CHAPTER 23
TRANSGRESSION OF THE ARBITRATORS' AUTHORITY: ARTICLE V(1)(C) OF THE NEW YORK CONVENTION

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1. Introduction

1.1 General Observations Regarding Article V(1)(c) as a Ground for Refusing Enforcement of an Arbitral Award

Article V(1)(c) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, Convention) sets out one of the five exhaustive[1] grounds that may justify a national court's refusal to recognise and enforce an arbitral award. Pursuant to this provision, recognition and enforcement of an award may be refused if 'the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or [if] it contains decisions on matters beyond the scope of the submission to arbitration'.

This ground for refusal of recognition and enforcement of an arbitral award ought to be distinguished from the one set out in Article V(1)(a) of the Convention, which provides, *inter alia*, that enforcement may be refused if the party resisting enforcement proves that the agreement under which the parties have undertaken to submit to arbitration all or some differences which have arisen or which may arise between them in respect of a defined legal relationship 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country *where the award was made*'. Whereas *lit.* (c) presupposes that the parties have concluded a valid arbitration agreement[2] and pertains to situations where

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[1] See, eg, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998), XXIVa *Y.B. Com. Arb.* 819, 830 (1999), which provides that 'the Convention's enumeration of defenses is exclusive'; *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys 'R' Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997), XXIII *Y.B. Com. Arb.* 1058, 1062 (1998), which provides that 'the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award'; *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996), XXII *Y.B. Com. Arb.* 993, 1000 (1997), which provides that 'Article V of the Convention lists the exclusive grounds justifying refusal to recognize an arbitral award'.

[2] See, for instance, Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* ¶ 10–41, at 450, Sweet

(continued...)

the scope – not the existence – of the arbitrators' jurisdiction is at issue, *lit*. (a) deals with situations where, as a result of the invalidity or inexistence of the arbitration agreement, the tribunal has no jurisdiction at all to rule on the parties' dispute.[3] Thus, Article V(1)(c) complements[4] Article V(1)(a). One may of course consider that the drafting of the New York Convention could have been better and that there is no logical reason to draw a distinction between situations in which the arbitrators lack jurisdiction as a result of the fact that there is no arbitration agreement, on the one hand, and those in which the existing agreement does not cover the dispute, on the other hand. The present commentary does not deal with the former situations, foreseen by Article V(1)(a), but rather focuses on situations which fall within the ambit of Article V(1)(c).

As discussed below, in addition to the transgression, by the arbitrators, of the scope of their jurisdiction, Article V(1)(c) of the New York Convention comprises another ground justifying a refusal to enforce an award: enforcement may be denied if the arbitrators have exceeded their mandate by awarding more than, or something different from, what the parties had claimed. There is, however, no unanimity in this respect:

& Maxwell (4th ed. 2004), according to whom the issue of jurisdiction 'raised as part of a plea that there was no valid agreement to arbitrate ... would fall under Article V.1(a) of the New York Convention'; Petar Sarcevic, *Course on Dispute Settlement in International Trade, Investment, and Intellectual Property – Dispute Settlement, International Commercial Arbitration – 5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention*, U.N. Doc. UNCTAD/EDM/Misc.232/Add.37, at 32 (2003); Jean-François Poudret and Sébastien Besson, *Droit comparé de l'arbitrage international* 889, Bruylant/LGDJ/Schulthess (2002); Albert Jan van den Berg, 'The New York Convention: Summary of Court Decisions', in *The New York Convention of 1958*, ASA Special Series No. 9, at 46, 85–86 (1996), according to whom 'Art. V(1)(c) does not relate to the case where the arbitrator had no competence at all because of lack of a valid agreement. This case is to be determined under ground a of Art. V(1). Ground c concerns the case where the arbitration agreement may be valid as such, but the arbitrator has given decisions which are not contemplated by or do not fall within the scope of the arbitration agreement and the questions submitted to him by the parties (terms of reference)'; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 312, Kluwer (1981).

[3] In a case between a German petitioner and a Dutch respondent, the respondent, resisting enforcement of an arbitral award, argued that the arbitration agreement concluded by the parties was invalid under the law to which the parties had subjected it (ie, German law) for lack of definiteness, and that this foreclosed an examination of the Award on the basis of Article V(1)(c) of the New York Convention. The President of the Court of First Instance of The Hague, ruling on the German petitioner's request for leave for enforcement, declared, on the one hand, that the arbitration agreement was valid, and, on the other hand, that 'the respondent ha[d] not asserted in the present proceedings that the arbitrators ha[d] in fact overstepped their competence when making their decision' (Rechtbank The Hague, 26 April 1973, *German (F.R.) party v. Dutch party*, IV *Y.B. Com. Arb.* 305, 306 (1979)). In other words, the President discussed separately the issue of the validity of the arbitration agreement and that of the tribunal 'overstepping its competence', and examined the latter issue only after having ascertained that the parties were bound by a valid arbitration agreement.

[4] E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* 988, Kluwer (1999).

some authors maintain that so long as the arbitrators are acting within the boundaries of their jurisdiction, Article V(1)(c) does not allow courts to refuse enforcement even if the arbitrators are proved to have decided *ultra* or *extra petita* (ie, to have ordered more than, or something different from, what the parties have claimed).

There are thus three different situations to be considered. If there is no valid arbitration agreement and the arbitrators nevertheless hand down an award, enforcement may be refused on the basis of Article V(1)(a) of the New York Convention. If the arbitrators rely on a valid arbitration agreement, Article V(1)(c) may come to application in two instances. On the one hand, should the arbitrators exceed the scope of the valid arbitration agreement, that is render an award relating to differences beyond the ambit of this agreement, enforcement may be refused for want of jurisdiction. On the other hand, should the arbitrators act within the scope of the valid arbitration agreement but exceed their authority by dealing with claims that the parties have not submitted to them, enforcement may be refused for transgression of the arbitrators' mandate.

Article V(1)(c) is to be construed narrowly, given the pro-enforcement bias of the New York Convention.[5] This means, on the one hand, that 'arbitral authority [should be construed] broadly to comport with the enforcement-facilitating thrust of the Convention and the policy favoring arbitration',[6] and, on the other hand, that the existence of the ground for refusal stipulated in Article V(1)(c) 'should be accepted in serious cases

[5] CA Bermuda, 7 July 1989, *Sojuznefteexport v. Joc Oil Ltd.*, XV *Y.B. Com. Arb.* 384, 397 (1990); *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), I *Y.B. Com. Arb.* 205 (1976), according to which Article V(1)(c) of the New York Convention 'basically allow[s] a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration. This defense to enforcement of a foreign award ... should be construed narrowly. Once again a *narrow construction* would comport with the enforcement-facilitating thrust of the Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a *strict reading*' (emphasis added); Redfern, Hunter, Blackaby, Partasides, supra note 2, ¶ 10–34, at 445; Jan Paulsson, 'The New York Convention in International Practice – Problems of Assimilation', in *The New York Convention of 1958*, ASA Special Series No. 9, at 100, 108 (1996), according to whom 'the grounds for refusal are meant to be interpreted narrowly. This means that the existence of the grounds in Article V(1) should be accepted in serious cases only'.

[6] *Management & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987), XIII *Y.B. Com. Arb.* 611, 615 (1988); see also *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992), XVIII *Y.B. Com. Arb.* 590 (1993); *American Construction Machinery & Equipment Corp. v. Mechanised Construction of Pakistan Ltd.*, 828 F.2d 117 (3d Cir. 1987), XV *Y.B. Com. Arb.* 539, 542 (1990); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), VII *Y.B. Com. Arb.* 382 (1982) (which cites the Commentary on Article V(1)(c), I *Y.B. Com. Arb.* 215 (1976)); *Parsons & Whittemore*, supra note 5; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449 (1974), I *Y.B. Com. Arb.* 203 (1976).

only [and that] obstructions by respondents on trivial grounds should not be allowed'.[7]

Recognition and enforcement of an award may be refused, on the basis of Article V(1)(c) of the New York Convention, only if the party against whom enforcement is sought alleges and proves[8] that the arbitrators have transgressed the boundaries of their authority.[9] In the absence of such proof, the arbitrators shall be presumed to have acted within the scope of their powers.[10] More often than not, courts will refuse to enforce an award if the arbitrators are proved to have exceeded their authority. Nevertheless, it stems from the permissive wording of the English[11] and Spanish[12] texts of the Convention, that even if the party resisting recognition and enforcement of the award has proved that 'the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration', the court before which enforcement is sought retains discretion to overrule the objection and grant enforcement of the award.[13] The permissive wording of Article

[7] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 208.

[8] See, for instance, Bezirksgericht [Ct. First Inst.] Zurich, 14 February 2003, *Italian party v. Swiss company*, and Obergericht [CA] Zurich, 17 July 2003, *Swiss company v. Italian party*, XXIX *Y.B. Com. Arb.* 819, 825 (2004), which provides that the 'court does not further review the jurisdiction of the foreign arbitral tribunal on its own initiative. On the contrary, Art. V(1)(c) Convention provides that the party opposing enforcement has the burden to prove that the arbitral award, for instance, deals with a difference not contemplated by the arbitration agreement'; *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.* [1987] 2 Lloyd's Rep. 246, 251, XIII *Y.B. Com. Arb.* 522, 529 (1988), which provides that '[t]he burden of proving any excess of jurisdiction lies on the person seeking to resist the enforcement of the award'; CA Trento, 14 January 1981, *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v. S.p.A. SIMER*, VIII *Y.B. Com. Arb.* 386 (1983); Swiss Fed. Trib., 14 March 1984, *Denysiana S.A. v. Jassica S.A.*, BGE/ATF 110 Ib 191, 195, 1984(4) *ASA Bull.* 206, 1985(3) *Rev. crit. DIP* 551, 1st decision, XI *Y.B. Com. Arb.* 536 (1986); Swiss Fed. Trib., 26 February 1982, *Joseph Müller A.G. v. Bergesen*, BGE/ATF 108 Ib 85, 87 & 90–91, IX *Y.B. Com. Arb.* 437 (1984); Swiss Fed. Trib., 8 February 1978, *Chrome Resources S.A. v. Leopold Lazarus Ltd.*, SJ 1980 65, 80, XI *Y.B. Com. Arb.* 538 (1986); *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976), II *Y.B. Com. Arb.* 252 (1977); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975), I *Y.B. Com. Arb.* 202 (1976); Stefan M. Kröll, 'Recognition and Enforcement of Foreign Arbitral Awards in Germany', 5(5) *Int'l Arb. L. Rev.* 160, 165 (2002); Paulsson, supra note 5, at 107, according to whom '[t]he burden of proof rests on the party resisting enforcement of the award'.

[9] A court may however refuse *ex officio* to recognise and enforce an award which both satisfies the conditions of Article V(1)(c) of the New York Convention and violates its national public policy (Art. V(2)(b)).

[10] This presumption was laid down, for instance, in CA Bermuda, 7 July 1989, *Sojuznefteexport*, supra note 5.

[11] The English text of Article V(1) of the New York Convention reads: 'Recognition and enforcement of the award *may* be refused' (emphasis added).

[12] The Spanish text of Article V(1) of the New York Convention reads: 'Sólo se *podrá* denegar el reconocimiento' (emphasis added).

