The German Arbitration Act 1998 and the New York Convention 1958

*by Professor Dr. Albert Jan van den Berg**

The new German Arbitration Act 1998 constitutes a great improvement in comparison with the former provisions relating to arbitration contained in the German Code of Civil Procedure.[1] The new Act is largely modelled after the UNCITRAL Model Law on International Commercial Arbitration of 1985. The German legislature greatly simplified matters by expanding the coverage of the UNCITRAL Model Law to domestic arbitration, thereby creating a single, unified legal regime for arbitration in Germany.

In the present contribution, I would like to examine the new German Act in relation to the enforcement of foreign arbitral awards under the New York Convention of 1958. To this effect, the new Act contains the following Section 1061:

> Ausländische Schiedssprüche
>
> „(1) Die Anerkennung und Vollstreckung ausländischer Schiedssprüche richtet sich nach dem Übereinkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (BGBl. 1961 II S. 121). Die Vorschriften in anderen Staatsverträgen über die Anerkennung und Vollstreckung von Schiedssprüchen bleiben unberührt.
>
> (2) Ist die Vollstreckbarerklärung abzulehnen, stellt das Gericht fest, daß der Schiedsspruch im Inland nicht anzuerkennen ist.
>
> (3) Wird der Schiedsspruch, nachdem er für vollstreckbar erklärt worden ist, im Ausland aufgehoben, so kann die Aufhebung der Vollstreckbarerklärung beantragt werden."

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1 The German Arbitration Act of 1 January 1998 is incorporated in Book 10 (Sections 1025-1066) of the German Code of Civil Procedure (*Zivilprozeßordnung-ZPO*). See generally, *K.-H. Böckstiegel*, National Report Germany, International Handbook on Commercial Arbitration (February 1998).

The translation of this provision[2] reads:

> „(1) 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 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.
>
> (2) If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany.
>
> (3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made."

These provisions are seemingly uncomplicated. However, as we will see, they give rise to a number of questions.

1. Arbitral award made in another State

Article I(1) of the New York Convention provides that it applies to the recognition and enforcement of arbitral awards made in another State. According to the reciprocity reservation contained in Article I(3), a State may limit the application of the Convention to arbitral awards made in another *Contracting* State. The German legislator has taken various actions to align its new legislation with the scope of the New York Convention.

To begin with the reciprocity reservation, Germany made that reservation when ratifying the New York Convention in 1961.[3] In 1998, Germany notified the Secretary-General of the United Nations that it withdrew the reciprocity reservation.[4] Consequently, Germany will enforce an arbitral award made in any other State under the New York Convention, irrespective of whether the State where the award was made is a Contracting State or not.

Thus, the expression „foreign arbitral awards" (*ausländische Schiedssprüche*) in Section 1061(1) refers to arbitral awards made in other States. As we will see shortly, this is probably the only category of foreign award that falls under Section 1061 of the new German Arbitration Act and that can be enforced in Germany.

2 Reproduced in *Böckstiegel*, n.1. *supra*.

3 The text of the reservation as expressed by the Federal Republic of Germany reads: „With respect to paragraph 1 of article I, and in accordance with paragraph 3 of article I of the Convention, the Federal Republic of Germany will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State."

4 Publication dated 3 December 1998 (BGBl. 1999 II no. 7).

in pertinent part that the court competent for entertaining a request for enforcement under the New York Convention is the Higher Regional Court (*Oberlandesgericht*) „where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court (*Kammergericht*) shall be competent."[8] This resolves one of the questions under Article III of the Convention as to whether specific requirements can or should be imposed with respect to the jurisdiction of the courts in the Contracting State with respect to the enforcement of a Convention award. Section 1063 contains general provisions. With respect to Convention awards, it is to be noted that sub-section (1) provides: „The court shall decide by means of an order, which may be issued without an oral hearing. The party opposing the application shall be given an opportunity to comment before a decision is taken."[9] Consequently, in theory, an oral hearing concerning a request for enforcement of a Convention award is not a fundamental requirement. Section 1064 gives particulars with respect to the enforcement of awards. It provides:

