CHAPTER 25

CAN PROCEEDING “NOT IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES” BE CONDONED?

Remarks on Article V(1)(d) of the New York Convention

1. ON VARIOUS MIGRANTS JOINING THE TERRITORY OF INTERNATIONAL COMMERCIAL ARBITRATION

Discussing one of the many facets of international commercial arbitration where adjustment and accommodation were needed – and have been achieved – Eric Bergsten makes a salient comparison (not unrelated to his personal experience):

The international commercial arbitration experience during the last fifty years is analogous to the experience of immigration into a country. Immigrants must adjust to their new country, but the country will also change to accommodate them.¹

International commercial arbitration has certainly become the destination of many migrants. The Bergsten article has scrutinized the migration of American approaches to the arena of international commercial arbitration. This arena has also become the new destination of many types of cases, which were earlier heading towards State courts; and parallel with this, it has become the destination of various philosophies and techniques of dispute resolution. During the period, which Bergsten is contemplating, arbitration ceased to have an ADR position in the realm of international commercial disputes. It has become the dominant

method of settling such disputes, including the most sophisticated and most complex ones. In other words, international commercial arbitration has become mainstream.

Mainstream phenomena usually reflect adjustments and compromises. I would like to devote attention to a traditional juncture of adjustments, which is actually present in all decision-making procedures. This is the accommodation between specific rules and flexibility. It is a peculiar fact that on the territory of international commercial arbitration flexibility is indigenous, and specific rules are the newcomer migrants. As long as it represented an alternative – and as long as it fostered mainly uncomplicated and small cases – international commercial arbitration was simple, informal and flexible. More and more specific rules have gained ground, however, since international commercial arbitration became the home of all types of cases, including the most sophisticated and most consequential ones.

There are many ways in which tensions have been generated – and accommodations have been achieved – between specific rules and flexibility. The juxtaposition is well known and reveals two options. If one concludes the analysis by establishing whether the arbitrators did or did not depart from a specific rule, more irregularities will be heeded and sanctioned. If, however, one extends the analysis, and endeavours to establish where the irregularity leads us (what its impact is), or whether a transgression may be balanced and neutralized, some irregularities may be perceived as innocuous, and thus may not impede recognition. I intend to focus on rules that have a special importance in the domain of arbitration, and these are rules created by the parties themselves. Here, we are facing the question whether departure is possible from the procedure agreed upon between the parties: or in other words, whether the relevance of such procedural irregularities or some other considerations should or should not be heeded. This is an issue arising in the setting of different variants of court control. My main focus is on recognition and enforcement of foreign arbitral awards – that is, on Art. V(1)(d) of the New York Convention (hereinafter: NYC).

2. TWO INTRODUCTORY CASES

Let us take a hypothetical in which the claimant has a clear and simple case. The evidence submitted by the claimant even includes a letter from the respondent in which he recognizes his debt, and only asks for a delay in payment. The claimant initiates arbitration, but the respondent is not properly invited and does not
participate in the proceedings. The arbitrators render a simple and convincing award in favour of the claimant. Recognition is sought, and the respondent opposes recognition and enforcement relying on Art. V(1)(b) of the New York Convention. It is clear that the respondent was not given ‘proper notice of the arbitration proceedings’, but the claimant argues that this is irrelevant, because he would have won anyway. Can the recognizing court investigate whether the claimant would have won anyway – and hence, whether the absence of proper notice was relevant (whether it had an impact on the outcome of the case)? I believe that the answer is no. Recognition cannot be granted in the presence of such a fundamental violation of due process. Furthermore, in order to establish whether the violation did or did not have an impact on the outcome, the court would practically have to re-hear the case. The award might be saved, but at the expense of sacrificing the principle of limited court control, which is a critically important mainstay of modern arbitration. This logic was stressed in a number of court cases, in various contexts. For example, in a 2004 English decision upholding challenge to an arbitral award, Justice Colman addressed the issue of assessing the weight of procedural irregularities, and stressed:

> Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.2

Returning to our hypothetical case, if one were to opt to investigate the impact and the relevance of the absence of a proper notice of the arbitration proceedings (which procedural irregularity was not cured by waiver), one might at the same time question the relevance of the whole arbitration process. The award might be confirmed, but the arbitration process might lose sense, because in this situation a court scrutiny (rather than arbitral decision-making) would yield the conclusion that the claim is or is not justified.

But suppose – and this is now a real case – that the arbitral proceedings are conducted in Rotterdam, instead of Amsterdam as agreed between the parties. Let me hasten to say that hearings are quite often conducted at a place different from the seat agreed between the parties; but normally, the arbitrators do not forget to heed the stipulation of the parties, and they will opt for a different site for hearings only with the consent of all parties concerned (typically, such

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proposals of the arbitrators are accepted – and if they were not accepted, the arbitrators will respect the site originally agreed upon between the parties, even if another site might be more convenient under the given circumstances). It appears that in *Quality Steel Incorporated v. Bummash*³ this was not the case: Such a precaution was not taken – or, at least, the Russian Supreme Court did not take note of such precaution. The recognition of the Dutch award of 8 January 2002 was denied by the Supreme Court of the Udmurt Republic on 20 March 2002. The Udmurt decision was confirmed by a decision of the Russian Supreme Court of 18 July 2002. In the summary of the holding (which introduces the published decision), the Russian Supreme Court stated that the Udmurt court rightfully refused recognition, since the hearings took place in Rotterdam, which was contrary to the agreement of the parties.⁴ It was added in the statement of reasons that the place of the arbitration proceedings is ‘not an unessential term of the arbitration agreement’. It may be necessary to mention that in this case other arguments against recognition were also advanced, but it appears that the Russian Supreme Court found that the fact that the hearing was held in Rotterdam (rather than in Amsterdam) was a sufficient basis for refusing recognition – and this was the only basis indicated in the summary of the holding.

