



RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN GERMANY

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Introduction¹

Since January 1, 1998 applications to have a foreign award recognised and enforced in Germany have been governed by the new German Arbitration Law. The relevant provisions constitute one of the few areas where the German law deviates from the UNCITRAL Model Law on which it is based. Instead of transferring Articles 35 and 36 Model Law directly into German law, section 1061(1) of the ZPO (Code of Civil Procedure) provides:

Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.

This deviation from the Model Law was, however, not intended to lead to a change in substance. The grounds to resist enforcement mentioned in Article 36 of the Model Law are basically identical to those of Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (hereinafter NYC). The reason for the deviation was primarily the fact that the relevant provisions of the Model Law do not distinguish between domestic and foreign awards. Under the pre-existing German law domestic awards only had to be declared enforceable but required no recognition. To keep this privilege for domestic awards required separate regimes for domestic and foreign awards resulting in the reference to the New

York Convention,² for which the "Contracting State Reservation" made in accordance with Article I(3) of the NYC was withdrawn.³

While the new law is to a large extent a modern and internationally acceptable re-codification⁴ of the existing law, the issue of recognition and enforcement of foreign awards is one of the few areas where substantial changes have been made. In the following the new regime governing recognition and enforcement of foreign awards in Germany will be set out.

I. Creation of a single regime for the enforcement of foreign awards

The new German law provides for a single regime for the recognition and enforcement of foreign awards abolishing the two separate systems existing under the old law allowing for enforcement either under the New York Convention or under old sections 1042 and 1044 of the ZPO.⁵ According to section 1061(1) of the ZPO the enforcement of foreign awards is generally governed by the New York Convention. Other rules may only become applicable by virtue of the second sentence of section

2. See the official report accompanying the draft of the new law BT-Drs. 13/5274, pp. 60 *et seq.* the grounds mentioned to resist enforcement of domestic awards are, however, identical to those mentioned in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter NYC).

3. The withdrawal of the reservation was notified to the United Nations on August 31, 1998, see BGBl. II 1999, p. 7; consequently s.1061(1) of the ZPO has primarily a declaratory character since the enforcement of foreign awards would anyway be governed by the New York Convention.

4. See official report BT-Drs. 13/5274, pp. 22 *et seq.*; Berger, "Das neue Recht der Schiedsgerichtsbarkeit," (1998) 21 *RWS-Dokumentation* 42 *et seq.*; Wagner, "Country Report: Germany", in Weigand ed., *Practitioner's Handbook on International Arbitration* (2002), paras 465 *et seq.*

5. BGH [Federal Supreme Court] RIW 1984, 685; OLG [Higher Regional Court] Hamm IPRax 1985, 218; OLG Frankfurt RIW 1989, 911; Geimer in Zöller, *Zivilprozessordnung*, (23rd ed., Köln, 2002), s.1044, para. 10.

1. The author acknowledges the help of Oliver Heidkamp in the preparation of the article. All German decisions rendered after January 1, 1998 are available online from the Database of the German Institution of Arbitration at www.dis-arb.de; for a general overview on the jurisprudence under the new Arbitration Law see Kröll, "Das deutsche Schiedsrecht vor staatlichen Gerichte: Entwicklungslinien und Tendenzen 1998-2000", (2000) NJW, 1173.

1061(1) of the ZPO according to which foreign awards may still be recognised and enforced by reference to other international treaties. These treaties are the Geneva Convention on the Enforcement of Arbitral Awards, numerous bilateral treaties on the recognition and enforcement of awards or general friendship or investment protection treaties.⁶

Which awards are considered to be "foreign awards" is no longer determined by the so-called "procedural theory", relying on the law applicable to the procedure as the relevant criterion.⁷ In line with the internationally prevailing practice Germany now follows the "territorial theory" where the place of arbitration determines the classification of an award as foreign or domestic. It can be deduced from section 1025(1) and (4) of the ZPO that an arbitral award is regarded as foreign, if the place of arbitration is not located in Germany.

In this regard the German law makes a clear distinction between the place of arbitration and the place where the hearings take place.⁸ If the parties have agreed on a place of arbitration it is this place which determines the "nationality" of an award, irrespective of whether all hearings were held at a different place. In practice it is rare that neither the parties nor the tribunal⁹ has clearly determined the place of arbitration, since often the relevant arbitration law requires that the award sets out the place of arbitration.¹⁰ The OLG Düsseldorf has, however, held that not every reference to the place where the award was signed must constitute a reference to the place of arbitration. It may also be just a reference to the arbitrators place of residence. The court determined that in those cases the place of arbitration will be at the place where the last hearing took place.¹¹

6. Such bilateral treaties exist between Germany and numerous countries such as Switzerland, Italy, Belgium, Austria, Greece, the Netherlands, Tunisia, Norway, Israel, Poland, England and the U.S.; see the texts reprinted in Bülow, Böckstiegel, Geimer and Schütze, *Internationaler Rechtsverkehr*, Vol. III.

7. According to the procedural theory an award rendered in a foreign country was still regarded as a domestic one, if the parties had opted for German law as the procedural law; cf. BGH, BGHZ 96, 40, at 41; BGH, WM 1988, 1178, at 1179.

8. OLG Stuttgart, December 6, 2001 (1 Sch 12/01); Schwab and Walter, *Schiedsgerichtsbarkeit*, (6th ed., Munich, 2000), chap. 30, para. 7; Schütze, *Schiedsgericht und Schiedsverfahren*, (3rd. ed., Munich, 1999), para. 140 *et seq.*

9. According to s.1043(1) of the ZPO if the parties have not made use of their right to determine the place of arbitration it is for the tribunal to do so. Such determinations will also be recognised at the enforcement stage.

10. See s.1054(3) of the ZPO; Art. 31(3) of the UNCITRAL Model Law; Art. 52(5) of the Arbitration Act 1996.

11. OLG Düsseldorf, EWIR 2000, 795 (note Kröll); see for an English summary of the decision [2001] Int.A.L.R. N-25; for the problem of determination of the seat of arbitration see also the English decision in *Dubai v. Paymentech*, [2001] 1 Lloyd's Rep. 65.

II. Significance and function of the declaration of enforceability

The function of the declaration of enforceability is the recognition of the foreign award with substantive *res judicata* effect¹² and to create an executory title. According to section 794(1) Nr. 4 a of the ZPO, it is not the award as such but the declaration of enforceability that is the executory title to be enforced in the execution proceedings. It follows from section 1060(1) of the ZPO, stipulating that execution only starts after the award has been declared enforceable,¹³ that the proceedings for a declaration of enforceability are not yet part of the execution proceedings, but a necessary precondition for the latter. This fact has several consequences. First, a court is not hindered to declare an award enforceable even if the concerned party to the dispute has entered insolvency proceedings after the award has been rendered.¹⁴ Insolvency proceedings bar only execution, not any preceding acts. Secondly, the declaration of enforceability may also be given to awards the content of which is not executory for the lack of certainty or that have no executory content at all.¹⁵ Thirdly, States or State entities that have submitted to arbitration cannot rely on their sovereign immunity in the proceedings to have the award declared enforceable. The waiver of immunity contained in the submission to arbitration also covers these proceedings.¹⁶ Fourthly, actions raising objections to the judgment claim according to section 767 of the ZPO ("Vollstreckungsgegenklagen") can only be directed against the declaration of enforceability not the award as such.

12. If the place of arbitration is in Germany the declaration of enforceability furthermore excludes any annulment of the award according to s.1059(3), 4th sentence of the ZPO.

13. s.1060(1) of the ZPO provides: "Enforcement of the award takes place if it has been declared enforceable."

14. OLG Dresden, September 25, 1998 (11 Sch 1/98); OLG Brandenburg, September 2, 1999 (8 Sch 1/99).

15. See BayObLG [Bavarian Highest Regional Court], BetriebsBerater 1999, 1948, where the court held that though the award did not specify the properties to be returned with the necessary certainty for an execution, it could be declared enforceable since the executability is not a prerequisite for a declaration of enforceability; see also OLG Hamm, June 20, 2001 (8 Sch 2/00).

16. See Kammergericht Berlin, February 16, 2001 (28 Sch 23/99); OLG Frankfurt, July 8, 1999 (10 Sch 1/98); that is in line with the practice in other states; see for example U.S.: *Iptrade International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978); Belgium, Cour d'appel de Bruxelles [Court of Appeal], Brussels, March 10, 1993, 123 *Clunet* 444 (1993); for a more extensive overview of the case law under different national laws see Langkeit, "Staatenimmunität und Schiedsgerichtsbarkeit", *Verlag Recht und Wirtschaft* (1989), pp. 131 *et seq.*; Delaume, "Sovereign Immunity and Transnational Arbitration", (1987) 3 *Arb. Int.* 28.

III. The Application for a declaration of enforceability

Applications to have a foreign award declared enforceable have to be filed with the locally competent Higher Regional Court and no longer with the courts of first instance. The underlying rationale to make these Courts of Appeals into entrance courts for most proceedings relating to arbitration is that the function of the first instance is performed by the arbitral tribunal.¹⁷ Several states have made use of the power provided for in section 1062(5) of the ZPO to centralise all proceedings in relation to arbitration in a single chamber of one court to increase the expertise of the judges dealing with arbitration related questions.¹⁸ Local competence has the Higher Regional Court in the district of which the debtor or its assets are located,¹⁹ if none of these places are in Germany, the Kammergericht Berlin has competence.²⁰

1. Legal representation

In general according to section 78 of the ZPO in proceedings in the Higher Regional Courts parties must be represented by a lawyer. Section 1063(4) of the ZPO, however, provides that applications to have an award declared enforceable may be made by the parties themselves without legal representation. The need to be represented by a lawyer only arises when an oral hearing is ordered because the other side objected to the enforcement of the award, which only happens in a minority of cases. In line with section 727 of the ZPO the application may also be made by the legal successors of the winning party which has to prove succession by submitting the relevant documents.²¹

The formal requirements of an application to have an award declared enforceable became an issue in proceedings before the Higher Regional Court of Stuttgart. The application was made by a letter using the company's letterhead, which was signed with "General Director B.W.W." and contained the company's seal. The Court held that such a letter was sufficient to prove that the application stemmed from the winning party and since the application was beneficial to the party involved the use of the seal was sufficient to evidence that the signing party had authority to do so.²²

17. See the official report BT-Drs 13/5274, p. 63.

18. A list of the competent courts can be found in Sachs, RPS 2/1999 Supplement 11 BetriebsBerater 38/99, p. 5.

19. s.1062(1); it is not required that there are sufficient assets for an execution; see OLG Köln, February 15, 2000 (9 Sch 13/99).

20. s.1062(2) of the ZPO; in the rare cases where the parties have agreed on which court has jurisdiction the application must be made there according to s.1062(1).

