its refusal to recognise a foreign annulment decision. The adoption of the rules for the recognition of foreign judgments under the judgment framework makes sense from this perspective.

b. Yukos

Outside the U.S., other courts have also gravitated towards the judgment recognition framework when enforcing annulled awards. In the *Yukos* case, both the English and Dutch courts were asked to enforce awards annulled by the Russian courts at the seat. Both courts acknowledged their discretion to enforce the awards under article V(1)(e) of the New York Convention, and structured the exercise of this discretion around the rules for the recognition of foreign judgments.

The case concerned four loan agreements entered into by Yukos Capital and Yuganskneftegaz, which contained agreements providing for arbitration before the International Commercial Arbitration Court (ICAC) in Moscow. At the time the loan agreements were concluded, both Yukos Capital and Yuganskneftegaz belonged to the Yukos Group of companies.

The Yukos Group was subsequently found liable for a significant amount of outstanding taxes by the Russian government. In December 2004, the Russian government forced the Yukos Group to auction off Yuganskneftegaz to pay its tax bill. The buyer at auction was the Baikal Finance Group. Four days later, Yuganskneftegaz was sold by the Baikal Finance Group to Rosneft, a State-owned oil and gas company.

In December 2005, Yukos Capital initiated Russian-seated ICAC arbitration under the loan agreements. In September 2006, the arbitral tribunal issued four awards in Yukos Capital's favour against Yuganskneftegaz. In October 2006, Yuganskneftegaz merged with Rosneft and ceased to exist. As the successor to Yuganskneftegaz, Rosneft sought the

annulment of the awards before the Russian courts. In May 2007, the Commercial Court of the City of Moscow granted Rosneft's annulment requests. Despite the annulment of the awards by the Russian courts, Yukos Capital sought their enforcement before the English and Dutch courts.

i. Yukos Before the Dutch Courts

In February 2008, the Dutch Court of First Instance rejected Yukos Capital's application for enforcement. The Court of First Instance refused enforcement of the annulled awards. However, this decision was overturned by the Court of Appeal.[275] The Court of Appeal found that though article V(1)(e) of the New York Convention permits courts to refuse enforcement of an annulled award, it does not compel a court of enforcement to recognise the decision annulling the award. The Court therefore concluded that 'leave to enforce an annulled award may be granted under exceptional circumstances'.[276]

The Court equated the enforcement of an annulled award with the refusal to recognise the annulment decision, holding that an annulled award could be enforced where the relevant annulment decision did not qualify for recognition under Dutch law. The Court considered the relevant test to be one of general private international law - where the procedure of the annulment decision 'does not comply with the principles of due process and for that reason… Dutch public policy',[277] then the annulment decision will not be recognised, and the award can be enforced.

Turning to the facts of the case before it, the Court reviewed findings by the English, Lithuanian, Swiss, and Dutch courts concerning the treatment of the Yukos Group by the Russian State. It also read out reports on the Russian judiciary's independence by the late Russian political journalist Marina Politkovskaya, a former member of the Parliamentary

[275] *Yukos* (n 148)

[276] ibid [2]

[277] ibid [5]

Assembly of the Council of Europe, Transparency International, the EU-Russia Centre, and Freedom House. Relying on these reports, the Court concluded that the Russian judiciary could not be expected to remain independent where State interests are at stake.

The Court went on to assess whether Rosneft's interests could be equated to the State's interests. It took into consideration the facts that 'the Russian State owns a vast majority of Rosneft's shares and… the majority of Rosneft's directors are political appointees who combine their position at Rosneft with Russian government positions'.[278] The Court also quoted Putin, who had referred to the purchase of Yuganskneftegaz by Rosneft as an example of the State 'taking care of its own interests'.[279] The Court thus concluded that:

> The established facts further show that there is an undeniable connection between the present disputes between Yukos Capital and Rosneft and the events in Russia that led to the dismantling and bankruptcy of Yukos Oil Company… [and further] the ties between the Russian State and Rosneft and the substantial interest of this claim… that the Russian State considers to be its own, are at issue in the present case too.[280]

The Court found that Rosneft had failed to rebut the inference that the Russian judiciary had been dependent and partial in its treatment of Yukos Capital. It rejected Rosneft's argument that Yukos Capital had failed to provide direct evidence of the dependence and partiality of the specific judges that had annulled the arbitral awards. The

[278] ibid [19]

[279] ibid [19]

[280] ibid [20]

court considered that it would be unreasonable to require direct proof, holding that 'partiality and dependence by their very nature take place behind the scenes'.[281]

Not only does this case illustrate the application of the judgment framework for the enforcement of annulled awards outside the U.S., but it also addresses the important issue of evidence. One of the points of contention between the parties was whether Yukos Capital had discharged the burden of proof by providing reports going to the integrity of the Russian judiciary as a whole in conjunction with evidence of the Russian State's interest in the fates of both Rosneft and the Yukos Group.

Van den Berg has been particularly critical of the Court of Appeal's approach to evidence in the *Yukos* case, calling it 'fundamentally wrong'.[282] He criticised how the Court was willing to rely on second hand reports to make the sweeping conclusion that the Russian judiciary lacks independence. Given the gravity of the Court's conclusion, van den Berg demanded that 'lack of impartiality and independence should be factually (and demonstrably) present in a given case, or else there should be (provable) circumstances present that have created an appearance of a lack of impartiality or independence on the part of the judges in question'.[283]

The Court of Appeal did not directly address how the burden of proof had been discharged. Either it lowered the burden of proof in recognition of the fact that directly proving bias would be unfeasible, or it decided the case on the basis of inferences drawn

[281] ibid [22]

[282] van den Berg (n 39) 180

[283] ibid 181

from circumstantial evidence. Though it would have made little difference in the *Yukos* case itself, in other cases this distinction may be crucial. If the Court relied on inference, then an award creditor will need a similar factual matrix to that in *Yukos* where the Russian government had a clear policy with respect to both the award creditor and the award debtor. On the other hand, if the Court is willing to lower the burden of proof in recognition of the difficulty of proving abuse by the courts of the seat, this will incentivise challenges to annulment decisions before enforcement courts and increase litigation. The *Maximov* case suggests that the Dutch courts require award creditors to frame their cases within a similar factual matrix to that in *Yukos*.

The claimant in *Maximov* had received an award in his favour against a large Russian company that had links to the Russian government. The award was subsequently annulled by the same judge that had annulled the awards in *Yukos*, who justified the annulment decision on the basis that the arbitrators worked within the same universities as some of the experts involved in the case, and that the dispute was inarbitrable. Neither of the parties had argued arbitrability before the courts, and the inarbitrability of the dispute had a tenuous grounding in the contemporary Russian legislation. After its break, the court accepted documents submitted by the award debtor that had previously been ruled inadmissible. The Russian first instance court had heard the parties for only 5 hours and delivered its decision 15 minutes after the close of proceedings.

Furthermore, the claimant in *Maximov* was under criminal investigation in Russia, and the award debtor had received a favourable legal opinion from the Russian President's legal department which had been put before the judge. The fact pattern was not dissimilar to that of *Yukos* in that the award creditor was under criminal investigation and the award

debtor seemed to be in favour with the Russian government. However, it did not take place against a similarly extreme backdrop of persecution as that in the *Yukos* case, nor was the award debtor a State-owned company.

The Dutch courts refused to enforce the award, upholding the refusal at the level of both the Court of Appeal and the Supreme Court.[284] The Court of First Instance considered Maximov's arguments on the links between the award debtor and the Russian government insufficient, distinguishing the case from *Yukos* which involved the State-owned Rosneft.[285] It further found that the reports adduced by Maximov on the Russian judiciary were insufficient to show 'that the judges who dealt with the case (in first instance and on appeal) were corrupt and biased in this concrete case'.[286]

In a preliminary decision, the Dutch Court of Appeal found that the '[s]tarting point is that a judge must be presumed to be impartial by virtue of his appointment… [i]t is important that a judge of one state exercises restraint when assessing the question of whether the judge of another state is partial'.[287] This position stands in stark contrast with the position adopted by the same Court in the *Yukos* case, where it was willing to accept

[284] *Maximov v OJSC NMLK*, Court of Appeal, 27 September 2016, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2017 Volume XLII* (Kluwer Law International 2017); *Maximov v OJSC NMLK*, Hoge Raad, Case No. 16/05686, 24 November 2017 reported in Stephan W Schill (ed), *Yearbook Commercial Arbitration 2018 – Volume XLIII* (Kluwer Law International 2018)

[285] *Maximov v OJSC NMLK*, District Court of Amsterdam, 17 November 2011, Case no. 491569/KG RK 11-1722 reported in Albert Jan van den Berg, *Yearbook Commercial Arbitration 2012 – Volume XXXVII* (Kluwer Law International 2012)

[286] ibid [19]

[287] *Maximov v OJSC NMLK*, Court of Appeal of Amsterdam, Case No. 200.100.508/01 18 September 2012 [28] reported in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* (Kluwer Law International 2013)

the bias of the judges involved on the basis of general reports on the Russian judiciary and the relationship between the parties and the Russian government.

Barry has questioned whether *Yukos* was properly decided, 'doubt[ing]… whether the evidence… was sufficiently cogent to support a finding of partiality and dependence'[288] and suggesting that *Maximov* represents a return to the appropriate standard of proof. However, the better view is that *Yukos* took place within a very specific factual matrix, from which it was reasonable to draw inferences both as to the Russian government's participation in the case and the courts' partiality and dependence.

It seems that the Dutch courts will only accept arguments as to abuse by the courts at the seat in two situations. The first is where the specific judges involved can be shown to be biased, which will require direct evidence showing as much. The second is where the broader factual context of the case makes it clear that the State at the seat had substantial interest in the dispute, that the government at the seat would have acted to protect that interest, and that the judiciary at the seat would have complied with the wishes of the government. In the latter situation, the finding of abuse is grounded in the relationships between the parties, the decision-makers, and any other persons with both an interest in the case and the potential to exert influence over the arbitration.

The Dutch courts can adopt this approach with respect to finding abuse by the judges that annulled an award as they are not bound by any rules of procedure when exercising their discretion under article V(1)(e). The Dutch courts are able to conclude that

[288] Barry (n 164) 322-3

there is a sufficiently high risk that the judge who annulled an arbitral award did so in obeisance to government, and that the annulment was thus abusive.

This can be contrasted with the situation where it is the arbitrator who is accused of bias, and not a national judge. Unless the situation falls within one of the article V defences, for which the award debtor must discharge the burden of proof, a court of enforcement is not entitled to refuse enforcement of the award. An award debtor who wishes to resist an award must be able to prove the bias of the particular arbitrator who resolved the dispute.

As will be discussed in the following chapter, the Russian courts struggled with situations where a party to arbitration would refer her disputes to her own arbitral institute. Such institutes were able to appoint arbitrators who would find in favour of their owners. As award debtors could only point to the appointment of the arbitrators by an arbitral institute owned by the award creditor, and as the award debtors had agreed to refer their disputes to those arbitral institutes, the courts were unable to annul or refuse enforcement of such awards. This can be contrasted to the Dutch courts' ruling in *Yukos*, where Yukos succeeded in relying on similar institutional affiliation between Rosneft and the Russian judiciary to assert that the specific judge who annulled the arbitral award should be presumed to have been biased.

In chapter V, this thesis will argue that under the reform of Russian arbitration law, Russian arbitral institutes are subordinate to the Russian government. If the Russian government exerts pressure on a Russian arbitral institute in the same way that it was perceived to have exerted pressure on the Russian judiciary in *Yukos*, there is a risk of arbitral institutes appointing arbitrators who can be relied upon to decide cases in line with

government policy. If this happens, a court of enforcement will find itself in a similar position as did the Russian courts when confronting non-independent arbitral institutes. In such a situation, a court of enforcement would not benefit from the procedural flexibility that the Dutch courts benefitted from in enforcing an annulled award under article V(1)(e), but would be bound by the rigid allocation of the burden of proof for the article V defences. Unless an award debtor somehow manages to find direct evidence of arbitrator bias, the court would have no choice but to enforce the award if it is to comply with its obligations under the New York Convention.

ii. Yukos Before the English Courts

The English proceedings did not get as far as the Dutch proceedings, and the English courts did not have an opportunity to rule on whether the Russian annulment decisions were in fact biased. However, both the English Court of Appeal and High Court did discuss the issue of the enforceability of annulled awards under English law. [289]

On appeal from a 2011 High Court decision,[290] the Court of Appeal considered the appropriate approach to a foreign annulment decision. It concluded that:

> 'the right to examine the question of substantial justice in a foreign jurisdiction must, we think, be a fortiori the position when, as here, a party to litigation in England is asking the English court to recognize a decision of a foreign court. For Rosneft is asking the English court to recognize the annulment decisions in Russia as removing the basis of Yukos's claim to be entitled to enforce the arbitration awards'.[291]

This line of reasoning was further developed in a 2014 High Court decision. Citing van den Berg, Rosneft's counsel advanced an argument based on the objective territorialist view of arbitration that an annulled award ceases to exist and therefore *ex nihilo nihil fit.*[292] The High Court rejected this argument, saying that an annulled arbitral award does not

[289] *Yukos v Rosneft,* [2014] EWHC 2188 (Comm)

[290] *Yukos v Rosneft,* [2011] EWHC 1461 (Comm)

[291] *Yukos v* Rosneft, [2012] EWCA Civ 855 [125]

[292] ibid [19]

simply cease to exist, and further stating that 'the answer to the question is not provided by a theory of legal philosophy but by a test'.[293]

Despite rejecting the relevance of theory, the High Court went on to adopt a test that falls squarely within the subjective territorialist model of international arbitration. Citing *Dicey, Morris and Collins*,[294] the High Court stated that 'where [an award] has been set aside in the court at the seat, an arbitral award should be enforced only if recognition of the order setting aside the award would be impeachable for fraud or as being contrary to natural justice, or otherwise contrary to public policy'.[295] Its conclusions mirror those of the Dutch Court of Appeal, which applied the judgment framework to the enforcement of annulled awards.

The High Court further referred to the Court of Appeal case of *Dallah v Pakistan*, in which Rix LJ considered 'the problem of an award perhaps improperly set aside in the courts of the country of origin'.[296] Rix LJ concluded that if the improper circumstances of the annulment decision could be established before the English courts, this would destroy the defence to enforcement under article V(1)(e) of the New York Convention. The High Court in *Yukos* considered that Rix LJ had been referring to the 'ordinary principles applying to the recognition of foreign judgments.'[297]

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[293] ibid [20]

[294] Lawrence Collins, Adrian Briggs, Andrew Dickson, Jonathan Harris et al, *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012)

[295] *Yukos* (n 148) [12]

[296] *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs of Government of Pakistan*, [2009] EWCA Civ 755 [91]

[297] *Yukos* (n 148) [16]

Like the Dutch courts, the English courts had occasion to revisit the issue of enforcing an annulled Russian award in the *Maximov* case. The High Court refused enforcement of the award, setting the relevant test as whether the annulment decisions were 'so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than bias'.[298]

[298] *Maximov v NMLK* [2017] EWHC 1911 (Comm) [53]

c. Summary

Those courts that have grappled with the issue of abuse by the courts at the seat have gravitated towards the judgment framework approach. The primary benefit of this approach is that it utilises the pre-existing framework for the recognition of foreign judgments, giving shape to the otherwise amorphous discretion to enforce annulled award under article V(1)(e) of the New York Convention.

Although it is only the Dutch, English, and U.S. courts that have had the opportunity to apply the judgment framework, its application by other courts has been advocated by both commentators[299] and judges.[300] Scherer sees the judgment framework as an 'emerging conceptual framework'[301] for the treatment of annulment decisions. It remains to be seen whether subjective territorialist or pluralist jurisdictions beyond the U.S., England and the Netherlands will adopt the judgment route when faced with an appropriate case, but the predominant academic view is that they should.

The judgment framework offers a set of rules for courts of enforcement to apply in protecting against abusive or otherwise improper annulment decisions by the courts at the

[299] Lee advocates its application in Korea (n 173); Barry advocates its application in Australia (n 164); Thurén advocates its use in Sweden in Martin Persson Thurén, 'A Study on the Enforcement of Annulled Foreign Arbitral Awards under the 1968 New York Convention from a Swedish Perspective', (Master's Thesis, Uppsala Universitet 2017) <http://www.diva-portal.org/smash/get/diva2:1173689/FULLTEXT01.pdf> accessed 21/04/20

[300] Chief Justice Allsop advocates its application in Australia in James Allsop, 'The Authority of the Arbitrator' (Clayton Utz University of Sydney International Arbitration Lecture, Sydney, 20 October 2013) <https://www.claytonutz.com/internal/archive/ialecture/content/previous/2013/speech_2013> accessed 21/04/20

[301] Though note that Scherer does not approve of the application of the judgment framework to any decisions but annulment decisions by the courts at the seat. Maxi Scherer, 'The Effect of Foreign National Court Judgments Relating to the Arbitral Award: An Emerging Conceptual Framework?' in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity* (Kluwer Law International 2017) 704-5

seat. It is notable that those cases in which annulled awards have been enforced are all widely regarded as cases involving biased, protectionist decisions by the courts at the seat. Where an award creditor can show that their award has been annulled in such circumstances, courts applying the judgment framework will enforce the award, rendering the abusive annulment decision ineffective.

However, the evidential burden upon award creditors seeking to enforce an annulled award is not to be underestimated. Judges are reluctant to submit their foreign peers to criticism. The *Termorio* case exemplifies this reluctance, with the Court of Appeals overlooking glaring deficiencies in the Columbian Consejo de Estado's annulment decision on the basis that it would not look behind the foreign decision. One commentator argues that U.S. and English courts will 'almost invariably recognise a foreign set-aside judgment'.[302]

The high evidential bar for the enforcement of an award means that courts of enforcement will only protect against the most glaring abuses by the legal system at the seat. However, apart from adopting the extreme suggestion by Smit to presumptively disregard any annulment rendered in the home court of one of the parties and at that party's request,[303] the judgment framework offers the most sophisticated and least disruptive means of combatting abuse.

[302] Childs (n 263) 278

[303] Cited in Silberman and Scherer (n 258) 322

4. Summary

Due to the respective roles of the courts of enforcement and the courts at the seat, the ability of courts of enforcement to address abuse by the courts at the seat has focused on the enforcement of annulled awards.

Apart from those courts that subscribe to the more extreme objective territorialist and autonomist models of international arbitration, courts have shown they are willing to address the issue of abuse by the seat. In the caselaw on the enforcement of annulled awards, subjective territorialist and pluralist courts have acknowledged the ability of courts to enforce annulled awards.

Those courts that have addressed the question of abusive annulment decisions have gravitated toward the judgment framework approach. The above U.S., Dutch, and English cases show how both common and civil law judges have adopted the judgment framework when considering whether to recognise the annulment decision or to enforce the annulled awards. There is further support for the adoption of the judgment framework in other countries, such as Korea, Australia, and Sweden.

The permissive language of article V(1)(e) of the New York Convention, which was discussed in the previous chapter, is wide enough to accommodate the judgment framework approach to the annulment of annulled awards. According to Paulsson 'a State cannot breach its conventional obligations by granting enforcement'.[304] The enforcement of an annulled award therefore cannot amount to a breach of the Convention. Moreover, the pro-

[304] Cited in Petrochilos (n 213) 881

enforcement bias of the Convention is more than sufficient to justify the enforcement of annulled awards in appropriate circumstances; in fact, some commentators argue that this exception is too narrow to fully give effect to the spirit of the Convention.[305]

Though courts of enforcement thus enforce annulled awards with the winds of the Convention at their backs, they nevertheless do so very rarely. Courts demand cogent evidence of abuse or impropriety by the courts at the seat, and are generally reluctant to accept such grave allegations against foreign judges without direct evidence. This is despite the fact that, as accepted by the Dutch Court of Appeal in *Yukos*, bias and dependence take place behind closed doors and are difficult to prove.

An important feature of a court of enforcement's power to enforce an annulled award under the discretion afforded by article V(1)(e) is that the court is free to determine the applicable procedure: this is because the New York Convention is silent on the issue of when a court may enforce an annulled award. Thus the Dutch courts were entitled to take account of the circumstances in which a number of Russian awards were annulled in *Yukos*, as well as the fact that it would be near impossible for the award creditor to prove the bias of the relevant judge. This is to be contrasted with the rigid allocation of the burden of proof when an award debtor raises an article V defence to resist the enforcement of an award.

As will be discussed in chapter V, the Russian reform has subordinated Russian arbitral institutes to the Russian government. This raises the risk of political pressure being exerted not on Russian courts but on Russian arbitral institutes. As will be discussed in

[305] Radicati di Bronzolo (n 181)

chapter IV, the defences listed under article V of the New York Convention are insufficient to combat the problems posed by biased institutes. In chapter VII, this thesis will revisit the conclusions made in this chapter to conclude that courts of enforcement cannot address the issue of politically dependent arbitral institutes to the same extent that they have addressed politically dependent judiciaries under the Convention.

Chapter IV - Russian International Arbitration Prior to the Reform

1. Introduction

The previous two chapters set out the international regime for arbitration, describing the legal framework under the New York Convention and how courts of enforcement have considered abuse by the courts of the seat within that framework. This chapter and the chapter that follows it address the recent reform of the Russian regime for international arbitration. This chapter discusses the issues that had occurred prior to the reform that acted as stimuli for the reform.

In particular, this chapter will look at the problems caused by non-independent arbitral institutes in Russia, and the Russian courts' campaign to restrict arbitrability under Russian law through judge-made rules. Not only does this chapter provide necessary context for understanding the following chapter's discussion of the reform, but the discussion of non-independent arbitral institutes will be relevant to the discussion of potential abuse by the legal system at the seat under the post-reform Russian arbitral regime.

This chapter begins with a brief description of the Russian legal system and court structure, as a basic understanding of these will be necessary going forward. The chapter will then go on to describe the pre-reform legislation for Russian arbitration, upon which the developments of Russian arbitration law prior to the reform are based. Finally, this chapter will address the two above-mentioned stimuli for the Russian reform – the struggle against so-called 'pocket arbitral institutes', and the Russian courts' restriction of arbitrability.

2. Overview of the Russian Legal System

Russia has a federal legal system. It is composed of 46 provinces, 22 republics, 9 regions, 4 autonomous regions, 3 cities with federal status, and one autonomous province. Together these make up the federal subjects of Russia. Each federal subject has its own political head, its own parliament, and its own constitution.

Within the federal legal system, the most authoritative piece of legislation is the Constitution of the Russian Federation, which was enacted in 1993. The Constitution has supreme juridical power and can be invoked directly without the need for implementing legislation.[306] The Constitutional Court provides constitutional review to ensure the conformity of federal laws, as well as other forms of legislation, with the Constitution. The Constitutional Court was established in 1990 and currently operates on the basis of the 1994 Law on the Constitutional Court. Any application to the Constitutional Court will first be subject to a preliminary review by one or more judges of the Constitutional Court, who will decide whether to admit the application for full consideration or to dismiss it.[307] Resolutions of the Constitutional Court have binding effect, and both public authorities and other courts must follow them.[308]

Article 15(4) of the Constitution provides that where Russia is a party to an international treaty, the provisions of that treaty are incorporated into Russia's legal system. The same is true for rules of customary international law. Article 15(4) further provides

[306] Constitution of the Russian Federation, article 15(1)

[307] Law on the Constitutional Court, articles 41-43

[308] ibid article 6

that where there is a conflict between a piece of national legislation and a treaty provision, the latter prevails. However, the Russian legislature is currently considering amendments to the Constitution that would give Russian law precedence over international law.

Russian federal laws are the next highest source of law. Federal laws are passed by the State Duma, which is the lower house in the Russian Federal Assembly. Federal laws have supremacy over other forms of Russian legislation, such as those laws passed by the parliaments of the federal subjects. This thesis does not concern any laws of lower standing than federal laws.

a. Court Structure

Apart from the Constitutional Court, which operates on its own unique terms, Russia has two parallel court systems - the Courts of General Jurisdiction, and the Arbitrazh Courts. The term 'Arbitrazh Court' has been a source of confusion for non-Russian lawyers as 'arbitrazh' by itself means arbitration. Arbitrazh Courts are the State courts that hear matters relating to economic disputes. The term dates back to the USSR when there was a planned economy. Due to the central coordination of the economy, there were no private economic disputes for courts to handle. Where there was conflict between public bodies in carrying out the government's economic plans, this would be mediated by the State Arbitrazh, a quasi-judicial government body. In order to prevent confusion, these courts will hereon be referred to as Commercial Courts.

The Courts of General Jurisdiction and the Commercial Courts each operate according to their own procedural code: the former operate on the basis of the Code of Civil Procedure and the latter operate on the basis of the Code of Commercial Procedure.

Both court systems have hierarchical structures. In order of ascending supremacy for the Courts of General Jurisdiction are: the district courts, the courts of the federal subjects, and the Supreme Court. Similarly, in order of ascending supremacy for the Commercial Courts are: the courts of the federal subjects, the appellate courts, the federal courts, and the Supreme Court. Prior to 6 August 2014 there had been a separate Supreme Commercial Court; however, it was collapsed into the Supreme Court to avoid having separate Supreme Courts for the Courts of General Jurisdiction and the Commercial Courts. Cases relating to domestic arbitral awards are heard before both the Courts of General Jurisdiction and

Commercial Courts; however, the Commercial Courts have had exclusive jurisdiction over cases relating to international arbitration since 2002.

Within both the Commercial and General Jurisdiction systems, a case may be heard at up to four instances - the first instance, the appellate instance, the cassation instance, and the instance of supervisory appeal. The first instance and appellate instance deal with the merits of the case. Cassation appeals relate solely to questions of law - the outcome of a cassation appeal is either to uphold, reverse, or amend a lower court decision, or otherwise remit the case back for retrial. Supervisory appeal is conducted by the Supreme Court.

Supervisory appeal is a two-stage process. First, a judge from the Supreme Court college will consider whether there are grounds for review. If there are, the case will be admitted before the Presidium of the Supreme Court for consideration. Where the case is refused admission before the Presidium, the refusal can be challenged before the chairman or deputy chairman of the Supreme Court.

b. Court Independence

The Russian judiciary is not perceived as independent from government. A 2009 survey by the Centre of Political Technology found that respondents perceived corruption and government subordination to be an issue in the lower courts, but that such decisions are often reversed on appeal.[309] However, the same survey found that where government interests are involved, the respondents thought that appellate courts both support decisions that are in favour of the government party and overturn decisions that do not.

The situation does not seem to have improved since 2009. Commercial parties with operations in Russia remain concerned with judicial corruption,[310] and the lack of independence of the judiciary from government.[311] Surveys of the Russian population itself have shown that less than 50% of Russians believe in the independence of their courts, while approximately 30% of Russians are concerned by the ability of the authorities to pressure the judiciary.[312] In general, the Russian courts are perceived as protecting the interests of Russian corporations and the Russian government.[313]

[309] *Судебная система. Состояние и проблемы* (Центр Политических Технологий 2009)

[259] 'Evaluation of Russia's business environment for 2017' (FleishmanHillard Vanguard, 05 February 2018) <https://fhv.ru/2018/02/evaluation-russias-business-environment-2017/?lang=en> accessed 21/02/20

[311] 'Russia Corruption Report' (GAN Integrity, 2017) <https://www.ganintegrity.com/portal/country-profiles/russia/> accessed 21/02/20

[312] 'Оценка деятельности судов в РФ' (VCIOM 2007) <https://wciom.ru/database/open_projects/otsenka_deyatelnosti_sudov_v_rossii/> accessed 21/02/20

[313] 'Country Reports on Human Rights Practices for 2015' (United States Department of State Bureau of Democracy, Human Rights and Labor 2016) <//2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252893> accessed 22/05/20

The independence of the Russian Supreme Court has come under greater scrutiny since the merger of the Supreme Commercial Court and the Supreme Court. The most recent Economic Survey by the OECD reports the concerns of major stakeholders about the independence of the unified Supreme Court.[314]

In the context of arbitration, the Russian courts have recently refused to enforce an arbitral award made against a State-owned party on the basis that to do so would jeopardise the functioning of a government power station.[315] The court found that enforcing the award would affect the rights of third parties due to the knock-on effect on those that rely on the power station. The courts also found eight other bases for refusing to enforce the award, most of which amounted to a review of the merits of the arbitral award. Where the Russian courts are quick to absolve government parties of their international commercial obligations, the international business community is justified in questioning their impartiality.

Another recent application of the public policy defence prevented the enforcement of an award against a State-owned company for the transfer of shares in another State-owned company to a foreign petitioner.[316] The court reasoned that doing so would affect the State's budget. Inasmuch as an award against a State-owned company will always affect the State's budget by depleting it up to the amount owed under the award, this reasoning severely undermines the ability of award creditors to enforce judgments where the State

[314] *Economic Surveys: Russian Federation Overview* (OECD Publishing 2014) 18

[315] Определение арбитражного суда Москвы от 16 марта 2017 по делу А40-230545/16-29-2261 reported in (2019) 11 *Arbitration.ru Journal* 88

[316] Определение арбитражного суда Москвы от 16 января 2019 по делу А40-117331/18 reported in Stephan W Schill (ed), *Yearbook of Commercial Arbitration 2019* (Kluwer Law International 2019) 664-6

has a financial interest in the award debtor. The courts have shown that they are willing to immunise State-owned companies from the enforcement of arbitral awards.

3. Pre-Reform Russian Laws on Arbitration

The previous regime for arbitration in Russia was primarily governed by The Law on Arbitral Tribunals in the Russian Federation 2002 and The Law on International Commercial Arbitration 1993. The former law contained the regime for domestic arbitration in Russia; the latter contained the regime for international arbitration in Russia. The Law on International Commercial Arbitration has been amended by the reform, while the Law on Arbitral Tribunals has been replaced in its entirety. Besides these Laws, a number of provisions relevant to arbitration can be found in the Code of Commercial Procedure and the Civil Code.

The Russian Law on International Commercial Arbitration was closely modelled on the UNCITRAL Model Law. The UNCITRAL Model Law was created in the wake of a 1978 consultation between members of the ICC's Commission on International Arbitration, the Asian-African Legal Consultative Committee, and the International Council for Commercial Arbitration. One of its primary objectives was to provide a law on international arbitration for adoption by States that lacked laws well-suited to modern international arbitration. The Model Law was drafted to give a high degree of party autonomy, containing few mandatory rules, and allowing the parties to determine most of the rules applicable to the arbitral proceedings.

The Russian Law on International Commercial Arbitration contains some deviations from the Model Law. One such change is in the definition of 'international' for the purpose of the Russia law's scope. Article 1(3) of the Model Law determines the scope of international commercial arbitration as where:

a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States; or

b) one of the following places is situated outside the State in which the parties have their place of business:

i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;

ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c) the parties have expressly agreed that the subject-matter of the arbitration agreement related to more than one country.

Prior to the reform, the Russian Law on International Commercial Arbitration's scope in article 1(2) allowed parties to submit to international arbitration:

> disputes of a contractual or civil-law nature, which arise in the course of foreign trade or other international economic relations, and where either the commercial activity or one of the parties is located abroad [and] disputes between enterprises with foreign investment, international associations, and international organisations formed in the Russian Federation, disputes between the participants of these bodies, and disputes between these bodies and other subjects of the law of the Russian Federation.

Unlike the Model Law, the Russian Law on International Commercial Arbitration does not allow parties to agree on the international nature of their dispute. However, prior to the reform, it did widen the objective criteria of 'internationality' to include disputes

involving domestic enterprises in which there was foreign investment. The reform amended the scope of the Russian Law to no longer include such enterprises.

The majority of the Russian Law faithfully replicates the provisions of the Model Law. However, the Russian Law has not adopted the 2006 Amendments to the Model Law, which contain provisions on the availability of interim measures in international commercial arbitration.

a. The Pre-Existing Regime for Foreign-Seated International Arbitration

Though most provisions of the Law on International Commercial Arbitration only apply where Russia is the seat of arbitration, article 1(1) provides that articles 8, 9, 35, and 36 apply where an arbitration is seated abroad. Articles 8 and 9 relate to the enforcement of arbitration agreements; articles 35 and 36 relate to the enforcement of arbitral awards.

With respect to the enforcement of arbitration agreements, article 8(1) repeats the provisions of article II New York Convention. Article 8(1) states that where there is a valid arbitration agreement, and a party so requests, the court shall stay any domestic proceedings in relation to a dispute governed by the arbitration clause and refer the parties to arbitration. Article 8(1) continues by stating than the court may refuse to refer the parties to arbitration if it is satisfied that the agreement is null and void, inoperative, or incapable of being performed.

The Code of Commercial Procedure article 148 reinforces article 8(1) by stating that commercial courts shall stay proceedings with the same subject-matter as any disputes currently under consideration by an arbitral tribunal, or subject to a valid arbitration clause.[317] Similar provisions for the Courts of General Jurisdiction can be found in articles 220 and 222 of the Code of Civil Procedure.

With respect to the enforcement and recognition of foreign arbitral awards in Russia, the starting point is article 35 of the Law on International Commercial, which refers to

[317] The Supreme Commercial Court explained that referring the parties to arbitration is mandatory in clause 2 of Информационное письмо от 25/12/96 No.10 <https://rulaws.ru/vs_rf/Informatsionnoe-pismo-Prezidiuma-VAS-RF-ot-25.12.1996-N-10>/ accessed 23/04/20

article 241 of the Code of Commercial Procedure. Article 241 states that foreign arbitral awards 'are recognised and enforced where such recognition and enforcement is provided for by a treaty of the Russian Federation and by federal law'. When enforcing an arbitral award in Russia the treaty most likely to be relied upon is the New York Convention, and the relevant federal law is the Law on International Commercial Arbitration.

