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**DISSERTATION**

**WHETHER DOES THE NEW YORK CONVENTION 1958 STILL FIT  
FOR THE PURPOSE IN THE UK AND PAKISTAN?**

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## ABBREVIATIONS

Act 1937	The Arbitration (Protocol and Convention) Act 1937
Act 1940	The Arbitration Act of 1940
Act 1950	The Arbitration Act of 1950
Act 1975	The Arbitration Act of 1975
Act 1996	The Arbitration Act of 1996
Act 2011	The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011
Geneva Protocol	Geneva Protocol on Arbitration Clauses of 1923
Geneva Convention	Geneva Convention on the Execution of Foreign Awards of 1927
ICC	International Chamber of Commerce
Model Law	UNCITRAL Model law on International Commercial Arbitration 1985
New York Convention	The Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958
Ordinance 2005	The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005
UK	The United Kingdom
UN	The United Nations

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# CHAPTER – I:

## INTRODUCTION

### A. BACKGROUND

International commercial arbitration is an increasingly popular method of resolving commercial disputes between traders from different countries.<sup>1</sup> The efforts to develop international commercial arbitration law were started at the beginning of the twentieth century. In start, it was heavily relied on domestic arbitration laws of the countries which considerably differed from each other.<sup>2</sup> These dissimilarities were insufficient for the purpose of the international commercial arbitration. The main problem was the non-enforceability of arbitral clauses referring future disputes to arbitration.<sup>3</sup> After the World War I, the efforts to develop and harmonise the international commercial arbitration law was taken over by the United Nations (UN) in framework of the League of Nations, and negotiated a multilateral convention as the '*Geneva Protocol on Arbitration Clauses of 1923 (Geneva Protocol)*'<sup>4</sup> aiming to provide unified set of rules to validate arbitration agreements and to enforce commercial arbitral clauses among the contracting states.<sup>5</sup> Article I of the Geneva Protocol deals with validation of arbitration agreements whether relating to existing or future commercial disputes.<sup>6</sup> After resolving the issue of validity of arbitration agreements under the Geneva Protocol, it was necessary to build confidence

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<sup>1</sup> Richard Garnett, International Arbitration Law: progress Towards Harmonisation (Melbourne Journal of International Law, Vol. 3, Issue 2, October 2002), pp. 400-413.

<sup>2</sup> United Nations Conference on Trade and Development, Recognition and Enforcement of Arbitral Awards: The New York Convention (United Nations, 2003) < [https://unctad.org/en/Docs/edmmisc232add37\\_en.pdf](https://unctad.org/en/Docs/edmmisc232add37_en.pdf) > accessed 10 July 2019.

<sup>3</sup> Ibid.

<sup>4</sup> Geneva Protocol on Arbitration Clauses of 1923 published in 27 League of Nations Treaty Series (1924), P 158.

<sup>5</sup> Allan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, London 2004), p. I-145.

<sup>6</sup> Geneva Protocol on Arbitration Clauses of 1923, Art. 1.

among parties regarding recognition and enforcement of arbitration awards in foreign countries where assets of the award debtor are located.<sup>7</sup> To govern the enforcement of foreign arbitral awards based on valid arbitration agreements under the Geneva Protocol, the UN under the auspices of the League of Nations, developed a new convention as the '*Geneva Convention on the Execution of Foreign Awards of 1927 (Geneva Convention)*'.<sup>8</sup> Although, both Geneva treaties made significant contribution towards unification but failed to meet the standards of international commercial community.<sup>9</sup> Therefore, immediately after the World War II, the International Chamber of Commerce (ICC) by incorporating the ideas of the earlier Geneva treaties, formulated a notable legal framework as the '*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*', commonly known as the *New York Convention*,<sup>10</sup> calling upon its contracting states to recognise commercial arbitration agreements and to enforce commercial arbitral awards. It was finally adopted by the UN in New York on 10 June 1958.<sup>11</sup> Furthermore, on 11 December 1985, the UN Commission on international trade law, after deliberation and extensive consultation with arbitral institutions, adopted another convention as the '*UNCITRAL Model Law on International Commercial Arbitration (Model Law)*'<sup>12</sup> aiming to assist the contracting states in reforming and modernising their domestic laws on arbitration procedures.<sup>13</sup> The Model Law provides a unified legal framework for fair and

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<sup>7</sup> Allan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, London 2004), p. I-147.

<sup>8</sup> Geneva Convention on the Execution of Foreign Awards of 1927 published in 92 League of Nations Treaty Series (1929-1930), p 302.

<sup>9</sup> United Nations Conference on Trade and Development, *Recognition and Enforcement of Arbitral Awards: The New York Convention* (United Nations, 2003) <[https://unctad.org/en/Docs/edmmisc232add37\\_en.pdf](https://unctad.org/en/Docs/edmmisc232add37_en.pdf)> accessed 10 July 2019.

<sup>10</sup> New York Convention, published in 330 United Nations Treaty Series No. 4739 (1959), p 38.

<sup>11</sup> Allan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, London 2004), p I-146.

<sup>12</sup> UNCITRAL Model Law on International Commercial Arbitration, published in United Nations Publication, Sales No. E. 77, V. 6.

<sup>13</sup> UNCITRAL Model Law on International Commercial Arbitration (United Nations, June 1985) <[https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf)> accessed 21 June 2019.

efficient settlement of disputes arising in international commercial relations.<sup>14</sup> Therefore, the success of international arbitration has largely attributed to the global enforcement regimes under the New York Convention.<sup>15</sup>

In earlier Geneva treaties, the entire focus was on validation of arbitration agreements whilst, the New York Convention addressed both elements from validation of arbitration agreements to recognition and enforcement of foreign arbitral awards in the contracting states.<sup>16</sup> Its most significant function was to provide universal enforceability and recognition of foreign arbitral awards.<sup>17</sup> The principal aim was to ensure the parties that foreign or non-domestic arbitral awards are generally capable of enforcement in their jurisdictions in the same way as the domestic awards.<sup>18</sup> Though, the text of the New York Convention is only a few pages long, but it contains seven essential provisions from Article I to Article VII. The remaining provisions have no relevancy in its self-executing status.<sup>19</sup> The provisions of the New York Convention established binding uniform international standards for courts in the contracting states to recognise arbitral agreements and to refuse recognition and enforcement of foreign arbitral awards.<sup>20</sup> Article I of the New York Convention provides two criteria in recognition and enforcement proceedings for determining whether the award is foreign; one the award is made in another contracting

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<sup>14</sup> Ibid.

<sup>15</sup> Mathew H. Kirtland, Katie Connolly and Jacob Smit, A Comparison of the Enforcement Regimes under the New York and Washington Conventions – A Tale of Two Cities (Norton Rose Fulbright, International Arbitration Report, Issue 10, May 2018).

<sup>16</sup> Gary B. Born, The New York Convention: A Self-Executing Treaty (Michigan Journal of International Law, Vol. 40, Issue 1, 2018), pp. 115-187.

<sup>17</sup> Ibid.

<sup>18</sup> United Nations Commission on International Trade Law: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations, 2015) <<https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>> accessed 19 June 2019.

<sup>19</sup> Christopher R. Drahozal, The New York Convention and the American Federal System, The Symposium (Journal of Dispute Resolution, Vol. 7, Issue 1, 2012), pp. 101-118.

<sup>20</sup> Gary B. Born, The New York Convention: A Self-Executing Treaty (Michigan Journal of International Law, Vol. 40, Issue 1, 2018), pp. 115-187.

state and secondly, the national courts in the contracting states consider the award as non-domestic award.<sup>21</sup> Whilst, Article II deals with enforcement of arbitration agreements as well as sets out the maximum requirements for valid arbitration agreements.<sup>22</sup> Article V sets forth the comprehensive refusal grounds for courts in the contracting states upon which the courts may, at the request of the party against whom it is invoked, refuse recognition and enforcement of foreign arbitral awards as well as two additional grounds upon which the courts may, on its own motion, refuse recognition and enforcement of foreign arbitral awards.<sup>23</sup> Although, the grounds for refusing enforcement provided in Article 36 of Chapter VIII of the Model Law, are identical to the refusal grounds laid down in Article V of the New York Convention, but these grounds are not relevant to foreign arbitral awards.<sup>24</sup> Alternatively, pursuant to Article VII, a party to enforcement proceedings before a national court in the contracting states, can rely on its national laws or any other treaty related to recognition and enforcement of foreign arbitral awards, for the time being in force, instead of the New York Convention, in order to seek enforcement of a foreign arbitral award or an arbitration agreement, if the New York Convention is less favorable.<sup>25</sup> Therefore, the New York Convention has succeeded to provide the unified set of rules but its scope of application is left open to national courts in the contracting states which are influenced by their culture, social and legal backgrounds.<sup>26</sup> Courts in the contracting states have discretionary powers while adjudicating the matters regarding recognition and enforcement of non-domestic or foreign arbitral awards, which means the

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<sup>21</sup> New York Convention, Art. I.

<sup>22</sup> New York Convention, Art. II.

<sup>23</sup> United Nations Commission on International Trade Law: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations, 2015) <<https://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/New-York-Convention-E.pdf>> accessed 19 June 2019.

<sup>24</sup> Model Law, Ch. VIII, Art. 36.

<sup>25</sup> Albert Jan van den Berg, The New York Arbitration Convention of 1958: Refusals of Enforcement (ICC International Court of Arbitration Bulletin, Vol. 18, No. 2, 2007).

<sup>26</sup> Ibid.

enforcing courts may still recognise and enforce a foreign arbitral award even if a ground under Article V of the New York Convention is established.<sup>27</sup> Alternatively, Article VII gave privilege to parties to the enforcement proceedings to choose different regimes, aiming to enhance the equality between foreign and domestic awards. The wording of the provision is used precisely to avoid interferences between these different regimes.<sup>28</sup>

In the entire history of commercial arbitration, the New York Convention was completely an innovative instrument which provides comprehensive legal regime for the international arbitral process.<sup>29</sup> It has now facilitated remarkable growth and success of international arbitration over the past 60 years. As of today, it has been ratified by 159 countries including the United Kingdom (UK) and Pakistan whilst, Pakistan is one of the initial signatories of it.<sup>30</sup> The New York Convention provided foundation for most national legislations governing the international arbitral process to give effect.<sup>31</sup> Originally, the UK acceded the New York Convention through the *Arbitration Act 1975 (Act 1975)*. Thereafter, the Parliament of England and Wales, extended the territorial jurisdiction by giving full effect to the New York Convention through Sections 100 to 104 of the *Arbitration Act 1996 (Act 1996)*.<sup>32</sup> The Act 1996 provides a robust set of powers for recognition and enforcement of foreign arbitral awards under the New York Convention.

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<sup>27</sup> Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010).

<sup>28</sup> Paul Lefebvre and Dirk De Meulemeester, *The New York Convention: An Autopsy of its Structure and Modus Operandi* (Journal of International Arbitration, Vol. 35, Issue 4, 2018), pp. 413-438.

<sup>29</sup> J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal* (The American Review of International Arbitration, Vol. 1, Issue 1, March 1990), pp. 91-107.

<sup>30</sup> Gary B. Born, *The New York Convention: A Self-Executing Treaty* (Michigan Journal of International Law, Vol. 40, Issue 1, 2018), pp. 115-187.

<sup>31</sup> Gary B. Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd edn, 2014), p. 1535.

<sup>32</sup> Charlie Lightfoot and James Woolrich, *Guide to Enforcement of Foreign Arbitral Awards and Court Judgements in England and Wales* (Practice Series, 2017) <<https://jenner.com/system/assets/assets/10464/original/UK%20Guide.pdf>> accessed 10 June 2019.