One may submit that this ‘real’ case leaves more room for doubt than the hypothetical one. One obvious question is whether waiver could have remedied the misstep (or rather the failure of the arbitrators to take appropriate steps, and to ensure consent for moving the hearing to Amsterdam). The Russian courts (the Udmurt court and the Russian Supreme Court) have taken note of the fact that there were difficulties in connection with the representation of the Russian party (due to visa problems). The Russian party (Bummash) was not represented by persons to whom it initially wanted to confide its case, because they did not receive their visas in due time. Bummash was eventually represented by Dutch lawyers, but it maintained its protest regarding representation. The Russian Supreme Court does not mention whether the Dutch lawyers voiced any objection with regard to moving the site to Rotterdam. Assuming that they did,

⁴ ОПРЕДЕЛЕНИЕ ВЕРХОВНОГО СУДА РФ ОТ 18.07.2002 N 43-Г02-2 В УДОВЛЕТВОРЕНИИ ЗАЯВЛЕНИЯ О ПРИЗНАНИИ И ПРИВЕДЕНИИ В ИСПОЛНЕНИЕ НА ТЕРРИТОРИИ РОССИЙСКОЙ ФЕДЕРАЦИИ РЕШЕНИЯ АРБИТРАЖНОГО СУДАНИДЕРЛАНДОВ ОТКАЗАНО ПРАВОМЕРНО, ТАК КАК В СООТВЕТСТВИИ С АРБИТРАЖНОЙ ОГОВОРКОЙ СПОРЫ ДОЛЖНЫ РАЗРЕШАТЬСЯ ПОСРЕДСТВОМ АРБИТРАЖА В Г. АМСТЕРДАМЕ, ОДНАКО В НАРУШЕНИЕ АРБИТРАЖНОЙ ОГОВОРКИ СЛУШАНИЕ ДЕЛА ПРОВОДИЛОСЬ В Г. РОТТЕРДАМЕ.
and hence there was no waiver, we are again facing the issue of relevance, as well as the issue whether relevance can (and should) be relevant. It is difficult to justify the apparent failure of the arbitrators to seek consent of the parties for moving the site of the hearing to Rotterdam – particularly in a sensitive situation where the representation of the Russian party was the result of an emergency solution. At the same time, it is difficult to see how the moving of the site from Amsterdam to Rotterdam could have had any relevance, how it could have influenced the outcome of the case or impaired procedural fairness. The intriguing (and difficult) question is whether in such a situation the recognizing court could (and should) address the issue of relevance, whether it should investigate whether the irregularity did or did not have a significant impact. The question also arises whether in addition to relevance and waiver there are other instruments that might offer a chance for recognition in face of objections pertaining to procedural irregularities.

3. NARROWING (AND EXPLAINING) THE FOCUS

One significant difference between the two cases mentioned above is that in the first case the ground for challenge is Art. V(1)(b) of the New York Convention (hereinafter: “NYC”), while in the second it is V(1)(d). V(1)(b) sets an obviously important but rather flexible dividing line between recognition and non-recognition. The test is whether one was or was not able to present one’s case. The question may be raised whether lack of proper notice of the appointment of the arbitrator or of the arbitration proceedings is a per se bar to recognition, or whether it is just a stated example of a situation in which one is typically unable to present one’s case. The latter interpretation appears to be more logical, and it is also supported by the term ‘otherwise’ (unable to present his case), which hints that lack of notice described in the preceding part of the sentence is also a step towards inability to present one’s case (and sanction will only follow if lack of notice actually yields such inability). Following this (flexible) interpretation, lack of proper notice will only yield denial of recognition if it resulted in inability to present one’s case. Taking into account this flexibility, it might be difficult to justify the introduction of an added layer of flexibility, namely to investigate whether someone lost just because he was unable to present his case, or whether he would have lost anyway – and to allow recognition if it turns out that he would have lost anyway. (One has to mention, however, that a somewhat

5 From the facts stated in the decision of the Russian Supreme Court it does not follow clearly whether reliance on waiver could have represented a plausible option.
different analysis is also conceivable. If one would perceive inability to present one’s case in connection with a specific detail - like the presentation of one piece of evidence – the argument could possibly be made that this piece of evidence did not have, or even could not have had an impact on the proceedings, and therefore the irregularity need not impede recognition. In this context, however, consideration of relevance is actually assisting the judge to reach a conclusion whether a party was or was not unable to present his case; rather than serving to neutralize the conclusion that a party was, indeed, unable to present his case.).

