PROCEDURAL AUTONOMY UNDER THE NEW YORK CONVENTION

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Article V(1)(d) of the New York Convention provides, as one of the grounds for non-recognition of an international arbitral award, a showing that "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place." Article V(1)(d) plays an essential role in establishing the legal framework for international arbitral proceedings: it confirms that arbitral procedures are governed by the agreement of the parties. Unfortunately, recent applications of Article V(1)(d) by some national courts can frustrate the purposes of the New York Convention—that is, to give effect to parties' agreement to arbitrate and to ensure the effective recognition of arbitral awards. In choosing to arbitrate disputes, parties choose arbitral tribunals, not national courts, to decide procedural matters when the parties' agreement on such matters is silent or ambiguous, and parties expect that awards properly rendered by arbitrators will be enforced by national courts. Thus, courts fail to give effect to the parties' agreement to arbitrate if they apply Article V(1)(d) to not enforce an award because a court disagrees with the arbitrator's procedural decisions and interpretations of the parties' agreement, rather than because those decisions and interpretations materially contravene the terms of the parties' procedural agreement. In this article, the authors examine recent applications of Article V(1)(d). After detailing the framework and purposes of the New York Convention, including discussing Article V(1)(d) and Article II, the authors examine several cases that illustrate the application of Article V(1)(d). First, they discuss two U.S. appellate decisions involving similar arbitration provisions concerning the proper procedure to assert counterclaims; one court properly deferred to the arbitrator's interpretation of the relevant provision and the other did not. Second, the authors discuss two recent Singaporean court decisions that incorrectly refused to defer to the arbitrator's choice of arbitral seat under a concededly ambiguous arbitration agreement. Finally, the authors discuss two cases in which the parties chose to

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arbitrate pursuant to a specified set of institutional arbitration rules, but the courts disagreed with the institution's application of those rules in deciding the number of arbitrators. The authors conclude that courts are still finding their footing in applying Article V(1)(d) and that greater attention to the New York Convention's purpose of giving effect to international arbitration agreements under Article II is required.

I. INTRODUCTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (hereinafter the "New York Convention" or the "Convention") plays a vital role in facilitating both international commercial dispute resolution and cross-border trade and investment. The Convention provides a global constitutional charter for international arbitration, ensuring that international arbitration agreements and arbitral awards are maximally enforceable around the world. In so doing, the Convention has contributed significantly to the

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

development of both international trade and investment and the rule of international law.

Among other things, the Convention plays an important role in ensuring that the procedural autonomy of parties to international arbitration agreements is given effect. Article II(1) of the Convention requires contracting states to recognize international arbitration agreements.[2] That includes the obligation to give effect to the material terms of agreements to arbitrate—such as agreements on institutional (rather than ad hoc) arbitration, on the means of selecting the arbitrators, on the language of the arbitration, on the arbitral seat, and on similar matters.[3] The parties' autonomy to agree upon these, and other procedural aspects of the arbitral process is one of the central strengths and attractions of international arbitration.

Article V(1)(d) of the Convention plays a related, more specific, role in ensuring that the parties' procedural autonomy in international arbitration is given effect. Article V(1)(d) provides that one of the grounds for non-recognition of an arbitral award is that "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place."[4] Although often under-appreciated, Article V(1)(d) plays an essential role in establishing the legal framework for international arbitral proceedings: it makes clear that arbitral procedure is governed by the agreement of the parties. This gives effect to the more general principle that arbitration is a creature of consent and that arbitral procedures are, with limited exceptions, matters subject to the parties' procedural autonomy.

A proper application of Articles V(1)(d) and II to questions involving the arbitral procedure is critical to the functioning of the Convention and to the international arbitral process. This Article explores Articles II and V(1)(d) of the Convention and the central role they play, when properly interpreted,

2. *See id.* art. II(1) ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

3. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION ch. 12, § 12.04[D], at 49–52 (3d ed. 2021).