21. OLG Stuttgart, OLG Report 2000, 386, 387.

22. OLG Stuttgart, September 20, 2001 (1 Sch 14/2001).

If the application is filed by a lawyer, the Supreme Court held that the latter must prove its power of attorney by producing the letter of authorisation in the original or at least a certified copy.²³ The court refused to declare a foreign arbitral award enforceable in Germany on the basis of missing authorisation of the counsel for claimant when filing the application to declare enforceability. The court held that in addition to sections 1061–1065 ZPO, which are explicitly mentioned in section 1025(4) to be applicable for foreign awards, also the general provisions of the Code of Civil Procedure are applicable as far as they are compatible with the special requirements of the enforcement proceedings. Consequently questions as to the counsel's authorisation to represent their client in the action are governed by sections 80ff of the ZPO, so that the defence of a missing authorisation, which may be invoked at any time during the proceedings, could only be countered by presenting the authorisation documents. A delegated authorisation needed to be led back to the party itself and not just to the holder of the principal authorisation, which means that the latter's authorisation has to be proven as well.

2. Accompanying documents

The formal requirements for an application to have an award declared enforceable are regulated in section 1064 of the ZPO which provides:

- (1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorised to represent the party in the judicial proceedings.
- (2) The order declaring the award enforceable shall be declared provisionally enforceable.
- (3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards.

Concerning the documents to be submitted, section 1064(1) deviates in several respects from Article IV of the NYC or Article 35(2) of the Model Law.²⁴ First, it only requires the presentation of the award or a certified copy thereof, but not that the arbitration agreement be submitted as well. Secondly, the copy of the award

23. BGH, March 27, 2002 (III ZB 43/00).

24. Art. IV of the NYC, widely mirrored by Art. 35 of the UNCITRAL Model Law, provides in the relevant parts:

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof."

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

may be certified by a party's counsel and thirdly, no translation of the award is required. However, according to section 1064(3) these alleviations only apply to applications to have foreign awards declared enforceable "unless otherwise provided in treaties". The question of whether Article IV of the NYC is one of those treaty provisions superseding section 1064(1) has given rise to divergent views. It became an issue in proceedings before the Bavarian Highest Regional Court to have a Russian award declared enforceable. The applicant submitted a duly certified copy of the award and the arbitration agreement as well as a translation of both, which, however, did not fulfil the requirements of Article IV of the NYC. Relying on Article VII of the NYC²⁵ the court held that section 1064(1) of the ZPO as a more favourable national provision was applicable. Since it did not even require a translation the court considered it irrelevant that the translation submitted did not fulfil the form requirements of Article IV of the NYC.²⁶

The OLG Rostock, however, came to the opposite conclusion submitting applications to have foreign awards declared enforceable to the stricter form requirements of Article IV of the NYC.²⁷ It interpreted Article IV as one of those treaty provisions mentioned in section 1064(3) of the ZPO, which exclude the application of section 1064(1) of the ZPO. It considered Article VII of the NYC not to be applicable to formal requirements, so that in relation to these it was impossible to rely on more favourable provisions of the national law. Furthermore, in its view there were "no more favorable provisions" of national arbitration laws in the sense of Article VII since the application of section 1064(1) was excluded by the stricter requirements in Article IV of the NYC.

Despite indications that the Supreme Court might follow the interpretation of the OLG Rostock,²⁸ it is submitted that the other interpretation is preferable. First, it is much more in line with the objectives of the NYC to foster recognition and enforcement of arbitral awards inter-

nationally. At the time of its drafting over 40 years ago, Article IV of the NYC was a liberal provision intended to facilitate enforcement and should not now be interpreted as a restrictive rule superseding more favourable national provisions. Secondly, the interpretation adopted by the Rostock Higher Regional Court would render the reference in section 1064(3) basically moot. With the withdrawal of the "Contracting State Reservation" all foreign awards fall within the scope of the NYC. As a consequence Article IV would always exclude the application of section 1064(1) with the very few exceptions of bilateral treaties providing for a more lenient regime. In these cases enforcement would, however, also be possible under the treaty provision according to section 1061(2) so that no reliance on the provisions of the ZPO would be necessary.

The differences between the two views have anyway been mitigated considerably by the interpretation given to Article IV of the NYC by the Supreme Court in a recent decision.²⁹ It concerned an award, based on the dispute resolution clause in the German-Polish Investment Protection Treaty of 1989, which referred to the NYC for enforcement. When claimant applied to have the award declared enforceable the respondent objected since the copy of the award submitted was not duly legalised. Since respondent only invoked the lack of a proper legalisation but did not also challenge the authenticity of the copy the Supreme Court rejected its objection. The court held that Article IV of the NYC is not intended to stipulate formal requirements to be fulfilled in any case but primarily serves evidentiary purposes, by setting out the means by which the existence and the content of an award could be proven when disputed by the other party. Therefore, the formal requirements could not be relied on in cases where the authenticity of the award is uncontested.³⁰

In addition, submitting applications to have a foreign award declared enforceable to section 1061(1) of the ZPO does not prevent the courts from requiring a party to submit a copy of the arbitration agreement or a translation of the award under their general powers. Such powers exist under section 142(3) of the ZPO and section 184 of the GVG should the court consider the submission of translations or documents necessary.

IV. Procedure

The new German law has replaced the sometimes cumbersome enforcement proceedings under the old law by a much less formal and facilitated procedure.³¹ No oral hearing is required unless the other party raises

25. For the applicability of Art. VII of the NYC to the formal requirements see also LG [Regional Court] Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/2000, p. 19, at 21.

26. BayObLGZ 2000, 233; OLG Rostock, RPS 1/2000, Supplement 8 BetriebsBerater 37/2000, p. 20; see also OLG Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/2000, p. 13; *id.*, RPS 1/1999, Supplement 4 BetriebsBerater 11/2000, p. 16, where it was held without further discussion that the application containing the original award and a certified copy fulfilled the formal requirements set out in section 1064(1) of the ZPO.

27. OLG Rostock, November 22, 2001 (1 Sch 3/2000); for a more detailed analysis see Kröll, *IPRax* 2002, 384 *et seq.*; in so far the court deviated from its earlier decision, cited in the preceding footnote, where it held that by virtue of Art. VII(1) of the NYC, s.1064(1) which would otherwise have been superseded by Art. IV of the NYC became applicable again; in favour of an application of Art. IV of the NYC see also OLG Köln, June 22, 1999 (9 Sch 8/98); Wagner, Fn. 4, para. 468.

28. See BGH, NJW 2000, 3650 (= BetriebsBerater 2000, 1961), reported in detail below, where the court discussed in length the requirements of Art. IV which would not have been necessary if s.1064(1) were applicable, the requirements of which were clearly met.

29. BGH, NJW 2000, 3650 (= BetriebsBerater 2000, 1961); see also OLG Köln, November 13, 2000 (9 Sch 4/00).

30. See also BGH, February 22, 2001 (II ZB 71/99), where the Court relied on that decision to hold that a not properly legalised award fulfilled the form requirements of Art. IV of the NYC since its authenticity had not been challenged.

31. See the official report BT-Drs 13/5274, pp. 62 *et seq.*

grounds for resisting enforcement or, on the basis of the materials submitted, the enforcement of the award might be contrary to public policy.³² The mere fact that the application is made by the legal successor of a party does not by itself necessitate an oral hearing even if the legal succession is contested by one party.³³

Where an oral hearing is ordered section 297 of the ZPO requires that only requests made orally at the hearing can be taken into account by the courts. The earlier written submissions may be referred to in the oral pleading but are by themselves not sufficient to constitute valid requests. To be valid any request has to be made by a lawyer admitted at the relevant court. Without an oral request at the hearing any substantial motion and thus any basis for a judicial decision is missing and the award has to be declared non-enforceable in Germany.³⁴

Security for costs may not be requested in proceedings to have a foreign award declared enforceable.³⁵ The Supreme Court held, that these proceedings were meant to be fast track procedures. As such they should not be slowed down by the necessity for a party to provide security for costs. Furthermore, it has been held that security for costs for the enforcement of foreign awards may conflict with Article III of the NYC, which prohibits submission of enforcement proceedings of foreign awards to requirements that are stricter than those of domestic proceedings.³⁶

In addition, with the request to have an award declared enforceable a party may submit a request for preliminary execution of the award.³⁷ According to section 1063(3) of the ZPO such preliminary execution may be granted by the presiding judge *ex parte* without any hearing of the other side.³⁸ In practice such an order will, however, only be granted if informing the other side may prevent enforcement of the award. Furthermore, the adequate means of execution are limited to those securing the later execution. Thus, a transfer of money, for example, to the

claimant's account may not be granted as it exceeds the actions necessary to secure later payment.³⁹ The defendant may also prevent a preliminary execution by providing adequate securities destroying any need for such a measure.

V. Award

A declaration of enforceability is only possible for awards. Other binding decisions by third parties, such as expert determinations do not fall in the ambit of section 1061 of the ZPO. In this respect the characterisation of a decision as an arbitral award is made on the basis of German law, which, however, takes into consideration the characterisation of a decision in its country of origin.⁴⁰ The law of the country of origin will determine which formal requirements have to be met by a decision to be considered a valid award.

Accordingly awards on agreed terms, provided for in German law under section 1053 of the ZPO,⁴¹ can be declared enforceable, if they are possible according to the applicable arbitration law. That probably also applies to awards on agreed terms which merely fix the results of a meditation. By contrast the Italian *lodi di arbitrato irrituale* is not considered to be an enforceable award.⁴²

The award must be final in its country of origin and no longer open for appeal either before a second arbitral instance or before the state courts. These true appeal procedures must not be confounded with the possibility of annulment proceedings against the award. As can be derived from section 1061(3) the possibility of applying for the annulment of the award in its country of origin does not prevent the award from being declared enforceable in Germany. That is even so where those proceedings have already been started. Though German courts will on the basis of section 148 of the ZPO generally stay proceedings for the declaration of enforceability if annulment proceedings are pending they are by no means required to do so. According to section 1061(3) the declaration of enforceability may, however, be set aside once an award has been annulled in its country of origin.⁴³

32. BGHZ 142, 204, at 207, (= NJW 1999, 2974); that the objections are justified is not a precondition for ordering an oral hearing, as long as they potentially exist on the basis of the documents submitted; see BayObLG, BayObLGZ 1999, 55 (= NJW-RR 2000, 807).

33. OLG Stuttgart, OLG Report 2000, 386.

34. BayObLG, BayObLGZ 1999, 55 (= NJW-RR 2000, 807).

35. OLG Stuttgart, September 20, 2001 (1 Sch 14/2001); OLG Hamburg, March 12, 1998 (6 U 110/97).

36. OLG Hamburg, March 12, 1998 (6 U 110/97).

37. The provision also applies to the execution of provisional measures ordered by the arbitral tribunal; see Schwab and Walter, fn 8, Chap. 28, para. 13.