It gave effect to the parties' agreement as well as reduce the control of the domestic laws.<sup>33</sup> On the other hand, Pakistan rectified the New York Convention on 12 October 2005, through the enactment of the *Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 (Ordinance 2005)*.<sup>34</sup> According to the Ordinance 2005, the awards made in any other contracting states were enforceable in the same manner as a judgement or order of a court in Pakistan.<sup>35</sup> The Ordinance 2005 was re-promulgated in the years 2006, 2007, 2009 and 2010, until it was finally enacted in 2011 as the *Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (Act 2011)*.<sup>36</sup> In doing so, the Act 2011 limited the judicial discretions of courts in Pakistan and repealed the *Arbitration (Protocol and Convention) Act 1937 (Act 1937)*.<sup>37</sup> The purpose of the Act 2011 was to adopt the New York Convention by recognising and enforcing foreign arbitration agreements and foreign arbitral awards.<sup>38</sup>

## **B. AIM AND OBJECTIVES OF THE STUDY**

The purpose of this paper is to analyse whether the New York Convention, as it is now, is fit for today's international commercial arbitration in the United Kingdom and Pakistan? If it is shown that the New York Convention has failed to reach the international standards,

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<sup>33</sup> Thomas E. Carbonneau, A Comment on the 1996 United Kingdom Arbitration Act (Tulane Maritime Law Journal, Vol. 22, 1998), p. 136.

<sup>34</sup> Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 (Ordinance No. VIII of 2005) published in the Gazette of Pakistan, Extraordinary, 14 July 2005, Part I, p. 645.

<sup>35</sup> Ibid.

<sup>36</sup> Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (Act No. XVII of 2011), published in the Gazette of Pakistan, Extraordinary, 19 July 2011, Part I, p. 373.

<sup>37</sup> Hassan Raza, Pakistan's dilemma with Foreign Arbitrations (Kluwer Arbitration Blog, 24 April 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/04/24/pakistans-dilemma-foreign-arbitrations/>> accessed 29 July 2019; Act 1937, published in Gazette of India, 1937, Part I, p. 1945.

<sup>38</sup> Ibid.

what needs to be revised in its structure as well as what are possible learnings from both the jurisdictions? In order to approach the question, earlier research papers such as articles, journals, books etc, are reviewed as well as considered the case laws related to enforcement of foreign arbitral awards from both jurisdictions. The dissertation consists of five chapters. Chapter One deals with historical development of international commercial arbitration laws. The scope includes the development of enforcement of arbitration agreements and arbitral awards under the New York Convention as well as the legal framework available in the UK and Pakistan for the matters ancillary thereto. Chapter Two discusses first obligation imposed by Article II of the New York Convention requiring courts in the contracting states to give effect to valid agreements to arbitrate. Chapter Three discusses second obligation imposed by Article V of the New York Convention on the contracting states to recognise and enforce foreign arbitral awards. Chapter Four provides the application of national laws or other treaties related to enforcement of foreign arbitral awards in order to enforce foreign arbitral awards by courts in the contracting states. The scope of Chapters Two to Four also include comparison of interpretations by both jurisdictions. Fifth Chapter provides the comparative summary of dissimilarity in interpretation of the New York Convention in both jurisdictions and by suggestion of the most convenient solution, which, in my opinion is amendment of the New York Convention and enactment of new procedural rules for national courts in the contracting states. In doing so, the UK is already flexible towards arbitration and the Act 1996 had given full effect to the New York Convention. On the other hand, although Pakistan has enacted the Act 2011 by giving effect to the New York Convention but the courts are inconsistent and failed to remove its judicial intervention. In the last, Conclusion provides summary of whole dissertation.

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## **CHAPTER – II:**

### **VALIDITY OF ARBITRATION AGREEMENTS**

Article II of the New York Convention governs the recognition and enforcement of arbitration agreements. It gives authority to national courts in the contracting states to recognise an agreement in writing and to enforce it by referring the parties to the arbitration subject to fulfil certain conditions. Initially, the scope of the New York Convention was limited to the recognition and enforcement of foreign arbitral awards, excluding arbitration agreements.<sup>39</sup> The drafters just three weeks before the adoption of the New York Convention, decided to include the provision on recognition and enforcement of arbitration agreements.<sup>40</sup> By that time, most of other provisions of the New York Convention were already adopted which were modified to reflect this change. That's why, the recognition and enforcement of arbitration agreements is not mentioned in the title or any other provision of the New York Convention including Articles I and VII.<sup>41</sup> For instance, sub-Article 1 of Article I of the New York Convention applies to all foreign awards or non-domestic awards but not to arbitration agreements, and reservations provided in sub-Article 3 of Article I further narrows the scope of its application. The commercial reservation applies to differences arising out of legal relationships whereas, the reciprocity reservation narrows the scope of application in which a contracting state only accepts arbitral awards made in another contracting state.<sup>42</sup> The drafters at the time of adoption of the New York Convention, rejected the proposal of Israel which was later on amended by the Italy, to introduce a general clause enabling the contracting states not

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<sup>39</sup> Travaux Préparatoires, Report of the Committee on the Enforcement of International Arbitral Awards (E/2704, E/AC. 42/4/Rev. 1), p. 6, Paras. 18-19.

<sup>40</sup> Travaux Préparatoires, United Nations Conference on International Commercial Arbitration (Summary Records of the Twenty-First Meeting, E/CONF. 26/SR.21), p. 17.

<sup>41</sup> Ibid.

<sup>42</sup> Reinmar Wolff, Commentary on Article II in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Commentary 85, R. Wolff edn, 2012), p. 99-104.

to apply the Article II in certain situations. The reasons behind rejection of the proposal were to give the provision a general application unlike Article I of the New York Convention,<sup>43</sup> that Article II governs the recognition and enforcement of arbitration agreements in irrespective of the seat, and any territorial limitation on scope of its application.<sup>44</sup> Therefore, to ensure that arbitration agreements are compiled accordingly, Article II gave discretionary powers to the national courts in the contracting states to interpret “*agreement in writing*”.

#### **A. The Obligation to Recognise an Agreement in Writing**

Central to the New York Convention is sub-Article 1 of Article II which establishes the basic rule of validity for arbitration agreements falling within its scope. According to the provision, an agreement subject to dispute to arbitration must be in writing which establishes a presumption that arbitration agreements are valid unless proves contrary by a party to the arbitration proceedings.<sup>45</sup> The mandatory rule to recognise and enforce arbitration agreements has been confirmed by decisions in most jurisdiction including the UK and Pakistan. The national courts in both jurisdictions widely accepted the obligation of agreements in writing that a word ‘shall’ used in the provision leaves no discretion to the courts to decide otherwise.<sup>46</sup> The courts while recognising and enforcing the arbitration agreements rely on consent of the parties whether they are agreed to submit the underlying dispute to arbitration. The parties’ consent can be found in variety of situations including participation of the parties in negotiation of contract or performance of contract, had knowledge of arbitration agreement or participated in arbitral proceedings without raising

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<sup>43</sup> Eugenio Minoli, L’Italie et la Convention de New York pour la reconnaissance et l’exécution des sentences arbitrales étrangères, in *International Arbitration Liber Amicorum* for Martin Domke (P. Sanders edn, 1967), p. 199 & 203.

<sup>44</sup> Frédéric-Edouard Klein, *Autonomie de la volonté et arbitrage (suite et fin)*, 1958 (R.C.D.I.P.), p. 491.

<sup>45</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 156.

<sup>46</sup> *Ibid.*

any objection to the tribunal's jurisdiction.<sup>47</sup> The Supreme Court of Pakistan held that consent can be inferred from the conduct of the parties based on exchange of correspondence. The party accepting some of the terms of said contract and denying others, cannot be allowed to blow hot and cold in the same breath.<sup>48</sup> This view was consistently upheld by the courts in Pakistan, even after enactment of the Ordinance 2005.<sup>49</sup> The High Court of Karachi, Pakistan stated that even the consent is proved in situations where a party do not sign the contract or return a written confirmation but perform its obligations under contract. The court held that such conduct of a party amounts to acceptance of terms of the contract including the clause of arbitration agreement.<sup>50</sup> On the other hand, the English courts do not accept the parties' participation in the contract as their obligation. For instance, in the *Dallah* case, the Supreme Court refused to enforce an award rendered against Pakistan that participation in negotiations and in performance of certain obligations under the contract do not add Government of Pakistan as party to the main contract.<sup>51</sup> The English courts interpreted the word 'differences' broadly such as the court in *Fili Shipping* case held that the parties should be referred to arbitration as whether or not a dispute existed, it was a matter for the arbitral tribunal to determine it.<sup>52</sup> The courts upheld this view in the *Fiona Trust* case.<sup>53</sup> It is also on the national courts in the contracting states to determine whether a specific subject matter can be settled by arbitration either by law referred to the arbitration agreement or their own law. Some courts determined that it

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<sup>47</sup> Domenico di Pietro and Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May Ltd, May 2008), p. 69-70.

<sup>48</sup> 1977 SCMR 409.

<sup>49</sup> 1982 SCMR 673, 1986 CLC 312, 1994 SCMR 1555, *Hitachi v Rupali Polyester*, 1998 SCMR 1618, 2002 SCMR 1903.

<sup>50</sup> *Metropolitan Steel Corporation Ltd. v Macsteel International UK Ltd.*, 2006 PLD 664 Karachi / 2006 CLD 1491 Karachi.

<sup>51</sup> *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, (2010) UKSC 46.

<sup>52</sup> *Fili Shipping Co. Ltd. v Premium Nafta Products Ltd.* (2007) UKHL 40.

<sup>53</sup> *Fiona Trust & Holding Corp. v Privalov*, (2015) EWHC 527.

should be resolved in accordance with the law applicable to the arbitration agreements whereas, other courts settled pursuant to their own system of law. In Global Quality case, the Karachi High Court dismissed the application for reference to arbitration due to non-availability of subject matter of arbitration. The court stated that no purpose would be achieved to refer the parties to arbitration as the same would be futile exercise without any outcome.<sup>54</sup>

## **B. The Signature Requirement**

The only form of agreement in writing is that the arbitration agreements must be signed by the parties or contained in exchange of letters or telegrams as envisaged in sub-Article 2 of Article II of the New York Convention.<sup>55</sup> The arbitration agreement may be a separate agreement or a clause in the contract, and it may be related to existing dispute or one arises in the future.<sup>56</sup> The provision do not prescribe any specific requirements for the contents of arbitration agreements.<sup>57</sup> In that spirit, the English courts held that the purpose of the New York Convention limits enforcement of awards to the parties signatories to the arbitration agreement as in the *Dallah* case, the Government of Pakistan was not named party or a signatory to the arbitration agreement therefore, the awards cannot be enforced against it.<sup>58</sup> There are also several issues regarding the signatures such as whether photocopy need to be signed by both parties, the signatures are necessary in case of

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<sup>54</sup> Global Quality Foods (Pvt.) Ltd. v Hardee's Food Systems Inc., 2016 PLD 169 Karachi.

<sup>55</sup> Parish Sanders, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (P. Sanders edn, 2011), p. 37.

<sup>56</sup> Albert Jan van den Berg, *Court Decision on the New York Convention* (ASA Special Series No. 9, 1996), p. 61.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*, (2010) UKSC 46.

exchange of letters, telegrams or emails.<sup>59</sup> In modern trade transactions, there is another issue regarding the validity of connected contracts of the arbitration agreements. For instance, a contract is renewed without an arbitral clause, now the question is whether the parties are still bound by the arbitral clause in the initial contract within the meaning of Article II of the New York Convention?<sup>60</sup> This provision was adopted in 1958 and technological achievements since then make it necessary for national courts in the contracting states to interpret this provision in a less restrictive manner so as to include other means of telecommunication providing a record of agreement as well as needed a uniform rule to meet the needs of the modern trade.<sup>61</sup> Indeed, the UNCITRAL amended the Model Law to clarify that the requirement of ‘in-writing’ is met by an electronic communication.<sup>62</sup> Therefore, in *Aroma Travel* case, the Karachi High Court stated that the New York Convention has wide-range of tentacles which the national courts have to weigh up and explore before referring a part to arbitration. The court held that an arbitral clause or an arbitration agreement signed by the parties, or any such agreement or understanding reflected in exchange of letters or telegrams is a legal relationship.<sup>63</sup> This view has been upheld consistently by the Pakistani courts in various cases.<sup>64</sup> In another case, the court regarding validity of signatures stated that the court could choose to resort to a comparison of signatures on an agreement and such procedure was in consonance with the spirit and policy of the Act 2011 which required the Court to dispose of issues by the usual test for

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<sup>59</sup> Albert Jan van den Berg, *The New York Convention of 1958: An Overview* (ICCA, 2019) <[https://www.arbitration-icca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf)> accessed 20 June 2019.

<sup>60</sup> Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), p. 377.

<sup>61</sup> *Ibid.* p. 444.

