

Table of Contents

Editors	v
Contributors	vii
Preface	xxi
CHAPTER 1	
The New York Convention as an Instrument of International Law	
<i>August Reinisch</i>	1
§1.01 Introduction	1
§1.02 Interpretation and Dispute Settlement	2
[A] Decentralized Application and Interpretation	3
[B] The Application and Interpretation of the New York Convention by National Courts as a Form of Trans-judicial Dialogue?	4
§1.03 Reservations	5
[A] Non-retroactivity of New York Convention Obligations	7
[B] Application of the New York Convention to Awards Made in Non-Contracting States	8
[C] National (Constitutional) Law Reservations	9
§1.04 Conclusion	12
CHAPTER 2	
Uniform Interpretation: What Is Being Done?	
<i>Filip De Ly</i>	13
§2.01 Introduction	13
§2.02 Uniform Interpretation: Definition and Objective	14
§2.03 Official Efforts at Uniform Interpretation: The Early Years	15
§2.04 Official Efforts at Uniform Interpretation: Early Initiatives	17
§2.05 Official Efforts at Uniform Interpretation: Consolidation	17
§2.06 A Methodology for Foreign Uniform Law Precedents	24

Table of Contents

§2.07	Conclusion	26
CHAPTER 3		
The Notion of 'Arbitral Award'		
	<i>Cristina M. Mariottini & Burkhard Hess</i>	27
§3.01	Introduction	27
§3.02	Autonomous Interpretation of the New York Convention: Reality or Fiction?	27
§3.03	The Lack of a Uniform Concept of the Arbitral Award in the New York Convention and the UNCITRAL Model Law	30
§3.04	Different National Concepts	35
	[A] Arbitral Awards in French Law	35
	[B] Arbitral Awards in German Law (Section 1055 ZPO)	37
	[C] Arbitral Awards in Italian Law	38
	[D] Arbitral Awards in English Law	41
	[E] Arbitral Awards in US Law	43
§3.05	Feasibility or Desirability of an Autonomous Notion of Arbitral Award under the New York Convention	47
	[A] The Interface of International Commercial Arbitration with National Provisions and the Feasibility of an Autonomous Notion of Arbitral Award	47
	[B] Is an Autonomous Notion of Arbitral Award under the New York Convention Desirable?	50
CHAPTER 4		
Procedures for the Enforcement of New York Convention Awards		
	<i>George A. Bermann</i>	55
§4.01	Article III Enforcement and Related Procedural Issues	55
	[A] What Is a "Rule of Procedure" under Article III?	56
	[B] Can a Procedural Issue Become a Problematic Limitation on the Application of Article III?	58
§4.02	Potentially Problematic Procedural Issues under Article III	58
	[A] Jurisdiction of Courts	58
	[1] Subject-Matter Jurisdiction	59
	[2] Personal Jurisdiction	60
	[B] Standing	62
	[C] <i>Forum Non Conveniens</i>	65
	[D] <i>Lis Pendens</i>	68
	[E] Claim and Issue Preclusion	69
	[1] Claim Preclusion	69
	[2] Issue Preclusion	70
	[F] Set-off of Claims	72
	[G] Sovereign Immunity	74
	[H] Statute of Limitations	75
	[I] Damages	76

	[J] Currency and Interest	76
§4.03	Conclusion	77
CHAPTER 5		
Four Roads Diverged in a Wood: Exploring the Various Interpretations of Article III of the 1958 New York Convention		
	<i>Lucas Siyang Lim</i>	79
§5.01	Introduction	79
§5.02	A Survey of the Procedural Mechanisms in Contracting States That May Hinder the Recognition and Enforcement of a Foreign Arbitral Award	80
	[A] Personal Jurisdiction	80
	[B] Statute of Limitations	83
	[C] <i>Forum Non Conveniens</i>	84
§5.03	Three Possible Interpretations of the New York Convention	86
	[A] Article V Is Exhaustive, Hence Procedural Rules Such as Personal Jurisdiction and Time Limits Cannot Be Applied under Article III since They Would Lead to the Denial of Recognition and Enforcement of Foreign Arbitral Awards	86
	[B] Procedural Doctrines Applicable via Article III May Be Applied Even If They Lead to the Denial of Recognition and Enforcement of Foreign Arbitral Awards If They Fall Within the “Public Policy” Exception in Article V(2)(b)	89
	[C] Article III Allows Contracting States to Independently Decide What “Rules of Procedure” Will Be Applied to Refuse the Enforcement of an Award	93
§5.04	The Fourth and Better View: Procedural Rules That May Lead to the Denial of Recognition and Enforcement Should Only Be Applied under Article III If They Are Widely Applied by Other Contracting States or Significantly Further the Interest of the Forum	97
§5.05	Conclusion	102
CHAPTER 6		
The Formal Requirements for Enforcing an Arbitral Award under the 1958 New York Convention, Between Autonomous Interpretation and References to Domestic Legal Systems		
	<i>Fabrizio Marongiu Buonaiuti</i>	105
§6.01	The Pursuit of an Autonomous Interpretation of International Conventions and Its Relevance for the New York Convention	105
§6.02	Autonomous Interpretation and References to Domestic Legal Systems: Problems Arising in Respect of <i>Lacunae</i>	107
§6.03	The Insufficiency of a Reference to the General Principles Inherent in the Relevant Convention	111
§6.04	Suitable Criteria for Selecting the Law Applicable in the Context of Article IV of the New York Convention	115

