



Faculty of Law
Victoria University of Wellington

The Courts' Discretion under UNCITRAL articles 34 and 36

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Franziska Liebelt

Abstract

This paper addresses the question whether or not courts have the discretion to disregard one of the grounds listed in arts 34 and 36 of the UNCITRAL Model Law and not set aside or enforce an award despite one of the grounds being proven. It further more analyses in what circumstances the courts disregard the grounds. This paper comes to the conclusion that the issue is not a question of the use of the word “may” in the relevant provisions because courts that do not accept the discretion nevertheless disregard grounds for the same reasons as courts that do accept the discretion as a matter of narrow interpretation of the grounds. This paper then moves on to discuss estoppel and materiality as reasons to disregard the grounds. It concludes that these two principles are international recognised and therefore justify the preservation of an award. It suggests that to reach further harmonisation in this issue the Model Law should include provisions on estoppel and materiality.

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The text of this paper (excluding footnotes, table of contents, headings and bibliography) comprises approximately 15,250 words.

I Introduction

The Model Law (ML) is a set of rules that was developed by the United Nations Commission on International Trade Law (UNCITRAL) to harmonise the arbitration procedure globally. Apart from extensive rules on the arbitration process it includes provisions on the enforcement and setting aside of arbitration awards. The articles relevant for this paper are arts 34 and 36 ML. Article 34 regulates the setting aside of arbitral awards and art 36 governs the cases in which courts may refuse to recognise or enforce an arbitration award. The two articles contain an almost identical list of grounds which justify the setting aside or refusal of enforcement of arbitral awards. In both articles the grounds are divided into two main groups: the first group lists grounds that have to be proven by the party invoking them, whereas the second group names grounds which the court can take into consideration itself. The grounds listed in arts 34 and 36 are:

(a) the party making the application furnishes proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;

- (v) (solely under art 36) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made
- (b) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.

The section in the provisions causing the question whether the courts have a discretion to disregard one of the grounds are the introductory sentences: “An arbitral award may be set aside by the court ...”¹ or “Recognition or enforcement of an arbitral award ... may be refused ...”.² The discourse about the existence of the courts’ discretion is triggered by the use of the word “may”. The issue is whether courts, when the opposing party has proven one of the grounds, have discretion to disregard this ground and enforce or not set aside the award nevertheless.

This paper addresses this issue in two ways. First, it assesses whether a discretion is compatible with the ML by virtue of its history, wording and purpose and examines how courts approach the question of the existence of discretion. After the assessment of the case law this paper proposes that the core of the issue is not the question whether there is discretion or not but in which circumstances courts disregard the grounds. This is due to the fact that even courts that do not accept discretion disregard grounds as a matter of narrow interpretation. Secondly, the paper looks at the practice of the courts to assess in what instances courts disregard grounds and whether this practice is compatible with the ML. It concludes that there is a divergence in the practise of the courts of different countries which poses a danger of unpredictability for the parties and enables forum shopping. However, the courts base their decision to disregard the grounds on internationally established legal principles. It is therefore the view of this paper that the courts’ approach is favourable to a rigid application of the grounds in order to comply with these fundamental legal principles. In the interest of harmonisation it would be favourable if the ML included provisions on the application of these legal principles.

¹ UNCITRAL ML A/40/17 and A/61/17 (1985), art 34(2).

² Art 36(1).

II The Background of Articles 34 and 36 Model Law

A The Model Law

The ML was developed by the UNCITRAL, which is a subsidiary body of the General Assembly of the United Nations. The ML was the follow-up of the New York Convention 1958 (NYC), which is the foundational document for international arbitration created by the UN. The NYC had been created to harmonize the cross-border recognition and enforcement of international arbitration awards.³ Its application is therefore limited to foreign awards and the Convention does not include any provisions on the general procedure in commercial arbitration nor on recourse against awards.

In the 1980s, the UN deemed it necessary to create a new international document which would provide comprehensive rules for the entire arbitration process and also apply to local international awards. A study on the application of the NYC had revealed problems that were due to the limited scope of the NYC.⁴ These regulatory gaps led to divergent rules in municipal arbitration laws.⁵ The UN saw the opportunity to achieve further harmonisation of the arbitration system by providing guide-lines for national law-makers.⁶ A Model Law could secure international standards of procedural fairness and help states to modernise their national arbitration laws.⁷ The final text of the ML was adopted by the Commission in 1985. Its scope is considerably wider than the scope of the NYC:⁸

[The Model Law] covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award.

³ http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html; Howard M. Holtzmann and Joseph E. Neuhaus *A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary* (Kluwer Law and Taxation, The Hague, 1989) at 2.

⁴ *Report of the Secretary-General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* A/CN.9/168 (1958) at [49].

⁵ *Report of the Secretary-General: possible features of a model law on international commercial arbitration* A/CN.9/207 (1981), at [108]; *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General* A/CN.9/264 (1985), at art 34 [1].

⁶ Holtzmann and Neuhaus, above n 3, at 10.

⁷ Holtzmann and Neuhaus, above n 3, at 10.

⁸ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

The ML provides a pattern for national governments that they can enact as part of their municipal law.⁹ The main difference between the ML and the NYC is that the ML focuses on local awards,¹⁰ whereas the NYC only governs the recognition of foreign awards.

B Articles 34 and 36 Model Law

Articles 34 and 36 are both provisions on the review of arbitration awards by national courts. Article 34 gives the parties to an international arbitration award the option to ask a court in the country of origin to set aside that award. Article 36 provides a defence against the enforcement or recognition of both local and foreign international arbitration awards. The judicial review limits the finality of arbitral awards because it allows the courts to deny the enforcement of awards and set aside awards. The purpose of both arts 34 and 36 is to harmonize this limitation by naming a conclusive list of reasons the courts can base their decision to set aside or not to enforce on.¹¹ The grounds enumerated in the articles guarantee minimum procedural rights that represent the consensus of the drafting nations.¹² They were adopted from art V NYC.¹³ The introduction of articles 34 and 36 created the first truly unified set of standards for the recourse against awards. The first step in this direction was the NYC. But the ML now also unifies the setting aside of awards and the recourse against local awards.

Article 36 has to be read in context with art 35, which enables the enforcement and recognition of an arbitral award “irrespective of the country in which it was made”.¹⁴ Article 36 provides a defense against the enforcement or recognition. The party against whom the award is enforced can request the court to refuse the enforcement or

⁹ Holtzmann and Neuhaus, above n 3, at 11.

¹⁰ UNCITRAL Model Law, art 1.

¹¹ Holtzmann and Neuhaus, above n 3, at 10.

¹² http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

¹³ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General*, above n 5, at art 34 [6]; Holtzmann and Neuhaus, above n 3, at 911 and 1055; David A R Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 467 and 559; Petar Sarcevic “The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law” in Petar Sarcevic (ed) *Essays on Commercial Arbitration* (Graham & Trotman, London, 1989) 177 at 186; and Stefan Michael Kröll and Peter Kraft “Chapter VI Recourse against the Award. § 1059 – Application for Setting Aside” in Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimiento (eds) *Arbitration in Germany. The Model Law in Practice* (Kluwer Law International, Alphen aan den Rijn, 2007) 436 at 452.

¹⁴ UNCITRAL Model Law, art 58(1).

recognition on the basis of one of the listed grounds. Article 36 was derived from Art V NYC.

Article 34 was developed to address the situation at the time, in which the different states set forth varied and multiple grounds for setting aside arbitral awards and allowed an application to set aside an award for long periods of time.¹⁵ National laws furthermore provided different means to “attack” an award, such as setting aside, annulment, suspension or reinstitution.¹⁶ The procedural rules differed in factors such as form, time-limit and competent authority.¹⁷ Article 34 was created to remedy this situation by providing limited and exclusive grounds, which establish the only active recourse against an arbitral award in front of a national court.¹⁸

When assessing the case law of the different nations one needs to keep in mind that the implementation of the ML is not compulsory and the national legislatures did not all incorporate the provisions in the same way. Some countries have omitted whole sections of the ML, for example arts 35 and 36 or have included different grounds for the setting aside or refusal of recognition.¹⁹ Other national laws on the other hand adopted the exact wording of the ML.²⁰

Even though articles 34 and 36 have a similar structure and both constitute a type of recourse against arbitral awards, they have different legal consequences and serve different purposes.²¹ The main difference is that the refusal to enforce an award only has

¹⁵ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General*, above n 5, at art 34 [1]; Aron Broches “The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation” (1987) 18 *Netherlands Yearbook of International Law* 3 at 36; and Gerold Herrmann “The Role of the Courts under the UNCITRAL Model Law Script” in Julian D M Lew (ed) *Contemporary Problems in International Arbitration* (Centre for Commercial Law Studies, London, 1986) 164 at 171.

¹⁶ *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, above n 5, at [108].

¹⁷ *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, above n 5, at [108].

¹⁸ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General*, above n 5, at art 34 [1].

¹⁹ Pieter Sanders “Unity and Diversity in the Adoption of the Model Law” (1995) 11(1) *Arb Int'l L* 1 at 24 and 25.

²⁰ See for example § 1059 ZPO (German Code of Civil Procedure) which corresponds with art UNCITRAL Model Law, art 34.

²¹ Broches, above n 15, at 36.

a local effect, while setting aside an award was designed to have an international effect.²² The effect of setting aside an award differs notably from the refusal to recognise or enforce an award, which might also lead to different considerations concerning the question of discretion. If the recognition or enforcement of an award is refused by a national court, the immediate consequence is that the party seeking enforcement will not be able to obtain relief in that particular country. However:²³

Although this is a disheartening result for the party seeking enforcement, it should be borne in mind that it may still have an award that can be enforced in another State in which the losing party has assets.

Whether or not this is possible depends on the ground on which the refusal was based. If the refusal was based on a violation of public policy, the chance to enforce it in a different country is reasonable, while a refusal because of a severe procedural defect will probably be confirmed in other countries.²⁴ In the latter case, the party will have to resume arbitration proceedings.²⁵

On the other hand, setting aside an award has more severe effects. The award is then not only unable to be enforced in the country where it was set aside (that is the country of origin) but will furthermore most likely not be enforced elsewhere.²⁶ This effect is due to the fact that the setting aside provides for refusal of the enforcement or recognition of an award under art 36(1)(a)(v) ML and art V(1)(e) NYC. The position of the winning party, who of course wants to enforce the award, depends again on the ground for the setting aside. If the award was set aside because there was no valid arbitration agreement, recommencing arbitration proceedings is not an option. Litigation might be a possibility, if there is no problem of limitation. If the award was set aside due to a procedural defect, the arbitration process has to be started again. In summary:²⁷

²² Albert Jan van den Berg “Enforcement of Arbitral Awards Annulled in Russia” (2010) 27(2) J Int’l Arb 179 at 182.

²³ Nigel Blackaby and others *Redfern and Hunter on International Arbitration* (5th ed) (Oxford University Press, Oxford, 2009) at 618.

²⁴ Blackaby, above n 23, at 618.

²⁵ Blackaby, above n 23, at 618.

²⁶ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General*, above n 5, at art 34 [8]; Blackaby, above n 23, at 618; and van den Berg, above n 22, at 182.

²⁷ Blackaby, above n 23, at 618.

This is a daunting prospect for even the most resilient claimant. A successful party does not wish to be deprived of victory because of a procedural failure on the part of the arbitral tribunal.

III The Role of Courts in Reviewing Arbitration Awards

One theoretical aspect that needs to be taken into account when assessing the courts' discretion is the courts' role in international arbitration in a more general sense. Granting the courts discretion to depart from the enumerated grounds of arts 34 and 36 ML and art V NYC means that the courts are not restricted to examine whether one of the grounds is fulfilled. Instead they can take a step further and examine whether there are any reasons to uphold the award even though one of the grounds is fulfilled. In order to assess such reasons, the courts must necessarily apply further and more detailed scrutiny to the arbitration procedure in the relevant case. This in turn leads to a greater influence on the arbitration process by the courts. It can be questioned whether this greater influence is compatible with the arbitration system.