<sup>62</sup> Official Records of the General Assembly (Sixty-First Session, Supplement No. 17, A/61/17), Paras 177-181 and Annex II <at [www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf)> accessed 8 June 2019.

<sup>63</sup> *Aroma Travel Services (Pvt.) Ltd. v Faisal Al Abdullah, Al Faisal Al Saud*, 2018 PLD 414 Karachi.

<sup>64</sup> *Jess Smith and Sons Cotton LLC v DS Industries* 2019 CLD 23 Lahore.

summary judgment.<sup>65</sup> Therefore, in view of the plain reading of the provision, the signature requirement does not apply to an exchange of documents.

### **C. Enforcement of Arbitration Agreements**

Sub-Article 3 of Article II adds an enforcement mechanism to this basic rule requiring each contracting state to refer the parties to arbitration unless the arbitration agreement is declared null or void, inoperative or incapable of being performed.<sup>66</sup> Article II(3) ensures the consistency of international arbitration agreement with their basic objectives as to enforce in accordance with the terms by the parties to arbitration rather than underlying their disputes.<sup>67</sup> By virtue of Article II, international arbitration agreement are presumed to be valid and enforceable unless the exception identified as provided in sub-Articles 1 and 3, and it is entirely on the party opposing to prove the applicability of these exceptions.<sup>68</sup> Under the New York Convention, courts in the contracting states may not fashion any additional or domestic grounds to refuse recognition of arbitration agreements unless the domestic grounds are fit within the limited scope of the grounds provided by Article II of the New York Convention.<sup>69</sup> Moreover, the choice of law applicable to arbitration agreements impliedly provided in Article II whereas, the choice of law is expressly provided in Article V(1)(a) of the New York Convention that the courts in the contracting states, on request of the parties, may choose the applicable law to international arbitration agreements, and if the parties do not give implied or express choice, the courts

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<sup>65</sup> *Louis Dreyfus Commodities Suisse SA v Acro Textile Mills Ltd.*, 2018 PLD 597 Lahore.

<sup>66</sup> Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz in Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No. 9), p. 217.

<sup>67</sup> Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Southwestern University Law Review, Vol. 3, Issue 1, 1971), pp. 1-38.

<sup>68</sup> *Ibid.*

<sup>69</sup> Gary B. Born, *The New York Convention: A Self-Executing Treaty* (Michigan Journal of International Law, Vol. 40, Issue 1, 2018), pp. 115-187.



in the contracting states shall apply the law of the arbitral seat.<sup>70</sup> Though, the New York Convention gave choice of law regarding invalidity of arbitration agreements but impose limits on grounds that may be used by courts to refuse the recognition of arbitration agreements. The New York Convention sets forth the standard rules that the courts may only refuse recognition when such arbitration agreements are invalid under general principles of contract law of that contracting state.<sup>71</sup> The courts may not avoid recognition and defeat the objectives of the provision by imposing general requirements of national laws such as notice requirements or tort claims and invalidity rules under their national laws. All these domestic requirements are impermissible under Article II(3) of the New York Convention.<sup>72</sup>

The court can refer the parties to the arbitration is not expressly settled by Article II(3) but the parties are at liberty to waive their consent prior agreement to arbitrate. The English court held that if neither party alleges the existence of an arbitration agreement, the court will not refer the parties to arbitration but uphold its own jurisdiction.<sup>73</sup> The court in another case stated that the courts are bound to send a dispute to arbitration it is with regard to any to be referred.<sup>74</sup> Furthermore, the English held that it is right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. The court further held that despite the fact that the tribunal had jurisdiction to determine but such principle does not preclude the national court in the contracting states from determining such question.<sup>75</sup> It is stated that the courts should be satisfied that there is a

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<sup>70</sup> Ibid. p. 121.

<sup>71</sup> *Yasmeen v Beach Developers through Managing Director*, 2003 YLR 1109.

<sup>72</sup> Gary B. Born, *The New York Convention: A Self-Executing Treaty* (Michigan Journal of International Law, Vol. 40, Issue 1, 2018), pp. 115-187.

<sup>73</sup> *British Telecommunications Plc v SAE Group Inc.*, (2009) EWHC 252.

<sup>74</sup> *Kammgarn Spinnerei GmbH v Nova (Jersey) Knit Ltd.* (1977) 2 All ER 463.

<sup>75</sup> *Albon Carriage Co. v Naza Motor Trading Sdn Bhd*, (2007) EWHC 665 (Ch).

valid arbitration agreement and the dispute fell within its scope. In *Berezovsky* case, the Court of Appeal held that the stay would be granted if the applicant proved the existence of a valid arbitration agreement covered the matter in dispute.<sup>76</sup> The court will grant a stay unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. However, the relevant case law suggests that the word ‘inoperative’ covers situations where the arbitration agreement has become inapplicable to the parties or their dispute.<sup>77</sup> The court stated that in order to measure the validity of arbitration agreement, the court should conduct cost analysis.<sup>78</sup> In *Fiona Trust* case, the court stayed the judicial proceedings under Section 9(1) of the Act 1996 as the applicant alleged the invalidity of the overall contract, but did not challenge the validity of the arbitration agreement itself.<sup>79</sup> The Pakistani court in *Travel Automation* case, held that there is no discretion of the court to grant or refuse to stay the proceedings even on the ground of inconvenience, except where the arbitration agreement itself is null and void, inoperative or incapable of being performed.<sup>80</sup> Some Pakistani courts had been undermined the validity of arbitration in the past,<sup>81</sup> but this approach was criticised and corrected by the Honourable Supreme Court in various judgements.<sup>82</sup>

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<sup>76</sup> *Aeroflot-Russian Airlines v Berezovsky & Ors*, (2013) EWHC Civ. 784.

<sup>77</sup> *Golden Ocean Group Ltd. v Humpuss Intermoda Transportasi TBK Ltd.*, (2013) EWHC 1240.

<sup>78</sup> *A v B*, (2006) EWHC 2006 (Comm).

<sup>79</sup> *Fiona Trust & Holding Corp. v Privalov*, (2015) EWHC 527.

<sup>80</sup> *Travel Automation (Pvt.) Ltd. v Abacus International (Pvt.) Ltd.* 2006 CLD 497 Karachi; *Far Eastern Impex (Pvt.) Ltd. Quest International Nederland BV*, 2009 CLD 153 Karachi; *Cummins Sales and Services (Pakistan) Ltd. v Cummins Middle East FZE*, 2013 CLD 291 Karachi.

<sup>81</sup> *Mercantile Fire & General Insurance Co. Pakistan Ltd. v Arcepey Shipping Co. USA*, 1978 PLD 273 Karachi.

<sup>82</sup> *Eckhardt & Com Marine GMBH, West Germany v Mohammad Hanif*, PLD 1993 SC 42; The same view was taken in these judgements: *Abid Associated Agencies International (Pvt.) Ltd. v Areva*, 2015 MLD 1646 Islamabad; 1974 SCMR 519; 1981 SCMR 129; 1993 SCMR 866; 1994 MLD 2227; 1994 SCMR 2189; 1999 CLC 437; 2000 MLD 1537; 2001 YLR 3150; 2002 CLD 77; 2002 SCMR 1954; 2004 CLD 1; 2004 CLD 1530; 2004 CLD 603; 2006 CLD 1491; 2006 CLD 497; 2008 CLD 662; 2008 SCMR 240; 2009 YLR 334; 2010 MLD 800; 2010 YLR 66; PLD 1968 Kar. 652; PLD 1970 SC 373; PLD 1990 SC 48; PLD 1993 SC 418;; PLD 1997 Kar. 636; & PLD 2003 SC 808.

## CHAPTER – III:

### REFUSAL GROUNDS FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article V of the New York Convention sets forth comprehensive refusal grounds on recognition and enforcement of foreign arbitral awards by national courts in the contracting states where such recognition and enforcement is sought.<sup>83</sup> Sub-Article 1 of Article V lists the grounds for refusal that must be raised by the party against whom the award is invoked whilst, Sub-Article 2 provides grounds on which courts in the contracting states may refuse foreign arbitral awards on its own motion on account of the subject-matters or public policy.<sup>84</sup> The English courts have consistent view on burden of proof that though Article V(2) do not allocate burden on either party to raise the defences before courts in the contracting states, but the party opposing recognition and enforcement has ultimate burden to prove such grounds.<sup>85</sup> Moreover, the grounds for refusal under Article V of the New York Convention, do not include an erroneous decision in law or in fact by arbitral tribunals so, courts invoking enforcement cannot review the merits of the arbitral tribunals' decision or award.<sup>86</sup> Though, the wording of the New York Convention was adopted by provisions of the Geneva Convention but it reflects significant changes. For instance, under the Geneva Convention, the burden was placed on the party to prove five conditions in order to obtain recognition and enforcement including the

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<sup>83</sup> Article V, New York Convention 1958 Guide (United Nations UNCITRAL) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=-1)> accessed 20 June 2019.

<sup>84</sup> Ibid.

<sup>85</sup> *Gater Assets Ltd. v Nak Naftogaz Ukrainiy*, (2007) EWCA Civ. 988; Dirk Otto and Omaia Elwan, Article V(2) in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (H. Kronke, P. Nacimiento et al. edn, 2010), p. 345-348.

<sup>86</sup> Article V, New York Convention 1958 Guide (United Nations UNCITRAL) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=-1)> accessed 20 June 2019.

final award while, in the New York Convention, the drafters listed five grounds on which courts in the contracting states may refuse to grant recognition and enforcement.<sup>87</sup> The drafters restricted the refusal grounds as well as placed burden of proof on the party opposing the recognition and enforcement of foreign arbitral award whereas, the parties were allowed to raise any additional grounds for refusal of arbitral awards under the Geneva Convention.<sup>88</sup> Moreover, pursuant to the Geneva Convention, courts in the contracting states were required to refuse recognition and enforcement if the award was either declared null and void in its country of origin or the award was passed by excess authority.<sup>89</sup> On the other hand, the drafters replaced the word ‘shall’ with ‘may’ in the New York Convention which omit courts in the contracting states to refuse the arbitral awards mandatory.<sup>90</sup> The objective of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards to provide maximum discretion to courts in the contracting states so, the courts can refuse or grant the recognition and enforcement without any obligation to do so.<sup>91</sup> The plain language of Article V provides three main features of refusal grounds for recognition and enforcement of foreign arbitral awards. First, courts in the contracting states may refuse recognition and enforcement. Secondly, the courts are not allowed to review merits of a foreign arbitral award and lastly, even in presence of one of the refusal grounds, the courts have discretionary powers to grant enforcement in cases where the violation is *de minimis*.<sup>92</sup> The English courts clarified the security available in the New York Convention while dealing with enforcement cases such as, in IPCO Nigeria case, the court provided guidance on the approach of a court considering an

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<sup>87</sup> Geneva Convention, Art. 1.

<sup>88</sup> Ibid. Art. 3.

<sup>89</sup> Ibid. Art. 2.

<sup>90</sup> Pieter Sanders, *The Making of the Convention in Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations Publication 3, 1999).

<sup>91</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 265.

<sup>92</sup> Michael Hwang and Amy Lai, *Do Egregious Errors Amount to a Breach of Public Policy?* (The Institute of Arbitration, Vol. 71, Issue 1, 2005).

application to enforce a foreign arbitral award, and held that the conditions for recognition and enforcement set out in Articles V and VI of the New York Convention do constitute a code, which is to lay down a common international approach. It further stated that the outcome must be consistent with overall spirit of the New York Convention.<sup>93</sup> The English courts are consistent that such refusal cannot be based on procedural grounds.<sup>94</sup> Similarly, the Pakistani courts stated that foreign arbitral award, as long as it was enforceable, was to be treated as binding for all purposes on persons between whom it was made. The intention of the Legislatures whilst enacting of the Act 2011 was to expedite the process by giving fast-track enforceability to arbitral awards granted between members of the New York Convention and remedies were made forthcoming in an expeditious manner without any unnecessary loss of time.<sup>95</sup> Article V of the New York Convention intends to ensure the recognition and enforcement of foreign arbitral awards around the world unless the party resisting enforcement proves contrary.<sup>96</sup> In international arbitration, the courts of the contracting state of the seat of arbitration have supervisory jurisdiction over the award. This supervisory jurisdiction concerns the remedies against award available under national arbitration legislation. These remedies comprise an application for setting aside award but not limited to the grounds for recognition and enforcement of the award under Article V of the New York Convention.<sup>97</sup> Therefore, rules of national law are more favorable to the recognition and enforcement of a foreign arbitral award, which means a court in enforcement proceedings may still recognise and enforce a foreign arbitral award even if a ground under Article V of the New York Convention is

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<sup>93</sup> *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp*, (2017) UKSC 16.

