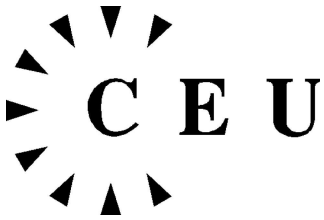

CENTRAL EUROPEAN UNIVERSITY

Excess of Authority by Arbitrators as a Defense to Recognition and Enforcement of an Award under Article V (1) (c) of the New York Convention

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TABLE OF CONTENT

ABSTRACT

Despite the vast scholarly writings on different areas of international commercial arbitration in recent years, little is said about the many issues touching upon the scope of arbitration agreement as a ground of refusal of recognition and enforcement of a convention award. The present work makes a holistic approach towards the analysis of plethora of disputes connected to arbitration agreements in a prayer for refusal of a convention award. The finding of the paper shows that the defense of excess of authority under Article V (1) (c) of the New York Convention is dependent on the way the courts of the host country interpret the arbitration agreement. Further more, through extensive case analysis coupled with review of scholarly writings, the work reveals that the defense of excess of authority by the arbitrators is unlikely to cause refusal of recognition and enforcement under the New York Convention.

ACKNOWLEDGEMENTS

I owe my deepest gratitude to my supervisor, Professor Tibor Varady, whose guidance and support from the cradle to the final level enabled me to develop an understanding of the subject. It is also my pleasure to thank all the preceding authors whose scholarly contribution has served as a basis for this work. I would like to offer my regards and blessings to friends who were so kind to share their time in contributing to the completion of this work. My special thanks go to Yemisrach Indale and Yitayal Ayalew. More than every thing thanks to God for giving me the courage to complete this work.

INTRODUCTION

Arbitration is founded on the will of the parties to submit their dispute to arbitration. The parties can submit some of their dispute to arbitration and not the others. The scope of power of the arbitrators is also determined on the basis of scope of disputes that the parties wanted to submit to arbitration. If the arbitrators decided on matters which were not actually part of the scope of arbitration agreement, the resulting award may not be enforced if the defendant in enforcement proceeding resisted enforcement according to Article V (1) (c) of the New York Convention.

More often than not, parties craft their arbitral clause in a broad way so as to include any dispute that may arise between them concerning a defined legal relationship be submitted to arbitration. Courts and arbitrators are also ready to interpret arbitration agreements liberally so as to include all the disputes between the parties within the ambit of the arbitrators' authority. This is a result of the presumption that rational business persons would prefer the efficacy resulting from one-stop shopping. Many national courts use this presumption to stop a party who originally entered into arbitration agreement but who started a bid to weasel out of the contractual responsibility at the later stage. Because of this presumption, arbitration agreements are interpreted liberally which fulfills the thrust of the New York Convention.

Although an attempt to tackle the enforcement of an award on the ground of Article V (1) (c) has been more frequently made in recent years, it was hardly successful. Firstly, many national arbitration laws have adopted pro-arbitration policy. Secondly, the interpretation of arbitration agreement usually made by the enforcing courts of developed regimes show

that arbitration agreements are interpreted expansively which includes the disputed subject matter. Thirdly, Courts have skepticism about the respondents' defense of excess of authority. They may consider such defense as a disguised call for a *de novo* review of the merits of the award. Fourthly, the '*may*' language of Article V (1) gives residual discretionary power to the courts to enforce an award even when the respondent proves that excess of authority by the arbitrators indeed existed. Fifthly, the enforcing court starts the trial with a powerful presumption that the arbitral tribunal acted within the boundary of its power. This also makes refusal of recognition and enforcement on this ground difficult, if not impossible. And finally, the court of host country can grant partial enforcement instead of refusing enforcement against the whole of the award.

The paper is divided into two broad chapters and a concluding chapter. Chapter one sets the different types of interpretation of scope of arbitration agreement. As interpretation of arbitration agreement id the only way to know the scope of arbitration agreement, this chapter critically analyzes how different courts have interpreted arbitral clauses. Besides, the chapter will also address the '*who decides the scope?"* question and to what extent do non-contractual claims and set-offs are covered by arbitration agreements. The second chapter juxtaposes the issues discussed in the first chapter with Article V (1) (c) of the New York Convention. Specifically, it analyzes the two forms of objection under the provision and all the possible applications the provision may have. Finally, the third chapter will follow with a conclusion about the findings.

Chapter I

Determining the Scope of Arbitration Agreement: *An Interpretive Issue*

1.1. The issue of interpreting Scope of Arbitration agreement

When national courts or arbitrators are seized with the question of scope of the matters submitted to arbitration, they have to interpret the arbitration agreement. The dispute as to scope of arbitration agreement may be raised in the court before the dispute is deferred to arbitration; it may be raised before the arbitral tribunal; or it may be put as a ground to set an award aside or for refusal of recognition and enforcement of an award. The concern here is to find out how arbitration agreements are interpreted so as to have a clear understanding of the cases where courts can refuse recognition and enforcement because of arbitrators' transgression of the scope of arbitration agreement.

All cases concerning objection to recognition and enforcement of an award under Article V (1) (c) of the New York convention require the court to interpret the arbitration agreement. Demarcating the exact width of arbitration agreement is important when it comes to the issue of scope. It involves determination of category of disputes, disagreements or claims that the parties have agreed to submit to arbitration. That is, whether the wording and nature of the agreement is capable of covering all contractual and non-contractual claims.[1] The following sub-sections discuss: (1.1.1) liberal versus restrictive interpretation of arbitration clause, (1.1.2) the applicability of general

[1] Gary B. Born, *International Commercial Arbitration,* (The Hague: Transnational Publishers Inc. and Kluwer Law International 2001), 1060-61

principles of contract to interpretation of international arbitration clauses, (1.1.3) the role of language in interpretation and (1.1.4) the law applicable to interpretation of international arbitration clauses.

1.1.1. Liberal *versus* Restrictive Interpretation of Arbitration Clause

Enthused by major international arbitration conventions, many national laws are inspired by a pro-arbitration policy. The New York Convention, *inter alia*, requires member state courts to refer disputes to arbitration where there is a valid arbitration agreement and requires them to recognize and enforce the awards except for the limited grounds listed under Article V. National laws, recognizing the strong belief in the efficacy of arbitral proceedings for the resolution of international commercial disputes, have revealed a policy favoring arbitration. Accordingly, it is possible to assume that the thrust of the Convention, coupled with the pro-arbitration policy developed arbitration regimes, favors the interpretation which gives effect to arbitral awards without deviating from the parties' intention.

As stated above liberal or expansive interpretation approach is the product of pro-arbitration presumption. The pro-arbitration presumption postulates that a valid arbitration agreement should be interpreted so as to include disputed claims in cases of doubt. Unless it is clearly comprehensible from the wording of the parties' agreement that they wanted to exclude certain disputes, liberal construction of arbitral clauses dictates us to make the presumption that the parties have submitted all disputes to arbitration. This is also derived from the assumption that rational and reasonable actors in international

commerce contemplate that arbitration will provide them with a single and centralized dispute resolution mechanism when they enter in to the agreement.[2]

The courts in US have frequently and ardently applied extremely strong presumption that parties to an arbitration clause intend to resolve all their disputes by arbitration. Indeed, such a strong presumption inexorably invites a very liberal approach to interpretation of the scope of arbitration agreement. In *Mitsubishi Motors Corp. case*, US Supreme Court held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[3] It follows that, US courts apply liberal interpretation even where the arbitration clause is narrow to both contractual and non-contractual claims (i.e., tort, breach of non-contractual or statutory protection). Thus, this liberal approach works regardless of whether the arbitral clause is narrow or broad so long as there is doubt; and so long as the parties' did not plainly put that they wanted to exclude a particular dispute from the reach of arbitrators.

Although not as strong as the US pro-arbitration presumption which calls for liberal interpretation of arbitral clauses, the courts of other countries have also stressed the need for liberal interpretation. For example, in *Fiona Trust & Holding Corp. case*, the English Court of Appeals has stated that "any jurisdiction or arbitration clause in an international commercial contract should be liberally construed."[4] In the same fashion, the Swiss Federal Tribunal held that 'if it is established that an arbitration clause exists, there is no reason to interpret that clause restrictively' rather it should be 'assumed that the parties

[2] Born, *supra note 1*, .74-76
[3] *Mitsubishi Motors Corp*., 473 U.S. at 626
[4] *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All E.R. (Comm.) 891 (English Court of Appeal),*aff'd*, [2007] UKHL (House of Lords)

wished for an embracing jurisdiction of the arbitral tribunal.'[5] Ontario Supreme Court also articulated that "where scope of arbitration clause is susceptible of two interpretations, it should be interpreted as providing for arbitration."[6] Generally, underpinned by the sensible assumption that business persons are unlikely to have intended that different disputes should be resolved before different tribunals, liberal interpretation calls for the inclusion of disputed subject matter in the scope of arbitration clause.