Article 242 of the Code of Commercial Procedure provides that an award creditor must submit the request for enforcement either to the court at the award debtor's place of residence or, if the debtor's place of residence is not known, to the court where the debtor's assets are located. [318]

The defences against enforcement of foreign arbitral awards in Russia are contained in article 36 of the Law on International Commercial Arbitration and in article 244 of the Code of Commercial Procedure. The defences set out in these two articles are identical to those under article V of the New York Convention. When considering an application for the recognition and enforcement of a foreign arbitral award, a Russian court should not review the merits of the case.[319]

[318] 'Place of residence' is further defined in article 54 of the Civil Code

[319] Code of Commercial Procedure, article 243(4)

b. The Pre-Existing Regime for Russian-Seated International Arbitration

Article 1(1) of the Law on International Commercial Arbitration states that the Law applies to arbitrations seated in Russia. Article 1 also addresses the issue of which types of dispute are arbitrable. Article 1(2) allows parties to submit to international arbitration all 'disputes of a contractual or civil-law nature'. Article 1(4) states that 'the Law does not affect the operation of other laws of the Russian Federation, by virtue of which certain disputes are not capable of settlement by arbitration or are only capable of settlement by arbitration on terms other than those contained in this Law'.

As the Law on International Commercial Arbitration is a federal law, only another federal law may affect its scope of operation. Under the pre-existing regime, the only provision of federal law to explicitly prohibit the arbitration of a particular class of dispute was the Law on Insolvency (Bankruptcy) article 33(3), which states bankruptcy issues may not be submitted to arbitration.

Articles 34 and 36 contain the same grounds for both annulling and refusing recognition and enforcement of an award. These grounds are identical to the defences under article V of the New York Convention. Though it would be strange for an award debtor to resist enforcement of a Russian award in a Russian court without attempting to set aside the award, both annulment and resistance are available as separate actions. This is reinforced by the separate provisions for annulling and resisting a Russian arbitral award in the Code of Commercial Procedure found in articles 233 and 239 respectively.

As with articles 34 and 36 of the International Commercial Arbitration Law, articles 233 and 239 of the Code of Commercial Procedure repeat the article V defences of the New York Convention. The initial draft of Code of Commercial Procedure had a differently worded public policy defence from that in the Law on International Commercial Arbitration and in the Code of Commercial Procedure. The Law spoke about a violation of public policy, whereas the Code of Commercial Procedure spoke about a violation of fundamental principles of Russian law. Both now refer to violations of public policy.

c. Summary

The Russian Law on International Commercial Arbitration is similar to the arbitration law of any other State that has adopted the UNCITRAL Model Law, or legislation based on the Model Law. However, the above description of Russian arbitration legislation prior to the reform is merely a roadmap of the black letter law of the Russian pre-reform regime for arbitration. Though helpful in navigating the developments of Russian arbitration discussed below, it is far from a full topography of Russian arbitration law prior to the reform.

In order to understand the stimuli for the Russian reform it is necessary to look in depth at two of the issues that had arisen under the pre-reform regime. The remainder of this chapter is devoted to analysing two such issues – the prevalence of pocket arbitral institutes in Russia, and the Russian judiciary's hostility toward arbitration as evidenced in the court-developed rules on arbitrability.

4. Pocket Arbitral Institutes

On 28 November 2017, Deputy Minister of Justice Mikhail Galperin delivered a speech at the 10th annual Arbitration Conference of ICC Russia. In his speech, Galperin mentioned four stimuli for the reform. Of these four stimuli, two of them relate to what had become known in Russia as 'pocket arbitral institutes' – institutes that were funded and owned by companies, and to which those companies would invariably refer their disputes.

He spoke about 'the administrators of the numerous "pocket" institutes, who would work for particular clients to guarantee them favourable [arbitral awards]' and 'arbitral institutes connected to major commercial organizations, [such as] banks, whose contractual counterparties would practically be forced to include arbitration agreements'.[320] Galperin drew attention to the fact that 'in such arbitral institutes there were, as a general rule, low arbitral costs due to the fact that the institutes were directly subsidized by one of the disputing parties, which would receive an arbitral award in its favour 100 per cent of the time'.[321]

Galperin's address is not an isolated reference to the existential threat posed to Russian arbitration by non-independent, pocket institutes. At a round table in December 2013, in which the initial steps of the Russian arbitration reform were discussed, Deputy Minister for Justice Elena Borisenko stated that 'arbitration is frequently used as a means

[320] Mikhail Galperin, 'Russia as a Place for Dispute Resolution' (Arbitration Conference of ICC Russia, Moscow, 28 November 2017) in *Вестник международного коммерческого арбитража* [2018](2) 158

[321] ibid 159

of fraud and theft of property'.[322] At the same round table, the Chief of the Supreme Commercial Court's Department of International Law and Cooperation simply stated that 'we are deeply disturbed by what lurks in this industry'.[323]

A notable feature of pre-reform arbitration in Russia was the curiously large number of arbitral institutes within the country. In 2014, Duma Committee on Procedural Legislation member Rafael Mardanshin, stated that there were over one thousand arbitral institutes in Russia, with possibly only one hundred to one hundred and fifty legitimate institutes.[324] The reason for these peculiar statistics was the lack of regulation for the establishment of arbitral institutes in Russia, which led to a number of large companies creating their own pocket arbitral institutes.[325]

Examples of the kinds of enterprises that had their own arbitral institutes were Gazprom, Lukoil, and Sberbank – major market players within the oil and gas and banking sectors. Such important companies could often deal on their own terms and would impose arbitration agreements providing for arbitration within their own institutes.[326] Where these companies had their own arbitral institutes to which they referred disputes, there was a risk that they enjoyed a home advantage.

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[322] 'Третейские суды хотят избавить от «плавающего и пугающего»' (Pravo.ru, 20 December 2013) <https://pravo.ru/review/view/99876/> accessed 13/02/19

[323] ibid

[324] 'Для третсйцких судов главное репутация, судает Марданшин' (Er.ru, 13 November 2014) <http://er.ru/news/124763/> accessed on 14/06/2016

[325] D N Slabkaya and D E Tupichkin, 'Проблема «карманных» третейских судов в российской федерации' [2015](2) *Современные проблемы науки и образования* <https://www.science-education.ru/ru/article/view?id=22715> accessed 23/04/20

[326] ibid

Even smaller companies made use of pocket institutes. Due to the potential difficulty of discovering the dependency of arbitral institutes within complex corporate structures, it was not impossible for a seemingly independent arbitral institute to in fact be dependent on one of the parties to an arbitration. The prevalence of pocket institutes in Russia did much to blacken the name of arbitration generally.

The Supreme Commercial Court waged a campaign against pocket arbitral institutes. Though the Supreme Commercial Court caselaw goes back further,[327] the situation prior to the reform can be best explained by analysing three cases - the Lukoil, Sberbank, and Gazprom cases. These cases exemplify the difficulties that the Russian courts faced in applying the grounds for annulment under the contemporary Russian arbitration legislation to awards issued within pocket institute arbitrations. It should be noted that the cases involving pocket arbitral institutes are all domestic arbitration cases. However, the grounds for annulling or refusing the enforcement of an award are identical in domestic and international cases under the Russian law; moreover, they are identical to the grounds for resisting enforcement found in article V of the New York Convention.

[327] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 25 июля 2006 г. N 2718/06; see also Mikhail Galperin, 'Проблема «карманных» третейских судов: возможные пути решения' (Garant.ru, 01 October 2007) < http://www.garant.ru/article/6674/> accessed 22/05/20

a. The Lukoil Case

The first case involved the oil company Lukoil. There had been an arbitration agreement in a contract for the delivery of goods between Lukoil-Energoseti and the company MK. When MK failed to perform its obligations under the contract, Lukoil-Energoseti initiated arbitration. The arbitration took place within an arbitral institute that was created, funded, and run by Lukoil, the parent company of Lukoil-Energoseti.

Lukoil-Energoseti was successful in the arbitration and received an arbitral award in its favour. When MK refused to perform its obligations under the arbitral award, Lukoil-Energoseti attempted to enforce the award through the Russian courts. Both the first instance[328] and the cassation[329] courts found in favour of Lukoil-Energoseti and ordered that the award be enforced.

However, in its decision of 22 May 2012 the Supreme Commercial Court overturned the decisions of the lower courts.[330] The Supreme Commercial Court drew attention to the following facts: Lukoil-Energoseti was a subsidiary of Lukoil; the arbitral institute involved had been created by Lukoil; the arbitral institute was financially dependent on Lukoil; the parties could only select arbitrators from a list provided by the arbitral institute; and under the institute's rules, the deputy president of the arbitral institute was president of the arbitral tribunal.

[328] Определение Арбитражного суда Пермского края от 26 мая 2011 N А50-5130/2011

[329] Постановление Федерального арбитражного суда Уральского округа от 20 сентября 2011 N А50-5130/2011

[330] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 22 мая 2012 N 16541/11

The Court came to the conclusion that where Lukoil was the parent company of both one of the parties and the arbitral institute itself, this infringed the requirements of impartiality and independence, which were enshrined in article 8(1) of The Law on Arbitral Tribunals. Article 8(1) provides that 'arbitrators may be selected from those persons capable of impartially resolving a dispute, who are neither directly nor indirectly dependent on either party, and who have agreed to undertaking the duties of an arbitrator'.

The Supreme Commercial Court found that where the requirements of impartiality and independence under article 8(1) had not been fulfilled, enforcing the award would violate fundamental principles of Russian law. The Supreme Commercial Court thus refused enforcement under the public policy defence found in article 239(4)(2) of the Code of Commercial Procedure.[331]

The decision was problematic for its application of article 8(1), which governs the selection of *arbitrators*, to an *arbitral institute*. The Supreme Commercial Court used the open-ended public policy defence as a means of extending the rule under article 8(1) of The Law on Arbitral Tribunals to arbitral institutes. The Supreme Commercial Court thus extended the article 8(1) requirement of independence from the substantive decision-makers in an arbitration to the administrative decision-makers without a legislative basis for doing so.

If it had not based its refusal to enforce the award on the arbitral institute's lack of independence, the only other defences the Court might have relied upon were those under

[331] This is the equivalent of the public policy defence found in the Law on International Commercial Arbitration, and under article V(2)(b) of the New York Convention

articles 239(3)(3) and (5) that the award debtor had not been given the opportunity to present its case or that the tribunal had been improperly composed. However, those defences, which are modelled on the New York Convention article V(1)(b) and (d) defences, would have required the award debtor to establish its defence on the facts.

In order to establish a defence on the basis that the award debtor had not been given the opportunity to present its case, it would have been necessary to prove that the arbitrators involved in the specific case had been biased in favour of the award creditor. The only proof that the award debtor had of the arbitrators' bias was that they had been appointed by a pocket institute. This would not have been sufficient to prove that the arbitrators had been biased.

Furthermore, it would have been difficult to argue that the tribunal had been improperly constituted. By choosing Lukoil's arbitral institute in their agreement, the parties accepted the institute's rules for the composition of the tribunal. It was not open for the award debtor to argue that the tribunal had been improperly constituted on the basis that the tribunal had been composed in accordance with those rules.

By using the open-ended public policy defence to impose a duty of independence upon arbitral institutes, the Supreme Commercial Court essentially both relieved the award debtor of the burden of proving the bias of the specific arbitrators involved, and allowed the award debtor to renege on its chosen arbitral institute. The subsequent Russian Commercial Court caselaw adopted the reasoning of the Supreme Commercial Court,

establishing a firm prohibition on the administration of disputes by arbitral institutes affiliated with one of the parties.[332]

[332] E.g. Определение об отказе в передаче дела в Президиум Высшего Арбитражного Суда Российской Федерации от 19 ноября 2012 N ВАС-14610/12, Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 29 октября 2013 N 8445/13, Постановление Федерального арбитражного суда Московского округа от 29 апреля 2013 N Ф05-3412/13

b. The Sberbank Case

The Sberbank case involved a credit agreement between Sberbank, one of Russia's major banks, and a company called Sofid. The credit agreement contained an arbitration agreement providing for arbitration at the Centre for Arbitration. The Centre for Arbitration was an autonomous non-commercial organisation, of which Sberbank was a founder. Sberbank succeeded in the arbitration and received an arbitral award in its favour. When Sofid refused to perform its obligations under the award, Sberbank applied for enforcement before the Russian courts.

Before the court of first instance Sofid resisted enforcement on the basis that Sberbank had coerced Sofid into concluding the arbitration agreement. [333] Sofid failed to prove coercion and the court ruled in favour of Sberbank. The decision was upheld at second instance.[334] Sofid appealed again, this time to the Supreme Commercial Court.[335]

Before the Supreme Commercial Court, Sofid raised a new argument. Sofid argued that the fundamental principle of equality of rights had been breached as the arbitration had taken place within the Centre for Arbitration, of which Sberbank was a founder. The Supreme Court noted that as a founder of the Centre, Sberbank had some supervisory control over the Centre's activities: it had voting rights in choosing the governing council for the Centre; the governing council in turn chose the administration for the Centre; the

[333] Определение Арбитражного суда Санкт-Петербурга и Ленинградской области от 31 октября 2012 N A56-48511/2012

[334] Постановление Федерального арбитражного суда Северо-Западного округа от 10 декабря 2012 N A56-48511/2012

[335] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 16 июля 2013 N ВАС-1567/13

administration had the power, *inter alia*, to amend the Centre's arbitration rules and list of arbitrators, and to choose the president and deputy presidents of the Centre. The Supreme Commercial Court thus found that Sberbank was able, albeit very indirectly, to influence the rules that would be applied to an arbitration at the Centre, and to amend the list of arbitrators allowed to hear disputes at the Centre.

In its decision, the Supreme Commercial Court eschewed reliance on article 8(1) of The Law on Arbitral Tribunals, instead relying on the ECtHR decision of *Hauschildt v Denmark*.[336] *Hauschildt* states that under ECHR article 6, *judges* are subject to both objective and subjective standards of impartiality. On the basis of the ECtHR decision, the Supreme Court imposed the requirement of both objective and subjective impartiality on arbitrators.

In light of the supervisory control that Sberbank had over the Centre, the Court found that the requirement of objective impartiality had been violated. The Court overturned the decisions of the lower courts, relying yet again on the public policy defence to refuse enforcement. The interchangeable reliance on article 8(1) of The Law on Arbitral Tribunals and ECtHR caselaw is illustrative of the Supreme Commercial Court's attempts to prohibit pocket institute arbitration despite both the lack of a legislative foothold for doing so, and the failure of award debtors to prove arbitrator bias under a Russian article V(1) equivalent defence.

The court failed to mention that the ECtHR had previously found that where parties are aware of an arbitrator's lack of independence, but do not challenge the arbitrator in the

[336] *Hauschildt v Denmark*, No. 10486/83, ECHR 1990

course of the arbitration, they may waive their right to challenge the award regardless of article 6.[337] In this case, the award debtor should have been aware of the links between Sberbank and the Centre. Where parties can waive recourse against dependant arbitrators, it stands to reason that the award debtor should have been held to have waived any objection based on the links between Sberbank and the arbitral institute.

Furthermore in *Nordström v Amsterdam,*[338] the ECtHR stated that it was not a violation of article 6 for Dutch law to refuse the annulment of an award where an arbitrator only appeared to lack impartiality and independence – i.e. article 6 does not impose the standard of objective impartiality on arbitrators. Where the ECtHR refused to impose the standard of objective impartiality to an arbitrator, it was incongruous for the Supreme Commercial Court to rely on ECtHR caselaw to impose that obligation on arbitral institutes. Where the arbitration agreement provided for an arbitral institute affiliated with one party and the award debtor had not challenged the arbitrators during proceedings, neither The Law on Arbitral Tribunals article 8(1) nor ECHR article 6 constituted a legitimate basis for the application of the public policy defence against the enforcement of the award.

Practitioners were divided with regard to the Supreme Commercial Court's decision. Vorobyov believed that the Supreme Commercial Court's decision was necessary given that Russian law provided no means of reining in the practice of pocket arbitral institutes. On the other hand, Ulezko took the position that the courts must consider the impartiality of the arbitrators themselves on a case-by-case basis.[339]

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[337] *Suovaniemi v Finland*, No. 31737/96, ECHR 1999

[338] *Nordström-Janzon and Nordström-Lehtinen v Netherlands*, No. 28101/95, ECHR 1996

[339] 'ВАС напомнил, что никто не может быть судей в собственном деле' (Pravo.ru, 16 July 2013) <https://pravo.ru/review/view/86830/> accessed 24/02/20

In 2014, Sberbank challenged the Supreme Commercial Court's interpretation of the relevant provisions of Russian law before the Constitutional Court.[340] The Constitutional Court found that the principles of impartiality and independence were fundamental to arbitration, but stressed that these principles must be considered in the particular context of arbitration as private dispute resolution. Where the parties' arbitration agreement contemplated arbitration governed by a particular institute's rules, they should be bound by that agreement. It was not for the courts to rewrite the parties' agreement by imposing the same standards of objective impartiality and independence as would apply in litigation.

The Constitutional Court ruled against the Supreme Commercial Court's interpretation of The Law on Arbitral Tribunals. The Constitutional Court pointed out that article 8(1) prohibited certain persons from acting as an arbitrator in a dispute where they were unable to act impartially and independently. The Supreme Commercial Court had applied article 8(1) to *arbitral institutes*, but the Constitutional Court emphasised that it was only applicable to *arbitrators*.

The Constitutional Court failed to find a violation of article 8(1) in the present case as Sberbank's powers as a founder of the Centre for Arbitration were limited to influencing the administrative decision-making for the institute, and not decisions on the merits of the dispute. Summarizing its legal position, the Constitutional Court stated that '*in and of itself* [the law in force]… provides no basis for the prohibition against entrusting arbitral institutes, formed before an NCO, with civil law disputes where one of the parties is a founder of the given NCO.'[341]

[340] Постановление Конституционного Суда Российской Федерации от 18 ноября 2014 <https://rg.ru/2014/11/28/postanovlenie-dok.html> accessed 23/04/20

[341] ibid pt 3 (emphasis my own)

The Constitutional Court did not prohibit lower courts from taking into account the relationship between a party and an arbitral institute when considering the possibility that the tribunal had been biased. However, it rejected the Supreme Commercial Court's previous legal position that such affiliation was in and of itself grounds for annulling or refusing the enforcement of an arbitral award.

c. The Gazprom Case

The Gazprom case started prior to the Constitutional Court decision and finished after it. It concerned a contract between Gazprom East Investments and Geotrest which contained an arbitration clause. The clause provided for arbitration at the Gazprom Arbitral Institute. The institute was financed and controlled by Gazprom, the parent company of Gazprom East Investments. A dispute arose between the parties and Geotrest submitted it to arbitration. Geotrest was successful in the arbitration and received an award in its favour. When Gazprom East Investments refused to voluntarily perform its obligations under the award, Geotrest applied to the Russian courts for enforcement.

The court of first instance, which made its decision prior to the ruling of the Constitutional Court in the Sberbank case, refused to enforce the award.[342] In its decision, the court pointed out that Gazprom financed the Gazprom Arbitral Institute; and that the head of Gazprom's legal department was also the president of the Arbitral Institute's presidium, and was therefore able to make orders concerning the payment of arbitrators' fees. The other members of the presidium were the president of the Arbitral Institute, and the president's three deputies. The president of the Arbitral Institute was appointed by the president of Gazprom; and the president of the Arbitral Institute chose his deputies.

There were thus strong institutional links between the management of Gazprom and the management of the arbitral institute. Where Gazprom was the parent company of one of the disputing parties, the court found this to violate the Supreme Commercial Court's

[342] Постановление арбитражного суда Томской области от 07 мая 2014 N А67-1587/2014

impartiality requirements. This finding was upheld on appeal by the Federal Court of Western Siberia.[343]

The case was appealed to the unified Supreme Court in February 2015.[344] By this time, the Constitutional Court had rendered its decision, rejecting the Supreme Commercial Court's caselaw on institutional impartiality. Referring to the Constitutional Court decision, the Supreme Court stated that the relevant questions were whether the parties willingly chose to submit their disputes to the Gazprom Arbitral Institute, and whether the arbitral tribunal had been impartial. On the latter point, the Court went into detail, stating:

> The guarantee of an arbitral tribunal's impartiality in a particular case is given by ensuring the impartiality of the arbitrators composing the tribunal. Impartiality is to be presumed where not proven otherwise and is achieved where the tribunal is equally bound to both parties, where each party may choose his or her own arbitrator from the list of arbitrators, or where the parties may jointly appoint a single arbitrator whom they both trust.

The difference between the Commercial Court rulings before and after the Constitutional Court decision is stark. Prior to the Constitutional Court ruling, both court decisions in the Gazprom case refused the enforcement of an award on the basis that the award debtor (Gazprom) had been affiliated with the administrating institute This can be contrasted with the Lukoil and Sberbank cases, in which it was the award creditor that had

[343] Постановление Федерального арбитражного суд Западно-Сибирского округа от 10 июля 2014 N А67-1587/2014

[344] Определение Верховного Суда Российской Федерации от 24 февраля 2015 по делу N 304-ЭС14-495

been affiliated with the relevant arbitral institute. Where a party has won on their own territory, as in the Lukoil and Sberbank cases, then there may be a justifiable suspicion that they benefitted from some kind of home advantage; however, where a party arbitrates within their own arbitral institute and loses, they should not be entitled to assert their own affiliation with the arbitral institute so as to resist enforcement of the award. The first instance and the appeal courts in the Gazprom case created a Kafkaesque situation where the award creditor was refused its rights under the award because the award debtor may have had a home advantage by arbitrating in its own arbitral institute.

Though it is technically possible that Gazprom had benefitted from a home advantage despite losing the arbitration, for example only being ordered to pay a percentage of the amount that should have been ordered, this is not an argument that should be raised by Gazprom itself in resisting the enforcement of the award. Finding that the award debtor has potentially influenced the tribunal, and then allowing the award debtor to rely on this as a defence to enforcement exemplifies the dogmatic approach of the Commercial Courts in their campaign against pocket arbitral institutes.

The Supreme Court's decision, which came after the Constitutional Court's ruling, signalled the end of the judicial campaign against pocket institutes. The Supreme Court overturned the lower court decisions and enforced the award against Gazprom East Investments. Though the Constitutional Court's judgment undoubtedly relaxed the law on impartiality, the Supreme Court's judgment made it clear that Constitutional Court had merely refocused the discussion onto the tribunal's impartiality and independence, and not that of the institute.

Neither the Constitutional Court nor the Supreme Court precluded taking account of the relationship between a party and an institute when considering the impartiality and independence of the arbitrators. They simply precluded award debtors from basing a defence to enforcement primarily on such a relationship. This position conformed to the black letter law of Russia at the time: article 8(1) of The Law on Arbitral Tribunals only required the impartiality and independence of arbitrators, and not arbitral institutes. Academic analysis of the black letter law at the time supported the Constitutional Court's interpretation of the Law on Arbitration.[345]

The Constitutional and Supreme Courts laboured the point that arbitration depends on the parties' free choice in choosing both the institute and the arbitrators. Where a party's ability to exercise either of these fundamental freedoms has been compromised, an ensuing arbitral award will be defective. In assessing whether the parties have in fact had such freedom, it is necessary to consider the choice of institute and the choice of arbitrator in sequence, as the choice of institute may affect the ability to freely choose one's arbitrator. In choosing to submit their dispute to an arbitral institute, the parties contract into the rules of the institute, including any rules providing for a compulsory list of arbitrators.

[345] See e.g O Y Skvortsov, *Комментарий к Федеральному закону 'О третейских судах в Российской Федерации'* (М.: Омега-Л 2003) 110; O Y Skvortsov, 'Комментарий к информационному письму Президиума ВАС РФ от 22 декабря 2005 г. No. 96', in L A Novoselova and M A Rozhkova, *Наиболее актуальные вопросы предпринимательской деятельности. Комментарий судебной практики ВАС РФ* (Гарант 2009); S A Kurochkin, *Постатейный научно-практический комментарий к Федеральному закону «О третейских судах в Российской Федерации»* (Третейский суд 2003) 14; E V Bruntseva, *Международный коммерческий арбитраж* (СПб 2001) 150; Slabkaya and Tupichkin (n 325); A A Korchin, 'Борьба с «карманными» третейскими судами и вопросы независимости и беспристрастности арбитров в российской судебной практике' [2013](1) *Вестник международного коммерческого арбитража* 42, though Korchin argues that arbitrators should be subject to more demanding conflict of interest rules than national judges, thus making it easier to raise a defence for arbitrator bias.

One of the arguments made by award debtors in the Russian caselaw was that companies with effective monopoly in their industries were able to force disputes into their affiliated institutes. Therefore, the weaker party had not freely chosen the institute and was subsequently restricted by that institute's exclusive list of arbitrators or appointment mechanisms. This is effectively an argument that there cannot be a free choice of institute where there is no real market for the service or goods in question, and where the only potential contractual counterparty demands the inclusion of an agreement providing for arbitration in its own institute.[346]

Though clearly this is a serious issue, it is a problem that should be assessed through competition law or the law on duress. Ideally this situation would be addressed by preventing the kinds of monopolies that might allow for such strong-arming. Otherwise the weaker party must be able to make out a contractual defence against the contract. To solve this by changing the standard of impartiality applicable in arbitration not only fails to address the root cause, but threatens to warp arbitration law.

It might be argued that adopting the above position is to assert that Russian arbitration practice must conform to the practice of other States despite the real differences between the Russian economy and arbitration practices and those of the other States. There is an argument that the risk of abuse was so widespread, and the root causes so ingrained into the Russian economy, that allowing arbitration to go unchecked presented too great a risk.

[346] Slabkaya and Tupichkin (n 325); '«Карманные» третейские суды: новый шанс на жизнь' (Rapsinews.ru, 26 November 2014) <http://rapsinews.ru/judicial_analyst/20141126/272656865.html> accessed 23/02/20; Anna Pushkarskaya and Anna Zanina, '«Карманные» суды вывернулись' (Kommersant.ru, 21 November 2014) <https://www.kommersant.ru/doc/2615270> accessed 24/02/20

Arbitration has historically been associated with abuse in Russia.[347] With the collapse of socialism in Russia and the subsequent creation of new private legal relations, there was a need for the rapid adoption of new legal concepts to accommodate the new private sector and the rights of those involved in it. This process was undermined by a number of factors, including the weak coercive power of the central authorities under the Yeltsin administration, and judicial unfamiliarity with the basic concepts involved.[348]

Apart from the pocket arbitral institutes of large companies, there were widespread reports of 'Skorovarki' institutes which would promise claimants quick awards in their favour, and 'Reshaly' institutes which would be established with the sole intent of rendering a few fraudulent awards before disappearing.[349] By denying courts the right to look at the merits of cases, arbitral awards allowed fraudsters to exploit the weaknesses of the Russian legal system by making it more difficult for courts to scrutinise parties' dealings.

Examples of this behaviour can be found in the history of immovable property arbitration. In the 2007 Baker & McKenzie International Arbitration Yearbook it was reported that "[t]he possibility of registering rights to immovable property on the basis of an arbitral award has quite often been exploited by dishonest persons".[350] Where abuse was

[347] Boris Romanovich Karabelnikov, *Международный коммерческий арбитраж*, (Московская высшая школа социальных и экономических наук 2013) 306-7

[348] See further Bernard S Black, Reiner H Kraakman, and Anna Tarassova, 'Russian Privatization and Corporate Governance: What Went Wrong?' (2000) 52(6) *Stanford Law Review* 1731

[349] Vladimir Khvalei, 'Цели нового законодательства об арбитраже' (Arbitration.ru, 01 August 2017) <https://arbitration.ru/press-centr/arbitration_reform/tseli-novogo-zakonodatelstva-ob-arbitrazhe/> accessed 25/01/19

[350] Vladimir Khvalei, 'New Developments in Russian Arbitration Law' in *International Arbitration Yearbook (*Baker & McKenzie 2008) 110

so widespread, the courts' attempt to introduce stricter rules to regulate arbitration is understandable.

However, the problem of pocket arbitral institutes was confined to domestic arbitration. In the global market, the issue of monopoly is less pronounced as companies have a much wider selection of potential contractual counterparties. This minimizes the risk that a Russian company will be able to force their foreign contractual counterparty into the Russian company's own arbitral institute. Karabelnikov similarly argues that abuse of domestic arbitration through pocket arbitral institutes cannot be used to justify the greater regulation of international commercial arbitration in Russia.[351] However, as will be discussed in the following chapter, this is precisely what happened under the reform.

[351] Karabelnikov (n 347) 307

d. Summary

Prior to the reform, the Russian courts had struggled to rein in the activities of pocket arbitral institutes. Though arbitral institutes are not traditionally viewed as affecting the decision on the merits of the disputes arbitrated under their auspices, this overlooks core functions performed by arbitral institutes.[352]

In particular, the ability of many institutes to affect the composition of an arbitral tribunal operating under their auspices will have a pronounced effect on the outcome of the dispute. Such decisions 'are material because they have an impact on the make-up of the arbitral tribunal… [i]n turn, the make-up of the tribunal influences how the tribunal will apprehend procedural and substantive decisions.'[353]

There are a number of ways that an arbitral institute might be able to affect the composition of a tribunal. The most basic form would be where the institute's rules provide the institute with the power to choose one of three arbitrators for a tribunal, the other two being chosen by each of the parties.[354] Many arbitral institutes entertain challenges to arbitrators taking part in arbitrations being administered by the institute, and some even have the power to replace a challenged arbitrator.[355]

[352] For an exposition of the traditional view of the role of an arbitral institute, see Remy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International 2016) ch 4

[353] ibid 192-193

[354] This is the case under article 16(7) of the 2017 Rules of the International Commercial Arbitration Court.

[355] Under article 25(2) of the RSPP Arbitration Centre Rules, the institute may choose a replacement arbitrator under certain circumstances.

More indirectly, many arbitral institutes have the power to consolidate arbitrations arising out of interconnected obligations.[356] Where there are multiple claimants and defendants as a result of consolidation, the claimants and defendants will have to share the choice of arbitrator. Where there is a single claimant and multiple defendants the arbitral institute may need to compose the tribunal itself to ensure parity in the composition of the tribunal.[357]

Arbitral institutes can affect the composition of the arbitral tribunals operating under their auspices by, for example, appointing one of the tribunal members. Where a company can refer its disputes to an arbitral institute that is biased in its favour, it can rely on that institute to ensure that the tribunal is predominately composed of arbitrators that will decide the dispute in its favour.

Fraudulent arbitration is not a problem unique to Russia. A non-Russian case concerning fraudulent arbitration that has received much international attention is that of *Al-Qarqani v Chevron*.[358] This case concerned an Egyptian arbitral award in favour of the heirs of Sheikh Abdullas al-Solaiman al-Hamdan and Sheikh Khalid Abu al-Waleed al-Qarqani and against the American company Chevron. The District Court for the Northern District of California refused enforcement of the award, *inter alia*, on the basis that the arbitration was a fraud. The heirs received an arbitral award in their favour in highly suspicious circumstances. Not only were the heirs not parties to the arbitration agreement

[356] This is the case under article 33 of the 2019 Russian Institute of Modern Arbitration Rules.

[357] This is the case under article 16 of the 2019 Russian Institute of Modern Arbitration Rules.

[358] No. C 18-03297 JSW, Californian Northern District Court

under which they brought their claim to arbitration, but the tribunal had not been appointed in compliance with the terms of that same arbitration agreement. The District court held:

> the constitution of the arbitral panel was highly irregular and appears to have been engineered to produce a result in favor of [the heirs]… There were multiple resignations of appointed arbitrators, some in protest of the proceedings, and a rotating cast of arbitrators filled the positions vacated by others. There was no neutral umpire… The various arbitral appointments were not in conformity with the plain terms of the arbitration agreement…[359]

What sets Russian pocket arbitral institutes apart from situations such as that in *Chevron* is their relative sophistication. In Chevron, the fraudulent nature of the arbitration was readily apparent to anyone who cared to review how the arbitration had developed. The danger posed by Russian pocket arbitration is that the owner of a pocket institute could rely on the institute itself to appoint a biased chairman or umpire to the tribunal, who in turn could be relied upon to side with the arbitrator chosen by the owner of the institute. In such circumstances, there will be no rotating cast of arbitrators, nor any other indication of the arbitrators' bias beyond their appointment by the dependent arbitral institute to which the parties had agreed to refer their dispute.

Another example of non-Russian arbitration fraud is that involving the Brazilian company Odebrecht. In 2019, Odebrecht was found to have engaged in corruption by bribing government authorities in Latin American countries so as to obtain infrastructure contracts. These contracts would initially be concluded at a competitive price, which would

[359] *Ibid* 10

subsequently be increased by modification requests submitted to arbitration. In all of these arbitrations Odebrecht appointed the same arbitrator, who later admitted to having accepted bribes from Odebrecht.[360] Again, Russian pocket arbitration can be distinguished as they are not characterised by bribery, which is a clear-cut indicator of bias. Rather they are characterised by the repeat appointment of particular arbitrators by an institute or by an institute's restrictive list of potential arbitrators: the repeat appointment of arbitrators remains a grey area in arbitration, and cannot be relied upon to show bias in the same way that bribery can be relied upon.[361]

In the English case of *Cofely v Bingham*,[362] the High Court removed an arbitrator where he had received 18% of his appointments and 25% of his income from that party. Courts outside Russia have therefore considered the issue of bias and repeat appointment. However, in *Cofely* there was also evidence that one of the parties had manipulated the institutional appointment mechanism to ensure the arbitrator's appointment. Repeat appointment will not necessarily in and of itself lead to a conclusion of arbitrator bias.