[13] See, for instance, Sup. Ct. Hong Kong, High Ct., 13 July 1994, *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, XX *Y.B. Com. Arb.* 671, 677 (1995), according to which 'the grounds of opposition are not to be inflexibly applied. The residual

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V(1)(c) in fact empowers courts to grant enforcement if the opposition of the party resisting enforcement appears abusive or belated. Indeed, 'the party resisting enforcement is not entitled to rely on any of the grounds in Article V(1) contrary to the rules of good faith, and, in particular, in a way which is inconsistent with [its] behaviour in the arbitration proceedings'.[14] Consequently, if this party has, for instance, taken part in the arbitral proceedings without raising any objection with respect to the jurisdiction (and there has nevertheless been no tacit extension of the arbitration agreement) or mandate of the tribunal, it can be deemed to be estopped from invoking the ground for refusal.[15] Also, if bad faith can otherwise be imputed to the party resisting enforcement, a court may grant enforcement of an award despite the fact that the conditions of Article V(1)(c) have been proved to be satisfied.[16]

discretion enables the enforcing court to achieve a just result in all the circumstances'; Julian D.M. Lew, Loukas A. Mistelis, Stefan M. Kröll, *Comparative International Commercial Arbitration* ¶ 26-67, at 707, Kluwer (2003). Only in a minority of countries have the courts interpreted 'may', in Article V(1)(c) of the New York Convention, as 'shall', thus leaving no discretion to the court of the country where enforcement is sought if the party resisting enforcement has proved the existence of the ground set out in Article V(1)(c). In Germany, for instance, the view is that the courts are bound to refuse enforcement if the conditions of Article V(1)(c) of the Convention are satisfied; see, in this respect, Kröll, supra note 8, 5(5) *Int'l Arb. L. Rev*. at 165, and the Memorial of the Federal Government on the ratification of the New York Convention, BT-Drs. 3/2160, at 26. Paolo Michele Patocchi in turn argues that '[t]he litteral interpretation does not seem to be a compelling criterion because this provision is not worded in the same way in the various authentic versions (see Article XVI(1)); the French text clearly contains no such reference to any form of judicial discretion' ('The 1958 New York Convention – The Swiss Practice', in *The New York Convention of 1958*, ASA Special Series No. 9, at 145, 166 (1996)).

[14] Patocchi, supra note 13, ASA Special Series No. 9, at 166.

[15] Redfern, Hunter, Blackaby, Partasides, supra note 2, ¶ 10-34, at 445; Mauro Rubino-Sammartano, according to whom 'apparently discretion is granted to the enforcement court whether or not to refuse enforcement', and who argues that the understanding according to which State courts 'are under a duty to refuse enforcement in the presence of any of the Convention's grounds for refusal, ... seems to force the wording of the Convention' (*International Arbitration Law and Practice* 956, Kluwer (2d ed. 2001)); van den Berg expressly states that '[t]he exceeding by an arbitrator of his powers (Art. V(1)(c)) … may also be considered as [a provision] of the Convention which may involve estoppel' (*The New York Arbitration Convention of 1958*, supra note 2, at 266). With respect to the enforcement of arbitral awards, under the New York Convention, in Germany, it has been stated that 'of considerable practical importance … are issues of preclusion. Most of the grounds mentioned can already be invoked in the arbitration proceedings or would justify annulment proceedings at the place of arbitration. Whether and to what extent a party not making use of such means of recourse can rely on the defences in enforcement proceedings often determines the outcome of the proceedings' (Kröll, supra note 8, 5(5) *Int'l Arb. L. Rev*. at 165).

[16] Poudret and Besson, supra note 2, at 881.

1.2 Transgression of the Limits of the Arbitrators' Authority

As stated earlier, the conditions of Article V(1)(c) of the New York Convention are satisfied and enforcement of an award may be refused if the arbitrators who rendered this award transgressed the limits of their jurisdiction or if they exceeded the limits of their mandate. In other words, Article V(1)(c) sanctions the trespassing, by the arbitrators, of the scope wanted by the parties, who conferred jurisdiction upon the arbitrators and defined their brief ('mandate') through their respective claims and defences (*Streitgegenstand*; *objet du litige*; subject matter of the arbitration). This begs several questions to be addressed successively.

The scope of the arbitrators' jurisdiction is determined primarily by the parties' arbitration agreement, be it an arbitral clause or a submission agreement (see sub-section 2.1, infra). In International Chamber of Commerce (ICC) arbitration, the scope of the arbitrators' jurisdiction may, in certain circumstances, be affected by the terms of reference signed by the parties or approved by the court (see sub-section 2.2, infra).

The limits of the arbitrators' mandate, in turn, are primarily fixed by the parties' claims (their respective prayers for relief), which define the relief that the arbitrators may award (see sub-section 3.1, infra). If a party has specified, in its prayers for relief, the legal ground(s) on which its claims are based, awarding the relief sought on another legal basis may amount to a transgression, by the arbitrators, of their mandate (see sub-section 3.2, infra). The award of an interest that the prevailing party has not claimed may, in turn, raise new questions given that the *lex arbitri* or the applicable substantive law may, in certain instances, empower judges to order such interest *sua sponte*, thus calling into question the exact limits of the arbitrators' mandate (see sub-section 3.3, infra). In ICC arbitration, the list of claims in the terms of reference does not define the arbitrators' mandate, since the claims set out in the parties' submissions supersede them (see sub-section 3.4, infra). Furthermore, although this view is not held unanimously, it is widely accepted that lists of issues to be determined mentioned in the parties' respective submissions may also be disregarded for the purpose of setting the limits of the arbitrators' mandate (see sub-section 3.5, infra).

Finally, unless otherwise provided for by the parties in their arbitration agreement or in either party's prayers for relief, contractual and legal provisions pertaining to substantive and admissibility issues do not influence the scope of the arbitrators' jurisdiction or the definition of their mandate. In other words, the court before which enforcement is sought may not refuse to enforce an award, on the basis of Article V(1)(c) of the New York Convention, on the ground that it does not agree with the arbitrators' substantive or admissibility findings (see section 4, infra).

2. The Limits of the Arbitrators' Jurisdiction

2.1 The Arbitration Agreement

It is undisputed that Article V(1)(c) of the New York Convention addresses – at least in part – the extent of the arbitrators' jurisdiction. Indeed, enforcement of an award may be refused if the arbitrators have gone beyond the scope of the parties' agreement to arbitrate their dispute.

The French and the English texts of the Convention differ slightly. As stated earlier, according to the English text of Article V(1)(c), recognition and enforcement of an award may be refused if the party against whom the award is invoked proves that:

> [t]he award deals with *a difference not contemplated by or not falling within the terms of the submission to arbitration*, or ... contains *decisions on matters beyond the scope of the submission to arbitration*. (emphasis added)

The French text, on the other hand, reads:

> [l]a sentence porte sur un *différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire*, ou qu'elle contient *des décisions qui dépassent les termes du compromis ou de la clause compromissoire*.[17] (emphasis added)

The French text thus uses two different terms designating two different types of agreements, namely the '*compromis*' (submission agreement), on the one hand, and the '*clause compromissoire*' (arbitral clause), on the other hand, whereas the English text only uses the expression '*submission to arbitration*'. Notwithstanding this terminological difference between the two texts, nothing indicates, *a priori*, that the English version does not cover both alternatives mentioned in the French text. In fact, neither courts nor scholars have argued that Article V(1)(c) of the Convention is intended to apply only in cases in which the parties have included in their agreement an arbitral clause, to the exclusion of situations in which the parties have concluded, after the dispute has arisen, a submission agreement.

[17] Pursuant to Article XVI of the New York Convention, both the English and the French texts are authentic. A wording similar to that of the French text can be found in the (authentic) Spanish text ('una diferencia no prevista en el compromiso o no comprendida en las disposiciones de la cláusula compromisoria'), as well as in the (non-authentic) German translation ('eine Streitigkeit …, die in der Schiedsabrede nicht erwähnt ist oder nicht unter die Bestimmungen der Schiedsklausel fällt').

In conclusion, the conditions of Article V(1)(c) are satisfied and enforcement may be refused if the arbitrators have exceeded the scope of the arbitration agreement (arbitral clause or submission agreement) by ruling on a dispute the subject matter of which is beyond the limits of the arbitration agreement. In such a situation, the arbitrators have exceeded the scope of their jurisdiction, even if they have not gone beyond the parties' claims and defences.[18] It is debatable whether situations in which the arbitrators have ruled on a dispute between entities that are not all parties to the arbitration agreement, fall under Article V(1)(a) or Article V(1)(c) of the New York Convention.

The following cases provide illustrations of situations in which the party resisting enforcement of an arbitral award argued that the arbitrators had exceeded the scope of their jurisdiction.

In *Tiong Huat Rubber Factory v. Wah-Chang Int'l Co.*,[19] the parties had concluded a contract which required that a letter of credit be provided by the defendant; the said letter of credit was never provided and the claimant sued for non-payment. The arbitrators rendered an award in favour of the claimant that the latter subsequently tried to enforce. The respondent, however, resisted enforcement, arguing that the arbitral clause, which read '[a]ll disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by Arbitration', only covered claims based on quality, size, and weight, and that, consequently, this clause did not give the arbitrators the power to render an award pertaining to the consequences of the non-opening of the letter of credit. The High Court rejected the respondent's argument, holding that payment was a crucial element in all sale of goods contracts, that it was not conceivable that the parties should have intended that quality claims should be arbitrated but that claims for non-acceptance and non-payment should be litigated in court with all the delay that this could entail in certain jurisdictions. Reminding that the House of Lords had recognised in *Falkingham v. Victorian Railways Commissioner* that the 'parties are entitled to provide for restrictive reference confined, for example, to disputes as to condition or quality', the Court of Appeal, however, reversed the decision of the High Court, and held that the term 'contract regulations' in the arbitral clause covered specific provisions but did not include letters of credit. Construing the arbitration clause narrowly, the Court of Appeal stated that:

> the court is not entitled to ignore any of these words. No more is it entitled to write a fresh arbitration clause for the parties on the

[18] See Rubino-Sammartano, supra note 15, at 957.
[19] High Ct. Hong Kong, 28 November 1990, and CA Hong Kong, 18 January 1991, XVII *Y.B. Com. Arb.* 516 (1992).

> footing that so to do would render it more efficacious from a business point of view and enable all disputes arising under one or more of the agreements to be dealt with by the same tribunal.

According to some commentators, '[t]his interpretation may be criticised for being unduly strict and the decision of the High Court in this case is to be preferred as being more in line with the Convention's general aim of encouraging enforcement'.[20] Be that as it may, it remains that the Court of Appeal refused enforcement because the arbitrators had exceeded their jurisdiction by deciding a dispute which the Court found to be outside the arbitration agreement.

In *Sojuznefteexport v. Joc Oil Ltd.*,[21] the Foreign Trade Arbitration Association in Moscow rendered an arbitral award in favour of the Soviet oil company Sojuznefteexport against the Bermudan oil trader Joc Oil. Before the arbitrators, Joc Oil had argued that the contract was invalid because two authorised signatures as required by Soviet law were lacking. The arbitral tribunal, however, upheld the validity of the arbitration clause on the basis of the doctrine of separability. Subsequently, the Court of Appeal of Bermuda found that, in ruling on the validity of the arbitration clause, the arbitrators had not exceeded the scope of their authority. First of all, the Court explained that the law applicable to the determination of the scope of the arbitration agreement is not the *lex fori* but the proper law of the arbitration agreement. Then, the Court held that since the arbitration clause covered '[a]ll disputes or differences which may arise out of this Contract or in connection with it', it encompassed, in particular, disputes concerning the consequences of the invalidity of the contract. The Court concluded that the arbitral tribunal had not exceeded the scope of its jurisdiction.

Finally, in *Management & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*,[22] the parties had entered into an agreement whereby the claimant was to assist the respondent in obtaining a contract with the Government of Iran to develop mining facilities. The agreement provided that if the respondent was awarded the contract, it would pay to the claimant 5 per cent of its 'gross billings'. The parties subsequently disagreed over the expression 'gross billings', and therefore entered into a subsequent superseding Letter of Agreement, according to which the respondent agreed to pay to the claimant an additional amount in 'full settlement' of the disputed payments, and which contained the following provision:

[20] Paulsson, supra note 5, ASA Special Series No. 9, at 112.
[21] Supra note 5.
[22] Supra note 6.