4. New York Convention, *supra* note 1, art. V(1)(d).

in international arbitration. It also examines how national courts can misapply—and in several recent decisions have misapplied—these provisions and, in particular, Article V(1)(d). Those types of misapplications can significantly undermine the efficacy and benefits of arbitration by compromising the finality of awards and undermining the procedural authority of tribunals and arbitral institutions.

As discussed below, application of Article V(1)(d) involves two competing principles: safeguarding the parties' autonomy to agree on the procedural aspects of an arbitration and safeguarding the parties' autonomy to agree more generally to resolve their disputes by arbitration. On the one hand, it is essential, under Article V(1)(d) and otherwise, to give effect to the parties' agreements on elements of the arbitral process—such as their choice of institutional rules, their selection of arbitrators, their choice of arbitral seat and language, and the like. On the other hand, the parties' general agreement to resolve their disputes by arbitration vests arbitral tribunals with broad authority to interpret arbitration agreements, including their procedural provisions, and to make procedural rulings regarding the conduct of the arbitration; that agreement also gives rise to a principle of judicial non-intervention in the arbitral process and safeguards most procedural rulings by arbitral tribunals from judicial second-guessing. In applying Article V(1)(d) to protect the parties' agreement with respect to the arbitral procedure, it is essential to properly reconcile these various provisions and principles and not to infringe on the interpretative and decision-making authority that the parties' agreement to arbitrate grants to the arbitral tribunal with respect to procedural matters.

As also discussed below, if properly interpreted, Article V(1)(d) reconciles these competing principles. Properly interpreted, Article V(1)(d) provides that, if there is ambiguity in the applicable institutional arbitration rules or the procedural terms of the parties' arbitration agreement, national courts should defer to the arbitral tribunal's interpretation of that agreement and the tribunal's or institution's interpretation of those rules. In cases of ambiguity, courts should not consider or decide de novo under Article V(1)(d) how they would, in the first instance, have interpreted the parties' agreement or the institutional rules: Rather, consistent with the tribunal's general procedural authority, courts should defer significantly to the

arbitrators' or arbitral institution's interpretation of the parties' agreement and applicable procedural rules. In contrast, where either an arbitration agreement or set of institutional rules provides unambiguously for particular procedures, which are significant to the conduct of the arbitration, but these procedures have been disregarded, Article V(1)(d) can properly be applied to deny recognition of an award.

In this Article, we first discuss the text and history of Articles II and V(1)(d) and the importance of their provisions to the arbitral process; we also discuss the manner in which Article V(1)(d) is applied in practice, including in cases where it may permit non-recognition of an award. We next examine the tension that can arise under Article V(1)(d) between the parties' procedural autonomy and an arbitral tribunal's or institution's broad procedural authority to interpret arbitration agreements and institutional rules, as well as the proper means of resolving that tension. Finally, we consider several recent cases in which national courts have applied, or misapplied, Article V(1)(d): if repeated, the decisions misapplying Article V(1)(d) will, unfortunately, materially undermine the progress that the Convention and Article V(1)(d) have hitherto achieved in international dispute resolution.

II. Procedural Autonomy Under the New York Convention

In Article II, the New York Convention gives effect to agreements to arbitrate international disputes. In addition, the Convention also specifically safeguards, and gives effect to, the parties' procedural autonomy. The Convention does so by requiring, in Article II(1), that contracting states recognize the material terms of international arbitration agreements,[5] including their procedural provisions, and also, in Article V(1)(d), by making an arbitral tribunal's failure to comply with the parties' agreement on the arbitral procedures grounds for

5. New York Convention, *supra* note 1, art. II(1) ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

non-recognition of arbitral awards.[6] In addition, Article II(1) more generally gives effect to the parties' autonomy to agree to resolve their disputes by arbitration, requiring contracting states to recognize and give effect to such agreements, including the broad procedural discretion that an agreement to arbitrate generally grants to arbitral tribunals and arbitral institutions.[7] These two aspects of Article II are important, both to applying the Convention and to interpreting Article V(1)(d).