The tension between the autonomy of arbitration tribunals and legal control is inherent in the arbitration system.²⁸ On the one hand, arbitration is accepted as an independent form of dispute resolution. On the other hand the national courts of the supervisory jurisdiction and the enforcing courts retain the power to regulate procedural rules and to review the award in light of its compliance with fundamental procedural rights. Even though the arbitration system exists as an independent system of dispute resolution, it is therefore not entirely free from the influence of the courts.²⁹

Jurists differ in opinion regarding the legal character of arbitration and the degree of influence the courts should be granted. Some argue that judicial review interferes with the finality of arbitration awards, and should therefore be restricted.³⁰ By submitting their dispute to arbitration, the parties had chosen an alternative to the courts and judicial intervention should therefore be limited.³¹ This approach has been endorsed by the courts, which have emphasised that the setting aside of an award was exceptional, as in principle the courts should not interfere with the decision of arbitral tribunals, but rather “acknowledge the primacy which ought to be given to the dispute resolution mechanism

²⁸ Andrew Barraclough and Jeff Wancymyer “Mandatory Rules of Law in International Commercial Arbitration” (2005) 6 Melb J Int'l L 205 at 207.

²⁹ Holtzmann and Neuhaus, above n 3, at 7.

³⁰ See Kenneth R Davis “When Ignorance of the Law is no Excuse: Judicial Review of Arbitration Awards” (1997) in 45 Buff L Rev 49 at 85.

³¹ Davis, above n 30, at 85.

that the parties have expressly chosen.”³² Others see a broad judicial review as necessary to ensure the award is legally correct and adheres to basic constitutional rights.³³ As put by one author:³⁴

[The court system] is our bulwark against corruption, arbitrariness, bias, improper conduct and-where necessary-sheer incompetence, in relation to acts and decisions with binding legal effect for others. No one having the power to make legally binding decisions ... should be altogether outside and immune from this system.³⁵

Arbitration tribunals often deal with cases of a large scope, so that it seems to be dangerous not to subject their decisions to judicial review.³⁶ The enforcement of flawed arbitral awards would contradict the courts’ traditional role to uphold justice³⁷ and undermine general confidence in arbitration awards.³⁸

These arguments in turn influence views on the existence and scope of the courts’ discretion when setting aside an award or refusing to enforce an award. Depending on the point of view, one might support a wide discretion for the courts or oppose discretion entirely, in order to limit the courts’ review of arbitral awards. The scope of power one grants the courts furthermore depends on how the arbitration system itself is categorised; whether one sees it as “a private act between private parties, or [as] a public function that stems from sovereign power.”³⁹ There are four main theories on this issue: the jurisdictional theory, the contractual theory, the mixed theory and the autonomous theory. A closer look at these theories is outside the scope of this paper.⁴⁰ However, for the

³² *Quintette Coal Ltd v Nippon Steel Corp* (1990) 50 BCLR (2d) 207 at [32]; *Corporation Transnacional de Inversiones, S.A. de C.V. v. STET International S.p.A.* (1999) 45 OR (3d) 183 at [22]; and *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) at 135.

³³ Rolf A Schütze “Die gerichtliche Überprüfung von Entscheidungen des Schiedsgerichts” (2009) *SchiedsVZ* 241 at 242; Kröll and Kraft, above n 13, at 438; Davis, above n 30, at 52; Michael Kerr “Arbitration and the Courts: The UNCITRAL Model Law” (1985) in 34(1) *ICLQ* 1, at 15.

³⁴ Kerr, above n 33, at 15.

³⁵ Kerr, above n 33, at 15.

³⁶ Davis, above n 30, at 122.

³⁷ Davis, above n 30, at 122; *Schweissbolzen* (1966) BGHZ 46 365 at [43].

³⁸ Davis, above n 30, at 121.

³⁹ Barraclough and Wancymmer, above n 28, at 207.

⁴⁰ A comprehensive analysis can be found in Julian D M Lew *Applicable Law in International Commercial Arbitration* (Oceana Publications, Dobbs Ferry, New York, 1978) at 51-61 and in Gary B Born *International Commercial Arbitration Volume I* (Kluwer Law International, Alphen Aan Den Rijn,

matter of this paper it can be summarised that even though these theories all have different approaches to the relationship between arbitration and the judicial system, none of them really questions the fact that courts are needed to give arbitration awards legal force when necessary. Even if the arbitration system is accepted as an independent system, it cannot function without the support of national legal mechanisms to ensure the legal validity and enforcement of the awards.⁴¹ In the words of Julian Lew: “The recognition and enforcement of awards is in the coercive power of the courts. ... [N]either the tribunal nor the arbitration institutions have any means to secure enforcement.”⁴²

The rationale behind the courts’ power to review is to have an institution that monitors compliance with procedural rights in order to protect the parties to the arbitration. Articles 34 and 36 ML ensure this kind of control. The parties participating in the drafting of the ML and the NYC agreed that the named grounds stipulate minimal procedural rules that are indispensable. However, what one can question is whether or not the parties agreed to give the courts discretion to depart from these grounds and what the scope of this discretion should be. The question for this paper is if and why courts are allowed in the scope of their review to not only test the awards for defects but also to disregard these defects in certain circumstances.

IV Existence of the Courts’ Discretion

The majority of scholars and courts accept that the word “may” provides for the courts’ discretion not to set aside or to enforce or recognise an award, even if a party has proven one of the grounds necessary for the setting aside or refusal of enforcement or recognition.⁴³ This has been found for how the NYC is applied and also for national laws

2009) at 184-189; and Julian D M Lew, Loukas A Mistelis and Stefan Kröll *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) at 71-82.

⁴¹ Kerr, above n 33, at 1.

⁴² Lew, Mistelis and Kröll, above n 40, at 689.

⁴³ Albert Jan van den Berg “Residual Discretion and Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards under the New York Convention of 1958” in Chan Wing Cheong, and others (eds) *Current Legal Issues in International Commercial Litigation* (The faculty of Law, National University of Singapore, Singapore, 1997) 327 at 335; Williams and Kawharu, above n 13, at 469, 559; Holtzmann and Neuhaus, above n 3, at 922; *Paklito Investment Limited v Klockner East Asia Limited* [1993] 2 HKLR 39 at 49; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215 at 226; *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another* [2011] HKLRD 707 at [29]; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No1)* [2012] 4 HKLRD 1 at [105]; *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd* [1996] 2 HKLR 155 at 157; *Schreter v. Gasmac Inc.* (1992) 7 O.R.

enacting the ML. There are few dissenting opinions, almost exclusively from the German courts and scholars, which advocate that the courts have no discretion under arts 34, 36 ML and art V NYC.⁴⁴

The following section will first outline the arguments brought forward in the dispute about the existence of discretion. It will then turn to an interpretation of the relevant articles of the NYC and the ML to assess whether the provisions support or contradict the assumption of discretion. In this context an analysis of some land mark cases that have dealt with the issue will be conducted. Finally this section will take a closer look at the practice of the German courts. It will compare the German approach to the practice of courts that accept discretion in order to assess whether the two approaches really differ or whether the courts just use different means to reach the same outcome.

A The Controversy

The controversy about the existence of discretion centres on the use of the word “may” in both art V NYC and arts 34 and 35 ML. While some understand the use of that word as a clear indication that the courts are granted discretion to disregard the grounds enumerated, others oppose the discretion because they find it contradicts the purpose of the NYC and the ML.

(3d) 608, at [12]; *United Mexican States v Metalclad Corp* (2001) BCSC 664 at [129]; *Michel Rheume v Societe d’investissements l’Excellence Inc* (2010) QCCA 2269 at [63]; *Chromalloy Aeroservices Inc v Arab Republic of Egypt* (1996) 939 F Supp 907 at 909; *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 at [67], [127]; and *Yukos Oil Co v Dardana Ltd* [2002] EWCA Civ 543 at [8] and [18].

⁴⁴ OLG Düsseldorf (2004) WuW/E DE-R 1647, at [25]; Patricia Nacimiento “Article V(1)(a)” in Herbert Kronke and others *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, The Netherlands, 2010) 205 at 208; Joachim Münch in Thomas Rauscher, Peter Wax and Joachim Wenzel (eds) *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (3d ed, C.H. Beck, München, 2008), at § 1059 [5]; *Schweißbolzen* (1966) BGHZ 46, 365, at [40]; Stefan Michael Kröll “Chapter VI Recourse against the Award. § 1061 – Foreign Awards” in Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimiento (eds) *Arbitration in Germany. The Model Law in Practice* (Kluwer Law International, Alphen aan den Rijn, 2007) 506 at 522; Wolfgang Kühn “Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung ausländischer Schiedssprüche. Eine Betrachtung der deutschen Rechtsprechung” (2009) *SchiedsVZ* 53 at 56; Wolfgang Gruber “OLG Karlsruhe: Zur Präklusion von Anerkennungsverweigerungsgründen im Rahmen der Vollstreckbarkeitserklärung ausländischer Schiedssprüche” (2006) *SchiedsVZ* 281 at 284; and Karl Heinz Schwab and Gerhard Walter “Schiedsgerichtsbarkeit” (7th ed) (CH Beck, Munich, 2005) at ch 56 mn 3.

The purpose of the ML and the NYC, as explained above, is to facilitate international commercial arbitration by standardising and harmonising the recognition and enforcement of arbitral awards.⁴⁵ The main argument against the courts' discretion is that discretion leads to uncertainty and unpredictability in the finality of arbitral awards and therefore prevents harmonisation.⁴⁶ Opponents of discretion have the concern that national courts are influenced by their laws and thus have different approaches towards applying discretion.⁴⁷ The enforcement and recognition of international arbitral awards would therefore depend on the nationality of the deciding court.

Another concern is that a residual discretion of the courts would mean that the judiciary was empowered to make autonomous considerations in an area that is pivotal to the NYC and the ML, as the rules on the enforcement and setting aside of awards are central mechanisms. It was predicted by the Secretary-General early on that the drafting of art 34 ML would be one of the most difficult and at the same time one of the most important tasks in creating a successful Model Law.⁴⁸

The issues relating to setting aside or annulment of arbitral awards are amongst the most difficult ones to be settled in the model law. It is also submitted that the pertinent provisions to be drafted will have a decisive influence on the value of the model law as a legal regime exclusively geared to international arbitrations. This is particularly true with regard to the grounds on which an application for the setting aside or annulment of an award may be based.

Correspondingly, the nations engaged in lengthy discussions about which violations would require the setting aside or the refusal of the recognition of awards.⁴⁹ The grounds they finally agreed upon represent the rules that were perceived as absolutely crucial and indispensable by all nations. They embody an international consensus of minimum standards of procedure, the lowest common denominator of internationally accepted procedural rights. This consensus might be endangered if the courts were granted the discretion to disregard these minimum procedural standards. Such a scenario would put the courts in the position to enforce awards, which, according to the consensus of the

⁴⁵ Sarcevic, above n 13, at 188; on arts 34 and 36 Arbitration Act 1996 (NZ): and Williams and Kawharu, above n 13, at 467.

⁴⁶ Nacimiento, above n 44, at 208.

⁴⁷ Nacimiento, above n 44, at 208.

⁴⁸ *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, above n 5, at [107].

⁴⁹ Holtzmann and Neuhaus, above n 3, at 912, 913 and 1056.

drafting nations, should not stand because they are seriously flawed. By some, such a power is perceived as incompatible with the autonomy of the international arbitration system.

Lastly, the right of the party opposing the award would be negatively affected by a discretionary power of the courts. In general, judicial review of awards lies in the interest of the parties:⁵⁰

At the beginning of an arbitration, the parties, given the choice, would surely desire judicial correction rather than enforcement of awards violating the rule of decision that they instructed the arbitrator to apply.

However, the parties can only expect a judicial review within the scope of the relevant statute. If the court has the right under arts 34 and 36 ML to enforce the award or not to set it aside, even though the opposing party succeeded in proving one of the grounds enumerated, that outcome is not foreseeable for the party. Even if it was possible to infer the existence of discretion from the wording of the statute, the provision does not provide any indication regarding the considerations the court may make inside of that discretion. The rights of the party invoking a ground would therefore be considerably narrowed: the party cannot rely on the grounds enumerated and the courts' review becomes unpredictable to a certain degree.