The situation is different with regard to V(1)(d). Here we do not have much initial flexibility (with the only exception of the ‘may’ language that applies to the whole Art. V). A ground for denying recognition is present as soon as the composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties (or with the law of the place of arbitration) - notwithstanding whether this impaired the ability of a party to present its case, or whether this yielded some other procedural unfairness.

It is to be noted that the dividing line between V(1)(b) and V(1)(d) is sometimes blurred. Arguments based on the same facts may occasionally be couched in terms of both provisions of the NYC. Let us take as an example a 2006 decision of the Italian Supreme Court considering an appeal regarding recognition of an award of the Court of Arbitration at the Hungarian Chamber of Commerce and Industry. The opposition to recognition was couched in terms of Art. V(1)(b) of the NYC, and it was alleged that the Italian respondent was ‘otherwise unable to present his case’. The specific issue which reached the Italian Supreme Court was the following. Art. 39(1) of the Rules of the Court of Arbitration at the Hungarian Chamber of Commerce and Industry provides that:

If the arbitral tribunal is satisfied that the circumstances of the dispute have been sufficiently clarified, it shall declare the taking of evidence completed. After having heard the closing arguments of the parties, the arbitral tribunal shall close the hearing and render its decision.


In this case, the Hungarian tribunal issued a procedural order whereby it notified the parties of the comments of the experts and reserved its right either to call a new hearing, or to issue the award. The tribunal opted later to issue an award. The Italian Supreme Court established that Art. 39 of the Hungarian Rules was not properly followed, since there was no procedural order stating explicitly that the taking of evidence was completed, and the parties were not invited to present their closing arguments. At the same time, the Italian Supreme Court also established that Technofrigo had ample opportunity to present its case during the arbitral proceedings, and it also had (and used) opportunities to present its case regarding the reports of the experts. It concluded that the procedural defect did not amount to a violation of the right of defence. Speaking of the sometimes volatile dividing line between Art. V(1)(b) and V(1)(d), one may mention that the Italian party could also have relied on Art. V(1)(d), and such a choice may have offered better prospects. Art. V(1)(d) focuses on the arbitral procedure proper, and allows refusal of recognition if the procedure was not in accordance with the agreement of the parties (or with the lex arbitri), while Art. V(1)(b) puts into focus the result of a procedural imperfection (inability to present one’s case). Following the avenue chosen by the Italian party, it was relatively easy to reject the challenge, because the failure to follow precisely Art. 39 of the Hungarian Rules did not result in inability to present one’s case. An argument under Art. V(1)(d) stating that the procedure was not in accordance with the agreement of the parties (because this agreement encompasses the Hungarian Rules including its Art. 39) would have represented a more difficult challenge. Had Art. V(1)(d) been put into focus, the question might have arisen whether the actual impact of the irregularity could (and should) be considered.

Having opted to focus on the grounds defined in Art. V(1)(d), I would like to add one more precision (or restriction) to the focus. Within the setting of Art. V(1)(d), I would like to put emphasis on procedure that is inconsistent with the agreement of the parties (rather than inconsistent with the law of the country where arbitration took place). National statutes normally do not contain detailed regulation of the arbitration proceeding. They are rather focused on court assistance to arbitration, on court control of arbitration, and such norms are normally not relevant under the angle of V(1)(d). National statutes will typically also set some general principles regarding due process. With regard to such principles, flexibility can normally be achieved by way of interpreting the standard – rather than acknowledging that due process was violated, and then investigating whether this violation had a critical impact (whether it was relevant), or whether the irregularity can be neutralized in some other way. There are only a few rules of national statutes, which define specific procedural steps
Liber Amicorum Eric Bergsten

(and restrictions). Such is the rule regarding the deadline within which the award has to be rendered. With regard to this rule (and a few similar rules), the manoeuvring room for interpretation is limited, and the question has, indeed, arisen whether the violation of such a norm is relevant under the given circumstances, and whether this may or may not be condoned during the process of court control of arbitral awards. In this connection, let me refer to an interesting decision of the Paris Court of Appeals. In Tinnes v. SA Système, the question arose whether an award may be valid if it was rendered beyond the time period of 6 months set by Art. 1456 of the New French Code of Civil Procedure. This time period (which is also the period until which the mission of the arbitrators extends) may be extended by consent of the parties, or by a judge (acting as juge d’appui). Since in the given case there was no party agreement on extension, and since de juge d’appui denied extension, the award was annulled. It has to be mentioned that in comparative court practice one may find different cases, and different approaches to the issue of time limits.

I would also like to make it clear that my main focus is centred on the setting of recognition and enforcement. The treatment of party stipulations in annulment and recognition proceedings respectively, need not be different. Since the NYC was adopted, one has witnessed a most considerable approximation of the grounds for setting aside and the grounds for refusal of recognition and enforcement. One could say that the New York Convention, as a migrant, has caused a lot of accommodation on the territory traditionally inhabited by norms set in codes of civil procedure. The 1985 UNCITRAL Model Law has set the trend of equating the grounds for setting aside with the grounds stated in Art. V of the NYC. Nevertheless, there are some countries – including ones that have played a consequential role in the development of international commercial arbitration – which have not followed suit. One example is Switzerland. The 1987 Swiss Private International Law Act does not identify procedure ‘not in accordance with the agreement of the parties’ as a distinct ground for setting aside. This position has been confirmed in Swiss court practice. For example, in a 2004 decision of the Swiss Supreme Court it was pointed out that the grounds for challenge stated in Art. 190 of the PIL Act do not encompass procedure not in accordance with party stipulations, and hence a challenge cannot be based on the allegation that the arbitrators did not follow the stipulated rules of the Zurich

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Chamber of Commerce.\textsuperscript{10} This example – as well as many others – shows that legislative norms on setting aside that have not followed the Model Law approach are certainly significant enough to deserve distinct attention. In this paper, however, I would like to restrict the focus to the setting of recognition and enforcement.