Properly interpreted, Articles II(1) and V(1)(d) function to facilitate both the parties' procedural autonomy and the arbitral tribunal's procedural authority—producing an efficient and effective means of dispute resolution. Conversely, if misapplied, Article V(1)(d) can undo many of these benefits, resulting in the second-guessing by national courts of the procedural decisions of arbitral tribunals and arbitral institutions, and the non-recognition of arbitral awards where tribunals properly used their authority to decide procedural matters.

A. *International Arbitration Agreements: Procedural Autonomy*

Arbitration agreements are, fundamentally, procedural agreements.[8] They do not specify substantive commercial terms, such as price, quantity or quality of products or services, and

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6. *Id.* art. V(1)(d) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes . . . proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or . . . was not in accordance with the law of the country where the arbitration took place.").

7. *Id.* art. II(1) ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

8. BORN (3d ed. 2021), *supra* note 3, ch.1 § 1.01[B][2], at 10 (explaining the procedural history of arbitration in the European Middle Ages); *id.* ch. 2 § 2.02[D], at 22–23 (defining arbitration as formed by procedures); *id.* ch. 3 § 3.02[B][2], at 5 (demonstrating historical characterization of arbitration as a "procedural contract"). *See* Interim Award in VIAC Case No. SGH-5024 A, Aug. 5, 2008, 2(2) INT'L J. ARAB ARB. 341, 352 (2010) ("an arbitration agreement is a (procedural) legal transaction"); Tobler v. Justizkommission Des Kantons Schwyz, Bundesgericht [BGer] [Federal Supreme Court] Oct. 7, 1933, ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 59 I 177, 179 (Switz.) ("According to settled case law of the Swiss Federal Tribunal the

instead prescribe procedures for resolving disputes about those substantive contractual terms. In turn, arbitral procedures, and agreements regarding those procedures, can take an endless variety of forms, depending on the parties' identities, interests, experience, negotiating abilities, industries, and other factors. Among other things, arbitration agreements can, and very frequently do, address issues such as the choice between institutional and ad hoc arbitration, the number of arbitrators and method of appointment, the procedural law of the arbitration, the seat of the arbitration, the language of the arbitration, the arbitral timetable or schedule, and countless other matters.[9]

As discussed below, parties enjoy broad autonomy to consent (or not to consent) to resolve their disputes by arbitration, and to draft their arbitration agreement in the manner they see fit.[10] In many cases, parties exercise their autonomy to incorporate an existing model arbitration clause, typically based upon language recommended by a leading arbitral institution.[11] These model provisions are almost always the product of lengthy prior institutional consultation, and seldom contain ambiguities or other drafting defects. Alternatively, parties may consult any of a number of guides on drafting arbitration provisions, which again ordinarily provide carefully-considered and workable procedures for dispute resolution.[12]

Nonetheless, it is almost inevitable, and has certainly proven true in practice, for arbitration agreements to contain drafting errors or other ambiguities; arbitration casebooks and treatises are replete with examples of such mishaps.[13] These types of

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arbitration clause is not an agreement of substantive law but of procedural nature.").

9. Gary B. Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing ch. 3, at 35–139 (6th ed. 2021); Gary B. Born, International Arbitration and Forum Selection Agreements: Planning, Drafting and Enforcing Chapter 3, pp. 38–86 (1st ed. 1999) (providing similar model clauses); Paul Friedland, Arbitration Clauses for International Contracts 64–70, 183–87 (2d ed. 2007); Jan Paulsson et al., The Freshfields Guide to Arbitration and ADR: Clause in International Contracts 129 (3d ed. 2011).

10. *See infra* Section I.B. (discussing parties' autonomy to consent under Articles II(1) and V(1)(d) of the New York Convention, *supra* note 1).