Table of Contents

§6.05	Policy Considerations Underpinning Either Solution	118
§6.06	Concluding Remarks	121
CHAPTER 7		
Nullity, Invalidity, the Conflict of Laws and Articles II(3) and V(1)(A) of the New York Convention		
	<i>Lawrence Collins</i>	123
§7.01	Introduction: Uniform Interpretation and Principles of the Conflict of Laws	123
§7.02	Article II(3) of the New York Convention and Its Relationship with the Conflict of Laws Provision in Article V(1)(a), and the Applicable Conflict of Laws Rules	127
	[A] Australia	129
	[B] United States	131
	[1] Insurance	131
	[2] Crew Members	133
	[C] ALI Restatement	134
	[D] England	137
§7.03	The Meaning of ‘Null and Void, Inoperative or Incapable of Being Performed’ in Article II(3)	141
	[A] ‘Null and Void’	142
	[B] ‘Inoperative’	146
	[C] ‘Incapable of Being Performed’	148
§7.04	Article V(1)(a) and Invalidity	150
	[A] Applicable Law	151
	[B] Validity	153
§7.05	Final Considerations	157
CHAPTER 8		
The Incapacity Defense under Article V(1)(a) of the New York Convention		
	<i>Francesca Ragno</i>	159
§8.01	Legislative History and Scope of the Incapacity Defense	159
§8.02	The Law Governing Capacity Issues	162
§8.03	The Characterization Dilemma	168
§8.04	Capacity Versus Authority	173
§8.05	Capacity Versus Arbitrability Ratione Personae	177
§8.06	Concluding Remarks	180
CHAPTER 9		
“Matters Beyond the Scope of the Submission to Arbitration”		
	<i>Alan Scott Rau</i>	181
§9.01	“Scope”, “Consent”, and Interpretation	181
§9.02	The “Submission to Arbitration” and Arbitral “Excess of Power”	184
§9.03	“Our Law of Contract”	192

§9.04	Default Rules and the Scope of the Agreement to Arbitrate	197
§9.05	Choice of Law, Municipal Law, and the Convention	206
§9.06	Finding the “Chosen Law”	207
§9.07	The Duty to “Recognize” an “Agreement [...] to Submit to Arbitration” under Article II	213
§9.08	French Law and the “ <i>Règle Matérielle</i> ”	218
§9.09	The U.S. and “Federal Common Law”	222
§9.10	Coda: The Uses of Municipal Law	231

CHAPTER 10

The “Scope” of the Submission to Arbitration

<i>Dennis Solomon</i>		241
§10.01	Introduction	241
§10.02	The Interpretation of Article V(1)(c) and Article II of the New York Convention	242
§10.03	The Objective Scope of the Submission to Arbitration and the Interpretation of the Arbitration Agreement	245
[A]	General Principle	245
[B]	The Law Applicable to the Interpretation of the Arbitration Agreement under Article V(1)(c) of the New York Convention	247
[C]	The Law Applicable to the Interpretation of the Arbitration Agreement under Article II(3) of the New York Convention	250
§10.04	The Personal Scope of the Submission to Arbitration	252
§10.05	The Temporal Scope of the Submission to Arbitration	256
§10.06	Excess of Mandate: Decisions <i>Ultra Petita</i>	258
[A]	Relevance of <i>Ultra Petita</i> as a Defense Against Enforcement	258
[B]	Determining Whether a Case of <i>Ultra Petita</i> Exists	261
§10.07	The “Scope” of the Submission to Arbitration and the Prohibition of “Révision Au Fond”	263
[A]	General	263
[B]	“Manifest Disregard of the Law”	264
[C]	Remedies Specifically Excluded in the Contract	265
[D]	Mistakes in Determining the Applicable Law	267
§10.08	Conclusion	270