On the other hand the goal of the ML and the NYC is not only harmonisation but also facilitation of the recognition of arbitral awards. This second goal speaks for the acceptance of discretion, as discretion enables the courts to enforce or not set aside arbitral awards in cases where the procedural mistake, despite fulfilling one of the grounds, is so minor, that it does not justify the nullification or non-enforcement of the award. The discretion therefore leads to the recognition of more awards. It enables the courts to consider factors that are not included in the provisions that might justify the preservation of the award. Thus, the courts can make just decisions on a case-to-case basis.⁵¹ Discretion allows courts more flexibility to take into account individual circumstances and prevents a rigid system.

⁵⁰ Davis, above n 30, at 126.

⁵¹ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 224; Williams and Kawharu, above n 13, at 469.

Thus, it could be argued that it is in the interest of the functionality of the arbitration system that awards which only suffer from a minor procedural mistake are nevertheless enforced, instead of causing a new arbitral procedure. However, this largely depends on the way courts exercise the discretion. Accepting the discretion of the courts holds the danger that the courts will interpret the discretion widely and exceed their power in a way that is not compatible with the intention of the ML. It is therefore necessary to analyse the way courts have so far exercised their discretion in order to evaluate whether or not the discretion is kept within the purposes of the ML. Before conducting such an analysis, this paper will focus on the interpretation of the relevant provisions to assess whether or not their wording and purpose shed any light on the existence of discretion. Because of the close relationship between arts 34 and 36 ML and art V NYC, it is important to examine art V NYC in regards to the courts' discretion, as it sets the historical foundation and background of arts 34 and 36 ML. The subsequent section will therefore first interpret art V NYC before turning to the interpretation of the ML provisions themselves.

B Interpretation of Article V New York Convention

Being an international convention, the interpretation of art V NYC is determined by arts 31 to 33 of the Vienna Convention on the Law of Treaties ("The Vienna Convention").⁵² According to these articles, the starting point for any interpretation is the meaning of the terms of the provision, in their context and in light of their object and purpose. Subsequently, any agreements between the parties to the treaty in connection with the treaty should be taken into account, followed by the preparatory work to the convention and the circumstances of its conclusion. Art 33 governs the interpretation of treaties that were authenticated in several languages. Under this provision all of these languages shall be regarded as the original. If the meaning of the wording differs between several languages, the wording shall be interpreted in light of the object and purpose of the treaty. Equipped with these guidelines, this section will now undertake an interpretation of art V NYC.

The relevant wording of art V NYC reads:

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

⁵² *The Vienna Convention on the Law of Treaties* (1969).

This introductory paragraph is followed by the grounds on which the court may base its refusal. The decisive word in the article is the word “may”. In compliance with the Vienna Convention, the interpretation shall be commenced with the ordinary meaning of this word.

Dictionaries⁵³ suggest the following meanings for the word “may” relevant in this context:

1. expressing possibility;
2. expressing permission;
3. to indicate ability or capacity;

These three meanings represent the two different ways the word is understood in the legal context. On one hand the word expresses possibility. In that sense the word allows for a range of options. It expresses the opposite of certainty and indicates that the allowed outcome will happen or that it will not. Understood this way, the word “may” gives courts the option to set aside or refuse recognition but does not oblige them to do so. The courts would therefore be left with a residual discretion.

On the other hand the word “may” can be understood as expressing permission or indicating ability or capacity. While this meaning also implies discretion, in the sense that it permits an action, but does not oblige the court to act in that way, the meaning could also be understood as merely conferring the power of refusing or setting aside an award upon the courts, and thus giving them the authority for this particular task. In this sense, the word “may” only expresses that, arbitration awards should in principle be final, but in the case of one of the grounds listed, the court is allowed to refuse enforcement. This latter understanding of permission could therefore be interpreted as giving the courts not the power to choose but merely the ability to execute the purpose of the provision. The ordinary meaning of the word “may” therefore does not give a clear indication whether or not discretion exists. However, in a legal context, the word “may” is usually understood as granting a discretionary power.⁵⁴

⁵³ *Oxford English Dictionary online; Collins English Dictionary online.*

⁵⁴ Francis Bennion *Understanding Common Law Legislation. Drafting and Interpretation* (Oxford University Press, Oxford, 2001) at 138; and Michael Sachs “§ 40” in Paul Stelkens, Heinz Joachim Bonk and Michael Sachs (eds) *Verwaltungsverfahrensgesetz* (CH Beck, München, 2008) at § 40 mn 21, 22.

Provided that the English word “may” indicates a discretionary power of the courts, the next problem is that the NYC was authenticated in five languages: Mandarin, English, Spanish, French and Russian. While it is beyond the scope of this paper to undertake a linguistic analysis and comparison of the relevant passage in these languages, Jan Paulsson has completed this task in his article “May or Must under the New York Convention: An Exercise in Syntax and Linguistics”.⁵⁵ He analyses the wording used in the five authenticated languages and concludes that the French version is the only one that poses doubt about discretion.⁵⁶ The wording used in the French version translates to “shall not ... unless”. This wording does not exclude the existence of discretion, because it only says the courts shall not set aside an award for any reasons other than the listed ones, but it does not say that the courts “shall” set aside an award if one of the grounds is fulfilled. However, the French version specifies discretion less clearly than the wordings in the other languages.⁵⁷

Since art 33 of the Vienna Convention requires regarding every authenticated version as an original, the fact that only one of the five languages does not explicitly grant discretion is not sufficient to conclude that discretion was originally intended. Paragraph 4 of art 33 of the Vienna Convention says that in such a case “the meaning which best reconciles the text ... shall be adopted”. The International Law Commission pointed out in this context:
58

The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text.

According to that statement, arguably the French version, as the only divergent version, should be interpreted to have the same meaning as the other four languages.⁵⁹

Furthermore, according to arts 31 and 33(4) of the Vienna Convention, one must turn to the object and purpose of the treaty. The purpose of the NYC is to facilitate the

⁵⁵ Jan Paulsson “May or Must under the New York Convention: an Exercise in Syntax and Linguistics” (1998) 14(2) *Arb Int'l* 227.

⁵⁶ Paulsson, above n 55, at 229.

⁵⁷ Paulsson, above n 55, at 229, 230.

⁵⁸ *Yearbook of the International Law Commission* (Kluwer, Deventer, Netherlands, 1996) II at 225.

⁵⁹ Paulsson, above n 55, at 230.

recognition and enforcement of international arbitral awards⁶⁰ and at the same time to harmonise the enforcement of arbitral awards by providing an exclusive list of grounds on which enforcement can be refused. The possibility that a court exercises its discretion and recognises an award even though one of the grounds for refusal is proven, facilitates the enforcement of arbitral awards as it will lead to a greater number of arbitral awards being enforced. At the same time, however, the discretion does not facilitate harmonisation, as national courts will always have slightly different approaches to how discretion is exercised. The object and purpose of the treaty therefore provides arguments for both sides.

As a final method of interpretation one may look to the *travaux préparatoires*. These do not make a clear statement about the intended meaning of the word “may”.⁶¹ However, it seems unlikely that the wording was used unintentionally, as the first draft used the word “shall” and not “may” and this was changed for the final wording of the provision.⁶² Furthermore, a German proposal to change the wording back to “shall” was filed but not accepted.⁶³

In conclusion, arguments both for and against discretion can be found in the interpretation of art V of the NYC. There is no decisive argument for either side.⁶⁴ However, one might feel a slightly stronger indication for the existence of discretion because the word “may” as a legal term is connected with discretion and the drafting commission deliberately decided on the use of this word.

C Interpretation of Articles 34 and 36 Model Law

Since the ML is not an international convention, the Vienna Convention is not directly applicable. Article 2A ML gives some indication as to the interpretation of the ML provisions. It is stated there that “regard is to be had to [the ML’s] international origin and to the need to promote uniformity in its application and the observance of good faith” and that “[q]uestions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law

⁶⁰ *Hebei Import & Export Corp v Polytek Engineering Corp Ltd* [1999] 1 HKLRD 665 at 691; and Paulsson, above n 55, at 229.

⁶¹ Gary H Sampliner “Enforcement of Nullified Foreign Arbitral Awards. Chromalloy Revisited” (1997) in 14(3) J Int’l Arb 141 at 149.

⁶² Sampliner, above n 61, at 149; and Paulsson, above n 55, at 230.

⁶³ Sampliner, above n 61, at 149, n 30.

⁶⁴ Van den Berg, above n 22, at 186.

is based”. This basically stipulates an interpretation in light of the object and purpose of the ML.

The analysis of the meaning of the word “may” in the previous section on the interpretation of art V of the NYC is directly transferrable to the wording of arts 34 and 36 of the ML and will therefore not be repeated. The same is true for the elaborations on the implications of the object and purpose of the NYC, as the ML was created for those same purposes, although there will be some separate comments made on the purpose of art 34 of the ML in particular.

1 Historical background

Since discretion is widely accepted under the NYC and arts 34 and 36 were derived from art V of the NYC, there is some indication that this principle was meant to be continued. There is no substantive difference in the NYC and the ML that would justify a different approach to the question of discretion. The few amendments in the text of the ML are not relevant to this issue.⁶⁵ The one difference that might have an impact on the question of discretion is the fact that art 34 of the ML also regulates for the first time setting aside an award. The controversial wording of art 36 of the ML and art V of the NYC was repeated for art 34. As mentioned earlier, the significance of setting aside awards is that it potentially has a global effect, because setting aside an award in the country of origin is listed as one of the grounds for refusal to recognise the award.⁶⁶ It shall therefore be analysed whether or not the nature of art 34 justifies a different view on the existence of discretion.

The intention of those drafting the ML was that the setting aside of an award in the country of origin would lead to the global nullity of the award.⁶⁷ This was meant to be achieved through listing the setting aside of an award as a ground for the refusal of enforcement or recognition. Most countries respect this intention and the legal authority of the state of origin, and do not enforce awards that have been set aside.⁶⁸ The global effect of art 34 of the ML might lead to the perception that discretion under this article would have a greater impact than under art 36 or art V of the NYC. In this respect it shall

⁶⁵ For an instructive summary of the amendments see Holtzmann and Neuhaus, above n 3, at 915-918; Broches, above n 15, at 36 – 41.

⁶⁶ New York Convention (1958), art V(1)(e), UNCITRAL Model Law, art 36(1)(a)(v).

⁶⁷ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General*, above n 5, at art 34 [8].

⁶⁸ Van den Berg, above n 22, at 183; the possibility of discretion under this particular ground will be discussed below.

first be clarified that the discretionary power of the courts under art 34 of the ML would not lead to more awards being set aside. Indeed the opposite is the case: the courts would be given the power to disregard the grounds listed and not set aside an award, so that more awards could be upheld. What is left is the question of whether or not the grounds causing the setting aside of an award under art 34 have a greater importance than the ones listed in art 36, and therefore the courts' discretion to disregard them would be less justified than in the enforcement procedure. Against this concern is the fact that the grounds listed in art 34 are almost identical to the grounds listed in art 36. The fact that the person opposing the award chose to file an application to set aside the award instead of opposing the enforcement at a later stage can be purely circumstantial and does not bring about different consequences for the question of discretion. It could even be argued the contrary, namely that, because setting aside an award has a stronger effect than refusing its recognition, the setting aside should be treated more carefully. Granting the courts discretion to take further considerations into account before setting the award aside enables them to refuse the setting aside in cases of minor mistakes and therefore helps such a careful application of art 34. It is therefore suggested that the nature of art 34 does not justify a different approach towards discretion.

2 *Drafting process of the Model Law*

A further method of interpretation is examining the *travaux préparatoires* of the ML, which were regarded as important means of interpreting the text of the ML by the drafting UNCITRAL itself.⁶⁹

During the drafting of arts 34 and 36, the Commission did not make any clear statement about the existence of a judicial discretion under these articles. However, there are some indications that room for consideration by the courts was intended. Firstly, it was suggested by the chairman of the working group that the word “may” in art 34 allowed the courts to look at the nature of the defect in order to reach their decision.⁷⁰ This indicates that the he saw a scope for discretionary considerations, such as the materiality of the defect. Secondly, and more significantly, a suggestion to change the word “may” in art 36 to “shall” was rejected.⁷¹ The fact that the Working Group discussed the wording of the relevant section shows that the word “may” was not used by pure coincidence. Instead, the commission made a conscious decision to use this terminology and therefore

⁶⁹ Holtzmann and Neuhaus, above n 3, at 15 and 16.