Thus, having narrowed and specified the focus, the main question I will deal with in this paper is whether a departure from the procedure agreed upon between the parties is inevitably a ground for denying recognition under the NYC.

4. THE IMPORTANCE OF ACTING IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES

Party stipulations contemplated under Art. V(1)(d) need not reflect inherent guarantees of fair proceedings. What we have here instead are specific deals of the parties regarding the conduct of the proceedings that may or may not reflect important requirements of fairness (take as an example opting for Amsterdam instead of Rotterdam); such stipulations may or may not be the result of serious weighing of possible methods of efficient proceedings – they may even be idiosyncratic. Nevertheless, one of the most important characteristics of arbitration is exactly the fact that the source of the power of the decision-maker is in the stipulation of the parties. Furthermore, by accepting the task to arbitrate, the arbitrators have accepted to arbitrate according to the modalities of the arbitration agreement. As it is stated by Jarosson ‘En effet, la proposition d’une mission d’arbitrage ne peut être détachée des modalités prévues dans la clause compromissoire ou dans le compromis.’\textsuperscript{11} If the arbitrator comes to the conclusion that a procedural arrangement set in the arbitration agreement is not rational or is not conducive to efficient proceedings, he or she may, of course, discuss this with the parties. Stipulations have often been modified as a result of such discussion. There is also the option of not accepting to arbitrate. But if the parties give power to the arbitrators to arbitrate on the ground of their arbitration agreement, and if the arbitrators accept to do so, procedural stipulations need to

\textsuperscript{10} BG (Switzerland), 1 July 2004, 4P.93/2004.(Petitioner X S.A. v. Respondents Y. GmbH). The conclusion of the Supreme Court is that the ‘[A]nfechtungsgrund von Art.190 Abs.2 lit d IPRG nur die zwingenden Vorschriften des Art. 182 Abs.3 IPRG unter Ausschluss der vertraglich vereinbarten Verfahrensordnung betrifft […]. Die Rüge, der Schiedsrichter habe Verfahrensvorschriften der Schiedsordnung der Zürcher Handelskammer verletzt, ist daher unbegründet.’

Liber Amicorum Eric Bergsten

be heeded. Sanctions for not doing so are logical, and they reflect an inherent characteristic of arbitration. This point was persuasively explained by G. Born:

The annulment of awards for failure to comply with the parties’ procedural agreement is a reflection of the consensual nature of arbitration and gives effect to the parties’ general procedural autonomy, which forms a cornerstone of the contemporary arbitral process.12

And yet, the question arises whether acting ‘not in accordance with the agreement of the parties’ can possibly be condoned or neutralized, whether there are some considerations and devices that can reduce the number of awards rendered ineffective on this ground. This is the issue to which I would like to devote the following pages.

5. POSSIBLE WAYS OF ENHANCING RECOGNITION

In an article devoted to court control of arbitral awards, W. Park states: ‘Efficient arbitration implicates a tension between the rival goals of finality and fairness.’13 He continues by explaining that freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court control. This is certainly true, but fairness is not always a rival of finality. In a different context, it may also be its ally. If finality is contested with reliance on an inconsequential procedural irregularity, considerations of fairness might support, rather than undermine finality. The same applies to irregularities – or alleged irregularities – in the context of Art. V(1)(d). Composition of the arbitral tribunal or procedure not in accordance with the agreement of the parties need not always yield annulment or refusal of recognition of the award. There are more ways in which flexibility can be achieved, and such flexibility may be conducive to fairness.

5.1. Enhancing Recognition by way of Interpretation of Party Stipulations

It is not always clear whether party stipulations do or do not allow a given conduct of the arbitrators (or conduct of other actors involved in the process of shaping the composition of the arbitral tribunal). If there is flexibility in interpreting party stipulations, there is also flexibility in coming to the conclusion as to whether party agreement was or was not infringed. Flexibility depends on the wording itself – and also on the willingness of the court to adopt (or not to

12 Gary Born, supra note 9 at 2596.
T. Várady: Remarks on Article V(1)(d) of the New York Convention

adopt) a flexible interpretation. For example, in *China Agribusiness Development Corp. v. Balli Trading*¹⁴, recognition of a Chinese award was requested in England. The party opposing recognition submitted an Art. V(1)(d) objection, stating that the proceedings were not conducted in accordance with the rules agreed upon between the parties. The arbitration clause agreed upon in June 1994 referred to the ‘Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade’. These rules have, however, ceased to have effect before the contract was made, and the ‘Foreign Trade Arbitration Commission’ (FETAC) changed its name to ‘China International Economic and Trade Arbitration Commission’ (CIETAC). The dispute arose in October 1994, and the proceedings were conducted under the (then) new CIETAC Rules. The question arose as to whether proceedings before the same institution as that agreed upon, but under a new name, and – more importantly – proceedings under the new rules of the same institution, do or do not amount to a violation of Art. V(1)(d). The English court stated that a clause referring to the rules of a particular institution prima facie refers to the rules current at the time when the arbitration begun. J. Longmore added: ‘In other words the parties have not used clear enough words to contract out the prima facie construction of such clauses’.¹⁵