Due to the sophistication of pocket institutes, the grounds for annulment or refusal to enforce an award under Russian law, which are modelled on the grounds for refusing enforcement under article V of the New York Convention, were unable to effectively address the risk posed by these non-independent institutes. Skvortsov noted that the

[360] Carlos Ríos Pizarro, 'Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators (Kluwer Arbitration Blog, 10/12/2019) < http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/> accessed 13/01/21

[361] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair given at the University of Miami School of Law on 29 April 2010)

[362] [2016] EWHC 240 (Comm)

available court review of pocket institutes awards was impotent in combatting the risk of abuse being committed through such institutes.[363]

The grounds for annulment and refusal to enforce cover situations where the composition of the tribunal has violated the parties' agreement or where an arbitrator can be shown to be biased. However, an award debtor is unlikely to succeed in arguing either of these grounds where the arbitral institute administering the arbitration has colluded with the award creditor. Where the parties have agreed to submit their arbitration to the institute, the institute's involvement cannot in and of itself constitute a violation of the parties' agreement. Where there is a three-person arbitral tribunal and both the institute and one of the parties have appointed arbitrators that will find in favour of that party, there is little need for those arbitrators to act in a manifestly biased manner during the arbitral proceedings as they can simply rely on their majority to decide the dispute as they see fit.

Where award debtors struggled to prove the bias of the specific arbitrators involved, the Commercial Courts sought to use the open-ended public policy defence to avoid forcing award debtors to prove bias. The approach of the Commercial Courts bore a strong resemblance to the evidential approach of the Dutch Court of Appeal in the *Yukos* case, discussed in the previous chapter.[364] In the *Yukos* case, the Court of Appeal did not require Yukos to prove the bias of the Russian judges that set aside its awards, instead drawing an inference on the basis that the government had a strong interest in the case and the judiciary would comply with the government's directives.

[363] O Y Skvortsov, *Третейское разбирательство предпринимательских споров в России: проблемы, тенденции, перспективы* (Wolters Kluwer 2005) ch 15

[364] pp. 170-177

In the pocket institute caselaw, the Russian judiciary inferred the bias of an arbitrator by relying on relationship between the award creditor and the arbitral institute that appointed the arbitrator, holding that the institute would comply with the award creditor's directive to appoint an arbitrator who would find in her favour. Drawing a parallel between pocket institutes and *Yukos*, the award creditor plays a similar role to Rosneft, the institute plays a similar role as the Russian government, and the arbitrator plays a similar role to the Russian judiciary.

However, a distinction must be drawn between *Yukos* and the Russian Commercial Courts pocket institute caselaw. Courts of enforcement have a discretion to enforce annulled arbitral awards under article V(1)(e) of the New York Convention. The Court of Appeal in *Yukos* enforced the awards under this discretion, the exercise of which is not subject to any rules as to the allocation of the burden of proof. Though one might criticise the Dutch Court of Appeal for its willingness to criticise specific Russian judges without cogent evidence of their bias, it was acting within the spirit and letter of the Convention.

In the pocket institute caselaw, the Russian Commercial Courts applied domestic grounds for the annulment of Russian awards, which were drafted to be identical to the Article V grounds for refusing enforcement under the New York Convention. The Commercial Courts applied the national equivalent of the article V(2)(b) public policy defence, which like article V(2)(b) itself lacks an explicit allocation of the burden of proof, to cases where the arbitral institute had been affiliated with the award creditor. This allowed award debtors to escape proving that the arbitrators who issued the relevant award were in fact biased, as would be required by the national equivalent of the article V(1)(b) defence.

As discussed in chapter II,[365] the article V(2)(b) defence of public policy must not be interpreted so as to undermine the allocation of the burden of proof for those defences under article V(1) – this was precisely what the Commercial Courts were doing. The Constitutional Court intervened to prohibit the Commercial Court's improper application of the Russian equivalent of article V(2)(b), rejecting the use of the public policy defence so as to relieve award debtors from proving that the arbitrators were biased to make out a defence under the Russian equivalent of article V(1)(b). Though this position is undoubtedly correct with regard the application of the national equivalents of the article V defences, this meant that award debtors who had in fact been deprived of a fair arbitration were unable to obtain effective relief due to the difficulty of proving the relevant arbitrator's bias.

The development of the Russian caselaw on pocket institutes highlights a flaw in the international regime for arbitration under the New York Convention – due to the rigidity of the rules for refusing enforcement of an arbitral award under article V, the Convention is unable to offer relief to award debtors who have been deprived of a fair arbitration in situations where there is unlikely to be any evidence of such deprivation. Where arbitral institutes administer arbitrations involving parties upon which the institutes are dependent is just such a situation, as the institute may be able to appoint a biased chairman to the tribunal without leaving any evidence of having done so.

As will be discussed in the following chapter, the reform of Russian arbitration has created a licensing system, under which the Russian government chooses which arbitral institutes are allowed to operate. The creation of such a system, which subordinates arbitral institutes

[365] pp. 61-63

to government, means that arbitral institutes have become dependent on the government for their existence. If such a system were to be abused, such as by pressuring an institute to appoint a particular arbitrator as chairman in a politically significant dispute, this would put the Russian government in much the same position as those persons who owned dependent arbitral institutes before the reform.

A court of enforcement operating under the New York Convention would probably be unable to refuse enforcement of an award in such circumstances due to the rigid allocation of the burden of proof under article V. The Convention empowers courts to combat abuse by the seat where such abuse comes in the form of an annulment by giving courts a general discretion to enforce awards: thus in *Yukos,* the Dutch Court of Appeal was entitled to enforce the awards so as to combat the perceived improper influence of the Russian government over the annulment proceedings.

However, the Convention gives no such discretion to courts to refuse enforcement. The Convention limits refusal to enforce to those circumstances where the award debtor has made out her defence on the facts. Even where the appropriate response to perceived abuse by the seat of arbitration is the refusal of enforcement, a court of enforcement is unable to refuse unless the requirements of article V have been met. This thesis argues that should the licensing system created by the Russian reform be abused by the Russian government, as pocket institutes were considered to have been abused prior to the reform, courts of enforcement will be as unable to effectively respond as the Russian Commercial Courts had been in the wake of the Constitutional Court's decision.

5. The Judicial Treatment of Arbitrability[366]

In his ICC Conference speech on the reasons for the reform, Deputy Minister Galperin spoke in depth about a major issue that had been plaguing Russian arbitration prior to the reform – the animosity of the State courts towards arbitration:

> [T]he state courts have long since mistrusted arbitral proceedings, justifiably suspecting them of prejudice. I must remark that in any country it is the mutual trust between arbitration and the state courts that constitutes the fundamental precondition for pro-arbitration politics. It is because of this relationship [between arbitration and the Russian courts] that the arbitrability of disputes has found itself narrowing, and judicial practice has found ever more reasons for setting aside or refusing to enforce arbitral awards.[367]

The relationship between the Russian courts and arbitration has long been a source of concern for the international arbitration community. When asked to rank those jurisdictions that they had not previously selected as seat for arbitration, respondents to the 2010 Queen Mary University International Arbitration Survey considered Russia the jurisdiction they were least likely to choose in the future.[368] In the same survey 62% of respondents emphasized the importance of legal infrastructure in choosing their seat. An important part of the legal infrastructure for arbitration is the courts, and therefore the courts' attitude toward arbitration. In a follow-up survey, the ICC Russian National

[366] The section on arbitrability does not distinguish between cases involving domestic and international arbitration as the applicable rules are identical

[367] Galperin (n 320) 159

[368] *International Arbitration Survey: Choices in International Arbitration* (Queen Mary University 2010)

Committee explained that these statistics were influenced by the perception that the Russian courts are not arbitration friendly.[369]

Nowhere is the antagonism between the Russian courts and arbitration more apparent than in the enforcement of arbitral awards. Under the pre-reform regime for arbitration arbitrability had become a battleground between the courts and arbitration, with the judiciary going to great lengths to limit the disputes that could go to arbitration under Russian law. Arbitrability was subject to few restrictions under the contemporary Russian black letter law, which was based on the liberal UNCITRAL Model Law. The Russian Commercial Courts sought footholds in non-arbitration legislation to restrict arbitrability. The problem of judicial activism in Russian arbitrability would go on to have a pronounced effect on the Russian arbitration reform.

[369] *Russia as a Place for Arbitration: Survey by the Russian National Committee of the International Chamber of Commerce* (ICC Russia 2011)

a. Arbitrability in the pre-Reform Russian Legislation

Article 1 of the Law on International Commercial Arbitration defines the scope of arbitrability under Russian law. Article 1(2) provides that private law disputes can be submitted to international arbitration; article 1(4) provides that disputes can be excluded from arbitration where so provided by federal law. The only exception under the pre-reform regime was found in the Law on Bankruptcy, which precludes the arbitration of disputes involving a bankrupt party. The black letter law provided that all other private law disputes were arbitrable.

Article 2(1) of the Civil Code defines the scope of private law disputes as including rights to intellectual property, contractual and non-contractual obligations, property relations, and *in personam* rights. The writer of the official commentary to the Civil Code does not consider this list exhaustive.[370] Where arbitrability was defined as covering private disputes and private disputes were defined so widely, Russian legislation provided for minimal restrictions on arbitrability. The previous Russian regime for arbitration '[did not contain] any general norms directly dealing with the issue of exactly which private law disputes can be considered arbitrable'.[371]

In the absence of such rules, the Russian Commercial Courts actively sought out potential legislative footholds for the exclusion of disputes from arbitration. A key development in this respect was the introduction of the 2002 Code of Commercial

[370] O N Sadikov, *Комментарий к Гражданскому кодексу Российской Федерации, части первой (постатейный)* (INFRA-M 2005) ch 1

[371] A L Makovsky and B R Karabelnikov, 'Арбитрабильность споров: российский подход', [2004](3)*Вестник международного коммерческого арбитража* 16

Procedure, which included a number of provisions on court jurisdiction that would go on to have a pronounced impact on the development of Russian arbitration law.

Prior to 2002, there had been confusion over the respective jurisdiction of the Courts of General Jurisdiction and the Commercial Courts. For example, under the 1995 Code of Commercial Procedure, the Commercial Courts had jurisdiction over 'economic disputes arising from civil, administrative and other legal relations' in the course of entrepreneurial activity; at the same time, under the Code of Civil Procedure, the Courts of General Jurisdiction had jurisdiction over 'civil, family, labour, and collective farming disputes'. The jurisdiction of the Courts of General Jurisdiction and the Commercial Courts were not clearly differentiated and overlapped.

The ambiguous delineation of jurisdiction between the two court systems was further muddied in 1996, when the Supreme Court stated that disputes involving a foreign company fall within the jurisdiction of both the Commercial Courts and the Courts of General Jurisdiction.[372] The situation was such that in practice even experienced lawyers had difficulty defining which court had jurisdiction over any given dispute.[373] A major development in the 2002 Code of Commercial Procedure was the clear delineation of jurisdiction between the Courts of General Jurisdiction and the Commercial Courts.

Under articles 31 and 32 of the 2002 Code of Commercial Procedure, the Commercial Court has jurisdiction over the annulment and enforcement of Russian arbitral

[372] Определение судебной коллегии верховного суда российской федерации по гражданским делам от 28 ноября 1996

[373] M V Borovsky, 'Суды общей юрисдикции в Российской Федерации: проблемы и перспективы' [2001](1) *Черные дыры в российском законодательстве* <http://www.k-press.ru/bh/2001/1/borovsky/borovsky.asp> accessed 23/03/20

awards, and the recognition and enforcement of foreign arbitral awards. Where previously the Courts of General Jurisdiction had dealt with the majority of arbitration cases, the Commercial Courts now stepped into this role. According to Komarov this change in jurisdiction had a profound impact on the development of judicial practice in Russian arbitration, the Commercial Courts still coming to terms with the intricacies of arbitration law four years later in 2006.[374]

Another important addition to the Code of Commercial Procedure was article 248. Article 248 provides for the exclusive jurisdiction of the Commercial Courts over cases with the participation of foreign persons involving, *inter alia*, 'immovable property or the rights to it, if the property is located in the territory of the Russian Federation'[375] and 'the creation, liquidation or registration of legal entities and individual entrepreneurs on the territory of the Russian Federation, as well as the challenge of decisions of these legal entities' bodies'.[376] Unfortunately, article 248 did not specify whom this jurisdiction sought to exclude, allowing the Commercial Courts to interpret it as restricting arbitrability.

On an isolated reading, it seems reasonable to read the exclusive jurisdiction of the Commercial Courts under article 248 as prohibiting arbitration.[377] However, article 248's position within the Code of Commercial Procedure undermines this interpretation. Chapter 32 of the Code of Commercial Procedure, within which article 248 appears, is devoted to

[374] A S Komarov, 'Некоторые актуальный вопросы международного коммерческого арбитража в Российской Федерации' [2006] Special Edition *Вестник международного коммерческого арбитража* 7

[375] Code of Commercial Procedure article 248(1)(2)

[376] Code of Commercial Procedure article 248(1)(5)

[377] Some commentators do in fact adopt this position: e.g. A G Svetlanov, *Международный гражданский процесс: современные тенденции* (M. : ТОН-Остожье, 2002) 140

the division of jurisdiction between Russian courts and foreign courts in cases involving foreign persons. Contextually, it makes sense to read article 248 as dividing jurisdiction between foreign courts and the Russian Commercial Courts,[378] and not between the Commercial Courts and arbitral tribunals. This interpretation is supported in the official commentary to the Code of Commercial Procedure that was published in 2003.[379] Many commentators take the position that article 248 was only intended to determine the jurisdiction of the Russian courts vis-à-vis the courts of other States.[380]

Furthermore, the Commercial Court's interpretation of article 248 as restricting the scope of arbitrability under Russian law was in direct conflict with provisions of other, more specialised laws.[381] Both the Law on the Subsoil and the Law on Production Sharing Agreements provide for the arbitration of disputes that fall within the scope of each of these laws. This necessarily includes disputes over real property and State-owned property involved in the extraction of oil, both of which are mentioned under article 248 of the Code of Commercial Procedure.

In spite of the arguments against interpreting article 248 as restricting arbitrability, the Commercial Courts persisted. In support of their interpretation of article 248, the

[378] Professor Oda believes that this provision was taken from the Lugano Convention, which regulates court jurisdiction and not arbitration - Hiroshi Oda, *Russian Commercial Law* (2nd edn, Brill – Nijhoff 2012) 51

[379] G A Zhilin (ed), *Комментарии к арбитражному процессуальному кодексу российской федерации*, (M. 2003) 770-5 referenced in in Oda (n 378) 52

[380] A V Nesterpenko, 'Критерии арбитрабильности споров по законодательству российской Федерации' [2005](4) *Вестник международного арбитража* 27; Skvortsov (n 363) ch 12.1; Oleg Vasilevich Ryabokon, Aleksandr Sergeevich Vaneev, 'Арбитрабельность споров в отношении недвижимости в практике международных коммерческих арбитражных судов России и Украины' [2009](6) *Закон* 203, 206

[381] On the interrelation of different laws for the purpose of arbitrability under Russian law see generally Karabelnikov (n 347) ch 2.10

Commercial Courts relied on a pre-existing means of determining the arbitrability of disputes – the distinction between public and private law disputes.[382] Since article 1(2) of the Law on International Commercial Arbitration defines the Law's scope in terms of private law disputes, issues had arisen where a piece of Russian legislation had a so-called 'complex' character.

These 'complex' laws contain provisions relevant to a variety of potential disputes, some of which could easily be characterised as either private or public in nature, but some of which are of a less determinate character. In deciding whether a dispute under a 'complex' law was arbitrable, the courts would take account of the circumstances of the dispute and the purpose of the legal provision in question: 'the more significant the 'public' aspect of a dispute, the greater the likelihood that a national court will consider the subject of the dispute inarbitrable'.[383]

[382] Nesterpenko (n 380)

[383] Makovsky and Karabelnikov, (n 371) 26-27

i. The Court and Arbitration: An Article on the Borders Between the Public and the Private

In a Supreme Commercial Court Gazette article titled 'The Court and Arbitration: An Article on the Borders Between the Public and the Private', then Supreme Commercial Court Justice Neshataeva set out an argument that married together the Commercial Courts' interpretation of article 248 and the established means of determining arbitrability by reference to the division between public and private law disputes.[384] Though this article postdates the foundational caselaw on arbitrability under article 248, Neshataeva's reasoning is both informed by, and indicative of, the prior Commercial Court caselaw.

In her article, Neshataeva defends the use of article 248 for the purpose of defining the scope of arbitrability under Russian law. She bases her argument on two main points. The first is that the draftsmen of Russian legislation had failed to distinguish between arbitral tribunals and courts in their terminology. The second is that those disputes enumerated under article 248 are necessarily inarbitrable due to their public nature. Neshataeva uses the example of immovable property disputes, but her argument extends to all the disputes listed under article 248, such as corporate disputes.

In making her first point, Neshataeva relies on a point of semantics. In Russian, the word 'суд' means 'court'. By itself, this word would ordinarily be used in the sense of a State court. However, it also appears in the phrase 'третейский суд', which means 'arbitral tribunal'. Article 11 of the Civil Code states that '[v]iolated or contested civil rights are to

[384] Tatiana Nikolaevna Neshataeva, 'Суд и арбитраж: о границах частного и публичного' [2010](11) *Вестник Высшего Арбитражного Суда Российской Федерации* 62

be defended in *the court, the commercial court, or arbitration (hereafter 'court')* in accordance with the rules on jurisdiction as set out by procedural legislation.'[385]

Neshataeva points to the drafting of this article to illustrate what she sees as an endemic issue in Russian legislation – the failure to sufficiently delineate government courts from arbitral tribunals. Neshataeva believes that this approach to drafting creates the impression that arbitral tribunals are part of the public legal system. By pointing out that both public and private dispute resolution are captured within the term 'суд' in the Civil Code, Neshataeva seeks to impress upon the reader the failure of Russian legislation to adequately differentiate public and private dispute resolution.

Neshataeva's point is that by failing to distinguish between courts and arbitral tribunals in its terminology, Russian legislation has undermined its own ability to articulate which disputes can go to arbitration and which disputes cannot. In Neshataeva's eyes, Russian law failed to express what she sees as the implicit rules on arbitrability. The lack of provisions explicitly limiting arbitrability is thus symptomatic of Russian legislation's general failure to distinguish between arbitration and litigation in its terminology.

Neshataeva believes that article 248 implicitly governs arbitrability in setting out the exclusive jurisdiction of the Commercial Courts over certain disputes. To support her interpretation of article 248, Neshataeva relies on article 55(3) of the Russian

[385] Emphasis mine

Constitution,[386] which provides that the rights of individuals may be restricted by federal law where necessary in the interests of public policy.

Neshataeva explains that where a dispute contains a 'public element' it touches upon public policy. She defines 'public element' as a large degree of general social interest in a particular form of regulation.[387] Where such a public element is present, Neshataeva considers that the dispute must be subject to special public-law regulation. Such special regulations must be applied by public courts and not by private arbitral tribunals, or else the special rules might be undermined should the arbitrators misapply them.

Neshataeva applies this formula to those disputes listed in article 248, focussing in particular on immovable property disputes. In applying her definition of 'public element' to immovable property she states that 'the factors involved in the enforcement against real property… have a substantial public element inasmuch as it can affect a range of unspecified persons, including the government that implements changes in the registry of high-value properties'.[388]

Neshataeva thus justifies the interpretation of article 248 as excluding arbitrability on the following reasoning. Russian legislation had failed to directly address the distinction between public courts and arbitral tribunals; the Constitution allows for the limitation of private rights, such as the right to arbitrate, by federal law where in the interest of public

[386] Neshataeva quotes this article as 'the rights and freedoms of persons and citizens may only be limited by federal law and only to the extent necessary to safeguard the foundations of constitutional order, good morals, health, the rights and legal interests of others, the defence of the country, and State security'

[387] Neshataeva (n 384) 71

[388] ibid 66

policy; the Civil Code has federal status; and Neshataeva considers the exclusion from arbitration of those disputes listed in article 248 to be a matter of public policy.

In order to support her conclusion as to the interpretation of article 248, Neshataeva argues that most other States exclude those disputes listed in article 248 from arbitration. Her overview of non-Russian arbitration law is at best glancing, and at worst incorrect. An example of this is when she cites English law as allowing the arbitration of public disputes, but only subject to full judicial review on the merits. She was presumably referring to section 69 of the English Arbitration Act 1996, which allows an appeal on a point of English law where the arbitrator's decision is either manifestly wrong, or where the point of law is of importance to the development of English law. Parties are able to opt out of this provision, making it hard to understand its relevance to her overarching argument in favour of mandatory court control over arbitration.

According to Neshataeva, most Western States prohibit the arbitration of immovable property disputes,[389] and EU law mandates that immovable property disputes be heard at the court where the property is located.[390] Neshataeva then elaborates on the reasons why immovable property disputes should be excluded from arbitration, explaining that immovable property is so integral to the territory of the State as to make it a component of its sovereignty. This precludes such disputes from being heard outside domestic State courts.

[389] Neshataeva fails to substantiate this assertion. Certainly this is not attested to in Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) paras 2.124-2.160

[390] The rule of EU law she is referring to here comes from the Brussels 1 Regulation which explicitly excludes arbitration from its scope, making it irrelevant to her argument

At the end of her comparative review, Neshataeva states that all States preclude the arbitration of competition, intellectual property, labour law, corruption, bankruptcy, securities, currency regulation, and immovable property disputes. Neshataeva brings this reasoning to bear on article 248 by pointing to the fact that immovable property disputes are listed both in article 248 and among those disputes she considers inarbitrable outside Russia.

Neshataeva thus justifies her interpretation of article 248 on the basis that those disputes listed article 248 should be inarbitrable. Neshataeva argues that Russian law has failed to explicitly deal with the limits of arbitrability due to its failure to distinguish between public and private dispute resolution in its terminology. Where the wording of article 248 is capable of an interpretation that limits arbitrability, Neshataeva argues that article 248 should be interpreted to do so. She further justifies this on the basis that the exclusion of those dispute listed under article 248 from arbitration is a matter of public policy, and that the Constitution allows for the limitation of private rights where public policy is concerned. Finally, she points out that the rules on arbitrability she purports to derive from article 248 conform with the rules of arbitrability under the laws of other States.

According to Neshataeva, article 248 disputes 'belong to the exclusive jurisdiction of the Russian State courts, in this context – the commercial courts… their resolution in foreign courts and at arbitration (both domestic and international arbitration) is prohibited.'[391]

[391] Neshataeva (n 384) 77

ii. Comments

Neshataeva's article is unconvincing as a justification of the Commercial Courts' interpretation of article 248. She thinks Russian law should provide further limits to arbitration than those found in the black letter law, and therefore concludes that the black letter law must itself be incorrect. The obvious rebuttal is that it is precisely because arbitrability under Russian law is subject to so few limitations that it is possible for Russian legislation to apply the term 'court' to arbitral tribunals – the jurisdiction of arbitral tribunals and the national courts are so similarly wide that there is no need to refer to them separately on issues of jurisdiction.

Her argument meanders through different Russian laws without sufficient explanation as to why the drafting of the Civil Code should be taken to reflect a failure by Russian legislation to distinguish arbitration from public dispute resolution. The draftsmen of the Russian Law on Bankruptcy had not struggled to draft article 33(3) as explicitly excluding arbitration where a party to a dispute was undergoing insolvency proceedings.

Neshataeva then turns to article 55(3) of the Constitution which permits private disputes to be restricted by federal law where necessary for public policy. Neshataeva further believes that the inarbitrability of disputes like immovable property disputes is a matter of public policy, and that the right to arbitrate must be limited accordingly.

Neshataeva brings this analysis to bear on her interpretation of article 248, turning it into a vessel for her previous arguments. Neshataeva argues that immovable property disputes are so clearly unfit for resolution by arbitration, that it makes sense to construe

article 248 so as to make immovable property disputes inarbitrable. In the absence of an express rule on the limits of arbitrability, she believes that article 248 on Commercial Court jurisdiction should be read to impose the necessary limitations on arbitration.

She then takes it upon herself to figure out the correct limits to Russian arbitrability by reference to the arbitrability rules of other States. She presumably does this on the basis that other laws have somehow better expressed the Russian rules on arbitrability than the Russian legislation itself had done. Leaving aside the paucity of her comparative analysis, it is questionable whether it is appropriate for the Russian judiciary to, in essence, give effect to foreign laws on the basis that it prefers them to those contained in Russian legislation.

The actual policy behind article 248 is that foreign courts are unsuitable forums for considering certain disputes; not that arbitration is unsuitable for considering these disputes. Neshataeva's argument about the close connection between disputes over immovable property and territorial integrity (i.e. sovereignty) makes sense in the context of excluding the jurisdiction of foreign courts. A foreign judge has sworn an oath to another State and carries out her duties in the name of that State. This same logic does not apply to arbitration, which is contractual in nature: arbitrators are carrying out the duties entrusted to them by the parties. To deny the arbitration of disputes over immovable property is tantamount to saying that the parties themselves have as little right to contractually dispose of their immovable property rights as a foreign sovereign does to rule on them.

In applying her definition of 'public element' to immovable property she justifies the exclusion of these disputes from arbitration on the basis that such disputes may affect a

large number of unspecified people, may require amendments to public registers, and may involve high-value assets. There are three major problems with this analysis. Firstly, arbitration cannot affect the rights of those not party to the arbitration agreement – this is a matter of privity and not a matter of arbitrability.

Secondly, she confuses the determination of rights with their implementation. An arbitral award determines the parties' rights and obligations. These rights are then either implemented by the award debtor voluntarily, or by enforcement through the courts. This is as much the case for immovable property disputes as claims for damages under a contract. In the context of immovable property disputes, the result is an amendment to the immovable property registry. However, the involvement of a public registry does not affect the private nature of the underlying dispute any more than the involvement of the public courts in enforcing a contract affects the private nature of the parties' contractual rights.

Finally, the implication that the value of the property in dispute should be relevant to determining whether a dispute is private in nature threatens to turn arbitration into a small claims court. Arbitration is commonly used by sectors that involve high-value projects such as the energy, construction, technology, and banking sectors. Current practice does not support Neshataeva's assertion that higher value claims should be heard by State courts, and arbitration is predicted to become even more important to these sectors in the future.[392]

Despite the flaws in Neshataeva's reasoning, it is representative of the logic employed in the Commercial Court caselaw. Neshataeva herself, as a Supreme Commercial Court judge at the time, would have had a great deal of influence over the development of

[392] Queen Mary Survey 2018 (n 156) 30

arbitration law. As the 2002 Code of Commercial Procedure had given the Commercial Courts jurisdiction over the majority of arbitration cases, the views of the Supreme Commercial Court were highly influential in guiding the development of arbitration law.

Within the Commercial Court caselaw, the arbitrability of two categories of dispute came under intense judicial scrutiny. The first, which received a great deal of attention in Neshataeva's article, is immovable property dispute arbitrability. The second is corporate dispute arbitrability. The caselaw on the arbitrability of these disputes exemplified the hostility of the Russian courts to arbitration; and in the case of corporate disputes, the judicial rules on corporate arbitrability had a profound effect on the 2016 reform.

b. Immovable Property

The Commercial Court's prohibition against immovable property arbitration can be traced back to 2004, when the Presidium of the Supreme Commercial Court issued its Informational Letter No. 78. The Letter cited with approval a lower court's refusal to provide interim measures in support of an immovable property arbitration on the basis of inarbitrability.[393] However, it was not until the Informational Letter No. 96 of December 22nd 2005 that the Supreme Commercial Court clarified that arbitral awards resolving immovable property disputes were to be refused enforcement or annulled.[394] Example cases no. 27 and no. 28, which were cited with approval in Informational Letter No. 96, precluded the arbitration of immovable property disputes.

Example case no. 27 concerned a dispute between two Russian companies over the rights to an as-yet unfinished building. The companies submitted their dispute to arbitration, and the tribunal ordered that title to the property be moved from the award debtor to the award creditor. The award debtor refused to comply with the arbitral award, and the award creditor sought enforcement. The court refused enforcement of the award on the basis of two findings.

The first finding was that article 2 of the Law on the State Registration of Rights and Transactions Relating to Immovable Property stated that transfer of title to immovable property could only be perfected through registration. On this basis, the court concluded that the tribunal's award imposed an obligation on the immovable property registry. As the

[393] Информационное письмо ВАС РФ от 07/07/04 No. 78, Example Case No. 25

[394] Информационное письмо ВАС РФ от 22/12/05 No. 96

registry is a public body the actions of which result in an amendment to public records, the court considered that the arbitral award sought to effect public law consequences.

The second finding was that article 17 of the same law provided that an in-force judicial decision was necessary for effecting an amendment to the registry. In distilling the rule exemplified in case no. 27, the Presidium of the Supreme Commercial Court stated that 'the Commercial Court shall refuse to enforce an arbitral award that would oblige the registration of property rights to immovable property because such registration is a matter of public law'.

The reasoning of the Commercial Court in the example case is problematic. Firstly, both articles 17(1) and 28 of the Law on the State Registration of Rights and Transactions provided for registration on the basis of 'arbitral decisions, which have been enforced by an in-force judicial decision of either the Courts of General Jurisdiction or the Commercial Courts'. The example case overlooked the fact that arbitral awards could themselves provide the basis for a judicial decision, thus meeting the requirements for registration. The Letter falsely equated the necessity of a judicial decision for registration with public law characteristics in immovable property disputes.

Secondly, the court was wrong to reason that where an arbitral award necessitates some form of public law consequence, then the award itself should be seen as deciding a matter of public law. Many disputes of a private law nature have tax law consequences, which are clearly public in nature; however, it is doubtful that anyone would argue the inarbitrability of a contractual dispute on that basis. The Letter's focus on the public or private law consequences of a dispute failed to identify the actual issue that was to be

decided by the tribunal – in this case ownership of property, which is a matter of private law.

Example case no. 28 concerned an arbitration between a Russian company and a foreign company. The foreign company had brought a claim against the Russian company for its failure to pay the foreign company for services rendered. The tribunal held in favour of the foreign company for both the debt and interest, ordering that the foreign company recover its debt by taking ownership of a building.

The Russian company sought to annul the award. The court of first instance found in favour of the Russian company and annulled the award. This finding was upheld on appeal. Both at first instance and on appeal, the Russian courts relied on the exclusive jurisdiction of the Russian Commercial Courts under article 248 of the Code of Commercial Procedure to annul the award for inarbitrability. According to the Informational Letter, the Supreme Commercial Court upheld the decisions of the lower courts on the point of immovable property arbitrability, finding that the tribunal lacked jurisdiction over the immovable property of the Russian company. In distilling the rule in case no. 28, the Presidium of the Supreme Commercial Court's Letter stated that 'the Commercial Court shall annul an arbitral award if it finds that the award touches upon issues that are subject to the exclusive competence of the Commercial Courts of the Russian Federation'.

Article 248 of the Code of Commercial Procedure on the exclusive jurisdiction of the Commercial Courts was never intended to apply to arbitrability – article 248 was drafted

to delineate the jurisdiction of Russian courts and foreign courts.[395] Not only did the Informational Letter's interpretation of article 248 conflict with the drafting of the Code of Commercial Procedure, but it also created inconsistency in the rules on Russian arbitrability depending on the parties involved. Article 248 applies where one of the parties to a dispute is foreign; there is no equivalent article for disputes between Russian parties. An interpretation of article 248 restricting arbitrability makes little sense in circumstances where it only precludes disputes involving foreign parties from going to arbitration.

The Supreme Commercial Court continued to restrict immovable property dispute arbitrability. An example of this is the Kalinka Stockmann case, which concerned the enforcement of a clause in a contract allowing a lessee to renew a lease. The Supreme Commercial Court had affirmed in August 2007 that 'сделк[и] о недвижном имуществе'[396] remained arbitrable as were simply contractual rights. Thus the case should have been arbitrable as it related to the right to enter into a new lease on identical terms to those in the old lease and not to property rights. [397]

However, in 2008 the Moscow Commercial Court set aside the Kalinka Stockmann award for, *inter alia*, inarbitrability. Applying Informational Letter No. 96, the court found the renewal clause in Kalinka Stockmann inarbitrable due to its public law nature.[398] This

[395] This was pointed out in a response to the Letter in D. V. Kurochkin, 'Несколько комментариев к рекомендациям Президиума ВАС РФ' [2006](3) *Международный коммерческий арбитраж* 66, 69-72

[396] Translated, this means 'sdelkas pertaining to immovable property' The concept of the 'sdelka' will be alien to common law jurists but will be familiar to civil law jurists as the 'juristic act'. It is a declaration of will made by a party with the intention that it should lead to legally binding consequences. It is the foundation of private obligations, and in civil contract law mirror juristic acts play the role played by offer and acceptance in the common law.

[397] Письмо высшего арбитражного суда от 23 августа 2007 N ВАС-С06/ОМП-1200

[398] Определение арбитражного суда Москвы от 14 августа 2008 по делу N А40-28757/08-25-228

was approved on appeal, where the Federal Commercial Court of the Moscow Region further held that the case belonged to the Commercial Courts' exclusive jurisdiction as an immovable property dispute;[399] this was despite the fact that article 248 itself was not applicable as both parties were Russian. The Supreme Commercial Court affirmed the lower court decisions, explicitly addressing all the lower courts' grounds for annulment except arbitrability.[400]

The Supreme Commercial Court's campaign against immovable property arbitrability reached its climax in 2011. The Supreme Commercial Court had suspended hearings over the annulment of an arbitral award that dealt with mortgaged property in order to submit an inquiry to the Constitutional Court. In its inquiry, the Supreme Commercial Court challenged the constitutionality of a number of Russian legislative provisions that were relevant to the suspended annulment proceedings.