On the other side of the spectrum is restrictive interpretation of arbitral agreements. It is an interpretation approach which resolves doubts about the coverage of a particular dispute against its inclusion in the scope of arbitration agreement. This interpretation is justified on the ground that parties are entitled to spend their day in court as a matter of principle. This is meant to say that litigation in the court is the norm while arbitration is an exception to the norm. Thus, proponents of this approach forward that restrictive or strict interpretation is required when there is dispute as to scope since the laws of exceptions are interpreted strictly.[7]

Some early US state court decisions, French commentators, Italian decisions before the amendment of Italian Code of Civil Procedure and limited number of older international arbitral awards have applied restrictive presumption to the interpretation of the scope of arbitration clauses.[8] Nevertheless, restrictive interpretation is archaic and it does not carry out the thrust of the New York convention. Besides, the justification upon which it is

[5] *Sonatrach v. K.C.A. Drilling Ltd,* (1990)
[6] *Dalimpex Ltd v. Janicki,* [2000] O.J No.2927 (Ontario S. Ct) (Where scope of arbitration clause is susceptible of two interpretations, it should be interpreted as providing for arbitration)
[7] Philip Fouchard/Emmanuel Giallard/Berthold Goldman, *International Commercial Arbitration*, Kluwer Law International 1999) (at ¶480), 260
[8] Born, *supra note 1,* pp.1076-1078

grounded no longer exists. Arbitration is not an exception which entails strict interpretation any more. It has become a norm in international commerce to submit disputes to arbitration.[9]

Without reliance on arbitration specific rules of interpretation, some authorities have neither relied on liberal nor on restrictive interpretation. Rather, they have sought to find the precise common intention of the parties by having a close look at the language used and circumstances of the arbitration clause.[10]The assumption is that arbitration clauses are contracts; and hence they should be interpreted like any other contracts. This approach, which was historically followed by English courts[11] and few older international arbitral awards, is not used as extensive as liberal rule on interpretation of scope.[12]

To sum up, the liberal interpretation of the scope of disputes falling within a given arbitration clause goes in line with the purpose of the New York Convention when it is compared with the restrictive one. On one hand, this approach is a good device to avoid multiple litigations which is at the very heart of efficacy of international commercial arbitration. And on the other hand, it encourages international commerce by creating certainty and predictability in the eyes of the parties. However, this should not be understood to mean that courts or arbitrators can create an obligation on the parties where they have unequivocally excluded certain disputes from the reach of arbitration. After all, arbitration is founded on party autonomy.

[9] Fouchard *et al. Supra note 7*, at ¶480, pp. 260
[10] D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement, (*Thomson Sweet and Maxwell (2005)) ¶¶4.46-4.48
[11] *See. e.g, Heyman v. Darwins Ltd*, [1942] 1 All ER 337, 360 (Lord Porter);*but see Fiona Trust supra note 5* (In this case, the court paved a way for liberal interpretation of scope of arbitration agreement)
[12] Born, *Supra note 1*, pp. 1076-1078

1.1.2. Applicability of general principles of contract to interpretation of international arbitration clauses

The New York Convention and other international conventions did not set a rule on the interpretation of arbitration agreements. Thus, having regard to the contractual nature of such agreements, national courts have applied general principles of contract as applied in national laws.[13] Likewise, arbitral tribunals have also applied rules of contract interpretation without deriving from a single legal system.[14] The following few paragraphs will discuss the most common rules of contract interpretation used to determine the meaning and scope of arbitration agreement.

The *principle of interpretation in good faith* is predominantly used in interpretation of arbitration agreement.[15] While interpreting the scope, the court or tribunal should seek to find the objective common intention of the parties rather than restricting oneself to the literal interpretation of the arbitration clause according to this principle. It is not uncommon that parties to arbitration agreement some times try to weasel out of the obligation to submit to arbitration. The principle of interpretation in good faith helps to find out the true intention of the parties when a party bids to avoid some disputes from the scope of arbitration agreement by making use of ambiguities in the arbitration clause.

Another contractual rule of interpretation used in determining the scope of arbitration clause is the principle of *contra proferentem.*[16] This principle asserts that contractual clauses should be interpreted *contra proferentem.* That is, in a case where there is

[13] *See. e.g., Walter Rau Neusser oel und Fett AG v. Cross pac. Trading Ltd,* XXXI Y.B.Comm.Arb. 559, 564 (Australian Fed. Ct 2005); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62 (1st Cir. 2000)
[14] Born, *Supra note 1,* at 1063-1066
[15] Fouchard *et al*, *Supra note 7,* at ¶477 pp. 257.
[16] *Ibid.*

ambiguity, it has to be interpreted against the party who drafted the agreement. Although it could be argued that there is no such thing as drafter and signor in arbitration agreements since both parties have equal obligation in the agreement to submit to arbitration, it cannot be said that it does not happen at all. US District Court stated that 'numerous courts have employed the tenet of *contra proferentem* in construing the ambiguities of in arbitration agreement against the drafters."[17]This implies that there are cases where arbitral clauses can be drafted by one party and signed by the other. The application of this type of interpretation is, however, limited. This emanates from the fact that it applies only when it is proved that an arbitral clause is drafted by one party and not by the other.

Where there is a pathological clause in the arbitration clause which conflicts with other provisions, the *special clause prevails over the general* one. This is also a principle of contract interpretation which is used in interpretation of scope of arbitration agreements.[18] A given provision in a contract has to be, considering arbitration clauses as contractual clauses, interpreted in a way that gives effect to the whole provisions found in the same contract. Giving effect to all parts of an agreement is also one of the cardinal principles of contract interpretation. But when there is ambiguity, the special one overrides the general one.

1.1.3. The Role of Language in Interpretation.

Parties to arbitration agreement usually use a limited number of languages in describing the scope of the dispute submitted to arbitration. More often than not, the languages used

[17] *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer,* 226 F. 3d 15, 25 (1st Cir. 2000)

are standard formulae. The recommendation of leading arbitral institutions and commentators has played a considerable role in shaping the way parties craft their arbitration clause.

Even if it is questioned that making a close reading of the wording in arbitration clause may not be accurate, some courts[19] have made fine distinction between different formulae. The following paragraphs are devoted to how the most commonly used wordings are interpreted in defining the scope of arbitration clause.

Parties may agree that '*all or any*' disputes shall be submitted to arbitration. Different authorities have interpreted this formulation in a broad way so as to include all disputes having significant connection with the parties' agreement. Similarly, the phrase '*relating to'* also encompasses any dispute having factual connection with the parties' contract.[20] The same is true for the phrase *'in connection with.'* Courts have interpreted it so as to include broad panoply of disputes within the scope of arbitration clause.[21]

However, authorities are classified on the interpretation of the phrase '*arising under.*' Some older English courts, for example, have interpreted it narrowly. In *Ashville Inv. Ltd v. Elmer Contractors Ltd* [1988],[22] English Court of Appeal stated that misrepresentation claims are not caught by '*arising under'* language, but were covered by the words '*in connection with.'* It follows from the court's argument that tort claims that do not directly involve the application of the parties' agreement will fall outside the scope of arbitrators'

[19] *See. E.g.* In *Paper products Pty Ltd v. Tomlinsons (Rochdale) Ltd* , French J recognized the liberal approach of interpretation but stated that the words chosen by the parties limited the scope of reference to contractual disputes ((1996) 116 ALR 163)

[20] *See.e.g.'Ashville Inv.Ltd v. Elmer Contractors Ltd* [1988] 3 W.L.R

[21] *See eg.* Ethiopian Oilseeds & Pulses Export Corporation v Rio del Mar Foods Inc [1990] 1 Lloyd's Rep 86 at 97.

[22] *'Ashville Inv.Ltd v. Elmer Contractors Ltd* [1988] 3 W.L.R

authority. Although some US and Australian courts were also interpreting the phrase narrowly, they have shifted to broad interpretation like the English courts did-at least with respect to international arbitration clauses.[23] Though authorities are also divergent on the way the phrase '*arising out of*' is interpreted, it is generally given broad interpretation.[24]

1.1.4. The law applicable to interpretation of international arbitration clauses

Given the international character of arbitration agreements, in international setting, and the pro-arbitration bias followed by the convention and different countries, it may not be relevant to rely on national laws to interpret scope of arbitration agreements. Thus, the wide recognition of the New York convention may call for the development of international rule of construction to interpret scope issues of arbitration agreements.