In a somewhat similar case, what the (French) court had to interpret was not which version of the rules (agreed upon by the parties) applies, but what is the meaning of some specific provisions of the applicable institutional rules. The issue arose in the context of annulment (rather than recognition and enforcement) proceedings, but the position taken remains pertinent, since the French court had to focus on an alleged non-observance of the procedure agreed upon between the parties. In *Torno*¹⁶ the question arose whether the award was rendered within the time limit specified in the ICC Rules. More specifically, what had to be interpreted was whether an extension of the time limit granted by the ICC Court of Arbitration was in accordance with the Rules, since this extension was not communicated to the parties. Interpreting the ICC Rules, the French court gave a generous interpretation of the manoeuvring room of the arbitral institution, holding that the Rules do not impose an obligation on the arbitral institution to inform the parties about extension. Hence, absence of information about

extension does not impair the validity of the award. It is not easy to take a position with regard to the fairness of such an interpretation. This flexibility might have saved a sound award. At the same time – as pointed out by Jarosson in his comment – it saved the arbitral institution (“La Cour vole au secours de la CCI...”) and it also condoned a behaviour that cannot be qualified as good practice. By accepting the ICC Rules, the parties are stipulating that the award has to be rendered within a certain time limit. The parties are also accepting that in line with Art. 24(2) of the ICC Rules, the Court may extend this time limit. It is logical, however, to assume that the parties are entitled to information about such an extension. It is not easy to make a choice between the considerations that got confronted in this case.

5.2. A Legislative Shelter

According to Art. 31(3) of the 1985 UNCITRAL Model Law, ‘The award shall state its date and the place of arbitration as determined in accordance with Art. 20(1). The award shall be deemed to have been made at that place.’ Thereby, a presumption (arguably an irrebuttable presumption) was created in favour of the place stated in the text of the award, and the parties have practically been deprived of the opportunity to challenge the award on the ground that the place stated in the award is not the actual place at which the award was rendered, and hence the award was actually not rendered at the place agreed upon between the parties. This legislative shelter appears to be justified. As it was argued during the drafting of the Model Law

[T]he making of the award was a legal act which in practice was not necessarily one factual act but, for example, done in deliberations at various places, by telephone conversation or correspondence.

Indeed, in international cases awards are rarely formulated in the presence of all arbitrators, and in this situation the place of the award becomes a matter of

17 In the original text of the decision it was stated that the ICC Rules ‘[n]’impose pas à cette institution d’informer les parties de son intention de prolonger le délai d’arbitrage ni même de les aviser des dates auxquelles doivent intervenir ces prolongations; le fait que cette décision administrative n’eût été portée à la connaissance d’une partie reste sans incidence sur la validité.’ Revue de l’arbitrage, No. 3 (1999): 606.
19 According to Article 20(1), the first option in determining the place of arbitration is an agreement of the parties.
construction. Given the inherent uncertainty about the place where the award was actually made, attempts of the courts to establish this place might yield a fruitless quandary. At the same time, this inherent uncertainty is a conceivable point of reliance of abusive tactics alleging inconsistency between the actual place of making of the award, and the place agreed upon between the parties. The presumption stated in Art. 31(3) provides a shelter against such tactics.

5.3. Uncovering the Attempt to Use Art. V(1)(d) as a Disguise

One of the major achievements of the NYC is the fact that the number of grounds on which an award may be challenged is limited. Like every limitation, Art. V has also created contested borders and prompted endeavours to “smuggle” some arguments under the guise of one of the sub-paragraphs of Art. V. At this juncture “neutralizing the irregularity with the aim of saving the award” receives a different context. Attempts to save the award are not contemplating the possibility of neutralizing some inconsequential transgression; instead, the award may be saved if an attempt to use Art. V(1)(d) as a guise is unmasked – and thus neutralized.

An interesting example of this problem-pattern can be found in a 2007 decision of the U.S. Court of Appeals, Sixth Circuit. An LCIA award was rendered in favour of a party from India who sought recognition and enforcement in Michigan. The district court granted recognition and enforcement. Upon appeal, the Sixth Circuit scrutinized the Art. V(1)(d) argument of the Appellant. The essence of the argument was that the arbitrator failed to apply Michigan law (agreed upon by the parties), which law provides that an option that is not exercised within the time allotted is forfeited. The Sixth Circuit stated that ‘This defence is simply a guise to invite us to reconsider the merits of this case.’

Michigan norms relating to the time period were not applied, because the arbitrators found that adequate notice was not provided, and hence, no time period was actually triggered. The Sixth Circuit stressed:

Thus, the issue Plaintiff attempts to have us consider is not a claim of procedural aberration because the arbitrators failed to apply the correct law.