<sup>94</sup> *Rosseel NV v Oriental Commercial Shipping (UK) Ltd.*, (1990) 1 WLR 615.

<sup>95</sup> *Dhanya Agro Industrial (Pvt.) Ltd. v Quetta Textile Mills Ltd.*, a2019 CLD 160 Karachi.

<sup>96</sup> Yasmine Lahlou, *How Courts Treat Foreign Award Judgments: The Unsettled State of US Law and an English Perspective* (Dispute Resolution International, Vol. 12, No. 2, October 2018), pp. 195-209.

<sup>97</sup> Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context* (American Journal of Comparative Law, Vol. 20, No. 32, June 2018), pp. 1-32.

established.<sup>98</sup> In that case, the unsuccessful party have two or more options to challenge the foreign arbitral award under Article V of the New York Convention either at seat of the arbitration or in enforcement proceedings in any jurisdiction.<sup>99</sup> In Yukos Oil case, the English court interpreted the word ‘may’ used in Article V of the New York Convention that the court can go beyond the listed circumstances.<sup>100</sup> In *Dallah Real* case, Lord Mance declared that the use of word ‘may’ in Article V of the New York Convention enables the court to consider other circumstances i.e. legal principles. The court further held that the court before the enforcement is sought has a discretion to recognise or enforce even if the party resisting proved that there was no valid arbitration agreement.<sup>101</sup> Thus, in UK, the Article V of the New York Convention enables the courts to envisage circumstances while deciding an application for enforcement of a foreign arbitral award.

#### **A. REFUSAL DUE TO LACK OF VALID ARBITRATION AGREEMENTS**

Article V(1) of the New York Convention furnishes burden of proof on the party resisting the recognition and enforcement of foreign arbitral awards. The first defence enumerated in Clause ‘a’ of Article V(1) which enable courts in the contracting states to refuse recognition and enforcement of foreign arbitral awards, if the party opposing recognition and enforcement, respondent, takes plea of invalidity of the arbitration agreement as referred in Article II of the New York Convention. Article II(2) of the New York Convention requires an arbitration agreement in-writing for the New York Convention to

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<sup>98</sup> Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Yukos Oil Co. v Dardana Ltd.*, (2002) EWCA Civ. 543.

<sup>101</sup> *Dallah Real Estate & Tourism Holding Co. v Ministry of Religious Affairs of the Gov’t of Pakistan*, (2010) UKSC 46.

be applicable which the courts in the contracting states will take into account while examining this ground. If the requirements provided in Article II to recognise an arbitration agreement are not met, the court will have powers either to refuse the foreign arbitral award or to examine the validity of the arbitration agreements under the national laws.<sup>102</sup> The courts will determine the question under national laws because Article II does not say anything about what law should apply to determine the requirements of an arbitration agreement. It only makes clear that arbitration agreement should be in-writing,<sup>103</sup> and the courts while invoking the invalidity of an arbitration agreement apply the subsidiary rule that the arbitration agreement is governed by the law of the country where the award was made.<sup>104</sup> The provision of Clause ‘a’ extends the principle enriched in Article II of the New York Convention as the parties cannot be referred to arbitration if they are not bound by a valid arbitration agreement. Therefore, courts in the contracting states may deny the recognition and enforcement if consent of the parties is not valid because of invalid arbitration agreement under the applicable laws or parties lacked capacity to inter into arbitration agreement.<sup>105</sup> Pursuant to Article V(1)(a), the parties seeking recognition and enforcement may raise defence of incapacity. Courts in the contracting states while interpreting the ‘incapacity of parties’ stated that the proof of incapacity by one party is suffice to deny recognition and enforcement of an arbitral award.<sup>106</sup> However, the courts in the contracting states use different approaches to determine incapacity of the party

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<sup>102</sup> Peter Sanders, A Twenty Years’ Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Award (The International Lawyer, Vol. 13, 1979), pp. 269-287.

<sup>103</sup> Linda Silberman, The New York Convention after fifty Years: Some Reflections on the Role of National Law (The Georgia Journal of International and Comparative Law, Vol. 38, 2009), pp. 25-46.

<sup>104</sup> Albert Jan van den Berg, The New York Convention 1958: An Overview, (ICCA, 2019) <[https://www.arbitration-icca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf)> accessed 19 June 2019.

<sup>105</sup> Stefan Kröll, Recognition and Enforcement of Awards in Arbitration in Germany: The Model Law in Practice (K. H. Böckstiegel, S. Kröll and P. Nacimiento edn, 2007), pp. 506 & 530.

<sup>106</sup> Albert Jan van den Berg, The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation (Kluwer Law and Taxation Publishers, Hague 1981), p. 271.

opposing recognition and enforcement of foreign arbitral awards. Generally, the courts determine the incapacity pursuant to their own legal systems. In civil law legal jurisdictions, the courts determine the capacity by the law of the party's nationality whereas, in common law jurisdictions, it is governed by the law of party's domicile or habitual residence.<sup>107</sup> The English court in *Ajay Kanoria* case, refused the recognition and enforcement of foreign arbitral award on the ground of incapacity by stating therein that the party should have opportunity to get independent advice in order to conclude the contract which contain arbitration clause or agreement.<sup>108</sup> The second limb of Article V(1)(a) that recognition and enforcement may be refused on the ground that arbitration agreement is invalid. The courts in the contracting states determine the validity as the requirements set out in Article II. Pursuant to the provision, the courts in the contracting states apply the law chosen by the parties and if the parties do not give their consent, the courts assess the validity under laws of the country where the award was made.<sup>109</sup> Generally, courts in the contracting states consider the seat of arbitration as the place where the award was made. The House of Lords in *Richard Henry* case determined that the award was made at the place where it was signed but not at the seat of arbitration designated by the parties.<sup>110</sup> In *Dallah* case, the court declared that validity of arbitration agreement will be assessed according to the law of the country where it was made which is seat of the arbitration but not the place where the arbitration agreement was signed.<sup>111</sup> Lastly, the provision furnish burden of proof on the party opposing the enforcement proceedings to

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<sup>107</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 276.

<sup>108</sup> *Ajay Kanoria Esols Worldwide Ltd. v Tony Francis Guinness*, (2006) EWCA Civ. 222.

<sup>109</sup> Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010).

<sup>110</sup> *Richard Henry Moffitt Outwaite v Robert Ralph Scrymegeour Hiscox*, (1991) WLR 599 (Comm).

<sup>111</sup> *Dallah Real Estate & Tourism Holding Co. v Ministry of Religious Affairs of the Gov't of Pakistan*, (2010) UKSC 46.



provide documentary evidence proving incapacity of the party at time of conclusion of the arbitration agreement or provide the original arbitration agreements or a copy thereof to prove validity of the arbitration agreement.<sup>112</sup> In Yukos Oil case, the Court held that once the party seeking recognition and enforcement of arbitral awards provide the arbitration agreement or copy proving its *prime facie* existence, the burden shift on the other party to prove any ground provided in Article V(1)(a) of the New York Convention.<sup>113</sup> Therefore, the drafting history suggests that the application only prove *prima facie* existence of the arbitration agreement while opposing party have to prove its invalidity.<sup>114</sup> Moreover, with respect to the standard of judicial review by enforcing courts, the English court by considering the view taken in China Minmetals case<sup>115</sup> held that the Article(1)(a) of the New York Convention does not restrict the nature of review by the enforcing courts. In Dallah case, the court further held that a party would not be precluded from raising a defence under Article (1)(a) that it had not participated in the arbitral proceedings before the tribunal or had not raised those grounds in setting aside proceedings.<sup>116</sup> Similarly, the Pakistani court stated that although Article V of the New York Convention dealt expressly only with the cases where arbitration agreement was not valid, the consistent international practice showed that there was no doubt that it also covered a case where a party claimed that the agreement was not binding on it because that party was never a party to the arbitration agreement. The court stated that as a general principle a suit whereby plaintiff as award-debtor sought declaratory and injunctive relief against a Convention Award, ought to be regarded as maintainable but whether it could, in law, be instituted depended

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<sup>112</sup> Ibid.

<sup>113</sup> Yukos Oil Co. v Dardana Ltd., (2002) EWCA Civ. 543.

<sup>114</sup> Reinmar Wolff, The New York Convention: A Commentary (Arbitration International, Vol. 30, Issue 1, March 2014), P. 187-188.

<sup>115</sup> China Minmetals Materials Import & Export Co. v. Chi Mei Corp., 334 F.3d 274, 283 (3d Cir.).

<sup>116</sup> Dallah Real Estate & Tourism Holding Co. v Ministry of Religious Affairs of the Gov't of Pakistan, (2010) UKSC 46.

on the exact terms of the law in force for the time being in the *lex fori*. The words used in the first paragraph of Article V of the New York Convention, are that 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" which words were not used the second paragraph of the said Article V of the New York Convention; therefore for paragraph one to apply, two antecedent conditions must be met, that the award must have been invoked against the award-debtor, and that the relevant ground must be shown to exist to the competent authority (the High Court), where the recognition and enforcement was sought. Therefore, the said conditions clearly contemplated the objections being taken in an action brought by the award-creditor for the recognition and enforcement of the Award and not otherwise. Pursuant to Section 7 of the Act 2011, the refusal must be "in accordance with" Article V of the New York Convention, which indicated that any action in which the question of a refusal to recognize or enforce a Convention Award was raised must conform both substantively and procedurally with requirements of Article V; which meant that a ground taken in paragraph one of the Article V of the Convention could only be taken in enforcement proceedings brought by the award creditor and not otherwise.<sup>117</sup>

## **B. REFUSAL ON VIOLATION OF DUE PROCESS**

Pursuant to clause 'b' of Article V(1) of the New York Convention, courts in the contracting states may refuse recognition and enforcement on violation of due process i.e. fundamental principle of procedure such as fair hearing and adversary proceedings, also

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<sup>117</sup> Abdullah v Chan Group SPA, 2014 PLD 349 Karachi.

referred to as '*audi et altram partem*'.<sup>118</sup> The drafters in this provision followed the language of the Geneva Convention but included different requirements. Specifically, it provides that the parties must have proper notice of the appointment of arbitrators and arbitration proceedings as well as must provide an opportunity to present their case before the tribunal.<sup>119</sup> The defences provided in the provision are frequently raised by the party opposing the recognition and enforcement, despite of the fact, that mostly struck down by the courts in the contracting states.<sup>120</sup> The courts rarely accept a violation of due process in foreign arbitral award cases while invoking this ground. Courts in the contracting states are consistent that a violation of domestic notions of due process does not constitute a violation of due process in a foreign arbitral award.<sup>121</sup> The courts interpreted that this ground requires proper notification of appointment of the arbitrator and of the arbitral proceedings, to the party against whom the arbitral award is invoked.<sup>122</sup> A proper notice must be given otherwise the recognition and enforcement may be refused but the courts in the contracting states are divided on the requirements or contents of the notice in accordance with their legal systems or national laws. Most of the courts are reluctant to graft additional notice requirements.<sup>123</sup> Moreover, the courts have consistent view that the burden of proof is on the party opposing the recognition and enforcement of arbitral award that the notice was not properly given. The court applied high standards regarding burden of proof and refused the enforcement if the notice was not given of the appointment of the

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<sup>118</sup> Albert Jan van den Berg, *The New York Convention 1958: An Overview*, (ICCA, 2019) <[https://www.arbitration-icca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf)> accessed 19 June 2019.

<sup>119</sup> *Ibid.*

<sup>120</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 297.

<sup>121</sup> Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions* (Journal of International Law and Politics, Vol. 28, 1995), pp. 175-215.