There are two major approaches to the law governing the interpretation of scope of international arbitration clauses.[25] The first one goes to the application of the law of judicial enforcement forum. That is, the court at which recognition and enforcement of an award is sought applies its own law to the interpretation of the scope of arbitration agreement.[26] Secondly, some countries apply the law governing the substantive validity of arbitration agreement to the interpretation of scope.

[23] Born, *Supranote 1*, at 1090-1095

[24] In *Ethiopian Oilseeds & Pulses Export Corporation v Rio del Mar Foods Inc [1990] 1 Lloyd's Rep,* 'in connection with' and 'arising out of' were treated as equivalents. But see: *SABAH SHIPYARD (PAKISTAN) LTD V GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN [2004] SGHC 109*

[25] *Supra note 23*

[26] In *Mitsubishi Motors case,* the US Supreme Court applied the pro-arbitration presumption of federal common law derived from the FAA.

1.2. Who decides the scope of arbitration agreement?

Most arbitral institutions[27] have expressly provided in their rules that jurisdictional issues are to be decided by the arbitrators. When parties submit their dispute to these institutions, it means that they have also submitted the dispute as to scope of their arbitration agreement to be decided by the arbitrators as well.

Despite such institutional rules, there may arise a dispute concerning whether courts or arbitrators should decide the scope of matters submitted to arbitration. The dispute can be decided by arbitrators at the outset of the arbitration or by court during the enforcement proceeding.[28] This issue particularly touches up on the doctrine of competence-competence.

One author argues that if a valid arbitration agreement exists and the remaining issue is the scope of subject matters covered by the arbitration agreement, the arbitrators should be given the power to decide in the first place.[29] Indeed, this argument goes in line with the doctrine of competence-competence. And the author has also stressed that this argument is overwhelming as it creates efficiency by minimizing prospect of multiple and conflicting national court decision.

Although the arbitrators can decide the dispute in the first place, they cannot have a final say on it. The convention does not give arbitrators such role and the enforcing court can

[27] *See*. *E.g.* ICC Rules, Art. 6(2); LCIA Rules, Art. 23(1); ICDR Rules, Art. 15(1); VIAC Rules, Art. 19(2); WIPO Rules, Art. 23(1)
[28] Alan Redfern and Martin Hunter, *Law and practice of International Arbitration.* (4th ed., Sweet and Maxwell, 2004), at ¶ 3-39, 154
[29] Born, *Supra note 1*. at 1087-88

refuse recognition and enforcement if it is proved that the arbitrators have exceeded their power regardless of their ruling on the scope of their authority.[30]

1.3. The Width of Arbitration Clause: What's Covered and what's Not?

Different types of disputes arise between parties in a given contractual relationship. The dispute can be contractual or not. Among them is a dispute about the scope of disputes covered by arbitral clauses. Parties to an arbitration agreement question whether certain types of contractual claims or non-contractual claims are covered by the arbitration clause. The following sub-sections deal with the most frequent scope disputes.

1.3.1. Non-contractual claims

Non-contractual claims can include tortious claims, such as negligence, misrepresentation and pre-contractual deceit or claims in respect of restitution or unjust enrichment. The definition of arbitration agreement provided by different international conventions provides that non-contractual claims are capable of being submitted to arbitration provided that they arise from a defined legal relationship. Article II (1) of the New York Convention, for example, states that an arbitration agreement includes differences arising from a relationship *whether contractual or not*.[31] Article 7 (1) of the UNCITRAL Model Law stipulates that arbitration agreements can extend to non-contractual claims. Different national laws also provide that tortious claims can fall within the scope of arbitration clause. For example, Art. 6 (1) of the 1996 English Arbitration Act puts it in similar wording with the New York Convention and UNCITRAL Model Law. Though put in a

[30] Albert J. van den Berg, *The New York Arbitration Convention of 1958,* (Kluwer law and taxation publishers 1994), 312
[31] *Emphasis added.*

different way, the Swiss[32] and French[33] law also put that non-contractual claims can be among the matters falling within the scope of arbitration agreement.

Despite the fact that they can be submitted to arbitration, both international instruments and national laws did not address the interpretive issue directly. Thus, they are interpreted by courts and arbitral tribunal on a case by case basis depending on the language used in the arbitration clause. Accordingly, having a look at how different courts approached this issue is relevant in this regard.

In *Caverit Steel and Crane Ltd V. Kone Corp.,* Alberta Court of Appeal held that the convention covers both contractual and non-contractual commercial relationship.[34] The court also underlined that the conspiracy of corporation with its subsidiary to cause a harm to a person with whom it has a commercial legal relationship raises a dispute "arising out of a commercial relationship, *whether contractual or not*."[35] From this ruling, it is understandable that non-contractual claims in general can fall within the ambit of the arbitrators' authority despite the different labels attached to them. It does not matter whether the non-contractual claim is based on negligence, misrepresentation, pre-contractual deceit, restitution or unjust enrichment.

[32] Switzerland's Federal Code on Private International Law of December 18, 1987, Artcle 177 (All pecuniary claims may be submitted to arbitration)

[33] French New Code of Civil Procedure, Article 1442 (An arbitration clause shall be the agreement whereby the parties to a contract commit themselves to refer to arbitration the disputes that that contract may give rise to)

[34] *Kaverit Steel and Crane Ltd v. Kone Corporation*, XIX Y.B Comm. Arb.643 (Alberta Court of Appeal 1992) (1994)

[35] *Ibid*, (Emphasis added)

In this regard, it is worth quoting the ruling of Italian Court of Cassation in substance:

> "arbitration clause encompassed tort, unjust enrichment and restitution claims: all disputes directly or indirectly arising under the contract fall within the scope of the arbitration clause, i.e., not only disputes concerning modification of the original contractual stipulation, alternative performance, or restitution claims for undue payment, but also disputes in which the [claim] does not directly arise under the contract, but which-as in claims for undue enrichment and settlement-ensure from the execution of the contract."[36]

The above quoted statement revitalizes the assertion that arbitration clauses are not crippled to cover only contractual disputes. Rather they can be wide enough to cover non-contractual disputes. It has to be remembered that the wider the scope of arbitration clause, the bigger the authority of the arbitrators and the lesser an award will be refused recognition and enforcement under Article V (1) (c).

Nevertheless, it does not mean that these category of dispute are ripe enough, standing alone, to fall in the arbitrators authority without any qualification. Indeed, the language used in the arbitration clause and the attachment of the non-contractual claim to the arbitration clause are crucial.

Wholly detached non-contractual claims may not fall within an arbitration clause. Arbitrators should not also decide on such matters, bearing in mind that they have the responsibility to make an enforceable award, since it will be challenged under Article v (1) (c) of the Convention. For example, in *Sojuznefteexport V. Joc Oil Ltd*, Bermuda Court of Appeal held that "it has now been established that even claims in tort which have close connection with the contract may be 'claims arising out of or in connection

[36] Judgment of November 1987, XVI Y.B Comm. Arb. 585 (Italian Corte di Cassazione) (1991)

with' the contract."[37] The inference we can make out of this ruling is that a wholly disconnected and unexpected non-contractual claims which are not the immediate result of the obligations stemming from the parent contract may not confer the power to decide on the arbitrators. This argument is also supported by the decision of 11th Circuit in *Telecom Italia, SPA V. Whole Sale telecom Corporation (2001).* [38]

The language used in the arbitration clause is also another relevant factor. If the parties have specifically agreed in their arbitration clause that only contractual claims are arbitrable, then non-contractual claims are avoided from the purview of arbitrators' authority by virtue of the agreement. Also, the parties may use different formulation in their agreement. As stated before, phrases like "all or any" disputes "arising out of" or "in connection with" create broad arbitration clause which can attract non-contractual claims to the scope of arbitrator power. However, there is possibility that non-contractual claims may be held not to arise "under" a contract particularly in common law jurisdictions.[39]

In conclusion, non-contractual claims fall within the scope of arbitrators' authority even if parties to arbitration attempt to cast their compliant on them to avoid their obligation under arbitration clause. However, the touch stone of their arbitrability is based on how much the contractual and non-contractual claims are closely knitted; and the way in which the arbitration clause is crafted.