> „(1) Mit dem Antrag auf Vollstreckbarerklärung eines Schiedsspruchs ist der Schiedsspruch oder eine beglaubigte Abschrift des Schiedsspruchs vorzulegen. Die Beglaubigung kann auch von dem für das gerichtliche Verfahren bevollmächtigten Rechtsanwalt vorgenommen werden.
>
> (2) Der Beschluß, durch den ein Schiedsspruch für vollstreckbar erklärt wird, ist für vorläufig vollstreckbar zu erklären.
>
> (3) Auf ausländische Schiedssprüche sind die Absätze 1 and 2 anzuwenden, soweit Staatsverträge nicht ein anderes bestimmen."

The translation reads:

> „(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 authorized 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."

8 *„(...) in dessen Bezirk der Antragsgegner seinen Sitz oder gewöhnlichen Aufenthalt hat oder sich Vermögen des Antragsgegners oder der mit der Schiedsklage in Anspruch genommene oder von der Maßnahme betroffene Gegenstand befindet, hilfsweise das Kammergericht."*

9 *„Das Gericht entscheidet durch Beschluß, der ohne mündliche Verhandlung ergehen kann. Vor der Entscheidung ist der Gegner zu hören."*

In so far as the New York Convention is concerned, Article IV(1) is more demanding in the sense that it requires the submission of „*(a)* The duly authenticated original award or a duly certified copy thereof; [and] *(b)* The original agreement referred to in article II or a duly certified copy thereof." In addition, Article IV(2) requires a translation that is „certified by an official or sworn translator or by a diplomatic or consular agent." Considering sub-section (3) of Section 1064, one is under the impression that Article IV of the New York Convention prevails. The Explanatory Memorandum (*Begründung*) accompanying the bill of the new Act, however, states: „In this context, the condition of the more favourable right is to be observed."[10] It is not entirely clear whether this refers to the more favourable right provision of Article VII(1) of the New York Convention, about which more will be said later in this contribution.

Finally, Section 1065 concerns recourse to the Federal Supreme Court (*Bundesgerichtshof*). Sub-section 2 provides in pertinent part: „the Federal Supreme Court may only examine whether the order is based on a violation of a treaty or another statute (...)"[11]

2. Non-domestic awards

The second sentence of Article I(1) of the New York Convention gives a second criterion for awards falling under the Convention: „[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." It appears that the new German Arbitration Act 1998 has abandoned the application of the second criterion insofar as Germany is concerned.

Here, there is some irony since Germany was one of the countries which vigorously insisted, at the time that the Convention was drafted, that the second criterion should be included. The history is as follows. The ECOSOC draft of 1955 was based on the principle that an award is governed by the arbitration law of the country where the award is made.[12] Certain Civil Law countries, which notably included Germany and France, however, allowed parties to agree that the award is governed by an arbitration law different from the law of the country in which the award is to be made. Thus, if the parties have agreed that an award is to be made in Germany under French arbitration law, a German court would regard such awards as foreign and a French court could hold them to be domestic. The delegates from Germany and France succeeded in advocating this concept at the New York Conference of 1958.[13] In view of this extension of the field of application, the text of the Convention was amended at two other places when the final text was adopted at the New York Conference.[14] In the first place, the

10 „*Dabei ist der Vorbehalt des günstigeren Rechts zu beachten.*" Bundestagsdrucksache 13/5274, 12 July 1996, p. 65.