> [The respondent] hereby agree[s] that should its gross billings to [Sar Cheshmeh] exceed a gross total of [$350 million] [the claimant] shall become entitled to receive from [the respondent] additional compensation. In such event and at such time [the claimant] will negotiate the terms and conditions of such payment to [the claimant].[23]

The Letter of Agreement also contained an arbitration clause, which read:

> Any dispute arising between us concerning this Letter of Agreement which cannot be settled amicably, shall be resolved by arbitration to be held by a three-man arbitration panel...[24]

Dispute over the total 'gross billings' continued and arbitration was initiated. The respondent subsequently resisted enforcement of the award rendered by the arbitrators, arguing that they had exceeded their authority in rendering an award on a subject matter which was, pursuant to the arbitration clause in the Letter of Agreement, to be determined by negotiation between the parties. More specifically, the respondent argued that the arbitrators had the authority to decide whether the gross billings in question exceeded US$350 million, but once that decision was made, they lacked the authority to determine the amount of additional compensation since that amount was to be determined by negotiation between the parties. The US District Court for the Central District of California rejected this defence and the Court of Appeals for the Ninth Circuit subsequently rejected the respondent's appeal, holding the following:

> An agreement to arbitrate 'any dispute' without strong limiting or excepting language immediately following it logically includes not only the dispute, but the consequences naturally flowing from it—here, the amount of additional compensation. By agreeing to arbitrate the decision of whether there had been US$ 350 million in sales and by using such broad language in the letter agreement, we find the parties also conferred arbitral authority to determine the amount of additional compensation due [to the claimant].[25]

The Court of Appeals further held that if 'the arbiters' authority to reach the main decision [is] within the scope of the [parties'] agreement, it follows the arbiters also [have] the authority to award costs and fees for obtaining the arbitral decision'.[26]

[23] ibid. 820 F.2d at 1532–33.
[24] ibid. 820 F.2d at 1533.
[25] ibid. 820 F.2d at 1534–35.
[26] ibid. 820 F.2d at 1535.

2.2 The Terms of Reference in ICC Proceedings

In ICC arbitration, the terms of reference may have an impact on the determination of the scope of the arbitrators' jurisdiction. By agreeing to and executing the terms of reference, the parties enter into a submission agreement[27] which may amend and extend the existing arbitration agreement, substitute for a missing or invalid arbitration agreement, or restrict the parties' initial agreement. In the latter case, however, it will take clear language to reach the conclusion that the parties actually do intend to restrict their arbitration agreement; indeed, the assumption is rather that the parties only endeavour to define, in the terms of reference, the claims and issues arising in the proceedings without limiting the scope of the arbitration agreement.

In conclusion, enforcement of an award on a question beyond the scope of the terms of reference in ICC arbitration 'does *not* in principle attract the application of Article V(1)(c) [(since the terms of reference do not set the limits of the arbitrators' authority)]..., unless the court is satisfied that both parties intended that a fresh arbitration agreement should be contained in, and evidenced by, the terms of reference, so that the arbitrators' decision beyond the scope of the terms of reference would amount to a decision on a matter not referred to arbitration'.[28]

3. The Limits of the Arbitrators' Mandate

3.1 The Parties' Claims (Prayers for Relief)

Neither the English nor the French text of the Convention explicitly mentions that the limits of the arbitrators' authority are also to be set by reference to the parties' claims. As a result, one could conclude, a priori, that Article V(1)(c) only pertains to the issue of the transgression, by the arbitrators, of the limits of the scope of their jurisdiction.

Numerous scholars[29] however agree that, in order to determine whether an arbitral tribunal has exceeded the limits of its authority within the meaning of Article V(1)(c) of the New York Convention, it is not sufficient to examine and establish the scope of the tribunal's jurisdiction. It is also necessary to analyze the extent of its mandate, as determined by the parties' specific claims. In other words, according to these scholars

[27] Gaillard and Savage, supra note 4, at 988. See also *CBS Corp. v. WAK Orient Power & Light Ltd.*, 168 F. Supp. 2d 403 (E.D. Pa. 2001), XXVI *Y.B. Com. Arb.* 1112 (2001), in which the District Court held that by signing the terms of reference, the parties had agreed to submit to arbitration the issues listed therein.

[28] Patocchi, supra note 13, ASA Special Series No. 9, at 181.

[29] See, for instance, Lew, Mistelis, Kröll, supra note 13, at 714, ¶¶ 26-93; van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 314; Poudret and Besson, supra note 2, at 889.

(as well as various courts), Article V(1)(c) also covers situations in which 'the arbitrator has decided matters which go beyond the claims and counterclaims made by the parties in the submission or during the arbitration proceedings instituted under an arbitration clause'.[30] 'If an arbitral tribunal were to award more than claimed by a party, such an award *ultra petita* would similarly attract the application of Article V(1)(c)'.[31]

As pointed out earlier, this opinion is not unanimous. Gaillard and Savage, for instance, state:

> decisions that are ... *ultra petita* ... cannot be said to be outside the terms of the arbitration agreement within the meaning of the New York Convention. In practice, it is only where the terms of reference ... set out the parties' claims in detail that arbitrators who have decided issues other than those raised in such claims can be said both to have ruled *ultra petita* and to have exceeded the terms of the arbitration agreement. If, on the other hand, the arbitration agreement is drafted in general terms and the claims are not presented in a way that contractually determines the issues to be resolved by the arbitrators, a decision that is rendered *ultra petita* would not contravene Article V, paragraph 1(c).[32]

These learned authors are thus of the (minority) view that Article V(1)(c) of the Convention applies only where the arbitrators have gone beyond the terms of the arbitration agreement, and not where they have exceeded their mandate whilst remaining within the ambit of their jurisdiction. Their conclusion is inconsistent with the (generally) accepted view that Article V(1)(c) also deals with situations where the arbitrators have transgressed the boundaries of their mandate.

As underlined by van den Berg, the view of the majority is supported by the English text of the Convention:

> whilst, for example, Article V(1)(a) refers to the arbitration agreement in general, Article V(1)(c) mentions specifically the 'submission to arbitration'. If the submission agreement and the arbitral clause were only intended to be provided for, Article V(1)(c) could simply have mentioned 'arbitration agreement'.[33]

[30] Rubino-Sammartano, supra note 15, at 957.
[31] Patocchi, supra note 13, ASA Special Series No. 9, at 181. The distinction between jurisdiction and mandate 'is that the mandate may comprise less than the arbitral clause. This has as consequence that in the case of the arbitral clause it depends on the type of allegation made whether the arbitral clause or the mandate must be taken as the measuring standard for determining the question whether the arbitrator has exceeded his authority' (van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 314).
[32] Gaillard and Savage, supra note 4, at 988.
[33] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 315.

This view is preferable: if Article V(1)(c) were only applicable in cases of transgression, by the arbitrators, of the scope of their jurisdiction, there would be no possibility to refuse the enforcement of an award rendered by arbitrators who, acting within the scope of their jurisdiction and in compliance with the requirements of due process, have awarded more than, or something different from, what was actually claimed.[34]

In *AB Götaverken v. General National Maritime Transport Co. (GNMTC)*,[35] for instance, the party resisting enforcement of the arbitral award argued that the arbitrator had exceeded his authority by awarding a price reduction even though the parties had not asked the arbitrators to determine whether there should be such a reduction. The Swedish Court of Appeal before which enforcement was sought held that the arbitrators' authority included the power to adjust the price, and concluded that the limits of their authority had consequently not been transgressed.[36] The opinion of the Court of Appeal was confirmed by the Supreme Court of Sweden.

German courts have expressed the view that in order to determine whether an arbitral tribunal has exceeded the scope of its mandate, 'it is not only the wording of the claim that is relevant'.[37] The Stuttgart Court of Appeal, for instance, granted enforcement of an award for the amount of DM 129,621, although the claim only amounted to DM 119,621, rejecting the defense that the arbitrators had gone beyond the scope of their mandate. The Court held that it clearly stemmed from the materials submitted with the request for arbitration that the claimant had actually applied for the amount awarded and that its specified claim was in fact based on a miscalculation. The Court stated:

[34] ibid. at 314–16; Poudret and Besson, supra note 2, at 889.

[35] Sup. Ct. Sweden, 13 August 1979, *AB Götaverken v. General Nat'l Maritime Transport Co. (GMTC)*, and CA Svea (5th Dept.) in Stockholm, 13 December 1978, VI *Y.B. Com. Arb.* 237 (1981).

[36] The Court of Appeal explained: 'the arbitrators' mission was to determine whether GMTC was obliged to take delivery of the vessels and to pay the last instalment of the purchase price. It meant that they had the power to determine that GMTC should take delivery and should pay the last instalment with a reduction for non-substantial defects in the vessels. Thus the reduction was not an unsolicited award of damages to GMTC but rather a price adjustment connected with the general determination that GMTC owed the last instalment' (VI *Y.B. Com. Arb.* at 238). In another case (*Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc.*, No. 03 Civ. 4363 SAS, 2003 WL 22881820 (S.D.N.Y. Dec. 4, 2003), XXIX *Y.B. Com. Arb.* 1172, 1184 (2004)), the defendant, resisting the enforcement of an arbitral award that had been rendered against it, contended that 'because the Board of Arbitration was improperly constituted, it had no authority to adjudicate the parties' dispute, and the award was by definition beyond its (non-existent) power'. Strangely, even though the issue of the composition of an arbitral tribunal is entirely unrelated to that of its mandate, the Court before which enforcement of the award was sought held that 'because the arbitral tribunal was improperly composed, it had no power to bind the parties; any assertion of such power, by definition, exceeded its mandate'.

[37] Kröll, supra note 8, 5(5) *Int'l Arb. L. Rev*. at 168.

> Enforcement of an arbitral award must not be denied because the award granted the claimant more than it claimed. The claimant did indeed seek payment of DM 119,621, according to the defendant's statement of the facts, [whereas] the defendant was directed to pay DM 129,621. The [award in] excess of the claim falls under the [objection of] excess of the arbitration agreement in Art. V(1)(c) Convention... However, the arbitral award does not exceed the claim. The amount of the claim is not determined by the wording of the request; rather, *the dispositive part of the decision must objectively correspond to the relevant presentation of the facts*. According to the arbitral award, the sum of DM 129,621 results from adding up the invoices claimed, so that the arbitral tribunal correctly assumed that the request for DM 119,621 was a writing error that could easily be corrected.[38] (emphasis added)

The Hamburg Court of Appeal, in turn, has held the following:

> For the same reason, an award ordering payment of interest for the time after it has been rendered until payment does not necessarily infringe the scope of the arbitration agreement even if interest for this time is not explicitly requested but only a starting point is mentioned. In those cases an interpretation of the request in light of the parties' interest usually reveals that interest is requested also for the post award period so that the tribunal has not acted *ultra petita*.[39]

The following conclusions may be drawn from the fact that there are two grounds (excess of jurisdiction and excess of mandate) that may justify a refusal, under Article V(1)(c) of the New York Convention, to enforce an award. In cases in which the parties have concluded an arbitration clause, the arbitrators are deemed to have dealt with a difference not contemplated by or not falling within the terms of the submission to arbitration, both if they have dealt with a dispute which falls outside the scope of the arbitral clause itself, and if they have gone beyond the limits of their mandate as defined above. In the case of an arbitration clause binding the parties, the terms 'submission to arbitration' in the English text of the Convention consequently encompass both the '*clause compromissoire*' (arbitration clause) and the 'delineation of the arbitrator's authority as made by the questions submitted to him (ie, the arbitrator's mandate)'.[40] On the other hand, in the case of an arbitration submission ('*compromis*'), as a general rule,

[38] Oberlandesgericht Stuttgart, 6 December 2001, 1 Sch 12/01, XXIX *Y.B. Com. Arb.* 742, 746 (2004).
[39] Kröll, supra note 8, 5(5) *Int'l Arb. L. Rev*. at 168, referring to Oberlandesgericht Hamburg, RPS 1/1999, Supplement 4 Betriebs-Berater 11/2000, at 13.
[40] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 315.