11. Born (6th ed. 2021), *supra* note 9, at 35, 43–62; Friedland, *supra* note 9; Paulsson, et al., *supra* note 9, at 129.

12. Born (6th ed. 2021), *supra* note 9, at 35–139; Friedland, *supra* note 9; Paulsson, et al., *supra* note 9, at 129.

13. Laurence W. Craig, William W. Park, and Jan Paulsson, International Chamber of Commerce Arbitration 127–135 (3rd ed. 2000); Fouchard

errors are unfortunate, but an inevitable result of the parties' procedural autonomy—including the autonomy to depart from both existing model arbitration provisions and guidance on drafting dispute resolution provisions.[14]

In some cases, agreements to arbitrate may be so defective as to prevent enforcement of the agreement at all—on the grounds, in rare cases, that they are supposedly "pathological,"[15] or so uncertain or indefinite as to be invalid.[16] Arguable examples of such provisions include inoperative arbitration clauses (providing for arbitration under the auspices of an institution

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GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 484 *et seq.* (Emmanuel Gaillard & John Savage eds., 1999); Daniel Girsberger & Pascal J. Ruch, *Pathological Arbitration Clauses: Another Lawyers' Nightmare Comes True*, *in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 124 (S. Kröll & L.A. Mistelis et al. eds., 2011); Carolyn Lamm & Jeremy Sharpe, *Inoperative Arbitration Agreements Under the New York Convention*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION IN PRACTICE (Emmanuel Gaillard & Domenico Di Pietro eds., 2008); Nicholas Pengelley, *Conflicting Dispute Resolution Clauses: The Rule in Paul Smith Revisited*, *in* ARBITRATION AWARDS: DEMYSTIFYING THE MYTH 4, 7, 9 (Radha Kalyani ed., 2009); Gary B. Born & Matteo Angelini, et al., *Rethinking "Pathological" Arbitration Clauses: Validating Imperfect Arbitration Agreements*, *in* FINANCES IN INTERNATIONAL ARBITRATION: LIBER AMICORUM PATRICIA SHAUGHNESSY 35, 38 (Sherlin Tung & Fabricio Fortese, et al. eds., 2019).

14. BORN (3d ed. 2021), *supra* note 3, ch.1 § 1.02[B][6], § 15.02[B]. *See* BORN (6th ed. 2021), *supra* note 9, at 35 ("[P]arties are in principle free to draft their international arbitration agreement in whatever terms they wish and in practice, this freedom is liberally exercised."); FRIEDLAND, *supra* note 9 at 57 ("An astonishing number of dispute resolution clauses in international contracts are defective because the drafters fail to begin the drafting process by consulting and using readily available model or standard forms.").

15. The term "pathological" arbitration agreement was coined by Frédéric Eisemann, a former Secretary-General of the ICC. *See* Frédéric Eisemann, *La Clause d'arbitrage pathologique*, in COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI 129–30 (1974) (Eisemann considered pathological "any arbitration clause which, by its wording cannot fulfill its essential functions." According to Eisemann an arbitration clause has four essential functions: "(1) . . . to produce mandatory consequences for the parties, (2) . . . to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award, (3) . . . to give powers to the arbitrators to resolve the disputes likely to arise between the parties, (4) . . . to permit the putting in place of a procedure leading . . . to the rendering of an award that is susceptible of judicial enforcement.").

16. Born & Angelini, *supra* note 13, at 38; Eisemann, *supra* note 15, at 129–30.

that no longer exists (or that never existed)),[17] indefinite or uncertain arbitration agreements (providing no mechanism to select an arbitral tribunal or arbitral seat),[18] and optional (or non-mandatory) arbitration clauses.[19] Even in these cases, most national courts will endeavor to give effect to the parties' underlying or dominant purpose (i.e. to arbitrate),[20] but in rare instances, sufficiently pathological or unworkable provisions are held invalid.[21]

17. Born & Angelini , *supra* note 13, § 4.03.

18. *Id.* § 4.01.