<sup>122</sup> *Ibid.*

<sup>123</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 298-99.

arbitrator and of the arbitration proceedings.<sup>124</sup> The provision is silent that what should be included in the notice of an appointment of the arbitrator. The courts in contracting states are divided into this requirement. The courts in civil law jurisdictions stated that names of the arbitrators must include in the notice whereas, the courts in the common law jurisdictions stated that names are not necessary but confirmation of appointment of arbitrators is enough.<sup>125</sup> The provision is also silent regarding the form of notice as well as service of notice. There are neither specific form required for notice nor formal requirements for the service of notice. Initially, the term ‘due form’ was considered but later on, the drafters removed any requirements in this regard, including the notice in writing.<sup>126</sup> Furthermore, the courts did not consider the time limit for the appointment of an arbitrator, preparation of defense, or notice period to appear at the hearing as violations under this ground.<sup>127</sup> In case of *Minmetals Germany*, the English court refused to set aside leave to enforce a foreign arbitral award that the arbitrators have committed a procedural error.<sup>128</sup> Thus, the general and inherent powers of the courts constrain the party resisting the enforcement of a foreign arbitral award, to abused its process. It is left open to the courts in the contracting states to interpret that what form of notice is acceptable.<sup>129</sup> On service of notice, the courts interpreted practically and flexibly the delivery and receipt of notice. Mostly courts even considered the service enough where the notice was not served but the reasonable attempts were made.<sup>130</sup>

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<sup>124</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), Para 1698, pp. 1001-03.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Travaux Préparatoires, Comments by Governments and Organisations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Annex I of E/2822), p. 23.

<sup>127</sup> Ramona Martinez, *Recognition and Enforcement of Foreign Arbitral Awards under the United Nations Convention of 1958: The ‘Refusal’ Provisions* (*The International Lawyer*, Vol. 24, No. 2, 1990), pp. 487-518.

<sup>128</sup> *Minmetals Germany GmbH v Ferco Steels Ltd.*, (1999) CLC 647.

<sup>129</sup> Marc Blessing, *Summary of Court Decisions on the N.Y. Convention*, in *The New York Convention of 1958* by Albert Jan van den Berg (ASA Special Series No. 9, 1996), Para. 509.

<sup>130</sup> *Ibid.*

The second defence provided in the provision is that parties should have been provided an opportunity to present their case before the tribunal.<sup>131</sup> It means the parties should be given reasonable time to prepare their claims, produce evidence and defences. The courts in the contracting states interpreted this requirement broadly but the courts refused the recognition and enforcement of arbitral awards where the courts are satisfied with a breach of due process.<sup>132</sup> However, the onus is on the parties presenting their case to prove that there is a breach of due process. The courts have usually considered that there is rare case of breach of due process and mostly, the parties take this defence when failing to participate in the arbitration proceedings or want an extension of time.<sup>133</sup> Therefore, courts in the contracting states have uniformity that the parties cannot be allowed benefit by their own procedural flaws. The spirit and pro-enforcement of the New York Convention vested discretionary powers to the courts in the contracting states to organise and control the arbitration proceedings so, the courts do not consider every issue raised by the parties.<sup>134</sup> Lastly, the parties' defence on the language of the proceedings affected their ability to present their case before the tribunal. The courts generally do not accept it as breach of due process but by considering the language used in the arbitration. The courts take into consideration the arbitration agreement or the applicable procedural rules to determine the language chosen by the parties to arbitration proceedings.<sup>135</sup>

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<sup>131</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), Para 1698, pp. 1001-03.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> Marc Blessing, *Summary of Court Decisions on the N.Y. Convention*, in *The New York Convention of 1958* by Albert Jan van den Berg (ASA Special Series No. 9, 1996), Para. 509.

### C. REFUSAL ON EXCESS OF THE ARBITRAL TRIBUNAL'S AUTHORITY

Article V(1)(c) allows competent authorities in the contracting states to refuse recognition and enforcement of foreign arbitral awards where the awards are passed beyond the scope of the submission to arbitration.<sup>136</sup> Though, the wording of the provision was taken from the Geneva Convention but the drafters limited its scope in the New York Convention such as the enforcing courts in the contracting states are not permitted to reconsider the merits of disputes. Another concern raised at the time of drafting of the provision that partial recognition and enforcement was allowed.<sup>137</sup> The English courts in recent cases observed that “immediate enforcement of discrete parts of the award would go with the grain of the award, not undermine it or second guess it.”<sup>138</sup> Ultimately, the provision allowed the partial recognition and enforcement. The authority of an arbitral tribunal is determined based on disputes submitted by a party to arbitration. This provision come into play when a tribunal decided on matters not actually part of scope of the arbitration agreement. Such arbitral award may not be enforced, if the respondent in enforcement proceedings raised this defense under Article V(1)(c) of the New York Convention before the tribunal.<sup>139</sup> Courts in the contracting states hardly refuse the enforcement of a foreign arbitral award on the ground of excess of authority, but the courts always look carefully the defenses as arbitrators may decide on matters which the parties excluded from the arbitration.<sup>140</sup> The mostly courts stated that the term ‘submission to arbitration’ may include arbitration agreements, modified and amended. Similarly, the English court in Lesotho case stated that “in the present case one is dealing with an ICC arbitration agreement. In such a case

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<sup>136</sup> New York Convention, Art. V(1)(c).

<sup>137</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), Para 1700, pp. 987-988.

<sup>138</sup> *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp*, (2008) EWHC 797 (Comm), Para 103.

<sup>139</sup> Shagrdi Manaye, *Excess of Authority by Arbitrators as a Defense to Recognition and Enforcement of an Award under Article V(1)(c) of the New York Convention* (Central European University, March 2010), p. 2.

<sup>140</sup> *Ibid.* p. 43.

the terms of reference which under Article 18 of the International Chamber of Commerce (ICC) rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement.”<sup>141</sup> Therefore, the courts in the contracting states consistently considered that only matters related to the arbitration agreement are subject to the jurisdiction of the arbitral tribunal.<sup>142</sup> Moreover, the courts also considered the consent of the parties by extending the scope of the provision that though the award based on the underlying contract was not within the subject matter of the arbitration agreement but it can be extended to the contract. It entirely depends on the intention of the parties.<sup>143</sup> The English court in *Deutsche* case considered a challenge to enforcement under Clause ‘c’ and ultimately rejected the challenge that parties were not bound by the arbitration agreement which did not make award in their favour. The court held that the award must be in favour of the parties.<sup>144</sup>

### ***Partial Recognition***

Another concern is partial recognition and enforcement of the award that part of the award contains decision on matters submitted to arbitration may be recognised and enforced. The word ‘may’ provided in the provision enable courts in the contracting states to either grant or refuse the partial enforcement.<sup>145</sup> The provision shows that the partial enforcement can be granted only if the matters submitted before tribunal can be separated from those not so submitted.<sup>146</sup> In case of *Highlands Development Authority*, the court refused the partial

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<sup>141</sup> *Lesotho Highlands Development Authority v Impreglio SpA et al*, (2005) UKHL 43, Para 21.

<sup>142</sup> Gary B. Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business Publishers, 2nd edn, 2009), pp. 1369-1372.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Deutsche Schachtbay-und Tiefbohrgesellschaft mbH v Ras al-Khaimah national Oil Co.*, (1986) 3 WLR 273.

<sup>145</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Arbitration* (Sweet and Maxwell, 4th edn, 2004), p. I-147.

<sup>146</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1994).

enforcement that the issue was not submitted before the tribunal.<sup>147</sup> The courts have applied the provision in context of multiparty arbitrations and excluded the portion from the enforcement of the award which address that a party was not bound by the arbitration agreement.<sup>148</sup> Therefore, the courts in the contracting have consistently held that enforcing courts are not permitted under any circumstances to review the merits of the award as it would run contrary to the spirit and purpose of the New York Convention. The English courts also have the same view.<sup>149</sup>

#### **D. REFUSAL ON IRREGULARITY IN COMPOSITION OF THE ARBITRAL TRIBUNAL OR PROCEDURE**

In accordance to Article V(1)(d) of the New York Convention, courts in the contracting states may refuse recognition and enforcement of foreign arbitral awards, if composition of the arbitral tribunal or the arbitral procedure was not adopted in accordance with the arbitral agreement, or the arbitral agreement was not in accordance with law of the country where the arbitration took place.<sup>150</sup> Such irregularities have to be raised and proved by the party opposing the recognition and enforcement of awards but not by the courts by their own motion.<sup>151</sup> The drafters of the New York Convention gave more supremacy to the parties to the agreement regarding composition of the tribunal and the arbitral procedure with compare to the Geneva Convention. It means the arbitration agreement must have an arbitration clause including the appointment of arbitrators by both parties which is not

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<sup>147</sup> Lesotho Highlands Development Authority v Impregilo S.P.A & others, (2005) UKHL 43.

<sup>148</sup> Albert Jan van den Berg, The New York Arbitration Convention of 1958 (Kluwer Law and Taxation Publishers, 1994).

<sup>149</sup> Lesotho Highlands Development Authority v Impreglio SpA et al, (2005) UKHL 43.

<sup>150</sup> William R. Spiegelberger, Enforcement of Foreign Arbitral Awards in Russia (JurisNet LLC, August 2014).

<sup>151</sup> Gary B. Born, International Commercial Arbitration (Wolters Kluwer Law & Business Publishers, 2nd edn, 2009), p. 2731.



even reduced the risk of refusal of recognition and enforcement of arbitral awards on grounds of procedural irregularities in national courts but also limited the powers of national courts in the contracting states to review the merits of the matter.<sup>152</sup> The courts in the contracting states rarely refuse the recognition and enforcement of arbitral awards that the composition of the arbitral tribunal deviated from agreement of the parties or the applicable rules.<sup>153</sup> The courts always takes into account the discretionary powers vested in the arbitral tribunal to control and organise the arbitration proceedings.<sup>154</sup> The provision of Article V(1)(d) does not specify minimum requirements for contents of the arbitration agreement. It is on the parties to agree on any terms, the parties can either agree on their national procedural laws or the laws govern these matters, or they can agree entirely on independent laws or rules.<sup>155</sup> Therefore, the courts invoke this provision in a formal and restrictive manner by interpreting the word ‘may’ under this provision as an exception.<sup>156</sup> The enforcing courts in the contracting states while invoking the provision ask the challenging party to show that the alleged irregularity resulted in a different arbitral award and if the party opposing the recognition and enforcement failed to demonstrate such irregularity, the courts will enforce the arbitral award.<sup>157</sup> For instance, the English courts enforced the arbitral award where the arbitral tribunal applied the revised procedural rules by suspending the arbitration agreement of the parties that the party opposing the recognition and enforcement had not sufficiently justify the refusal.<sup>158</sup> In another case, the

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<sup>152</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Refusals of Enforcement* (ICC International Court of Arbitration Bulletin, Vol. 18, No. 2, 2007).

<sup>153</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 323.

<sup>154</sup> *Ibid.*

<sup>155</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), Para 1702, p. 990.

<sup>156</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 323.

<sup>157</sup> *Ibid.*

<sup>158</sup> *China Agrobusiness Development Corporation v Balli Trading*, (1999) 1 All ER 315 (Comm).

arbitration was held at different place than on the parties agreed place of arbitration in the arbitration agreement, one party refused to participate in the arbitral proceedings, the English court enforced the arbitral award that different place did not affect the fairness of the proceedings.<sup>159</sup> The English court also confirmed the same view in another case that declaratory awards can be enforced.<sup>160</sup> Similarly, the Pakistani courts held that the parties must honour their bargain to invoke a particular forum by mutual agreement, if the contract is valid and binding but not otherwise.<sup>161</sup> Another question arisen that whether a party can take the defence provided in the provision before the enforcing court rather than to raise it before the arbitral tribunal, the mostly courts in the contracting states stated that a party can take this plea before the arbitral tribunal but not before the enforcing courts in enforcement proceedings. Similarly, the English court have consistently confirmed the view to raise such an defence before the arbitral tribunal even if a party choose not to participate in an arbitration proceedings before the arbitral tribunal, it had waived its right to challenge so, at enforcing stage the party do not have any right to raise the same defence.<sup>162</sup>

#### **E. REFUSAL WHERE AWARD IS NOT BINDING, SET ASIDE OR SUSPENDED**

Pursuant to Article V(1)(e) of the New York Convention, the courts in the contracting states may refuse the recognition and enforcement of foreign arbitral awards if the party opposing the recognition and enforcement establishes that either the arbitral award is not binding on the parties, or the award was set aside or suspended. Furthermore, such setting

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<sup>159</sup> Tongyuan International Trading Group v Uni-Clam Ltd., (2000) UKHC 1143 (Comm).