'there is no need to distinguish between the agreement and the mandate since the mandate is defined in the agreement itself'.[41]

3.2 The Legal Qualification of the Parties' Respective Claims

As stated above, the parties' claims define the limits of the mandate of the arbitrators. One issue remains. Is an arbitral tribunal that acted within the limits of its jurisdiction and awarded no more than what was actually claimed nevertheless deemed to have exceeded the scope of its mandate if it awarded the remedies sought on the basis of legal grounds other than the ones invoked by the party to support its claims? Do the arbitrators transgress their mandate if they base their findings on legal grounds that have not been invoked by the parties, but on which the tribunal has invited the parties to express themselves?

As a preliminary observation, it should be noted that the court before which enforcement is sought may look into the award without violating the principle that courts should not review the substance of arbitral awards (see sub-section 4.1, infra), so long as this investigation is strictly limited to the issue whether the arbitrators have transgressed their mandate. In particular, reaching the conclusion that the arbitrators have founded their decision on legal grounds other than those invoked by the parties does not amount to substituting the court's judgment for that of the arbitrators: the court before which enforcement is sought does not examine which grounds should have been taken into consideration, but merely whether the arbitrators have departed from their mandate when examining legal grounds other than those set forth by the parties to support their claims.

No uniform rule applicable to international arbitration provides whether arbitrators are bound by the parties' legal qualifications of their claims. Arbitrators are however often considered entitled to determine *ex officio* the content of the substantive applicable law, in accordance with the adage '*iura novit curia*'. Hence, although the parties remain in charge of alleging and proving the contents of the applicable substantive law, the arbitrators are entitled to conduct their own research and substitute their legal characterisation of the facts of the case for that of the parties. If the parties fail to allege and establish the contents of the applicable substantive law, the arbitrators may do so *ex officio*.[42] In conclusion, as a

[41] ibid. at 314. The mention of the '*compromis*' (submission agreement) in the French text of the Convention is also an indication that the claims of the parties are to be taken into account for setting the limits of the arbitrators' authority.

[42] Gabrielle Kaufmann-Kohler, '"Iura novit arbiter" – Est-ce bien raisonnable ? – Réflexions sur le statut du droit de fond devant l'arbitre international', in A. Héritier-Lachat and L. Hirsch (eds.), *De lege ferenda – Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch* 71, 77, Slatkine (2004).

general rule, the arbitrators may not be held to have exceeded the limits of their mandate if they award what was claimed on the basis of a legal ground different from the one invoked by the claiming party.

This solution is in accordance, for instance, with the rules articulated by the Swiss Federal Tribunal and those laid down in the English Arbitration Act 1996. Section 34(2)(g) of this Act allows arbitrators to decide 'whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law'. In other words, the arbitrators have the right to decide how the substance of the applicable law must be proved and by whom. In consequence, the arbitrators are free to establish, *ex officio*, the content of this law, and may disregard the parties' submissions in this respect.

This is also the position adopted by US courts. In *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*,[43] the District Court for the Southern District of California rejected the defendant's claim that the tribunal had issued a ruling based upon legal theories not asserted by the parties, and that this precluded the enforcement of the award. Referring to *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, the Court held that under the New York Convention, a court is to determine 'whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties' pleadings'.[44] In *Gould*, the respondents had objected to the confirmation of the award 'because the award [was] not based on the same legal theory as that stated in the pleadings'.[45] The Court had found that the subject matter of the respondent's claim consisted in the contracts binding the parties, and that, to the extent that the 'award resolve[d] the claims and counterclaims connected with the two contracts it ... [did] not exceed the scope of the submission to arbitration'.[46] The District Court concluded that the award resolved the parties' claims arising from their contracts and that the fact that this award was not based on the same legal theories as those set forth in the pleadings could not be a basis for refusing to confirm it.

There are two exceptions to the principle according to which the arbitrators may requalify the parties' claims. First, if a party has expressly spelt out, in its prayers for relief, the legal basis supporting its claim, the arbitrators may not award the relief sought on another legal basis; if they do, the award rendered may be considered *ultra*

[43] *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998), XXIV *Y.B. Com. Arb.* 875 (1999).
[44] *Cubic Defense Systems*, supra note 43, 29 F. Supp. 2d at 1173, XXIV *Y.B. Com. Arb.* at 879.
[45] *Gould*, supra note 6, 969 F.2d at 771, XVIII *Y.B. Com. Arb.* at 594.
[46] ibid.

petita.[47] Indeed, in such a situation, the party has limited the object of its claim and has excluded claiming the disputed relief on a ground other than the one mentioned in its prayers for relief. Secondly, if the arbitrators' legal findings are entirely unrelated to the parties' submissions, and if it appears, as a consequence, that such findings would 'take the parties by surprise', it is the arbitrators' duty to invite the parties to provide their comments on such findings.[48] If the arbitrators fail to do so and render an award which grants to the parties what they claimed, but on legal bases entirely different from the ones raised by the parties, the arbitrators may be considered to have transgressed the limits of their mandate.[49] In such a situation, however, it is rather on the basis of Article V(1)(d) of the New York Convention (violation of due process) that enforcement of the arbitral award may be refused.

3.3 The Award of Non-Claimed Interest

In the context of the definition of the limits of the arbitrators' mandate, the issue of the award of non-claimed interest is of a particular nature. In all the situations examined above, the limits of the arbitrators' authority were to be set according to the parties' intent (according either to the arbitration agreement or to the parties' respective claims). However, considering that some sets of laws authorise judges to grant non-claimed interest, one may wonder whether the scope of the arbitrators' mandate may be extended to grant interest which a party has failed to pray for.

The French Civil Code provides for the payment of non-claimed interest.[50] In the past, French courts held that if French law applied to

[47] Swiss Fed. Trib., 30 April 1992, *O. & consorts v. V.*, unpublished; CA Paris, 14 October 1993, unpublished. *Contra*, François Perret, 'Les conclusions et les chefs de demande dans l'arbitrage international', 1996(1) *ASA Bull.* 7, and François Perret, 'Les conclusions et leur cause juridique au regard de la règle *ne eat judex ultra petita partium*', in *Etudes de droit international en l'honneur de Pierre Lalive* 595, Helbing & Lichtenhahn (1993).

[48] Swiss Fed. Trib., 22 February 1999, *B AS et C AS v. A SpA*, 1999(4) *ASA Bull.* 537, 544.

[49] See Cass. 1e civ., 14 March 2006, *Conselho Nacional de Carregadores v. Charasse*, 2006(3) *Rev. arb.* 653, which held: 'Attendu que si le tribunal arbitral n'a pas l'obligation de soumettre au préalable l'argumentation juridique qui étaye sa motivation à la discussion des parties, il doit cependant respecter le principe de la contradiction; Attendu que, pour rejeter le moyen d'annulation tiré de la violation du principe de la contradiction, l'arrêt retient que les arbitres ont motivé leur sentence en droit en appliquant leur raisonnement aux éléments de fait et de droit débattus par les parties et qu'ils en ont déduit les conséquences juridiques qu'ils estimaient fondées; Qu'en statuant ainsi alors que le tribunal arbitral avait, sans débat contradictoire, fondé sa décision sur les dispositions non invoquées de l'article 1843 du Code civil, la cour d'appel a violé les textes susvisés'.

[50] Pursuant to Article 1153-1 of the French Civil Code, '[e]n toute matière, la condamnation à une indemnité emporte intérêts au taux légal même en l'absence de demande ou de disposition spéciale du jugement. Sauf disposition contraire de la loi, ces intérêts courent à compter du prononcé du jugement à moins que le juge n'en décide autrement'.

the merits of the parties' dispute, the arbitrators were entitled to grant non-claimed interest[51] or to grant interest as from an earlier day than that claimed by the parties.[52] These precedents were however reversed on 30 June 2005, when the Cour d'appel de Paris vacated an arbitral award on the ground that the arbitrators had granted non-claimed interest. Arguing that 'il y a une différence entre l'exercice de la fonction de juger par un juge étatique et par un arbitre dont la juridiction a une origine conventionnelle', the Cour d'appel held the following:

> la soumission du contrat litigieux au droit français n'autorise pas pour autant les arbitres à prononcer une condamnation sur la base de l'article 1153-1 du Code civil au seul motif que cet article l'envisage même en l'absence de demande.[53]

According to this decision, unless a party has requested the payment of interest, the arbitrators' mandate does not include the right to award such interest. This decision can hardly be upheld.[54] If the judge/arbitrator is entitled, according to the applicable substantive law, to grant interest *sua sponte*, the award of non-claimed interest is not a ground justifying a refusal to enforce the award under Article V(1)(c) of the New York Convention. The situation is not different if the award of non-requested interest is provided for in the procedural law governing the arbitration proceedings (*lex arbitri*). In both instances, enforcement may be granted given that the arbitrators found the '*petitum*' (interest) in an applicable law. Another issue is whether the arbitrators called the attention of the parties to the possible award of interest; in this respect, Article V(1)(d) of the Convention may sanction the arbitrators' failure to respect the requirements of due process.

Likewise, the Court of Appeal of Hamburg dismissed the objection to enforcement raised by a defendant who argued that the award was vitiated given that the arbitral tribunal had granted post-award interest that had not been claimed.[55] It held that the applicable procedural law (the English Arbitration Act 1996) and arbitration rules allowed the

[51] CA Paris, 6 November 2003, *Caisse Fédérale de Crédit Mutuel du Nord de la France v. Banque Delubac et compagnie*, 2004(3) *Rev. arb.* 631.
[52] CA Paris, 25 March 2004, *Fontan Tessaur v. ISS Abilis France*, 2004(3) *Rev. arb.* 671, 673, which held: 'sur les intérêts des condamnations, que leur octroi résulte de la simple application de la loi, l'article 1153-1 du Code civil prévoyant que leur point de départ peut en être fixé à une date autre que celle du jugement; que le droit applicable en la cause étant le droit français, cette disposition autorisait donc les arbitres à accorder les intérêts des sommes allouées à partir de la demande d'arbitrage, sans avoir à motiver spécialement leur décision sur ce point'.
[53] CA Paris, 30 June 2005, *Pilliod v. Econosto International Holding*, 2006(3) *Rev. arb.* 687, 688.
[54] See also the opinion of Pierre Raoul-Duval, 'Intérêts moratoires: vers une remise en cause du pouvoir des arbitres ? (A propos d'un arrêt de la Cour d'appel de Paris du 30 juin 2005)', *Gazette du Palais*, 15 December 2005, No. 349, at 11.
[55] Oberlandesgericht Hamburg, 30 July 1998, XXV *Y.B. Com. Arb.* 714 (2000).

arbitrators to award more interest than claimed by the claimant. Indeed, the Court held the following:

> The fact that more interest was awarded than it was claimed is not at odds with the [shipowner's] claim, since this claim clearly cannot be read to limit the power of the arbitral tribunal to award more interest. Hence, the arbitrators did not exceed their authority in the sense of Article V(1)(c).

The issue of the award of interest, if provided for in the *lex arbitri*, is similar to that of the award of costs. In *Aasma v. American Steamship Owners Mutual Protection and Indemnity*, the plaintiff resisted enforcement of an award on the ground that the award of costs was beyond the scope of the parties' arbitration agreement since 'nowhere [were] costs or attorneys' fees specifically mentioned, much less agreed upon'.[56] The Court rejected the defense, holding that 'the parties' agreement established that the arbitration was to be conducted in accordance with the Arbitration Act 1996' and that 'Sections 59-64 of the Act specifically provide for the awarding of costs and set forth default provisions in the absence of an agreement between the parties as to costs'. The Court explained:

> Saliently, Section 63 of that Act provides that in the absence of an agreement regarding costs, an arbitrator 'may determine by award the recoverable costs of the arbitration on such basis as it thinks fit'.... Under the Act, 'costs of the arbitration' is a term of art and includes arbitrators' fees and expenses, fees and expenses of the arbitral institution, and 'the legal or other costs of the parties'... Based on the foregoing, the Court finds the award of costs to be within the scope of the parties' arbitration agreement.[57]

3.4 The List of Claims in the Terms of Reference in ICC Proceedings

As explained above, both the scope of the arbitral tribunal's jurisdiction and the scope of its mandate must be taken into consideration to determine the limits of its authority. With respect to the arbitrators' mandate, one question remains: in an ICC arbitration, if the terms of reference signed by the parties or approved by the ICC Court set forth narrower claims or, on the contrary, include more or wider claims than those set out in the parties' submissions, which ones should prevail at the time of the enforcement?