[37] *Sojuznefteexport v. Joc Oild Ltd*, XV Y.B. Comm. Arb. 384, 427 (Bermuda Court of Appeal 1989) (1990)
[38] In *Telecom Italian, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1104 (11th Cir. 2001), (the court held that, , tortuous interference claim is not subject to arbitration Clause because it was not the immediate, foreseeable result of the performance of contractual duties in the case).
[39] See *Medetirranean Enters v. Ssangyong Corp.*, 708 2F2d 1458 (9th Cir. 1984); *Gerling Global Reinsurance Co v. ACE Property and Casuality Insurance*, 17(8) Mealey's IAR 7(2002); *See also*, Working group on the ICC standard arbitration clause, Final report, 3 March 1992, ICC Doc. No 420/318 Rev 16

1.3.2. Counter- claim and set- off

It has been discussed that the power of arbitrators is within the boundary set by the parties in the arbitration agreement. The only disputes that can be heard and decided by the arbitrators are the ones that fall within the arbitration agreement.[40] Whether counter claims and set off can fall within the territory of scope of arbitration agreement and thereby granting arbitrators to rule on them is another interesting issue.

It is generally admissible if respondent sought to introduce a counter claim or raise a set-off against a claim brought by the claimant provided that it relates to the same contract as the main claim.[41] Like in the case of non-contractual claims, counter claim and the claim of set off should be closely knitted to the claim under the arbitration agreement. This is supported by article 19(3) of UNCITRAL rules which reads as follows:

> "[T]he respondent may make a *counter-claim* arising out of *the same contract* or rely on a claim arising out of the *same contract* for the purpose of *set-off*."[42]

Indeed, there should be a link between the counter-claims and set-off. Otherwise the arbitrator(s) will run the risk of rendering an award which may not be recognized and enforced on the ground of article 5(1) (C) of NY convention.

Arbitration rules of different institutions have also a role in determining whether counter-claims and set-off can fall within the scope of arbitrations' authority. Many institutional

[40] W. Laurence Craig, "*Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*",30 Texas International Law Journal 1, 8(1995)
[41] Berger, "*Set-off in International Economic Arbitration*", 15 Arb. Int. 53 (1999), 64-65
[42] UNCITRAL rules, Art 19 (3), emphasis added

rules provide that arbitrators can entertain counter-claims by stating that respondent can bring her counter-claim in the statement of defense.[43]

The coverage threshold of set-off mostly depends on the relation between the main claim and the claim used for purpose of set-off. As stated above, if there is connection between the two, arbitrators will have the mandate to decide on the set-off claim without risking refusal of recognition and enforcement, at least on this ground.

However, a completely different approach is followed by Swiss Rules of international Arbitration. Article 21(5) of the Swiss Rules states that "[t]he arbitral tribunal shall have jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise *is not within* the scope of the arbitration clause or is the object of another arbitration agreement or a forum-selection clause."[44] What we can draw from Article 21(5) of Swiss Rules is that, the litmus test of connectivity between the main claim and the claim used for the purpose of set-off is not required if the parties chose Swiss Rules. The provision has the potential of broadening the scope of set-off claims that arbitrators can entertain. The same holds true for Zurich chamber of Commerce Tribunals.[45]

Generally, the gist of the analysis made above reveals that counter-claim and set-off falls within the authority of the arbitral tribunal if they have connection with the main claim. The requirement of connection may also be disregarded in cases where parties choose arbitral rules which allow non-connected set-off claims to be arbitrated.

[43] Art 18 (1) (c) of International Chamber of Commerce 1998 Arbitration Rules (counter-claim can be included in terms of reference); Article 17 (1) of American Arbitration Association International Rules (The tribunal may decide whether the parties shall present any written statement in addition to statement of claims and counter-claims ….); Article 15.3 of Arbitration rules of the London Court of International Arbitration of 1998; Article 19 (3) of Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration.

[44] Art 21 (5) of Swiss Rules of International Arbitration, Emphasis added

[45] Art 27 of International Arbitration Rules of Zurich Chamber of Commerce (1989)

Chapter II

Refusal of Recognition and Enforcement under Article V (1) (c) of the New York Convention

2.1. The Dividing Line Between article V (1) (c) and the other grounds

Article V of the New York Convention lists exhaustive[46] grounds upon which the courts of host country may refuse recognition and enforcement of arbitral awards. The first dividing line is dependent on 'who is to raise the grounds'. They are divided as the ones which have to be invoked by the parties resisting enforcement and the ones which can be raised by the courts of host country upon their own motion. The grounds listed under Article V (1) (a-e) are to be invoked by the party resisting recognition and enforcement (the first category).[47] Accordingly, the *onus* of proving the existence of the ground invoked rests on the party who is alleging the grounds, that is, on the resisting party. On the other side, the grounds listed under Article V paragraph 2 are the ones which can be raised by the court of the host country upon their own initiation.[48] Under the second category, the two grounds that the courts can raise are arbitrability of the subject matter and whether the enforcement of the award could be contrary to public policy of the host country. The present paper does not deal with the second category, foreseen by article 5(2), but rather focuses on Article V (1) (c) which falls within the first category.

[46] *M &C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir.1996), XXII Y.B Comm.Arb. 993, 1000 (1997)

[47] The opening line of Art. V (1) of the Convention states that "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that…); *See also* Fouchard, *supra note 7*. ¶ 1693, pp. 983

[48] Fouchard *et al.*, *supra note 7*. ¶ 1693, pp. 983

Accordingly, the next dividing line to be drawn is between the grounds listed under the first category and thereby identifying their distinction with Article V (1) (c).

Putting Article V (1) (a) aside for a while, let us start our comparison from Article V (1) (b). Article V (1) (b)[49] essentially deals with the refusal of recognition and enforcement because of violation of due process. In the words of US Court of Appeal (2nd Circuit), Article V (1) (b) essentially sanctions the application of the forum states standards of due process.[50] However, Article V (1) (c) is about whether the arbitrators have acted beyond the power granted to them by the arbitration agreement. It is not concerned about whether a fair hearing and adversary proceeding is conducted unlike art V (1) (b).

Article V (1) (d) gives a ground of objection for the resisting party on the instance that the arbitral tribunal is not properly composed or the arbitral procedure was not in accordance with the agreement of the parties or in the absence of agreement, was not in accordance with the law of the country where the arbitration took place.[51] Accordingly, this ground is invoked when the resisting party finds irregularity in the composition of the arbitral tribunal or arbitral procedure: not when the arbitrators rule on matters beyond the reach of the powers given to them.

With regard to Article V (1) (e), the difference lies in the fact that it deals with an award which is set aside by the court of the country of origin. The difference it has with article V (1) (c) is apparent in that whether an award was set aside is not a ground to be invoked under article V (1) (c).

[49] Article V (1) (b) of the Convention states that the host court can refuse recognition and enforcement where the invoking party proves that "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"

[50] *Persons & Whittemore v. RAKTA*, US no.7, reported in Yearbook vol. I.P.205

[51] Article V (1) (d) of New York convention

The most important dividing line that has to be drawn is between article V (1) (a) and V (1) (c) because both of them are concerned about the jurisdiction of the arbitral tribunal. Article V(1) (a) is relied upon by the resisting party when the arbitration agreement on which the award is rendered is invalid as a result of incapacity of a party to conclude the agreement or where the consent of a party is vitiated.[52] Indeed, what is invoked under article V (1) (b) is the existence of the agreement itself. It is not about whether certain disputes are submitted to arbitration while the others are not. As such, the resisting party is claiming that the arbitrators have no jurisdiction to rule on the matter at all. In other words, the party resisting enforcement is claiming that the dispute should not have been submitted to arbitration when it invokes article V (1) (a).