⁷⁰ *Summary Record A/CN.9/SR.318* at para 65.

⁷¹ *Fourth Working Group Report A/CN.9/245* (1983), at [139], [141]; Holtzmann and Neuhaus, above n 3, at 1057, 1058.

showed that it regarded a certain flexibility of the courts for considering individual aspects as valuable.⁷²

D Practice of the Courts

What follows is an analysis of whether or not the case law gives some indication of why judges tend to accept discretion. Due to the close relation of art V of the NYC and arts 34 and 36 of the ML, approaches to the interpretation of art V in the case law are transferrable to the corresponding ML provisions.⁷³

The practice of the courts endorses the existence of discretion. This paper looks at case law from Germany, the United Kingdom, Hong Kong, Canada, New Zealand and the United States of America and with the exception of the German courts all courts accept the existence of discretion when applying art V NYC or arts 34 and 36 ML.⁷⁴ The German courts generally refuse the existence of discretion.⁷⁵

Most judges infer discretion simply from the use of the word “may” and do not question its existence. One example of this is the case of *Schreter v Gasmac Inc*⁷⁶, where Feldman J stated in regards to art 36 of the Ontario Act, which implements art 36 of the ML:⁷⁷

As the grounds set out in article 36, including article 36(1) (a)(v), are discretionary, it is within the discretion of the ... enforcing court, to recognize and enforce the

⁷² Holtzmann and Neuhaus, above n 3, at 1058.

⁷³ *Corporation Transnacional de Inversiones, SA de CV v STET International SpA*, above n 32, at [26] and general practice of authorities.

⁷⁴ *Paklito Investment Limited v Klockner East Asia Limited*, above n 43, at 49; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 226; *Apex Tech Investment Ltd v Chuang's Development (China) Lt*, above 43, at 157; *Schreter v. Gasmac Inc.* (1992) 7 O R (3d) 608, at [12]; *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, above n 43, at 909; *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*, above n 43, at [67], [126], [127]; *Yukos Oil Co v Dardana Ltd*, above n 43, at [8] and [18]; *Hebei Import & Export Corp v Polytek Engineering Corp Ltd* [1999] 1 HKLRD 665, at 690 per Sir Anthony Mason NPJ; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No1)*, above n 43, at [62]; *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another*, above n 43, at [29]; *United Mexican States v Metalclad Corp*, above n 43, at [129]; and *Michel Rheaume v Societe d'investissements l'Excellence Inc*, above n 43, at [63].

⁷⁵ OLG Düsseldorf, above n 44, at [25]; Nacimiento, above n 44, at 208; Münch, above n 44, at § 1059 [5]; Schweißbolzen (1966) BGHZ 46, 365, at [40]; Kröll, above n 44, at 522; Kühn, above n 44, at 56; Gruber, above n 44, at 284; Schwab Walter, above n 44, at ch 56, marginal no 3.

⁷⁶ *Schreter v Gasmac Inc*, above n 74.

⁷⁷ At [29].

arbitral award even where it has not become binding or has been set aside by a court in the jurisdiction of the award.

None of the judges in the relevant cases really question the existence of discretion. If they elaborate on the matter of discretion at all, they usually turn immediately to the question of scope and application of the discretion. The only judge who really commented on the question of the existence of discretion is Kaplan J, a Hong Kong judge, who was faced with the issue in two important decisions.⁷⁸ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd (China Nanhai v Gee Tai)* was a case of an arbitration award rendered by a tribunal that was technically not the one the parties had agreed upon. When considering the enforcement of the award notwithstanding this mistake, because the defendant had failed to challenge the jurisdiction of the tribunal previously, he turned to the question whether art V of the NYC allowed the court to take such factors into account. In his assessment Kaplan J followed Jan van den Berg's analysis⁷⁹ of the issues and concluded:⁸⁰

I think there is much force in Dr van den Berg's point that even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement.

For Kaplan J, the reason to accept discretion was that it enabled him to make a just decision.⁸¹

It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the arbitral tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on

⁷⁸ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43; and *Paklito Investment Limited v Klockner East Asia Limited*, above n 43.

⁷⁹ Albert Jan van den Berg *The New York Convention of 1958* (Kluwer Law International, The Hague, 1981) at 182 – 185.

⁸⁰ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 225.

⁸¹ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 225.

the merits and then 2 years after the award attempt to nullify the whole proceedings on the grounds that the arbitrators were chosen from the wrong CIETAC list.

Kaplan J therefore applied the principle of estoppel. Even if other judges do not explicitly explain why they are in favour of discretion, one can get an idea of their reasons from the context of the cases. Judges apply or consider applying discretion in cases, where the facts in the court's view do not justify setting aside or refusing to enforce the award, even though one of the grounds has been fulfilled. This is usually the case if the defendant had not opposed the procedural mistake previously or if the defect did not materially affect the outcome of the proceedings. The courts see the need to take these circumstances into consideration in order to make a fair judgment and they do this by applying discretion. It can therefore be said that courts justify the application of discretion due to a need for flexibility and fairness.

E The "German Approach"

The German courts have so far insisted that they have no discretion. However, in practice, this alternative approach by the German courts does not make a substantial difference. While the courts do not accept a residual discretion, they interpret the grounds in the German provisions implementing the ML very narrowly. In this context courts have stated that the NYC did not prevent the courts from a "restrictive handling" of the grounds for refusal.⁸² The restrictive interpretation is based on the "enforcement-friendly" nature of the NYC (meaning that the NYC is generally in favour of enforcement) and also on art VII(1) of the NYC, which allows a more enforcement-friendly approach in the national law.⁸³ This restrictive interpretation of the grounds comes very close to the exercise of discretion.⁸⁴ The narrow interpretation means that the courts include considerations such as causality, materiality and estoppel.⁸⁵ In cases where other national courts would make use of their discretion, German courts would therefore already deny the existence of one of the grounds, leading to the same end-result.⁸⁶ In fact, this

⁸² *Zur Präklusion von Anerkennungsverweigerungsgründen im Rahmen der Vollstreckbarkeitserklärung ausländischer Schiedssprüche* (2006) SchiedsVZ 2006, 281(OLG Karlsruhe) at [21].

⁸³ Gruber, above n 44, at 284; art VII (1) NYC: The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

⁸⁴ Gruber, above n 44, at 284.

⁸⁵ Kühn, above n 44, at 57; Gruber, above n 44, at 282.

⁸⁶ Kröll, above n 44, at 522; Nacimiento, above n 44, at 208.

approach is not limited to the practice of the German courts. At least for the principle of estoppel can be said that judges from other countries have included this principle in the interpretation of the grounds instead of the application of the discretion. Other times it is unclear whether or not they include estoppel in the discretion or in the application of the grounds themselves.

One example of this lack of clarity in a judge's recourse to the principle of estoppel is the judgment of Kaplan J in *China Nanhai v Gee Thai*.⁸⁷ Kaplan J here first turned to the question of whether or not the defendant might be estopped from invoking the wrong composition of the tribunal. He looked at a line of argument developed by Jan van den Berg and agreed that the word "may" can be understood as a basis for taking other considerations into account, such as estoppel.⁸⁸ He then concluded that the defendant was estopped.⁸⁹ After that he turned to the question of discretion, opening this section with the following statement:⁹⁰

As I have decided that the Defendants are estopped from relying upon the wrongly constituted arbitral tribunal, it is not strictly necessary for me now to consider the question of discretion although I have discussed it briefly in the context of the doctrine of estoppel.

He then went on to discuss the question of discretion as cited above.⁹¹ The structure of Kaplan J's judgment and the statement just cited indicate that he sees estoppel as an issue separate from the issue of discretion. However he also agreed with Jan van den Berg's proposition to include the principle of estoppel in the discretion allowed by the word "may". Furthermore, in the preceding judgment of *Paklito Investment Limited v Klockner East Asia Limited*⁹² Kaplan J had considered estoppel under the heading of discretion.⁹³ Another example of this blurred line is the judgment in the first appeal of *Dallah Estate and Tourism Holding Company v Pakistan*.⁹⁴ In this case Moore-Bick LJ clearly separated between the issue of estoppel and the exercise of discretion.⁹⁵

⁸⁷ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43.

⁸⁸ At 225.

⁸⁹ At 226.

⁹⁰ At 226.

⁹¹ At IV D.

⁹² *Paklito Investment Limited v Klockner East Asia Limited*, above n 43.

⁹³ At 49.

⁹⁴ *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755

⁹⁵ At [48]

Before going any further I think it is desirable to disentangle two strands in the argument, estoppel and the exercise of discretion. The exercise of discretion in a case of this kind raises difficult questions to which I shall return in a moment, but it is in my view quite separate from the question of estoppel.

He turns to the question of discretion only after discussing estoppel and decides that he will not apply it in this case because the opposing party was not even party to the arbitration agreement. In the second appeal, Lord Mance on the other hand mentioned estoppel as a principle that could be considered as part of the discretion opened by the word “may”.⁹⁶

These examples show that the distinction between the interpretation of the grounds allowing to set aside and to refuse to enforce an award and applying discretion is a more general problem. The German courts are not the only ones who have judged that these additional considerations should be included in the grounds themselves. It is therefore suggested that the inclusions of additional considerations is not a question of the existence of discretion. Since all courts seem to agree that there should be room for additional considerations somewhere, it is more important to analyse what type of additional considerations the courts might take into account and in what kinds of cases a defendant has to envisage that the court might refuse to set aside the award or to enforce an award even if he or she has succeeded in proving one of the grounds. This will be further analysed below.

F Conclusion

Regarding the object and purpose of both the ML and the NYC, there are arguments both for and against the discretion of the courts. The drafting process of both statutes speaks slightly for the existence of discretion as the *travaux préparatoires* suggest that the word “may” was used intentionally. An analysis of the case law shows that most courts accept the existence of discretion. The German courts, which do not accept the existence of discretion nevertheless take the same aspects into account, only as an integral part of the grounds instead of as part of the discretion. The issue therefore is not the question of whether or not discretion exists but rather what kinds of consideration the courts have taken into account and should take into account when evaluating an arbitral award. However, the aforementioned criticism of the courts’ ability to include these additional

⁹⁶ At [67] and [68].

considerations⁹⁷ persists and should not be ignored. The fear of unpredictability is justified and poses a considerable burden on the party opposing the award. Only an analysis of the case law can show whether those concerns are justified or whether the courts handle the additional considerations carefully enough to be consistent with the purpose of the NYC and the ML. The case analysis will shed some light on the question of whether or not discretion does in practice lead to inconsistency in the court decisions and whether or not this has a considerable negative impact on the independence of the international arbitration system and the interests of the parties.

V Scope of the Discretion and of the Interpretation of the Grounds

What follows is an analysis of the ways that courts have exercised their discretion, or how they have interpreted the grounds for setting aside and refusal of recognition or enforcement and what types of additional considerations they make. After some preliminary comments this paper will first analyse the two different types of considerations that have been applied by the courts: estoppel and materiality. Second, the paper assesses whether the courts have different approaches concerning local and foreign awards. The last section looks at the limits of these considerations, as they have been phrased by case law.

A Preliminary Considerations

1 The enumerated grounds are final

For clarification the grounds enumerated in arts 34, 36 of the ML and art V of the NYC are final.⁹⁸ The courts cannot refuse to enforce or recognise or set aside an award for reasons other than the ones listed. However, since the implementation of the ML is not compulsory, national law makers are free to add further grounds that allow the courts to set aside an award. This is also possible for the refusal of recognition or enforcement of awards, unless the nation is a signatory to the NYC.

⁹⁷ At IV A.