[56] *Aasma v. American Steamship Owners Mutual Protection and Indemnity*, 238 F. Supp. 2d 918, 921 (N.D. Ohio 2003), XXVIII *Y.B. Com. Arb.* 1140, 1143 (2003).
[57] ibid., 238 F. Supp. at 922, XXVIII *Y.B. Com. Arb.* at 1143.

If the parties eventually claim less than what they requested in the terms of reference, the arbitrators' mandate is ultimately fixed by the parties' claims in their submissions. Hence, enforcement may be refused if the award orders more than what is claimed in the parties' submissions, albeit the terms of reference included prayers for such an order. In other words, the terms of reference may be disregarded for the delimitation of the scope of the arbitrators' mandate, which is fixed by reference to the parties' final claims.

Is the answer the same if the parties claim more than, or something different from, what was listed as their anticipated claims at the time of the signature or approval of the terms of reference? Article 19 of the ICC Rules of Arbitration explicitly provides that the arbitral tribunal may authorise the parties to make new claims after the terms of reference have been signed or approved by the Court.[58] Two situations may be envisaged.

In the first situation, one party claims, in its submission(s), more than, or something different from, what it declared it would claim at the time of the signature or the approval by the court of the terms of reference, and the other party does not object to these new claims. In such a situation, regardless of whether the Arbitral Tribunal has authorised the former party to make new claims (Article 19 of the ICC Rules of Arbitration), the parties are deemed to have mutually consented to a modification of the terms of reference. As a result, the party against whom enforcement of the award is sought is estopped from arguing that by granting the 'new' claims, the arbitrators have gone beyond the scope of their mandate.[59] In conclusion, under this hypothesis again, what fixes the scope of the arbitral tribunal's mandate are the parties' final claims, not the content of the terms of reference, which have been modified by implicit agreement between the parties.

In the second situation, one party, remaining within the ambit of the arbitration agreement,[60] claims more than, or something different from,

[58] Article 19 of the ICC Arbitration Rules reads: 'After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances'.

[59] This is in accordance with the spirit of Article 33 of the ICC Arbitration Rules, according to which '[a] party which proceeds with the arbitration without raising [an] objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal, or to the conduct of the proceedings, shall be deemed to have waived its right to object'.

[60] If the arbitrators grant new claims that are in fact beyond the scope of the arbitration agreement, enforcement of the award may be refused on the basis of Article V(1)(c) of the New York Convention for excess of jurisdiction (see Sec. 2, supra), not for violation, by

(continued...)

what it anticipated it would claim in the terms of reference, but this time its opponent objects. In this situation, it must be checked whether authorisation had been granted by the arbitral tribunal to the former party to make new claims after the signature or approval of the terms of reference (Article 19 of the ICC Rules of Arbitration). In the affirmative and so long as the new claims fall within the scope of the arbitration clause, the opponent may not, when enforcement of the award is sought, argue that the arbitral tribunal has gone beyond the scope of its mandate by granting claims that were not mentioned in the terms of reference. In conclusion, once again, the scope of the tribunal's mandate is fixed by the parties' ultimate claims rather than by the terms of reference.

3.5 The 'Issues To Be Determined'

When discussing the scope of the arbitrators' mandate under Article V(1)(c) of the New York Convention, authors sometimes use the terms 'questions submitted by the parties to the arbitration' or 'issues to be determined'.

It is the arbitrators' decision on the parties' claims that may be the object of subsequent enforcement under the New York Convention. As a result, unless the *lex arbitri* provides for a different solution, the parties' claims shall circumscribe the arbitrators' mandate in the sense of Article V(1)(c) of the New York Convention. A reference to 'questions' or 'issues to be determined' ought therefore to be understood as a reference to such claims, not to all the issues to be determined in the course of the proceedings.[61] It should indeed be understood that:

> In the case of an arbitration clause (relating to future disputes), the allegation by a respondent that the arbitrator has overstepped his authority may be of two kinds. The first type is that the arbitrator has dealt with a dispute that does not fall within the scope of the arbitration clause. The second is that he has given decisions on matters that are beyond or outside the *questions submitted to him by the parties*, which may be called the arbitrator's

the arbitrators, of the scope of their mandate, which is the object of the present section.

[61] In this respect, see Cass. 1e civ., 6 March 1996, *Farhat Trading Company v. Daewoo*, 1997(1) *Rev. arb.* 69, which provides that 'la mission de l'arbitre, définie par la convention d'arbitrage, est délimitée principalement par l'objet du litige, tel qu'il est déterminé par les prétentions des parties; que la Cour d'appel a exactement retenu que les arbitres, investis par une clause d'arbitrage qui leur soumettait 'tout litige relatif au présent contrat', pouvaient statuer sur toutes les demandes qui leur étaient soumises à cet égard, sans s'attacher uniquement à l'énoncé des questions litigieuses dans l'acte de mission'. See also Sup. Ct. Sweden, 13 August 1979, *Götaverken*, supra note 35, in which the Swedish Supreme Court confirmed the Svea Court of Appeal's decision that since the arbitrators' declaration, in the award, that 'by the execution of this decision, both parties will be deemed to have fulfilled all their obligations under the three contracts', was not subject to enforcement, it was irrelevant to the issue whether leave for enforcement should be granted.

> *mandate. The latter type of allegation usually concerns the allegation that the arbitrator has awarded more than, or differently from, what was claimed*....[62] (emphasis added)

This understanding is in keeping with the language used in ICC arbitration. This language draws a distinction between the parties' respective claims and the relief sought (Article 18.1(c) of the ICC Rules of Arbitration), on the one hand, and the issues which the arbitrators will establish and list in the terms of reference, if appropriate (Article 18(1)(d) of the ICC Rules of Arbitration), on the other hand. Recognition and enforcement may be refused under Article V(1)(c) of the New York Convention only if the award deals with a 'difference' (in the French text '*différend*') not contemplated by or not falling within the terms of the submission to arbitration: with respect to the arbitrators' mandate, the 'difference' is determined by reference to the parties' opposing claims (or prayers for relief), not by reference to the issues.[63]

In *Cubic Defense Systems*, the District Court for the Southern District of California denied the defendant's cross-motion for an order vacating an ICC award. This cross-motion was based, *inter alia*, on the defense that the award rendered by the Arbitral Tribunal violated Article V(1)(c) of the New York Convention. The defendant argued that the award ignored the terms of the parties' contract, that the 'Terms of Reference constitute the jurisdictional mandate of an arbitral panel, and any decision which exceeds the scope of that jurisdictional reference is improper',[64] and that the Tribunal had decided issues not submitted by the parties. The Court ordered the confirmation of the award. It held that 'the Terms of Reference allow the Arbitrators a leeway in resolving the conflict that the parties presented to them'.[65] The Court pointed out that, in the case at hand, the terms of reference listed twelve issues that could be considered in the adjudication of the parties' claims and defences: the arbitrators were neither explicitly required to consider all of these issues, nor limited to these issues, and could consider additional issues in

[62] Albert Jan van den Berg, 'Failure by Arbitrators to Apply Contract Terms from the Perspective of the New York Convention', in G. Aksen, K.H. Böckstiegel, M.J. Mustill, A.M. Whitesell, P.M. Patocchi (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in honour of Robert Briner* 63, 67, ICC Pub. No. 693 (2005).

[63] The term '*matters*' subsequently used in Article V(1)(c) of the New York Convention is adequate with respect to the issue of the arbitrators' jurisdiction, but ought to be understood, with respect to the issue of the arbitrators' mandate, as synonymous with the term '*difference*'. Accordingly, we disagree with the hypothesis advanced by van den Berg – concerning the issue whether Article V(1)(c) may be applicable to refuse enforcement of an award rendered in disregard of contractual provisions – that 'ground (c) does not use the word 'claims' but rather 'matters' which can be said to comprise more than claims' (van den Berg, supra note 62, at 69).

[64] Supra note 43, 29 F. Supp. 2d at 1172, XXIV *Y.B. Com. Arb.* at 878.

[65] ibid.

resolving the parties' dispute.[66] The Court concluded that the award was within the parameters of the twelve issues listed in the terms of reference.

4. The Arbitrators' Substantive and Admissibility Findings and the Extent of the Court's Review Under Article V(1)(c) of the New York Convention

4.1 Substantive Findings

4.1.1 Absence of Review of the Merits of the Arbitral Award

The list of grounds in the New York Convention on the basis of which a national court may refuse to enforce an arbitral award is exhaustive. Since this list does not include mistakes in fact or law by the arbitrators, the court before which enforcement of an award is sought may not review the merits of this award.[67] Indeed, 'a national court should not interfere with the substance of the arbitration'[68] and 'may not substitute its judgment for that of the arbitrators'.[69] 'What counts at exequatur stage is only the legal result of the arbitral decision and not the rules of law employed to reach it'.[70] Accordingly, '[t]he New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal's award'.[71] In conclusion, 'when a request for enforcement of a foreign arbitral award is considered, there should, in principle, not be a review of the substance of the award'.[72]

[66] Indeed, the questions posed to the Arbitrators were presented in the following manner in the Terms of Reference: 'The issues to be determined shall be those resulting from the Parties' submissions and which are relevant to the adjudication of the Parties' respective claims and defenses. In particular, the Arbitral Tribunal *may have to consider the following issues (but not necessarily all of these or only these*, and not necessarily in the following order)....' (ibid., emphasis added).

[67] Redfern, Hunter, Blackaby, Partasides, supra note 2, ¶ 10-33, at 444; Kröll, supra note 8, 5(5) *Int'l Arb. L. Rev*. at 165, referring to Oberlandesgericht Hamburg, RPS 1/1999, supra note 55, which provides that according to German law – which refers to the New York Convention – 'the courts will not scrutinise the award as to its correctness as any 'révision au fond' is not permitted'; Rubino-Sammartano, supra note 15, at 956; van den Berg, supra note 2, ASA Special Series No. 9, at 81.

[68] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 269.

[69] CA Bermuda, 7 July 1989, *Sojuznefteexport*, supra note 5, XV *Y.B. Com. Arb.* at 397.

[70] Fabrizio Marrella, 'Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts', 36 *Vand. J. Transn'l L.* 1137, 1186 (2003), citing *Cubic Defense Systems*, supra note 43.

[71] Cour Supérieure de Justice Luxembourg, 24 November 1993, *Kersa Holding Co. Luxembourg v. Infancourtage*, XXI *Y.B. Com. Arb.* 617, 624 (1996); see also High Ct. Hong Kong SAR, Ct. First Instance, 27 March 2003, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara – Pertamina*, according to which a 'complaint that substantive law was wrongly applied ... cannot be transformed into a point of jurisdiction' (XXVIII *Y.B. Com. Arb.* 752, 785 (2003)).

[72] Sup. Ct. Sweden, 13 August 1979, *Götaverken*, supra note 35, VI *Y.B. Com. Arb.* at 240.

However, recently, an especially authoritative author, van den Berg, wrote:

> With respect to the first part of ground (c), an award that 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration' is not confined to consideration of the claims asserted by the parties, but may also include the circumstance that the arbitrators have seriously ignored, in their analysis, the application of the terms of the contract, as pleaded by the parties. Thus, if an arbitrator ignores express provisions in a contract, it can be argued that he fails to deal with the difference between the parties.[73]

Van den Berg's suggestion is that, faced with an exceptionally untenable award, the judge may find in Article V(1)(c) of the New York Convention a basis to refuse enforcement. His view is that, in rendering such an award, the arbitrators did exceed their mandate, given that the parties had not commissioned them to disregard logic (of facts and law). This motive is praiseworthy but would defeat the spirit of Article V(1)(c).