Alongside a number of provisions relating to mortgaged property, the inquiry challenged the constitutionality of article 1(2) of The Law on Arbitral Tribunals which defined the scope of arbitrability for domestic arbitration, and articles 17 and 28 of the Law on the State Registration of Rights and Transactions Relating to Immovable Property. These latter provisions allow for the registration of rights to immovable property on the basis of court-enforced arbitral awards. Article 248 of the Code of Commercial Procedure was not mentioned in the inquiry, as it was not relevant to the suspended annulment proceedings.

[399] Постановление федерального арбитражного суда московского округа от 13 октября 2008 по делу No A40-28757/08-25-228

[400] Постановление президиума высшего арбитражного суда российской федерации от 19 мая 2009 N 1741/08

The contents of the inquiry essentially repeated the argument expounded by Neshataeva in 'The Court and Arbitration: An Article on the Borders Between the Public and the Private'. The inquiry asserted that due to their nature, immovable property disputes could only be resolved in State courts. As a result, where statutory provisions allow for the resolution of immovable property disputes in arbitration, they should be considered unconstitutional for incorrectly conflating arbitral tribunals with State courts.

In its judgment of 26 May 2011, the Constitutional Court rejected the Supreme Commercial Court's argument.[401] The Supreme Commercial Court's inquiry relied on two assumptions: the first assumption was that arbitral tribunals cannot be equated to national courts; the second assumption was that only national courts can resolve immovable property disputes. Only if one accepts both of these assertions can the legislative provisions complained of be seen as unconstitutionally conflating arbitral tribunals and national courts by providing for the arbitration of immovable property disputes.

The Constitutional Court agreed that arbitral tribunals could not be seen as embedded within the system of public justice;[402] however, it did not agree with the Supreme Commercial Court's views on immovable property arbitrability. Where the Constitutional Court did not consider immovable property disputes the exclusive domain of the State

[401] Постановление Конституционного Суда Российской Федерации от 26 мая 2011 No. 10-П. For an English translation see 'The Resolution of the Constitutional Court of the Russian Federation dated 26 May 2011 No. 10-P' [2011](2) *Международный коммерческий арбитраж* 226

[402] Though see Judge Aranovsky's Dissenting Opinion on this matter. Judge Aranovsky takes a purposive view of the administration justice and does not agree that it is reserved to State courts. Aranovsky sees the justice as a fundamental principle that exists on a higher plane than the State, and to which the State cannot make exclusive claim. He does not see arbitral tribunals as any less able than State courts to administer justice. For an English translation see K V Aranovsky, 'Opinion by Judge K. V. Aranovsky of the Russian Federation regarding Resolution No. 10-P by the Constitutional Court of the Russian Federation dated 26 May 2011' [2011](2) *Международный коммерческий арбитраж* 243

courts, the provisions complained of in the inquiry could not be seen as conflating arbitral tribunals with State courts.

In its decision, the Constitutional Court picked apart much of the reasoning that the Commercial Courts had employed in developing their doctrine of immovable property inarbitrability. With respect to the relevance of mandatory registration to arbitrability, the Constitutional Court held that:

> The public law nature of disputes, which predetermine the impossibility of submitting them to private arbitration, is conditioned not by the type of property (movables or immovables) in question, but by the specific nature of the relations having given rise to the disputes over that property and by the composition of the parties involved. The requirement of state registration for real estate is related neither to the parties to a dispute nor to the nature of the relations having prompted the dispute; the determining factor is the nature of the object of the property relationship concerned. [403]

The Constitutional Court also condemned the Commercial Courts' interpretation of article 248 of the Code of Commercial Procedure. This was somewhat surprising as article 248 had not been included within the scope of the Supreme Commercial Court's inquiry. On this matter, the Constitutional Court explained:

> [Article 248] – by its meaning in the context of the other stipulations set out in Chapter 32 (Competence of Commercial Courts in the Russian Federation to Hear

[403] Resolution of the Constitutional Court (n 401) 237

Cases with Foreign Persons Involved) of the Code of Commercial Procedure of the Russian Federation – is directed at determining the competence of the state courts of different jurisdictions to settle transborder disputes… [Article 248] does not prevent the parties from opting for alternate dispute resolution, subject to the observance of the applicable general legal rules.'[404]

The Constitutional Court's ruling was a great practical and symbolic victory for the Russian arbitration community. Practically speaking, the Court had reaffirmed the test for arbitrability that had been championed by the critics of the Commercial Court's judge-made rules on immovable property arbitrability. Symbolically speaking, the Court had confronted the Supreme Commercial Court on the matter of inarbitrability under article 248, even going beyond the scope of the inquiry to do so. The issue of immovable property arbitrability had been resolved in favour of arbitration.[405]This can be contrasted with the handling of corporate arbitrability by the Russian courts discussed in the following section.

[404] ibid 237-8

[405] See e.g. Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 27 сентября 2011 N 634/10; Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 13 сентября 2011 N 3004/11; Определение о передаче дела в Президиум Высшего Арбитражного Суда Российской Федерации от 26 января 2012 N ВАС-9094/11

c. Corporate Disputes

Corporate law in Russia has borne witness to systemic abuse, leading one economist to remark in 2002 that Russia was 'notorious for [sic] wildest violations of corporate law'.[406] Lacunae in the Code of Commercial Procedure had been abused by dishonest claimants, with the director of the department of corporate administration at the Ministry of Economic Development reporting in 2006 that '[j]urisdiction (particularly artificial change of jurisdiction is actively utilised by the parties [and] litigation is initiated not at the location of the company which is involved in the dispute, but in the courts of various locations'.[407]

In one reported instance,[408] a bailiff presented a general shareholders' meeting with an injunction against the participation of one of the shareholders that had been granted by a court on the other side of the country. With the shareholder unable to represent his shares, the general meeting was dissolved due to lack of quorum. The Law on Joint Stock Companies at the time provided that in these circumstances it was possible to call for another general shareholder's meeting, but with the quorum reduced to one third of the votes present. This allowed persons that otherwise have too low shareholdings to pass resolutions. Abuse of jurisdiction was thus used by dishonest claimants in order to wrest control over companies.

[406] Alexander Radygin, Revold Entov, Marina Turuntseva, Alena Gontmakher, Harry Swain, Jeff Caruthers, Karen Minden, and Cheryl Urban, *The Problem of Corporate Governance in Russian and its Regions* (Gaidar Institute for Economic Policy 2002) 36 http://www.iep.ru/files/RePEc/gai/ppaper/12Radygin.pdf accessed 22/05/20

[407] Cited in Hiroshi Oda, 'Corporate Litigation in Russia: Procedural Reform of 2009' in Herbert Küpper (ed), *Von Kontinuitäten und Brüchen: Ostrecht im Wandel der Zeiten: Festschrift für Friedrich-Christian Schroeder zum 75. Geburtstag* **(**Peter Lang GmbH 2011**)** 246

[408] Described in Maksim Gennadevich Iontsev, *Корпоративные захваты* (3rd edn, Ось-89 2003) 159-170; Gleb Panov, "Обеспечительные меры как инструмент в корпоративных войнах" [2007](3) *Корпоративные юрист* 27, 33

It is against this backdrop that the Commercial Courts jealously guarded their jurisdiction over corporate disputes against arbitration, which in their eyes was a tool for avoiding justice and resolving disputes behind closed doors.[409] Russia set itself apart from other jurisdictions which had already accepted corporate dispute arbitration and which had recognised that corporate arbitration is neither public in nature, nor subject to exclusive court jurisdiction, nor liable to affect third parties where the proper procedural guarantees are in place.[410]

Whereas the caselaw on immovable property was primarily concerned with article 248 of the Code of Commercial Procedure, the caselaw on corporate property arbitrability revolved around the interpretation of article 33. Article 33(1)(4) provided for the special jurisdiction of the Commercial Courts over disputes arising from the activity of companies and their management, creation, and organisation. Just as article 248 had been intended to delineate jurisdiction between foreign and Russian courts, article 33 had been aimed at delineating the jurisdiction of the Commercial Courts and the Courts of General Jurisdiction.[411] As had happened with immovable property arbitrability under article 248, the Commercial Courts developed an interpretation of article 33 that excluded arbitral tribunals from hearing corporate disputes.

Unlike the caselaw on article 248, court practice was not uniform with respect to arbitrability under article 33. This is likely because immovable property inarbitrability

[409] For a further examination of the Commercial Courts' distrust of private governance in the area of corporate disputes, see the treatment of shareholders' agreements under Russian law at the time, see Karina L Pulec, 'Legal Restraints on the Use of Shareholder's Agreements for Structuring Foreign Investment Deals in Russia' (2012) 45 *Cornell International Law Journal* 487

[410] Pilar Perales Viscasillas, 'Arbitrability of (Intra-) Corporate Disputes' in Loukas Mistelis and Stavros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009)

[411] Karabelnikov (n 347) 146-7

under article 248 had been specifically addressed in an Informational Letter, whereas the interpretation of article 33 as restricting arbitrability had not. As a result, in some of the earlier cases we see the Russian courts expounding the proper interpretation both of article 33 and arbitrability in general.

In a 2009 case concerning an arbitration over the possession of shares, the Federal Court of the Moscow Region stated that article 33 'in and of itself cannot support the conclusion that [corporate] disputes are inarbitrable… in any given case it is necessary to take account of the subject of the dispute, the character of the legal relationship between the parties, and the consequences of the award before concluding on the arbitrability of the dispute'.[412] Not only does this case show the Federal Court of the Moscow Region correctly interpreting article 33, but it also illustrates the Commercial Courts' ability to properly define arbitrability prior to the 2011 Constitutional Court decision on article 248.[413]

However, the Federal Court of the Moscow Region had previously come to the opposite conclusion in a 2006 case concerning an arbitration over property rights to the authorised capital of a company.[414] The court found that article 33(1)(4) precluded the dispute from being heard by an arbitral tribunal. Even though the dispute did not technically fall under article 33, as it related to the ownership of a company's authorised capital, the court nevertheless found that the practical effect of enforcing the award would be to give

[412] Постановление федерального арбитражного суда Московского округа от 04 августа 2009 по делу N A40-30102/08-69-336

[413] See also: Постановление федерального арбитражного суда московского округа от 14 декабря 2006 по делу N КГ-А41/11095-06; Определение высшего арбитражного суда от 16 февраля 2007 по делу N А41-К1-17351/06; Определение высшего арбитражного суда от 01 апреля 2009 по делу N А56-16057/2008

[414] Постановление ФАС Московского округа от 04.10.2006, 11.10.2006 N КГ-А40/8672-06 по делу N А40-27193/06-30-160

the award creditor participatory rights in the company.[415] As participatory rights in a company did fall under article 33, the court relied on article 33 to exclude the dispute from arbitration.

The logic on display is analogous with that concerning the registration of immovable property. The Commercial Court took an approach that subordinates the nature of the actual dispute to the practical effect of enforcing the award, characterising the dispute in terms of the award's effect. In considering immovable property arbitrability, the courts looked to the legal requirement of registration; in considering corporate arbitrability, the courts looked to whether the award creditor gained participatory rights in a company

Though the effect of the award is relevant in applying the public policy defence, this same is not true for arbitrability. Arbitrability is aimed at excluding a category of disputes from arbitration due to their nature. Premising arbitrability on the outcome of enforcement leads to absurdity. Had the tribunal held that ownership of the capital should not be transferred, the practical effect of the award would have changed but the nature of the dispute would not have. This would mean that the arbitrability of a dispute changes in accordance with which party wins – this cannot be correct.

The caselaw on corporate and immovable property arbitrability diverges in one important respect. The Constitutional Court rejected the Commercial Courts' judge-made

[415] Skvortsov has supported the view that rights to shares cannot be viewed as simple property rights as owner of shares has the right to participate in the company. Skvortsov has thus argued that disputes over the ownership of shares inarbitrable – Skvortsov (n 363) ch 12.2. For contrary views see: N N Pakhomova, *Цивилистическая теория корпоративных отношений* (Налоги и финансовое право 2005); Pavel Stepanovich Stepanov, *Корпоративные отношения в коммерческих организациях как составная часть предмета гражданского права* (Doctoral Dissertation, Lomonosov Moscow State University 1999)

rules on immovable property arbitrability and criticised their interpretation of article 248; on the other hand, the Constitutional Court refused to engage with the Commercial Courts' judge-made rules on corporate arbitrability. In order to illustrate this divergence, it is necessary to consider the Maximov case.

i. The Maximov Case

The Maximov case concerned a dispute over a contract for the sale of shares in the Maxi Group. The contract contained an arbitration agreement. Mr Maximov had agreed to sell 50% of his share interest and one further share in the Maxi Group to Novolipetsk Metallurgical Enterprises. The share price was to be paid over two instalments. Novolipetsk Metallurgical Enterprises paid the first instalment but refused to pay the second, claiming misrepresentation and breaches of warranty by Maximov. Maximov submitted his claim for the remainder of the share price to arbitration. The tribunal found in favour of Maximov, dismissing the counterclaims of Novolipetsk Metallurgical Enterprises.

Novolipetsk Metallurgical Enterprises sought the annulment of the award before the Moscow City Commercial Court. The Court annulled the award, *inter alia*, on the basis that article 33 of the Commercial Procedural Court precluded the dispute from going to arbitration.[416] The case went through all appellate levels of the Commercial Court system, and Maximov further made two applications to the Constitutional Court. The first application to the Constitutional Court was made after Maximov's appeal to the Federal Court of the Moscow Region; the second application was made after Maximov's appeal to the Supreme Commercial Court. Due to the similarity, both in substance and in outcome, the Constitutional Court applications shall be dealt with together after a discussion of the Commercial Court decisions.

[416] Определение арбитражного суда города Москвы от 28 июня 2011 по делу N A40-35844/11-69-311

The Federal Court of the Moscow Region upheld the decision of the first instance court.[417] It found that the first instance judge had correctly applied articles 33 and 225.1 of the Code of Commercial Procedure.[418] In setting out its support of the lower court decision, the Federal Court made two findings. The first was that the sales contract had a complex character. Despite the fact that the arbitration only concerned the unpaid share price, the court found that the participatory rights under the shares and the necessity of registering share ownership with the company registrar meant that the dispute contained a public element. The second finding was that articles 33 and 225.1 govern the arbitrability of corporate disputes. Maximov thus solidified the previously uncertain legal position with respect to corporate arbitrability.[419]

The parallels with the caselaw on immovable property arbitrability are striking, with the Federal Court in the Maximov case repeating the same arguments on registration and Commercial Court jurisdiction under the Commercial Procedural Code. However, the Court overlooked the differences between corporate and immovable property disputes. In particular, the similar treatment of state registration for immovable property and the registration of rights to a company's shares with a company registrar makes little sense.

[417] Постановление федерального арбитражного суда от 10 октября 2011 по делу N A40-35844/11-69-311

[418] Article 33 was supplemented by Article 225.1 in 2009. Article 225.1 provided that all disputes concerning companies, from disputes over share ownership to disputes concerning the convocation of a general meeting, were subject to the special jurisdiction of the Commercial Courts. Article 225.1 thus provided objective criteria by which to determine whether a corporate dispute came under the Commercial Court's special jurisdiction. See further on this: V V Yarkov, *Комментарий* к *Арбитражному процессуальному кодексу Российской Федерации*, (3rd edn, Инфотропик Медиа 2011)

[419] Though see also the later decision of Постановление федерального арбитражного суда московского округа от 03 апреля 2013 по делу N 140-111506/2012, in which the Federal Court of the Moscow Region raised neither Article 33 nor 225.1 when considering an arbitral award that had resolved a corporate dispute.

In the former situation the involvement of a public body, in the form of the immovable property registry, constituted the basis for the courts to find some kind of public element in the dispute. Though this argument ignores the role of the registry as perfecting rights that had arisen independently of registration, the public element was understandable inasmuch as the enforcement of an award necessitates action by a State body. This argument does not translate to a company registrar. Here the registering authority is part of the company and not a State body, lacking the features that gave rise to the public element argument for immovable property dispute arbitrability.[420]

The appeal to the Supreme Commercial Court is of less interest than the Federal Court decision. The college of judges refused leave for a full hearing before the Supreme Commercial Court, handing down a brief affirmation of the lower courts' decisions. [421] In its reasoning, the college simply cited the prohibition on arbitrating any dispute that fell within the special jurisdiction of the Commercial Courts under article 33 of the Code of Commercial Procedure.

Though the college's refusal to submit the dispute to a full hearing before the Supreme Commercial Court was procedural and does not carry the weight of a decision by the Presidium, the message to the lower courts was clear - the law on the inadmissibility of corporate disputes to arbitration was considered sufficiently settled so as not to warrant full consideration by the Supreme Commercial Court.

[420] See further on the inapplicability of the public element argument in prohibiting Russian corporate disputes from going to arbitration: Anna Igorevna Mishina, *Арбитрабильность: Теория и практика международного коммерческого арбитража* (Инфотропик Медиа 2014) 64-72

[421] Определение ВАС РФ от 30.01.2012 N ВАС-15384/11

Finally, there were the applications made by Maximov to the Constitutional Court. Both applications essentially concerned the constitutionality of articles 33 and 225.1 of the Code of Commercial Procedure; however, the two applications were not identical.

The first application was made after the Moscow Commercial Court decision. The application referred to articles 33 and 225.1, requesting that the Constitutional Court assess whether these provisions presented an unconstitutional restriction on Maximov's right under article 45(2) of the Constitution to protect his legal rights by any recourse not prohibited by law (i.e. by arbitration). The Constitutional Court refused Maximov a full hearing, giving a brief and formalistic response.[422]

The Court explained that parties to a dispute do not enjoy an unfettered discretion in choosing how their disputes are decided, and that the articles in question merely set out the procedure to be adopted with respect to the hearing of corporate disputes. The Constitutional Court's analysis was restricted to articles 33 and 225.1 themselves and did not touch upon how they should properly be interpreted. By focusing solely on the black letter law of the Code of Commercial Procedure, the Constitutional Court avoided having to rule on the constitutionality of the judge-made arbitrability rules that had emerged from the Commercial Courts' interpretation of these provisions.

The second application took place after the judicial college's refusal to submit the case to the Supreme Commercial Court. This second application had been specifically worded to address the interpretation by the Commercial Courts of articles 33 and 225.1 of the Code of Commercial Procedure. It explained how the purpose of article 33 was to

[422] Определение Конституционного Суда РФ от 21 декабря 2011 N 1804-О-О

clarify jurisdiction as between the Commercial Courts and the Courts of General Jurisdiction, and that article 225.1 had simply provided objective criteria for determining which disputes qualify as corporate disputes. The application also drew parallels between the treatment of corporate disputes and immovable property disputes, seeking to rely on the Constitutional Court's own ruling on the latter as precedent for the former.

The second application further requested that the Constitutional Court consider the public/private argument raised in the judgment of the Federal Court of the Moscow Region. The application cited the Constitutional Court's ruling on immovable property dispute arbitrability where the Court stated that registration merely expresses public interest in recording the possession of rights and does not express public interest in deciding who possesses such rights.

Whilst not raising any new perspectives on the issue at hand, the application went to great lengths to portray the Commercial Courts' treatment of corporate dispute arbitrability as identical to that of immovable property arbitrability. However, the Constitutional Court refused to permit the case a full hearing.[423] In a brief, one-and-a-half-page decision, the Constitutional Court repeated the same formalistic, black letter analysis of the provisions under consideration. The Constitutional Court again refused to engage with the Commercial Court's interpretation of articles 33 and 225.1.

[423] Определение Конституционного Суда РФ от 17 июля 2012 N 1804-О-О

d. Summary

The immovable property and corporate arbitrability caselaw exemplifies the Russian Commercial Courts' practice of restricting arbitrability, refusing to enforce or annulling awards wherever they could find any legislative provision capable justifying their doing so. In both corporate and immovable dispute arbitrability the Commercial Courts interpreted loosely worded provisions of the Code of Commercial Procedure to restrict the ambit of arbitrability under Russian law. In both areas, the Commercial Courts denied arbitrability on the grounds that these disputes entailed public elements due to mandatory registration, or due to participatory rights in a company arising out of the ownership of shares.

The only manner in which the treatment of immovable property arbitrability and corporate arbitrability diverged was in the approach taken by the Constitutional Court. With respect to immovable property arbitrability, the Constitutional Court went beyond the issues submitted to it by the Supreme Commercial Court inquiry in order to correct the law. With respect to corporate arbitrability, the Constitutional Court retreated behind a formalistic interpretation of Maximov's submissions. Even when Maximov explicitly sought to challenge the Commercial Courts' interpretation in his second application, the Constitutional Court refused to engage with his arguments.

In the caselaw surrounding pocket arbitral institutes and immovable property arbitrability, the Constitutional Court had been a bulwark against the more aggressive inroads into arbitration by the Commercial Courts. The fate of corporate arbitrability signified that the Constitutional Court would not always protect arbitration from the Commercial Courts.

A potential reason for the difference in treatment can be found in the treatment of shareholders agreements under Russian law. In a number of cases in the mid-2000s, the Russian courts found that shareholder agreements governed by foreign laws were unenforceable. The Russian courts justified these decisions on the basis that Russian company law is mandatory and may not be deviated from or replaced by the choice of a different law.

Pulec argues that the Russian State gains much through the monopolization of corporate law, remarking that 'control over how the law is practically enacted is essential to the Russian government, which is increasing its control not only over strategic resources and services, but also over the corporations that own and trade them'.[424] Arbitration has been criticized as an instrument of 'обход закона'.[425] It is therefore understandable that the Russian legal system would seek to prevent arbitration from deciding disputes that the government would prefer subject to State control. Kocí further argues that the judge-made rules on arbitrability serve a national protectionist agenda, arguing that the inarbitrability of Russian corporate disputes allows greater State control over, *inter alia*, capital transfers out of Russia.[426]

[424] Pulec (n 409) 509-512

[425] In Russian law this is the use of legally permissible means in order to accomplish something that if done directly would be prohibited by law. See further on this A I Muranov '"Обход закона" в международном частном праве: мнимость актуальности и надуманность проблем' [2004](7) *Законодательство* 67; A Muranov, '"Обход закона" в международном частном праве: мнимость актуальности и надуманность проблем' [2004](8) *Законодательство* 44; A Muranov, 'Попытка внедрения понятия «обход закона» в ГК РФ и международный коммерческий арбитраж в России' [2011](1) *Вестник международного арбитража* 188

[426] Milos Kocí, 'Limitations on arbitrability in the Russian Federation from a legislative and judicial perspective' (2019) 22(2) *International Arbitration Law Review* 97

Whilst it is not possible to state with certainty why corporate arbitrability has been subject to such limitation by the Russian courts, the difference in the treatment of the arbitrability of immovable property disputes and corporate disputes indicates that corporate disputes had been singled out for special treatment. Furthermore, the rules for corporate arbitrability under the Russian reform are consistent with a broader policy of State control over the dealings of Russian companies.

The post-reform rules allow the arbitration of corporate disputes, but only where the parties' arbitration meets the strict requirements of the Russian law: these restrictions include the imposition of a Russian seat and the mandatory administration of the arbitration in an arbitral institute licensed by the Russian government. The Russian courts' prohibition of corporate arbitration has thus evolved into rules that allow Russian arbitration to consider Russian corporate disputes but disallow foreign arbitration from considering Russian corporate disputes.

As was discussed in chapter II, national arbitration laws that impose a local seat upon an arbitration violate the New York Convention, as a proper interpretation of article V(2)(a) must not be interpreted to compel disputes to go to local arbitration by prohibiting international (i.e. foreign) arbitration.

6. Summary

Prior to the 2016 reform, the Russian regime for arbitration was governed by the Law on International Commercial Arbitration and The Law on Arbitral Tribunals. The pre-reform regime was characterised by non-independent arbitral institutes and judicial hostility. Dishonest parties could use arbitration's flexibility and privacy to commit fraud; and the courts jealously guarded their jurisdiction from arbitration, looking for legislative footholds to incrementally restrict the range of disputes capable of going to arbitration under Russian law.

The risk of fraud enacted through non-independent arbitral institutes of arbitration under the pre-reform regime was due to the lack of regulation for arbitral institutes. Without any restrictions placed on who could establish an arbitral institute, dishonest parties could create institutes through which to commit fraud. Pocket institutes were widely perceived as biased, and as issuing arbitral awards in favour of the parties that had created and financed them.

The Commercial Courts struggled to address the risks posed by pocket institutes. The Courts applied the grounds for annulling or resisting the enforcement of awards, which were identical to the grounds under article V of the New York Convention. Award debtors would allege bias by the arbitrators appointed by pocket institutes. As under article V(1)(b), award debtors had to prove the bias of the particular arbitrators involved to make out a ground for annulling an award under Russian law; however award debtors struggled to achieve this where the only evidence they had was the affiliation of the arbitral institute with the award creditor. The Commercial Courts used the equivalent of the article V(2)(b)

public policy defence to relieve award debtors of the burden of proving bias by the specific arbitrator in question. Eventually, the Constitutional Court rejected the use of the public policy defence for this purpose.

Judicial hostility towards arbitration under the pre-reform regime manifested in the form of judge-made rules restricting arbitrability. The Commercial Courts sought to prevent both immovable and corporate disputes from going to arbitration. The judge-made rules were uncertain and liable to expand from case to case. Though the Constitutional Court intervened to allow immovable property disputes to go to arbitration, corporate disputes remained inarbitrable. Russian law was reluctant to allow corporate disputes to go to arbitration, with commentators remarking that doing so would conflict with the Russian government's policy of maintaining control over the private sector.

The pre-reform regime required change. A mechanism for combatting the abuse of arbitration through fraudulent arbitral institutes and clear legislative provisions on arbitrability were needed. The Russian legislature responded by requiring arbitral institutes to obtain a government license and by creating a new form of arbitrability – conditional arbitrability. Though the reform has dealt with the issues that arose under the pre-reform regime, it has done so by subordinating Russian arbitration to government. As will be discussed in the following chapter, this subordination of arbitration creates a risk of new forms of government interference with arbitration and a new form of abuse by the legal system at the seat of arbitration.

Chapter V – The Russian Arbitration Reform

1. Introduction

This chapter considers the 2016 reform of Russian arbitration. The regime for arbitration under the Russian reform threatens to undermine the ability of courts of enforcement and parties to discern and combat abuse by the legal system at the seat. It has done this through the introduction of two new legal devices to Russian arbitration law.

The first of these devices is the new licensing system for arbitral institutes in Russia – under the reform arbitral institutes must receive and maintain a government license to continue their operations. The second device is conditional arbitrability – Russian law now provides for a number of procedural conditions, such as a mandatory Russian seat, that must be met in order for certain corporate and procurement disputes to go to arbitration.

The chapter begins by tracing the development of the reform from its grassroots beginnings within the Russian arbitration community to its subsequent adoption and development by the Russian government. With the change from private initiative to public initiative, the reform's goal changed from self-regulation by the arbitration community to public regulation by the government.

The chapter will briefly outline how the post-reform Russian regime for arbitration discriminates between arbitration inside and outside licensed institutes, with the latter form of arbitration being unlikely to survive the reform as a viable form of dispute resolution.

The chapter will then move on to discuss the licensing system for arbitral institutes and conditional arbitrability under the Russian reform.

The chapter will explain how the creation of a licensing system for arbitral institutes subordinates arbitral institutes to the Russian government and creates the possibility of a new form of abuse in a Russian-seated arbitration. Furthermore, the rules for conditionally arbitrable disputes shepherd corporate and procurement disputes into Russian-seated arbitration within these licensed institutes, pushing those disputes most likely to attract political interest into arbitrations that are within the reach of the Russian government.

The following chapter will then go on to consider how the post-reform regime for Russian arbitration interacts with the international regime for arbitration under the New York Convention.

2. A Brief History of the Reform

Starting as a private initiative of the Russian arbitration community, the reform eventually caught the eye of government. As it moved from being a private initiative to a matter of public legislation, the reform began to take its final shape. The reform has been implemented in two major pieces of legislation passed in 2015, and one supplementary piece of legislation passed in 2018.

a. The bottom-up beginnings of the reform

The reform of Russian arbitration started as an initiative of the Russian arbitration community itself. One of the major Russian arbitration journals, *Третейский суд*, took a leading role in organizing the arbitration community to address the issues that had arisen under the pre-reform Russian arbitration regime.

In a 2012 questionnaire conducted by the *Третейский суд*-affiliated Council of Experts on Arbitration, respondents expressed a desire for an improved system for regulating arbitration. Respondents favoured a system of self-regulation by the arbitration community for this purpose.

The questionnaire was composed of 42 questions, and spanned issues such as the regulation of arbitral institutes, the redrafting of certain provisions of Russian arbitration law, and the provision of interim measures in Russian arbitration.[427] 29 respondents took

[427] 'Опросный лист экспертного совета третейского сообщества' (Третейский суд 2012) <http://arbitrage.spb.ru/ests/ests/oprosnik_v2.docx> accessed 23/05/20

part in the questionnaire, including many leading figures of Russia's arbitration community. According to the majority of respondents, 31 of the 42 issues addressed in the questionnaire required some kind of reform.[428] Of particular interest are the responses to questions 1, 3, and 4.

Question 1 asked whether there should be formal rules determining which organizations are allowed to create arbitral institutes (e.g. non-commercial organizations). The majority of respondents approved of rules for determining which organizations could create arbitral institutes by a ratio of 17 to 11. Those who believed some kind of restriction was necessary varied greatly in how this should be implemented. Notably, Savransky believed that any restrictions on the types of organizations allowed to create arbitral institutes must not be used to create monopolies in Russian arbitration.[429]

Those reasoned responses that rejected limiting which organizations may create arbitral institutes did so on the basis that such a measure would be ineffective. Fraudsters would simply adapt to the formal restrictions by founding organizations of the appropriate type. Both Sevastyanov and Pogantsev preferred self-regulation as the more appropriate solution, as it would allow a more substantive approach to the regulation of Russian arbitral institutes and the prevention of abuse.[430]

[428] 'Итоги первого этапа деятельности ЭСТС' (Третейский суд 2012) <http://arbitrage.spb.ru/ests/itogi.html> accessed 23/05/20

[429] M Y Savransky, *М Ю Савранский* (Третейский суд 2012) <http://arbitrage.spb.ru/ests/savranskyi.pdf> accessed 23/05/20

[430] Gleb Vladimirovich Sevastyanov, *Г В Севастьянов* (Третейский суд 2012) <http://arbitrage.spb.ru/ests/Sevastyanov.pdf> accessed 23/05/20; Ivan Vladimirovich Pogantsev, *И В Поганцев* (Третейский суд 2012) <http://arbitrage.spb.ru/ests/pogantsev.pdf> accessed 23/05/20

Question 3 asked whether there should be a register for arbitral institutes, which controls their creation and dissolution. Question 4 follows on from question 3 by asking whether such a register should be self-regulatory or governmental in nature. Though respondents answered questions 3 and 4 separately, they form a single topic. Read together, the questions asked what kind of register, if any, should exist for arbitral institutes.

23 of the 29 respondents saw the creation of a register for arbitral institutes as a positive development. The respondents' views on which kind of registration system should be introduced were less uniform. Of the 11 respondents who gave a description of their preferred system, 6 were in favour of self-regulation by the arbitral community, 4 were in favour of a government-operated system, and 1 was in favour of an arbitration registry under the supervision of the Supreme Commercial Court and Supreme Court.

The reasons given by those who chose self-regulation exhibit a distrust of government involvement in arbitration. Sevastyanov premised his choice of self-regulation on the necessity of maintaining arbitration as a neutral, private dispute resolution.[431] Nosyreva simply stated that any register 'must not be government-operated'.[432] With one exception, those who opted for a government-operated system often did not explain their rejection of self-regulation. The exception was Zaitsev, who generally saw self-regulation as an ineffective means of implementing change and therefore insufficient for combatting pocket institutes.[433]

[431] Sevastyanov (n 430)

[432] Elena Ivanovna Nosyreva, *Е В Носырева* (Третейский суд 2012) <http://arbitrage.spb.ru/ests/nosyreva.pdf> accessed 23/05/20

[433] Aleksej Igorevich Zaitsev, *А И Зайцев* (Третейский суд 2012) <http://arbitrage.spb.ru/ests/zaitsev.pdf> accessed 23/05/20

b. The top-down conclusion of the reform

The reform soon became part of the Russian government's agenda. President Putin officially adopted the reform as a government project in December 2012.[434] In his 2013 State of the Nation address, Putin spoke about the necessity of reforming Russian arbitration.[435] Before long, both the Ministry of Economic Development and the Ministry of Justice had each been commissioned to look into reforming Russia's arbitration laws.