22 YCA 2008: 975.
It is a claim that the arbitrators incorrectly held that there was no written notice and that we should substitute our own judgment to that of the arbitrator. This is not a cognizable defence under the Convention.\textsuperscript{23}

The problem discussed by the Sixth Circuit is an interesting one. An Art. V(1)(d) violation might have taken place had the time period been triggered. But under the given circumstances, in order to take into account an alleged procedural irregularity, the court would have first had to revisit a fact finding of the arbitrators (it would have had to establish that the arbitrators were wrong in holding that there was no adequate notice, and hence, no time period was triggered). One may submit that the position taken by the Sixth Circuit is in line with both the wording and with the spirit of the NYC. It would be a dangerous extension of the NYC if court scrutiny were also to extend to the question whether a party stipulation did or did not become pertinent in the light of some facts. At this point, certain subtle questions might arise. Suppose the parties agree that French law will be applicable to procedure, and Polish law will be applicable to the substance of the dispute. The arbitrators follow this stipulation, but in doing so, they make a controversial judgment in qualifying an issue as a matter of procedure, rather than substance. Would a challenge of the award under V(1)(d) be a challenge which deserves court scrutiny, or would it be ‘a guise to reconsider the merits of the case’? Can one say that the arbitrators disregarded a party stipulation? Probably not. Can one say that the ‘arbitral procedure was not in accordance with the agreement of the parties’? This is a more difficult question. The dividing line may be volatile, but the logic of the Sixth Circuit might still be better suited. The opposite logic would mean that one should undertake a V(1)(d) scrutiny not only in cases in which the arbitrators (allegedly) acted contrary to a procedural stipulation of the parties, but also in cases in which the arbitrators (allegedly) misconstrued facts or legal precepts which, under a different construction, might have faced the arbitrators with choices which they actually did not make. The principle of limited court control might be seriously jeopardized if one were to follow the latter logic.

\textbf{5.4. Reliance on Waiver}

Waiver is one of the most powerful instruments serving the purpose of upholding the award in spite of ‘composition of the arbitral authority or arbitral procedure not in accordance with the agreement of the parties’. I would refer at this point to

\textsuperscript{23} YCA 2008: 975–976.
T. Várady: Remarks on Article V(1)(d) of the New York Convention

an article that I devoted to this subject, in which I endeavoured to deal with waiver and related concepts in the context of court control of arbitral awards. It is well known that waiver is recognized as a general principle in Art. 4 of the UNCITRAL Model Law, and it has been used as a point of reliance in many court decisions. At this point, I would only note that waiver has a particular justification against the background of Art. V(1)(d). Since Art. V(1)(d) focuses on observance of rules created by the parties themselves, it is clear that such rules can be superseded by conduct of the same parties who crafted the rules. Thus, limitations on waiver are practically irrelevant in the context of Art. V(1)(d). Art. 4 of the Model Law states that waiver can only have effect with regard to provisions ‘from which the parties may derogate’. The parties may certainly derogate from rules which they created themselves.

5.5. Neutralizing the Irregularity by Way of Considering its Impact and Relevance

I would like now to return to one of the most important facets of the cases presented as ‘introductory cases’. This is the challenging dilemma as to whether one should heed the impact or relevance of a procedural irregularity. Let me first refer to a case quite similar to the first introductory case in which the Russian Supreme Court denied recognition because the hearing took place in Rotterdam, rather than in Amsterdam. In Tongyuan (USA) International Trading Group v. Uni-Clan Ltd the claimants requested recognition and enforcement of a Chinese award. This request was granted in an order of 16 October 2000, and an appeal was lodged before the Commercial Court. One of the grounds for appeal was the allegation that the procedure was not in accordance with the agreement of the parties. The parties had agreed that ‘the arbitration shall take place at the Shenzhen or the Shanghai office of the CCPIT’; whereas, the tribunal held its hearing in Beijing. This objection was rejected, and Justice Moore-Bick held that:


25 Of course, parties may include into their arbitration agreement rules that are at the same time mandatory norms of the lex arbitri. But in this case, we are actually facing a different issue. Waiver might be impeded, but only on the ground that it is not permitted by the lex arbitri.

It seems to me that one cannot assess the gravity of a breach of this kind simply in geographical terms; it is necessary to assess the extent to which it had some impact on the conduct of the proceedings. Removing the proceedings from Shenzhen or Shanghai to Beijing had no effect on the curial law, and in all the circumstances I am quite unpersuaded that this award can be regarded as a nullity simply on the grounds that the proceedings were conducted in Beijing rather than in one or other of the two chosen localities.27

In other words, the English court conceded that there was a procedural irregularity, that one specific procedural stipulation of the parties was not heeded. This irregularity was neutralized by considering its impact (or rather lack of impact). One has to add that taking such a position was greatly facilitated by the circumstance that the respondent did not voice any protest or objection; moreover, it accepted the proposition that holding the hearing in Beijing did not impair the fairness of the proceedings. As it was emphasized by Justice Moore-Bick:28

In this case, the sellers made it clear, at a very early stage, that they had no interest in taking part in these proceedings. They were invited to appoint an arbitrator, but failed to do so. They were invited to take part in the proceedings and failed to do so. Mr Aylwin has very frankly conceded that in those circumstances, holding the arbitration in Beijing had not the slightest effect on the fairness of the proceedings and caused no prejudice to his clients.