<sup>160</sup> West Tankers Inc. v Allianz SpA & others, (2012) EWCA Civ. 27.

<sup>161</sup> Aroma Travel Services (Pvt.) Ltd. v Faisal Al-Abdullah, Faisal Al-Saud, 2018 PLD 414 Karachi.

<sup>162</sup> Tongyuan International Trading Group v Uni-Clam Ltd., (2000) UKHC 1143 (Comm).

aside or suspension must be made by the competent authority of the state in which the arbitral award was made.<sup>163</sup> The wording of this provision was adopted from the Geneva Convention but the requirement of finality as the arbitral award is not final until it is open to the parties such as appeal and it can only be lead to the enforcement when it became final, was replaced with mechanism of *double exequatur* that the requirement of non-binding awards resulted the refusal of recognition and enforcement of arbitral awards.<sup>164</sup> The courts consistently referred the innovation of *double exequatur*. Similarly, the English court in Dowans Holding case held that “it is common ground that the intention of the New York Convention was to make enforcement of a Convention award more straightforward, and in particular to remove the previous necessity for a *double exequatur* i.e. the need, before a Convention award could be enforced in any other jurisdiction, for it to be shown that it has first been rendered enforceable in the jurisdiction whose law governs the arbitration.”<sup>165</sup> The provision provides three different grounds; bindingness, setting aside and suspension of the arbitral award. Firstly, the courts in the contracting states gave different interpretations to the word ‘*binding*’. Some courts determine the binding force under the law applicable to the arbitral award whereas, other courts interpret it as the arbitral award loses its seriousness on merits in the enforcement proceedings.<sup>166</sup> The English court held that “where a foreign court decided that an award was not binding, there was no reason in principle why that decision should not give rise to an issue *estoppel* between the parties provided that the other conditions for an issue estoppel applied.”<sup>167</sup> In Dowans Holding case, the English court stated that the decision of the arbitration shall be

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<sup>163</sup> New York Convention, Art. (V)(1)(e).

<sup>164</sup> Nadia Darwazeh, *Article V(1)(e)* in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International., 2010), p. 301, 306-07.

<sup>165</sup> Dowans Holding SA v Tanzania Electric Supply Co. Ltd., (2011) UKHC 1539 (Comm).

<sup>166</sup> Albert Jan van den Berg, The New York Arbitration Convention of 1958: Refusals of Enforcement (ICC International Court of Arbitration Bulletin, Vol. 18, No. 2, 2007).

<sup>167</sup> Diag Human SE v Czech Republic, (2014) EWHC 1639.

final and binding upon the Parties, and shall not be subject to appeal, by holding that the binding effect of an arbitral award depends on whether it is subject to ordinary resources, referred to arbitration agreement and the ICC Rules.<sup>168</sup> Therefore, the unusual circumstances may appeal a court to refuse the recognition and enforcement otherwise, the courts are reluctant to do so.

### *Set-Aside or Suspended*

Second principle is that the action of setting aside the award does not lead that award to be non-binding for the purpose of the provision.<sup>169</sup> This principle is affirmed by mostly courts in the contracting states. The English court stated that “the application of Article V(1)(e) is not triggered automatically by a challenge being brought before a court in the country of origin.”<sup>170</sup> In another case, the court held that Article (V)(1)(e) only applies where arbitral award has been set aside or suspended and nothing that “the fact that there is an application to set aside an award does not mean that award has been set aside.”<sup>171</sup> The role of the court at the seat of arbitration is different from that of a court in enforcement proceedings. The court at the seat of arbitration has supervisory powers so, it can entertain an application for setting aside the arbitral award.<sup>172</sup> In any event, the vast majority of the courts in the contracting states refuse to enforce a foreign arbitral award that have been set aside in the country it was passed either under the New York Convention or otherwise.<sup>173</sup>

In *Malicorp* case, the High Court declared that the English courts have discretion to enforce

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<sup>168</sup> *Dowans Holding SA v Tanzania Electric Supply Co. Ltd.*, (2011) UKHC 1539 (Comm).

<sup>169</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), Para 1698, pp. 1001-03.

<sup>170</sup> *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp.*, (2017) UKSC 16.

<sup>171</sup> *Continental Transfer Technique Ltd. v Federal Government of Nigeria*, (2008) UKHC 1280 (Comm).

<sup>172</sup> Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context* (*American Journal of Comparative Law*, Vol. 20, No. 32, June 2018), p 1-32.

<sup>173</sup> Albert Jan van den Berg, *When is an Arbitral Award Non-Domestic under the New York Convention of 1958?* (*Pace Law Review*, Vol. 6, No. 25, 1985), pp. 41-42.

a foreign arbitral award vacated at the seat, but it would not be right to exercise that discretion.<sup>174</sup> Last principle enumerated in the provision allows the parties to challenge the recognition and enforcement of an arbitral award on the ground of award's suspension. The provision does not provide guidance on this principle but mostly courts in the contracting states agrees that suspension directly come from a court decision.<sup>175</sup> The courts also agree that the automatically suspension does not come into force, it would be initiated from the application for setting aside the arbitral award filed by the opposing party otherwise, it would defeat the whole spirit of the New York Convention.<sup>176</sup> Therefore, the courts may adjourn its decision on enforcement if the respondent has filed an application for suspension of the award in the country of the seat.<sup>177</sup>

## **F. REFUSAL ON LACK OF SUBJECT-MATTER**

Sub-Article 2 of Article V of the New York Convention enables a court in the contracting states to refuse the enforcement of a foreign arbitral award on its own motion, if such enforcement proved contrary to the public policy of that country under Article V(2)(b) of the New York Convention, or if the subject-matters is not capable of settlement by arbitration under the law of the country where such enforcement is sought under Article V(2)(a).<sup>178</sup>

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<sup>174</sup> *Malicorp Ltd. v Government of the Arab Republic of Egypt & Ors*, (2015) EWHC 361.

<sup>175</sup> Albert Jan van den Berg, *When is an Arbitral Award Non-Domestic under the New York Convention of 1958?* (Pace Law Review, Vol. 6, No. 25, 1985), pp. 41-42.

<sup>176</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 352.

<sup>177</sup> *Ibid.*

<sup>178</sup> New York Convention, Art. V(2).

The Clause 'a' of sub-Article 2 of Article V of the New York Convention deals with subject matter cannot be settled by court in the contracting states.<sup>179</sup> This ground for refusal may be raised by a court *ex officio* but few courts in the contracting states considered that the burden to prove is on the party opposing the recognition and enforcement of arbitral award that subject matter is not capable of settlement by arbitration.<sup>180</sup> Similarly, the English court Rosseel case held that the parties do not have to plead such grounds as the same may be observed by a court *ex officio*.<sup>181</sup> In another case, the court stated that the burden of proof also does not lie on either party. It is purely on the court to decide the question of admission.<sup>182</sup> The Pakistani court stated that Pakistan being signatory to the New York Convention would recognise written agreement, under which the parties undertook to submit to arbitration all or any differences which had arisen or which might arise between them in respect of their defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement through arbitration. The court stated that claim of exclusive rights by the plaintiff in terms of IDA could not become the subject matter of arbitration. No purpose would be achieved to refer present parties to arbitration as the same would be futile exercise without any corporal outcome. The court dismissed the application for reference to arbitration in circumstances.<sup>183</sup> However, the provision does not identify the types of subject matters which are capable of settlement by arbitration. The plain reading of the provision suggests that specifically enforcing court in the contracting states can only determine the subject matter of the dispute whether it is capable of settlement by arbitration either under the law of that state where such

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<sup>179</sup> New York Convention, Art. V(2)(a).

<sup>180</sup> Emmanuel Gaillard and John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999), Para 169, p. 983.

<sup>181</sup> Rosseel NV v Oriental Commercial Shipping, (1990) 1 WLR 1387.

<sup>182</sup> NTT Docomo Inc v Ultra D.O.O, (2010) 10 Civ. 3823.

<sup>183</sup> Global Quality Foods (Pvt.) Ltd. v Hardees' Food Systems Inc., 2016 PLD 169 Karachi.

recognition and enforcement is sought or where the arbitration is took place, or any other law.<sup>184</sup> Regardless of the different approaches adopted by the courts in the contracting states, the courts are consistent that only small category of disputes do fall under this provision.

### ***Commercial or Non-Commercial Disputes***

The courts divided these disputes into two board categories, one concern commercial disputes and other types is non-commercial disputes which the courts have in exceptional circumstances.<sup>185</sup> The mostly courts in the contracting states have consistent view that a dispute whose subject matter is of a commercial nature, is capable of being settled by arbitration and arbitration award resulted from a commercial differences should not be refused pursuant to Article V(2)(a) of the New York Convention.<sup>186</sup> The courts reasoned that breach of contract claims in commercial nature is frequent therefore, the same are capable of settlement by arbitration as well as it is on the national courts in the contracting states to determine that which disputes are capable of settlement by arbitration.<sup>187</sup> The other category of disputes are of non-commercial nature such as employment, labour or competition disputes. Therefore, the courts rarely have any view that whether disputes from these matters should be refused or not pursuant to the provision.<sup>188</sup> Lastly, the Article V(2)(a) allows a court to refuse the enforcement of an award on account of non-arbitrable subject-matter which reflects a national interest in judicial than arbitrable resolution of a

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<sup>184</sup> Emmanuel Gaillard and John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999), Para 169, p. 983.

<sup>185</sup> Shearman and Sterling, United Nations UNCITRAL: New York Convention Guide 1958 (Columbia Law School) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=727&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=727&opac_view=-1)> accessed 12 July 2019.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

dispute. It varies from country to country and it has led to a refusal of enforcement in a very few cases under Article V(2)(a) of the New York Convention.<sup>189</sup>

## **G. REFUSAL ON MATTERS RELATED TO PUBLIC POLICY**

Pursuant to Article V(2)(b) of the New York Convention, the courts in the contracting states may refuse the recognition and enforcement of an arbitral award if the same is contrary to their public policy.<sup>190</sup> The wording of this provision was also adopted from the Geneva Convention. The provision seems to override the parties autonomy as well as allows to the courts in the contracting states to protect the integrity of their legal order in which these belongs.<sup>191</sup> Initially, the drafters were reluctant to introduce public policy as ground for refusing the recognition and enforcement of foreign arbitral awards thereafter, they changed the wording of Article 1(e) of the Geneva Convention that the enforcement may be refused on the ground of public policy. In addition, the drafters omitted the references to an award being contrary to the public policy of that state.<sup>192</sup> Although, different jurisdictions define public policy differently but this ground rarely causes recognition and enforcement of a foreign arbitral award to be refused.<sup>193</sup> The court of appeal of England and Wales considered the ground of public policy as an exception under

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<sup>189</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Refusals of Enforcement* (ICC International Court of Arbitration Bulletin, Vol. 18, No. 2, 2007).

<sup>190</sup> New York Convention, Art. V(2)(b).

<sup>191</sup> Shearman and Sterling, *United Nations UNCITRAL: New York Convention Guide 1958* (Columbia Law School) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1)> accessed 12 July 2019.

<sup>192</sup> Anton G. Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation and Application* (Juris Net LLC, Revised edn, June 2013), p. 63.

<sup>193</sup> Bernard Hanotiau and Olivier Caprasse, *Public Policy in International Commercial Arbitration in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), pp. 787 & 802.



the New York Convention that where “the enforcement of the award would be clearly injurious to the public good or, possibly, enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”<sup>194</sup> Similarly, the Pakistani court stated that bare assertion of the objection that the award was contrary to law and public policy of Pakistan and no law or public policy was cited to show that the award violated the same, is not enough. The court held that such objection of the defendant, in circumstances, had no merit which was repelled by the High Court.<sup>195</sup> In another case, the court stated that the award was made in pursuance of an agreement of arbitration which was valid under the law by which it was governed and it was made by the Tribunal provided for in the agreement or constituted in manner agreed upon by the parties as well as it was made in conformity with the law governing the arbitration procedure. It had become final in the country in which it was made therefore, it must be in respect of a matter which may lawfully be referred to arbitration under the law of Pakistan and that enforcement thereof, must not be contrary to the public policy or the law of Pakistan.<sup>196</sup> On this reason, the distinction is drawn between domestic and international public policy. This distinction is justified by different purposes of domestic and international relations and it is widely accepted by the courts in the contracting states.<sup>197</sup> For instance, the UK courts distinguished the domestic and international public policy as ‘there is nothing which offends English policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either proper law of the contract or its curial law, even if English domestic public policy might

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<sup>194</sup> *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.h v Shell International Petroleum Co. Ltd.*, (1990) 1 AC 295.