In *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, the US Court of Appeals for the Second Circuit held that if an award has been rendered by a competent arbitral tribunal (the subject matter of the dispute being within the scope of the tribunal's jurisdiction), the court before which enforcement is sought must enforce it, and is prohibited from substituting its judgment for that of the arbitrators by examining the merits of the dispute. More specifically, the Court stated the following:

> Overseas principally directs its challenge at the $ 185,000 awarded for loss of production. Its jurisdictional claim focuses on the provision of the contract reciting that '[n]either party shall have any liability for loss of production'. The tribunal cannot properly be charged, however, with simply ignoring this alleged limitation on the subject matter over which its decision-making powers extended. Rather, *the arbitration court interpreted the provision not to preclude jurisdiction on this matter*.... [T]he court may be satisfied that the arbitrator premised the award on a construction of the contract and that it is 'not apparent', ... that the scope of the submission to arbitration has been exceeded.
>
> The appellant's attack on the $ 60,000 awarded for start-up expenses ... cannot withstand the most cursory scrutiny. In characterizing the $ 60,000 as 'consequential damages' (and thus proscribed by the arbitration agreement), Overseas is again attempting to *secure a reconstruction in this court of the contract—*

[73] van den Berg, supra note 62, at 69.

> *an activity wholly inconsistent with the deference due arbitral decisions on law and fact....*
>
> *Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement*. The appellant's attempt to invoke this defense, however, calls upon the court to ignore this limitation on its decision-making powers and usurp the arbitrator's role.[74] (emphasis added)

Similarly, the Court of First Instance of Hamburg held, in a case where the defendant had objected to the enforcement of an award on the ground that the arbitrators had allegedly exceeded their authority by applying the *lex mercatoria*, that:

> dealing with an objection relating to an [alleged] excess of authority would lead ... to reviewing the interpretation of the choice of law clause and indirectly to reviewing the correctness of the arbitral award as to the merits.[75]

In *Cubic Defense Systems*, the US District Court for the Southern District of California rejected the defendant's claim that the arbitrators had exceeded the scope of the terms of reference by referring to the Principles of International Commercial Contracts (UNIDROIT Principles) published in 1994 and to principles of fairness such as good faith and fair dealing. The Court stated:

> One of the issues presented to the Tribunal was whether general principles of international law apply to this dispute. That Cubic disagrees with the Tribunal's response to the question posed by the Parties is not a reason to find that the Tribunal addressed issues beyond the scope of the Terms of Reference. The same is true for Cubic's assertions with regard to the Tribunal's references to equitable principles of contract law.

The Court concluded:

> The Tribunal's reference to and application of the UNIDROIT Principles and principles such as good faith and fair dealing do not violate Article V(1)(c). The Tribunal applied these principles to differences contemplated by and falling within the terms of the submission to arbitration and therefore the Award does not violate Article V(1)(c).[76]

[74] Supra note 5, 820 F.2d at 976–77.
[75] Landesgericht Hamburg, 18 September 1997, XXV *Y.B. Com. Arb.* 710, 713 (2000).
[76] Supra note 43, 29 F. Supp. 2d at 1173.

In *National Oil Corp. v. Libyan Sun Oil Co.*,[77] Sun Oil argued before the US District Court for the District of Delaware that the arbitrators had exceeded their authority and that confirmation of the award should consequently be denied on the basis of Article V(1)(c) of the New York Convention. Sun Oil stated, *inter alia*, that the arbitrators had exceeded their authority since they had failed to base the award of damages on the evidence presented and had instead acted as *amiable compositeurs*. The Court ruled that the arbitrators had not exceeded the scope of their authority. It held that the arbitration clause concluded by the parties was broad, as it provided, *inter alia*, that 'any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall, in the absence of an amicable arrangement between the Parties, be settled by arbitration'.[78] The Court concluded that the issue of damages 'was properly before the arbitrators'.[79] The Court further observed: 'mindful of the fact that '[i]t is not this Court's role ... to sit as the panel did and re-examine the evidence under the guise of determining whether the arbitrators exceeded their powers'... the Court will not inquire any further'.[80] The Court thus properly laid down the rule according to which it is prohibited, under the Convention, from substituting its judgment for that of the arbitrators.

In reaching the conclusion that the arbitrators had not exceeded their authority, the US District Court resorted to a Court of Appeals decision, rendered under US federal arbitration law, which is in fact not entirely in keeping with the standards of the New York Convention. According to the said decision of the Court of Appeals, the test to be applied to determine whether an arbitrator has exceeded his powers is twofold: the arbitrator's award must be 'rationally derived' from the parties' agreement and the terms of the award should not be 'completely irrational'.[81] As stated by van den Berg, under the New York Convention, '[t]he first part of the test... , i.e., the arbitrators award can be rationally derived from the agreement of the parties, seems appropriate for determining whether the arbitrators have exceeded their authority. The second part, i.e., that the terms of the award are not "completely irrational", is questionable ... [since] the court may not review the merits of an arbitral award'.[82]

[77] *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800 (D. Del. 1990), XVI *Y.B. Com. Arb.* 651 (1991).
[78] ibid. 733 F. Supp. at 817.
[79] ibid.
[80] ibid. 733 F. Supp. at 819, quoting *Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co.*, 868 F.2d 52 (3d Cir. 1989).
[81] *Mutual Fire*, supra note 80, 868 F.2d at 56.
[82] Albert Jan van den Berg, 'New York Convention of 1958 – Consolidated Commentary – Cases Reported in Volumes XV (1990) – XVI (1991)', XVI *Y.B. Com. Arb.* 432, 499–500 (1991).

That arbitrators have acted as *amiable compositeurs* despite the absence of agreement thereon between the parties is a substantive issue which does not constitute a ground, in the sense of Article V(1)(c) of the New York Convention, for refusing to enforce an award. Indeed, if they decide *ex aequo et bono* without authorisation, the arbitrators exceed neither their jurisdiction (which pertains to the subject matter of the dispute) nor their mandate (which pertains to the parties' respective claims). Deciding *ex aequo et bono* neither relates to the arbitration agreement, nor concerns the operative part of the award. It rather concerns the reasoning of the arbitrators, which is not a matter to be reviewed under Article V(1)(c) of the Convention. This view is however not unanimously accepted.

Lew, Mistelis and Kröll cite, as examples of situations in which an arbitral tribunal is deemed to have decided matters outside the scope of its jurisdiction, in the sense of Article V(1)(c) of the New York Convention, the case in which an arbitral tribunal has awarded consequential damages despite the contract's specific exclusion of this type of damages, and the case in which an arbitral tribunal has awarded remedies not specified in the contract notwithstanding the objection of one of the parties.[83] To decide whether such cases fall within the ambit of Article V(1)(c), it has to be determined whether the parties had in view jurisdiction, the arbitrators' mandate or their substantive rights. A distinction should indeed be drawn between situations in which the exclusion of certain types of remedies or the list of remedies that may be awarded pertains to the arbitration agreement or the arbitrators' mandate, on the one hand, and situations in which the exclusion of certain types of remedies or the list of remedies that may be awarded pertains to the substance of the agreement, on the other hand. In the latter case – as in the cases mentioned by Lew, Mistelis and Kröll – the issue of the award of certain types of remedies not foreseen by the contract or expressly excluded by it is entirely unrelated to the issue of the scope of the arbitrators' authority (jurisdiction or mandate). Rather, as explained below, the argument that the arbitrators have awarded remedies that were not foreseen by the contract or that were specifically excluded by it only relates to the arbitral tribunal's substantive findings and cannot justify a refusal to enforce the award under Article V(1)(c).

[83] Lew, Mistelis, Kröll, supra note 13, ¶ 26–92, at 714, citing *Fertilizer Corp. of India*, supra note 6, and *Millicom Int'l V N. V. v. Motorola Inc.*, No. 01 Civ. 2668 (SHS), 2002 WL 472042 (S.D.N.Y. Mar. 28, 2002), XXVII *Y.B. Com. Arb.* 948 (2002). The first of these two decisions is commented below. The second is not, since it has not been decided under the New York Convention and is therefore not relevant in the context of the present discussions (this case was decided under the provisions of the Federal Arbitration Act, following the respondent's request that the arbitrators' award be modified to eliminate the 'extra-contractual remedies', or, alternatively, that it be vacated entirely).

First, the fact that an arbitral tribunal has rendered an award that violates – even blatantly – the parties' contract is unrelated to the issue of its jurisdiction: jurisdiction does not pertain to the arbitrators' substantive findings, but rather relates to the parties' agreement regarding the nature and subject matter of the disputes to be resolved by arbitration. The scope of the arbitrators' jurisdiction is unrelated to the issue of the remedies that may eventually be awarded by the arbitrators, unless, of course, as stated above, the parties have actually expressed the intent, in their arbitration agreement, to exclude the arbitrators' jurisdiction to award certain types of remedies (in this respect, it remains necessary to examine and interpret the parties' arbitration agreement).

Secondly, the purpose of a contractual clause excluding, for instance, consequential damages is to ensure that neither party will have to bear the payment of, or be awarded, consequential damages; the purpose of such provision is not to safeguard the right of national courts to award consequential damages. In other words, the challenge is not 'relevant to the nature of the forum to which the complaint will be heard',[84] and the issue is consequently not of a jurisdictional nature. The following question allows a clear distinction between jurisdictional issues (which may entail the application of Article V(1)(c) of the Convention) and other types of issues: 'is the objecting party taking aim at the tribunal or at the claim?'[85] ie, do the parties reserve the claim in question for another (State) court or do they exclude the compensation of such claim? In the case of a contract excluding the award of certain types of damages, the objecting party is clearly taking aim at the claim, and the objection may not justify a refusal to enforce the arbitral award in question.

In conclusion, a national court's refusal to grant enforcement of an arbitral award on the ground that the said award provides for the payment of damages explicitly excluded by the contract, would amount to an examination of the merits of the award. In other words, the national court which would refuse to enforce an award on this ground would be substituting its judgment for that of the arbitrators, which is prohibited by the New York Convention.

Lew, Mistelis and Kröll refer to *Fertilizers Corporation of India v. IDI Management*[86] to support the view that arbitrators exceed their authority

[84] *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), in which a party challenged the validity of a contractual exclusion of punitive damages, and in which the Circuit Court held that the issue, 'unrelated to the question of forum', should be decided by the arbitrators.
[85] Jan Paulsson, 'Jurisdiction and admissibility', in G. Aksen, K.H. Böckstiegel, M.J. Mustill, A.M. Whitesell, P.M. Patocchi (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in honour of Robert Briner* 601, 616, ICC Pub. No. 693 (2005).
[86] Supra note 6.

if they award consequential damages albeit the parties had excluded such relief. In this case, enforcement of an award was sought before the US District Court of Ohio. The defendant argued that the arbitrators had exceeded their authority by awarding consequential damages, whereas the award of such damages was expressly excluded by the contract. The Court found that, under the standards of the Convention, the arbitrators had not exceeded their authority in granting consequential damages. The Court dealt separately with the issue of the permitted extent of review of the award in relation to the arbitral tribunal's jurisdiction and the issue of the permitted extent of review of the award in relation to the merits of the dispute. The Court thus made it clear that the issue of the arbitrators' jurisdiction is independent from that of the award of damages. The Court further clearly stated that the issue whether the arbitrators ought to have awarded consequential damages was irrelevant in the context of the enforcement procedure. Indeed, the Court held that:

> Without engaging in an in-depth analysis of the law of contract in the United States, we cannot say with certainty whether a breach of contract found to be material or 'fundamental' would abrogate an express clause limiting damages to those other than consequential. *The answer, however, is irrelevant***.** The standard of review of an arbitration award by an American court is extremely narrow....[87] (emphasis added)

The Court added that:

> The Convention 'does not sanction second-guessing the arbitrator's construction of the parties' agreement', nor would it be proper for this Court 'to usurp the arbitrator's role'.[88]

Finally, the Court asserted that the issue of the arbitrators' jurisdiction is unrelated to the content of the award rendered, referring to a decision by the US Supreme Court of 1854:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal.... If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside from error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.[89]

[87] 517 F. Supp. at 959 (emphasis added).
[88] ibid., quoting *Parsons & Whittemore*, supra note 5, 508 F.2d at 977.
[89] ibid. at 959–60, quoting *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349, 15 L. Ed. 96 (1854).