⁹⁸ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 217; Münch in Thomas Rauscher, Peter Wax and Joachim Wenzel (eds) *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (3d ed, C.H. Beck, München, 2008), at § 1059 [4]; Nacimiento, above n 44, at 209 and 210; Williams and Kawharu, above n 13, at 479; Kröll and Kraft, above n 13, at 439; Kröll, above n 44, at 452; *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, above n 32, at 134, 173; van den Berg, above n 79, at 297; Blackaby, above n 23, at 639; and van den Berg, above n 22, at 185.

2 Correlation between the discretion and the standard of review

The general perception is that the grounds listed in arts 34 and 36 of the ML need to be construed narrowly because they represent exceptions to the internationally accepted finality of arbitration awards.⁹⁹ These grounds must be construed narrowly to avoid devaluing the international agreement that arbitral awards are final and binding and also to preserve the autonomy of the forum selected by the parties by minimising judicial intervention in arbitral awards.¹⁰⁰ This narrow definition is particularly important for the public policy ground, which has been interpreted by courts as only encompassing violations of “most basic notions of morality and justice”¹⁰¹ or as such violations that “offend our local principles of justice and fairness in a fundamental way”.¹⁰² In relation to the question of the tribunal’s jurisdiction, a court has stated that “[w]here a Tribunal’s jurisdiction is called into question as it is here, an applicant must overcome ‘a powerful presumption’ that the arbitral tribunal acted within its powers”.¹⁰³ In the same judgment it was held that for a violation of due process the conduct of the arbitral tribunal must be sufficiently serious. One example was a tribunal that deliberately concealed documents from one party.¹⁰⁴ Other criteria that have been used to narrow the grounds down are materiality and causation of the mistake, which will be discussed below.¹⁰⁵

This narrow interpretation of the grounds affects the scope of discretion. Because the threshold to prove a sufficient defect of the award is already very high, and therefore a defect needs to be severe in order to set aside the award, there are not many cases in

⁹⁹ *Louis Dreyfus SAS v Holding Tusculum BV* (2008) QCCS 5903, at [66]; *Corporation Transnacional de Inversiones, SA de CV v STET International SpA*, above n 32, at [26]; Williams and Kawharu, above n 13, at 468; *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, above n 32, at 139, 140, 173 and 174; Kröll, above n 44, at 522; Lew, Mistelis and Kröll, above n 40, at 706; *Waterside Ocean Navigation Co v International Navigation Ltd*, (1984) 737 F.2d 150, at 152; Blackaby, above n 23, at 639; for more case law see *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, above n 32, at 139 and 140.

¹⁰⁰ *Corporation Transnacional de Inversiones, SA de CV v STET International SpA*, above n 32, at [26]; *Quintette Coal Ltd v Nippon Steel Corporation et al*, above n 32, at [32]; *Bayview Irrigation District No. 11 v. United Mexican States* (2008) CarswellOnt 2682, at [13]; Sarcevic, above n 13, at 184; *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, above n 32, at 139, 140, 173 and 174.

¹⁰¹ *Waterside Ocean Navigation Co v International Navigation Ltd*, (1984) 737 F.2d 150, at 152.

¹⁰² *Schreter v. Gasmac Inc.* (1992) 7 O.R. (3d) 608, at [47]; *Anerkennung ausländischer Schiedssprüche* (1986) NJW 3027 (BGH), at 3028; OLG Düsseldorf, above n 44, at [26].

¹⁰³ *Corporation Transnacional de Inversiones, SA de CV v STET International SpA*, above n 32, at [27].

¹⁰⁴ *Corporation Transnacional de Inversiones, SA de CV v STET International SpA*, above n 32, at [45].

¹⁰⁵ At VB.

which the courts will exercise their discretion to enforce or recognise the award despite one of the grounds being proven.

B Reasons to Enforce, Recognise or not to Set Aside an Award despite a Proven Ground

The two recognised reasons to disregard the establishment of one of the grounds are estoppel and materiality (also referred to as causation). The case law shows no notable difference in the application of these principles between art 34 and 36 of the ML and art V of the NYC. However, there were some comments made by judges on the difference between the enforcement of a local award and a foreign award, which will be addressed below. This section will try to explain why courts sometimes decide that it is more just to preserve an award even though it is, according to the drafters of the ML, flawed.

During the making of art 34 of the ML, there was discussion as to whether minor defects in the arbitration process should result in the setting aside of an award.¹⁰⁶ The secretariat suggested several options to overcome this problem:¹⁰⁷

One possible way is to use the idea of estoppel or implied waiver and to preclude reliance on a ground which the party had knowledge of during the arbitration proceedings and did not invoke then ... Another possible way would be to qualify the procedural defect (e.g. “serious” or “gross” violation, non-compliance with mandatory provisions). Yet another way ... could be to qualify the causal connexion between the procedural mistake and the award... .

These propositions are mirrored by the approaches that have been taken by national courts.

1 Estoppel

One principle courts apply to arts 34, 36 of the ML and art V of the NYC is the principle of estoppel or preclusion. This is a principle recognised in both civil law and common law countries, and means that a party has to bring an objection as soon as they have both knowledge of the relevant facts and the opportunity to object. If the party fails to object at the earliest possible point of time, it might be precluded from bringing this objection in later proceedings.¹⁰⁸ Estoppel is a principle of effectiveness, preventing parties from stretching proceedings out unnecessarily by delaying an objection that they already knew

¹⁰⁶ Holtzmann and Neuhaus, above n 3, at 921.

¹⁰⁷ Second Draft, A/CN.9/WG.II/WP.42, Art 41(2), n 28; Holtzmann and Neuhaus, above n 3, at 921.

¹⁰⁸ Kühn, above n 44, at 59.

about at an earlier point in time.¹⁰⁹ In the context of enforcing arbitration awards, courts have applied this principle if the opposing party failed to raise the issue giving rise to one of the grounds in the arbitration proceedings or in setting aside proceedings in the country of origin.

The principle of estoppel is incorporated in art 4 of the ML,¹¹⁰ which states that a party that does not object to a case of non-compliance during the arbitration, despite knowing of it, is deemed to have waived its right to object. The commission report on art 4 of the ML explicitly states that the provision is applicable to both arts 34 and 36.¹¹¹ The principle of estoppel is furthermore codified in most national laws, for example in § 1027 of the German Code of Civil Procedure (ZPO), which enacts art 4 of the ML, and in s 73(1) of the 1996 Arbitration Act in England. Therefore, in most countries estoppel is undoubtedly applicable to setting aside local awards and in enforcement proceedings regarding local awards. However, art 4 of the ML and the national provisions are only applicable to local awards¹¹² and the NYC does not codify the principle of estoppel. When dealing with foreign awards, the courts therefore have to assess whether the principle of estoppel can be applied to these as well. Several courts faced with this question were in favour of applying the doctrine of estoppel to foreign awards. However, there is no coherent approach towards the question of estoppel in the cases reviewed.

There are several issues related to the question of estoppel. The first question is to confirm that courts accept that the principle applies. Courts from most countries see estoppel as one of the reasons to apply their discretion, or as an integral part of establishing the grounds. Examples of this are included in the analysis of the case law below. The more pressing question is in what circumstances a party is estopped from invoking a ground. Since estoppel definitely applies to local awards, the only situation that needs to be discussed is estoppel during enforcement procedures of a foreign award. In these cases estoppel will become an issue when the party opposing the enforcement has failed to bring its objection in front of the arbitration tribunal or in front of a court of the country of origin as part of setting aside procedures. The following diagram illustrates the different questions arising in the various possible scenarios:¹¹³

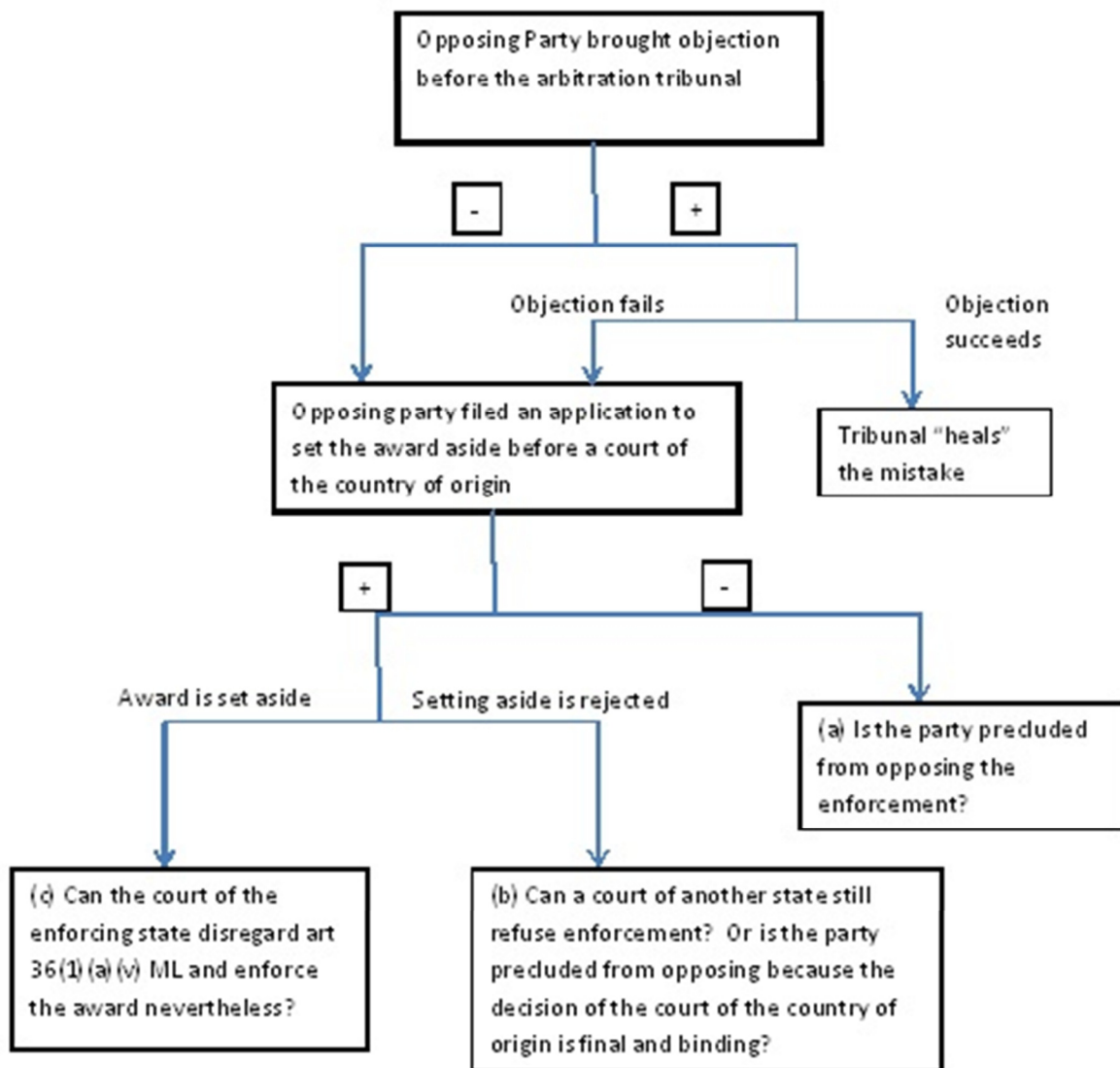
¹⁰⁹ *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania, AB Geonafra* [2005] EWHC9 (Comm), at [22]; Gruber, above n 44, at 285.

¹¹⁰ Holtzmann and Neuhaus, above n 3, at 922.

¹¹¹ Commission Report A/40/17 (21 August 1985), at [57]; Holtzmann and Neuhaus, above n 3, at 200.

¹¹² Art 1 (2) ML; Kühn, above n 44, at 59; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania, AB Geonafra* [2005] EWHC9 (Comm), at [26].

¹¹³ Diagram created by author.



As shown in the graphic, there are three possible outcomes ((a), (b) and (c)). These will be addressed below in alphabetical order.

(a) Is a party obliged to raise an objection as early as possible or will it otherwise be precluded from objecting to the enforcement of the award?

The first question is whether or not a party is precluded from relying on one of the grounds if it failed to raise the objection earlier in the proceedings. In this context it is important to note that art 34(3) ML itself includes a time-limit of three months for the application to set aside an award. In *Paklito Investment Limited v Klockner East Asia*

*Limited*¹¹⁴ Kaplan J took the view that a party was not obliged to challenge the award in the country of origin:¹¹⁵

There is nothing in s. 44 [arbitration ordinance] nor in the New York Convention which specifies that a defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere.