38. s.1063(3) provides:

"The presiding judge of the civil court senate ('Zivilsenat') may issue, without prior hearing of the party opposing the application, an order to the effect that, until a decision on the request has been reached, the applicant may pursue enforcement of the award or enforce the interim measure of protection of the arbitration court pursuant to section 1041. In the case of an award, enforcement of the award may not go beyond measures of protection. The party opposing the application may prevent enforcement by providing as security an amount corresponding to the amount that may be enforced by the applicant."

39. Schwab and Walter, fn 8, Chap. 28, para. 13.

40. OLG Rostock, RPS 1/2000, Supplement 8 BetriebsBerater 37/2000, p. 20; Schwab and Walter, fn. 8, Chap. 30, para. 11; Geimer in Zöller, fn. 4, s.1061 para. 4, who requires, however, that the decision will also be considered as an arbitral award in its country of origin; for an overview of how the various forms of binding third party decisions are distinguished see Kröll, *Ergänzung und Anpassung von Verträgen durch Schiedsgerichte*, (Köln 1998), pp. 247 *et seq.*

41. BGH, NJW 2001, 373 (English summary [2002] Int.A.L.R. N-12); Lörcher, "Schiedsspruch mit vereinbartem Wortlaut—Notizen zur Vollstreckbarkeit im Ausland", RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 2.

42. BGH, NJW 1982, 1124; Geimer in Zöller, fn. 5, s.1061 para. 6.

43. s.1061(3) of the ZPO provides: "If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made".

VI. Reasons to deny enforceability

In line with the basic idea underlying the NYC, German law is based on the assumption that foreign arbitral awards should in general be enforced in Germany. Only where the other party can prove that one of the few grounds to resist enforcement mentioned in Article V of the NYC is present, a court can refuse to declare an award enforceable. Beyond these grounds, intended to protect certain vital interests of the state and the losing party, no further examination of the award is possible. In particular, the courts will not scrutinise the award as to its correctness as any "*révision au fond*" is not permitted. By stating that enforcement "may" be refused, Article V seems to give the courts discretion to refuse enforcement where one of the grounds mentioned exists. However, the German view is that the courts have no such discretion and are, thus, bound to refuse enforcement.⁴⁴

The burden of proof is generally borne by the party trying to resist enforcement. Concerning the burden of pleading one has to distinguish between the grounds mentioned in Article V(2) of the NYC, the lack of objective arbitrability and public policy, and the others stated in Article V(1). The former are to be observed by the court *ex officio* at all stages of the proceedings. They do not have to be specifically pleaded and can also be invoked at the appeal stage for the first time. By contrast all grounds mentioned in Article V(1) must be pleaded by the party trying to rely on them. The courts have been fairly strict concerning the requirements for such pleading. It is not sufficient to state the facts but the parties must clearly say on which ground they want to rely.⁴⁵

The strictness of the requirements is, however, mitigated by the fact that a number of the grounds mentioned in Article V(1) also constitute a violation of the *ordre public* so that they have to be observed *ex officio* in the context of Article V(2).

Of considerable practical importance, however, are issues of preclusion. Most of the grounds mentioned can already be invoked in the arbitration proceedings or would justify annulment proceedings at the place of arbitration. Whether and to what extent a party not making use of such means of recourse can rely on the defences in enforcement proceedings often determines the outcome of these proceedings.

44. Memorial of the Federal Government on the ratification of the New York Convention, BT-Drs. 3/2160, p. 26; Wagner, fn. 4, para. 473; the same applies for Austria, Burgstaller, "Vollstreckung ausländischer Schiedssprüche in Österreich", ZfRV 2000, 83, 86; for the different international practice see Di Pietro and Platte, *Enforcement of International Arbitration Awards—The New York Convention of 1958* (London 2001), p. 133.

45. BGH, ZIP 2000, 2270, 2271; OLG Hamburg, OLGR Hamburg 2000, 19 ff.; Ehrlicke, "Die Beschleunigung der Finalität von Schiedssprüchen nach dem neuen deutschen Schiedsverfahrensrecht", (2000) 113 ZJP 453 at 457.

1. Lack of a valid arbitration agreement—Article V(1)(a) of the NYC

The existence of a valid arbitration agreement between the parties is generally a precondition for any arbitration proceeding. No party can be deprived of the constitutional right to have its disputes decided by courts without its consent evidenced in a valid arbitration agreement. Consequently the enforcement of an award not based on such an agreement would be contrary to public policy and must be refused *ex officio* according to Article V(2)(b) of the NYC.

Given that there cannot be any arbitration without an arbitration agreement, its existence is in general already verified by the arbitral tribunal, particularly when its jurisdiction is challenged by one of the parties. In those cases often even a preliminary award on jurisdiction will be rendered. These findings of the arbitral tribunal, however, do in general not bind the German enforcement court. It can enter into a full investigation of the facts and the law.⁴⁶ In contrast to the former law the parties may no longer give the tribunal the power to settle disputes as to its jurisdiction with binding effect for the state courts.⁴⁷ Since this affects the arbitrability of disputes relating to the tribunal's jurisdiction it is submitted that a German court will even enter into a full investigation of the facts and the law in cases where the law applicable to the arbitration allows for a binding *Kompetenz-Kompetenz*.⁴⁸

In practice most parties relying on the lack of a valid arbitration agreement either claim that the form requirements have not been fulfilled or that it lacks substantive validity. Lack of substantive validity exists when the parties never entered into an arbitration agreement at all, it has been terminated or is invalid for other reason. By contrast the lack of subjective arbitrability, governed by the law applicable to the parties according to Articles 7 and 12 of the EGBGB, has played only a minor role.⁴⁹

46. OLG Rostock, November 22, 2001 (1 Sch 3/2000); for a more detailed analysis see Kröll, IPRax 2002, 384 *et seq.*

47. s.1040 (3) of the ZPO; Berger, fn. 4, p. 46.

48. But see for a different view OLG Schleswig, June 24, 1999 (16 SchH 1/99) where the court considered itself bound by the decision of the tribunal since the arbitration proceedings started before the entry into force of the new law and the old law still allowed for the granting of a binding *Kompetenz-Kompetenz*, which the court deduced from the terms of reference.

49. For one of the rare cases where the lack of subjective arbitrability was invoked see BGH, April 23, 1998, XXIVb YBCA 928(1999) where a Yugoslavian party lacked the necessary foreign trade permission and therefore could not validly enter into an arbitration agreement with a foreign party; in international practice subjective arbitrability was held to be missing in cases where the person who signed the arbitration agreement did not have the required authority for that; see for example ICC case no. 6850, XXIII YBCA 37(1998); Dubai Court of Cassation, June 25, 1994, [1998] Int.A.L.R. N-62, where the person agreeing on the arbitration clause was acting under a power of attorney which according to the view of the Court did not cover the submission to arbitration.

Though questions as to form and substance, in particular the consent to arbitration, are often interwoven or at least closely-related, they might be submitted to different laws and require separate treatment.

a. Formal validity In Germany the reference in Article V(1)(a) of the NYC to an "arbitration agreement referred to in Article II" is interpreted in a way that the court can verify whether the arbitration agreement fulfils the form requirements.⁵⁰ The prevailing view in German law is that the relevant standard to be met in this regard is always Article II of the NYC. Article II is considered to be a unified substantive rule of private international law superseding all national form requirements even when they are more lenient.⁵¹ Some courts go as far that the latter should not even have an influence on the interpretation Article II, which is to be made autonomously free from any national understanding of the writing requirement.⁵²

This is of particular relevance in connection with arbitration clauses contained or referred to in letters of confirmation. According to the prevailing interpretation of Article II of the NYC these agreements do not fulfil the form requirements of Article II.⁵³ Neither is there a single document signed by both parties nor is there an exchange of documents. By contrast the form requirements in the German arbitration law are more lenient. Section 1032(2) states explicitly that an arbitration clause contained in a confirmation letter may fulfil the writing requirement provided the contents of the confirmation letter become binding according to trade usage if no objection is raised.⁵⁴ As a consequence, a foreign award based on an arbitration clause contained in a letter of confirmation could not be declared enforceable in Germany since the form requirements of Article II of

the NYC are not fulfilled though the arbitration agreement is perfectly valid according to German law and would not be an obstacle to the enforcement of a German award. This preferential treatment of domestic awards conflicts to a certain extent with the general jurisprudence on the *ordre public*. Generally the *ordre public* international is considered to be narrower than the national *ordre public*⁵⁵ while in case of the existence of a valid arbitration agreement it would be the other way around.

Even more problematic are the results in cases where the arbitration agreement would also fulfil the form requirements of the place of arbitration. If for example a confirmation letter providing for arbitration in England sets out the content of an earlier oral agreement, it would fulfil the form requirements of section 5 of the Arbitration Act 1996. Consequently, no action could be brought in the state courts. The enforcement of the award in Germany could, however, be resisted since the arbitration agreement does not fulfil the form requirements of Article II. Furthermore, it would be questionable whether foreign awards based on arbitration clauses in testaments or the constitutions of foundations, corporations and associations would be enforceable any longer. In these cases often either an arbitration agreement signed by all parties concerned or an exchange of documents, as required by Article II of the NYC, is missing.

For these reasons the better view is to interpret Article II as setting the maximum standard, which does not preclude any reliance on the more favourable German law.⁵⁶ As long as an arbitration agreement fulfils the form requirements of section 1031 of the ZPO, Article V(1)(a) of the NYC cannot be relied on to resist enforcement. This interpretation of Articles II, V(1)(a) is much more in line with the objective of the convention, which is to foster the international recognition and enforcement of arbitral awards. That it only intended to determine the possible maximum requirement can be derived from the wording of Article V and Article VII. According to Article V enforcement "may" be refused but there is no obligation to do so if the national law sets lower requirements. Article VII explicitly allows reliance on the more favourable national law. Though Article VII is internationally often interpreted to allow only for a complete reliance on a more favourable enforcement regime, excluding an application of the NYC system to avoid cherry picking,⁵⁷ such an interpretation of the wording is by no means compelling. It should at least not apply in cases where the national law does not provide for a separate regime for the enforcement of foreign awards and, while referring to the NYC, nevertheless sets lower form requirements.

50. See Münchkomm and Gottwald, *Münchener Kommentar zur Zivilprozessordnung*, (2nd ed., Vol. 3, Munich 2001), UNÜ Art. V para. 7; see further the references in the following footnotes; that is in line with the international practice; see Van den Berg, *The New York Arbitration Convention of 1958—Towards a Uniform Judicial Interpretation*, (1981), p. 285; for a different view see Di Pietro and Platte, fn. 44, pp. 83 *et seq.*

51. OLG Schleswig, RIW 2000, 706; OLG Hamburg, RPS 1/1999, Supplement 4 Betriebsberater 11/2000, p. 13; Schwab and Walter, fn. 8, Chap. 30, para. 18.