Thus, although the court pointed out lack of impact as a superseding factor in rather unequivocal terms, the fact remains that recognition in spite of a procedural irregularity had in this case other strong pillars as well – first of all waiver.

In another case dealing with an alleged violation of Art. V(1)(d), recognition and enforcement of an ICC award was sought before a U.S. court29, and the party opposing recognition argued that the ICC Rules of Arbitration were violated because legal costs were not included into the draft award submitted to the Court – but were added after the draft award had been approved by the ICC Court. The

27 2001 WL 98036, p.3.
28 Ibidem.
District Court rejected the objection. Again, lack of impact was pointed out as a point of reliance – but again, this was not the only basis of the decision. The district court raised the question of the appropriate standard of review and pointed out:

Rather, the Court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party.30

This is, again, a clear acceptance of the proposition that relevance and impact may be considered in deciding whether to sanction a procedural irregularity (procedure not in accordance with the agreement of the parties). At the same time, it is important to add that the court invited experts and investigated whether adding legal costs after the award was approved by the ICC Court does, indeed, represent a violation of the ICC rules (the rules agreed upon by the parties). The court came to the conclusion that there was actually no violation. In this context, the arguments regarding the impact of the violation can only be regarded as a dictum.

In a similar vein, in a case between a Taiwanese claimant and a German respondent, recognition of the Taiwanese award was requested in Germany. Before the Karlsruhe Court of Appeals (Oberlandesgericht Karlsruhe) the German party opposed recognition in several grounds, including an alleged violation of Art. V(1)(d) of the NYC.31 The respondent/defendant pointed out that the composition of the arbitral tribunal was not in accordance with the agreement of the parties, since – after the parties failed to make appointments – the arbitrators were appointed by the Taipei Arbitration Association, and not by State courts (Taiwanese courts). The respondent added that the arbitration tribunal lacked impartiality because all appointed arbitrators were Taiwanese nationals. The Karlsruhe court rejected this objection (as well as other objections) and granted enforcement. With regard to the V(1)(d) objection, the court held:

Even if we assume that the state courts, not the arbitral institution, were competent to appoint the arbitrators as an alternative […]it remains to be proved to what extent an appointment by the state court could have led to a different outcome of the proceedings […] and in particular, for instance, to

30 1992 WL 122712, and also in Várady, Barcelo & von Mehren, supra note 24 at 894.
31 OLG Karlsruhe, Decision No. 9 Sch 02/07 of 14 September 2007, reported in Yearbook Commercial Arbitration 2008, 541-548.
no arbitrator of the same nationality being appointed, a fact the debtor argues was particularly unfavourable.\textsuperscript{32}

Again, we have rather strong language bespeaking the relevance of the impact of the procedural irregularity; and again, lack of impact on the outcome was not the only justification for rejection of the V(1)(d) objection. The Karlsruhe court also found that the respondent was estopped from raising the objection. Furthermore, the court did not take a conclusive position regarding the initial question, namely, regarding the question whether appointment by the arbitral institution (rather than by courts) was, indeed, contrary to the agreement of the parties. It is interesting to note, that in investigating the impact of the purported irregularity, the court found guidance in one of the allegations of the parties, and investigated ‘in particular’ whether the nationality of the arbitrators was influenced by the circumstance that appointments were made by the arbitral institution.

I would also like to mention a case in which the court opted not to weigh the impact of the procedural irregularity. In First Investment Corp. (Marshall Islands) v. Fujian Mawei Shipbuilding Ltd. and Fujian Shipbuilding Industry Group Corporation (China)\textsuperscript{33}, the claimant requested recognition of a 19 June 2006 award rendered under the LMAA (London Maritime Arbitrators Association) Rules. The request for recognition was submitted on 5 December 2006 to the Xiamen Maritime Court. The Fujian Higher People’s Court (the Xiamen Maritime Court belongs to the Fujian Province) requested an opinion from the Supreme People’s Court, and a reply to this request was issued by the Supreme People’ Court on 27 February 2008. Considering the legal opinion of the Supreme Court, the Xiamen Maritime Court refused recognition in May 2008. Recognition was challenged on the ground that the composition of the arbitral authority was not in accordance with the agreement of the parties. The problem was that after the first draft of the award was formulated and commented on, one of the arbitrators got arrested (on charges unrelated to the arbitration). Thereafter, a second and a third version of the award were drafted and discussed, but without the participation of the arrested arbitrator. There was no suggestion of waiver, i.e. there was no suggestion that the parties would have accepted the completion of the award by a truncated tribunal. The Chinese courts opted not to consider the impact of the procedural irregularity (Had impact been considered, the argument could have been made that in all likelihood, the participation of the third arbitrator would have been particularly unfavourable)

\textsuperscript{32} YCA 2008, 547.

\textsuperscript{33} I would like to express thanks to my students Ms Wu Si, LL.M. and Ms Yao Wenting LL.M., who provided information about this case.
The arbitrator would not have had any effect on the outcome. There is no information about the position taken by the third arbitrator, but even if he had a different opinion, this would have yielded the same majority award. On the other hand, one cannot completely exclude the possibility that the third arbitrator could have influenced his colleagues had he participated in the deliberations concerning the second and the third drafts.