The Ministry of Economic Development brought together working groups composed of senior government officials and leaders of the arbitration community. Despite this promising beginning, the Ministry of Justice took control of the project in 2013. Sevastyanov, a member of *Третейский суд*'s editorship, reported less inclusivity in the Ministry of Justice's working groups than had been found in those formed under the Ministry of Economic Development.[436]

Within the Ministry of Justice, the reform efforts were led by Deputy Minister Borisenko, whose suggestion that the Ministry of Justice should control the establishment of arbitral institutes would prove key to the reform's outcome. In 2013, the Ministry of Justice put forward its recommendations for the reform, the main points of which can be summarised in the following manner:

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[434] Vladimir Putin, *Перечень поручений по реализации Послания Федеральному Собранию* (Kremlin 2012) <http://kremlin.ru/acts/assignments/orders/17248/print> accessed 12/04/19

[435] Vladimir Putin, 'Послание президента РФ Владимира Путина федеральному собранию' (Annual Address by the President of Russia, Kremlin 12 December 2013) <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=155646&fld=134&dst=100000001,0&rnd=0.7581331394565011#05606591614600706> accessed 23/05/20

[436] Gleb Vladimirovich Sevastyanov, 'Третейская реформа в России: хронология основных событий и специфика содержания' *(*Zakon.ru, 20 November 2015) <https://online.zakon.kz/Document/?doc_id=34232820> accessed 23/05/20

1. There should be a new form of registry for arbitral institutes, which will be operated by a special subdivision of the Ministry of Justice

2. Arbitral institutes should only be created by non-commercial organizations, excluding non-commercial organizations with a membership structure

3. Foreign institutes should require permission to conduct arbitrations in Russia.[437]

In November 2013, the Council of Experts on Arbitration conducted a second survey.[438] The first survey had shown the arbitration community's desire for change; the second survey showed that the Ministry of Justice's recommendations were not the change that they wanted. Respondents to the questionnaire criticised the Ministry of Justice's recommendations over the excessive intrusion of government into private dispute resolution.

Of the ten issues raised, only three of them found favour with respondents.[439] These three issues were the uncontentious areas of creating a publicly accessible database of arbitral institutes, the ability to deposit ad hoc awards with courts of first instance, and the requirement of obtaining a writ of execution upon an arbitral award for the purpose of making amendments to public registers (such as that for immovable property).

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[437] 'Комплекс мер по развитию третейского судопроизводства в российской Федерации' [2014](2/3) *Третейский суд* 27

[438] 'Опросный лист экспертного совета третейского сообщества No 2' (Третейский суд 2013) <http://arbitrage.spb.ru/ests/ests/oproslist2.doc> accessed 23/05/20

[439] 'Итоги опроса No 2 среди членов Экспертного Совета третейского сообщества' (Третейский суд 2013) <http://arbitrage.spb.ru/ests/itogi2.html> accessed 23/05/20

Respondents feared the governmentalisation of arbitration. On the question of reducing the number of arbitral institutes in Russia, respondents considered this a matter for the market, and not for government. Though some took the view that reducing the number of institutes might aid in the combat against fraudulent institutes, the general consensus was that a mass cull was too blunt an instrument to be proportionate.

Respondents also rejected the idea of mandating particular corporate forms for arbitral institutes. Respondents found that such requirements would merely impose formal obstacles to creating an arbitral institute. In order to prevent the creation of fraudulent institutes, some kind of ongoing regulation was necessary. One suggestion was to implement a registration or licensing system. However, Pogantsev made the important point that the government licensing of arbitration, a private institution, would impermissibly blur the lines between private and public dispute resolution.[440]

Finally, respondents were unhappy with the proposal to establish a special body within the Ministry of Justice for the regulation of arbitral institutes. Nemchinov saw the proposal as cutting against the private nature of arbitration and risking the Ministry of Justice stipulating how arbitration could be administered in Russia. Those who supported the creation of a regulatory body within the Ministry of Justice varied in how they envisioned this body's function - Asoskov suggested that this body should only regulate domestic arbitration,[441] while Varvarin suggested that the body should be limited to

[440] Ivan Vladimirovich Pogantsev, *И В Поганцев* (Третейский суд 2013) <http://arbitrage.spb.ru/ests/ol2/pogantsev.pdf> accessed 23/05/20

[441] Anton Vladimirovich Asoskov, *А В Асосков* (Третейский суд 2013) <http://arbitrage.spb.ru/ests/ol2/asoskov.pdf> accessed 23/05/20

carrying out checks to ensure that arbitral institutes are complying with the reform's requirements.[442]

When Russia's major arbitral institutes were asked to comment on the Ministry of Justice's recommendations for the reform, their views broadly aligned with the respondents to the 2013 questionnaire.[443] The only proposition to receive the support was the establishment of a publicly accessible database of arbitral institutes. The least popular suggestions were the control of arbitral institutes by the Ministry of Justice, the expansion of court powers over arbitration, and the licensing of institutes by the Ministry of Justice.

The editorship of *Третейский суд*, on analysing the law in its near final form, made the following dramatic statement:

> The bills on the reform of arbitration propose that arbitration should take on features not suited to alternative dispute resolution: they introduce a binding system for the creation and further control of arbitral institutes by both State courts and executive bodies such as the Ministry of Justice. These novelties run against the legal nature of arbitration, including international commercial arbitration, as dispositive institutions of civil society (private procedural law). The perversion of the legal nature of arbitration risks nonconformity with international best practice, expressed in documents such as the New York Convention, and may give foreign jurisdictions cause to refuse the recognition and enforcement of international commercial arbitral

[442] Aleksandr Viktorovich Varvarin, *А В Варварин* (Третейский суд 2013) <http://arbitrage.spb.ru/ests/ol2/varvarin.pdf> accessed 23/05/20

[443] 'Сводная таблица мнений по наиболее принципиальным вопросам третейской реформы' [2014](2/3) *Третейский суд* 148

awards rendered in Russia! By definition, the running of such legal risks at the international level cannot correspond to national interest.[444]

Similar points were raised in the comments to the reform by the President's Office for State Legal Affairs. The comments pointed out that the subjugation of arbitral institutes to government bodies was undesirable in that it cut against the contractual nature of arbitration. It also stated that the reform risked calling the impartiality of arbitrators into doubt where the government is able to exercise extensive control over how arbitration can be conducted in Russia.[445]

The two laws that make up the foundation of the reform were passed in December 2015 and came into effect the following September. These are the Law on Arbitration,[446] and the Law on Amendments to Particular Legal Instruments.[447] A further piece of legislation was brought in toward the end of 2018,[448] making changes to the Law on Arbitration and the Law on Advertisement.

c. Summary

[444] Sevastyanov (n 436)

[445] 'Заключение Государственно-правого управления Президента Российской Федерации' [2014](4) *Третейский суд* 76

[446] Федеральный закон от 29.12.2015 N 382-ФЗ

[447] Федеральный закон от 29.12.2015 N 409-ФЗ

[448] Федеральный закон от 27.12.2018 N 531-ФЗ

The impetus for the reform came from within the arbitration community itself as a demand for the creation of a healthier environment for Russian arbitration. The predominant view within the Russian arbitration community was that such change should be effected through self-regulation: arbitral institutes had an incentive to weed out bad faith actors, as the frauds being committed were reflecting poorly on those administering arbitration in good faith.

However, once the government had adopted the reform of arbitration as part of the legislative agenda it became apparent that self-regulation was no longer an option. The recommendations made by Deputy Minister for Justice Borisenko have been decisive in shaping the reform, which imposes strict government regulation on arbitral institutes and even mandates the procedure to be adopted in some arbitrations. The resulting legislation cannot be ascribed to the demands of the Russian arbitration community, but rather reflects the policy decisions of the Russian government alone.

The discussion within the arbitration community prior to the passing of the reform legislation shows us the path untravelled in Russian arbitration law. This chapter will go on to discuss the creation of a government-run licensing system for Russian arbitration institutes, and the risks that arise from subordinating arbitration to government. Had the arbitration community's requests for a system of self-regulation been granted, the risks discussed in this thesis would not have arisen.

The trajectory of the Russian arbitration reform as it moved from a private initiative to a matter of public legislation also indicates the Russian government's preference for public control in arbitration, despite arbitration's function as private adjudication. Many of the objections to government regulation in arbitration pointed to the private nature of

arbitration. The arbitration community's suggestion to create the necessary infrastructure for self-regulation would have preserved the private nature of arbitration; the Russian government's choice to impose public regulation on arbitral institutes leads to the situation where Russian arbitration has moved toward a hybrid public-private dispute resolution mechanism.

3. Arbitration Inside and Outside Licensed Institutes

Before discussing the licensing system for arbitral institutes, it is necessary to briefly outline the different treatment afforded to arbitration conducted within licensed institutes and arbitration conducted outside such institutes. Where parties refer their dispute to Russian-seated arbitration outside a licensed institute, the parties' freedom to customize their arbitration is severely limited and they must rely on the Russian courts to perform key functions. However, where parties refer their dispute to Russian-seated arbitration within a licensed arbitral institute, they have greater freedom than was possible under the pre-reform regime and can even waive their right to challenge an arbitral award in setting aside procedures.

a. The restrictions placed upon arbitration outside a licensed institute

Article 44(20) of the Law on Arbitration states that 'in [arbitration outside a licensed institute], the administration of certain functions, including the appointment and removal of arbitrators, by an organization that has not been licensed in accordance with this law is prohibited'. Article 2(3) of the Law on Arbitration defines 'administration' widely, and includes the selection, appointment, or removal of an arbitrator, the organization of arbitral correspondence, and the collection and distribution of arbitral costs.

After the reform, only licensed arbitral institutes can perform these functions in an arbitration. Where unlicensed institutes have undertaken any of these functions in an arbitration, such as by assisting in the composition of the tribunal, the courts will annul the resulting awards for violating public policy.[449]

Certain of these functions must now be handled by the parties and the arbitral tribunal themselves. The organization of arbitral correspondence and the collection and distribution of arbitral costs are such functions. By forcing the parties and the arbitral tribunal to undertake these administrative functions, the reform makes arbitration conducted outside licensed institutes more onerous and less attractive.

Those functions that relate to the composition of the tribunal are now allocated to the Russian courts. Article 13(3) of the amended Law on International Commercial Arbitration provides that where the parties have agreed the procedure for removing an arbitrator, and that a request for removal has not been granted upon following that procedure, the party

[449] Постановления арбитражного суда Московского округа от 6 декабря 2018 N А40-225596/2017

seeking removal may request that the Russian courts remove the arbitrator. Article 14(1) provides a similar rule for situations where a party seeks to terminate an arbitrator's mandate because the arbitrator is unable to fulfil her duties. Article 11(3)(1) provides that where a party fails to appoint an arbitrator to a three-person tribunal, the Russian courts will appoint an arbitrator in her place. Article 11(3)(2) provides that where the parties to an arbitration involving a one-man tribunal fail to agree the arbitrator, the Russian courts will appoint the arbitrator. [450]

Under the pre-reform regime, the role of appointment and removal authority had been held by the President of the Chamber of Commerce. Article 11(3) of the Law on International Commercial Arbitration previously provided that that the President of the Chamber of Commerce would act as the default appointing authority where the parties could not agree on an arbitrator. Article 11(4) provided that where the parties' agreed procedure for appointing arbitrators had failed, the President of the Chamber of Commerce would act as the default appointing authority. Article 13(3) previously included a similar provision, providing that when the parties' agreed procedure for removing arbitrators had not resulted in removal, a party was entitled to appeal the issue to the President of the Chamber of Commerce.[451]

Though it is not unusual for national courts to play the role of appointment and removal authority in arbitration, the changes under the Russian reform are notable because under the pre-reform Russian regime it was the President of the Chamber of Commerce

[450] Articles 11(4), 13(3), and 14(1) of the Law on Arbitration contain analogous rules for domestic arbitration

[451] Articles 14(1) and (2) previously provided similar rules for the revocation of an arbitrator's mandate where the arbitrator is unable to fulfil her duties

who performed this role. The reform therefore moved this role from a private individual with links to both industry and arbitration to the Russian courts.

The Russian courts have no experience in this role, and, given their anti-arbitration attitude in the past, it is questionable whether they will perform it well. Furthermore, where the Russian courts are not generally considered to be neutral in politically significant cases,[452] there is the risk that the courts may be pressured to abuse their role as appointment and removal authority in such cases by appointing an arbitrator who will decide the dispute in line with government policy.

It might be argued that the Russian courts will be less hostile to arbitration now that it is subject to strict regulation. The courts' view of arbitration had been darkened by pocket institutes. Now that pocket institutes have been removed from Russian arbitration, the courts may be better disposed towards arbitration in general. Unfortunately, the available statistics on enforcement and annulment do not support this hypothesis. The rate of annulment by Russian courts has gone from 23% before the reform in 2015 to 30% in 2018; enforcement rates fell from 78% to 69%.[453]

Furthermore, the Russian legislature has continued to place restrictions on arbitration conducted outside a registered institute since the reform first came into effect. After the reform forced more than 99% of previous Russian arbitral institutes to close, those

[452] The most recent ICC Russia report states that 'the majority of respondents considered the courts to be influenced by the executive authorities' - *Russia as a place for arbitration: Survey by the Russian National Committee of the International Chamber of Commerce – ICC Russia* (ICC Russia 2019) <http://www.iccwbo.ru/komissii/arbitrazhnaya-komissiya/proekty/ICC_Russia_Survey_Russia_as_a_place_for_arbitraion.pdf> accessed 22/05/20

[453] Khvalei (n 12)

arbitrators who had operated through those institutes joined together to create 'The College of Independent Autonomous Arbitrators'.[454] The College had an online presence and each individual arbitrator had their own page that contained their professional credentials and their own set of arbitral rules.

However, this practice was targeted by Ministry of Justice officials, with Deputy Minister Novak describing it as 'casting a shadow across the face of Russian arbitration' in an April 2019 speech.[455] Under the 2018 amendments to the Law on Arbitration and the Law on Advertisement, it is now illegal for anyone outside a licensed arbitral institute to advertise their services in arbitration. As of 25 September 2019, the College's website has no arbitrator profiles on it. Where individual arbitrators advertise their services, they risk their awards being set aside.

[454] 'Третейские суды переходят в формат ad hoc' (Arbitration.ru, 12 December 2017) <https://arbitration.ru/press-centr/arbitration_reform/kratko-o-rezultatakh-arbitrazhnoy-reformy/> accessed 23/01/19

[455] D V Novak, 'Выступление Д. В. Новака, заместителя министра юстиции РФ, 25 апреля 2019 г. на Шестой ежегодной конференции РАА' [2019](1) *Вестник международного арбитража* 126, 129

b. The freedoms granted to arbitration conducted within a licensed institute

Parties to an arbitration conducted within a licensed institute, on the other hand, enjoy new freedom under the reform. Some of these are designed to make the conduct of arbitration easier. An example of this is article 30 of the Law on Arbitration, which provides for court assistance in collecting evidence where an arbitration takes place in a licensed institute.

However, of more significance are the new freedoms that are available where the parties have concluded a 'direct agreement'. The 'direct agreement' is a new concept under the reform in the Law on Arbitration. It is not explicitly defined in any of the reform legislation. However, article 7(13) of the Law on International Commercial Arbitration contains sufficient information to deduce a formal definition.

Article 7(13) explains that where an arbitration agreement refers to a set of arbitral rules, those rules are generally held to be an inseparable part of the arbitration agreement – by referring to, for example, the rules of the ICAC, those rules are incorporated into the arbitration agreement. Article 7(13) goes on to say that certain default provisions in the Law on International Commercial Arbitration can only be supplanted by an agreement between the parties, which explicitly states the parties' intention to do so.

Those provisions of the Law on International Commercial Arbitration providing that the Russian courts are to act as the default appointment and removal authority belong to the group of default provisions that can only be supplanted by direct agreement. Where the parties to an arbitration conducted within a licensed arbitral institute explicitly agree in their arbitration agreement, they are able to remove the Russian courts' jurisdiction over

arbitrator appointments, arbitrator removals, and the revocation of an arbitrator's mandate where the arbitrator is unable to fulfil her duties. [456]

There are two more important court powers that can be ousted by means of direct agreement. Article 16 provides that where an arbitral tribunal has ruled on its jurisdiction by way of a preliminary ruling, then a party to the arbitration is able to appeal this decision to the court. However, article 16(3) allows parties to an arbitration conducted within a licensed institute to oust the Russian courts' power to rule on the jurisdiction of the arbitral tribunal.

Article 34 provides for the Russian courts' power to set aside an arbitral award where the seat of arbitration is Russia. However, under article 34(1) parties to an arbitration conducted within a licensed institute can oust the Russian courts' power to set aside the award. The Russian courts would still be entitled to refuse recognition and enforcement of a Russian-arbitral award, but they could not set aside the award so as to give the award debtor a defence to enforcement outside Russia under article V(1)(e) of the New York Convention.

Russian law has thus adopted similar rules to those found in Swiss law, which allows parties to an arbitration to waive annulment proceedings where they explicitly state their intention in their arbitration agreement.[457] In this respect, Russia has joined those countries that allow parties to effectively delocalise their arbitration.

[456] Articles 11(5), 13(3), and 14(1) of the Law on International Commercial Arbitration

[457] Domitille Baizeau, 'Commentary on Chapter 12 PIL, Article 192 [Waiver of Annulment]' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2nd edn, Kluwer Law International, 2018) 378-9

c. Summary

The limitations placed upon arbitration conducted outside a licensed institute have been justified on the basis that otherwise pocket institutes would continue their operations under the guise of ad hoc arbitration. However, the reform has gone too far in restricting this form of arbitration.[458] The requirement that the parties and the tribunal manage the arbitral correspondence and costs places an unnecessary administrative burden on them, slowing down the arbitral proceedings.

The reform has also made also such arbitrations more dependent on the Russian courts, by making the courts the appointment and challenge authority for arbitration outside licensed institutes. The Russian courts will be the only authority capable of rendering a final decision where the parties have an appointment or removal dispute. Previously this role was played by the President of the Chamber of Commerce.

Furthermore, the question arises as to whether the advertising restrictions introduced in 2018 were necessary. The primary focus of the campaign against fraudulent arbitration was to purge Russia of pocket arbitral institutes. Where the parties had chosen to arbitrate within a pocket institute, it was not then open to an award debtor to assert that the arbitrator was biased simply on the basis that the institute had appointed her. This kind of abuse is not possible where the parties agree to submit their dispute to ad hoc arbitration before a particular arbitrator, whom both the parties can vet in advance, or where two party-appointed arbitrators appoint a third tribunal member.

[458] Komarov explicitly states that the differentiation in the legal regime for ad hoc and institutional arbitration is unjustified. A S Komarov, 'Международный коммерческий арбитраж в России: на пороге реформы законодательства' [2015](1) *Вестник международного коммерческого арбитража* 7

Muranov has criticised the treatment of arbitration conducted outside licensed institutes, in particular calling the prohibition on advertising a form of 'government monopolization in the arbitration market.' [459] With such severe limitations both on providing and advertising services, it is questionable whether arbitration outside a licensed institute will survive in Russia.[460]

On the other hand, the reform makes arbitration within a licensed institute more attractive by offering parties greater independence from the courts in conducting their arbitrations. The reform thus adopts a carrot and stick approach, pushing disputes into government licensed institutes and chasing them out of ad hoc arbitration.

[459] Muranov (n 12) 150

[460] This sentiment is shared by Karabelnikov, who points out that the imposition of close supervision by the Russian courts 'seriously compromises the viability of ad hoc arbitration proceedings in Russia'. Karabelnikov (n 11) 19

4. The Government Licensing of Arbitral Institutes

The most important effect of the Russian reform is the introduction of a licensing system for arbitral institutes – institutes that have been licensed are termed permanently operating arbitral institutes. The reform also introduces rules for granting non-Russian arbitral institutes permission to administer arbitration in Russia. There are currently only 7 arbitral institutes allowed to operate in Russia.

ICAC and the Maritime Arbitration Commission are exempted from the licensing system and operate on a statutory basis. The institutes that have been licensed under the system are the Russian Arbitration Centre at the Russian Institute of Modern Arbitration (RAC), the RSPP Arbitration Centre (RSPP), and the Chamber of Sports Arbitration. Further to these Russian institutes, two foreign institutes have received permission to operate in Russia - the Hong Kong International Arbitration Centre (HKIAC) and the Vienna International Arbitration Centre (VIAC).

The provisions governing the issuing of a license or permission for an arbitral institute to operate in Russia are found in the Law on Arbitration. Though the Law on Arbitration is predominantly concerned with domestic arbitration, the definition of the Law's scope in article 1 provides that chapters 9 to 12 also apply to international arbitration. The provisions governing the issuing of licenses for arbitral institutes can be found in chapter 9.

a. The licensing system

Chapter 9 on the regulation of licensed institutes is broken up into 5 articles, each of which has approximately 20 sub-articles. Article 44 concerns the establishment of a permanently operating arbitral institute. Article 45 concerns the arbitral rules of such institutes. Article 46 concerns the conflict of interest rules for such institutes. Article 47 provides miscellaneous rules for the activities of such institutes. Finally, article 48 concerns the forced closure of such institutes.

Article 44 provides that only non-commercial organizations are allowed to create a permanently operating arbitral institute.[461] Any commercial enterprises that wish to set up a pocket institute will be prevented by law. In order for an arbitral institute to qualify as a permanently operating arbitral institute for the purposes of the Law on Arbitration, the non-commercial organization that created it must have received a license from the Ministry of Justice.[462] The only exceptions to this rule are the Maritime Arbitration Court and the International Commercial Arbitration Court, which have existed since Soviet times, and which were instrumental in drafting the laws of the reform. Though the decision to grant a license belongs to the Ministry of Justice, the decisive factor in whether a non-commercial organization will be given a license is whether it has a recommendation from the Council for the Improvement of Arbitration.[463]

[461]Article 44(1) Law on Arbitration

[462] ibid

[463] Article 44(4) Law on Arbitration

The Council is a specialist body affiliated with the Ministry of Justice, which is composed of civil servants, and representatives of Russia's business, legal, and academic communities. The composition of the Council is partly determined by the Law on Arbitration, which provides that no more than one third of the members may be civil servants.[464] The Ministry of Justice, as the government body responsible for the Council, is entrusted with deciding the composition of the Council, and confirming the Decrees on the Creation and Functions of the Council.[465] Apart from making recommendations on issuing licenses, the Council is responsible for reviewing the application of the Law on Arbitration by the courts, as well as playing a number of other roles provided for in the Decrees on the Creation and Functions of the Council.[466]

On reviewing each non-commercial organization's application, the Council must check the documents enumerated in article 44(6.1) of the Law on Arbitration against the exhaustive criteria provided for under article 44(8).[467] These criteria are as follows:

1. The rules of the non-commercial organization's arbitral institute must comply with the Law on Arbitration.

2. The non-commercial organization's arbitral institute must have a list of recommended arbitrators that meets the requirements of the Law on Arbitration.

[464] Article 44(5) Law on Arbitration

[465] The Decrees on the Creation and Functions of the Council for the Improvement of Arbitration, 27/03/2019 N 54183 – Приказ Минюста России от 20.03.2019 N 45

[466] ibid, article 4(6)

[467] Article 44(9) Law on Arbitration

3. The non-commercial organization must provide authentic information both about itself, and about its founders or stakeholders.

4. The reputation of the non-commercial organization, as well as its scope of operations and activities must allow it to organize the arbitral institute to a sufficiently high level: particularly relevant in this respect are the financial resources of the non-commercial organization, and the arbitral institute's contributions to the development of arbitration in Russia.

i. The requirements for establishing a permanently operating arbitral institute

A permanently operating arbitral institute may have different rules for different types of dispute.[468] Article 45 provides list of issues that must be covered by a permanently operating arbitral institute's standard rules. In total there are 24 issues that must be provided for in a permanently operating arbitral institute's standard rules. These mandatory provisions are primarily aimed at increasing the transparency of Russian arbitral institutes.

The Law requires a permanently operating arbitral institute's rules to contain, *inter alia*: the respective jurisdictions of the institute and the arbitral tribunal in deciding how an arbitration is to be conducted; the relevant costs for arbitrations or their manner of calculation; the applicable rules for the impartiality and independence of arbitrators, and how these rules are to be guaranteed (e.g. by means of declarations by the arbitrators); the procedure for composing the tribunal; the prescribed time period for an arbitration; and the grounds and procedure for removing an arbitrator. Any provisions of an arbitral institution's rule not in conformity with the Law on Arbitration are void, and any award tainted by an offending provision is liable to be set aside.[469]

The conflict of interest rules under the Law on Arbitration are relatively straightforward: they forbid a permanently operating arbitral institute from administering any dispute that involves one of the persons listed under article 46(2).[470] These persons are the non-commercial organization that created the arbitral institute, a stakeholder or *de facto*

[468] ibid, article 45(2)

[469] ibid, article 45(9)

[470] ibid, article 46(1)

director of the non-commercial organization, or any person within the arbitral institute empowered to act as appointment authority. The conflict provisions concerning persons empowered to act as appointment authority also extend to direct family members of such persons, and companies in which such persons have a controlling stake or the power to appoint management. It is not exactly clear what the repercussions are where an institute has administered an arbitration in contravention of these provisions: under article 46(4) this will not be sufficient in and of itself to warrant the refusal to enforce, or annulment of, an arbitral award.

Finally, article 47 provides a number of miscellaneous rules for the internal structuring of a licensed arbitral institute. These include the requirement to maintain a list of no less than thirty recommended arbitrators, one third of which must have Russian academic degrees, and no less than half of which must have at least 10 years' experience as judges or arbitrators. No arbitrator may appear on the list of more than three institutions.[471]

A permanently operating arbitral tribunal must also have a committee for the appointment and removal of arbitrators. Where a single person, such as the chairman of an arbitral institute, is empowered to make appointment decisions, the rules must allow for an appeal to the appointments committee.[472] Two thirds of the appointment and removal committee are to be voted for by a simple majority of those persons on the recommended arbitrator list; the other third can be appointed by another method where this is provided for by the rules of the institute. At least one third of the appointments committee must have

[471] ibid, articles 47(1) and (3)

[472] ibid, article 47(4)

a higher legal education.[473] At least one third of the committee must be rotated every three years, with at least three years before reinstatement on the committee for each member that has been rotated off.[474]

The further requirements under article 47 provide for the compulsory online publishing of information on the stakeholders and internal bodies of a licensed arbitral institute,[475] as well as the requirement that the institute maintain a website.[476]

Where a non-commercial institute has received a license for its arbitral institute, the arbitral institute must deposit its rules for arbitration with the Ministry of Justice and publish its rules online. Only once these conditions have been met may an institute administrate arbitrations. The arbitral institute will only be permitted to carry out those functions that are provided for under the deposited rules.[477] In particular, the rules must stipulate whether the institute carries out the following functions - administering international commercial arbitration, administering domestic arbitration, and providing support to arbitral tribunals in arbitrations outside a licensed institute.[478]

Where a permanently operating arbitral institute commits repeated, or serious violations of the rules under the Law on Arbitration, the Ministry of Justice will order the

[473] ibid, article 47(5)

[474] ibid, article 47(6)

[475] ibid, articles 47(9) and (10)

[476] ibid, article 47(11)

[477] ibid, articles 44(17) and 45(1)

[478] ibid, articles 44(18) and (19) Law on Arbitration

institute to shut down. If this is not done voluntarily, the Ministry of Justice can request assistance from the Russian courts.[479]

[479] ibid, articles 48(3) and (4)

ii. The licensing of foreign arbitral institutes

It should be noted that foreign arbitral institutes do not need to meet the requirements applicable to Russian arbitral institutes.[480] The relevant provision for the licensing of foreign arbitral institutes is article 44(4.1): in order to administer arbitration in Russia, a foreign institute must be included on the list of foreign institutes recognised as permanently operating arbitral institutes. An institute is included on the list on the basis of the recommendation of the Council. For the purposes of the Council's review, foreign arbitral institutes must present the documents listed under article 44(6.2). The criteria for licensing a foreign permanently operating arbitral institute are 'a widely recognised international reputation', and, if the institute intends to administer domestic arbitration, a Russian subdivision of the institute.[481]

Further guidance on the 'reputation' criterion for foreign institutes has been given by the Council.[482] The factors that the Council takes into account for foreign institutes are: inclusion on a global ranking list (such as the Global Arbitration Review White List); how long the institute has been in operation; the number of new arbitrations per year for the last 5 years; the number of arbitrations within the institute over the last 5 years that involved a party from outside the State in which the institute has its headquarters; information on the nationality and location of the parties to arbitrations held within the institute for the last 5 years (including Russian parties); the ratio of arbitrations fully administered by the institute

[480] ibid, article 44(12.1)

[481] ibid, article 44(12)

[482] 'Recommendation of the Council for the Improvement of Arbitration to the Ministry of Justice of the Russian Federation' (Russian Ministry of Justice, 27 December 2018) <https://minjust.ru/sites/default/files/rekomendaciya_soveta_po_kriteriyam.docx> accessed 23/05/20

to arbitrations in which the institute has provided a specific function, such as that of appointment authority; and the rate of enforcement for awards issued by the institute.

b. The licensing system and combatting pocket arbitral institutes

The licensing system is a response to the problem of pocket arbitral institutes that had arisen under the Russian pre-reform regime for arbitration. The licensing system has made it impossible to create an arbitral institute that is dependent on, or related to, a commercial enterprise, such as those that were involved in the Lukoil, Sberbank, and Gazprom cases described in the previous chapter.

The requirement that arbitral institutes be attached to non-commercial organizations acts as the major bulwark against pocket arbitral institutes being created and funded by large Russian companies. Furthermore, the conflict of interest provisions contained in article 46 preclude the administration by a licensed arbitral institute of an arbitration involving any parties that may exert influence on that institute. Where a company is involved in the creation of a permanently operating arbitral institute through participation in the relevant non-commercial organization, this also will fall under the conflict of interest provisions of the Law on Arbitration.

The reform has precluded the risk of abuse that was previously posed by pocket arbitral institutes in Russia. The process of establishing a permanently operating arbitral institute has made it impossible to set up a non-independent arbitral institute. Furthermore, the current licensed institutes are highly unlikely to engage in fraudulent activity as they have not only been extensively vetted but face severe repercussions should they do so.

Where an institute administers a dispute in violation of the conflict of interest provisions it risks being shut down under article 48. There are currently 7 arbitral institutes

allowed to operate in Russia, meaning that the Russian arbitration market has been divided up between a small number of players. Institutes that have received licenses enjoy a large captive market with minimal competition. There is a strong incentive for arbitral institutes to maintain a good relationship with the government and not to violate any of the provisions of the Law on Arbitration so as not to prejudice their license, as the rewards in terms of the market-share incentivise obedience.

c. The potential for government abuse of the licensing system

The reform has precluded commercial enterprises from abusing arbitration through non-independent institutes. Previously there was a fear of illegitimate private influence over Russian arbitration; now there is the question of whether arbitration has become so centrally regulated as to allow for government influence over an arbitration.

Were such influence to be exerted, one might expect similar problems as arose in pocket institute arbitrations prior to the reform. Previously, the owner of a pocket institute could have pushed the institute to appoint a chairman to a three-arbitrator tribunal, who, along with the owner's appointed arbitrator, could issue a majority decision in favour of the arbitral institute's owner. The reform now gives the Ministry of Justice the power to control arbitral institutes' access to the arbitration market. Where the Ministry controls access to the arbitration market, this raises the question of whether the Russian government could use this control to push for the appointment of a specific arbitrator in an arbitration involving Russian government interests.

The counterargument to this is that the reform was necessary to prevent the abuses of arbitration that had occurred previously. The imposition of government control over arbitration is a means to the end of improving Russian arbitration and precluding fraud. Any system of control creates a risk that the system might be abused. Without evidence that the Russian government is in fact abusing the licensing system for arbitration, there is no greater call for alarm than when considering other government licensing systems such as the English government system for issuing driving licenses.

This counterargument overlooks three important issues, however. The first is that government control was not necessary to cure Russian arbitration of fraud. This thesis sides with the majority of the respondents to the first *Третейский суд* survey in holding that self-regulation by the arbitration community would have been sufficient. A system by which the major arbitral institutes, or a group of people chosen from within the Russian arbitration community, operate a register of arbitral institutes would have been sufficient to weed out those institutes that had been acting in bad faith. The defence of the licensing system as necessary to combat pocket arbitral institutes thus does not withstand scrutiny.

The second point is that arbitration is an institution of private society. International arbitration, in particular, is valued for its ability to move disputes from national courts into an anational forum, in which neither party can benefit from a home advantage. According to respondents to the 2018 Queen Mary survey, the second greatest benefit of arbitration is its ability to avoid specific national legal systems.[483] Extensive government regulation of arbitration undermines the nature of arbitration as a private institution and its ability to provide for an anational forum.

The third point is that any abuse of the licensing system would be undetectable, undermining the argument that the licensing system does not warrant criticism until it can be shown that it is in fact being abused. Prior to the reform, parties had struggled to prove that pocket institutes were appointing biased arbitrators as there was no evidence of bias beyond the appointment itself. It would be just as difficult to evidence abusive appointments after the reform should they be carried out at the behest of the Russian government. The Dutch Court of Appeal previously concluded that the Russian

[483] Queen Mary (n 156) 7

government exerted pressure on the judge who annulled the Yukos awards; if one does not consider the Dutch ruling entirely unfounded, it is quite possible that the Russian government will exert pressure on a Russian arbitral institute in an equally politically significant dispute. There is thus the risk of such pressure being exerted. Should that risk materialise, it will be extremely difficult to prove.

Russia has a large degree of state capture in the private sector. With respect to the extent that state-owned enterprises' capture of the national economy, Russia is fourth behind China, Poland, and Indonesia in an analysis of which States. Russia is third behind China and the United Arab Emirates in terms of the State share in the 10 largest national companies.[484]

Where the State is so enmeshed in the private sector, there will be many arbitrations that touch upon State interests. Where it has been concluded that the Russian government previously exerted pressure on the Russian judiciary in *Yukos*, there is no reason to believe it will not exert pressure on Russian arbitral institutes in future cases. Though *Yukos* was an extreme case, and the vast majority of cases will not implicate Russian government interest to the same extent, the possibility that the Russian government will intervene in a similarly politically significant case cannot be excluded.