However, Article V (1) (c) is invoked with the presumption that there exists a valid agreement.[53] That means, a party who challenges an arbitral award on the ground of validity of arbitration agreement has to do so under article V (1) (a). But if a party invokes Article V (1) (c), it means that the challenge is not based on invalidity or non-existence of arbitration agreement. Rather it is the transgression of scope of jurisdiction by arbitrators. In this regard, it is worth quoting what Albert Jan Van den berg asserts. He states that:

> "Article V (1) (c) does not relate to the case where the arbitrator had not competence at all because of lack of a valid arbitration agreement. This case is to be determined under the ground **a** of Article V (1). Ground **c** concerns the case where the arbitration agreement may be valid as such, but arbitrator has

[52] Fouchard *et al.,, Supra note 7,* ¶ 1695, pp. 984
[53] Redfern *et al., Supra note 28,* ¶410-41, pp. 450

given decisions which are not completed by or do not fall within the scope of the arbitration agreement and the questions submitted to him by the parties."[54]

From the above quotation and discussion we can draw the conclusion that paragraph **a** of Article V (1) is concerned with whether arbitrators have the competence to decide, which is determined on the basis of validity of the arbitration agreement while paragraph **c** is concerned with whether arbitrators have decided based on the authority given to them by valid arbitration agreement. Their point of similarity is, however, in both cases arbitrators have decided on the dispute in the absence of because the arbitration agreement is void according to paragraph **a** or because it does not cover the subject matter on which the arbitrators have ruled on according to paragraph **c**.[55]

2.2. Forms of objection under Article V (1) (c)

Article V (1) (c) of New York convention states that the court of host country can refuse recognition and enforcement when:

"The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration…"[56]

According to a leading authority on the convention, there are two forms of objection against recognition and enforcement of an award that the resisting party can invoke under paragraph **c** of Article V (1).[57] The first form of objection is that *(2.2.1)* the arbitrator has

[54] Albert J. van den Berg: *Summary of Court Decisions in The NY Convention of 1958,* ASA special series No. 9, ¶ 46, 85-86 (1996)
[55] Fonchard *et al.*, *Supra note7,* ¶1700 pp. 987-88 (besides, it states that paragraph c complements paragraph **a** which concerns invalid arbitration agreement)
[56] Article V (1) (c) of the New York Convention.
[57] Berg, *Supra note 54,* at 314

exceeded the ambit of arbitration clause while the second one is that *(2.2.2)* the arbitrator has decided outside her mandate. Both forms of objections are discussed below.

2.2.1. The Arbitrator has Exceeded the Ambit of Arbitration Clause

Both the New York convention and the UNCITRAL Model law recognize that an arbitration agreement can be concluded by parties to submit existing and/or future disputes to arbitration.[58] While an arbitration clause, which is widely used in modern arbitration practice,[59] deals with disputes that may arise in the future[60], a submission agreement deals with an already existing dispute.[61] Both types of arbitration agreements are equally valid under the Convention. However, these terminologies are not used under Article V (1) (c). Rather, it uses the expression "submission to arbitration." This expression as stated under article V (1) (c) of the convention should be understood as referring to both arbitration clause and submission agreement.[62] It follows that arbitrators are deemed to have exceeded their authority when they decide outside the subject matter agreed upon by the parties' arbitration clause or submission agreement.

The following few paragraphs provide illustration of how parties resisting enforcement and recognition have argued under paragraph **c** of Article V (1) and how the courts have dealt with it.

[58] Article II (1) of the New York Convention and Article 7(1) of UNCITRAL Model law.
[59] Tibor Varady *et al. International Commercial Arbitration: A transnational Perspective,* (Thomson 2006), 97; Julian D.M. Lew, Loukas A. mistelis, et al., *Comparative International Commercial Arbitration,* (Kluwer Law International 2003), 99-100
[60] Tibor Varady et al., *Supra note 59* (Thomson 2006) at 97
[61] Alen Redferen *et al., Supra note 28,* at 132
[62] Berg, *Supra note54,* at 314-316 (Generally, he states that the expression "submission to arbitration" as stated under the English text is open to interpretation. Thus it has to be supplemented by the French Text of the convention which is equally authentic according to Article XVI of the convention.)

In *Sojuznefteexport V. Joc Oil Ltd.*,[63] the issue disputed was whether deciding on the validity of arbitral clause falls within the arbitrator's authority. The Foreign Trade Arbitration Association has rendered an award in favor of Sojuznefteexport, Soviet Oil Company, against Joc Oil, Bermuda oil trader. Although Joc Oil had argued that the contract between the parties was invalid because the requirement of signature was not fulfilled according to Soviet law, arbitrators had rules that the arbitration clause is valid based on the doctrine of separability. Joc Oil challenged the award before the court of Bermuda. The arbitration clause in their contract provided for all dispute or differences which may arise out of or in connection with the contract to be submitted to arbitration. The court of appeal of Bermuda held that the arbitral tribunal had not exceeded the scope of its power under the arbitral clause as the arbitration clause is broad enough to cover disputes concerning the consequences of the invalidity of the contract. This case illustrates that a dispute on the validity of the parent contract falls within the scope of the arbitrators' power if the clause is drafted broadly.

In *Parsons and Wittermore Overseas Co. v Societe Generale de l'Industrie (RACTA),*[64] an award was rendered in favor of an Egyptian Corporation RACTA against American Corporation Overseas. The parties had an agreement that overseas should construct, start up, and, for one year, manage and supervise a paper board mill in Alexandria, Egypt. Before completion of the project, the construction was stopped and the workers of overseas left Egypt because of the Arab-Israeli six day war on the horizon. Arbitration was started and the arbitral tribunal, after several sessions, had rendered an award in

[63] *Sojuzneteexport v. Joc oil Ltd*, XV Y.B. Comm. Arb. 384, 427 (Bermuda Court of Appeal 1989) (1990)
[64] *Parsons and Wittermore Overseas Co. v Societe Generale de l'Industrie (RACTA)*, US Court of Appeal, 2nd Circ, 1974, 508 F.2d 969

favor of RACTA. One of the grounds on which Overseas has challenged enforcement of the award before US District Court for the Southern District of New York was excess of jurisdiction by the arbitrators. Overseas, basically, argued that the $185,000 (one of the three components of the award) for loss of production is outside the scope of the arbitration agreement by reciting a clause in the contract which states that "neither party shall have any liability for loss of production."[65] The district court confirmed the award despite the challenge of overseas. Subsequently, overseas appealed to the Court of Appeal Second Circuit which also confirmed the award by stating that the arbitral tribunal interpreted the provision not to preclude jurisdiction on the matter and that it is not apparent that the scope of the submission to arbitration has been exceeded. The Court of Appeal further held that "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 arbitrators construction of parties, agreement."[66]

Finally, in *Tiong Huat Rubber Factory v. Wah-Chang International Co.,*[67] the contract concluded between the parties stated that the defendant should provide for a letter of credit. The defendant failed to provide the letter of credit and the claimant started arbitral proceeding in its claim for non- payment. Upon getting an award in its favor, the claimant subsequently sought a leave to enforce which the defendant objected on the ground that an award concerning the consequence of failure to open letter of credit did not fall within the arbitration clause. The arbitration clause stated that "[a]ll disputes as to qualify or condition of rubber or other dispute arising under these contract regulations shall be

[65] *Ibid.*
[66] *Ibid.*
[67] *Tiong Huat Rubber Factory v. Wah-Chang International Co*, High Ct. Hong Kong, 28 November 1990, and CA Hong Kong, 18 January 1991, XVII Y.B. Comm. Arb. 516 (1992)

settled by arbitration."[68] The high court confirmed the award by stating 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 jurisdiction. However, the Court of Appeal reversed the decision by holding that the court is not entitled to ignore the arbitration clause and write a fresh one for the parties under the guise of the business efficacy derived from one-stop shopping. Accordingly, the Court of Appeal refused enforcement finding the term 'contract regulation' in the arbitral clause covered specific provisions but letter of credit.

2.2.2. The Arbitrator has Decided Outside her Mandate

As stated above, the objection that arbitrators have acted beyond their mandate is not expressly stated under paragraph **c** of Article V (1). However, in determining whether the arbitral tribunal has exceeded its authority the analysis should not be confined to the arbitration agreement.[69] Rather the analysis includes the determination of whether the arbitral tribunal has decided within the limit of its mandate as stated in the parties claim.[70] This is to mean that arbitrators can be deemed to have exceeded their authority within the meaning of article V (1) (c) if they render an award which goes beyond the claims and counter claims of parties. Therefore, arbitrators' exercise of authority beyond the mandate given to them as inferred from the parties claim constitutes another ground of refusal under Article V (1) (C).

[68] *Ibid.*
[69] Berg, *Supra note 54,* at 314
[70] *Ibid*; *see also* Lew *et al.*, *supranote 59*,at ¶¶26-93, pp. 714; *But see* Fouchard *et al.,* at 988

The respondent in an enforcement proceeding can raise different forms of objection when the arbitrators exceed their mandate. She can argue that the award should not be recognized and enforced because *(2.2.2.1)* the award is *ultra petita* and/or *infra petita*, *(2.2.2.2)* the arbitrators acted as *amiable compositeur (2.2.2.3)* or the award is based on non-claimed interest.