11 „*Der Bundesgerichtshof kann nur überprüfen ob der Beschluß auf der Verletzung eines Staatsvertrages oder eines anderen Gesetzes beruht (...).*"

12 UN DOC E/2704 and Corr 1.

13 See report of Working Party no. 1 concerning Article I(1), UN DOC E/CONF. 26/SR.16.

14 UN DOC. E/CONF. 26/SR.23.

text provided that the enforcement of the award could be refused if the arbitration agreement were invalid „under the law applicable to it." This was amended to the effect that it reads now: „under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" (Article V(1)(a)). In the second place, the text provided that enforcement of the award could be refused if the award had been set aside „in the country in which it was made." This was amended to the effect that it now reads: „the country in which, or under the law of which, that award was made" (Article V(1)(e)).

Initially it was thought that the chosen compromise formulation implied two limitations. The first limitation was that it only concerned awards made in the country where the enforcement is sought. The second limitation was that a court may apply the second material law at its discretion. The idea was that if certain countries, such as Germany and France, wished to apply the Convention to awards governed by an arbitration law as chosen by the parties other than that of the country where made, it was their affair, but that the countries which did not share this view should not be obliged to hold the Convention applicable to such awards.

The above compromise regarding the definition of the Convention's scope may have enhanced the conclusion of the Convention, but it has made its field of application highly complex and has created a lot of confusion. In particular, the discretionary power to consider an award made within a court's own territory as domestic rendered hazardous in practice the possibility offered by the Convention to designate an arbitration law different from the country where the award was to be made. For example, when envisaging arbitration in country A under the arbitration law of country B, the parties had first to ascertain whether the courts of country A allowed such a procedure. But their inquiry should not stop here. They should also ascertain whether the court of country B will recognize the possibility of arbitrating in another country – in our example in country A – under country B's arbitration law. This inquiry was important for the purposes of knowing which country's court is competent to render assistance in the arbitration (for example, for the appointment of the arbitrators) and to exercise control over irregularity of the arbitration and the award, a function ordinarily carried out in an action for the setting aside of the award. For example, if country A does not recognize the faculty to designate a foreign arbitration law, it will hold the award made within its territory to be domestic. It will then also hold itself competent to entertain an action for the setting aside of the award. But if at the same time country B allows arbitration abroad under its arbitration law, it will also consider the award as domestic and hold itself equally competent to entertain an action for setting aside of the award. This may result in the undesirable situation where the setting aside of the award can be requested in two countries. The reverse situation may equally be undesirable: if country A recognises the faculty, and country B does not, then setting aside cannot be sought in either country.

At the time, the German legislator dutifully implemented the second criterion. Thus, Section 2 of the law of 1961 implementing the Convention in Germany provided:

> „(1) If an award falling under the Convention is made in another Contracting State according to German procedural law, then an action for setting

> aside this award can be initiated in Germany. Sections 1041, 1043, 1045, para. 1, and 1046 ZPO apply to this action for setting aside.
>
> (2) Should the action for enforcement of an arbitral award as meant in paragraph 1 be denied in accordance with Article V of the Convention, then the arbitral award is to be set aside at the same time, when one of the grounds for setting aside as given in Section 1041 ZPO is applicable."[15]

The above provisions only contemplated an award made in another country under German arbitration law. (In the example above, the other country would be country A and Germany country B). They were somewhat incomplete as they did not expressly regulate the situation where the award was made in Germany under a foreign arbitration law. It could have provided that in such a case no action for setting aside the award would be possible before the German courts. Probably, the German legislator had at the time deemed such a provision superfluous, as this was the generally accepted view in Germany.[16]

One is happy to note that the new German Arbitration Act 1998 has abolished Section 2 of the law of 1961 implementing the New York Convention in Germany.[17] In the Explanatory Memorandum, the German Government observes:

> „It concerns a change as a result of the newly drafted Book 10 of the CCP (article 1 no. 6) which is necessary because the new law follows the principle of territoriality. Arbitral proceedings, which take place in Germany, are in future governed mandatorily by German law (cf. Section 1025(1) of the new CCP). Irrespective of the law under which an arbitral award is made, an arbitral award made abroad shall be considered as a foreign arbitral award (c.f., explanation to Section 1061 of the new CCP). This has as result that these awards can no longer be subject in Germany to an application for setting aside, and that therefore Section 2 of the aforementioned Law must be abrogated."[18]