CHAPTER 11

The Interplay of Autonomous Concepts and Municipal Law under Article V(1)(d) of the New York Convention

<i>Franco Ferrari & Friedrich Rosenfeld</i>		273
§11.01	Introduction	273
§11.02	The Autonomous Concepts in Article V(1)(d)	274
[A]	Events That Occur Prior to the Initiation of the Arbitration Proceedings Are Not Matters of Procedure or of the Composition of the Arbitral Authority	275

Table of Contents

	[B] Issues of Validity Are Distinct from Matters of Procedure or of the Composition of the Arbitral Authority	276
	[C] Article V(1)(d) Does Not Cover Issues That Go to the Substance of the Dispute	278
	[D] The Deviation from the Applicable Procedure or Composition of the Arbitral Authority Must Meet a Certain Threshold	280
	[E] There Is Some Support for the Proposition That Courts Must Apply Rules of Estoppel in the Administration of Article V(1)(d)	282
§11.03	The Role of Municipal Law under Article V(1)(d)	284
	[A] Municipal Law Governs the Existence and Validity of the Parties' Agreement on the Arbitral Procedure or the Composition of the Arbitral Authority	284
	[B] Municipal Law Governs the Interpretation of the Parties' Agreement on the Arbitral Procedure and on the Composition of the Arbitral Authority	286
	[C] Municipal Law Is Not a Yardstick to Examine Whether Parties Are Allowed to Conclude an Agreement on the Procedure or on the Composition of the Arbitral Authority	288
	[1] The Canon of Treaty Interpretation Set Forth in the VCLT	288
	[2] The Drafting History	289
	[3] Case Law	293
	[D] Municipal Law Applies as a Subsidiary and Supplementary Source to Assess the Procedure and Composition of the Arbitral Authority	295
§11.04	Conclusion	296
CHAPTER 12		
Autonomous Arbitrability? Whose Autonomy? Whose Arbitrability?		
<i>Winnie Jo-Mei Ma & Lawrence Boo</i>		
§12.01	Introduction	299
§12.02	New York Convention Provisions Relating to Arbitrability	301
§12.03	Arbitrability Versus Public Policy (Article V(2)(a) Versus Article (2)(b))	303
	[A] Legislative Approach: Narrowing the Scope of Non-arbitrable Matters	304
	[B] Judicial Approach: Narrowing the Applicability of the Non-arbitrability Exception	305
	[C] International Arbitrability Versus International Public Policy	306
§12.04	Arbitrability Versus Validity of Arbitration Agreement (Article V(2)(a) Versus Article II)	307
	[A] Objective Arbitrability Versus Subjective Arbitrability	307
	[B] Characterization of Arbitrability: Contractual Issue of Validity or Autonomous Issue of Jurisdiction?	309
§12.05	Law(s) Applicable to Arbitrability	309

[A]	Is the Law Applicable to Article V(2)(a) Subject to Article V(1)(a)?	309
[B]	Does the Law Applicable to Article V(2)(a) Also Apply to Article II?	310
§12.06	Autonomous Arbitrability? Harmonizing Approaches to Arbitrability	312
§12.07	Conclusion	314
CHAPTER 13		
The Concept of Public Policy under the 1958 New York Convention: An Autonomous Interpretation?		
	<i>Andrea Bonomi</i>	315
§13.01	Introductory Remarks	315
[A]	The Meaning of 'Autonomous Interpretation'	316
[B]	The Rules of Interpretation	317
§13.02	An Autonomous Interpretation of Public Policy?	319
[A]	Arguments Against an Autonomous Interpretation of Public Policy	319
[1]	Absence of a Definition of Public Policy	320
[2]	The Reference to the Law of the Enforcing State	322
[B]	Arguments Favouring an Autonomous Interpretation of Public Policy	325
[1]	The Need for a Uniform Interpretation	325
[2]	The Goals of the New York Convention	326
[3]	The Practice of the Contracting States	327
§13.03	The Content of an Autonomous Concept of Public Policy	327
[A]	Components of the Autonomous Notion	328
[1]	A Narrow Reading of the Public Policy Exception	328
[2]	Public Policy as Including only 'Fundamental' or 'Core' Principles of the Domestic Legal System	331
[3]	'International Public Policy' as Opposed to 'Domestic Public Policy'	332
[B]	Aspects Not Covered by an Autonomous Definition	334
[1]	No General Consensus on the Notions of 'Truly International Public Policy' or 'Transnational Public Policy'	334
[2]	No General Consensus on the Impact of Overriding Mandatory Rules	341
§13.04	Conclusion	346
Index		349