52. OLG Schleswig, RIW 2000, 706.

53. See for example OLG Rostock, November 22, 2001 (1 Sch 3/2000); OLG Hamburg, RPS 1/1999, Supplement 4 Betriebsberater 11/2000, p. 13, where, however, the later correspondence between the parties in connection with the appointment of arbitrators was considered to be sufficient to fulfil the writing requirement; Münchkomm and Gottwald, fn. 50, UNÜ Article II para. 11; see also Di Pietro and Platte, fn. 44, pp. 71 *et seq.*

54. s.1032(2) of the ZPO provides:

"The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and—if no objection was raised in good time—the contents of such document are considered to be part of the contract in accordance with common usage."

55. See below.

56. For such a view see also OLG Dresden, January 13, 1999 (11 Sch 6/98); see also generally on the interpretation of Art. II in this sense Fouchard, Gaillard and Goldmann, on International Commercial Arbitration, The Hague, 1999, para. 271.

57. See for example Bredow; in Bülow, Böckstiegel, Geimer and Schütze ed., *Internationaler Rechtsverkehr*, C I 3b, p. 15; Schlosser in Stein and Jonas, *Kommentar zur Zivilprozessordnung*, (21st ed., Tübingen 1994), Anh. s.1044, para. 38.

Irrespective of which law applies, references to standard conditions on the back of a letter containing an arbitration clause have been considered to fulfil the writing requirements.⁵⁸ In an ongoing relationship the OLG Schleswig even considered the writing requirement of Article II of the NYC to be fulfilled in a case where only the front page of a letter confirming an order was faxed to the other party and signed by it while the back of the page containing the arbitration clause was not transmitted. In the court's view it was sufficient that the standard conditions were sent at an earlier time.⁵⁹

Even the more lenient form requirements of section 1032 of the ZPO will not be fulfilled in cases where the applicant cannot prove that the other party ever received the letter containing the arbitration agreement.⁶⁰ The decision of the OLG Rostock concerned the enforcement of an award rendered in England where the German respondent throughout the arbitration proceedings, as well as in the ensuing proceedings in England to have the award recognised, contended to have never received the fax or letter containing the arbitration clause. The arbitral tribunal had held that it accepted on the "balance of probability" that the award was sent but relied as a fall back argument on later correspondence allegedly referring to the letter containing the arbitration clause. From the phrase on the "balance of probability" the OLG Rostock deduced that the tribunal was not convinced that the respondent had actually received the letter. In that case no valid arbitration agreement would have existed as correctly pointed out by the tribunal. The only document containing the arbitration agreement was the confirmation letter the receipt of which was in dispute. If the letter had never been received, later correspondence referring to it could not fulfil the form requirement. In this case, however, the tribunal and the English High Court of Justice, which rejected respondent's objection to have the award declared enforceable as a judgment, had apparently assumed that a valid arbitration agreement existed. Therefore, the correct way for the OLG Rostock to proceed would probably have been to examine whether the fax was actually received rather than just relying on the alleged failure to prove the receipt in the arbitration proceedings.⁶¹

b. Substantive validity of the arbitration agreement

According to Article V(1)(a) of the NYC, the substantive validity of the arbitration agreement is determined according to the law chosen by the parties in the arbitration agreement or in the absence of such a choice according to the law of the place of arbitration.

Irrespective of the law applicable to the substantive validity German courts will not refuse enforcement of a foreign award for the mere fact that the contract containing the arbitration agreement has been terminated or is invalid. Section 1040(1) of the ZPO clearly states that arbitration agreements are separate contracts and are not *per se* affected by the fate of the contract in which they are

included. That this also applies at the enforcement stage is evidenced by a decision of the OLG Hamburg, in a case concerning the enforcement of an award rendered in Switzerland. The dispute arose out of a contract for services as a consultant in relation to a construction project in Syria where one side after having been awarded the contract refused to make the agreed payment. When the award ordering payment was to be declared enforceable in Germany, respondent submitted that the consultancy contract was invalid under Syrian law and the money to be paid was not remuneration for services rendered but constituted bribes. Without entering into the merits of these allegations the court held that they would not affect the validity of the arbitration clause, given that German law adhered to the doctrine of severability and no allegation was made that the arbitration agreement as such was also invalid.⁶²

Whether the parties actually agreed on a certain type of arbitration may be in issue where the award is based on a badly drafted arbitration clause. In connection with these so-called "pathological" arbitration agreements, German courts have been very reluctant to hold them invalid for uncertainty. The Kammergericht Berlin, for example, has rejected the annulment of an award interpreting a dispute resolution clause providing for arbitration in Berlin at the "German Central Chamber of Commerce" as a submission to arbitration under the Rules of German Institution of Arbitration in Bonn.⁶³ Unless the applicable law clearly opposes such an interpretation it is submitted that the courts will take the same approach in relation to arbitration agreements governed by a foreign law.

Problems may, however, be raised by arbitration agreements in the constitutions and rules of associations of companies or other organisations. A recent Supreme Court decision⁶⁴ has cast doubts on the view⁶⁵ that such clauses would bind all members irrespective of whether they consented or objected to their inclusion or have never been aware of their existence. In the case concerning the German Shepherd Dog Association one member objected against the later inclusion of an arbitration clause into the statutes and considered itself not bound by the clause. The Supreme Court emphasised that a party may only voluntarily subject itself to the jurisdiction of an arbitral tribunal. Therefore, it con-

62. OLG Hamburg, March 12, 1998 (6 U 110/97); see also OLG Köln, June 22, 1999 (9 Sch 8/98), where it was held in relation to a sale transaction that even if the main contract should have been void lacking the required number of signatures under Ukrainian law that would not have affected the arbitration agreement which met the requirements of Art. II of the NYC.

63. Kammergericht Berlin, RPS 1/2000, Supplement 8 BetriebsBerater 37/2000, p. 13; [2000] Int.A.L.R. N-71.

64. BGHZ 144, 146, (=NJW 2000, 1713= DB 2000, 1166); English summary [2002] Int.A.L.R. N-10.

65. See for example the decision of the OLG Hamm, RPS 2/1999, Supplement 11 BetriebsBerater 38/1999, p. 10 distinguishing between arbitration agreement contained in contracts and those contained in articles of association for which the express consent of all members was not required as long as the will was exercised according to the rules; this view was based on an earlier decision of the Supreme Court, BGHZ 88, 314, 316 (= NJW 1984, 1355).

58. BayObLG, BayObLGZ 98, 219.

59. OLG Schleswig RIW 2000, 706.

60. OLG Rostock, November 22, 2000 (1 Sch 3/2000).

61. For a more extensive criticism of the decision see Kröll, IPRax 2002, 384 *et seq.*

cluded, that an arbitration clause was only valid for those members that voluntarily opted for its insertion into the constitution.

In light of the reasoning adopted the decision may even be of relevance in cases where the arbitration agreement is not governed by German law. Since the Supreme Court argued on the basis of a violation of the constitutional right to have one's rights determined by the courts it may have public policy implications. It is to be hoped that the decision will be interpreted narrowly and will not affect the enforcement of foreign awards. It should be limited to cases where the membership in the organisation is a *sine qua non* for the professional activity as in the relevant case where the continuance of the party's professional activity as a breeder of German Shepherd dogs was dependent on the membership in the association. In all other cases the appropriate measure for members who do not agree with the submission to arbitration is to leave the organisation.

Irrespective of any problems concerning the formal or substantive validity of the arbitration agreement, which might have originally existed, it is clear that a party, which participated in the arbitration proceedings without challenging first the jurisdiction of the tribunal cannot successfully invoke the defence.⁶⁶ By its participation it is considered to have submitted to the jurisdiction of the tribunal. Consequently only parties which have either not participated in the arbitration proceedings at all or have challenged the jurisdiction of the tribunal⁶⁷ may rely on the defence. Even for these parties the question arises whether they might be precluded from invoking the defence if they have not made use of the means of recourse existing at the place of arbitration.

2. Infringement of the scope of the arbitration agreement—Article V(1)(c) of the NYC

Closely related to the defence of a missing arbitration agreement is that of an infringement of the scope of the arbitration. For the violation of the constitutional right to go to court it makes little difference whether there is no arbitration agreement at all or whether it does not cover disputes decided by the tribunal.

In practice actual violations of the arbitration agreement are rarely invoked. More important are allegations that tribunal acts *ultra petita*, ordering more than the claimant actually requested, which according to German inter-

pretation fall within the ambit of Article V(1)(c).⁶⁸ In this respect, however, it is not only the wording of the claim that is relevant. The OLG Stuttgart, for example, had to deal with an award for the amount of 129.621 DM though the claim submitted only related to 119.621 DM.⁶⁹ The court rejected the defence of *ultra petita* since it became obvious from the materials submitted with the request for arbitration that the claimant actually applied for the amount granted while its specified claim was based on a miscalculation.

For the same reason, an award ordering payment of interest for the time after it has been rendered until payment does not necessarily infringe the scope of the arbitration agreement even if interest for this time is not explicitly requested but only a starting point is mentioned. In those cases an interpretation of the request in light of the parties' interest usually reveals that interest is requested also for the post award period so that the tribunal has not acted *ultra petita*.⁷⁰

3. Improper notification and violation of the right to defend—Article V(1)(b) of the NYC

The defences of lack of a proper notification and other infringements of the opportunity to properly defend ones case are special emanations of the right to be heard, belonging to the procedural public policy. For this reason there is a large overlap with the public policy defence under Article V(2) potentially resulting in a wide reaching obligation of the courts to ensure the observance of the principles underlying Article V(1)(b) *ex officio*.⁷¹ However, according to the German understanding not every infringement of the right to be heard necessarily violates the very narrow *ordre public* international so that the defences have an importance of their own.⁷²

The lack of notification was successfully invoked in proceedings before the Bavarian Highest Regional Court to have a Russian award declared enforceable.⁷³ The German party neither received the request for arbitration nor any further order from the tribunal. Service was assumed on the basis of a service fiction contained in Article 3 of the Russian Law concerning International Commercial Arbitration, according to which a document

66. OLG Schleswig RIW 2000, 706; see for the same practice in Austria: Burgstaller, fn. 44, ZfRV 2000, 83, 88, 67. See for one of the rare cases of a third alternative OLG Hamburg, November 8, 2001 (6 Sch 4/01) where respondent appointed its own arbitrator who in conjunction with the other party appointed arbitrator appointed the chairman and where the tribunal rendered an award before the defendant could file its statement of defense. The Court found the defendant to be excused for not invoking the defense of a missing arbitration clause before the arbitral tribunal.