Finally, it should be emphasized that this thesis is not making any positive assertion that the licensing system is being abused or has been abused. The focus of this thesis is the question of whether the licensing system could be abused, and if so whether the international regime for arbitration under the New York Convention is capable of

[484] *Economic Surveys: Russian Federation Overview* (OECD Publishing 2014) 19-20

addressing such abuse. The conclusions drawn with respect to the risks of extensive government oversight in arbitration extend beyond the Russian reform and its licensing system for arbitral institutes, and are relevant to developments in any national law by which arbitration is subject to a high degree of control by government.

Muranov has argued that the reform of Russian arbitration amounts to bad faith manoeuvring by the Russian government as it attempts 'to gain control over arbitration, to neutralize it as a rival'.[485] Muranov considers that the policy of bringing arbitration to heel originates from its experience in three arbitrations, from which the government fully appreciated arbitration's ability to remove dispute resolution from the government's sphere of control.

The first is the arbitration between Yukos and Rosneft in 2006, with Muranov describing the awards made against Rosneft as a major blow to the Russian government. The second arbitration was that between Maximov and Novolipetsk Metallurgical Enterprises in 2011. Though the award was soon set aside, Muranov explains that the owner of Novolipetsk Metallurgical Enterprises, Vladimir Lisin, has played a pivotal role in pushing for and financing the arbitration reform. The third arbitration was that between Russia itself and the various parties who brought a claim under the Energy Charter Treaty in relation to the Russian government's treatment of Yukos: the arbitration resulted in awards against Russia of over $50 billion.

[485] Aleksander Muranov, *'Russian' Institute of Modern Arbitration and Russian Arbitration Centre: Examining Their Role in Russian Arbitration* (Moscow 2020) 78 <http://centerarbitrgongo.ru/wp-content/uploads/2020/03/Muranov_A-Study_about_the_RAC-2020-in_English.pdf> accessed 25/04/20

Each of these arbitrations involved the interests of the Russian government, or a person close to government. In each of these arbitrations, the Russian government or government-affiliated party lost before an arbitral tribunal. Furthermore, in *Yukos v Rosneft* the Dutch courts provided an illustration of the difficulty of controlling an arbitration by refusing to recognise the Russian annulment decisions. If the Russian government has a policy of controlling the resolution of Russian disputes, the decentralised nature of arbitration could pose a risk to the effective implementation of that policy. In this sense, Muranov views the arbitration reform as 'a continuation and reflection of the policy of subordinating the state courts to the executive branch',[486] and thus policing the resolution of disputes.

On the other hand, Skvortsov and Kropotov have argued that as the Ministry of Justice is only entitled to review an institute's day-to-day operations for conformity with the law, the licensing system does not give it the ability to interfere with the integrity of an individual arbitration.[487] The Ministry of Justice is not impowered to review the internal decisions of an arbitral institute, such as those concerning the administration of an individual arbitration. If the licensing system does not allow the Council or the Ministry of Justice to review individual decisions concerning the appointment of arbitrators, then the risk of influence being exerted over appointment decisions is minimized.

However, Skvortsov and Kropotov overlook the fact that the Ministry of Justice does not need the power to review individual appointment decisions to be able to exert pressure on an arbitral institute with respect to arbitrator appointments. Where the Ministry of

[486] ibid 16

[487] Skvortsov and Kropotov (n 12)

Justice controls access to the arbitration market and can make realistic threats or promises to an arbitral institute with respect to such access, this will give the Ministry both a carrot and a stick by which to exert influence over an appointment decision by a Russian arbitral institute. To exert pressure on how an institute conducts an arbitration, the government simply needs leverage on the arbitral institute. Where the government is able to revoke an institute's license, it has such leverage; the fact that the government does not explicitly monitor how licensed institutes conduct an individual arbitration is irrelevant. [488]

Though the Global Arbitration Review saw ICAC as sufficiently safe to include it in its White List, it previously noted concerns about the funding of RAC. The April 2019 Global Arbitration Review appraisal of RAC reported rumours that the government was secretly funding it. Though the review was subsequently amended, Khvalei corroborates its previous description of RAC.[489]

Muranov has devoted an entire book to the subject of RAC's relationship with the Russian government. He points out that the founders of RAC all have strong links to the Russian government or are otherwise shell entities,[490] and that the money provided to RAC by its founders is of an unknown origin.[491]

[488] In the Sakhalin II project, the Russian government was able to exert pressure on a consortium of oil and gas companies through alleged violations of environmental law to force the consortium to accept the Russian company Gazprom as a majority shareholder in the project. The lack of a relationship between the environmental violations and imposition of a Russian majority shareholder posed no problem for the Russian government in achieving this.

[489] Vladimir Khvalei, 'Why Arbitration Reform in Russia Failed?' (2019) 11 *Arbitration.ru* 4, 16-17

[490] Muranov (n 485) 36-44

[491] Muranov (n 485) 45-48

Another topic discussed by Muranov is the Councils' treatment of RAC in comparison to other applicants for a license. When RAC applied for its license, it had held one business breakfast and one conference, published two articles, participated in several educational events, and given several speeches at roundtables, seminars, and conferences. This can be compared to the Russian Arbitration Association (RAA), which was established in 2013, and has made numerous contributions to the development of arbitration at both the international and national level.[492] On its third application for a license, the RAA was rejected on the basis that it did not meet the reputational requirements.[493]

It cannot be realistically argued that RAC's achievements at the time of its application outstripped those of the Russian Arbitration Association, as RAC's activity prior to licensing has been brief and limited whereas the RAA had years of activity and an international scope. RAC thus seems to have benefitted from preferential treatment from the Council, which has otherwise acted as an extremely strict gatekeeper of the Russian arbitration market.

Furthermore, Muranov draws attention to what he considers the favourable treatment shown by the Russian government to RAC. The government has permitted RAC to include 'Russian' in its name. RAC is one of only 28 organizations with such permission, the test for which is that the organization must supply unique services that are beneficial to the nation. As RAC has operated for less than three years there is the extra requirement that

[492] Muranov (n 485) 105-106

[493] Muranov (n 485) 21-25

the Prime Minister instruct that permission be granted.[494] That RAC was granted such permission where it supplies similar services as other arbitral institutes, and that the Russian president specifically instructed that it be granted such permission, there is a strong argument that the Russian government is closely involved with RAC.

Another cause for concern is that RAC has created a specialist subdivision for nuclear energy disputes, the director of which was previously the director of the pocket institute affiliated with Rosatom, Russia's state-owned nuclear energy company. [495] The institutional fees for nuclear disputes at RAC are just over 10% of the fees for other categories of dispute, which Muranov argues is indicative of the fact that Rosatom is one of the sources of RAC's funding.[496] It thus seems that at least one State pocket institute may have survived the reform as a division within a permanently licensed institute.

It should be stated that RAC denies the allegations that it has benefitted from preferential treatment, and that the government is involved in its operation and funding. RAC further states that it is considering legal action against Muranov with respect to his allegations.[497] A strong argument in favour of RAC's independence is that the Board of RAC in involved in appointment decisions, and that the Board includes a number of important figures from outside Russian arbitration, such as Neil Kaplan and Dame Elizabeth Gloster.[498] These individuals can be expected to resist any appointments that clearly evidence signs of government influence. However, their ability to provide absolute

[494] Muranov (n 485) 26-27

[496] Muranov (n 485) 59-62

[497] 'Press-Release' (RAC, 2020) <https://centerarbitr.ru/en/2020/02/10/press-release/> (accessed 20/01/21)

[498] 'The Board' (RAC, 2020) < https://centerarbitr.ru/en/presidium-2/> (accessed 22/02/21)

protection against such influence may be undermined by the fact that they are unlikely to have a thorough knowledge of the Russian arbitrators put forward as candidates for appointment due to the fact that they are not insiders of the Russian arbitration community.

The overall picture that forms from Muranov's analysis of RAC's establishment as a licensed permanently operating arbitral institute it one of preferential treatment both by the Russian government, and by the Council. This championing of RAC by both government and the Council lends some credibility to the arguments that the two are more coordinated in their regulation of arbitration than is immediately apparent from the black letter, and that the government is able to exert influence over the licensing system through the Council. In order to gain a better understanding of this issue, it is necessary to take a closer look at the Council.

i. The Council for the Improvement of Arbitration

Where the Russian courts find themselves subject to government pressure in politically charged cases like *Yukos*, it is quite possible that permanently operating arbitral institutes will find themselves subject to similar pressure in such cases. The extent to which licensed arbitral institutes are susceptible to this pressure will depend on the licensing system, and in particular on the extent to which the licensing system provides the necessary safeguards to ensure the independence of Russian arbitral institutes from the Russian government. A major factor in determining this is whether the Council is independent of the government.

The Council's importance under the reform cannot be underestimated. Besides its key role in deciding whether to license arbitral institutes, article 6 of the Decrees makes the Council responsible for, *inter alia*, monitoring the application of Russia's arbitration laws, advising the Ministry of Justice on the drafting of future laws for arbitration, and reviewing the application of the Law on Arbitration. The Council not only has a role in determining how the current rules on arbitration are to be applied, but also has a role in determining what rules may be introduced in the future.

The Council is supposed to be an independent body representing the interests of the Russian arbitration community. The extent to which the Council is independent from the Ministry of Justice has serious implications for the independence of Russian arbitration from government. An important factor in considering the independence of the Council is its composition.[499]

[499] 'Composition of the Council for the Improvement of Arbitration' <http://minjust.gov.ru/ru/ekspertnye-i-konsultativnye-organy-pri-ministrestve-yusticii-rossiyskoy-federacii/sostav-soveta-po> (accessed 23 June 2020)

Article 4 of the Decrees states that the Council operates under the Ministry of Justice. It is composed of 20 to 50 members who are chosen by the Ministry of Justice.[500] Government officials may make up no more than one third of the composition of the Council; and there must be at least 2 representatives from Russia's business associations, and 2 representatives from Russia's chambers of commerce and industry.[501] The rest of the Council is composed of representatives of the academic and business communities, excluding people who are involved with the management of existing permanently operating arbitral institutes and the non-commercial organizations that have created such institutes.[502]

However, a number of the members represented as working in the private sector or academia have strong links to the government. Roman Bevzenko and Dzhunus Dzhakupov are both government justice advisors – roles similar to public prosecutors in England. In addition, at least one other member occupies a senior position in a State-controlled company – Tamara Merebashvili is a senior figure in Inter RAO, which is in turn primarily owned by State-owned companies.[503] Analysis of potential government links to council members is complicated by the complex corporate holding structures prevalent in the Russian market.

Muranov argues that 'at least 50% [of the Council] have neither participated as arbitrators… nor have they in any way seriously come across arbitration issues in their

[500] Articles 4 and 11 of the Decrees

[501] Article 12 of the Decrees

[502] Article 13 of the Decrees

[503] 'Interrao Shareholder Structure' (Interrao.com, 04 June 2019) <https://www.interrao.ru/en/investors/securities-information/shareholder-structure/> accessed 24/04/20

professional activities'.[504] Furthermore, Muranov argues that 25 of the present 50 members can be relied upon to vote in line with government interests either due to working directly for the government or due to their close affiliation with the government: as a result 'it is impossible to get a recommendation without an instruction from the Ministry of Justice.[505]

A further consideration in determining whether the Council is sufficiently insulated from government is the role of the Council president. The president is chosen from the deputy ministers of the Ministry of Justice and fulfils a number of vital functions. Under article 18 of the Decrees, the president is charged with rotating Council members on and off active duty. At least one third of the members of the Council must be rotated every three months.[506]

Not only are Council members selected by the Ministry of Justice, but it is a Deputy Minister of Justice that is in control of rotating Council members on and off active duty. Article 18 of the Decrees further empowers the president of the Council to choose when to convene the Council and to set its agenda.

In order to recommend that an arbitral institute be licensed, the decision must be adopted by a two thirds majority of all council members. If one third of the Council can be composed of government employees and can be convinced to vote against issuing a license, it would require absolute unanimity from the rest of the Council to issue a recommendation. Moreover Muranov does not consider those non-government members of the Council to be

[504] Muranov (n 485) 51

[505] Muranov (n 485) 52-3

[506] Article 15 of the Decrees

independent of the Ministry of Justice: he argues that younger members face difficulties in developing their careers, and older members risk their status, should they come into conflict with the Ministry.[507]

Whether such unanimity among those members not employed by government is possible depends on the composition of the Council at any given point in time. Where the function of rotating members lies in the hands of a deputy minister from the Ministry of Justice, it is hard to see the Council as beyond the reach of political influence. A number of those who have gone through the application process have complained that the Ministry of Justice has too much control, and that the Council is not politically neutral.[508]

Moreover, before an application is even put before the Council, the Ministry reserves the right to perform a formal examination of the documents to ensure the application has been properly formulated.[509] Thus the Ministry retains the ability to screen those applications to go before the Council. Muranov reports that of the 141 applications made between the creation of the Council until 29 March 2019, only 23 were allowed to go before the Council by the Ministry of Justice.[510]

The two thirds majority requirement for licensing an institute can be contrasted with the requirement of a simple majority of members present at a Council session for other Council decisions, such as recommending the revocation of an arbitral institute's license.

[507] Muranov (n 12)

[508] See: Roman Zybkov and Dmitry Artyukhov, 'Без суда. Акт III' (2019) 11 *Arbitration.ru* 31; Dmitry Artyukhov, 'Скверный анекдот' (2019) 11 *Arbitration.ru* 41

[509] Muranov (n 12) 151-2

[510] Muranov (n 485) 20-21

The president of the Council is entitled to choose when to convene the Council. By choosing when to convene the Council, it will be possible to influence the composition of those in attendance: by planning a meeting during exams this may prevent academics from attending; by planning a meeting during a major conference, this may prevent practitioners from attending.

If the president's right to plan Council meetings were to be exercised cynically, it would not be difficult to engineer a situation where the majority present are government officials regardless of the fact that they may comprise no more than one third of the total number of Council members. Furthermore, if Muranov can be believed then 25 of the 50 current Council members are likely to vote in line with government policy, it would be simple to ensure that a majority of the members present at any meeting will vote for the closure of an institute or against issuing a license.

ii. The availability of review under the licensing system

The Law on Arbitration does purport to offer safeguards against wrongful decisions under the licensing system through judicial review. Article 44(10) of the Law on Arbitration provides that where a non-commercial organization has been refused a license by the Ministry of Justice, this decision may be appealed before a court. The situation is complicated, however, by the relationship between the Ministry of Justice, which is the body that ultimately approves or refuses an application, and the Council for the Improvement of Arbitration.

Before the Decrees, the relationship between the Ministry of Justice and the Council was regulated by the Rules for the Assignment of the Right to Create a Permanently Operating Arbitral Institute.[511] Article 2 stated that the granting of a licence is made by Government order, while article 3 provided that the Ministry of Justice drafts such orders in accordance with the recommendation of the Council.

The exact words used to describe the relationship between the Ministry's decision and the Council's recommendation in this regard were 'в соответствии', which translate to 'in accordance with', and which gave the Ministry no discretion in choosing whether to follow the recommendation of the Council in granting a license.[512] Where the Council has no defined legal status and is not the formal decision-maker, there is no possibility of

[511] Rules for the Assignment of the Right to Create a Permanently Operating Arbitral Institute - Постановление Правительства РФ от 25.06.2016 N 577

[512] The problematic nature of this phrasing was even highlighted in a Government-issued anti-corruption report by the independent consultancy company: 'Заключение по результатам независимой антикоррупционной экспертизы', (Ценные Бумаги Консалтинг, 18 April 2016) <http://cbk.lt/i/comm/299_1391/zakluchenieсbk.pdf> accessed 24/04/20

appealing a recommendation of the Council before the courts.[513] The Ministry's decision would be immunized from judicial review because it is bound to follow the decisions of the Council, which are themselves unappealable.

It unlikely that the situation has changed under the Decrees, which have been effective as of 8 April 2019. Article 46 of the Decrees does not contain the phrase 'в соответствии' but contains the phrase 'по итогам', which translates to 'according to the results of'. This does not seem to give the Ministry any more discretion to depart from a recommendation of the Council than it had under the Rules.

Attachment 4 to the new rules provides a model letter of refusal, which uses different wording. The model letter uses the phrase 'на основании рекомендации', which means that the decision has been made on the basis of, but not necessarily exclusively on, the Council's recommendation. It is unfortunate that this wording should be found in the model letter, but not in the rules themselves. The Ministry will probably be able to rely on the Council's recommendation to avoid substantive review of its decision.

Morozov argues that even were a court to find that the Ministry cannot solely base its decision on the Council's recommendation, the requirements under article 44(8) of the Law on Arbitration do not lend themselves to judicial review.[514] This is particularly true for the nebulous reputation requirement. Morozov points to the Russian judiciary's refusal

[513] M E Morozov, 'Процессуальные вопросы оспаривания отказа в выдаче разрешения на администрирование арбитража' [2016](6) *Третейский Суд* 27, 29-30

[514] ibid 30-31

to review the selection process for Supreme Court justices as precedent for the refusal to subject similar value judgements to review in the licensing of arbitral institutes.

Furthermore, beyond the issue of whether recommendation decisions lend themselves to substantive review, there is the question of whether the Russian courts can be expected to protect arbitral institutes from the influence of the Russian government. Not only have there been concerns as to the independence of the Russian courts in politically sensitive cases, but the post-reform enforcement rates indicate a lingering hostility to arbitration by the Russian courts. Where the Russian courts remain hostile to arbitration, it is difficult to see them taking up the role of protectors of the arbitral institutes' interests against the Ministry of Justice

The existing caselaw on the review of the licensing of institutes provides support for Morozov's view that the courts will not subject licensing decisions to substantive scrutiny. In one case brought by the Centre for Arbitral Proceedings, the Commercial Courts refused to decide the Centre's claim on the basis that arbitral institutes are not commercial entities but rather institutions of justice – the dispute therefore fell outside the Commercial Courts' jurisdiction.[515] The Centre then brought its claim before the Courts of General Jurisdiction, which simply confirmed that the Council had voted against the issue of a license without any substantive evaluation of whether the Centre should have been given a recommendation.[516]

[515] Постановление арбитражного суд Москвы от 12 сентября 2019 года No. A40-157872/19, upheld on appeal in постановление девятого арбитражного апелляционного суда от 18 октября 2019 года No. A40-157872/19 and постановление арбитражного суда московского округа от 12 декабря 2019 года No. A40-157872/19

[516] Постановление замоскворецкого районного суда от 16 декабря 2019 года No. 2A-835/2019

The lack of effective review in the licensing system is not restricted to the issuing of licenses. Articles 48(2) and (3) of the Law on Arbitration provide for the shutting down of permanently operating arbitral institutes where so directed by the Ministry. Under article 48(2) the Ministry must warn a licensed institute that it is in violation of the provisions of the Law on Arbitration, giving it a month to remedy the situation. Under article 48(3) the Ministry may immediately order an institute to close where the institute has committed repeated serious violations or is found to have failed to meet the information requirements in its original application for a license under articles 44(8)(1)-(3). Where the institute does not willingly comply with the order for its closure, article 48(4) allows the Ministry of Justice to apply to the courts for compulsory closure.

Of particular interest is the potential role of the Council in this process. Article 6(7) of the Decrees empowers the Council to recommend the closure of permanently operating arbitral institutes. If the Council's recommendations play a similar role in the closure of permanently operating arbitral institutes as they do in the licensing of such institutes, this would insulate mandatory closure orders by the Ministry from appeal.

A subsidiary point is that the courts have already refused to subject the reform to judicial review under Russian competition law. In 2018, three arbitral institutes challenged the regime created by the reform on the basis that it had created a monopoly in arbitration. The claims were refused at first instance on the basis that the claimants had failed to make out their case.[517] Though a competition law claim could have provided a means of challenging the outcome of the reform, since the 2018 amendments article 44(1.1) of the

[517] Постановление арбитражного суда города Москвы от 19.12.2018 N А40-217302/18-33-2400; upheld on appeal in Постановление девятого арбитражного апелляционного суда от 07.03.2019 N 09АП-4217/2019

Law on Arbitration now explicitly removes arbitral institutions from the ambit of competition law.

Somewhat worrying in this regard is a comment made in a Council session. The Council was deciding whether to issue a license for the Centre for Arbitration, one of the institutes that had mounted the challenge to the reform under Russia's competition laws. When discussing whether the Centre for Arbitration had a sufficiently good reputation, the legal challenge was raised as a red flag by Chubarov, and the Centre was not recommended for a license.[518] Where an institute's ability to obtain a license might be prejudiced by challenging government policy, there is a dangerous possibility of a party line in the Council.

[518] 'В России начнут работать два новых третейских суда// Спортивный и Гонконгский арбитражи поддержаны советом при Минюсте' (Zakon.ru, 04 April 2019) https://zakon.ru/discussion/2019/04/04/v_rossii_nachnut_rabotat_dva_novyh_tretejskih_suda__sportivnyj_i_gonkongskij_arbitrazhi_podderzhany_ accessed 23/05/20

d. A comparative analysis of licensing arbitral institutes and discriminating between arbitration inside and outside of licensed arbitral institutes

Russia is not the only State to exert some form of control over arbitral institutes. Other States that do this include Costa Rica, Ecuador, Nicaragua, Panama, Peru, Angola, Mozambique, Zambia, Uganda, Bahrain, Ukraine, Latvia, and Uzbekistan. However, the overall regime for arbitral institutes in Russia diverges from these States.

Firstly, Russia has given only 7 arbitral institutes permission to operate; Latvia, for example, has around 80 arbitral institutes in operation.[519] Even States that have fewer arbitral institutes, like Ukraine which has 3, differ from the Russian regime in that they do not prevent foreign arbitral institutes from operating in their country and do not place limitations on ad hoc arbitration.[520] The combined effect of Russia's rules means that only those institutes that have been licensed by the Russian government are able to provide effective Russia-seated arbitration. In this respect, the only other country with a similar approach to arbitration is China.

[519] O. Skvortsov, M. Savransky, G. Sevastyanov, *Международный коммерческий арбитраж* (Библиотека Журнала Третейский Суд, 2018) 208

[520] 'Ukraine' (GAR, 2020) <https://globalarbitrationreview.com/jurisdiction/1005743/ukraine> (accessed 25/03/20)

i. Discriminating between forms of arbitration in China and Russia

Where an arbitration is seated in China, the Chinese provisions governing the validity of arbitration agreements will apply. Of interest are the rules under articles 16(3), 11(1), and 18 of the Arbitration Law of the People's Republic of China. Article 16(3) provides that a valid arbitration agreement must specify a designated arbitral institute for the arbitration. Article 11(1) provides that a designated arbitral institute must have its own charter in accordance with the Arbitration Law. Article 18 provides that where the arbitration agreement does not provide a sufficiently clear specification of a designated arbitral institute, the agreement will be considered null and void.

Two important consequences result from the interplay of these provisions. The first consequence is that ad hoc arbitration with a Chinese seat is not permitted. The requirement that an arbitration agreement provide for an arbitral institute precludes the submission of a dispute to a tribunal not operating within an institute. Any arbitration agreement that fails to provide for an institute is null and void, making ad hoc arbitration a legal impossibility. Though note that recently article 9 of the 2016 Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Development of Free Trade Zones has provided an exception to this position where both parties to an ad hoc arbitration are wholly owned foreign enterprises registered in free trade zones.

Awards from ad hoc arbitrations seated abroad, however, will still be enforced under the New York Convention in China. Xiao Yang, the former Chief Justice of the

SPC, has stated that Chinese courts will enforce foreign, ad hoc awards on a case-by-case basis, consulting the law of the seat at the seat to assess the validity of the awards.[521]

The second consequence of Chinese provisions on arbitration agreements is the so-called 'Great Wall of China' for foreign arbitral institutes.[522] Whilst these provisions do not explicitly state that a foreign institute cannot be designated in the parties' arbitration agreement, court practice suggests that such agreements will be considered null and void.

In the *Züblin*[523] and *Xiaxin Electronics*[524] cases, the Supreme Court found arbitral agreements providing for China-seated ICC arbitration invalid. Though the court did not make a general pronouncement on the validity of arbitration agreements for arbitration with a non-Chinese institute in China, other official statements by senior figures in China's legislature suggest that such agreements are not recognised by Chinese law. At a May 2004 ICCA Congress roundtable, the senior legislator for Chinese arbitration law expressly denied the validity of arbitration administered by a foreign arbitral institution in China.[525]

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[521] Fei Gao, *The Chinese Courts' Support and Supervision to Arbitration – An Interview with the President of the SPC Xiao Yang*, (Arbitration and Law, 2001)

[522] Jingzhou Tao and Clarisse Von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions' *Arbitration International*, 23(2) 1 June 2007 309

[523] *Züblin International GmbH v Wuxi Woco-Tongyong Rubber Engineering Co Ltd* [2003] Min Si Ta Zi No 23 (SPC, 8 July 2004), reproduced in Xiang Wan (ed), *Guide on Foreign-related Commercial and Maritime Trials* (People's Court Press, 2004) 36

[524] *Xiaxin Electronics Co, Ltd v Société de Production Belge AG* [2009] Min Min Di Zi No 7 (SPC, 2009)

[525] See, Weixia Gu, 'Judicial review over arbitration in China: assessing the extent of the latest pro-arbitration move by the Supreme People's Court in the People's Republic of China' *Wisconsin International Law Journal* 27(2) 221

The similarity in the regulation of how arbitration may take place under the post-reform Russian regime and under the Chinese regime is striking. Both States place restrictions on arbitrations where they are not conducted by an arbitral institute that has been established in accordance with domestic law. In China, ad hoc arbitration is simply prohibited; in Russia ad hoc arbitration is inhibited by the restrictions placed upon it.

Furthermore, both States have a general prohibition on foreign arbitral institutes from operating within themselves; though in Russia foreign institutes may apply to the Ministry of Justice for permission to administer Russian arbitrations. Even where such foreign institutes are incorporated outside of Russia, their ability to operate in Russia is still regulated by the Council. The significance of an institute's incorporation abroad is questionable when the institute's ability to operate is still regulated domestically.

China prohibits all China-seated *ad hoc* arbitration, whereas Russia technically allows *ad hoc* arbitration. However, the restrictions placed upon Russian *ad hoc* arbitration ineffective and unattractive as a means of private dispute resolution. Such arbitrations will depend on the courts, or otherwise on a licensed institute, to carry out core functions such as arbitrator appointments.

A potentially more significant difference is that where China has over 200 arbitral institutes,[526] Russia has 7. Though CIETAC handles the lion's share of Chinese arbitrations,[527] the Chinese regime allows for competition between institutes. The Russian

[526] '常见问题' (Beijing International Arbitration Centre) <http://www.bjac.org.cn/page/zc/problem.html#6a> (accessed 07/05/2019)

[527] Alisa Protasova and Regina Abulgafarova, 'Взгляд на восток: обзор арбитражных институтов китая', *Arbitration.ru* (2019) 12 36

reform has restricted the market for arbitration to a few chosen champions, whereas China's regulation of arbitral institutes has not been so restrictive in allowing access to the market.

ii. The Role of the Arbitral Institute in China and Russia

One Chinese commentator, having conducted interviews in China, reported the primary reasons for the rejection of *ad hoc* arbitration as the difficulty of controlling the quality of arbitration and conduct of arbitrators without an arbitral institute supervising procedures, as well as the facilitation of collecting data on China-seated arbitrations through institutes.[528]

An example of the kind of quality control mandated under Chinese law is the regulation of arbitrators through articles 11 and 13 of the Arbitration Law of the People's Republic of China. Under article 11(4), Chinese arbitral institutes are required to maintain a list of appointed arbitrators. Article 13 provides a list of requirements, at least one of which must be met for a candidate to qualify as an appointed arbitrator. Article 13 requires candidates to have eight years' experience in arbitration, as a judge, or as a lawyer; though a candidate may also qualify where she has had a senior legal academic post, or she has knowledge of the law through holding a senior position in industry.

The only exception to these requirements is in foreign-related arbitration where it is possible to appoint a foreign specialist.[529] Apart from CIETAC, institutes in China force parties to choose their arbitrators solely from their lists of arbitrators. Though CIETAC still provides for some institutional control where parties appoint arbitrators from beyond CIETAC's list, as such appointments are subject to approval by CIETAC's Chairman.[530]

[528] Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Bloomsbury Publishing, 2013) 78

[529] Article 67 of the Arbitration Law of the People's Republic of China

[530] Article 26(2) of the CIETAC Arbitration Rules 2015

Furthermore, arbitral institutes in China play two important roles usually left to the arbitral tribunal in other jurisdictions - the provision of interim measures, and the determination of the tribunal's jurisdiction. Under articles 28 and 46, parties submit requests for the preservation of evidence or property to the arbitral institute itself, and not the tribunal. The law thus affords less control to parties' chosen arbitrators, and more control to the institute.

Notably, article 77 of CIETAC's Rules effectively makes the tribunal the *de facto* decision-maker by internally delegating the role to it, while the institution's involvement is confined to fulfilling the formal requirements of articles 28 and 46.

Article 20 of the Arbitration Law of the People's Republic of China provides for arbitral institutes to decide on the tribunal's jurisdiction. The arbitral institute may only rule on a tribunal's jurisdiction where a Chinese court has not already been asked to rule on the issue. The Chinese position is almost the reverse of the *kompetenz-kompetenz* principle, which gives the tribunal the first say on its own jurisdiction.[531] Not only does Chinese law preclude determination of a tribunal's jurisdiction by the arbitrators themselves, it also gives precedence to public courts where the matter has not yet been decided by the institute.

CIETAC is again notable for circumventing the black-letter law through its internal rules. Article 75 provides that the tribunal may decide on the matter, with the institute simply confirming this decision for the purposes of the Arbitration Law. Though even this cannot prevent the court taking jurisdiction prior to the tribunal deciding the issue.

[531] Fan (n 528) 92-94

The Russian and Chinese approaches to the role of arbitral institutes are not identical, but do betray similar attitudes to arbitration. Under the Chinese regime, institutes carry out functions that would usually be performed by the tribunal. Chinese law shows a distrust of party-appointed decision-makers by allocating such important functions as ruling on jurisdiction or ordering interim relief to the arbitral institute. The distrust of private decision-makers also informs how Chinese law gives precedence to the court where the question of jurisdiction has not already been resolved.

The Chinese arbitral institute acts as a compromise between party autonomy and public justice. Where individual tribunals dissolve after the arbitration is complete, arbitral institutes are more permanent fixtures that must continue to coexist with the State. Where there are concerns about the quality of private dispute resolution, it makes sense to allocate important functions to the more permanent body – the arbitral institute.

Under the Russian reform, ad hoc arbitration is subject to limitations that move core functions to the Russian courts. However, Russian arbitration conducted within a licensed institute is given greater freedom than was available before the reform. Parties to arbitration conducted within a licensed institute can, by means of direct agreement, exclude court review of the tribunal's ruling on its jurisdiction and even prevent the courts from annulling an award.

Chinese arbitration law allocates decision-making roles to the arbitral institute itself; Russian arbitration law allows for the expansion of the powers of the arbitrators when they act within a licensed institute. Russian arbitration law affords a great deal of trust to private decision-makers where those decision-makers act within an institute that

is answerable to the Russian government. The Russian reform takes a carrot and stick approach to channelling arbitration into government champions in the arbitration market, whereas in China the importance of the arbitral institute is merely part of a general preference for more publicly accountable bodies and a distrust of private decision-makers.

iii. Summary

Of those countries that regulate the establishment of arbitral institutes, Russia most resembles China. Though China has many more arbitral institutes than Russia, both States place a great deal of importance on the role of the arbitral institute. Both States channel arbitration into arbitral institutes. Russia does so by incentivizing the use of institutional arbitration and disincentivizing ad hoc arbitration, whereas China does so by prohibiting ad hoc arbitration.

Where arbitrations are channelled into Russian and Chinese arbitral institutes, these institutes provide a point of contact between the parties and the government. This facilitates the regulation of how arbitration is conducted within Russia and China. An English-language commentator on Russian arbitration law has noted that the anti-ad hoc bias of the reform stems from 'the basis that ad hoc tribunals are, by their very nature, immune to state regulation through controls imposed on administering institutes'.[532] This sentiment is mirrored in the Chinese attitude that institutes are necessary to quality check and collect data on domestically-seated arbitration. Both States take a similar approach to the arbitral institute as the intermediary between the parties and the government.

Both Russia and China take advantage of this by using arbitral institutes to 'quality control' arbitration. Russia does so through the licensing system for arbitral institutes, which restricts access to the arbitration market through issuing and revoking licenses for arbitral institutes to operate. On the other hand, China allocates important functions away

[532] Dominic Pellew, 'Some Observations on the Current Proposed Reforms to Russian Arbitration Law' in A, Asoskov, A, Muranov, R, Khodykin (eds) *Новые горизонты международного арбитража выпуск 2*, (Infotropic Media, 2014) 61, 69

from the arbitral tribunal and to the arbitral institute, preventing the party-chosen arbitrators from deciding on crucial matters such as jurisdiction and interim measures.