19. *Id.* § 4.06.

20. *See* Insigma Tech. Co. Ltd v. Alstom Tech. Ltd., [2009] SGCA 24 ¶ 31 (Sing. Ct. App.) ("[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars . . . so long as the arbitration can be carried out without prejudice to the rights of either party."); KVC Rice Intertrade Co., Ltd. v. Asian Mineral Resources Pte. Ltd. and Another Suit, [2017] SGHC 32 ¶ 29 (Sing. High Ct.) ("[A] bare arbitration clause which merely provides for submission of disputes to arbitration without specifying the place of the arbitration, the number of arbitrators or the method for establishing the arbitral tribunal remains a valid and binding arbitration agreement if the parties have evinced a clear intention to settle any dispute by arbitration."); Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g Ltd., [1993] 1 H.K.C. 404, 407–08 I ("I cannot see how it can be said that this arbitration clause is 'inoperative or incapable of being performed.' . . . [T]he correct approach in this case is to satisfy myself that the parties have clearly expressed the intention to arbitrate any dispute which may arise under this contract."); Khan v. Dell, Inc., 669 F.3d 350, 357 (3d Cir. 2012) ("The contract's language does not indicate the parties' unambiguous intent not to arbitrate their disputes if NAF is unavailable. Section 5 of the FAA requires a court to address such unavailability by appointing a substitute arbitrator. The District Court's contrary conclusion is at odds with the fundamental presumption in favor of arbitration."); China Agribus. Dev. Corp. v. Balli Trading [1998] 2 Lloyd's Rep. 76 (QB) (Eng.) (recognizing award made pursuant to CIETAC Rules, where arbitration agreement provided for arbitration pursuant to Foreign Economic and Trade Arbitration Commission (FETAC) Rules and FETAC was succeeded by CIETAC). Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 6, 1998, Bull. Civ. I No. 268, 187.

21. *See Lovelock Ltd v. Exportles* [1968] 1 Lloyd's Rep. 163 (English Ct. App.) (internally contradictory clause invalid); Judgment of 15 January 1992, *Brunet v. Artige*, 1992 Rev. arb. 646 (Cour de cassation civ. 2e) [Fr.] (requirement to "ask the other party" whether dispute should be submitted to arbitration is unenforceable); Tribunale federale [TF] [Federal Supreme Court], Jan. 17, 2013, Decisioni del Tribunale federale svizzero [DTF] 4A_244/2012, ¶ 4.4 (Switz.) (annulling award on ground that no arbitration agreement was formed: "In view of the contradictory provisions in the Employment

Much more frequently, arbitration agreements will arguably not even be pathological or invalid, but will nonetheless contain errors or ambiguities—just like other types of contracts inevitably contain defects. Arbitration clauses may be ambiguous or contain conflicting provisions regarding every aspect of the arbitral process—including incorporation of multiple sets of different institutional rules, incorporation of different versions (or uncertain versions) of the same set of institutional rules, incorporation of ill- or un-identified institutional arbitration rules, specification of differing or unclear means of selecting arbitrators, inclusion of differing or unclear requirements for arbitrator experience (or nationality), selection of different languages of the arbitration, selection of an unclear (or conflicting) arbitral seat(s), specification of unclear time limits for the arbitral award to be made, and uncertain provisions regarding disclosure, discovery, written submissions, hearing procedures, or other aspects of the arbitral process.[22] All of these various types of drafting defects can create significant procedural difficulties and uncertainties in the arbitral process.