In that case, the party opposing the award had not been able to present its case before the tribunal but had not challenged the award in China, the country of origin. Kaplan J allowed the party to oppose the enforcement of the award and refused the enforcement. In the later decision of *China Nanhai v Gee Tai*¹¹⁶ on the other hand Kaplan J applied the principle of estoppel because in his view that case was “somewhat different”.¹¹⁷ The defendant there opposed enforcement of the award on the ground that the tribunal had acted without jurisdiction. The parties had agreed to arbitration in front of a CIETAC tribunal in Beijing but the award had been rendered by a CIETAC tribunal in Shenzhen. Hence, Kaplan J found that technically the Beijing tribunal did not have jurisdiction.¹¹⁸ However, the defendant had failed to raise this objection formally during the arbitration process. Kaplan J therefore ruled that the defendant was estopped from bringing this objection.¹¹⁹ This decision was influenced by the fact that in the judge’s view the defendants “got what they agreed in their contract in the sense that they got an arbitration conducted by 3 Chinese arbitrators under CIETAC rules.”¹²⁰ To establish that the principle of estoppel was enshrined in the NYC he followed a line of argument provided by Albert Jan van den Berg which suggests that the principle of estoppel is a fundamental principle of good faith.¹²¹ In this view, the principle of good faith can be read into the discretion allowed by art V of the NYC, and was in line with the “pro enforcement bias of the Convention”.¹²² For the judge the decisive difference in the case of *Paklito Investment Limited v Klockner East Asia Limited*¹²³ was that the defendants in *China*

¹¹⁴ *Paklito Investment Limited v Klockner East Asia Limited*, above n 43.

¹¹⁵ *Paklito Investment Limited v Klockner East Asia Limited*, above n 43, at 48.

¹¹⁶ *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43.

¹¹⁷ At 223.

¹¹⁸ At 222.

¹¹⁹ At 226.

¹²⁰ At 226.

¹²¹ van den Berg, above n 79, at 185; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 225.

¹²² Van den Berg, above n 79, at 185; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, above n 43, at 225 and 226.

¹²³ *Paklito Investment Limited v Klockner East Asia Limited*, above n 43.

Nanhai v Gee Thai knew from the beginning of the arbitration procedure that the tribunal did not have jurisdiction, but did not challenge it formally. In other words, in Kaplan J's view, a party is not obliged to challenge an award with a procedural flaw in the country of origin, however, if the whole arbitration procedure is invalid and one party knows this from the beginning, they have to challenge this in front of the tribunal. This approach seems slightly arbitrary and makes it very hard to predict an outcome for the opposing party.

In *Hebei Import & Export Corporation v Polytek Engineering Co Ltd*¹²⁴ the opposing party established that one of the arbitration judges had been biased and the award therefore violated the public policy of Hong Kong. The court ruled that the defendant was estopped from invoking this ground because they had failed to raise this complaint with the arbitration tribunal.¹²⁵ Sir Anthony Mason NPJ followed the assessment of Kaplan J in *China Nanhai v Gee Thai* and Albert Jan van den Berg and concluded:

Whether one describes the respondent's conduct as giving rise to an estoppel, a breach of the *bona fide* principle or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration is beside the point in this case. On any one of these bases, the respondent's conduct in failing to raise in the arbitration its objection ... was such as to justify the court of enforcement in enforcing the Award.¹²⁶

This statement supports the generally accepted notion that a party has to raise an objection as early as possible and otherwise loses its right to raise the objection entirely.¹²⁷

The German courts have also applied the principle of preclusion. In German law, preclusion can be seen as part of the principle of *venire contra factum proprium*, which is a more generally applicable principle of law.¹²⁸ For German arbitral awards, preclusion follows from § 1060 II sentence 3 of the ZPO, which stipulates that the grounds for refusal of enforcement shall be disregarded if the party opposing the award failed to apply for setting aside the award in the three months' deadline set by § 1059 III sentence 1

¹²⁴ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665.

¹²⁵ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, at 690.

¹²⁶ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, at 690.

¹²⁷ See also *Yukos Oil Co v Dardana Ltd*, above n 43, at [8].

¹²⁸ "No one may set himself in contradiction to his own previous conduct."; a German legal principle comparable with the principle of estoppel; Kühn, above n 44, at 59.

of the ZPO. In regards to the enforcement of international awards, preclusion used to be an accepted principle because the old German arbitration rules allowed applying the procedural law of the country of origin. Therefore, if the opposing party failed to bring an objection in the time set by the law of the country of origin, the German courts applied the principle of preclusion.¹²⁹ However, since a change in the German Code of Procedure in 1998, which enacted the ML, the situation on this issue is not as clear as it used to be because the relevant German provision now simply declares art V of the NYC as applicable, which does not include a principle of preclusion. There has been one decision by the BGH in particular that has created doubt about whether or not the principle of estoppel is still as prominent as before the legal change.¹³⁰ In that decision the BGH (federal supreme court) ignored the principle of estoppel, a decision that can be interpreted in two ways: either the BGH does not see estoppel as applicable anymore, or it simply did not see its requirements as fulfilled.¹³¹ Lower courts, on the other hand, have continued to apply the preclusion-principle to international awards.¹³² The parties in these cases were precluded from invoking the invalidity of the arbitration agreement¹³³ and a violation of the German public policy.¹³⁴ The courts have based the applicability of the principle of estoppel on art of the VII NYC which allows a more enforcement friendly practice by the national courts.¹³⁵ The fact that the NYC does not provide for preclusion was a gap that left the national courts with some scope for interpretation.¹³⁶ Since the principle of preclusion is clearly applicable to national awards, a further argument for its applicability to foreign awards is the harmonization of enforcement of local and foreign awards and legal certainty.¹³⁷ In cases where the preclusion is based on the fact that the

¹²⁹ Gruber, above n 44, at 284.

¹³⁰ Gruber, above n 44, at 284.

¹³¹ Gruber, above n 44, at 284.

¹³² *Zur Präklusion von Anerkennungsverweigerungsgründen im Rahmen der Vollstreckbarkeitserklärung ausländischer Schiedssprüche*, above n 82; *Zur Präklusion des Einwands fehlender Schiedsvereinbarung* [2006] SchiedsVZ 106 (OLG Hamm); OLG Karlsruhe (2012) BeckRS 09444; Gruber, above n 44, at 284.

¹³³ *Zur Präklusion des Einwands fehlender Schiedsvereinbarung* [2006] SchiedsVZ 106 (OLG Hamm), at 108.

¹³⁴ OLG Karlsruhe (2012) BeckRS 09444; OLG Karlsruhe (2006) SchiedsVZ 281.

¹³⁵ *Zur Präklusion von Anerkennungsverweigerungsgründen im Rahmen der Vollstreckbarkeitserklärung ausländischer Schiedssprüche*, above n 82, at [21].

¹³⁶ Gruber, above n 44, at 284.

¹³⁷ *Zur Präklusion von Anerkennungsverweigerungsgründen im Rahmen der Vollstreckbarkeitserklärung ausländischer Schiedssprüche*, above n 82, at [21]; Münch in Thomas Rauscher, Peter Wax and Joachim Wenzel (eds) *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (3d ed, C.H. Beck, München, 2008), at § 1061 mn 12.

opposing party had failed to object the award in the country of origin, German courts find that the application of the preclusion principle respects the primacy of the courts in the state of origin.¹³⁸ The courts give a high priority to the assessment of the local court because it is often more familiar with the law governing the arbitration procedure.¹³⁹ The rule of preclusion in Germany has one exception, which is when the opposing party was not able to or could not reasonably be expected to bring its objection in the arbitral procedures or in setting aside procedures.¹⁴⁰ In other words, a preclusion is only possible, if “the remedies available at the place of arbitration provide for an equal standard of protection as that afforded by the German provisions.”¹⁴¹ In Germany, an uncertainty about the application of the principle of preclusion to international awards remains until the BGH has taken a clear stance.

It is suggested that, if a party is precluded from applying for setting aside an award in the country of origin, it is consistent to preclude the party from opposing the award in any other country.¹⁴² Otherwise, the time-limitation on the application for setting aside the award does not have a substantial affect, as the party can still oppose the enforcement of the award. On the other hand, if a party is not precluded with the setting aside procedures in the country of origin, a preclusion in the enforcement procedures would seem unjustified.¹⁴³ It is therefore the task of the national courts to assess what the rules are for preclusion according to the national law of the country of origin and whether or not the deadline has expired. This can prove difficult, as all countries have varying provisions in this regard.¹⁴⁴

¹³⁸ *Schiedsrichterbefangenheit und ordre public im Anerkennungs- und Vollstreckungsverfahren* (2001) NJW-RR 1059 (BGH), at 1060; Gruber, above n 44, at 283; Münch in Thomas Rauscher, Peter Wax and Joachim Wenzel (eds) *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (3d ed, C.H. Beck, München, 2008), § 1061 mn 12.

¹³⁹ *Schiedsrichterbefangenheit und ordre public im Anerkennungs- und Vollstreckungsverfahren* (2001) NJW-RR 1059 (BGH), at 1060.

¹⁴⁰ *Schiedsrichterbefangenheit und ordre public im Anerkennungs- und Vollstreckungsverfahren* (2001) NJW-RR 1059 (BGH), at 1060.

¹⁴¹ Kröll, above n 44, at 526.

¹⁴² Münch in Thomas Rauscher, Peter Wax and Joachim Wenzel (eds) *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen* (3d ed, C.H. Beck, München, 2008), at § 1061 mn 13.

¹⁴³ Gruber, above n 44, at 284.

¹⁴⁴ Gruber, above n 44, at 285; *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, at 688.

The English courts, even though principally accepting the possibility of estoppel,¹⁴⁵ seem to have the opinion that a party is not obliged to challenge the award in the country of origin in order to be allowed to challenge the enforcement of the award overseas:¹⁴⁶

Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court.

There is therefore no internationally consistent approach to the question of whether or not a party is obliged to raise an objection as early as possible in order to avoid being precluded from objecting the enforcement of the award.

(b) If a court in the country of origin rejects an application to set aside an award, can the court of another country still refuse to enforce that award?

This question was addressed in *Hebei Import & Export Corporation v Polytek Engineering Co Ltd*, where the court took the position that a party that had unsuccessfully applied to set aside the award in the country of origin was not precluded from resisting the enforcement of the award:¹⁴⁷

The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced. It follows, in my view, that it would be inconsistent with the principles on which the Convention is based to hold that the refusal by a court of supervisory jurisdiction to set aside an award debars an

¹⁴⁵ *Yukos Oil Co v Dardana Ltd*, above n 43, at [8]; *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*, above n 43, at [127].

¹⁴⁶ *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*, above n 43, at [98]; see also *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529, at [104].

¹⁴⁷ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, at 688.

unsuccessful applicant from resisting enforcement of the award in the court of enforcement.

The court stated that even if this principle might be subject to limitations, it should at least apply in cases where the opposing party is invoking the violation of public policy, because the public policy of the supervisory jurisdiction might differ from the public policy of the enforcing jurisdiction.¹⁴⁸ This approach is in line with the German perception that the courts of the supervisory jurisdiction have a better insight into violations of the governing law than the enforcing courts. The German courts have ruled in several decisions that they were bound by the decision of a court of the supervisory jurisdiction on the same matter.¹⁴⁹ However, this superiority can only apply to the grounds that do not depend on the national law of the respective state. The application of this principle would mean two things for a party opposing an award that has failed in a setting aside procedure in the country of origin:

1. If it relies on one of the grounds it has to prove itself, it might be precluded from invoking this ground, if the enforcing court respects the decision of the supervisory court;¹⁵⁰
2. If it relies on the grounds the court assesses ex officio (public policy or lacking arbitrability) it will most likely not be precluded, because these grounds relate to the law of the enforcing state.

One problem this practice would cause is that the parties are left with an award that might not be enforceable in all countries while at the same time they cannot start a new arbitration procedure in the country of origin, as the award is still standing there.