Even clearer is the following statement in the Explanatory Memorandum under Section 1061:

> „The current field of application of the 1958 Convention is subject to a necessary change due to the principle of territoriality laid down in Section 1025 of the new CCP because it can no longer lead to arbitral awards made in [Germany] under the law of another (Contracting) State. Rather, in the future all arbitral awards made in the Federal Republic of Germany shall be considered as domestic awards. Article I(1), second sentence, of the

15 BGBl. III no. 319/13.

16 *K-H. Schwab*, Schiedsgerichtsbarkeit, (3rd ed. Munich) 1979 p. 320.

17 Bundestagsdrucksache 13/5274 Article 2, Section 2, repealing Section 2 of the law of 1961 implementing the New York Convention.

18 Id. pp. 66-67.

1958 Convention therefore will be meaningless for the Federal Republic of Germany with the entry into force of Section 1025 of the new CCP."[19]

However, in the Explanatory Memorandum, the German Government does not exclude that, in the future, arbitral proceedings may take place outside Germany in accordance with German procedural law „to the extent that the applicable foreign law does not follow the principle of territoriality laid down in [section 1025 of the new CCP]".[20] In order to avoid doubt, the Government immediately thereafter states: „However, arbitral awards made abroad under German procedural law must in the future equally be considered as foreign arbitral awards."[21] One wonders why the German Government leaves that door open. By abrogating Section 2 of the law implementing the New York Convention, an award made abroad under German arbitration law can no longer be set aside before the German courts. The question then is where a dissatisfied party can seek the setting aside of such an award. The German Government would have assisted practice if it had simply declared that parties cannot agree to arbitrate abroad under German arbitration law.

Whilst one is happy that Germany has apparently abandoned the concept that one can agree to arbitrate in one country under the arbitration law of another country (*Verfahrenstheorie*), the inclusion of this concept in the New York Convention has opened a Pandora's box. One cannot fault the Courts in the United States for failing to grasp the academic subtleties of the German/French concept that prevailed in 1958. Thus, the Second Circuit in the famous case *Bergesen v. Müller* believed that the second criterion permitted application of the Convention to the enforcement of an award made in the United States where the case involved a foreign (or international) element.[22] This led to an enormous confusion in the United States.[23] It took some fifteen years to clear up the confusion, which in particular involved questions of „overlapping coverage" (i.e., whether the grounds listed in the Convention are exclusive, or whether, in addition, the grounds listed in Chapter I of the Federal Arbitration Act or implied therein by the Courts of the United States can also be used as a defence to enforcement of a non-domestic award, and whether the grounds for setting aside should be those contained in Chapter I or should be equated to those listed in the Convention). The US Court of Appeals for the Second Circuit clarified this situation in a decision rendered in 1997 in *Alghanim v. Toys „R" Us.*[24]

19 Id. p. 62.
20 Id. p. 62.
21 Id. p. 62.
22 US no. 54, reported in IX Yearbook Commercial Arbitration (1984, p. 487).
23 See *A.J. van den Berg*, „Non-domestic Arbitral Awards under the New York Arbitration Convention," Arbitration International, Vol. 2, No. 3 (1986) pp. 191-219.
24 US no. 261, reported in XXIII Yearbook Commercial Arbitration (1998, p. 1058). For an overview, see *A.J. van den Berg*, „Consolidated Commentary on cases reported in Volumes XXII (1997) – XXIV (1999)," XXIVa Yearbook Commercial Arbitration (2000) at pp. 102 and 104.

The second criterion has also led some to believe that the Convention provides a legal basis for the concept of a-national awards, i.e., arbitral awards that are not governed by any national arbitration law and in respect of which the place where the award was made is in principle irrelevant.[25] For reasons explained elsewhere,[26] parties are in general ill-advised to agree to de-nationalized arbitration.