The Court concluded that in the case at hand, 'the award [was] within the submission to the arbitrators',[90] that it did 'not find under the Convention that the arbitrators exceeded their authority in awarding consequential damages, as the issue was properly submitted to them'[91] and that 'acting under the narrow judicial review of arbitral awards granted to American courts, [it] may not substitute its judgment for that of the arbitrators'.[92]

The situation would of course have been different had the arbitrators awarded consequential damages notwithstanding the absence of claim for such damages. In this case, the issue would neither have been one of jurisdiction of the tribunal (the tribunal would, as before, have had jurisdiction to rule on the dispute, the subject matter of this dispute being within the scope of the arbitration agreement), nor one pertaining to the merits of the case. Indeed, for the court before which enforcement would have been sought, the issue would not have been to determine whether, pursuant to the contract, the arbitral tribunal was entitled to award consequential damages, but merely whether this tribunal had exceeded the scope of its mandate, as delimited by the parties' claims. In other words, the issue of the transgression of the arbitrators' mandate would have been resolved regardless of the terms of the contract, and it would consequently not have been necessary to examine the legitimacy of the tribunal's findings to reach the conclusion that enforcement of the award may be refused under Article V(1)(c) of the New York Convention on the ground that the arbitrators exceeded the scope of their mandate.

4.1.2 Examination of the Substance of the Award for the Sole Purpose of Determining Whether the Arbitrators Have Transgressed the Limits of Their Authority

The fundamental rule according to which a court is prohibited from reviewing the substance of an arbitral award does not imply that the court before which enforcement is sought may not examine the award for the specific purpose of determining whether the arbitrators have exceeded the limits of their jurisdiction or their mandate. To determine whether, under Article V(1)(c) of the New York Convention, the arbitral tribunal has ruled on a difference not contemplated by the arbitration agreement or has awarded more than, or something different from, what was claimed, the court may have to look into the substance of the award.

[90] 517 F. Supp. at 960. The arbitration clause contained in the parties' contract reads: 'Except as otherwise provided, all disputes and differences between FCI and C & I shall be finally settled by arbitration in conformity with the rules of conciliation and arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the rules. The venue of all arbitrations shall be New Delhi in India' (at 956).
[91] 517 F. Supp. at 961.
[92] ibid. at 960.

Such investigation is permitted to the extent that its purpose is limited to the determination of the scope of the arbitration agreement: 'the court's scrutiny of the award is strictly limited to ascertaining whether the award contains things which may give rise to a refusal of enforcement on [the ground] mentioned in Article V[(1)(c)]; it does not involve an evaluation by the court of the arbitrator's findings'[93] and may not lead to a determination, by the national court, on such findings. Thus, the issue examined by the court is not whether the decision reached by the arbitral tribunal is well-founded or even how the arbitral tribunal has reached its decisions, but merely whether this decision transgresses the scope of the arbitrators' jurisdiction or mandate. In other words, the court must limit its investigations to what is strictly necessary for the interpretation of the scope of the arbitration agreement and the arbitrators' mandate.

In *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v. SpA SIMER (Società delle Industrie Meccaniche di Rovereto)*,[94] the Court of Appeal of Trento, where enforcement of an arbitral award rendered in Syria was sought, stated that:

> an Italian judge deciding on the enforcement of a foreign award is not allowed to examine the merits of the decision. However, this principle does not apply to the examination as to whether the foreign arbitrator has exceeded the limits of the merits to be decided by him, and in particular not to the examination of questions pertaining to the arbitrator's competence which have to be examined by the Italian judge in an autonomous and independent manner.[95]

With respect to the distinction between jurisdictional and substantive issues, the Court of Appeal of Stuttgart held the following:

> The dispute [at issue] falls within the scope of the arbitration clause, since all disputes arising between the parties under the sales contract were to be settled by the arbitrator. The claimant claimed payments under this sales contract before the arbitrator. *Whether the claimant was entitled to these payments or had lost the right thereto because of a cession or takeover is irrelevant for the question whether the dispute falls within the scope of the arbitration clause.* Rather, it concerns the question, which was referred to the arbitrator, whether the claimant was entitled to claim [these payments].[96]

[93] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 271.
[94] CA Trento, 14 January 1981, supra note 8.
[95] VIII *Y.B. Com. Arb.* at 387.
[96] Oberlandesgericht Stuttgart, 6 December 2001, supra note 38, XXIX *Y.B. Com. Arb.* at 744 (emphasis added); see also Oberlandesgericht Cologne, 15 February 2000, 9 Sch 13/99, XXIX *Y.B. Com. Arb.* 715, 719 (2004), which reads: 'The defendant argues that the decision in the arbitral award is in excess of the arbitration agreement (Art. V(1)(c) Convention), because [the defendant had] a right to retain the goods or suspend

(continued...)

4.2 Admissibility Findings

As a general rule, procedural issues are to be distinguished from jurisdictional issues: the scope of the arbitrator's jurisdiction is 'defined by reference to the issues to be resolved by the arbitrators and not by reference to the procedure to be adopted for that purpose'.[97] In particular, jurisdictional issues and admissibility issues must not be confused. Enforcement of decisions rendered by a tribunal that has gone beyond the scope of its jurisdiction may be refused. Enforcement of decisions pertaining to the admissibility of the parties' claims, rendered by a competent tribunal, cannot be refused on the basis of Article V(1)(c) of the New York Convention. In other words, just as a national court may not refuse, on the basis of Article V(1)(c) of the Convention, to enforce an award on the ground that it would not have ruled on the merits of the case in the same manner as the arbitrators did, a national court may not refuse, on the basis of Article V(1)(c), to enforce an award on the ground that it would have decided differently on the admissibility of the claims. This view is however not undisputed.

Transport- en Handelsmaatschappij 'Vekoma' B.V. v. Maran Coal Corp.[98] provides an example of failure of a national court to properly distinguish issues of jurisdiction and issues of admissibility. Even though, in this case, the action was not an enforcement action but an annulment action, observations regarding the distinction between jurisdiction and admissibility remain useful for the interpretation of Article V(1)(c) of the Convention.

The contract contained an arbitral clause which provided that disputes would be submitted to arbitration in Switzerland under the Rules of the ICC. The arbitration clause required that arbitration proceedings be initiated 'within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation'. A dispute arose between the parties. Maran wrote to Vekoma that unless the latter agreed to a proposed accommodation within eight days, Maran would initiate arbitration. More than eighty days after its first letter to Vekoma, Maran wrote another letter to the latter. Ten days later, Vekoma rejected Maran's complaint. More than one hundred and twenty days after having sent its first letter to Vekoma, Maran initiated arbitration. Vekoma argued that Maran's right to arbitration had lapsed. The ICC Arbitral Tribunal

performance pursuant to Arts. 81(2) and 71 CISG. The defendant cannot successfully raise this objection, which concerns the awarded claim itself'.

[97] *Minmetals Germany GmbH v. Ferco Steel Ltd.* [1999] 1 All ER (Comm) 315, XXIVa *Y.B. Com. Arb.* 739, 742 (1999).

[98] Swiss Fed. Trib., 17 August 1995, *Transport- en Handelsmaatschappij 'Vekoma' B.V. v. Maran Coal Corp.*, 1996(4) *ASA Bull.* 673. For a detailed commentary on this decision, see Paulsson, supra note 85, at 616.

dismissed Vekoma's argument, holding that the latter should in good faith have answered Maran's first letter, and that the thirty-day period had only started running after Vekoma had made its position clear, when it answered Maran's second letter. The arbitral tribunal concluded that the commencement of the arbitration, twenty-nine days after Vekoma had made its position known, was timely. The Swiss Federal Tribunal upheld the challenge to the award, holding that the agreement to arbitrate was subject to a condition subsequent (the thirty-day time-limit), and that this condition had not been satisfied, since Maran had failed to initiate arbitration within thirty days after the expiration of the eight-day time limit granted by Maran in its first letter to Vekoma.

Undoubtedly, the parties could have agreed – when drafting the part of the arbitration clause providing for a thirty-day time limit for the initiation of the arbitration proceedings – that the Arbitral Tribunal would have jurisdiction to rule on the dispute only if the arbitration proceedings were initiated within this limit, failing which the municipal courts would regain their jurisdiction. In such a case, the Federal Tribunal would have reviewed the arbitrators' conclusion as to the moment when the thirty-day limit had elapsed as part of its control function. Indeed, in order to determine whether the arbitrators did have jurisdiction to rule on the dispute, it would have been necessary to determine whether the thirty-day time limit had already elapsed when the proceedings were initiated, and consequently, to determine when the parties intended this time limit to start running. By resolving these issues, the Court would have set the limits of the scope of the arbitrators' jurisdiction *ratione temporis*, and on the basis of its finding regarding the moment when the thirty-day time period had started, the Court would have determined whether the arbitrators had exceeded the scope of their jurisdiction. It is, however, on the basis of Article V(1)(a) rather than Article V(1)(c) of the New York Convention that, in this instance, enforcement might have been refused.

On the contrary, if the issue is whether the claim was admissible, the arbitrators' decision is subject to no review under Article V(1)(a) or (c) of the Convention. Nor is it possible, in such a case, to oppose enforcement on the basis of an irregularity of the arbitral procedure as this would unduly extend the scope of Article V(1)(d).

In order to determine whether an issue is one of jurisdiction of the arbitrators or one of admissibility of the parties' claims, one should 'enquire whether in a given case the parties should reasonably be considered to have intended that contentions regarding [this] particular issue ... should be decided conclusively by the arbitrators'.[99] In other

[99] Paulsson, supra note 85, at 615.

words, as briefly mentioned earlier (see sub-section 4.1.1, supra), one should enquire whether the challenge is 'relevant to the nature of the forum in which the complaint will be heard'.[100] Thus, as pointed out by Paulsson:

> the nub of the classification problem is whether the success of the objection necessarily negates consent to the forum.... [In conclusion,] to understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> – If the reason for such an outcome [is] that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
> – If the reason [is] that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final.[101]

In the *Maran Coal* case, the answer to the question whether the thirty-day deadline was intended by the parties to be a limitation on the tribunal or on the claim

> seems clear if one puts the question thus: in the event the thirty-day limitation was exceeded, was it the parties' intention that the relevant claim should no longer be arbitrated by ICC arbitration but rather in some other forum, or was it that the claim could no longer be raised at all? Opting for the former conclusion would mean that the objection is jurisdictional, but it is hard to imagine that there would be many adherents of such a thesis. The purpose of the limitation was clearly to ensure that disputes would not linger. No reasonable purpose would be served by stipulating that cases brought within thirty days are somehow suitable for ICC arbitration, but others should not be subject of any stipulation at all – i.e. exposed to the vagaries of international conflicts of jurisdiction.[102]

The Federal Tribunal misconstrued the nature of the challenged arbitral decision. Since the parties had agreed that all disputes under their contract would be settled by arbitration and since the arbitrators made a decision as to the admissibility of the claim within the exercise of their jurisdictional authority, the national court was not to review this decision and set it aside under Article 190(1)(a) of the Swiss International Private Law Act (jurisdictional ground for the annulment of awards). Likewise, in the same situation, it would not have been possible to resist enforcement on the basis of Article V of the New York Convention.

[100] *Great Western Mortgage*, supra note 84, 110 F.3d at 232.
[101] Paulsson, supra note 85, at 616 and 617.
[102] ibid. at 616.