- (c) If a court of the country of origin has set aside the award, can the award still be enforced in another country?

This question considers the issue whether or not an enforcing court can disregard ground (v) under art 36(1)(a) of the ML or art V(1)(e) of the NYC and enforce an award even though it has been set aside in the country of origin. The question comes back to a much broader issue, namely whether an arbitral award is based in the legal system of the country of origin (in what case an award that has been set aside would arguably cease to

¹⁴⁸ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, at 688, 689.

¹⁴⁹ Stefan Kröll “Die Entwicklung des Schiedsrechts 2009-2010 (2011) NJW, 1265, at 1270.

¹⁵⁰ For Germany see Kröll, above n 44, at 526 and 527.

exist – territorial approach)¹⁵¹ or whether an arbitral award finds its foundation in the international legal system (in which case setting aside an award would not lead to the nullity of that award – international approach). This is a vast issue that cannot be comprehensively dealt with in the scope of this paper.¹⁵² However, a few observations shall be made.

First of all, as was mentioned above,¹⁵³ it was the intention of the drafters of the ML that an award set aside in the country of origin should not be enforced in other countries.¹⁵⁴ Most countries follow this intention and respect the decision of the country of origin to set aside the award.¹⁵⁵ However, there were a small number of cases in which awards that had been set aside were enforced. This includes two cases in France,¹⁵⁶ one case in the United States of America¹⁵⁷ and, most recently, a case in the Netherlands.¹⁵⁸ In most of these cases the courts relied on art VII of the NYC.¹⁵⁹ The reason for enforcing the award even though it had been set aside was that the setting aside procedure was flawed in the view of the courts,¹⁶⁰ or the award was not contradictory to the law of the enforcing state.¹⁶¹ The French in fact have adopted this practice permanently as a matter of their national law.¹⁶² The United States' courts on the other side have not followed the

¹⁵¹ van den Berg, above n 22, at 187; Kühn, above n 44, at 56.

¹⁵² For comprehensive analysis see Emmanuel Gaillard "The Enforcement of Awards Set Aside in the Country of Origin" (1999) 14(1) ICSID Rev, 16 and van den Berg, above n 22; Sampliner, above n 61; and Robert C Bird "Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of the "New" New York Convention (2012) 37(4) NCJ Int'l L & Com Reg 1013.

¹⁵³ At II B.

¹⁵⁴ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration. Report of the Secretary-General*, above n 5, at art 34 [8].

¹⁵⁵ Van den Berg, above n 22, at 183; for Germany see Kröll, above n 44, at 551.

¹⁵⁶ *Société Pablak Ticaret Limited Sirketi v Norsolor S.A* (1984) YB Comm Arb. 1986 489 (Cour de Cassation); *Société Hilmarton Ltd v Société OTV* (1994) YB Comm Arb. 1995 663 (Cour de cassation).

¹⁵⁷ *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, above n 43.

¹⁵⁸ *Yukos Capital S.A.R.L. v. OAO Rosneft* (2009).

¹⁵⁹ Pieter Sanders *The Work of UNCITRAL on Arbitration and Conciliation* (2ed) (Kluwer Law International, The Hague, 2004), at 179.

¹⁶⁰ Van den Berg, above n 22, at 187; Christopher Koch "The Enforcement of Awards Annulled in their Place of Origin. The French and U.S. Experience" (2009) 26(2) 267, at 277.

¹⁶¹ Christopher Koch "The Enforcement of Awards Annulled in their Place of Origin. The French and U.S. Experience" (2009) 26(2) 267, at 277.

¹⁶² The French arbitration law does not include the setting aside of an award as a reason to refuse enforcement and the French courts are strong advocates of the "international approach".

Chromalloy decision and now only disregard a foreign annulment decision if it fundamentally violates the United States' public policy.¹⁶³

There are several arguments relevant to this discourse that have been summarised in the Secretariat's suggestion for further research into this issue.¹⁶⁴ One problem that the French practice poses is the possibility of forum shopping.¹⁶⁵ In the words of Albert Jan van den Berg: "If an award is set aside in the country of origin, a party can still try its luck in France."¹⁶⁶ The enforcement of awards that were set aside causes the surreal situation where the award can be enforced abroad but not in the country of origin. This is particularly troublesome if the award is simultaneously being retried in the country of origin.¹⁶⁷ Furthermore, divergence between the practice of the French courts and most other courts contradicts the purpose of the NYC and the ML to unify the enforcement of arbitration awards. On the other hand, it seems justified not to accept an annulment decision if it is substantially flawed, which has led some authors to advocate that the enforcement should only be refused if the grounds for annulment are internationally recognized.¹⁶⁸

(d) Application in relation to the different grounds

Another interesting question concerning preclusion is the scope of its application in relation to the grounds, which relates to some of the issues already mentioned. In Germany the preclusion with regards to national awards is only applicable to the grounds equivalent to art 36 (1)(a) of the ML, so only the ones that have to be proven by the party invoking them and which are based on the law governing the arbitration, rather than the law of the enforcing state.¹⁶⁹ The grounds that are assessed by the courts ex officio on the other hand are not subject to preclusion. It has been suggested that this should apply equally to foreign awards because these grounds protected the public interest for which it should be irrelevant whether or not the party has failed to challenge the award in the

¹⁶³ Christopher Koch "The Enforcement of Awards Annulled in their Place of Origin. The French and U.S. Experience" (2009) 26(2) 267, at 267.

¹⁶⁴ Secretary-General International Commercial Arbitration. Possible future work in the area of international commercial arbitration (A/CN.9/460, at [136] – [143].

¹⁶⁵ Secretary-General International Commercial Arbitration. Possible future work in the area of international commercial arbitration (A/CN.9/460) at [140].

¹⁶⁶ Yearbook of Commercial Arbitration 1994 Volume XIX at 592.

¹⁶⁷ Van den Berg, above n 22, at 188.

¹⁶⁸ Jan Paulsson "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA) (1998) 9(1) The ICC International Court of Arbitration Bulletin 14 at 14.

¹⁶⁹ § 1060 II sentence 3 ZPO.

country of origin.¹⁷⁰ This suggestion seems valid because the grounds that concern violations of the law of the enforcing state cannot be invoked as such in the country of origin, so that a party should not be estopped from relying on these grounds. However, as mentioned above, the OLG Karlsruhe has in two cases ruled parties to be precluded from invoking the public policy ground. In relation to the arbitration agreement German courts apply estoppel where an agreement is invalid but not where no agreement exists whatsoever.¹⁷¹ Courts of other nations have indicated further circumstances under which it is unlikely that a court would apply the principle of estoppel. In *Hebei Import & Export Corporation v Polytek Engineering Co Ltd*¹⁷² it was stated that it was unlikely that a court would enforce an award when it was contrary to the public policy of the state.¹⁷³ In *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* Lord Mance indicated that he would be reluctant to enforce an award in cases where there was no valid arbitration agreement, which is in line with Moore-Bick LJ's opinion in the lower court.¹⁷⁴

In my view, however, if the person opposing recognition or enforcement of an award can prove that he was not a party to the relevant arbitration agreement, it will rarely, if ever, be right to recognise or enforce it solely on the grounds that he has failed to take steps to challenge it before the supervisory court. That would be contrary to the policy of the Convention.

However, Lord Mance also indicated that estoppel could be an exception to this.¹⁷⁵

(e) Conclusion

In summary the principle of estoppel is an internationally accepted principle that is applied by most courts. It is used to enforce the general principle of good faith, to prevent parties from unnecessarily prolonging the proceedings and to respect the superiority of the courts in the country of origin. The courts find it appropriate to apply this international principle when asked to refuse the enforcement of a foreign award, even

¹⁷⁰ Gruber, above n 44, at 285.

¹⁷¹ Kühn, above n 44, at 59.

¹⁷² *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665.

¹⁷³ *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665 at 690.

¹⁷⁴ *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755 at [61].

¹⁷⁵ *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*, above n 43, at [68].

though it is not explicitly included in the NYC and the ML. It is either included in the exercise of discretion or seen as allowed by art VII of the NYC.

It is suggested that applying estoppel is in line with the object of the ML to facilitate the enforcement of arbitral awards and reflects the fact that the arbitration process is based on the agreement of the parties to take part actively in arbitration.¹⁷⁶ Estoppel facilitates the efficiency and speed of arbitral proceedings, which is one of the main reasons parties choose arbitration.¹⁷⁷ Estoppel also supports the integrity of the arbitration system, as it demands that a party raises an issue before the tribunal if possible. The parties have chosen the arbitration tribunal as the forum for the resolution of their dispute. It seems consistent to oblige them to raise all issues before the arbitration tribunal and not wait until the dispute appears before the court, otherwise it would be possible for a party to withhold an objection during the arbitration and wait until a court proceeding. This course of action would rob the other party of the opportunity to submit on the objection in front of the forum the parties agreed upon.

However, the above analysis shows that the principle of estoppel is by no means applied consistently. The German courts seem to be the strongest advocates of its applicability, while the English courts seem more reluctant to preclude a party from relying on a ground. In Hong Kong the courts don't seem to have agreed on a consistent approach yet. Because of the inconsistency, it would be favourable to develop a common practice concerning its application. The most transparent situation would arise if all courts agreed that a party is precluded from objecting to enforcement if it has failed to apply for setting aside the award in the country of origin within the provided deadline even though it could reasonably be expected to do so.¹⁷⁸ The preclusion should only apply to the grounds that do not depend on the law of the enforcing state.

Because of the current unpredictability it is advisable for parties to an arbitration to raise an objection as early in the procedure as possible. This should be done before the arbitration tribunal, or at the latest as part of an application to set aside the award in the country of origin. This will give the parties the security not to be precluded from raising

¹⁷⁶ Gary B Born *International Commercial Arbitration Volume II* (Kluwer Law International, Alphen Aan Den Rijn, 2009) at 596, 597, 1008 and 1009.

¹⁷⁷ Gruber, above n 44, at 285; *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665 at 688.

¹⁷⁸ Gruber, above n 44, at 284.

these objections during the enforcement procedures and is a reasonable step to take as it does not unreasonably burden a party that seriously doubts the validity of the procedure.

2 *Materiality and causation*

(a) Introduction

The second principle that is applied by courts in setting aside and enforcement procedures is the principle of materiality or causation. Under this principle a defect of the award only justifies the setting aside or the refusal of its enforcement if the defect affected the outcome of the arbitration and was therefore “material” or a causal factor in the award. The secretariat’s suggestions to include such a qualification were not adopted in the provisions of the ML. The Commission concluded on art 34 ML: “an award may be set aside on any of the grounds listed in paragraph (2) irrespective of whether such ground had materially affected the award.”¹⁷⁹ However, this does not exclude the possibility for a court to take causation and materiality into consideration as part of their discretion or in interpreting the grounds.¹⁸⁰ Some national arbitration laws include a requirement of materiality. One example is s 68 of the 1996 Arbitration Act of England that requires a “serious irregularity” to challenge an award.¹⁸¹ Serious irregularity is defined as “an irregularity ...which the court considers has caused or will cause substantial injustice to the applicant”.¹⁸² Again, this provision is only applicable to national awards as it regulates the setting aside procedure. No such requirement is included in s 103 concerning the refusal of enforcement of international awards. In the German provision on the setting aside of awards materiality is a requirement for a violation of the composition of the arbitral tribunal or the arbitral procedure.¹⁸³

(b) The case law

Several courts have considered the gravity of the defect and the extent to which it influenced the arbitration tribunal in their decisions.¹⁸⁴ In line with the previous analysis, some courts see materiality as an integral part of establishing one of the grounds, while others see it as party of their residual discretion. Sometimes the courts discuss the quality

¹⁷⁹ *Commission Report A/40/17* (1985) at [303].

¹⁸⁰ Holtzmann and Neuhaus, above n 3, at 922.

¹⁸¹ Arbitration Act 1996 (UK), s 68 (1).

¹⁸² Arbitration Act 1996 (UK), s 68 (2).

¹⁸³ § 1059 (2) Nr.1d) ZPO.