2.2.2.1. The award is ultra petita and/or infra petita

An award *ultra petita* results when the arbitrators rule on a claim which is not made by the parties or decide on a dispute that was not submitted. An award *ultra petita* as a ground of objection is not agreed upon by all scholars. For example, Fouchard *et al.*, argue that an award *ultra petita* cannot be regarded as a ground of objection under Article V (1) (c) so long as the award does not fall outside the scope of arbitration agreement.[71] However, Berg states that article V (1) (c) is not casted to refer to arbitration agreement in general unlike article V (1) (a)[72]. Hence, Article also refers to the mandate of arbitrators as deduced from the submission of the parties according to him. This shows that an award *ultra petitia* can be a ground of objection for the defendant in enforcement proceeding although the arbitrators have remained within the scope of arbitration agreement. Berg's position is supported by some court decisions.

In a case before the Swedish Court of Appeal,[73] the respondent resisted enforcement of the award by alleging that the arbitrators have awarded price reduction without being asked to make a reduction by the parties. Hence, the respondent argued that the court

[71] Fouchard *et al.*, *Supra note7* at 988
[72] Berg, *Supra note 54* at 315
[73] AB Gotaverken v. General Maritime Transport Co. (NMTC), Svea Court of Appeal (5th department), December 13, 1978, aff'd by the Swedish Supreme Court , August 13, 1979, VI Y.B.Comm. Arb 237 (1981)

should not confirm the award as the arbitrators have exceeded their mandate. The court, however, confirmed the award by explaining that 'the reduction was not an unsolicited award of damages to [the respondent] but rather a price adjustment connected with general determination that [the defendant] owed the last installment.'[74] Thereby the court held that the arbitrators did not exceed their authority. The judgment was subsequently confirmed by the Swedish Supreme Court. The court refused to accept the objection not because an award *ultra petita* is not a ground under Article V (1) (c). Rather it is because the price reduction in the award did not constitute *ultra petita*. This holding shows that arbitrators may render an award *ultra petita* and that this can be a ground under Article V (1) (c).

On the other hand, an award *infra petita* happens when arbitrators make incorrect assessment of their jurisdiction by considering the scope of their authority to be less broad than in fact it is.[75] Therefore, this type of award is a result of arbitrators' failure to decide on all the claims submitted to them. An award *infra petita* may affect both the respondent and the claimant to an enforcement proceeding. It affects the respondent when the arbitrators fail to consider the claim made by the respondent. Then the respondent tries to use such defense to tackle the enforcement of the award. The claimant can also be affected when the tribunal renders an award which is less than what it claimed. However, this concern of claimant is not part of the discussion here since she has already asked enforcement and recognition based on what is awarded in her favor in the award.

Born forwards that, the arbitral tribunal's failure to decide on a claim, an award *infra petita,* constitutes excess of authority by the tribunal in the same way as an award *ultra*

[74] *Ibid.* (at 238)
[75] Fouchard, *Supra note 7* at¶1627 pp. 938

petita does.[76] In a case before the Court of First Instance in Munich, Germany, the respondent resisted enforcement on the ground that the tribunal has failed to rule on the validity of the arbitration agreement despite a request for so.[77] In denying recognition of the award for failure of the tribunal to decide on jurisdictional objection of the defendant, the court held that:

> "Notwithstanding the objections of the respondent that no arbitration agreement had been concluded, [the tribunal] has omitted the necessary examinations as to whether there existed a valid arbitration agreement at all"[78]

The ruling of the court shows that the tribunal's failure to decide on the objection of the defendant constituted an award infra petitia and thereby established a ground for refusal.

However, it is questionable that an award *infra petita* can be a ground under the convention. In one case, the Court of Appeal of Luxembourg held that "even if *infra petita* is proved, it cannot prevent the recognition of an award as it is not provided in the convention."[79] Besides many scholars[80] argue that Article V (1) (c) does not regulate *infra petita* and as a matter of principle, an incomplete award can be enforced.

[76] Born, *Supranote 1*, at 2799
[77] Landgericht, Munich, 20 June 1978, *German Seller v. German Buyer*, Reported in Y.B.Comm. Arb. V (1980), pp 260-263
[78] Foot note 23 at page 260
[79] CA Luxembourg, 28 Jan 1999, *Sovereign participations International S.A. v. Chadmore Developments Ltd*, XXIVa YB Comm. Arb. 714, 721 (1999)
[80] Mauro Rubino-Summartano,*International Arbitration Law and Practice*, (Kluwer 2nd ed. 2001) pp.957-957; Berg, *Supra note 54*, at 320

2.2.2.2. The Arbitrators Acted as Amicable Compositeur

Different arbitral rules[81] allow the arbitral tribunal to decide as *amiable compositeur* on the condition that the parties, prior to or during the arbitration, make an express authorization. In similar fashion, international conventions and some domestic laws have adopted that arbitrators can decide a dispute as *amiable compositeur* if they are duly authorized by the parties to do so.[82] The issue rests on what happens if the arbitrators decide as *amiable compositeur* in the absence of prior agreement by the parties. Would it amount to be excess of mandate by the arbitrators? And can it be invoked under article V (1) (c)? The following cases illustrate how national courts have decided on this issue.

In *International Standard Electric Corp. (ISEC) v. Bridas Sociedad Anonima Petrolera Industrial Y Commercial*,[83] ISEC argued that the tribunal exceeded its authority by deciding the damage issue based on equitable grounds rather than on the law. By so doing, ISEC continued, the tribunal acted as *amiable compositeur* without the consent of the parties which is a requirement under CC rules. The court held that it had no authority to reconsider the tribunal's fact finding under the convention, nor it could make a *de novo* review to see whether the tribunal has properly applied the substantive law.[84]

[81] Article 17 (3) of ICC rules; Article 28 (3) of AA rules; Article 33 (2) of Swiss rule; Article 22.4 of LCIA rule (But allows arbitrators to decide as *amiable compositeur* only to the merit of the dispute); Article 33 (2) of UNCITRAL rules (It requires the permission of the law applicable to the arbitral procedure for an arbitrator to decide as *amiable compositeur* in addition to the express authorization of the parties)
[82] Hong-Lin Yu, Amicable Composition- A Learning Curve, *Journal of International Arbitration*, (Kluwer Law International 2000 Volume 17 Issue 1), pp. 79
[83] *International Standard Electric Corp. (ISEC) v. Bridas Sociedad Anonima Petrolera Industrial Y Commercial*, 745 F. Supp. 172 (S.D. N. Y. 1990)
[84] *Ibid.* ¶¶34 and 37

In a case[85] before US district court for District of Delaware, the defendant resisted enforcement arguing, *inter alia*, that the arbitrators have exceeded the scope of their authority in their failure to base the award on the evidence adduced and has instead acted as *amiable compositeurs*. Consequently, the defendant has asked the court to deny confirmation pursuant to article V (1) (C) of New York convention. The court found that the arbitration clause is broad and that the issue of damage was properly brought before the arbitrators.[86] Therefore, the court held that the arbitrators had not exceeded the scope of their authority. Besides, the court made it clear that it has no authority to examine the evidence under the guise of determining whether the arbitrators exceeded their power.[87] Accordingly, the court refrained from making further inquiry.

In a case[88]before the court of First Instance of Hamburg, the defendant resisted enforcement on the allegation that the tribunal's application of *lex mercatoria* amounted to excess of authority. However, the court ruled that if the court had to deal with this allegation, it would inevitably lead to the interpretation of the choice of law clause which indirectly leads to reviewing the merits of the award.

To wrap up the discussion on *amiable compositeur*, it is good to make inference from the cases discussed above. As illustrated above, the defendants' objection to enforcement because the arbitrators acted as *amicable compositeur* may not be accepted by courts for it, indirectly, leads to a *de novo* review of the merits of an award. Such objection has a substantive nature that calls for substantial court review which is not allowed by the

[85] *National Oil corp. v. Libyan Sun Oil Co.*, 733, F. Supp. 800 (D.Del.1990), XVI Y.B.Com. Arb. 651(1991)
[86] *Ibid*, at 817
[87] *Ibid*, at 819
[88] Landesgericht Hamburg, 18 September 1997, XXV Y.B. Com Art. 710 (2000)

convention. Hence, this defense is less likely to succeed before host courts of the countries which are member to the Convention.

2.2.2.3. The Award is based on Non-Claimed Interest.

The award of non-claimed interest is a defense which is similar in nature with an award *ultra petita* defense. But it tends to be more specific. Arbitrators may award an interest or costs without being prayed for.

In a case before the Court of Appeal of Hamburg,[89] the defendant resisted enforcement by claiming that the arbitrators awarded post-award interest which had not been claimed. The court ruled that the tribunals' award of post-award interest is not at odds with the claimants claim since the claim cannot be read to limit the power of the tribunal to award more interest. Accordingly, the court held that the arbitrators did not exceed their authority in the context of Article V (1) (c). The decision of the court shows that an award may not be denied recognition and enforcement under article V (1) (c) if the arbitrators granted a non-claimed interest which is not at odds with the claim submitted to them.