The cases referred to above cannot provide sufficient support for unequivocal conclusions, but they highlight some important issues. The option of considering the impact of procedural irregularities (with the aim of opening the gate for recognition in spite of the irregularity) takes us to a number of difficult questions. One of the questions is against what should one measure the impact (or lack of impact) of a V(1)(d) irregularity. The cases mentioned above reveal that there are various perceptions of the target of the impact. In the Tongyuan decision, the English Commercial Court speaks of ‘impact on the conduct of the proceedings’. The Karlsruhe court focuses on ‘impact on the outcome of the proceedings’. The Hammermills court states that one should only uphold challenges based on procedural violations that work ‘substantial prejudice to the complaining party’. Should one weigh the impact on procedure, or should one rather consider the impact on the decision of the arbitrators? In the first hypothesis, the question is whether the irregularity did or did not impair the fairness of the proceedings. If one accepts this approach, the analysis boils down to an analysis of due process, and the Art. V(1)(d) ground might lose its distinct identity and purpose. The main purpose of Art. V(1)(d) is to protect procedural autonomy and the consensual nature of arbitration. It is for this reason that sanctions are imposed if the proceeding is not conducted in accordance with the agreement of the parties. An analysis of the fairness of the proceedings takes us under the neighbouring tent, that of Art. V(1)(b). If, on the other hand, the focus of the analysis is on impact on the outcome of the case, the recognizing court would have to undertake an analysis of the outcome (and possibly, to shape a perception of its own of the ‘right outcome’, in order to compare with the decision reached by the arbitrators); and this could be irreconcilable with the principle of limited court control.

The point is that while reference to impact (usually without a full scale analysis) may serve as a persuasive supporting argument, it is difficult to posit lack of impact or limited relevance as the only foothold of a decision to disregard the fact that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.
Fortunately, there are only very few cases in which the arbitrators departed from the stipulation of the parties without reliance on some plausible interpretation, or without at least tacit consent of the parties. If such a case emerges, it is difficult to say whether it is pro-arbitration to try to save the award by way of scrutinizing the impact of the irregularity. It is certainly true that it does not appear to be pro-arbitration to disregard the (admittedly fair) result of extensive arbitral proceedings on the ground of some small irregularity that in all likelihood did not taint either the fairness or the outcome of the proceedings. At the same time, it is also a fact that one of the critically important pillars of contemporary international commercial arbitration is the awareness (both of the parties and of the arbitrators) that party stipulations should be heeded, coupled with the confidence (of the parties) that their stipulations will be respected. Undermining this confidence is not ‘pro-arbitration’, and court decisions that fail to sanction disregard of party stipulations may, indeed, undermine such confidence.

6. CONCLUDING REMARKS

Unlike rules of the lex arbitri that are designed to apply in an undetermined number of disputes, party stipulations are tailored to specific disputes between specific parties. This means that procedural stipulations of the parties are much more within sight, the parties are normally positing them as an element of the deal to submit present or future disputes to arbitration (assuming, of course that the stipulations reflect the actual considerations of the parties, rather than the fashion of copy-pasting). Furthermore, procedural stipulations are gaining particular importance in the light of the consensual nature of the arbitration process. In balance, it is a fact that non-observance of a stipulated detail need not necessarily yield unfairness, and need not even yield proceedings departing form the spirit of the party design – hence, denying recognition on this ground might be an incommensurate sanction.

This leads to the difficult question whether proceedings ‘not in accordance with the agreement of the parties’ can or cannot be condoned. At this juncture, a


35 Of course, party stipulations referring to institutional rules are targeting rules that are broadly applicable, but the choice is nevertheless case-specific, because the stipulation yields the application of one set of rules (instead of another) specifically for the dispute between the given parties.
number of molds of accommodation and adjustment have emerged. Focusing on possible ways of enhancing recognition – without contradicting the basic principle of procedural autonomy – various types of accommodation may be considered. This paper has put into focus five possible patterns. The first three (interpretation of party stipulations, the legislative shelter, and the screening out of attempts to use Art. V(1)(d) as a disguise) are looking for a solution without conceding the procedural irregularity; recognition is enhanced by way of interpreting the stipulation, and putting it into a purposeful context. The fourth pattern (waiver) concedes that the party stipulation was not followed, but takes into consideration the conduct of the parties themselves who drafted the stipulation, and who have the power to change it. Tacit consent may override the initial stipulation without contradicting the principle of party autonomy. The most difficult to adopt is the fifth pattern – assuming that it remains the sole ground on which the award could possibly be saved. The question is whether lack of consequential impact of disregard of a party stipulation may represent a point of reliance when it is clear that the stipulation was disregarded, and when this was not condoned by action or inaction of the parties themselves. The ‘may’ language of Art. V certainly offers an opportunity, but there is every reason to exercise caution in relying on this opportunity. One of the reasons for restraint is the fact that an analysis of relevance (impact) may defy the principle of limited court control. Furthermore, it becomes difficult to say what attitude is actually pro-arbitration, because saving the award may not be consistent with saving confidence in the authority of party stipulations, which represents an anchor of the arbitration process.