Despite the similarities in the general ethos of Russian and Chinese arbitration law, Russian arbitration differs in the role that the Ministry of Justice plays in determining which arbitral institutes are allowed to function. Though Chinese institutes must meet the formal requirements for a designated arbitral institute under article 11(1) of the Arbitration Law of the People's Republic of China, the number of institutes operating in China indicates that this is a matter of formality. The situation is different in Russia where the number of institutes has been artificially reduced to a handful by the licensing system.

d. Summary

A major stimulus for the reform was the demand for impartial arbitral institutes. Where pocket institutes had been dependent on companies that would fund and support them, this raised concerns as to the impartiality of the arbitrators that operated under, and were appointed by, those institutes. The reform has succeeded in purging Russia of these pocket arbitral institutes.

Under the reform no arbitral institute is dependent on a commercial enterprise. However, under the reform Russian arbitral institutes are dependent on the Ministry of Justice for their operation as they are not permitted to administer arbitration without a Ministry-issued license. Without the necessary safeguards in place, the licensing system could be abused by the government just as the owners of pocket institutes previously were viewed to have abused their influence over the institutes that they owned.

The safeguards provided for under the reform are the insertion of the Council as a mediating figure between arbitral institutes and the Ministry of Justice, and the provision of judicial review of licensing decisions by the Russian courts. The rules on the operation of the Council allow the Ministry of Justice to decide the Council's composition, and allows the Ministry to staff one third of the Council with government employees. A decision to license an institute requires a two thirds absolute majority. If the Russian government is able to rely on its employees to vote in accordance with its wishes, the government can expect almost total control over the issuing of licenses should it wish to. This is compounded by the issue that the Ministry of Justice is allowed to sift which

applications even make it to the Council, with only 16% of applications having made it through this sift so far.

Muranov argues that irrespective of how many government employees currently sit on the Council, 50% of the Council is sufficiently closely connected to the government as to justify the conclusion that they would vote in line with government policy. Where a recommendation to close an institute only requires a simple majority of Council members present at a meeting and a Ministry of Justice official decides when to hold a meeting, it would not be difficult for the government to engineer a situation in which a recommendation to close an institute is assured. Furthermore, it is a Ministry of Justice official who decides the rotation of Council members on and off of active duty, meaning that the Ministry is well positioned to ensure that active Council members at any point in time are balanced in such a way as to allow for government control of the Council's decision-making.

Where there are doubts as to whether the Council can be seen as an effective safeguard against government influence over Russian arbitration, the question is whether judicial review is likely to provide a robust defence of arbitral institutes' interests. Morozov has argued that the allocation of formal decision-making power between the Ministry of Justice and the Council, with the Ministry acting as the formal decision-maker but the Council acting as the substantive decision-maker, inoculate the Ministry's decision from judicial review.

Morozov also points out that due to the Council's unclear legal status, its decisions are not reviewable judicial review. Furthermore the criteria to be applied by the Council

are sufficiently vague and subjective as to resist court review – especially the criterion of 'reputation'. Finally, the caselaw on judicial review of licensing decisions supports Morozov's views, with the Commercial Courts refusing jurisdiction and the Courts of General Jurisdiction refusing to subject the Council's decision to substantive scrutiny.

Without effective safeguards to prevent the Russian government from exerting influence over the licensing system for arbitral institutes, the relevant question is not whether the Russian government can exert influence over arbitral institutes through the licensing system, but whether it would do so. In such circumstances, the author of this thesis considers it worthwhile to assess the extent to which the international regime under the New York Convention equips courts of enforcement to address any potential abuse by the Russian government, and in particular exerting pressure on a licensed arbitral institute to appoint a government-approved arbitrator in politically sensitive disputes. This will be considered in the following chapter.

5. Conditional Arbitrability

One of the issues that had arisen under the pre-reform regime was the judicial restriction of Russian arbitrability. The reform has sought to undo much of the Commercial Courts' inroads into arbitrability by amending the Code of Commercial Procedure to introduce detailed rules for arbitrability. There is now a list of disputes that are prohibited from going to arbitration in article 33(2).[533] This list is not exhaustive, and the previous delineation of arbitrability in terms of private/public law disputes survives.

Of those disputes that are arbitrable under the reform, a new category of arbitrability has emerged. This category is comprised of those disputes that can go to arbitration, but only where certain conditions have been fulfilled. In other words, they are conditionally arbitrable. Russian procurement disputes and the majority of Russian corporate disputes belong to the category of conditionally arbitrable disputes.[534] Though the Russian legislature is willing to let these disputes go to arbitration, it nevertheless seeks to retain control over how and where these disputes are arbitrated.

[533] Article 22.1 of the Code of Civil Procedure also provides a list of disputes that are precluded from arbitration. Apart from those also under Article 33(2) of the Code of Commercial Procedure, this list also covers labour disputes, family disputes, claims for loss of health or life, and residential property disputes

[534] Those Russian corporate disputes that are inarbitrable are listed in Articles 225.1(2) and 33(2)(4) of the Code of Commercial Procedure. They are - disputes concerning the calling of a general meeting; disputes arising out the activities of notaries concerning juristic acts involving the charter capital of limited liability companies; disputes relating to actions or inactivity by government bodies or representatives; those concerning strategically important companies, with the exception of disputes over the ownership of shares or charter capital that do not require government approval; disputes concerning share buybacks; disputes concerning the purchase of over 30% of the shares in a public company; and disputes concerning the exclusion of a shareholder from participating in a company.

a. *The Rules on Conditional Arbitrability*

The two types of dispute that are conditionally arbitrable under the reform are Russian corporate disputes and disputes arising out of the provisions of the federal Law on the Contract System for the Provision of Goods and Services for the Purposes of Federal and Municipal Necessities (i.e. procurement disputes).

Of those disputes that are conditionally arbitrable, there are three different groups: there are those disputes that are arbitrable subject to minimum conditions; there are those disputes that are arbitrable subject to medium conditions; and there are those disputes that are arbitrable subject to maximum conditions. Procurement disputes belong to those disputes that are arbitrable subject to medium conditions. The rules on corporate dispute arbitrability are more complex.

Corporate disputes are broadly defined in article 225.1(1) of the Code of Commercial Procedure as those disputes concerning:

> the establishment or management of, or participation in a commercial organization, a non-commercial partnership, an association of commercial organizations, other non-commercial organizations composed of commercial organizations and/or individual enterprises, and non-commercial organizations deemed self-regulating under federal law.

Within this widely drafted definition of corporate disputes there are three categories for the purpose of arbitrability: there are those that are inarbitrable, those that are arbitrable

subject to minimum conditions, and those that are arbitrable subject to maximum conditions.

i. Minimally Conditional Arbitrability

The basic position on the arbitrability of Russian corporate disputes is set out in articles 225.1(2) and (5). Article 225.1(2) states that Russian corporate disputes are generally arbitrable with a few exceptions. Article 225.1(5) states that Russian corporate disputes may go to arbitration, but only where the arbitration is conducted within a licensed institute. The minimum condition for the arbitration of a Russian corporate dispute is therefore that the parties' arbitration agreement must provide for arbitration within a licensed institute.

The types of corporate dispute that fall within the group of minimally conditional arbitrability is defined by process of elimination. Article 225.1 specifies those disputes that fall into the groups of Russian corporate disputes that are inarbitrable and arbitrable subject to maximum conditions. The group of corporate disputes that are arbitrable subject to minimum conditions are therefore any disputes that fall within the definition of a corporate dispute under article 225.1(1), but which are not specified as being inarbitrable or arbitrable subject to maximum conditions.

There is one exception to the above. In 2018, the Law on Arbitration was amended to include disputes arising out of agreements among participants in a company concerning the company's management (i.e. shareholder agreement disputes) within the category of corporate disputes that are arbitrable subject to minimum conditions.[535] The Code of Commercial Procedure has not yet been amended, and it maintains that these disputes are arbitrable subject to maximum conditions.[536] There is therefore a high risk that the Russian

[535] Article 45(7.1) Law on Arbitration

[536] Articles 225.1(1)(4) and 225.1(3) Code of Commercial Procedure

courts will apply the provisions of the Code of Commercial Procedure, and annul awards resolving shareholder disputes where the arbitration has not met the conditions of maximally conditional arbitrability.

Apart from shareholder agreement disputes, other examples of corporate disputes that are arbitrable subject to minimum conditions are disputes over the possession and sale of shares or rights to charter capital;[537] and most disputes arising out of the activities of company registries for securities and shares.[538]

[537] Articles 225.1(1)(2) and 225.1(3) Code of Commercial Procedure

[538] Articles 225.1(1)(6) and 225.1(3) Code of Commercial Procedure

ii. Medially Conditional Arbitrability

This category is comprised of Russian procurement disputes. In the wake of the reform there had been some debate as to whether these disputes were arbitrable or not, with Russian courts initially finding that these disputes contain a public element.[539] This debate was settled in favour of procurement dispute arbitrability in July 2018 by both the Supreme Court and the Constitutional Court in the Mosinzhproekt case.[540] Both courts held that procurement disputes involve private law relations despite the involvement of the State, or a State-owned party.

At the end of 2018, the Russian legislature amended the Law on Arbitration to explicitly provide for the arbitrability of these disputes. However, it seems to have made the arbitration of procurement disputes conditional on a Russian seat and arbitration within a licensed institute. Article 45(10) now provides that 'where the seat of arbitration is the Russian Federation [procurement disputes] may be heard only in arbitration conducted within [a licensed institute]'.

The wording of this article is unclear and could support two different interpretations. The first is that procurement disputes may go to foreign-seated arbitration conducted within any arbitral institute, but where the seat is Russia it must go to arbitration conducted within a licensed institute. On a purely grammatical construction of the article 45(10), this is what the provision seems say. However, this interpretation of article 45(10) would create a dual regime for these disputes, under which they can be heard in foreign arbitration subject to

[539] See Sorin Dolea, 'Arbitrability of Disputes Arising out of Procurement Contracts Concluded by Municipally Owned Companies in the Russian Federation'(2019) 37(1) *ASA Bulletin* 82

[540] B R Karabelnikov, 'Опять арбитрабильность, или новая песня на старый лад' [2018](10) *Закон* 148

no conditions, or they can be heard in Russian arbitration subject to the condition that they must be heard in a licensed institute.[541]

Such an interpretation does not conform to the general character of the reform's approach to arbitrability, which is to attempt to force Russian disputes back into Russia. Instead, not only would this interpretation of article 45(10) give the parties the choice to arbitrate with a foreign seat, but would encourage parties to do so by giving them a greater freedom of choice with respect to arbitral institutes where they seat their arbitration outside Russia. It is highly unlikely that the Russian courts would interpret article 45(10) in this manner.

The second interpretation is that procurement disputes may only go to Russian-seated arbitration conducted within a licensed institute. It is this interpretation that the court are more likely to adopt. This interpretation would better conform to the goals of the reform by forcing parties to submit their disputes to a Russian seat and a licensed institute, instead of both allowing parties to take their disputes outside of Russia and incentivising them to do so by limiting their freedom should they choose to arbitrate in Russia. This is also the interpretation upon which practitioners and law firms are currently advising their clients.[542] As yet the Russian courts have not had occasion to rule on this issue.

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[541] It should be noted that at the end of 2019 the Supreme Court issued a practice statement in which it implied that Russian government procurement disputes may only be arbitrated in an arbitral institute that is specifically empowered to resolve such disputes. This seems to be due to the wording of article 13(8) of the Law on Amendments to Particular Legal Instruments, which says that the prohibition on arbitrating procurement disputes in article 33 of the Commercial Procedural Code will cease to apply when a law is introduced providing for the establishment of an arbitral institute empowered to hear such disputes. Arguably, such a law was introduced when the Law on Arbitration was amended in 2018 to include article 45(10) which provides for the arbitrability of these disputes. See Постановление Пленума Верховного Суда РФ ор 10 декабря 2019 N 53.

[542] See, for example, 'Alert Memorandum' (Clearly Gottlieb, 29 March 2019) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwjakKCB4bDoAhXCTBUIHXpoBv8QFjADegQIAhAB&url=https%3A%2F%2Fwww.clearygottlieb.co

Procurement disputes are therefore arbitrable only where the parties' arbitration agreement provides for Russian-seated arbitration conducted within a licensed arbitral institute. They occupy the middle of the spectrum for conditional arbitrability in that they require not only that the dispute be submitted to a licensed institute, but also that the arbitration be seated in Russian; however, unlike maximally conditional arbitrability, these disputes are not currently subject to the application of mandatory rules of arbitral procedure.

m%2F-%2Fmedia%2Ffiles%2Falert-memos-2019%2Fchanges-to-russias-arbitration-law-rus.pdf&usg=AOvVaw1gXagEGguz35KKgN1923Ca> accessed 23 March 2020

iii. Maximally Conditional Arbitrability

This category of conditional arbitrability is comprised of those Russian corporate disputes set out in Articles 225.1(3) and 225.1(4) of the Code of Commercial Procedure. Article 225.1(4) determines whether a dispute is arbitrable subject to maximum conditions by reference to the parties involved in the dispute. It states that any type of corporate dispute that arises between the legal entity to which the dispute relates and participants in that legal entity is arbitrable subject to maximum conditions.

Article 225.1(3) lists those corporate disputes that are only arbitrable subject to maximum conditions regardless of the parties' identities. These disputes are: disputes involving the creation, reorganization or liquidation of a legal entity; claims by founders, shareholders, or participants in a legal entity for the recovery of losses sustained by that legal entity, for the recognition of a juristic act by that legal entity as invalid, and/or over the consequences of recognizing such a juristic act as invalid; disputes over the appointment and removal of directors; disputes arising out of the issue of securities; and disputes challenging the decisions of a legal entity's management.

Disputes that belong to this group of conditional arbitrability may only be arbitrated in a Russian-seated arbitration conducted within a licensed institute, and which must be arbitrated under arbitral rules that comply with the Law on Arbitration's provisions on corporate arbitration rules.[543] Neither the VIAC nor the HKIAC has such corporate arbitration rules.

[543] Articles 225.1(3) and (4) Code of Commercial Procedure. A similar provision can be found under Article 45(7) of the Law on Arbitration.

The requirements for corporate arbitration rules are found in Article 45(8) of the Law on Arbitration. Corporate arbitration rules must include provisions requiring that the arbitral institute notify the legal entity to which the dispute relates, all participants in the legal entity, and any relevant securities registrars or depositaries of the claim. Corporate arbitration rules must provide for the online publication of information on the dispute. Corporate arbitration rules must allow participants in the relevant legal entity to join the arbitration at any stage of proceedings. Finally, corporate arbitration rules must allow participants that have joined an arbitration, and who establish a legal interest in the continuation of the arbitral proceedings, to object to the abandonment of the claim by the claimant, the acceptance of the claim by the defendant, or any settlement agreement.

A corollary of the requirement that all participants be entitled to join an arbitration where the dispute falls under Article 225.1(3) or Article 225.1(4) of the Code of Commercial Procedure is that the arbitration agreement must be concluded between all participants in the legal entity to which the dispute relates, the legal entity itself, and any other claimants or respondents in the dispute.[544]

Amendments to the Law on International Commercial Arbitration assist with the requirement that all participants and the legal entity be party to the arbitration agreement. The Law now allows for the inclusion of an arbitration agreement in the charter or founding documents of a legal entity.[545] The inclusion of an arbitration agreement in these documents must be agreed by a unanimous decision of a general meeting. Furthermore, this option is not available to joint stock companies with over 1000 voting participants, or

[544] Articles 225.1(3) and (4) Code of Commercial Procedure

[545] Article 7(8) Law on International Commercial Arbitration

to public joint stock companies. For a third party to be bound by an arbitration agreement in a company's charter or founding documents, they must expressly agree as much – this is mostly relevant where an arbitration concerns a transaction between the company and a third party.

iv. Conditional Arbitrability and the Licensing System

Even where the licensing system provides insufficient safeguards to protect Russian arbitral institutes from government pressure, this is primarily an issue for domestic arbitration. Unlike in domestic arbitration, parties to international arbitration are free to choose their seat. If the parties do not trust Russian licensed institutes and do not wish to submit themselves to Russian arbitration conducted outside a licensed institute, they can avoid Russia altogether by providing for a non-Russian seat in their arbitration agreement.

Conditional arbitrability seeks to force certain disputes into licensed institutes, and to impose a Russian seat upon them. Parties are thus prohibited from contracting out of Russian arbitration by providing for a different seat or different arbitral institute. Where the parties provide for the arbitration of a conditionally arbitrable dispute outside a licensed institute, the Russian courts will refuse to recognise the arbitration agreement or enforce the arbitral award under articles II and V(2)(a) of the New York Convention respectively.

Any awards rendered in relation to disputes that are conditionally arbitrable will probably require enforcement in Russia. With respect to a Russian corporate dispute, the company itself is incorporated in Russia and is likely to keep its assets in Russia. Similarly, an award creditor in a Russian procurement dispute will need to be able to enforce against the assets of the State, or State-owned, entity against which the award was made – this is probably going to be in Russia.

Should a foreign party and a Russian party submit a Russian corporate dispute to English seated arbitration, then should the foreign investor win she will be unable to

enforce her award. The same cannot be said if the State entity wins, as it would likely require enforcement before the courts where the foreign investor has assets, which is unlikely to be Russia. This creates an asymmetry of rights where the foreign investor is uniquely disadvantaged in the drafting of the arbitration agreement – either she submits herself to a Russian government licensed institute and Russian seat, or she faces a situation where the arbitral award will only be enforceable if it has been made against her.

Not only does this create disparity between the parties by providing as default that one of their home States is to both host the arbitration and regulate the administering arbitral institute, but it undermines one of the main benefits of international arbitration itself. Respondents to the 2018 Queen Mary survey reported the ability to avoid specific legal systems as the second most valued attribute of international arbitration;[546] however, the Russian rules on conditional arbitrability are specifically drafted to force the parties into the Russian legal system.

[546] Queen Mary (n 156) 7

b. The Disproportionality of Conditional Arbitrability

The policy considerations that have led Russia to adopt conditional arbitrability rules are not unique, and other States have also grappled with similar concerns. Russia has a valid interest in ensuring good corporate governance; however, this cannot justify conditional arbitrability. The disproportionality of conditional arbitrability becomes clear when one considers how the U.S. courts have dealt with similar concerns in antitrust arbitration where they have adopted the 'second look doctrine'.

As described in chapter IV,[547] Neshataeva justified the restrictions placed upon corporate arbitrability in terms of the large degree of general social interest in a particular form of corporate regulation. Neshataeva argued that these disputes must be resolved by public courts and not private tribunals, or else the regulatory rules might be undermined by arbitrators misapplying them. Similar reasoning was provided to prevent the arbitration of U.S. antitrust disputes in *American Safety*.[548]

In that case, Judge Feinberg set out the reasons why he considered arbitration inappropriate for the resolution of antitrust disputes. Three of these reasons are relevant to the present argument. Firstly, antitrust claims have a public function as antitrust violations can affect a large number of people. Secondly, antitrust claims can be extremely factually complex, and arbitration is not suited to resolving such disputes due to its lack of a means to compel the production of evidence. Thirdly, arbitrators chosen by the parties should not be entrusted with the implementation of rules intended to protect the public interest.

[547] pp. 236-244

[548] *American Safety v J. P. Maguire,* US Court of Appeals, 2nd Circuit, 166, 189 (1968)

Neshataeva and Feinberg both feared that allowing the arbitration of corporate and antitrust disputes would undermine the States' ability to ensure the health of corporate governance and the free market. The arbitration agreement might direct the tribunal to apply a foreign law, circumventing national corporate or antitrust rules; the arbitration agreement may stipulate the use of unsuitable procedures; or the arbitrators might interpret the relevant law in a manner that is inconsistent with the purpose of ensuring good corporate governance or preventing market collusion.

However, U.S. law on antitrust arbitrability has changed with the adoption of the second look doctrine by the US Supreme Court in *Mitsubishi*.[549] The case concerned an agreement for the distribution of Mitsubishi automobiles in Puerto Rico. The agreement included a clause providing for arbitration before the Japanese Arbitration Association. Tension arose between the parties when the new car market slackened, eventually leading to a dispute. Mitsubishi initiated arbitral proceedings in Japan; Soler counterclaimed before the U.S. courts, alleging violations of U.S. antitrust law.

The Court of Appeals for the First Circuit refused to refer the antitrust claims to arbitration. Applying the *American Safety* decision, the Court of Appeals found that the U.S. antitrust issues could not be referred to arbitration. This decision was appealed to the U.S. Supreme Court. Justice Blackmun, giving the judgment for the majority of the Supreme Court, directly addressed Judge Feinberg's reasons for prohibiting the arbitration of antitrust disputes as set out in *American Safety*.

[549] *Mitsubishi v Soler*, US Supreme Court, 473 US 614, 105 S Ct 3346 (1985) reported in Albert Jan van den Berg, *Yearbook Commercial Arbitration 1986 – Volume XI* (Kluwer Law International 1986) 555-565

On the argument that antitrust disputes are too complex for arbitration, he stated that 'potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter'.[550] He further rejected the idea that arbitrators were unqualified to decide important legal questions – 'the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly'.[551] Where a party intends to pursue an antitrust claim, they will presumably appoint an arbitrator capable of understanding this claim.

The Supreme Court referred the antitrust claims to arbitration. However, it stated that U.S. courts would ensure that any antitrust claims had been properly considered when it came time to enforce the resulting award. When enforcing the award, the U.S. courts would use the public policy defence to 'ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed'.[552] Justice Blackmun's opinion finished with a warning – the handling of antitrust claims by arbitrators would be subject to a second look by U.S. courts.

Justice Blackmun provided little elaboration as to how this review might be conducted, simply stating that 'it would not require intrusive inquiry'.[553] However, the situation is more nuanced than Blackmun let on. If such review amounts to a full review on the merits, this will simply turn arbitration into a court of first instance; if it amounts to

[550] ibid 562

[551] ibid 563

[552] ibid 564

[553] ibid 564

merely ensuring the arbitrators cite U.S. antitrust law, this cannot ensure the proper implementation of this law.

Though the exact contours of the second look doctrine are still not entirely clear, U.S. courts appear unwilling to subject antitrust arbitration to extensive review on the merits. In the words of the Seventh Circuit Court of Appeals, 'Mitsubishi did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew'.[554] It appears that as long as the arbitrators have given a reasoned decision on a party's antitrust claim, the court will not second guess them.

The second look doctrine as developed by the U.S. courts allows the arbitration of antitrust disputes by subjecting resulting awards to an expanded public policy review. Wherever antitrust issues are raised in arbitration, the U.S. courts will necessarily check to see that those issues were properly addressed by the arbitrators. This goes beyond the commonly accepted position that a review of the arbitrators' reasoning is only justified where a *prima facie* public policy violation has been made out;[555] however, it is still within the bounds of a reasonable interpretation of the New York Convention and permits the parties to provide for whatever arbitration they want as long as they pay due attention to U.S. antitrust law in resolving their dispute.

It is worth briefly mentioning that in *Mitsubishi* the U.S. Supreme Court warned parties that courts might intervene at an earlier point where an arbitration agreement acted in tandem with a choice of law clause 'as a prospective waiver of a party's right to pursue

[554] *Baxter v Abbott*, 315 F.3d 829 (7th Cir. 2003) [5]

[555] See, for example, Mayer and Sheppard (n 53) 249-263

statutory antitrust remedies'.[556] However, later cases have shown that even where an arbitration clause appears alongside a choice of non-U.S. law, the courts will reserve judgment until the end of the arbitration on the basis that the non-U.S. law may provide adequate protection to U.S. parties against antitrust infringements.[557]

Conditional arbitrability takes a strict approach to the arbitration of Russian corporate disputes by imposing Russian procedural rules, a Russian government-licensed institute, and Russian court supervision on the arbitration. It allows corporate disputes to go to arbitration only where the Russian legal system remains able to exert control over how these disputes are resolved. This mitigates the risk that an arbitrator will misapply Russian corporate law or apply a law other than Russian corporate law by making the arbitrator's jurisdiction conditional on a Russian seat, the choice of a government-approved institute, and the application of compulsory procedural rules. However, it sacrifices arbitration's flexibility and antionality as the parties are forced to accept a predetermined, Russian arbitration.

In many respects the difference between the second look doctrine and conditional arbitrability is a question of rules versus standards. The second look doctrine allows the arbitration of antitrust claims as long as a few general standards have been met during the arbitration. This allows for greater flexibility in how an arbitration takes place, but may be a weaker means of ensuring that antitrust claims are dealt with correctly. On the other hand, conditional arbitrability imposes detailed rules for how Russian corporate disputes must be arbitrated. This restricts the parties' ability to choose the arbitral institute, seat, and

[556] *Mitsubishi* (n 549) 564

[557] See *Lindo v NCL*, 652 F. 3d 1257 (2011)

procedure for their arbitration in order to ensure that corporate disputes are resolved correctly in the eyes of the Russian legal system.

Conditional arbitrability forces domestic rules upon arbitration, undermining its international character. It is an example of a single State attempting to impose itself on international commercial dealings; this stands in stark contrast to the U.S. Supreme Court's admission in *Mitsubishi* that '[the U.S.] cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts'.[558]. The egocentric approach of conditional arbitrability threatens to undermine the cooperation of the international community in promoting international commerce and arbitration.

There already exists at least one foreign arbitral institute capable of administering corporate disputes in line with the requirements of Russian law. The German Arbitration Institute (DIS) has created special rules for the arbitration of corporate disputes that provide similar protections to those that the Russian Law on Arbitration requires from the corporate arbitration rules of licensed institutes.[559] German arbitration law also imposes similar requirements for the arbitration of corporate disputes as does Russian law - all shareholders must be party to the arbitration agreement and be given the chance to take part in the arbitration.[560]

[558] *Mitsubishi* (n 549) 560

[559] DIS Supplementary Rules for Corporate Law Disputes <http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15> accessed 26/03/20; see also R I Karimullin, 'Арбитраж корпоративных споров в Германии: развитие правил арбитража и судебной практики в 2014-2018 гг.' [2018](2) *Вестник международного арбитража* 86

[560] Nils Schmidt-Ahrendts and Alessandro Covi, 'Arbitrability of Corporate Law Disputes: A German Perspective' [2014](1) *Вестник международного коммерческого арбитража* 110

Where the DIS and the German courts are capable of supervising Russian corporate disputes in a manner that complies with the requirements of Russian law, there is no reason Russian courts should not enforce an award resolving a Russian corporate dispute rendered in a German-seated DIS arbitration. Even where a Russian corporate dispute is arbitrated outside Germany or Russia within the ICC or LCIA, the question should not be where the dispute was arbitrated but how it was arbitrated. Instead of using arbitrability to impose specific arbitral institutes, a Russian seat, and government-approved procedural rules, the correct approach is for the Russian courts to review whether the arbitration was conducted in a manner that is compliant with Russian public policy.

Finally, it should be noted that prior to the reform Russian commentators had already pointed to an emerging acceptance of the second look doctrine by Russian courts in the area of Russian antitrust arbitration.[561] There is no good reason why the Russian legislature needs conditional arbitrability to ensure that Russian corporate governance is not undermined by arbitration. The public policy defence under article V(2)(b) of the New York Convention is capable of achieving this without forcing parties to arbitrate in Russian government approved institutes, with a Russian seat, and under Russian government approved procedural rules.

[561] Alexander Gurkov, 'The Second-Look Doctrine in Russian Arbitrazh Courts' (2013) 38(3/4) *Review of Central and East European Law* 389

c. *Summary*

Before the reform, the Russian judiciary used ambiguous provisions in Russian legislation to restrict arbitrability. The reform has addressed this issue by including new, detailed rules on arbitrability under Russian law. Within these rules, the Russian legislature has included special provisions for the arbitration of Russian corporate and procurement disputes. These provisions impose specific arbitral institutes, a Russian seat, and government-approved arbitral rules upon arbitration.

It is argued that these rules are not necessary to achieve the aim of ensuring that Russian corporate and procurement disputes are resolved properly. The experience of the U.S. courts with antitrust arbitration shows that it is possible to address this issue through a narrow expansion of the public policy defence under article V(2)(b) of the New York Convention. Instead, Russian law has incorporated a mandatory seat, a mandatory list of arbitral institutes, and mandatory procedural rules into the article V(2)(a) defence of arbitrability.

The rules on conditional arbitrability interact with the creation of a licensing system for Russian arbitral institutes to prevent parties from contracting out of the new system of arbitration in Russia after the reform. Parties to Russian corporate and procurement disputes may not arbitrate outside those institutes, the licenses of which are subject to review by the Council and the Ministry of Justice. Similarly, many of these arbitrations are subject to a compulsory Russian seat, meaning that parties must subject their arbitration to the custody of the Russian legal system and the provisions of the Russian *lex arbitri*. Once it has been acknowledged that the licensing system risks the exercise of government

influence over licensed arbitral institutes, the rules on conditional arbitrability effectively shepherd corporate and procurement disputes into arbitrations that are vulnerable to government influence.

6. Summary

The reform started off as an initiative of the Russian arbitration community, which sought to combat the problem of dependent arbitral institutes. The Russian arbitration community leant toward the creation of some form of system of self-regulation. When the reform was adopted as part of the Russian government's legislative agenda, however, its trajectory turned toward the regulation of arbitration by government.

The reform has introduced a licensing system for Russian arbitral institutes that is operated by the Ministry of Justice with the assistance of the Council for the Improvement of Arbitration. The licensing system has created a situation under which it will not be possible for private persons to own and control an arbitral institute, effectively addressing the problem of pocket institutes that existed prior to the reform. However, by creating a system that gives the Russian government effective control over access to the Russian arbitration market, there is the risk that this system could be used by government to exert influence over Russian arbitral institutes in a similar manner that the owners of previous pocket institutes did.

Though this thesis does not argue that such influence has been, or is being exerted by the Russian government, it does argue that there are insufficient safeguards in place to preclude such influence being exerted. The Council has been created with the advertised goal of acting as an independent mediator between government interests and the interests of the Russian arbitration community. Furthermore, the Council has been given a number of crucial roles in the reform, such as the power to recommend the issue or revocation of licenses to arbitral institutes. However, the Council cannot be truly considered independent

of government. In particular, the rules on the operation of the Council, including the rules on the Council's composition, the selection of Council members by the Ministry of Justice, the role of president being played by a Ministry of Justice official, and the voting requirements for issuing licensing and revocation recommendations fail to sufficiently insulate the Council's decision-making process from the Ministry of Justice.

Though the reform provides for the judicial review of licensing decisions, the allocation of decision-making power between the Council and the Ministry of Justice presents an obstacle to effective review. The Ministry is the official decision-maker, but acts on the recommendation of the Council, which does not have a determinate legal status for the purpose of judicial review. Furthermore, the criteria for issuing a license are highly subjective, such that the Russian courts have refused to subject licensing decisions to substantive review in the one case that has been brought so far.

The reform has also created a new form of arbitrability under Russian law – conditional arbitrability, which forces certain disputes into licensed institutes and a Russian seat of arbitration, and mandates that certain rules of arbitration are applied by the tribunal. The rules on conditional arbitrability intersect with the licensing system for Russian arbitral institutes in an unacceptable manner. If one accepts that the licensing system creates a risk of government influence over licenced institutes, the rules on conditional arbitrability compel parties to submit their disputes to these institutes. Thus conditional arbitrability prohibits the parties from contracting out of those arbitrations most susceptible to government influence.

In the following chapter, this thesis will consider how the national regime for arbitration under the Russian reform interacts with the international regime for arbitration under the New York Convention. In particular, it will consider whether the New York Convention equips courts of enforcement to address the risk that the Russian government may exert influence over an arbitral institute so as to affect the outcome of a dispute.

Chapter VI – The Russian Reform and the New York Convention

1. Introduction

In this chapter, this thesis' overarching argument will be summarized, with the different conclusions drawn throughout the chapters of this thesis being brought to bear upon each other. The previous chapters of this thesis are separated into those chapters that pertain to the international regime for arbitration under the New York Convention, and those chapters that pertain the national regime for arbitration in Russian. This chapter describes how these two regimes interact, the problem that arises from this interaction, and a potential means of resolving this problem.

There are three arguments that this thesis makes in relation to the interaction of these regimes. The first argument relates to the ability of the international regime under the New York Convention to address a theoretical case in which the Russian government uses the licensing system to exert influence over an arbitral institute and its administration of an arbitration. This thesis holds that a court operating under the New York Convention will be unable to refuse enforcement of the award in such a case.

The second argument relates to the interaction of the Russian rules on conditional arbitrability and the New York Convention. In particular, it will be argued that the Russian rules on conditional arbitrability violate the Convention.

The third argument relates to the principle of reciprocity under the New York Convention. This thesis will argue that as the rules on conditional arbitrability are in

violation of the New York Convention, a non-Russian court of enforcement will be entitled to refuse the enforcement of awards that arise out of conditionally arbitrable disputes.

This chapter will first briefly revisit the conclusions drawn in the previous chapters, which are relevant to each of these arguments, drawing out the overarching argument as to the risk posed by the Russian reform to the international regime under the New York Convention. This chapter will then offer a means of mitigating this risk through the principle of reciprocity where reciprocity is utilised by courts of enforcement to refuse the enforcement of awards resolving those disputes that the rules on conditional arbitrability seek to shepherd into arbitrations that are vulnerable to interference by the Russian government.

2. The Problematic Interaction of the International and the Russian Regimes

i. The Licensing System and the New York Convention

In chapter II,[562] it was argued that the New York Convention gives courts of enforcement a general discretion to enforce awards despite the applicability of one of the article V defences. Different courts have taken different attitudes toward this discretion depending on the theoretical model to which they subscribe, with attitudes ranging from rejecting the enforceability of annulled awards to rejecting the relevance of annulment decisions.