3. More favourable legislative regime

Pursuant to Article VII(1) of the New York Convention, a party is free to base its request for enforcement of a foreign arbitral award on an enforcing State's domestic law concerning enforcement of foreign awards instead of the New York Convention. This provision is referred to as the more-favourable-right provision. The rationale underlying the more-favourable-right provision is that the New York Convention aims at facilitating recognition and enforcement of foreign arbitral awards. This is confirmed by the Final Act at the New York Conference of 1958, which describes the Convention as contributing „to increasing the effectiveness of arbitration in the settlement of private law disputes." Article VII(1) of the New York Convention is to the effect that if domestic law makes recognition and enforcement easier, that regime can be relied upon. In other words, a party is free to seek enforcement on the basis of a domestic law concerning enforcement of foreign awards that is more favourable than the New York Convention.

The practical relevance of the more-favourable-right provision of Article VII(1) of the Convention can be seen in particular in cases where the arbitration agreement does not comply with the rather stringent written form requirement set forth in Article II(2) of the Convention. Domestic laws on enforcement of foreign awards may lead to the application of less demanding requirements.

The more favourable regime under domestic law for the enforcement of foreign arbitral awards can be either legislative provisions or case law, or a combination of both. There are a few countries which have specific legislative provisions in this respect. One example is the Netherlands where Article 1076 of the Netherlands Arbitration Act 1986 specifically provides for the enforcement of foreign arbitral awards outside a treaty. In practice, that regime is now frequently relied upon, as it is more favourable than the New York Convention.

The former arbitration law contained in the German Code of Civil Procedure also contained provisions on the enforcement of foreign arbitral awards which were applied by the courts outside the New York Convention. Section 1044 of the former German Code of Civil Procedure provided:

> „1. A foreign award which has become final (*verbindlich*) in accordance with the law which is applicable to it shall, except insofar as treaties enter-

25 Id. pp. 102 and 109.
26 *A.J. van den Berg*, The New York Arbitration Convention of 1958 (Kluwer, 1981), pp. 28-43.

ed into with States do not contain provisions to the contrary, be declared enforceable in accordance with the procedure prescribed for domestic awards. Section 1039 shall not apply.

2. An application for an order for enforcement shall be rejected:

(1) If the arbitration award is not valid in law; for the validity in law of an award, and insofar as treaties entered into with States do not contain provisions to the contrary, the law regulating arbitration procedure shall apply;

(2) If the recognition of an award achieves a result obviously contrary to essential principles of German law, in particular if the recognition is incompatible with the Basic Law (*Grundrechten*);

(3) If the party was not duly represented, insofar as the party has not expressly or tacitly accepted the continuation of the proceedings;

(4) If the party has not obtained the legal right to be heard in the proceedings.

(...)"

In practice, Section 1044 of the former Code of Civil Procedure came to the rescue of foreign arbitral awards that otherwise could not have been enforced in Germany. An example is a case in which arbitration had taken place in New York between a Swiss and a German buyer against a German seller. In the enforcement proceedings in Germany, the question was raised whether the arbitration agreement contained in the general conditions constituted a validly concluded arbitration agreement. The Court of Appeal of Karlsruhe relied on Section 1044 of the former law and declared the award enforceable. The German Federal Supreme Court approved this reasoning:

> „Instead of relying on the New York Convention the Court of Appeal examined whether the award can be enforced in accordance with Sect. 1044 of the German Code of Civil Procedure. This way of proceeding is correct. The more-favourable-right-provision of the applicable New York Convention provides that the Convention does not deprive a party of the right to rely on domestic law of the country in which the award is invoked (Art. VII, para. 1)."[27]