One may also question the German Federal Supreme Court's examination (in 1976), under Article V(1)(c) of the Convention, of the transgression by the arbitrators of time limits for initiating arbitration proceedings.[103] The parties had concluded a contract concerning Romanian lard. The General Conditions of Sale and Delivery contained a clause providing for arbitration to be settled by the Arbitration Commission of the Chamber of Commerce of the Romanian People's Republic. The parties had added the following sentence to this clause: 'Any claim for arbitration formulated after 6 months from the date of arrival of the goods at the final station or port of destination is null'. An arbitration was initiated more than six months after the arrival of the goods; the arbitral tribunal in Bucharest declared itself competent and ruled on the dispute. A German Court of Appeal, however, refused to enforce the award, on the basis of Article V(1)(c) of the New York Convention, holding that the arbitrators had exceeded the terms of the arbitration agreement. It interpreted the sentence quoted above and, in particular, the words 'any claim for arbitration formulated ' as meaning that any submission to arbitration had to be made within six months after arrival of the goods, and that after this period, the arbitral tribunal was no longer competent to rule on any dispute. The German Federal Supreme Court subsequently reasoned, on the one hand, that the addition to the arbitration clause was ambiguous as it did not, *expressis verbis*, exclude the jurisdiction of the tribunal after the expiration of the six-month period, and, on the other hand, that it was unclear whether the time limit was to be observed by the arbitral tribunal on its own motion or only at the request of a party. As to the first issue, the Court referred to Article V(1)(c) of the New York Convention and held that the addition to the arbitration clause could mean, *inter alia*, an absolute bar to the jurisdiction of the arbitral tribunal, or one which the latter could decide. As to the second issue, the Court held, with reference to the conflict of laws rules of Article V(1)(a) of the Convention, that the issue should have been examined by the Court of Appeal under Romanian law. The German Federal Supreme Court consequently referred the case back to the Court of Appeal.

With respect to this decision, van den Berg has expressed the following opinion:

> It may be questioned whether the reliance on ground *c* is appropriate for the question whether the arbitrators have transgressed the time limits for initiating the arbitration. Rather, time limits for initiating arbitration affect the validity of the arbitration agreement.... Article V(1)(c) is not concerned with the incompetence of the arbitrators due to an invalid arbitration

[103] Bundesgerichtshof, 12 February 1976, II *Y.B. Com. Arb.* 242 (1977).

> agreement, as this question falls under the ground for refusal of enforcement set out in Article V(1)(a). The Supreme Court should therefore have referred to Article V(1)(a) not only for the purpose of determining the law for resolving the question of time limits for initiating arbitration, but also for deciding on the question regarding the arbitrator's competence in its entirety.[104]

The question whether issues of time limits relate to the scope of the arbitrators' jurisdiction, to admissibility, or to the validity of the arbitration agreement, may only be determined through a process of interpretation of the parties' agreement. Unless otherwise provided in the parties' agreement, the issue of the time limit for submitting a claim to arbitration is either an issue of admissibility or one of time limitation of the said claim. Unless otherwise provided in the parties' agreement, the expiration of the time period for filing a claim does not invalidate or put an end to the effectiveness of the arbitration clause. According to the relevant provision, it is the claim that is 'null' if formulated more than six months after the arrival of the goods. The expiration of the six-month period does not have any effect on the arbitrators' jurisdiction: as in the *Maran Coal* case, the purpose of the addition to the arbitration clause was to ensure that disputes would not linger; no reasonable purpose would have been served by stipulating that cases brought after the expiration of the six-months period should be subject to national litigation. In conclusion, the German Court of Appeal should have concluded that the conditions of Article V(1)(c) of the New York Convention for refusing enforcement were not satisfied and it should consequently have enforced the award.

As a general rule, unless the parties have agreed otherwise, namely that the following issues should affect the arbitrators' jurisdiction, these issues are to be considered as admissibility issues:[105] timeliness issues, the issue whether additional claims may be raised once the initial pleadings have been submitted, certain conditions precedent to the filing of an arbitration, such as participating in an attempt to settle the dispute, and contentions of extinctive prescription.

On the other hand, issues of waiver of claims, of mootness and of absence of a legal dispute or of an indispensable third party, are considered, depending on the applicable law, issues of admissibility or issues of substantive law. In neither case, however, are they issues of jurisdiction of the arbitral tribunal (unless otherwise provided for by the parties), and they may consequently not justify a refusal, under Article V(1)(c) of the New York Convention, to enforce an award.

[104] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 318.
[105] Paulsson, supra note 85, at 609.

Finally, the nature and subject matter of the dispute as well as the moment in time when the alleged cause of action has arisen constitute classical jurisdictional issues.[106]

5. Partial Enforcement

Article V(1)(c) *in fine* of the New York Convention provides that 'if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced'. Thus, Article V(1)(c) allows the enforcement of the part of an award which actually deals with issues submitted to the arbitrators' jurisdiction and are within their mandate, provided that the said part of the award is severable, that is, provided that it can be separated from the parts of the award that are outside the parties' arbitration agreement or that go beyond their claims. In countries in which partial enforcement is subject to the satisfaction of a condition, such as the payment of a guarantee, Article V(1)(c) *in fine* pre-empts the relevant national provisions.

Article V(1)(c) *in fine* 'does not deal with the opposite situation, ie, omission by the arbitrators in their final award of a decision on all the claims which had been made by the parties and which fell under the arbitration clause or submission'.[107] Unlike the Geneva Convention of 1927 which provided, in its Article 2(2), that in the case of an incomplete award, the court before which enforcement was sought could either postpone the decision on the enforcement or grant enforcement subject to such guarantee as the court would decide, the New York Convention is silent with respect to incomplete awards. In particular, so long as the arbitrators who rendered the award were competent, there is no ground justifying the refusal of enforcement of an incomplete award. Indeed, 'the reproach that the arbitral tribunal did not decide on all the points of the dispute ... even if established, could not hinder the recognition of the awards, as an *infra petita* decision is not sanctioned by the New York Convention'.[108] For example, it is not permissible to refuse enforcement of an award ordering payment of the principal of a claim, on the ground that the arbitrators failed to rule on the interest claims.

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[106] ibid.

[107] Rubino-Sammartano, supra note 15, at 957–58.

[108] Cour Supérieure de Justice Luxembourg, 24 November 1993, *Kersa Holding*, supra note 71, XXI *Y.B. Com. Arb.* at 625. See also CA Luxembourg, 28 January 1999, *Sovereign Participations International S.A. v. Chadmore Developments Ltd.*, which provides that '[i]n so far as [a] ground for appeal reproaches the arbitrators for not deciding on all issues of the dispute, this ground, even if proven, could not prevent the recognition of the award, as the case of "infra petita" ... is not provided for in the Convention' (XXIVa *Y.B. Com. Arb.* 714, 721 (1999)).

The language of Article V(1)(c) *in fine* is permissive: 'if the partial excess of authority is proved, that part of the award that concerns matters submitted to arbitration *may* be saved and enforcement ordered'[109] (emphasis in the original text). Certain authors have drawn from the Summary Records of the New York Conference what they consider to be guidelines as to how the court's discretion can be exercised: 'partial enforcement may be granted if the matter in excess of the arbitrator's authority is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement'.[110] The text of Article V(1)(c) *in fine*, however, does not establish such restrictions to the partial enforcement of arbitral awards. Furthermore, arbitration has evolved in the last fifty years in the direction of firmer recognition and enforcement even of imperfect awards. In conclusion, there is no reason to bring such limitations to the Convention's bias in favour of enforcement.

The *SIMER* case[111] provides an example in which the Court before which enforcement of an arbitral award was sought granted partial enforcement pursuant to Article V(1)(c) *in fine*. In this case, the parties' contract for the supply, installation and commissioning of two automatic bakery machines included a clause providing that disputes arising out of the contract would be resolved by arbitration: 'non-technical' disputes would be resolved by local (Syrian) arbitration (five arbitrators), whereas 'technical' disputes would be resolved by international arbitration according to the Arbitration Rules of the ICC. The claimant alleged that the respondent had performed its obligations improperly and in an untimely manner, and resorted to local arbitration, requesting compensation for the damages resulting from the delay in performance and for the ensuing loss of profits. The respondent opposed the local arbitration, arguing that the dispute concerned technical questions which had to be decided by international arbitration. The local tribunal ruled on the dispute and rendered its award. The claimant subsequently sought enforcement of this award before the Court of Appeal of Trento. The Court granted partial enforcement of the award pursuant to Article V(1)(c) of the Convention. It held that whereas those controversies which had arisen before the first test of the machinery were not technical in nature (they concerned a delay in the delivery of the machinery) and were consequently to be resolved by local arbitration, those controversies which had arisen after this first test were technical (they concerned the provision of water, electricity, wheat, yeast and qualified labour) and consequently fell within the jurisdiction of ICC arbitrators.

[109] Redfern, Hunter, Blackaby, Partasides, supra note 2, ¶ 10–42, at 450–51.
[110] van den Berg, *The New York Arbitration Convention of 1958*, supra note 2, at 319.
[111] CA Trento, 14 January 1981, supra note 8; van den Berg, supra note 2, ASA Special Series No. 9, at 81.

In another case, a US court found that the arbitral tribunal had exceeded its authority in making an award against a non-signatory who was not expressly party to the arbitration agreement. The court vacated the part of the award that was against the non-signatory and rightly enforced the remaining part of the award, on the basis of Article V(1)(c) of the Convention.[112]

6. Concluding Remarks

The applicability and success of an objection to enforcement based on Article V(1)(c) of the New York Convention may, as a general rule, be determined only through a process of interpretation of the parties' intent. On the one hand, in order to determine whether the arbitrators have exceeded the limits of their mandate, it is, as a general rule, the parties' respective claims and the legal grounds invoked in their prayers for relief to support these claims, that must be examined. On the other hand, in order to determine whether the arbitrators have exceeded the scope of their jurisdiction, it is the parties' arbitration agreement and, in ICC arbitration proceedings, possibly also the terms of reference signed by them, that must be scrutinised.

In practice, courts have often rejected the argument raised by a party that enforcement of an arbitral award should be refused on the ground that the arbitrators have transgressed the scope of their authority, holding that the circumstances of the particular case did not justify the application of Article V(1)(c) of the Convention. This is not merely a consequence of the broad interpretation of the notion of authority of the arbitrators, in compliance with the enforcement-facilitating thrust of the Convention. Attempts by a party to resist enforcement of an arbitral award on the basis of Article V(1)(c) have also often failed simply because this party had misconstrued Article V(1)(c), invoking the violation of contractual or legal provisions affecting the arbitrators' substantive or admissibility findings, whereas their authority was in fact not at issue.

Furthermore, it is not surprising that Article V(1)(c) of the New York Convention is seldom successfully invoked by the party resisting enforcement. Should a party argue that the arbitrators exceeded their jurisdiction, Article V(1)(a) will, more often than not, suffice. Should this party, on the other hand, complain about the arbitrators' transgression of their mandate, one should remember the double-basis for the prohibition to decide *ultra* or *extra petita*: the first is party autonomy and the second is to avoid any surprise, that is to avoid awards addressing claims that the parties did not have the opportunity to

[112] *FIAT S.p.A. v. Ministry of Finance and Planning of the Republic of Suriname*, No. 88 Civ. 6639 (SWK), 1989 WL 122891 (S.D.N.Y. Oct. 12, 1989), XXIII *Y.B. Com. Arb.* 880 (1998).

discuss. Due process (Article V(1)(d)) fully protects the parties as to the second and, more often than not, also as to the first. In other words, recourse to Article V(1)(c) is not the only nor necessarily the most direct path the party resisting enforcement may opt for.

In conclusion, few situations, construed narrowly, may lead to the successful application of Article V(1)(c) of the New York Convention. This provision clearly conveys the spirit of the Convention, rarely allowing a national court to refuse enforcement of an arbitral award.