<sup>195</sup> *Islamic Republic of Iran Shipping Lines v Hassan Ali & Co. Cotton (Pvt.) Ltd.*, 2006 CLD 153 Karachi.

<sup>196</sup> *Meredith Johns & Co. v Usman Textile Mills Ltd.*, 2002 CLD 1121 Karachi.

<sup>197</sup> Paolo Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (The American Journal of Comparative Law, Vol. 8, No. 3, 1959), p 283-309.

have taken a different view”.<sup>198</sup> Thus, the English courts took other states’ views into account to give interpretation of the public policy defense.<sup>199</sup> The courts in the contracting states generally interpreted the public policy as fundamental rules of that state where recognition and enforcement of an award is sought but the question is whether fundamental rules of these states should consider public policy as an exception while recognising and enforcing the arbitral award.<sup>200</sup> It is not disputed between the courts in the contracting states that certain mandatory or fundamental rules meet the standard of the public policy defence to recognition and enforcement of arbitral awards.<sup>201</sup> Moreover, the criteria forming the basis of determination that the mandatory national law constitutes public policy are not specified by the courts in the contracting states. therefore, the courts are consistent with the letter and spirit of provision of the New York Convention that mandatory rules of the enforcement should be considered as part of their public policy and it must reflect from their fundamental concepts of morality and justice.<sup>202</sup> Moreover, the courts have consistent view that while dealing with the defence of public policy, the courts are not allowed to reargue the merits of the case or to allege that the case was wrongly decided.<sup>203</sup> The courts narrow interpreted the provision so, the application for refusal of recognition and enforcement of arbitral awards are rarely refused on this ground.<sup>204</sup> The courts only review the arbitral awards brought before them for fraud, bribery or some other

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<sup>198</sup> Ibid.

<sup>199</sup> Wafā Janahi, Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts (Journal of Sharia & Law, Vol. 47, July 2011), p 43-66.

<sup>200</sup> Bernard Hanotiau and Olivier Caprasse, Public Policy in International Commercial Arbitration in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (Cameron May, 2008), pp. 787 & 791-94.

<sup>201</sup> Luke Villiers, Breaking in the “Unruly Horse”: The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards, (Australian International Law Journal. Vol. 155, 2011), p. 179-80.

<sup>202</sup> Emmanuel Gaillard and John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999), p. 996.

<sup>203</sup> William W. Park, Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration, (Brook Journal of International Law, Vol. 12, 1986), p. 646-47.

<sup>204</sup> Pieter Sanders, A twenty Years’ Review of the Convention on recognition and Enforcement of Foreign Arbitral Awards (International Lawyers, Vol. 13, 1979), p. 269.

significant irregularities in due process but not otherwise. The English court have taken the same view.<sup>205</sup> Therefore, the conclusion about the procedural irregularities is commonly reached that the award was procured through fraud. The English courts held that it would not appropriate to refuse the recognition and enforcement of foreign arbitral awards if the relevant evidence was available to hearing before the arbitral tribunal or if the same allegation were raised before the arbitral tribunal but the same were rejected.<sup>206</sup> Other common law jurisdictions have also taken the same view that if a party failed to raise such irregularities before the arbitral tribunal, it waived its right to do so at the enforcement stage. Similarly, the civil law jurisdictions have also barred the party from doing so at the enforcement stage if that party failed to raise such irregularities before arbitral tribunal.<sup>207</sup> the English court in Gater Assets case held that the burden of proof rests on the party opposing the recognition and enforcement of an award, irrespective of whether a jurisdiction has a authority to review an award for breach of public policy *ex officio* or at the request of the party.<sup>208</sup>

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<sup>205</sup> Gater Assets Ltd. v Nak Naftogaz Ukrainiy, (2008) EWHC 237; Westacre Investments Inc. v Jugo import SPDR Holding Ltd., (2000) 1 QB 288.

<sup>206</sup> Westacre Investments Inc. v Jugo import SPDR Holding Ltd., (2000) 1 QB 288; *Minmetals Germany GmbH v. Ferco Steel Ltd.*, (1999) CLC 647; *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, (1999) 2 Lloyd's Rep. 222.

<sup>207</sup> Shearman and Sterling, United Nations UNCITRAL: New York Convention Guide 1958 (Columbia Law School) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1)> accessed 12 July 2019.

<sup>208</sup> Gater Assets Ltd. v Nak Naftogaz Ukrainiy, (2007) EWCA Civ. 988.

## CHAPTER – IV:

### APPLICATION OF NATIONAL LAWS OR OTHER TREATIES

Article VII of the New York Convention governs its connection with other treaties as well as domestic laws of the contracting states. By virtue of Article VII, courts in the contracting states are not in breach of the New York Convention in order to recognising and enforcing foreign arbitral awards under treaties relevant to enforcement of foreign arbitral awards or their domestic laws.<sup>209</sup> This reflects the maximum control of the courts in the contracting states over the recognition and enforcement of foreign arbitral awards.<sup>210</sup> The wording of this provision was also adopted from Article 5 of the Geneva Convention by adding the rule that the provision of the New York Convention shall not affect the validity of bilateral agreements regarding the recognition and enforcement of awards. Article VII of the New York Convention is divided into two parts; first is referred as to compatibility provision whereas, the second part allows an interested party to rely on most favourable treaty or domestic laws.<sup>211</sup> The main purpose of both provisions are to promote the enforceability of as many foreign arbitral awards as possible.<sup>212</sup> According to the Sub-Article 1 of Article VII of the New York Convention, the parties are permitted to request before national courts in the contracting states to take into consideration their national laws or other treaties related to enforcement in order to recognise and enforce foreign arbitral award or an arbitral agreement, where the New York Convention

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<sup>209</sup> Article V, New York Convention 1958 Guide (United Nations UNCITRAL) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=628&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=628&opac_view=-1)> accessed 20 June 2019.

<sup>210</sup> Ibid.

<sup>211</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, Hague 1981), p. 81.

<sup>212</sup> Ibid. p. 180.

is less favorable.<sup>213</sup> Most courts in the contracting states have similar view that it is not necessary for an interested party to request to the court to apply most favourable law, but the enforcing court may apply the favourable law by its own motion because the court would not be in breach of the New York Convention.<sup>214</sup> The domestic laws of the contracting states take different approaches in order to recognise and enforce the foreign arbitral awards while some jurisdiction's domestic arbitration laws provide recognition and enforcement of foreign arbitral awards,<sup>215</sup> other contain specific provisions concerning recognition and enforcement.<sup>216</sup>

#### **A. DIFFERENTIATION IN ARTICLE V & VII**

There is a substantial difference between the provisions of Article V and Article VII. None of the grounds for refusal are mandatory under Article V whereas, the provisions of Article VII are mandatory. The word “shall” used in Article VII instead of word “may” used in Article V which means if national laws of the contracting states are more favorable, a party can rely on it and the national court do not have any discretionary powers to grant or refuse.<sup>217</sup> Furthermore, the wording “any interested party” is used in Article VII which means that a resisting party may also ask a national court for using the more favorable laws. This interpretation may defeat the purpose of the New York Convention so, the more favorable meaning may be that only a party requesting the enforcement can have this special right.<sup>218</sup> Therefore, the Article was adopted to increase the possibility of

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<sup>213</sup> Article V, New York Convention 1958 Guide (United Nations UNCITRAL) <[http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=628&opac\\_view=-1](http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=628&opac_view=-1)> accessed 20 June 2019.

<sup>214</sup> Ibid.

<sup>215</sup> Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011.

<sup>216</sup> Arbitration Act 1996, Ss. 100-104.

<sup>217</sup> Di Pietro Domenico and Martin Platte, Enforcement of International Arbitration Awards: The New York Convention of 1958 (Cameron, May 2001), p. 183.

<sup>218</sup> Ibid. p 184.

enforcement of foreign arbitral awards but it has negative effects of undermining the achievement of uniformity in the legal regime governing the enforcement of arbitration agreements and arbitral awards within the context of international commercial arbitration. On the other hand, sub-Article 2 of Article VII have limited relevancy that all the contracting states which part of the Geneva Convention were, are now parties to the New York Convention. The English courts held that the Geneva Convention shall cease to apply to the recognition and enforcement of foreign arbitral awards in the contracting states because the same states are now parties to the New York Convention.<sup>219</sup>

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<sup>219</sup> *Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow & Partners*, (1984) AC 426.

## **CHAPTER – V:**

### **COMPARATIVE SUMMARY AND SUGGESTIONS**

#### **A. NEW YORK CONVENTION**

The New York Convention is most influential in the field of enforcement of arbitral awards. It provides for a much more simple and effective method of obtaining an enforcement of foreign arbitral awards, replacing the Geneva Protocol and the Geneva Convention. Even though the Convention much simplified the whole process and improved the preceding Geneva treaties, but it is not without faults.<sup>220</sup> There is not a uniform approach on the interpretation of the New York Convention by courts in the contracting states. The New York Convention itself is now beginning to show its age.<sup>221</sup> As the New York Convention was adopted about 6 centuries earlier which gave rise to questions as to the necessity and feasibility of its revision. Although the language of certain provisions needs to be modernised, the New York Convention continues, overall, to fulfil its purpose in a satisfactory manner.<sup>222</sup> The language of the New York Convention is at time outdated and some of its provisions could be fine-tuned but it does not lead to its revision. The revision can only be suggested unless it identify serious flaws in the enforcement proceedings as well as case laws suggest that these flaws can only be cured by modification of language used in it. There are two issues regarding enforcement identified from case laws as well as review of research papers; first problem is conclusion of arbitration agreements and second ground is of public policy which the courts in the contracting states always be in position to manipulate to refuse the enforcement. These

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<sup>220</sup> Allan Redfen and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004), Para I-147.

<sup>221</sup> *Ibid.*

<sup>222</sup> Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention: 50 Years of the New York Convention* (ICCA Congress Series No. 14, Dublin 2009), pp. 689-707.

problems have no relation whatsoever with the New York Convention, but results come from different approaches adopted by courts in the contracting states. Secondly, the liberty is provided to courts in the contracting states in Article VII of the New York Convention which sets minimum requirements. Therefore, the assessment of efficiency of the enforcement of foreign arbitral awards in today's world cannot be seen solely the case laws. Lastly, the New York Convention is rectified by above 150 states would not agree to amend it. The above discussion suggests that the common law jurisdictions gave very restrictive interpretations while dealing the ground of public policy. The difference is between the prevailing legal systems i.e. civil law and common law. Though the New York Convention is formulated by civil law jurisdictions but now it has been rectified by every major trading nations.

## **B. PAKISTAN**

Though the Act 2011 attracted the international award creditors to file applications for recognition and enforcement of foreign arbitral awards in Pakistan, but the ambiguity was not fully removed. The drafters used the word 'shall' which prevented the courts to refuse the enforcement of arbitral awards unless it found contrary to the grounds provided in Article V of the New York Convention. The Act 2011 is simple and had lesser court interventions but unfortunately, the courts failed to adopt this radical change and the courts passed inconsistent judgements under the Act 2011. The judgement of the Lahore High Court in Taisei Corporation case, the court held that remedy to seek recognition and enforcement remain available under Section 14 of the *Arbitration Act 1940 (Act 1940)*,<sup>223</sup>

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<sup>223</sup> Arbitration Act 1940, published in Gazette of India, July 1939, Part V, p. 142.



which applied to the domestic arbitrations in Pakistan.<sup>224</sup> In another cases, the courts refused enforcement by stating that arbitration agreements were vague and uncertain, and that the parties had to affix stamp duty on foreign arbitral awards under domestic laws.<sup>225</sup> In Pakistan Stone case, the court allowed stay of proceedings on the ground that it reflects insecurity as to its own authority.<sup>226</sup> In another case, the court held that a party opposing the enforcement can seek nullity of the foreign arbitral awards through civil suit in accordance with the grounds provided in Article V of the New York Convention.<sup>227</sup> In case of Rossmere, though the court recognised a foreign arbitral award but refused its enforceability on the ground that the award debtor do not have any assets in the territorial jurisdiction of this court.<sup>228</sup> The interpretation in these judgements simply defeated the purpose of the New York Convention and the main issue is that the Act 2011 being a special law, do not provide any procedure for courts to recognise and enforce the foreign arbitral awards. On the other hand, in some cases, the courts clearly and correctly outlined the policy of the Act 2011, the theme of the New York Convention and criteria for reviewing a foreign arbitral award in terms of Article V of the New York Convention.<sup>229</sup> In another case on validity of arbitration agreement, the court held that it is entirely on the court to satisfy itself whether emails and letters available on record constitute a valid arbitral agreement.<sup>230</sup> Some courts used the severability principle that the arbitration agreement was separated from rest of the contract and held that nullity of the contract did not render the arbitration agreement void.<sup>231</sup> The courts with respect to the arbitration

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<sup>224</sup> Taisei Corporation v AM Construction Company (Pvt.) Ltd., 2012 PLD 455 Lahore.