68. Schwab and Walter, fn. 8, Cap. 57, para. 4.

69. OLG Stuttgart, December 6, 2001 (1 Sch 12/01).

70. OLG Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/2000, p. 13.

71. Consequently courts have often dealt with the defences under the heading of public policy, in particular where investment protection or friendship treaties stipulate that public policy is the only ground to resist enforcement; see for example BayObLG, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 15 (= NJW-RR 2001, 431) (Enforcement under Art. 8 of the German-Russian Treaty of 1958).

72. Borges, "Die Anerkennung und Vollstreckung von Schiedssprüchen nach dem neuen Schiedsverfahrensrecht", (1998) 111 ZZP 487 at 491.

73. BayObLG, NJW-RR 2001, 431.

is considered to be served if sent to the last known address of a party. Based on the right to be heard, the Court held that service on the basis of this fiction would violate public policy even if the requirements of Article 3 would have been met, which the court denied since the present address of the party was known. The court furthermore held that in such a situation a party could also not be required to challenge the award at the place of arbitration, but could invoke the violation of the right to be heard directly in the enforcement proceedings.

The right to be heard only requires that a party is granted the opportunity to defend itself and does not become the object of decisions of the arbitral tribunal without having had such opportunity. Each party must be given the chance to comment on the relevant facts and means of evidence on which the court wants to rely in its decision.⁷⁴ Whether a party makes use of that opportunity or not is its own decision but does not affect the right to be heard. In a case decided by the OLG Hamburg the respondent invoked Article V(1)(b) relying on a long absence of its managing director, which allegedly made it impossible for respondent to defend itself. The court held that it is for each party to ensure that in the absence of the relevant person its interests are represented, in particular when it is aware of the forthcoming arbitration proceedings. Therefore and in the light of the several extensions in time granted by the arbitral tribunal no violation of the right to be heard existed.⁷⁵

The right to be heard does in general not only require the tribunal to hear the parties, but also consider the parties' submission in its decision making. The tribunal is nonetheless free to come to different conclusions than the parties themselves. A mere consideration of the submissions and requests made by the parties was held to be sufficient, but should preferably be visible from the reasoning given by the tribunal.⁷⁶ By contrast the tribunal is generally not required to deal with submissions that are irrelevant on the basis of its reasoning. If for example the tribunal finds that the terms of a contract are fixed by a letter of confirmation that was not objected to, the tribunal does not violate the right to be heard if it does not deal with submissions as to the preceding negotiations.⁷⁷ The Supreme Court demands a minimum standard concerning the grounds the award is based upon, which must be fulfilled by a foreign arbitral award to be declared enforceable in Germany. The award must at least enclose statements on all relevant requests and defences.⁷⁸ It is, however, not required that the award deals explicitly with every submission made by a party. There is a presumption that the tribunal also dealt with

submissions not expressly treated in the award unless there are indications to the contrary.⁷⁹

A party which wants to invoke a violation of the right to be heard must set out in its submission what it would have said and how it might have affected the decision if it had been heard.⁸⁰ For example, in a case decided by the OLG Bremen the arbitrators in a second award considered all defences to be precluded that were not brought in the proceedings leading to a first award, which was later annulled. The respondent considered that to be a violation of its right to be heard. The court agreed that in general the refusal to deal with the submission of respondent might constitute a violation of the right to be heard. In the present case, the respondent had, however, not substantiated how the evidence presented might have potentially affected the outcome of the proceedings had it been admitted by the tribunal. Neither did the award show that the tribunal would have taken the evidence into consideration if they had not considered the submissions to be precluded.⁸¹

That a party enters insolvency proceedings and therefore is put under state control does not, according to the German view, affect its ability to properly defend itself. This task is taken over by the receiver.⁸²

4. *Improper composition of the arbitral tribunal—Article V(1)(d) Alt. 1 of the NYC*

An arbitral tribunal will be improperly composed in the sense of Article V(1)(d) of the NYC if the appointment process deviates from the agreement of the parties or the applicable rules and laws. That is, for example, the case where an arbitrator is appointed by the wrong appointing authority, a sole arbitrator decides instead of a three-member tribunal, or a suitable nominee has been incorrectly rejected and a different person is appointed instead.⁸³

The defences were unsuccessfully raised in proceedings in front of the OLG Dresden to have a Russian award declared enforceable.⁸⁴ According to the applicable arbitration rules each party had 30 days time to appoint its arbitrator after which time the arbitrator was to be appointed by the president of the Russian Chamber of Commerce. When the German respondent failed to appoint its arbitrator in due time it received an additional request by the arbitration institution to

74. OLG Hamburg, OLGR Hamburg 2000, 19.

75. OLG Hamburg, RPS 1/1999, Supplement 4 Betriebsberater 11/2000, p. 13.

76. BayObLG, BB, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 16 (= EWiR 2000, 199, note Berger).

77. OLG Hamburg, OLGR Hamburg 2000, 19 ff.

78. BGHZ 110, 104, also published as: BGH NJW 1990, 2199, though the decision concerned the old law it is also valid under the new law; see OLG Bremen, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 18; for an English summary see [2001] Int.A.L.R. N-26.

79. OLG Stuttgart, December 6, 2001 (1 Sch 12/01); BayObLG, December 15, 1999, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 16 (= EWiR 2000, 199); see also BGH, NJW 1992, 2299.

80. OLG Schleswig, June 24, 1999 (16 SchH 1/99).

81. OLG Bremen, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 18; for an English summary see [2001] Int.A.L.R. N-26.

82. OLG Hamm, IPRax 1985, 218; further examples where a party was considered not to have been able to defend itself properly see Bredow, fn. 57, C I 3b, p. 28.

83. BayObLG, February 24, 1999 (4Z Sch 17/98).

84. OLG Dresden, October 20, 1998 (11 Sch 4/98).

appoint its arbitrator. In reply to that he empowered the president of the Russian Chamber of Commerce to appoint an arbitrator on its behalf, requesting that the arbitrator should speak German. While the first appointee fulfilled that requirement, the arbitrator finally appointed in his replacement did not speak any German. The court held that the lack of the requested language did not lead to an incorrectly composed tribunal. According to the applicable arbitration rules, respondent's failure to appoint its arbitrator within the 30-day period led to the transfer of the appointment right to the chairman of the Russian Chamber of Commerce. Consequently from that time onward respondent lost any right to state binding requirements as to the arbitrator appointed on its behalf, but could only express non-binding wishes. Additionally, the court considered the respondent to be precluded from relying on the composition of the tribunal since according to the arbitration rules any objection had to be raised within 15 days and not six months later as was done by the respondent.

A tribunal may also be improperly composed if the applicable challenge procedures have been deviated from. It cannot be excluded that if the challenges were conducted properly they might have led to a different result affecting the composition of the tribunal. The Bavarian Highest Regional Court, for example, in a domestic case annulled an award for the improper composition of the arbitral tribunal where the challenge proceedings initiated by the parties were dealt with by the arbitral tribunal and not—as required by the old German law applicable to the challenge procedure—by the courts.⁸⁵

By contrast, the mere participation of an arbitrator that lacks the necessary independence or impartiality as such does not lead to an improperly composed arbitral tribunal. This can be deduced from a recent decision of the German Supreme Court, which though still rendered on the basis of the old law is also valid under the new law. In the case a party found out after the award had been rendered that the law firm of the arbitrator it appointed worked regularly for the mother company of the other party. This had not been disclosed by the arbitrator. The OLG Frankfurt held that this violation of an arbitrator's obligation to disclose its relationship to the parties led to an inadmissible procedure. The German Supreme Court,⁸⁶ however, overruled the decision holding that in general under German law an arbitrator can only be challenged in special challenge proceedings until the award has been rendered. Once an award has been rendered considerations of legal certainty prevail over the right to challenge and exclude the initiation of challenge proceedings even if the grounds for challenge only became obvious after the award was rendered. The Supreme Court ruled that these considerations of legal certainty and *res judicata* must in general also prevail in proceedings for annulment of an award or to have it declared enforceable. Otherwise the time limits for

challenge proceedings could be circumvented. Given the importance of the right to have one's dispute decided by an independent and impartial tribunal the Supreme Court, however, held that in cases of grave and obvious bias the violation of the disclosure obligation might be a ground to refuse a declaration of enforceability. In those cases that right prevailed over considerations of legal certainty. Though the issue was treated by the OLG Frankfurt and the Supreme Court as relating to the defence of an incorrect procedure it is also relevant for the question whether the participation of an arbitrator lacking the necessary independence lead to an incorrectly composed tribunal.⁸⁷

5. Inadmissible procedures—Article V(1)(d) Alt. 2 of the NYC

A procedure will be inadmissible in the sense of Article V(1)(d) if it is contrary to the specific rules agreed upon by the parties or the chosen arbitration rules or if it violates provisions of the applicable law. The infringement may relate to any part of the procedure since the term "proceedings" as used in Article V(1)(d) covers the arbitral proceedings comprehensively, ranging from the constitution of the tribunal to rendering the award; only the decision-making itself is excluded.⁸⁸ Therefore, courts have dealt with an alleged violation of procedure in a wide range of circumstances often also covered by different defences.

A clear violation of the agreed procedure exists where the tribunal bases its decision on a different law than that agreed upon by the parties. These cases have to be separated, however, from those in which the arbitral tribunal applied the proper law but in a faulty way. The OLG Hamburg emphasised that only the application of an improper law justifies setting aside an award, whereas the way the (proper) rules of law were interpreted and used was outside the legal area to be verified by state courts.⁸⁹ Consequently also the awarding of compound interest does not constitute a violation of agreed upon procedure, where the applicable law or rules explicitly provide for compound interest, such as for example Article 49 of the Arbitration Act 1996.⁹⁰

Also questions as to the non-existence of the arbitration agreement have occasionally been treated under the defence of an inadmissible procedure. In a decision rendered by the OLG Stuttgart, for example, the

85. BayObLG, February 24, 1999 (4Z Sch 17/98).

86. BGH, March 4, 1999 (III ZR 72/98), published in: BGHZ 141, 90; commentary by Kröll, EWiR 1999, 1087.

87. See also Schwab and Walter, fn. 8, Chap. 24, para. 18; for a more detailed discussion of challenges under German law see Kröll, "Naumburg Higher Regional Court offers good example of how German Arbitration Law balances party's needs and protects arbitral process", (2002) 17(6) *Mealey's IAR* 27.

88. Borges, fn. 72, (1998) 111 ZZZP 487 at 493.

89. See also BayObLG, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 16 (= EWiR 2000, 199, note Berger), where it was held that potential mistakes in the application of the applicable Italian patent law do not constitute a ground to refuse enforcement.

90. OLG Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/2000, p. 13, at 16.

respondent tried to resist amendment of an award. The court held that the amendment of an award by rendering a second one was a new award that needed to be based on an arbitration agreement. The arbitral proceedings, however, which were covered by the arbitration clause, were ended by the first award according to section 1056 of the ZPO, so that the new award was rendered without the necessary authorisation by the parties. Thus, the proceedings in regard to the second award were found to be inadmissible.