¹⁸⁴ *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, above n 32, at 150; for a list of NZ cases see Williams and Kawharu, above n 13, at 469.

a violation must have in order to fulfil the ground and sometimes they discuss whether the violation influenced the outcome of the award. These are two different approaches to the same general principle. Materiality has been applied most often in cases where the opposing party alleged not to have been able to present its case or a violation of public policy.

In Hong Kong there has been a number of cases that dealt with the issue of materiality,¹⁸⁵ starting with *Paklito Investment Limited v Klockner East Asia Limited*¹⁸⁶ where Kaplan J accepted the general possibility that a court might enforce an award despite a relevant ground proven “if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute.”¹⁸⁷ In the most recent case, *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)* the judges considered these cases as a line of precedent that allows the consideration of materiality as part of the discretion when enforcing or setting aside awards.¹⁸⁸ The result of this precedent is that before Hong Kong courts an award will only be set aside or not enforced if the opposing party can show that “the result will not remain the same if the violation had not occurred.”¹⁸⁹ Saunders J described the test that the court has to apply as follows:¹⁹⁰

In order to determine the answer to the proposition required to be put by the losing party as described above, the court must ask itself this question: Is the court able to say that it can exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different?

The room for disregarding a ground is therefore narrow: only if the court can exclude the possibility that the decision would have been different if it wasn't for the violation will the court uphold the award.¹⁹¹ In only one of the reviewed cases the court disregarded one

¹⁸⁵ *Paklito Investment Limited v Klockner East Asia Limited*, above n 43; *Apex Tech Investment Ltd v Chuang's Development (China) Lt*, above 43; *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another*, above n 43; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)* [2011] 4 HKLRD 188; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No1)*, above n 43.

¹⁸⁶ *Paklito Investment Limited v Klockner East Asia Limited*, above n 43.

¹⁸⁷ At 49.

¹⁸⁸ *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)*, above n 185, at [71]-[102]; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No1)*, above n 43, at [83]-[107].

¹⁸⁹ At [102] and [106].

¹⁹⁰ At [90].

¹⁹¹ *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)*, above n 185, at [91].

of the grounds, which was in *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another*.¹⁹² In this case the opposing party alleged that it had not been able to present its case. However, the tribunal had based its decision on several factors, so that the judge decided the procedural mistake was not material to the outcome of the award and upheld the tribunal's decision in that regard.¹⁹³ In the other reviewed Hong Kong cases the courts have been careful in applying the principle of materiality and decided that they could not rule out the possibility that the outcome of the arbitration might have been different if the violation had not occurred.

In Germany the concept of materiality is applied consistently. It is seen as an integral part of establishing any of the grounds under art V NYC.¹⁹⁴ This principle has existed for a long time¹⁹⁵ and has been confirmed in recent decisions. In these decisions parties were not able to rely on the ground that they had not been able to present their case and on a violation of public policy because the award was not based on these violations.¹⁹⁶

New Zealand courts likewise generally take the magnitude and consequence of procedural defects into consideration¹⁹⁷ and the New Zealand Law Commission stated that "[t]he matters upon which an award may be challenged under article 34 [of the Arbitration Act 1996 (NZ)] must be taken to be fundamental to the procedure which [sch 1] establishes."¹⁹⁸ Similarly, Dobson J stated in *Todd Petroleum Mining Company Limited v Shell (Petroleum Mining) Company Limited*:¹⁹⁹

[w]here it can be demonstrated, that an argument, although tenable, is very unlikely to produce any materially different outcome on a re-argument, then that is a legitimate factor against granting relief.

In applying that principle to the case at hand he stated that:²⁰⁰

¹⁹² *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another*, above n 43.

¹⁹³ At [40].

¹⁹⁴ Kühn, above n 44, at 57.

¹⁹⁵ *Anhörungspflicht des Schiedsgerichts* (1959) BGHZ 31, 43.

¹⁹⁶ OLG Karlsruhe (2009) BeckRS 2011, 08009; OLG Celle (2004) BeckRS 2004, 18356; and OLG Hamm (1999) 17 SchH 05/99.

¹⁹⁷ Williams and Kawharu, above n 13, at 469.

¹⁹⁸ As cited in Williams and Kawharu, above n 13, at 467.

¹⁹⁹ *Todd Petroleum Mining Company Limited v Shell (Petroleum Mining) Company Limited* CIV-2008-485-2816, at [80].

²⁰⁰ At [80].

It is sufficient for present purposes to find, as I do, that the arguments on which the arbitrator did not hear from the parties had a realistic prospect of influencing the outcome in this important matter. I certainly cannot dismiss them as less than tenable and that is sufficient to make their omission material to the breaches of natural justice involved.

(c) Conclusion

The principle of materiality seems to be applied more consistently than the principle of estoppel. This might be the case because it does not pose as extensive questions as estoppel. The case analysis shows that German courts apply the principle more sweepingly than Hong Kong and New Zealand courts, the latter using a very narrow definition of materiality. While in Germany a ground is already disregarded when the decision was not based on the violation, in Hong Kong the court must be sure beyond doubt that the decision would not have been different if the violation had not occurred. The New Zealand approach requires that the violation has a realistic prospect of influencing the outcome, which seems closer to the Hong Kong approach. While the German approach is more enforcement friendly, the Hong Kong and New Zealand approach give a stronger effect to the grounds of the ML and the NYC.

C Different Approach to Foreign and Local Awards

Both materiality and estoppel are applied to foreign as well as local awards. The courts show a slightly different approach when asked to refuse the enforcement of a foreign award. This is because it is harder for courts to assess whether there has been a procedural violation in a foreign jurisdiction than in their own.²⁰¹ Litton PJ even used a stricter approach for foreign awards in regards to a public policy violation of the enforcing state.²⁰²

In my view, there must be compelling reasons before enforcement of a Convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgment or award.

²⁰¹ Blackaby, above n 23, at 626.

²⁰² *Hebei Import & Export Corp v Polytek Engineering Corp Ltd*, above n 60, at 674 and 675 per Bokhary PJ.

In his view the test is the following:²⁰³

In my judgment, the position is as follows. Before a convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.

D Limits

Lastly it shall be assessed what the limits to disregarding the grounds are. In England it is established that the discretion to enforce an award despite a ground proven is a limited discretion that is only to be exercised in exceptional circumstances. This approach was developed by Mance LJ in *Yukos Oil Co v Dardana Ltd*.²⁰⁴

Section 103(2) cannot introduce an open discretion. The use of the word 'may' must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel.

He continued:²⁰⁵

The word 'may' at the start of s 103(2) does not have the 'permissive', purely discretionary, or I would say arbitrary, force that the submission suggested. Section 103(2) is designed ... to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s 103(2).

With these words Lord Mance set a limit to the discretion in that only "recognisable legal principles" can be applied. This approach was confirmed in *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*.²⁰⁶ In this case Lord Mance stated that there was no room to enforce an arbitral award which was rendered without an arbitration agreement.²⁰⁷ He agreed with Rix LJ's opinion in the

²⁰³ *Hebei Import & Export Corp v Polytek Engineering Corp Ltd*, above n 60, at 676.

²⁰⁴ *Yukos Oil Co v Dardana Ltd*, above n 43, at [8] as per Mance LJ

²⁰⁵ At [18].

²⁰⁶ *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*, above n 43, at [67], [127].

²⁰⁷ At [68].

lower court, that a valid arbitration agreement is so fundamental that the court cannot exercise its discretion in favour of enforcement of the award.²⁰⁸

It goes without saying that, if there is such a discretion, its positive use in this case to enforce an award when ex hypothesi the Government of Pakistan had never been a party to the agreement, would be an immensely strong, not to say unjust, exercise of it. The whole basis of arbitration is that, as a means of deciding disputes, it is founded on consent.

Similarly, as mentioned above, German courts apply estoppel where an agreement was invalid but not where no agreement existed whatsoever.²⁰⁹

Looking at the different grounds listed in arts 34, 36 ML and art V NYC, courts apply materiality and estoppel to almost all of them. Even if the arbitral tribunal had had no jurisdiction because the arbitration agreement was invalid or the parties had agreed to a different arbitration tribunal courts have enforced the award. For estoppel the only limit that has been accepted by most courts (but not by all, see above)²¹⁰ is the enforcement of awards that have been set aside in supervisory jurisdiction. Furthermore there has yet been no case in which an award that contained aspects that are non-arbitrable was enforced. Regarding materiality the applicability is limited by its nature. It is for example unthinkable how an invalid arbitration agreement could not be material for the outcome of the proceedings. The principle of materiality is most relevant in cases where the opposing party was not able to present its case or in cases of a violation of public policy. In a case like *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another* it is imaginable that the wrong composition of the arbitral tribunal is not material if the court is convinced that the correct arbitral tribunal would have come to the same decision. However, all of these observations vary from state to state.

Lastly, it should be mentioned that it is common ground that the court's discretion may never lead to a review of the merits of the case, meaning that the court may not make an evaluation of the arbitration tribunal's findings.²¹¹ On the one hand this is because the

²⁰⁸ *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755, at [74].

²⁰⁹ Kühn, above n 44, at 59.

²¹⁰ At VB1(c).

²¹¹ *Apex Tech Investment Ltd v Chuang's Development (China) Lt*, above 43, at 158; *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd and Another*, above n 43, at [69]; *Grand Pacific Holdings (I)* at [54]; *Williams and Kawharu*, above n 13, at 470, 559; *van den Berg*, above n 79,

exhaustive list of grounds is limited to procedural mistakes.²¹² On the other hand, a review of the merits of the case would contradict the agreement of the parties to submit their dispute to arbitration and undermine the tribunal's authority.

VI Conclusion

In conclusion the history, wording and purpose of the ML and the NYC are neither clearly in favour nor clearly opposed to a discretion allowed by the use of the word "may" in the relevant provisions. An analysis of the case law shows that all but the German courts accept discretion. However, the case law analysis also shows that German courts do include the same principles that other courts include as part of their discretion as integral parts of proving one of the grounds. As has been shown above this distinction is not limited to the German courts but has been considered by other courts as well.²¹³ It is therefore proposed that the real question in this discourse is not whether the word "may" allows discretion or not, but under what circumstances courts enforce awards even though one of the grounds is proven. It is likely that even if the provisions did not use the word "may" many courts would take estoppel and materiality into account as integral part of the ground. It is therefore suggested that the whole issue does not depend as much on the ambiguity of the wording of the provisions as might have been the impression.

Turning to the circumstances that courts rely on when disregarding one of the grounds, materiality and estoppel are the two recognised principles. Their exact application however varies from country to country. This diversity confirms the concerns of the opponents of discretion that the ML's and NYC's purpose of harmonising the enforcement of arbitral awards is disrupted. However, the consensus of the courts of several countries regarding the application of materiality and estoppel shows that these principles are enshrined in most legal systems and are therefore fundamental legal principles. The pure reason of harmonisation does not justify their non-applicability in enforcement and setting aside procedures for arbitration awards. These principles have developed over a long time and represent common consensus on certain rules of procedure and causality. The application of these principles facilitates the enforcement of arbitration awards which is in line with the purpose of the Convention and the ML. The

at 269; Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999), at 983; Blackaby, above n 23, at 638; for more case law see *UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration*, above n 32, at 140.

²¹² Van den Berg, above n 79, at 269.

²¹³ At IV E.

interest in harmonisation cannot justify the annulment and refusal of enforcement of awards that suffer from mistakes that, according to globally accepted legal standards, are not relevant. The courts show the necessary prudence in the application of these principles to prevent an excess of court intervention in arbitral awards.²¹⁴ A rigid application of the grounds listed in the provision would not provide for the adequate consideration of individual circumstances of the case. The discretion gives the courts the opportunity to apply general principles of law which will justify the enforcement or recognition or not to set aside an award even though one of the grounds is proven. Complete uniformity must stand back in the interest of fair and just outcomes.²¹⁵ However, the diversity in approaches does pose the problem of unpredictability for the opposing party and the possibility of forum shopping. It would therefore be favourable if the ML included provisions on materiality and estoppel in order to facilitate an internationally harmonised approach.

²¹⁴ Van den Berg, above n 22, at 186.

²¹⁵ Williams and Kawharu, above n 13, at 469.

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