<sup>225</sup> 1982 CLC 301; 1990 MLD 857.

<sup>226</sup> Pakistan Stone Development Company v Mohammad Yousaf, 2018 CLC 877 Islamabad.

<sup>227</sup> Abdullah v CNAN Group Spa, 2014 PLD 349 Karachi.

<sup>228</sup> Rossmere International Ltd. v Sea Lion International Shipping Inc., 2017 PLD 29 Baluchistan.

<sup>229</sup> Louis Dreyfus Commodities Suisse SA v Acro Textile Mills Ltd., CO No. 649 of 2013, Lahore High Court, Lahore.

<sup>230</sup> Jess Smith & Sons Cotton LLC v DS Industries, CO No. 628 of 2014, Lahore High Court, Lahore.

<sup>231</sup> 2015 MLD 1646.

agreements, the courts have interpreted as removing the courts' discretion in enforcing foreign arbitration agreements even on the ground of highly inconvenience arbitration, but the courts are divided regarding the enforcement of foreign arbitral awards such as the definition of foreign arbitral awards provided in Section 2(e) of the Act 2011, requires a notification from the contracting state in which the arbitration took place, which is not always a simple matter to obtain. Furthermore, even if such a notification is provided, Pakistani Courts have classified arbitration awards where the governing law of the main agreement was Pakistani law as domestic arbitration awards.<sup>232</sup> Therefore, in view of the above discussion, it is evident that though the language of the Act 2011 is clear and simple but the government should make rules under Section 9 of the Act 2011, providing procedure for courts to recognise and enforce foreign arbitral awards in accordance with the New York Convention. Secondly, the issue is not with wording of provisions of the Act 2011 or the New York Convention, but with approach of the courts in Pakistan. The courts need consistency and have to decide the matters by adopting the international approach as to remove the judicial intervention. The Supreme Court of Pakistan has removed the ambiguity to some extent, but the courts below also need consistency.

### **C. UNITED KINGDOM**

Though the United Kingdom acceded the New York Convention on September 1975 through the Act 1975, but it has adopted friendly approach to arbitration since medieval Europe. Later, the Act 1975 was repealed by the Act 1996 which is more consistent with terms of the New York Convention. Under the Act 1996, the party seeking recognition and enforcement of foreign arbitral awards, must produce arbitral award and arbitration

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<sup>232</sup> Hitachi v Rupali Polyester, 1998 SCMR 1618.

agreement before the relevant court which terms are reflected in Section 102 of the Act 1996. Under the terms of both the New York Convention and the Act 1996, the courts grant the recognition and enforcement unless the party established one of refusal grounds reflected in Article V of the New York Convention and Section 103 of the Act 1996. When an arbitral award is issued by the arbitral tribunal, it deemed final and binding on the parties to the arbitration. The protection is provided under Section 81(2) of the Act 1996. The English courts are consistent to not review the merits of foreign arbitral awards while invoking the refusal grounds. The burden of proof is also rest on the party resisting the recognition and enforcement of foreign arbitral award if wishes to invoke any refusal ground however, the courts may also invoke the refusal grounds in respect of subject matters and public policy on their own motion. Section 103(3) of the Act 1996 reflects sub-Article 2 of Article V of the New York Convention that the subject matter must be capable of settlement by arbitration in terms of Article V(2)(a) of the New York Convention. In respect to the public policy, the courts divided it into domestic and international public policy in the sense of Article V(2)(b) of the New York Convention. The attitude of the English courts while recognising and enforcing foreign arbitral awards in terms of the New York Convention can be seen from judicial interpretations in both pre and post the Act 1996. In *Soleimany* case, the court declined the recognition and enforcement of foreign arbitral award under the *Arbitration Act 1950 (Act 1950)* that the recognition and enforcement would be contrary to public policy as the agreement is illegal in view of the domestic laws.<sup>233</sup> In *Honeywell International* case, the High Court refused enforcement on ground of public policy. The court stated that bribery is clearly contrary to English public policy so, the contract to bribe are enforceable.<sup>234</sup> However, the pro-

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<sup>233</sup> *Soleimany v Soleimany*, 1999 QB 785.

<sup>234</sup> *Honeywell International Middle East Ltd. v Meyden Group LLC*, (2014) EWHC 1344 (TCC) at Para 93.

enforcement approach of the court adopted in Honeywell International case was refined in Dallah case by the Honourable Supreme Court. This case turned on question of who was named as party in the arbitration agreement. The court stated that the arbitration agreement was in between a Trust created by the Government of Pakistan and Dallah International, but the Government of Pakistan was not named as party in the arbitration agreement. The court refused the enforcement of arbitral award.<sup>235</sup> Thus, considering the judicial decision on enforcement of arbitral awards, it seems that the Act 1996 is positive and favourable, but the drafters need to balance the relationship between courts and the arbitration on public policy. The courts also should change their attitude by giving less restrictive interpretation on account of the international public policy.

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<sup>235</sup> Dallah Real Estate & Tourism Holding Co. v Ministry of Religious Affairs, Pakistan, (2011) 1 AC 763 at Para 104.

## CONCLUSION

In the end, the relevant factors point irresistibly to the conclusion that international arbitration is preferred method to resolve cross-border disputes and the New York Convention is widely recognised in international commercial arbitration. The concept of a final and binding award capable of enforcement is important in international commercial arbitration which shows certainty and predictability. Although, approaches to the enforcement of arbitral awards and interpretation of the provisions of the New York Convention varies in the contracting states. The UN played vital role in development of commercial arbitration laws as initially, formulated the Geneva Protocol and Geneva Convention aiming to provide rules for validation of arbitration agreements and enforcement of arbitral awards, respectively. Later, both Geneva treaties were repealed by the New York Convention which provides both elements from validation of arbitration agreements to enforcement of arbitral awards. The New York Convention provided the common legislative standards for the recognition of arbitral agreements, and court recognition and enforcement of foreign or non-domestic arbitral awards. It has now been rectified by every major trading nations around the world including UK and Pakistan is one of the initial signatories of it. The UK rectified the New York Convention in 1975 followed by the Act 1996 but it has a long history and flexible approach towards arbitration. The Act 1996 empowered national courts to recognise and enforce foreign arbitral awards by giving effect to the New York Convention. On the other hand, Pakistan rectified the New York Convention through Ordinance 2005 which was re-enacted by the Act 2011. It was the first time when the New York Convention was directly given effect in Pakistan. The Pakistan was one of the initial signatories and its long waited rectification was a landmark in

international commercial arbitration which now applicable in all major trading countries.<sup>236</sup> As a result, the international award creditors encouraged to file applications for recognition and enforcement of foreign arbitral awards in Pakistani courts on the basis of the Act 2011. The Act 2011 being a special law, is clear and had lessor judicial intervention though national courts need more consistency in interpretation its terms.<sup>237</sup> The courts strictly construed the applications for enforcement that the same shall not be refused until one of the refusal grounds provided in Article V of the New York Convention, is proved.<sup>238</sup> However, the present form of arbitration in Pakistan is a product of the English arbitration laws, introduced during the British rule in the Indian sub-continent from 1857 to 14 August 1947,<sup>239</sup> such as the Act 1940 deals with domestic arbitration was derived from the English law of arbitration so, as a result, the case law could not be developed to any extent, even after independence, the Pakistani courts continue to rely heavily on the English arbitration cases.<sup>240</sup>

The New York Convention contains key provisions on determination of foreign arbitral awards or non-domestic awards, arbitration agreements and grounds upon which recognition and enforcement may be refused at the request of the party, against whom it is invoked as well as two additional grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award. Article I of the New York Convention provides two criteria in recognition and enforcement proceedings for determining whether the award is foreign, one the award is made in another contracting state and secondly, the national courts in the contracting states consider the award as non-domestic award, whereas Article II deals with

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<sup>236</sup> ICC Pakistan, New York Convention 1958 (Iccpakistan.com.pk, 2019) <<http://www.iccpakistan.com.pk/New%20York%20Convention%201958.html>> accessed 26 June 2019.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Anees Jillani, Recognition and Enforcement of Foreign Arbitral Awards in Pakistan (International and Comparative Law Quarterly, Vol. 37, No. 4, October 1988), pp. 926-935.

<sup>240</sup> Ibid. p. 927.

enforcement of arbitration agreements as well as sets out the maximum requirements for a valid arbitration agreement. Article II gave discretionary powers to courts in the contracting states to interpret validity of arbitration agreements. The courts are consistent to refuse to refer the parties to arbitration in absence of valid arbitration agreements. Article V provides refusal grounds to the parties. The UK and Pakistani courts have similar view that validity of arbitration agreements depends on consent of parties and it will be accessed according to the law of the country where it was made. The courts largely dealt with defence and stated that it can be raised before the enforcing court even the party resisting the enforcement failed to challenge before the arbitral tribunal. The courts may also refuse the enforcement if proper notice regarding appointment of arbitrators or arbitration proceedings is not given to the party. The courts are consistent for giving notice but divided on contents or requirements of the notice. Most courts in the contracting states including UK are consistent to not reviewing the merits of the case and take it as final and binding upon the parties by giving effect to the New York Convention but the courts in Pakistan are inconsistent and has given different interpretations. To invoke this ground, the parties must raise this defence before the arbitral tribunal otherwise, the party cannot be allowed to raise the same defence at the enforcing stage. The courts can also refuse the enforcement if the arbitral tribunal issued the award by access of authority and composition of arbitral tribunal was not made in accordance with the arbitration agreement. The English court put aside the defence by asking the party opposing the enforcement that what damage has caused if arbitral tribunal is not composed in accordance with the arbitration agreement or did you raise this defence before the arbitral tribunal. The courts also consistent to refuse the enforcement if arbitral award was not binding, set aside or suspended by the competent authority of the country it was made. The Pakistani courts are inconsistent, and some applied the principle of severability in which the arbitration agreements are separated from the main contract. Article V(2) enables courts in the contracting states to

refuse enforcement on its own motion if subject matter is not capable by settlement to arbitration or it is found contrary to public policy. The mostly states acknowledge that arbitral awards can only be set aside in exceptional cases on account of public policy. Although, the grounds for refusing enforcement provided in Article 36 of Chapter VIII of the Model Law are identical to the refusal grounds laid down in Article V of the New York Convention, but these grounds are not relevant to foreign arbitral awards. Alternatively, pursuant to Article VII, a party to enforcement proceedings before a national court in the contracting states, can rely on its national laws or any other treaty related to recognition and enforcement of foreign arbitral awards, for the time being in force, instead of the New York Convention in order to seek enforcement of a foreign arbitral award or an arbitral agreement, if the New York Convention is less favorable. Therefore, courts in the contracting states enjoy discretionary powers while deciding the matters regarding recognition and enforcement of non-domestic or foreign arbitral awards which means the courts in recognition and enforcement proceedings may still recognise and enforce a foreign arbitral award even if a ground under Article V of the New York Convention is established. The courts are at more liberty under Article VII in which privilege to choose different regimes given to the parties to the enforcement proceedings, aiming to enhances the equality between foreign and domestic awards. The wording of the provision is used precisely to avoid interferences between these different regimes.

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