An extreme example of violation of the correct procedure is provided by a domestic case concerning an award rendered in a quality arbitration.⁹¹ The arbitrator rendered the award before claimant had even submitted a proper request of arbitration and then later applied on behalf of claimant to have the award declared enforceable.

Most frequently the alleged violation of procedural rules relates to evidentiary matters. However, since the tribunal has usually wide discretion as to the procedure adopted, the defences are seldom successful. The mere fact that the applicable arbitration law provides for means to have witnesses heard by the court when they refuse to appear before the tribunal does not render a refusal by the tribunal to do so automatically an incorrect procedure. If the arbitrator considers the hearing of these witnesses to be unnecessary for the award he is under no obligation to do so.⁹² Furthermore, the tribunal is not required to deal and reject explicitly any request relating to evidence so that the lack of such an explicit decision cannot be considered as a violation of the procedural rights.⁹³

The rendering of an award without an oral hearing might constitute a violation of the procedural rules if they provide for a mandatory hearing at a party's request.⁹⁴ Where the rules are however silent on the issue or give the tribunal discretion to refuse to hold a hearing, no defence exists under Article V(1)(d).⁹⁵

As with several of the other defences in relation to Article V(1)(d), the question of preclusion or later consent may become an issue. That is well evidenced by a decision rendered by the Higher Regional Court of Naumburg concerning the application to have a domestic award declared enforceable. The respondent alleged a violation of the procedure since the arbitrator had informed the parties in writing that he would decide the case on the basis of documentary evidence only and would not hold the hearing required by respondent. The court considered that the respondent was not permitted to raise its defence of incorrect procedure since it should have objected to the announced procedure immediately. In

line with section 1027 of the ZPO the lack of objection was considered to lead to a preclusion to rely on the deviation from the procedure provided for by the law.⁹⁶

Different views exist as to whether *any* violation of procedural rules, or only significant violations or violations of important rules, may lead to a refusal of enforcement.⁹⁷ The applicant needs to substantiate, however, that the infringement of procedural rules had some effect on the award. The mere assertion that it did so was found to be insufficient.⁹⁸

6. Award not binding or set aside—Article V(1)(e) of the NYC

In German arbitration law only final awards binding in their country of origin can be declared enforceable. Binding in the sense of Article V(1)(e) are all awards against which no appeal is possible irrespective of whether they have been declared enforceable or can be challenged on procedural grounds.⁹⁹ By contrast awards which have been set aside in their country of origin cannot be enforced irrespective of the reasons for the setting aside. German courts interpret the "may" in Article V of the NYC in a way that it becomes an obligation and does not leave the arbitrator any discretion even when the annulment decision is under appeal and thus not binding yet. In a case decided by the Higher Regional Court of Rostock¹ concerning the enforcement of a Russian award, the award had been set aside in Russia, but with appeal proceedings against the annulment pending. The court held that the mere appeal against the annulment decision did not render the award binding and enforceable. It further rejected any stay of the proceedings according to Article VI of the NYC and declared the award to be unenforceable in Germany.

On the other hand, a non-appealable declaration of enforceability can be set aside afterwards according to section 1061(3) of the ZPO, in case the award was later set aside in a foreign country. The question is whether this rule applies to all countries or just the country of origin of the award and whether the judicial order to set aside first needs to be recognised in Germany. In the context of Article V(1)(e) of the NYC only an order to set aside rendered in the country of origin is to be considered and only if it is recognised in Germany.

96. OLG Naumburg, February 21, 2002 (10 Sch 8/01).

97. Borges, fn. 72, (1998) 111 ZJP 487 at 493; Münch in Münchener Kommentar zur Zivilprozessordnung, (2.ed, Vol. 3, Munich 2001), s.1059, para. 16; in favour of a limitation only to serious violations of procedure, Schwab and Walter, fn. 8, Chap. 24, para. 21; Münchkomm and Gottwald, fn. 50, UNÜ Article V para. 35.

98. Münchkomm and Gottwald, fn. 50, UNÜ Article V para. 17, 35; for a domestic case where that requirement follows already from the wording of s.1059(2)(1d) see OLG Hamm, October 18, 1999 (17 Sch H 5/99).

99. Bredow, fn. 57, C I 3b, p. 31.

1. OLG Rostock, RPS 1/2000, Supplement 8 BetriebsBerater 37/2000, p. 20.

91. BayObLG, September 29, 1999 (4 Z Sch 2/99).

92. OLG Schleswig, June 24, 1999 (16 SchH 1/99).

93. BayObLG, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 16.

94. OLG Naumburg, February 21, 2002 (10 Sch 8/01); BGH, NJW 1994, 2155.

95. OLG Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/2000, p. 13; OLG Bremen, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 18, for an English summary see [2001] Int.A.L.R. N-26.

7. Missing objective arbitrability—Article V(2)(a) of the NYC

Enforcement of an award is to be denied if the matter in controversy lacks (objective) arbitrability in Germany. The standard for the evaluation of the objective arbitrability is the German (substantive) law.

Under new German law, generally all pecuniary claims are arbitrable, unless the arbitrability is limited or excluded by special provisions (section 1030(1) first sentence of the ZPO). Non-pecuniary claims are arbitrable whenever dispute resolution by settlement is admissible. This construction reveals the legislator's intention to allow arbitrability in general and to reserve the right to decide for the state courts only in exceptional cases, which are to be based on a special provision in every single case. This intention needs to be kept in mind in the interpretation of this provision. Consequently disputes involving allegations of bribery are generally arbitrable.²

8. Ordre Public—Article V(2)(b) of the NYC

The public policy exception defines the boundary between party autonomy in the settlement of disputes on the one hand and the state judiciary on the other. In proceedings to have a foreign award declared enforceable in Germany it has been rarely invoked successfully since it has been interpreted very narrowly.

In line with an international practice foreign awards are submitted to the narrower *ordre public* international.³ According to the constant jurisprudence of the Supreme Court an award does not automatically violate the international public policy if the application of mandatory German law would have led to a different result, but only if its enforcement would violate the basic principles of German public and economical life in such a way that its enforcement seems simply unbearable. The Higher Regional Court of Bremen, for example, declared a Turkish award enforceable in Germany, although the reasons given for the award did not meet the standards of the German national *ordre public*.⁴ It took into consideration that the legal traditions of countries differ regarding the legal reasoning applied, and that, in light of this, foreign awards should be subject to much lower requirements.

2. OLG Hamburg, March 12, 1998 (6 U 110/97).

3. BGH NJW 1986, 3027, at 3028; BGHZ 123, 268, at 270, (=NJW 1993, 3269; =EuZW 1994, 29); OLG Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/1999, p. 16; OLG Brandenburg, RPS 1/2001, Supplement 6 BetriebsBerater 31/2001, p. 21; *id.* 11 Mai 2000 (8 Sch 2/00); against such a distinction Schwab and Walter, fn. 8, Chap. 30, para. 21, according to whom the definition of the domestic *ordre public* is already much wider than in other countries so that there is no need to distinguish between the *ordre public* national and the *ordre public* international.

4. OLG Bremen, RPS 2/2000, Supplement 12 BetriebsBerater 50/2000, p. 18; English summary [2001] Int.A.L.R. N-26.

In practice it is often distinguished between the substantive *ordre public* and the procedural *ordre public* without, however, any legal significance attached to it.

a) Substantive ordre public The substantive *ordre public* is the only, albeit very limited, gate to a review of the award's content. The Supreme Court has made clear that this must not lead to a comprehensive verification of the application of the law, but to a verification that the result is compatible with the fundamental principles of the German legal system.⁵ It must, however, not result in a *révision au fond*, which is not permitted. In particular, a mere violation of the applicable substantive or procedural rules is not sufficient.⁶

The Supreme Court has consistently held that in determining whether the enforcement of the award would violate substantive public policy the court is neither bound by the tribunal's legal reasoning nor its fact-finding.⁷ Recently, however, the OLG Hamburg expressed a certain favour for a more limited review of the fact-finding to avoid the threat of a *révision au fond*.⁸ The case, already mentioned above in the context of separability, concerned the application to have an ICC award rendered in Switzerland declared enforceable in Germany. The defendant asserted that the claimant, an outside business counsel for the defendant, used the claimed payments arising out of a counselling contract for a project in North Africa for bribery. The arbitral tribunal rejected this allegation since in its view the respondent did not submit sufficient evidence to prove it. In the enforcement proceedings respondent asked the court to reopen the fact finding of the tribunal. The court expressed its favour for the view that an enforcement court could only examine the facts established by the arbitrator when it could be shown that the arbitral tribunal violated the rules as to taking evidence. In the end the court left the question, however, undecided since even on the basis of the wider position of the Supreme Court no violation of public policy could be established.

In relation to interest, courts have held that neither the ordering of interest considerably above the German rate nor awarding compound interest violates public policy.⁹ The same applies in relation to periods of limitations where German courts will only step in where the application or the mere existence of the statutes lead to an exclusion of any period of limitation in practice¹⁰ or to period of limitation that is too short. Otherwise they will not rule on the correctness of the application of foreign statutes of limitation. Especially in procedural matters the recognition and enforcement of a foreign arbitral award that complies with foreign law could only be denied in exceptional cases, where the basic principles of public and economical life would be infringed to a high degree.