In chapter III,[563] this thesis described how courts of enforcement operating under the New York Convention have previously addressed situations where one of the parties to an arbitration claims that the legal system at the seat has improperly influenced their arbitration. These cases have involved claims by award creditors that the courts of the seat have improperly annulled their awards in order to protect the interests of a local or State-affiliated award creditor. In these cases, courts of enforcement have demanded cogent evidence that the judges involved in the annulment proceedings were biased. However, due to the fact that the New York Convention does not regulate how courts may exercise their discretion to enforce an award, the option remains open for a court to hold that circumstantial evidence about the legal system in which a judge operates is sufficiently powerful to indicate bias: the Dutch Court of Appeal took such an approach in *Yukos*.

[562] pp. 64-69

[563] pp. 135-182

In chapter II,[564] it was also argued that a court of enforcement has no discretion to refuse the enforcement of an arbitral award where one of the article V defences has not been made out. Furthermore, where a defence falls under both one of the article V(1) defences, for which the allocation of the burden of proof lies upon the award debtor resisting enforcement, and the article V(2)(b) defence of public policy, for which there is no allocation of the burden of proof, then an award debtor must not be able to escape the allocation of the burden of proof by pleading article V(2)(b).

In chapter IV,[565] the practical implications of the conclusions drawn with respect to the burden of proof under the New York Convention were illustrated by the Russian caselaw on pocket institutes. Pocket institutes posed a risk that the institute's owner would refer its disputes to the institute, relying on the institute to appoint an arbitrator who would find in favour of the owner – the institute-appointed arbitrator and the owner-appointed arbitrator would be able to issue a majority award in favour of the owner. Award debtors struggled to prove the bias of the institute-appointed arbitrator, as the only evidence they could adduce was the arbitrator's appointment by the pocket institute to which they had agreed to refer the dispute. In order to aid award debtors, the Russian courts, applying identical grounds to those contained in article V of the New York Convention, set aside awards from pocket institutes on the basis of public policy, the Russian national equivalent of article V(2)(b). Eventually the Constitutional Court intervened, prohibiting the lower courts from setting aside awards on the basis of public policy as it effectively allowed award debtors to raise a defence of arbitrator bias without proving it.

[564] pp. 51-63

[565] pp. 202-228

In chapter V,[566] it was argued that the licensing system created by the Russian reform gives the Russian government the ability to exert pressure on Russian arbitral tribunals in much the same way that owners of pocket institutes exerted influence over their institutes. This is because the Russian government controls access to the arbitration market through the licensing system, and is capable of preventing an institute from continuing to operate. Without the necessary safeguards to ensure the government cannot control licensing decisions, there is a risk that the government may push an arbitral institute to appoint a particular arbitrator in a politically sensitive dispute who will decide the case in line with government policy.

Where previously abuse by the seat of arbitration took the form of improper annulment decisions, there is now the risk of abuse effected through an arbitral institute. Instead of having to consider the propriety of an annulment decision, a court of enforcement would consider the propriety of the award itself; the relevant remedy for such abuse would not be the enforcement of an annulled award, but the refusal to enforce the award. The most relevant defence is that under article V(1)(b), which allows a court to refuse enforcement where the award debtor 'was unable to plead [her] case'. Article V(1)(b) captures situations where an arbitrator is biased, thus preventing the award debtor from having a fair hearing in which to make her case.

The article V(1) defences require the award debtor to prove the facts that give rise to a defence. Unlike the flexibility afforded to courts when considering whether to enforce an annulled award, a court is bound by the strict procedural rules of article V when considering whether to refuse enforcement of an award. Considering the difficulties that arose in the

[566] pp. 289-333

analogous Russian caselaw on pocket institutes, it would be surprising if the award debtor could effectively prove a defence under article V(1)(b).

In refusing enforcement of an award, a court cannot rely on the same reasoning as was employed by the Dutch Court of Appeal in *Yukos*. In that decision, the Court was willing to draw inferences on the basis of the relationships between Rosneft and the Russian government, and the Russian government and the Russian judiciary. This is the same reasoning that was rightly prohibited by the Russian Constitutional Court when it spoke out against the use of the Commercial Courts' invocation of public policy to annul awards on the basis of the award creditor/pocket institute owner's relationship with the institute, and the institute's power to appoint an arbitrator.

As was shown in the *Maximov* and *Termorio* cases, courts of enforcement have demanded cogent evidence of bias by the judge who annulled an award if they are to enforce the award. Where courts of enforcement impose a high evidential threshold for exercising their discretion to enforce an annulled award, it stands to reason that they should demand equally, if not more, cogent evidence in refusing to enforce an arbitral award under the Convention. This is not only because courts should be careful not to violate their obligation to enforce, but also because the pro-enforcement bias of the New York Convention would be undermined were courts to more readily accept arguments of abuse by the seat in refusing enforcement than in justifying enforcement.

Were a court to refuse enforcement of an award in a dispute in which the Russian government has interests by applying the article V(2)(b) public policy defence on the basis that the arbitral institute involved is dependent on the Russian government for its license,

it would be in violation of the New York Convention. If the application of the public policy defence elicited criticism from the Russian Constitutional Court at the national level, it would elicit outrage when applied under the Convention at the international level as it would be tantamount to declaring all Russian arbitration untrustworthy.

ii. Conditional Arbitrability and the New York Convention

In chapter II,[567] it was argued that the article V(2)(a) defence of arbitrability under the New York Convention must be construed so as to preclude national rules which seek to force parties to arbitrate locally by refusing enforcement of foreign awards while allowing enforcement of domestic awards. To do otherwise would undermine the fundamental premise of the Convention, which is that international arbitration is a legitimate means of resolving disputes regardless of which courts have supervisory jurisdiction of it.

In chapter V,[568] it was explained that the Russian rules on conditional arbitrability force certain corporate disputes and procurement disputes into a Russian-seated arbitration. Russian legislation provides that these disputes are only considered arbitrable where they are arbitrated in Russia and within a licensed institute. Where a party arbitrates one of these disputes outside of Russia, the resulting award will not be enforced by the Russian courts. This is a violation of the New York Convention as it prohibits foreign arbitration whilst allowing Russian arbitration, thus attempting to turn the Convention into a means of unilaterally exporting awards for enforcement abroad.

[567] pp. 51-61

[568] pp. 334-355

The rules on conditional arbitrability thus shepherd corporate and procurement disputes into arbitrations that are particularly vulnerable to interference by the Russian government. Not only will the Russian courts be the supervisory courts as the courts of the seat, but these arbitrations must take place inside an arbitral institute which relies for its operation upon its Ministry of Justice-issued license.

In the context of international arbitration, conditional arbitrability will work to the detriment of non-Russian parties to Russian corporate or procurement disputes. This is because awards in their favour are likely to require enforcement against a Russian party before the Russian courts, but awards made against them are likely to require enforcement before the courts of their home States. Should the non-Russian party arbitrate outside Russia, an ensuing award will only be effective when made against them; should the non-Russian party arbitrate in Russia, they make their arbitration vulnerable to the influence of the Russian government.

Alarming in this respect is a recent law passed by the Russian government amending article 248 of the Code of Commercial Procedure. Under the amended article 248, Russian natural and corporate persons subject to sanctions can turn to the Russian commercial courts for a declaration that they are not bound by any arbitration agreements providing for non-Russian seated arbitration which they have concluded, and for injunctions against proceedings initiated against them outside Russia.[569] Not only does this new law highlight the protectionist nature of conditional arbitrability, but it also shows conditional arbitrability evolving to take into account not only of the subject matter in arbitration (i.e.

[569] Law on the Introduction of Amendments to the Code of Commercial Procedure No. 171-ФЗ 2020

objective conditional arbitrability) but also the identity of the parties (i.e. subjective conditional arbitrability).

3. The Suggested Solution

i. The Problem

As discussed earlier in this chapter, there is a risk that the Russian government's licensing system will be used to exert pressure on Russian arbitral institutes. The Russian Commercial Courts' struggle against pocket institutes prior to the reform illustrates the difficulty of applying the grounds for refusal to enforce in article V of the New York Convention to situations where an arbitral institute is in collusion with the award creditor.

Where an arbitral institute has appointed a biased arbitrator, the award debtor will argue that they have been deprived of a fair hearing – such a defence comes under article V(1)(b) of the Convention. Article V(1)(b) requires the award debtor to prove that the relevant arbitrator was biased in order to establish a defence. Unless the arbitrator explicitly shows her bias during proceedings, the award debtor is unlikely to have any direct proof of bias. The only evidence the award debtor will be able to point to is the appointment of the arbitrator by a licensed institute. Even in cases involving a State or State-owned party, a court of enforcement is unlikely to refuse enforcement of an award on the basis that the government could theoretically have exerted pressure on the institute.

The caselaw on the enforcement of annulled awards shows that courts of enforcement require cogent evidence of bias by the specific judge that annulled the award if they are to exercise their discretion to enforce an annulled award. Where courts of enforcement impose a high evidential threshold for exercising their discretion to enforce an annulled award, they should set at least an equally high evidential threshold for establishing an exception

to their obligation to enforce awards under the Convention. This position is in line with both the understanding that exceptions must be invoked sparingly so as not to undermine the general rules, and the pro-enforcement bias of the Convention itself. As courts have set a high evidential threshold for proving abuse by the seat to justify the enforcement of annulled awards, it would be inappropriate for them to set a lower threshold for proving abuse by the seat where refusing enforcement of an award.

Furthermore, as indicated in the Russian caselaw on pocket institutes, award debtors may not invoke the public policy defence under article V(2)(b) of the Convention to avoid proving the bias of the specific arbitrators that resolved their disputes.[570] Should a court of enforcement refuse enforcement on the grounds of public policy where one of the parties is a State or State-owned entity and the government is theoretically capable of exerting influence on the arbitral institute that has appointed an arbitrator, this would be tantamount to excusing the award debtor from proving the bias of the arbitrator as is required under article V(1)(b).

The international regime for arbitration under the Convention is ill-equipped for addressing abuse by the seat where such abuse is effected through an arbitral institute. It is difficult to conceive of a case where an award debtor will be able to prove an arbitrator's bias simply on the basis that the arbitrator has been appointed by a licensed arbitral institute.

[570] This position is further supported by the historical refusal by courts of enforcement to entertain claims for bias under Article V(2)(b) to resist the enforcement of awards issued by the Chambers of Commerce of Eastern European States. See van den Berg (n 39) 378-9: 'The main complaint is that in many CMEA countries arbitrators can be chosen solely from a list which is drawn up in advance by the Chamber of Commerce of the Socialist country concerned and which is comprised of nationals of that country only. A further complain is that the Chamber of Commerce, which draws up the list, could be controlled by the State and the Socialist arbitrators owe allegiance to the State… [C]ourts, however, have invariably rejected the allegation that the constitution and composition of arbitral tribunals in CMEA countries would constitute in itself a violation of public policy. They point out in this case also, that what matters is that in a given case the arbitrators have not acted in an impartial manner'.

Where the Russian reform has created a licensing system that fails to safeguard the regulation of arbitral institutes from government influence, there is the risk that the New York Convention might become a vehicle for the export of Russian policy in the guise of arbitral awards.

Usually, parties can mitigate the risk of political interference by the government at the seat of arbitration by choosing to arbitrate with a neutral seat and in a neutral institute. One of the justifications advanced for deference to the seat is that in choosing their seat the parties accept the benefits and disbenefits of that choice. The parties should choose to arbitrate with a non-Russian seat and in an arbitral institute that is independent from the Russian government, otherwise there is an argument that they should abide by the consequences. It is at this point that the rules on conditional arbitrability come into consideration.

The rules on conditional arbitrability aggravate the risk posed by the licensing system by shepherding corporate and procurement disputes into arbitration in a licensed institute, often with a mandatory Russian seat, in return for an ensuing award's enforceability before the Russian courts. Moreover, corporate disputes are likely to attract government attention due to the Russian government's large capture in the private sector; and procurement disputes are likely to attract government attention as they necessarily involve government parties. The risk posed by the Russian reform thus centres on those disputes subject to conditional arbitrability, as they are the disputes that cannot be removed to a neutral arbitration, and are likely to touch upon government interests.

ii. The Solution

The international regime for arbitration under the Convention is ill-equipped for addressing abuse by the seat where such abuse is effected through an arbitral institute. It is difficult to conceive of a case where an award debtor will be able to prove an arbitrator's bias simply on the basis that the arbitrator has been appointed by a licensed arbitral institute. Where the Russian reform has created a licensing system that fails to safeguard the regulation of arbitral institutes from government influence, there is the risk that the New York Convention might become a vehicle for the export of Russian policy in the guise of arbitral awards.

The rules on conditional arbitrability aggravate the risk posed by the licensing system by shepherding corporate and procurement disputes into licensed institute arbitration, often with a mandatory Russian seat, in return for an ensuing award's enforceability before the Russian courts. Without the rules on conditional arbitrability, the Russian reform would not be as problematic: by shepherding disputes into a Russian seat and a licensed institute these rules prevent parties from protecting their interests when choosing where to arbitrate their disputes.

The imposition of a Russian seat, in particular poses the issue of preventing parties from choosing the judiciary of a neutral third country to supervise their arbitration. Even where the parties are compelled to submit their disputes to a licensed institute under the rules on minimally conditional arbitrability, as they can seat their arbitration outside Russia the parties can elect to make the courts of the seat the appointment and removal authority instead of the institute itself. This would circumvent the risk posed by the Russian licensing

system – politically motivated appointment decisions by licensed arbitral institutes at the behest of the Russian government.

This thesis suggests a solution that is derived from the New York Convention itself. Though other mechanisms for combatting abuse by the seat may be available outside the New York Convention regime, they are beyond the scope of this thesis.[571] An important feature of the New York Convention is that it does not limit how States regulate arbitration within their territories. The Convention is only concerned with the circulation of awards between States. Matters that are governed under the arbitration law of the seat do not fall under the Convention.

The primary risk under the Russian reform is that the licensing system might be used to influence the appointment decisions of Russian arbitral institutes. However, the licensing system is a matter of Russian arbitration law, and the Convention is therefore agnostic to its existence. The Convention does, however, regulate the rules that apply to the enforcement of foreign arbitral awards. The rules on conditional arbitrability exist within the remit of the Convention, which allows for courts of enforcement to apply national arbitrability rules under article V(2)(a). A proper interpretation of article V(2)(a) does not permit a Contracting State to use its arbitrability rules to force disputes into domestically seated arbitration.

[571] The European Court of Human Rights and investor-State arbitral tribunals have previously entertained claims on the basis that the legal system at the seat has abused its supervisory role. See generally on this: Reisman and Richardson (n 159). Further, some commentators have suggested redrafting the New York Convention: the redrafted Convention could provide relief against the new forms of abuse facilitated by the Russian reform. However, the feasibility of agreeing a new treaty among the 163 parties to the New York Convention is negligible. See further on this 'Hypothetical Draft Convention on the Enforcement of Arbitration Agreements and Awards: Explanatory Note' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Kluwer Law International 2009); Carolyn B. Lamm, 'Comments on the Proposal to amend the New York Convention' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Kluwer Law International 2009); Gaillard (n 77)

As explained by Quinke,[572] the only reason to allow domestic arbitration and disallow foreign arbitration is that arbitration as a form of dispute resolution is not inherently trustworthy and should be subject to domestic courts. Allowing domestic arbitration while prohibiting international arbitration not only shows a distrust of other courts in regulating the arbitration, but shows a distrust of arbitration itself and thus violates both the spirit of the Convention and the proper interpretation of article V(2)(a).

The Russian rules on medial and maximal conditional arbitrability have precisely this effect – these corporate and procurement disputes must go to Russian-seated arbitration or else an ensuing award will be unenforceable in Russia. Russia refuses to enforce any foreign arbitral award concerning these subject matters, while Russian awards concerning these disputes still benefit from enforcement outside Russia under the Convention.

In chapter II,[573] this thesis discussed the application of the principle of reciprocity under the New York Convention. It was stated that article XIV allows Contracting State A to default on one of its Convention obligations with respect to Contracting State B where Contracting State B is in default of that Convention obligation with respect to Contracting State A.

When States accede to the Convention, they waive their right to complain of the application of national law by other States under those Convention articles that provide for the application of national law. Where State A's national law does not recognise certain

[572] Quinke (n 45) 404

[573] pp. 80-92

disputes as arbitrable, State B should be taken to have waived complaint against State A's refusal to enforce awards from State B concerning those disputes. However, where State A's rules on arbitrability are themselves in violation of the convention, State B might properly refuse to enforce awards from State A that fall under State A's arbitrability rules.

This thesis has argued that the Russian rules on conditional arbitrability violate article V(2)(a) on a proper interpretation of the arbitrability defence. Should the Russian courts refuse to enforce a foreign award on the basis of the rules on conditional arbitrability, they would be in default of their Convention obligation to enforce foreign awards. Non-Russian States faced with a Russian award resolving a conditionally arbitrable dispute would therefore be within their rights to refuse enforcement for a lack of reciprocity under article XIV.

As article XIV is phrased in terms of the rights of Contracting States, parties cannot directly invoke article XIV to resist an award for lack of reciprocity. Contracting States must therefore introduce into their arbitration law provisions that give effect to the principle of reciprocity if award debtors are to plead reciprocity as a defence to enforcement. Should States incorporate such a provision into their arbitration legislation, then the award debtor to a Russian award resolving a Russian corporate or procurement dispute will be able to resist enforcement on the basis that had the same award been issued in an arbitration seated in the State where enforcement is sought, that award would not have been enforced by the Russian courts.

In chapter II,[574] it was argued that the goals of reciprocity in the area of private international law is to create a level playing field between the nationals of different Contracting States to a treaty, and to exert pressure on the Contracting State in default to observe their treaty obligations. However, it was also stated that However, the invocation of reciprocity can lead to a number of problems.

One general criticism of reciprocity is that it drags innocent individuals into a dispute between States. An award creditor will be refused its rights under the New York Convention on the basis that its home State has denied similar rights to nationals of the State of enforcement. This sacrifices the rights of individuals to greater policy concerns, causing injustice in those individual cases where an award creditor is refused their rights under an award.

A further issue is that courts of enforcement cannot pick and choose which awards they refuse to enforce on the basis of reciprocity. Should a national of the State of enforcement seek to enforce a Russian award resolving a conditionally arbitrable award, the court of enforcement must not grant enforcement where it would not have granted enforcement to a Russian award creditor. The Russian rules on conditional arbitrability do not take into account the nationality of the award creditor, and therefore reciprocal treatment under the Convention must similarly be blind as to the award creditor's nationality. Reciprocity may thus deprive nationals of the State of enforcement of their rights under awards.

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A further criticism of reciprocity is that it undermines the efficacy of the treaty in question. Where State A defaults on its obligations under the New York Convention in response to a violation by State B of State B's obligations under the New York Convention, this results in two States refusing to observe their Convention obligations. Invoking reciprocity weakens the overall efficacy of the Convention by reducing overall compliance by Contracting States.

In response to these criticisms, the author of this thesis would like to emphasize that reciprocity is not a perfect solution to the risk posed by the Russian arbitration reform. Innocent award creditors would be denied their rights under awards, and it would lead to States other than Russia refusing to observe their Convention obligations. Furthermore, where one State denies rights to the subjects of another on the base of reciprocity it can only serve to escalate the situation by giving both States cause for complaint concerning the other's observance of the Convention.

However, it should be borne in mind the main purpose of invoking reciprocity is the policing of the New York Convention. If Contracting States to the New York Convention do not take action against conditional arbitrability, this risks other Contracting States adopting similar rules. The wider adoption of conditional arbitrability would turn the New York Convention into a treaty for the one-way enforcement of arbitral awards. This is not in line with the spirit of the New York Convention, and would allow States to ensure that arbitrations concerning politically significant industries are subject to the supervision of their courts.

Reciprocity will inevitably harm the interests of individual award creditors and lower the observance of the New York Convention by Party States in the short-term. However, taking a strong stance against conditional arbitrability will ensure the long-term health of the New York Convention. Reciprocity is thus the lesser of two evils.

There is a further criticism specific to the invocation of reciprocity under New York Convention. Since the Convention's scope is drawn by reference to the seat of arbitration, a court of enforcement cannot invoke reciprocity on the basis of the parties' nationality. A State of enforcement can only refuse to enforce those awards that were issued in an arbitration seated in the State in default of its Convention obligations. A court of enforcement cannot refuse enforcement on the basis that the award creditor is a national of the defaulting State. Generally speaking, reciprocity is uniquely ill-suited to ensuring parity between the nationals of different States under the New York Convention, as a court of enforcement cannot focus the effects of invoking reciprocity on the nationals of the State in default of its obligations.

The above criticism also makes it questionable whether the invocation of reciprocity under the New York Convention can coerce a defaulting State into compliance with its obligations. Where nationals of the defaulting State can simply arbitrate in a third State to avoid having their awards refused for lack of reciprocity, there is little reason for the defaulting State to remedy its behaviour unless it is seeking to court parties into seating their arbitrations within itself. Those States that actively court arbitration are unlikely to be those States in default of their obligations under the Convention – there is thus misalignment between those States against which reciprocity can be invoked, and those

States for which reciprocity could act as an effective means of compelling compliance with the Convention.

In the context of conditional arbitrability, the scope of the Convention is much less of a problem for the invocation of reciprocity. Russian medially and maximally conditional arbitrability coerce parties into a Russian seat of arbitration by making the award's enforceability before the Russian courts dependent on a Russian seat. As conditional arbitrability shepherds arbitrations into a Russian seat, the fact that reciprocity may only be invoked against Russian awards poses no problem. Furthermore, conditional arbitrability forces Russian parties to arbitrate with a Russian seat, meaning that they cannot arbitrate in a third State so as to avoid having their award refused for a lack of reciprocity.

Those disputes that are subject to conditional arbitrability are Russian corporate and procurement disputes. These are disputes where a non-Russian party will likely require enforcement in Russia, meaning that non-Russian parties are unlikely to be prejudiced where non-Russian courts refuse to enforce Russian arbitral awards resolving these disputes. The invocation of reciprocity is likely to only negatively impact Russian award creditors who require enforcement of the award against assets located outside of Russia. Conditional arbitrability is thus a uniquely good match for reciprocity under the New York Convention, as Russian nationals are the ones who will be impacted by the refusal to enforce by non-Russian States of enforcement. As a result, reciprocity may be effective in coercing Russia to abolish its rules on conditional arbitrability in order to protect the interests of its nationals.

A final criticism of the invocation of reciprocity under the New York Convention is the that courts of enforcement should not review each other for compliance with the Convention. It has been argued that the practical difficulty of verifying whether courts are complying with their Convention obligations will lead courts to invoke reciprocity in inapplicable situations, and thus violate the Convention themselves.

Again, this does not pose a problem for the invocation of reciprocity against the Russian rules on conditional arbitrability. The rules are unambiguous in their effect, and are binding upon the Russian courts due to their incorporation into Russian legislations. The situation is fundamentally different from one in which an award debtor seeks to argue lack of reciprocity on the basis of ambiguously reasoned court decisions, forcing the court of enforcement both to consider the merits of those decisions and to decide if those decisions are representative of general court practice in the relevant State. There is thus no difficulty in concluding that the Russian rules on arbitrability violate the Convention and thus justify invoking the principle of reciprocity under article XIV.

This would mitigate the risk posed by the licensing system for Russian arbitral institutes. Russian-seated arbitration in a Russian institute is vulnerable to government influence due to the lack of safeguards in the licensing system. Conditional arbitrability prevents non-Russian parties from choosing to arbitrate these disputes outside Russia and outside a licensed institute. By invoking reciprocity against the Russian rules on conditional arbitrability, courts will refuse the enforcement of those awards that are shepherded into arbitrations most vulnerable to government influence.

This application of the principle of reciprocity does not affect awards arising out of disputes that are subject to minimally conditional arbitrability. These disputes may be arbitrated outside Russia as long as they are arbitrated within a licensed institute, and thus minimally conditional arbitrability does not violate the Convention in the same way as medially and maximally conditional arbitrability. However, the parties to a dispute that is arbitrable subject to minimum conditions have sufficient means to protect themselves if they are concerned about arbitrating in a licensed institute. The parties can provide for arbitration seated within a trusted jurisdiction and provide for the courts at the seat to act as the appointment and removal authority, circumventing the risk that an institute's appointment decision might be influenced by the Russian government.

Chapter VII – Conclusion

This thesis considers whether the international regime for arbitration under the New York Convention equips courts of enforcement to address different types of abuse by the seat of arbitration. This thesis defines abuse as the exercise of a right for a purpose different from that for which the right was originally created, and in such a manner as it causes injury to another.

Where the courts at the seat annul an arbitral award in order to insulate a local party from liability against a foreign party, they abuse their supervisory power in arbitration by exercising it to further a protectionist agenda. The regime under the Convention has proven itself sufficiently flexible to address abusive annulment decisions by the courts at the seat of arbitration. Where an arbitral award has been annulled at the seat the award debtor can raise a defence against enforcement under article V(1)(e) of the Convention, but the court of enforcement is nevertheless not obliged to refuse enforcement.

Article V(1)(e) states that the court of enforcement *may* refuse the enforcement of an award where it has been annulled at the seat. The use of the permissive modal verb 'may' gives the court of enforcement discretion in choosing whether to grant or refuse enforcement. It should also be noted that article VII contains a 'more favourable rule' provision that allows a court of enforcement to enforce an award whenever its domestic law allows for enforcement; however, the only State in which annulled awards are routinely considered under domestic law via article VII is France.

Where the courts at the seat have abusively annulled an award in order to insulate a local party from liability, a court of enforcement can rely on the permissive wording of Article V(1)(e) to enforce the award despite the annulment decision. Where a court of enforcement is willing to enforce the annulled award, the abusive annulment is rendered ineffective as the courts at the seat fail to effectively insulate the local party from liability in the jurisdiction where enforcement is granted.

In exercising their discretion to enforce annulled awards, courts of enforcement are free to apply whatever rules of procedure that they deem suitable. Those courts that have addressed this question have gravitated towards the judgment route approach, under which they consider whether the annulment decision qualifies for recognition under their national law's rules on the recognition of foreign court judgments. Courts have generally required cogent evidence of the bias of the specific judges involved in the annulment proceedings, setting a high evidential threshold for the award creditor to meet.

However, in an appropriate case courts have drawn an inference of bias from circumstantial evidence establishing strong relationships between the government at the seat, the parties to the arbitration, and the local judiciary. In *Yukos*, the Dutch Court of Appeal drew inferences that that Russian government had interceded on behalf of Rosneft, a State-owned oil and gas company, and that the Russian judiciary would have bent to government pressure.

The 2016 Russian reform has created the opportunity for a different form of abuse by the State at the seat of arbitration. Whereas in *Yukos* the Russian government pressured the Russian judiciary to influence the outcome of an annulment decision, the reform's

introduction of a licensing system for arbitral institutes may enable the Russian government to exert pressure on Russian arbitral institutes. The licensing system fails to implement sufficient safeguards to prevent the Russian government from being able to exert such pressure on arbitral institutes.

The primary decision-maker in the licensing system is the Council for the Improvement of Arbitration. The Council is represented as an independent body that represents the interests of the arbitration community. However, the Council's independence is undermined by the Ministry of Justice's control over the composition of the Council, the rotation of Council members on and off active duty and the scheduling of Council meetings.

Furthermore, the different majority requirements for issuing and revoking licenses allow for cynical manoeuvring. Two thirds of all active Council members must vote in favour of issuing a license – where government employees may make up one third of the Council, this could give the Russian government effective veto power. Only one half of Council members present at a Council session are required to vote in favour of revoking a license – where the Ministry of Justice schedules the Council's sittings and rotates Council members on and off active duty, there are insufficient safeguards against politically motivated license decisions.

Where a Russian arbitral institute's survival depends on its relationship with the Russian government, the Russian government can exert pressure on Russian institutes. In a case of similar political significance to the *Yukos* case, there is the risk that the Russian government will pressure an arbitral institute as it is believed to have pressured the Russian

judiciary. The Russian government could pressure a Russian arbitral institute to appoint an arbitrator who will resolve the dispute in accordance with government policy. The result would be an arbitral award in favour of the government-favoured party to the arbitration. Such an award would be presented to courts outside the seat for enforcement under the New York Convention. Courts of enforcement would have to consider the award under the grounds to refuse enforcement contained in article V of the New York Convention.

A court of enforcement considering such an award under the article V defences would be in a similar position to that which the Russian Commercial Courts had occupied prior to the 2016 reform with respect to awards issued within pocket institute arbitrations. Pocket institutes were owned by commercial enterprises, and were believed to have appointed arbitrators who could be trusted to resolve disputes in favour of their owners. Just as pocket institutes were dependent on funding from commercial enterprises, licensed institutes are now dependent on their government licenses.

The Russian Commercial Courts previously attempted to annul or refuse the enforcement of pocket institute awards under the relevant provisions of Russian law, which are identical to the grounds for refusal to enforce under Article V. However, the relevant grounds for annulment or refusal to enforce require the award debtor to establish the facts upon which the annulment or defence is based. Where an award creditor argued that the institute-appointed arbitrator had been biased, they could only point to her appointment by the award creditor-affiliated institute as evidence of bias. In and of itself, this was insufficient to make out grounds for annulment, especially as the award debtor would have agreed to submit its disputes to that institute.

The Russian Commercial Courts attempted to circumvent this problem, by applying the equivalent of the Article V(2)(b) public policy defence. Like Article V(2)(b), the Russian law equivalent does not specify who bears the burden of proof with respect to the public policy defence, and allows courts to raise the defence of their own motion. The Commercial Courts developed an interpretation of the public policy defence under which they annulled or refused the enforcement of any award issued in an arbitration conducted within an institute that was affiliated with one of the parties.

The Commercial Court applied similar reasoning as that of the Dutch Court of Appeal in the *Yukos* case. The Dutch Court of Appeal drew an inference as to the bias of the specific judges that had annulled the awards in the *Yukos* case on the basis that the Russian government would have pressured the judiciary on behalf of Rosneft, and that the Russian judiciary would have complied with government's demands. The Commercial Courts were effectively drawing an inference as to the bias of the specific arbitrator in a pocket institute arbitration on the basis that the award creditor would have pressured the institute to appoint an arbitrator who would resolve the dispute in favour of the award creditor. Both the Dutch Court of Appeal and the Russian Commercial Courts drew inferences from the circumstantial evidence and the lack of safeguards against abuse.

Under the New York Convention, such an approach is permissible where a court of enforcement is exercising its discretion to enforce an annulled award. A court of enforcement can exercise its discretion to enforce annulled awards under the New York Convention however it pleases. However, such an approach is impermissible when a court of enforcement is refusing to enforce an award under the Convention. A court of enforcement must not refuse enforcement of an award for bias under article V(2)(b) where

the award debtor would not be able to prove the bias of the particular arbitrator under article V(1)(b). To do so undermines the explicit allocation of the burden of proof upon the award debtor under Article V(1)(b).

The New York Convention is insufficiently flexible in its approach to the refusal of enforcement of arbitral awards to protect parties from abuse by the seat where such abuse is effected through an arbitral institute. Where the Convention is unable to provide relief to award debtors in such circumstances, it is incumbent on parties to ensure that they do not refer their disputes to an arbitration that is vulnerable to such abuse. However, the Russian reform has made the arbitrability of Russian corporate and procurement disputes conditional on the parties submitting their dispute to arbitration with a Russian seat, and in a Russian licensed institute.

Where a foreign party and Russian party arbitrate a conditionally arbitrable dispute in an arbitration that does not conform to the Russian rules on conditional arbitrability, the foreign party will not be able to enforce an award in her favour before the Russian courts. The Russian party, on the other hand, will be able to enforce an award issued in such an arbitration before the home courts of the foreign party. This puts non-Russian parties in a Scylla and Charybdis situation where they either arbitrate with a Russian seat in a licensed institute, or risk the unenforceability of any award issued in their favour before the Russian courts.

This thesis argues that that the Russian rules on conditional arbitrability constitute a violation of the New York Convention. Conditional arbitrability seeks to impose a Russian seat on international arbitration by allowing domestic arbitration while prohibiting foreign

arbitration. Such a position can only be justified on the basis of the differences between Russian and non-Russian arbitral proceedings. Only if one accepts that Russian arbitration is safer than arbitration outside Russia, is the requirement to arbitrate in Russia warranted. To accept this argument would go against the underlying principles of the New York Convention - that international arbitration is an appropriate means of dispute resolution that does not rely on the supervision of a particular State for its validity.

As the Russian rules on conditional arbitrability violate the Convention, other States are entitled to invoke reciprocity to refuse enforcement of Russian awards resolving conditionally arbitrable disputes. This thesis suggests that States should amend their national laws to allow for the refusal to enforce arbitral awards on the basis of reciprocity. Reciprocity provides an adequate solution to the specific problem posed by conditional arbitrability in that it creates an even playing field between non-Russian and Russian parties to such disputes. Neither will be able to enforce an award made in their home States in the home State of her counterpart. Though this may lead to reduced economic activity or higher transaction costs in those areas subject to conditional arbitrability, this is necessary to ensure that individual States do not abuse the Convention framework.

Moreover, this will mitigate the primary risk of the Russian licensing system for arbitration. Arbitral awards arising from arbitrations that have been shepherded into a Russian seat and a Russian licensed institute will only be effective within Russia; other States will refuse their enforcement for lack of reciprocity. Such awards will therefore be unenforceable before the home courts of non-Russian award debtors, significantly reducing the risk that the Russian government will be able to influence the contents of an award that is subsequently enforced outside Russia.

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