In *Aasma v. American Steamship Owners Mutual Protection and Indemnity*,[90] a group of US seamen started an arbitral proceeding against two insurers. In the award, the arbitrators issued that the cost of attorneys' fee should be covered by the group of US seamen. The group challenged the enforcement of the award in US by invoking that the fee award was beyond the scope of the submission to arbitration in the sense of Article V

[89] Oberlandersgericht Hamburg, 30 July 1998, XXV Y.B. Com. Arb 714(2000)
[90] *Aasma v. American Steamship Owners Mutual Protection and Indemnity*, 238 F.Supp.2d 918, 921 (N.D. Ohio 2003), XXVIII YB Comm. Arb. 1140 (2003)

(1) (c) by stating that the contract has made no provision for fee allocation. The court held that the parties' agreement designated the applicability of the Arbitration Act 1996 and that section 63 of the Act allows an arbitrator to award recoverable costs as it thinks fit where there is no agreement between the parties.[91] Accordingly, the court found that the award of costs falls within the scope of the parties' arbitration agreement. This decision makes it clear that the arbitral tribunal can decide on costs even if the parties did not conclude a prior agreement to that effect on the condition that the *lex arbitri* allows so.

2.3. ICC Terms of Reference

A term of reference is used to identify the issues to be decided in ICC arbitration. Article 18 of ICC rules defines the content of terms of reference and sets out the procedure to be followed. The provision particularly states that "the terms of reference *shall* include…a summary of the parties' respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed and counter claimed." [92]

J. Wetter argues that the terms of reference is one of the moat controversial and antiquated relics in the ICC rules since it requires the arbitrators to agree on the definition of the dispute at the first meeting. **[93]** The issue at this juncture is whether the ICC terms of reference which is signed at the cradle stage of the arbitral proceeding can serve as a yardstick to determine the scope of arbitrators' power. In other words, should a court base its determination of scope on the claims listed in the terms of reference when a party resisting enforcement of an award redered by ICC tribunal invokes Article V (1) (c)?

[91] *Ibid.* at 1143
[92] ICC Rules Art. 18(1) (c) (Emphasis added)
[93] J.Gillis, Wetter, The Present Status of the International Court of Arbitration of the ICC: An Appraisal (1 Am.Rev. Int'l Arb't 91, 101-102(1990) in Varady *et al.*, at.506-508

This question can be approached from different directions depends on whether the parties have submitted a narrower or broader claim to the tribunal after signing the terms of reference. The parties may submit a narrower claim than the terms of reference. In this case, the defendant cannot resist enforcement under Article V (1) (c) so long as the tribunal renders its award within its mandate as stated in the claims.[94] In any case, the scope of arbitrators' authority is not made in reference to the terms of reference. Instead the host court considers the narrower claim submitted to the arbitration by the parties.

Nevertheless, the parties may claim more than what is listed in the terms of reference. In such cases, Art 19 of the ICC rules states that the party introducing new claim or counter-claim should seek the authorization of the arbitral tribunal. The arbitral tribunal can grant authorization so long as the claim which is not listed in the terms of reference remains within the scope of the arbitration agreement.[95] It is also conceivable that one party may claim more than what is listed in the terms of reference without seeking the authorization of the tribunal. In this instance, the other party can object as to the inclusion of the new claims and, then the tribunal may accept or reject depending on whether the new claim falls within the scope of the arbitration agreement. But if a party fails to object the inclusion of the new claims, she cannot raise the defense of Article V (1) (c) since she is presumed to have waived her right under Article 33 of the ICC Rules.[96]

[94] For excess of mandate see the discussion on section 2.2.2
[95] Art.19 of ICC Rules empowers the arbitral tribunal to consider the nature of claim or counterclaim in granting the authorization.
[96] *See also,* Yves Derains and Eric A. Schwartz, *A Duide to the New ICC Rules of Arbitration,* Kluwer Law international (1998), 349-351

The bottom line is that, according to the discussion made above, the parties claim in the submission determines the scope of the arbitrators mandate rather than the terms of reference.

2.4. The Standard of Review under Article V (1) (c)

One of the reasons why international commercial arbitration is appealing to business persons is the finality of the award. Parties to arbitration usually include in the arbitration clause that the award which is going to be rendered is final. However, when it comes to recognition and enforcement of arbitral awards, the resisting party may question the enforceability of the award on various grounds. One of which is the ground stated under article V (1) (c) of the New York Convention. The question which needs to be answered is that to what extent does a court seized with enforcement of the award can scrutinize the award for the specific purpose of determining whether the arbitrators have exceeded the scope of their power or not.

The court before which enforcement of an award is sought may examine the award so long as the purpose of doing so is limited to identifying whether the arbitrators have transgressed the scope of the arbitration agreement.[97] In *LIAMCO v Socialist Libyan Arab Jamahiriya*, a US Court stated that the standard of review by an American court is

[97] *See. e.g. General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria V. SpA SIMER*, CA Trento, 14 January 1981 VIII Y.B. Com. Arb. 386(1983)

extremely narrow and that it is inappropriate for the court to usurp the arbitrators' roles.[98] Further more, van den Berg notes that:

> "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 [as] mentioned in Article V[(1) (c)]: it does not involve an evaluation by court of the arbitration findings."[99]

Accordingly, all the court has to do when a defense of Article V (1) (c) is invoked is to address only whether the arbitrators have exceeded the scope of the arbitration agreement or the mandate given to them as inferred from parties' claims and the arbitration agreement.

Pretty conclusively, the courts' review is limited to determining whether the arbitrators have rendered an award within the limits of their power. And it does not extend to scrutinizing whether the arbitrators' reasoning or decision is rational in the eyes of the court. In other words, the court should not go onto the re-examination of the merits of the award[100] and see what it could have done if it were in the shoes of the arbitrators.

2.5. The Powerful Presumption and the Narrow Construction of Article V (1) (c)

Developed international arbitration systems accept and implement 'pro-enforcement' policy to recognition of international arbitral awards."[101] In support of this, the Singapore court noted that "there is the principle of international comity enshrined in the

[98] *Libyan American Oil Company (LIAMCO) V. Socialist Peoples Libyan Arab Jamahiriya, formerly Libyan Arab Republic*, Vol. VII (1982) Y.B. Comm. Arb. 382 at 388 (By so stating the court made reference to Overseas case)

[99] Albert J. van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, Kluwer (1981), 312

[100] Berg, *Supta note 55*, at 314; See also., *Lesotho Highlands Dev.Auth. V. Impregilo SpA* [2006] 1 A.C. 221, at ¶930 (House of Lords)

[101] Born, *Supra note1*, at 2711

Convention that strongly inclines the courts to give effect to foreign arbitral awards."[102] This is the general enforcement-biased impression that the courts reveal. However, enforcement can be refused if the exclusive grounds listed under Article V are fulfilled. The issue here is what kind of presumption and interpretive construction are the courts using when it comes to Article V (1) (c).

The Court of Appeal of Bermuda held that 'arbitrators shall be presumed to have acted within the scope of their power in the absence of proof by the resisting party.'[103] Moreover, the US Court of Appeals decision has made it concrete that a party who invokes Article V (1) (c) must overcome a powerful presumption that the arbitral body acted within its powers.[104] Therefore, a court which is seized with a contention on the scope of arbitrators' power as a defense to enforcement starts to hear the case having the presumption that arbitrators have acted within their power in its mind. This presumption puts the obligation on the defendant to prove excess of power to the satisfaction of the court. This presumption is a derivative of the pro-enforcement bias of the Convention.

It has been discussed that arbitration agreements are generally interpreted in a broad way.[105] As a matter of logic, broad interpretation of the arbitration agreement in itself calls for narrow construction of Article V (1) (c). Similar to the other grounds of defenses, as stated by van den Berg, Article V (1) (c) should be construed narrowly.[106] The US court of Appeals also stated that this ground should be construed narrowly like

[102] *Aloe Vera of Am., Inc. V. Asian Foods (s) Pte Ltd.* XXXII Y.B. Comm. Arb. 489 (Singapore High court 2006) (2007) ¶940
[103] Sojuaznefte export case, *Supra note 63*
[104] U.S. Court of Appeals(2nd Cir), December 23, 1974, Parsons & Whittermore Overseas Co. Inc. V. Societe Generale de lIndustrie da Papier (RACTA) (U.S. no.7)
[105] See the discussion on the interpretation of arbitration agreements in Chapter I.
[106] Berg,*Supra note 54* at314; Redfern *et al., Supra note 28,* ¶10-35, pp.445

the other grounds.[107] The Court went on to put that such a narrow construction would comport with the enforcement facilitating thrust of the Convention. This position can be inferred form other courts' decisions too.[108] Once again, the narrow construction of Article V (1) (c), like the powerful presumption, is the derivative of the pro-enforcement bias of the Convention.