5. BGHZ 142, 204, at 206; (= NJW 2000, 2974).

6. OLG Köln, February 15, 2000 (9 Sch 13/99).

7. BGH, NJW 1972, 2180 (= WM 1972, 1244).

8. In favour of such an approach see also Geimer in Zöller, fn. 5, s.1059 paras 49 *et seq.*

9. OLG Hamburg, RPS 1/1999, Supplement 4 BetriebsBerater 11/1999, p. 16.

10. OLG Bremen, January 13, 1999 (11 Sch 6/98).

Examples of the infringement of the substantive *ordre public*, are awards granting punitive damages¹¹ and awards infringing compulsory commercial laws, like competition law,¹² currency regulations,¹³ import restrictions¹⁴ and price fixing.¹⁵

b) Procedural public policy The procedural public policy is violated if the award has been rendered in proceedings which deviate from the basic principles of German procedural law in a way that the procedure cannot be considered as being in accordance with the basic principles of fair trial.¹⁶

The procedural *ordre public* is manifested especially in the right to be heard before the judge or the arbitral tribunal respectively. Consequently parties have often tried to claim an alleged violation of the right to be heard in the context of public policy, albeit with limited success.¹⁷ Though Article V of the NYC provides that violations of public policy have to be observed *ex officio*, German courts have, particularly in connection with an alleged violation of the right to be heard, required that the party specifies the alleged violation and its effect on the award. For that the party was requested to state how it would have defended itself had it been granted sufficient opportunity to do so.¹⁸

In connection with the composition of the arbitral tribunal, it has been confirmed that the practice of having a party-appointed arbitrator decide as sole arbitrator if the other side fails to appoint its arbitrator is not a violation of public policy in international cases.¹⁹ The relevant decision also dealt with the wider question as to the effect of the participation of a biased arbitrator, which will in general not constitute a violation of public policy. The Supreme Court has held that a violation of public policy is generally excluded when the lack of impartiality can be raised in proceedings in the place of origin, which fulfil the same standards as challenge proceedings in Germany.²⁰ Only where that is not possible or a challenge has been unsuccessful the public policy defence may be invoked. A violation of public

policy will in those cases only exist where the arbitrator was clearly biased and that bias influenced the award. The dispute arose out of the non-performance of a contract for carriage of goods by sea. When no amiable solution could be found the owners appointed the person who had led the negotiations on their behalf as their arbitrator. Since respondent did not nominate its arbitrator claimant's appointee became the sole arbitrator in accordance with the applicable LMAA Rules and rendered an award in favour of claimant. In the ensuing proceedings to have the award declared enforceable in Germany the respondent raised *inter alia* the defences that enforcement of the award would be contrary to public policy. The lower instances²¹ accepted that argument. They considered the right to an impartial arbitrator so important that any violation constituted a violation of public policy irrespective of the existence of challenge proceedings. They were, however, overruled by the Supreme Court which held that such a view did not balance correctly the opposing public policy aspects involved. In those cases where the foreign law provides for sufficient remedies against the award, the right to an impartial tribunal is outweighed by the requirements of legal certainty, which also form part of public policy. The court based the balancing undertaken on the fact that also in German law the challenge procedure is subject to time limits and cannot be initiated after an award has been rendered. The same must apply for foreign awards which are submitted only to the less stringent *ordre public international*. Furthermore, in an earlier decision the Supreme Court determined that the participation of an allegedly biased arbitrator would only violate public policy if the alleged lack of independence had actually affected the award.²²

To what extent the enforcement of an award allegedly obtained by fraud violates the *ordre public* became an issue in proceedings before the Supreme Court to have a domestic award declared enforceable.²³ In the case an award on agreed terms concerning the price to be paid for shares was entered into on the basis of incorrect but certified company accounts. The court held that a violation of public policy can be assumed in all cases that would give rise to an action for restitution under section 580 of the ZPO. In this context the court, however, also considered section 581 of the ZPO to be applicable according to which allegations of fraud only justify an action under section 580 of the ZPO if they have been proven in a criminal court. As in the case at hand, no binding decision had yet been rendered and the Supreme Court denied a violation of public policy despite the fact that the accounts were clearly incorrect and criminal investigations had been started. In the end, however, the court denied the declaration of enforceability on the basis of section 826 of the Civil Code, which it considered to be an additional non-regulated ground to deny enforcement. It is submitted that in an international case where no additional ground for refusal exists the court would

11. Schwab and Walter, fn. 8, Chap. 30, para. 22; Stein, "Punitive Damages—eine Herausforderung für die Internationale Wirtschaftsschiedsgerichtsbarkeit, EuZW 1994, 18, at 21.

12. BGHZ 46, 365; see also the decision of the ECJ June 1, 1999, Case 126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] E.C.R. I-3055.

13. RGZ 108, 139.

14. BGH, KTS 1964, 174.

15. BGHZ 27, 249.

16. OLG Brandenburg, RPS 1/2001, Supplement 6 BetriebsBerater 31/2001, p. 21.

17. See for example BayObLG, NJW-RR 2001, 431 where enforcement was resisted since the defendant was not properly informed about the proceedings in Russia; for a more comprehensive discussion see above.

18. OLG Hamburg, RIW 1991, 152, 154; see also Geimer in Zöller, fn. 5, s.1061 Rn. 34.

19. BGH, RIW 2001, 458; confirming BGHZ 98, 70, 75; in an earlier decision relating to domestic arbitration the Supreme Court had considered such a practice to be contrary to public policy; see BGHZ 54, 392.

20. For a more extensive summary and discussion of the case see Kröll, 17(8) Mealey's IAR, forthcoming.

21. OLG Stuttgart, October 18, 1999 (5 U 89/98); LG Ravensburg, April 2, 1998 (4 O 2046/97).

22. BGHZ 98, 70, 75.

23. BGH WM 2001, 104; with note Kröll WUB 2001, 351; English summary [2002] Int.A.L.R. N-12.

probably have stayed the proceedings for a declaration of enforcement until criminal proceedings were terminated. In this respect, however, the mere allegation of fraud not supported by appropriate evidence is not sufficient.²⁴

The continuance of arbitration proceedings though the party has become insolvent does not violate the procedural public policy.²⁵

VII. Additional Defences

In general the wording of Article V of the NYC seems to exclude the possibility to raise additional defences not mentioned in Article V to resist enforcement of an award. According to its wording enforcement may only be rejected if one of the mentioned grounds exists. Therefore, any reliance on section 826 of the Civil Code invoked by the Supreme Court in proceedings to have a domestic award declared enforceable should be excluded.

Very controversial is, however, the question to what extent substantive defences against the judgment claim can be raised in the enforcement proceedings. According to section 767 of the ZPO, those defences may be raised in the execution proceedings against an application to have a title declared executable if they are based on facts which only arose after the judgment had been rendered.²⁶

In the light of that, the old German arbitration law permitted parties to declare a set off already in proceedings to have an award declared enforceable if the requirements of section 767(2) were met.²⁷ For reasons of procedural economy it was considered inappropriate to require a party to initiate new proceedings to bring forward its defences which would then destroy the enforceability of the award granted before.

According to the Bavarian Highest Regional Court the new German Arbitration law excludes the possibility to declare a set off since it is no longer compatible with the objectives and the structure of the revised enforcement procedure.²⁸ It held that the prime objective for the

changes made to the proceedings for a declaration of enforceability—to facilitate and streamline them in the interest of a faster conclusion of the arbitration proceedings and a decrease of the courts work load—would be counteracted if one were to allow a party to declare a set-off with contested claims. To prove the claims might involve extensive taking of evidence and delay the declaration of enforceability considerably. Furthermore, the court justified its rejection of the earlier jurisprudence with the difference that now exists between proceedings under section 767 of the ZPO and the *exequatur* proceedings in relation to the competent court, the procedure to be followed and the form of the decision.

By contrast the Higher Regional Court in Hamm,²⁹ supported by the prevailing view in literature,³⁰ held that the possibility to declare a set off in the enforcement proceedings also existed under the new law. It correctly considered the differences in procedure to be actually minor.

Contrary to the finding of the Bavarian Highest Regional Court the same court has jurisdiction for an action to have an award declared enforceable and actions on the basis of section 767 of the ZPO. The other differences are also not so great that they override the considerations of procedural efficiency to deal with the question in a single set of proceedings.

Beyond any disputes it is clear that the requirements of section 767(2) of the ZPO apply so that no defence may be raised which could already have been raised in the arbitration proceedings. Consequently the OLG Köln excluded any reliance on an alleged right to withhold performance under Articles 81(2), 71 of the CISG, since the facts relied on existed already during the arbitration proceedings and could have been invoked before the arbitral tribunal.³¹ Furthermore, a set off may also not be declared in enforcement proceedings where German courts do not have jurisdiction over the underlying claim either because it is referred to arbitration as well or no basis for jurisdiction exists.

The same principles also apply to other defences against the substantive claim that could be raised in an action according to section 767 of the ZPO. Consequently the OLG Schleswig held that a party which has paid at least part of the amount due under the award after it has been rendered may invoke performance in the proceedings to have the award declared enforceable and does not have to bring a new claim.³²

24. OLG Dresden, October 20, 1998 (11 Sch 4/98).

25. Kammergericht Berlin, February 16, 2001 (28 Sch 23/99).

26. According to German law the execution of a judgment requires that it must be declared executable. Since the effect of a declaration of enforceability is only to give an award the same effect as a final judgment it then has to be declared executable.

27. BGHZ 34, 274, 277; BGHZ 38, 259, 262; BGH NJW 1990, 3210, 3211; deviating from the wording of s.767 (2) the defence could not only be raised if it came into existence after the award had been rendered but also when the tribunal could not deal with it since it was not covered by the arbitration clause.

28. BayObLG, BayObLGZ 2000, 124 (= JZ 2000, 1170 (with critical comment Wagner) = MDR 2000, 968 (with approving comment Weigel); BayObLG, BayObLGZ 2000, 131; see also OLG Stuttgart, OLG Report 2001, 50, at 51; in favour of this solution also Peters, "Materielle Einwendungen gegen den Schiedsspruch—Erwiderung," JZ 2001, 598.

29. OLG Hamm, June 20, 2001 (8 Sch 2/00).

30. Geimer in Zöllner, fn. 5, s.1060, para. 4, s.1061 para. 21; Schwab and Walter, fn. 8, Chap. 27, para. 12; Schütze, fn. 8, para. 252; Wagner, JZ 2000, 1171, at 1173; Münch, "Das Exequatur von Schiedssprüchen: materielle Einwendungen zur prozessualen Verteidigung?", in: Lüke, Mikami, Prütting ed., *Festschrift für Akira Ishikawa* (Berlin, 2001), p. 348.

31. OLG Köln, February 15, 2000 (9 Sch 13/99).

32. OLG Schleswig, February 11, 1999 (16 SchH 3/98).

VIII. Preclusion to rely on grounds

Most of the defences provided for in Article V would justify challenges of the award in its country of origin or can even be raised in arbitration proceedings to challenge the jurisdiction of the tribunal or objecting to a procedural order. Where the defences can still be invoked in challenge proceedings in the country of origin, they can without doubt also be raised in the German enforcement proceedings. However, often the relevant arbitration law provides that these objections must be raised within a certain period, after which the parties are either considered to have consented to a measure or are at least precluded from raising the defence. To what extent these defences can nevertheless be relied on in proceedings to have the award enforceable often determines the outcome of those proceedings.

Under the old law, the Supreme Court had decided in relation to the allegation that no valid arbitration clause existed that this defence generally had to be invoked in the country where the award was rendered if the law of the place of arbitration provided for a recourse.³³ In its decision, the Supreme Court relied heavily on the wording of Article 1044(2), para. 1, which did not provide that enforcement could be resisted if there is no valid arbitration agreement, but instead made the rejection of the declaration of enforceability dependent on the showing that the award is not legally valid under the law applicable to the arbitration proceedings. The court held that when the time for invoking the lack of a valid arbitration agreement in challenge proceedings at the place of arbitration has expired the award becomes legally valid and any reliance on the old section 1044(2) No. 1 of the ZPO to resist enforcement is generally excluded. The only exception permitted under public policy considerations was where the arbitration tribunal had ascertained its jurisdiction in a completely arbitrary way finding no basis whatsoever in the parties relationship.³⁴ While the Supreme Court appeared to limit the preclusion to the defence of the missing arbitration agreement some Higher Regional courts also considered other defences to be excluded when they had not been invoked at the place of arbitration.