27 Bundesgerichtshof [Federal Supreme Court], 10 May 1984, Wertpapier-Mitteilungen (1984) pp. 1014-1016, excerpt in X Yearbook Commercial Arbitration (1985, p. 427); see also in the same case Bundesgerichtshof, 26 March 1987, Wertpapier-Mitteilungen (1987) p. 739, excerpt in XIII Yearbook Commercial Arbitration (1988, p. 471). In 1976, the Bundesgerichtshof had held that the New York Convention did not supersede Section 1044 of the former German Code of Civil Procedure as, pursuant to Article VII(1) of the New York Convention, a party is free to base its request for enforcement on the domestic law of the country where the enforce-

Section 1044 of the former law was in particular more favourable than the New York Convention since it provided that a foreign award can be enforced in Germany unless it has not become legally binding (*rechtsunwirksam*) under the applicable arbitration law. According to case law, if a respondent had failed to make an application to set aside the award in the country of origin, then the award had become binding under that law, and there was no longer a possibility to assert its invalidity in enforcement proceedings before the German Courts.[28]

The new German Arbitration Act 1998 does not contain provisions similar to Section 1044 of the former law. Does that mean that Germany no longer has a domestic regime for the enforcement of foreign arbitral awards that is more favourable than the New York Convention? The answer to that question may depend on the interpretation of Article VII(1) of the New York Convention. Until recently, it was assumed that the Convention, on the one hand, and the domestic law on the recognition and enforcement of foreign arbitral awards, on the other, are mutually exclusive. A party cannot pick and choose between provisions of the Convention and provisions of another basis for enforcement of a foreign arbitral award. Under this interpretation, a petitioner is, for instance, not allowed to base the request for enforcement on the Convention and at the same time rely on domestic law with respect to the written form requirement.

The foregoing interpretation is, for example, laid down in the Netherlands Arbitration Act 1986. It contains two articles relating to the enforcement of foreign arbitral awards. Article 1075 provides for the enforcement under a treaty, by which, in particular, is meant the New York Convention. Article 1076, on the other hand, contains a regime for enforcement of a foreign arbitral award „if an applicable treaty allows a party to rely upon the law of the country in which recognition and enforcement is sought." Article 1076 sets forth the documents to be supplied by the petitioner; the grounds for refusal of enforcement of a foreign arbitral award, which are more favourable than the New York Convention in certain respects; and the possibility of an adjournment of the enforcement decision pending an action for setting aside in the country of origin.

This understanding remained unchallenged for a long time. Recently, however, some have interpreted Article VII(1) expansively in the sense of encompassing the right to recognition or enforcement that a party may have in respect of a domestic award. That interpretation can, for example, be found in the much-discussed decision of the District Court for the District of Columbia in *Chromalloy v. Egypt.*[29] I have been unable to identify any German court decision to this effect or any German author who advocates this type of „blended interpretation" of combining the Convention and domestic law.

ment is sought. Bundesgerichtshof, 12 February 1976, 22 Recht der Internationalen Wirtschaft (1976) pp. 449-451, excerpt in II Yearbook Commercial Arbitration (1977, p. 242).

28 Bundesgerichtshof, 3 January 1971, Die Deutsche Rechtssprechung auf dem Gebiet des Internationalen Privatrecht (1971) no. 158.

29 US no. 230, reported in XXII Yearbook Commercial Arbitration (1997, p. 1001).

In any event, it is regrettable that the new German Arbitration Act does not contain express legislative provisions along the lines of the former Section 1044 of the German Code of Civil Procedure. This matter may crystallize over the next decade when the new German Act is tested in practice. It has become fashionable to review legislation after a certain period of time in order to assess whether it contains any shortcomings. My own country is an example: in 1986, a completely new arbitration act was enacted which was believed to be rather comprehensive. However, it was at the same time realised that the provisions should be revisited after having gained experience in practice. And indeed, now that practice has shown that the Act contains a number of shortcomings, the Dutch are in the process of revising their 1986 Act. Knowing Karl-Heinz *Böckstiegel*'s boundless energy, a similar German project may be one of many that he will complete before I get the chance to contribute to his next *Festschrift*.