2.6. The 'may' Language of Article V

The opening line of Article V (1) states that "[r]ecognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that…."[109]

This opening line equally applies to all the five grounds listed under paragraph one among which is the defense of excess of authority by arbitrators. Obviously, a party invoking Article V (1) (c) has to necessarily prove that the arbitrators have exceeded their power in order to succeed in her defense. However, is there an obligation on the courts to deny recognition and enforcement of an award even when the resisting party proves that the arbitrators have exceeded their power?

Although a defendant in enforcement proceeding proved that one of the grounds listed under Article V (1) is fulfilled, the enforcing court is not under obligation to refuse enforcement owing to the permissive nature of the 'may' language.[110] Accordingly, the

[107] U.S. Court of Appeals(2nd Cir), December 23, 1974, *Parsons & Whittermore Overseas Co. Inc. V. Societe Generale de lIndustrie da Papier (RACTA)* (U.S. no.7)
[108] *Fiat S.p.A. v. Ministry of Finance and Planning of Suriname*, 88 Civ. 6639 (SWK), 1989 U.S. Dist.; *Lesotho Highlands Dev.Auth. V. Impregilo SpA* [2006] 1 A.C. 221, at 430(House of Lords)
[109] Art. V (1) of the New York Convention. (Emphasis added)
[110] Redfren, *Supra note.*…¶10-13, p.445; Lew *et al., supra note59*, at 706-707

enforcing court has residual discretionary power to enforce the award even when the ground is made out where violation is *de minimis*.[111]

In *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co Ltd*,[112] the defendant resisted the enforcement of an award rendered by China International Economic and Trade Arbitration Commission (CIETAC). The defendant challenged the award on the basis of irregularity in the composition of the arbitral tribunal [Art. V (I) (d)]. Although the defendant has technically proved the existence of irregularity in the composition, the court eloquently held that, '[t]he residual discretion enables the court to achieve a just result in all circumstances.[113] The court nevertheless enforced the award. Even if the ground of defense raised by the defendant in this case is paragraph **d**, not paragraph **c**, the reasoning of the court applies to both including the other three grounds listed under Article V (1).

Generally speaking, the gist of the above discussion indicates that a leave for enforcement can be granted even when the defendant proves that the arbitrators transgressed the scope of their power because of the residual discretionary power of the court which emanated from the 'may' language of Article V (1). Yet, it needs to be underlined that this interpretation is not followed by all member states.[114]

2.7. Partial Enforcement under Article V (1) (c)

Once excess of authority is proved by the resisting party, there are three alternatives as to the fate of the award for which recognition and enforcement was sought. The first one is

[111] Berg, *Supra note 54,* at 265
[112] Hong Kong Supreme Court, 13 July 1994, *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co Ltd,* (1995) XX YB. Comm. Arb.671.
[113] *Ibid.* at 677.
[114] Lew *et al., Supra note 110*

that the court may use its residual discretionary power and grant a leave to enforce where the court finds that the violation is *de minimis.*[115] The second one is to refuse enforcement at all. Berg states that enforcement is refused in very exceptional cases which are countable by fingers.[116] Thus, the second alternative is a possibility that happens once in a blue moon. Finally, excess of an authority may result in partial enforcement and this one is our concern under this topic.

The second half of Article V (1) (c) proclaims that 'if the decision on matters submitted to arbitration *can be separated from* those not so submitted, that part of the award which contains decision on matters submitted to arbitration *may* be recognized and enforced.'[117] This provision shows that the arbitral tribunal has exceeded its power in some aspects and not in others.[118] It seems that this provision is trying to save the part of the award which is rendered in compliance with the parties' submission to arbitration. This can be deduced from the fact that Article V (1) (c) is the only defense in which partial enforcement is possible which reflects the enforcement thrust of the Convention.[119] But, when should a court grant partial enforcement? Is there an obligation on the court to do so?

It is clearly stated in the provision that the matters upon which the arbitrators exceeded their authority and the matters on which they remained within the ambit of their authority should be severable. That means, if the enforceable part of the award can be separated

[115] See the discussion on the 'may, language,' in Chapter II

[116] 512 *Grounds for Refusal of Enforcement-Excess of Authority by Arbitrator* in Albert Jan Van den Berg(ed), Y.B. Comm.Arb. Vol. XIX 1994, Volume XIX (Kluwer Law International 1994), 578 (In the court decision reported so far, *with two exceptions*……., the courts invariably rejected the defense that the arbitrator exceeded his authority). (Emphasis added)

[117] Article V (1) (c) of the New York Convention. (Emphasis added)

[118] Redfern, *Supra note 28,* at 450

[119] Robert S. Mathia, *The Federal Courts and the Enforcement of Foreign Arbitral Awards,* 5 PACE L. Rev.151, 167(1984): *See also,* Thomas E Carbonneau and Jeanette A. Jaeggi (Editors), *Hand Book on International Commercial Arbitration & ADR,*(Juris net, LLC (2006)) pp. 171-172

from the ones outside the scope of the arbitrators power, the court can grant enforcement.[120] However, the enforcing court can exercise its own discretion in doing so. The *'may'* language of the provision signals that the court has got the discretion to grant or refuse partial enforcement.[121]

In *Fiat S.p.A. v. Ministry of Finance and Planning of Republic of Suriname*, the New York District Court found that the tribunal exceeded its authority when it purported to bind a non-signatory not expressly covered by the arbitration agreement when the issue was submitted to arbitration.[122] Basing its justification on Article V (1) (c) which allows partial enforcement, the court vacated the award as to the non-signatory and confirmed the remainder against the other party.

[120] Robino-Sammartano, *Supranote80,* at 957; Redfern *et al., Supra note 28,* at 450-451
[121] Berg, *Supra note 54,* at 319; Redfern *et al.*, *Supra note 120*
[122] *Fiat S.p.A. v. Ministry of Finance and Planning of Republic of Suriname,* 1989 WL 122891(S. D. N. Y., 1989)

Chapter III

Conclusion and Remark

It has been discussed under Chapter one that the decision of the enforcing court concerning whether the arbitrators have exceeded the scope of the arbitration agreement in the sense of Article V (1) (c) of the New York Convention depends on the courts' interpretation of the arbitration agreement. We have also seen the different approaches to the interpretation of arbitration agreements. Among them, the most compelling type of interpretation is the so called liberal or expansive interpretation. This approach is favored by developed legal regimes because of its capacity to fulfill the thrust of the convention. However, there are other types of interpretation which do not go in line with the need of the convention. For example, the restrictive or strict type of interpretation does not support the commercial reality for which the parties have chosen arbitration. In addition, the reliance of courts to create fine distinction between different types of wordings used in arbitral clause is not a matter to be encouraged. Even if courts have chosen interpretation which is business friendly in the recent years, one should not undermine the problem that lack of uniformity may bring to the world of arbitration.

In the first place, parties to commercial arbitration will fall in the string of skepticism if there is no uniform rule as to the interpretation of scope of arbitration agreement. Adoption of such a uniform rule as to the interpretation will help countries which are member to the New York convention but which do not have a developed legal system.

In the second place, apart from having some how uniform rule of interpretation, it is also recommendable to swiftly react to the developing issues of counter claims and set-offs.

Whether counter-claims and set-offs can comfortably be put under the scope of arbitration agreement is not answered by one voice. Indeed, such matters deserve to be treated on a case by case basis. However, there needs to be a uniformly accepted threshold for test.

It is to be appreciated that the enforcing courts are following a specially different pro-enforcement stand as far as Article V (1) (c) is concerned. It has been discussed that it is very unlikely that the court of the host country will refuse recognition and enforcement of a convention award on this ground. Yet, it is important to pay attention to the defenses as arbitrators may decide on matters which the parties have excluded from arbitration. The strong presumption that arbitrators have acted within the ambit of their authority should not create a loop hole for arbitrators to decide in the absence of the will of the parties. The stronger the presumption, the more expansively will the court interpret arbitral clauses. The more expansive interpretation is used, the narrower Article V (1)(c) will be construed and the lesser an ward may be refused recognition and enforcement on the ground of excess of authority.

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