Different views exist as to whether this jurisprudence continues to be valid under the new arbitration law. The OLG Schleswig held that with the replacement of the old section 1044 of the ZPO the jurisprudence on preclusion lost its basis also. In its view the wording of Article V(1)(a) of the NYC clearly provides that enforcement can be resisted if no valid arbitration agreement exists and does not allow for any preclusion.³⁵ Also other Higher

Regional Courts raised doubts as to the continuing validity of the Supreme Court's jurisprudence but could leave the question undecided since they either relied on the public policy exception existing under the jurisprudence³⁶ or considered it to be limited to the defence of a lack of a valid arbitration agreement.³⁷

However, important parts of the commentary literature are of the opposite view and favour maintaining the old principles of preclusion.³⁸

There is no direct decision of the Supreme Court on the issue yet. However, of considerable interest in this respect may be the above mentioned decision of the Supreme Court of February 1, 2001 dealing with the *ordre public* defences in relation to the participation of an arbitrator lacking the necessary independence. The Supreme Court held that as long as the law of the place of arbitration was comparable to German law as to the protection granted, the defence should have been raised in the country where the award was rendered. Even though it did not directly hold the party to be precluded from invoking the defence but only excluded the possibility of any violation of public policy, it provides a clear indication that the Supreme Court considers recourse at the place of arbitration, and not in the enforcement proceedings in Germany, to be the appropriate forum to raise defences.

The underlying rationale would in no way be limited to the defence of a missing arbitration agreement but also covers all other grounds upon which a challenge can be based. It would be odd if the mere existence of a right of recourse would exclude a violation of public policy but could still be raised as a procedural defence in an action to have an award declared enforceable. A certain note of caution must be made in this respect since the decision concerned the participation of a biased arbitrator where the courts have generally been very reluctant to allow any reliance on the fact after the award has been rendered, so that even without the existence of the right to recourse the participation might not have constituted an *ordre public* infringement.

Closely related to the question of preclusion is that of the extent to which the German enforcement court is bound by a decision rendered in annulment proceedings in the country where the award was rendered. This became an issue in proceedings to have a Turkish award declared enforceable in Germany. The respondent objected to the enforcement since the arbitration agreement allegedly did not cover all disputes involved. The OLG Bremen held that in this regard it was bound by the decision of

33. BGH, BGHZ 52, 184, 189 *et seq.*; confirmed in BGHZ 57, 153, 156; BGH NJW 1984, 2763; for a different view see Schwab and Walter, fn. 8, Chap. 30 para. 19; Bülow, "Der Schiedsvertrag in dem Verfahren der Vollstreckbarerklärung eines ausländischen Schiedsspruches", NJW 1971, 486; id., "Der Schiedsvertrag im Exequaturverfahren", NJW 1972, 415; in relation all other defences, in particular the violation of the right to be heard, an preclusion was rejected see BGH, NJW 1992, 2299.

34. BGHZ 52, 184, at 190.

35. OLG Schleswig, RIW 2000, 706, 708.

36. OLG Rostock, November 22, 2001 (1 Sch 3/2000) which held that the arbitral tribunal had arbitrarily without any basis in the parties agreement assumed jurisdiction, a finding which in light of a decision of the London High Court rejecting objections against a decision having the award declared enforceable as a judgment seems at least questionable; for a more detailed analysis of the decision see forthcoming Kröll, IPRax 2002.

37. BayObLG, NJW-RR 2001, 431.

38. Münchkomm and Münch, fn. 97, s.1061 para. 7; Geimer in Zöller, fn. 5, s.1061 para. 26; Münchkomm and Gottwald, fn. 50, UNÜ Article V, para. 52.

the Turkish courts which had held that the disputes were covered. Unless it could be shown that one of reasons mentioned in section 328(1) of the ZPO existed to refuse recognition of the judgment, it had to be recognised by the German court and therefore prevented any further examination of the question.³⁹ The mere allegation that the Turkish court interpreted the arbitration clause incorrectly was no such ground required by section 328(1) of the ZPO. In this context violations of procedural rights in the arbitration agreements can only be pleaded in the context of the public policy defence. All other grounds mentioned in section 328(1) of the ZPO relate to violations of procedure in the court proceedings. Therefore, it is submitted that in light of the narrow interpretation given to the public policy defence unsuccessful challenge proceedings in the country of origin will widely exclude any possible defence in the enforcement proceedings in Germany.

IX. Decision and means of recourse

The decision on an application to have an award declared enforceable is rendered in the form of a court order and not in the form of a judgment. It may either declare the award enforceable or state that the award is not to be recognised in Germany. In the latter case the decision is only declaratory and the court will not annul the award as such.

The decision must contain the relevant facts on which it is based. They may be contained in a separate statement of facts; but it is also sufficient if they can be deduced from the legal reasoning or even from references to the award.⁴⁰

According to section 1065(1) of the ZPO an appeal to the Supreme Court is possible under the limited preconditions set out in section 574(2) of the ZPO. It must therefore either be of considerable importance or necessary to ensure a uniform practice. The appeal may only be based on grounds which had already been invoked before the Higher Regional Court or on grounds which have to be observed *ex officio*. The facts established by the Higher Regional Court are generally binding for the Supreme Court. Only where the appeal specifically maintains that the Higher Regional Court breached procedural rules in ascertaining the facts, may they be examined by the Supreme Court. However, no new facts may be submitted by the parties.⁴¹ A certain exception in this respect are decisions in relation to the annulment of the award in its country of origin. If an award has been annulled or an annulment been lifted after the decision of the Higher Regional Court these facts may be invoked by the parties. In an appeal against the decision of the OLG Rostock which refused to declare a Russian award enforceable since it had been annulled in Russia the

German Supreme Court allowed the new fact that this annulment had been overturned and declared the award enforceable.⁴²

X. Annulment of the declaration of enforceability

The annulment of the award after it had been declared enforceable, in addition of being admitted as a new fact in appeal proceedings, also justifies a separate action for the annulment of the declaration of enforceability. It does not automatically affect the declaration of enforceability but only gives right to an action. The prevailing view in Germany is that irrespective of the reason underlying the annulment proceedings in the country of origin the fact that the award is annulled leads to an annulment of the declaration of enforceability. That is even so if the ground relied on has been rejected in the German proceedings leading to the declaration of enforceability.

Grounds which would have justified the rejection of an application to have an award declared enforceable but which were only discovered after it had been granted do not as such justify the annulment of the declaration.⁴³ A party may only try to initiate annulment proceedings against the award in its country of origin on the basis of these grounds and then use its annulment to have the declaration of enforceability annulled but there is no direct way.

XI. Alternative judicial proceedings

Concerning the enforcement of the foreign award as such there are no alternatives to the application to declare the award enforceable. A party is barred from initiating court proceedings concerning the substantive legal relationship due to the award's *res judicata* effect. Furthermore, actions for declaratory judgment are also inadmissible. There are no cases where the legal interest required for such a declaratory judgment would exist. Even awards, the content cannot be executed, may nonetheless be declared enforceable.

Where the award has already been granted an *exequatur* in its country of origin, it may, however, be possible to declare this judgment enforceable in Germany on the basis of sections 722 *et seq.*, and 328 of the ZPO. The Supreme Court has held that at least judgments incorporating the content of the award and giving it a *res judicata* effect can be enforced under section 722 of the ZPO.⁴⁴ This is acknowledged by the Supreme Court at

42. BGH, February 22, 2001 (II ZB 71/99).

43. Geimer in Zöller, fn. 5, s.1061 para. 59.

44. BGH, RIW 1984, 644, at 645; OLG Hamburg, RIW 1992, 939; according to the jurisprudence of the Reichsgericht, the predecessor of the BGH, the mere declaration of enforceability would not render the award a judgment and could therefore not be enforced, RGZ 5, 397; *id.* 30, 368; RG [Reichsgericht] JW 1938, 468; for "doctrine of mergers" see Borges, "Das Doppelresequatur von Schiedsverfahren" (Köln, 1997), pp. 275 ff.

39. OLG Bremen RPS, 2/2000, Supplement 12 Betriebs-Berater 50/2000, p. 18; English summary [2001] Int.A.L.R. N-26.

40. BGHZ 142, 204.

41. BGH, RIW 2001, 458; Kröll, 17 (8) Mealey's IAR 34 *et seq.*

least for the U.S.-American "judgment upon the award".⁴⁵ The Higher Regional Court of Hamburg⁴⁶ adopted the Supreme Court's opinion in a similar case where a judgment of the English High Court of Justice was concerned. In those cases a party has the possibility to opt for an enforcement of the foreign judgment granting *exequatur* as opposed to having the award itself declared enforceable in Germany.⁴⁷

The consequence of these proceedings is, that the examination of the award by the German State courts would be limited significantly. The foreign declaration of enforcement can only be reviewed in regard to possible infringements of the German *ordre public*. A practically more important consequence would be, that interest payments, which were not dealt with in the award could nonetheless be enforced in Germany if contained in the foreign declaration of enforceability.

On the other hand a party cannot apply for a set aside of a foreign award in Germany. In this respect the wording of section 1062(2) of the ZPO, which appears to establish jurisdiction for a German court in such an action, is too wide. That the German legislator did not want to deviate from the widely recognised principle that awards can only be annulled in their country of origin becomes obvious from the systematic of the Arbitration law. In

relation to foreign awards section 1025(4) of the ZPO explicitly only refers to sections 1061 to 1065 of the ZPO and not to section 1059 governing the action to set aside an award.

Summary

The procedure to have a foreign award declared enforceable in Germany has in general been considerably facilitated by the new law. The majority of awards are declared enforceable without an oral hearing and without legal representation by a lawyer being required in a summary decision resulting in an order. However, the possibilities to resist enforcement might have increased with the abolition of a second enforcement regime available under the old law. In this respect no final evaluation may yet be given, since for a number of important issues no clear practice of the courts has yet crystallised. It is, however, to be hoped that in the near future the Supreme Court will have to deal with this issue and follow the lines already indicated in a recent judgment that all defences have in general to be raised in proceedings at the place of arbitration when possible.

45. BGH, RIW 1984, 557.

46. OLG Hamburg, RIW 1992, 939, at 940.

47. In favour Schütze, fn. 8, para. 256; Borges, fn. 143, pp. 379 ff; for a different view see Geimer in Zöllner, fn. 5, s.1061, para. 8 who considers the *exequatur* judgment not to be a judgment falling under section 722; MünchKomm and Münch, fn. 97; s.1061, para. 13.