A key aspect of an arbitral tribunal's (and, in some cases, an arbitral institution's) mandate is to administer the arbitration notwithstanding these types of ambiguities and uncertainties in the parties' arbitration agreement. Unless a tribunal (or institution) is able to do so, then many arbitrations would stall or otherwise go awry. In practice, therefore, arbitral tribunals (and institutions)

Agreement therefore, the principle of reliance shows no clear intent of the parties to remove certain disputes from the jurisdiction of the state courts and to submit them to an arbitral tribunal."); *Judgment of 2 December 1982*, 1983 NJW 1267 (German Bundesgerichtshof) (arbitration clause referring to two different arbitral institutions invalid); Judgment of 15 November 1994, XXII Y.B. Comm. Arb. 707, 709 (Oberlandesgericht Hamm) (1997) (denying enforcement of award on grounds that arbitration clause was invalid because it failed to specify arbitral tribunal, clause provided for arbitration by "the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich"); *Judgment of 30 March 1993*, XXI Y.B. Comm. Arb. 681 (Vaud Ct. App.) (1996) (Switz.) (no arbitration agreement concluded); Kenon Eng'g Ltd v. Nippon Kokan Koji Kabushiki Kaisha, [2004] H.K.C.A. 101 (C.A.) (H.K.) (dispute resolution clause referring to mediation invalid on grounds of uncertainty); *Tai-Ao Aluminium (Taishan) Co. Ltd v. Maze Aluminium Eng'g Co. Ltd*, [2006] HKCFI 220, ¶ 3 (H.K. Ct. First Inst.) (clause providing "[t]he arbitration power of this contract belongs to the court(s) of the place where the seller is situated" held to be too uncertain to be valid).

22. See BORN (6th. ed. 2021), *supra* note 9, for representative examples of poorly-drafted arbitration agreements.

routinely resolve disputes over the meaning of poorly-drafted procedural terms of the parties' arbitration agreements,[23] in addition to exercising their general procedural discretion to conduct the arbitral process in a fair and efficient manner where the parties have not agreed upon aspects of the arbitral procedure.[24]

Most leading institutional and other international arbitration rules grant arbitral tribunals and institutions broad discretion to administer the arbitration and adopt procedures for the arbitral proceedings. Article 17(1) of the United Nations Commission on International Trade Law ("UNCITRAL") Rules is one example, providing: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate."[25] Similarly, the International Chamber of Commerce ("ICC") Rules provide that "[t]he arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate,"[26] and the London Court of International Arbitration ("LCIA") Rules provide that the tribunal's duties include "a duty to adopt procedures suitable to the circumstances of the arbitration."[27]

Relatedly, institutional rules also typically grant the arbitral institution authority to interpret its own institutional arbitration rules. Article 2.1 of the Hong Kong International Arbitration Center ("HKIAC") Rules provides that the "HKIAC shall have the power to interpret all provisions of these Rules. The arbitral tribunal shall interpret the Rules insofar as they relate to its powers and duties hereunder."[28] Similarly, Article 42 of the Interna-

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23. *See* Born (3d ed. 2021), *supra* note 3, ch.26 § 26.05[C][5][b][iii] ("Where an arbitration agreement is ambiguous or internally inconsistent, recognition courts accord the interpretations and applications of that agreement by an arbitral tribunal (or arbitral institution) substantial deference."). *See also* Nigel Blackaby et al., Redfern and Hunter on International Arbitration ¶ 2.220 (7th ed. 2023) (noting that "[arbitration] institutions have generally attempted to give effect to arbitration agreements, notwithstanding a degree of uncertainty arising from the language chosen by the parties").

24. Born (3d ed. 2021), *supra* note 3, ch.15 § 15.03; Blackaby et al., *supra* note 23.

25. United Nations Comm'n on Int'l Trade L., UNCITRAL Arbitration Rules art. 17(1) (2021) [hereinafter UNCITRAL Rules].

26. Int'l Chamber of Com., Arbitration Rules (In Force as from 1 January 2021) art. 3(4) (2021) [hereinafter ICC Rules].

27. London Ct. of Int'l Arbitration, Arbitration Rules (Effective 1 October 2020) art. 14(1)(ii) (2020) [hereinafter LCIA Rules].

28. Hong Kong Int'l Arbitration Ctr., 2018 Administered Arbitration Rules art. 2.1 [hereinafter HKIAC Rules].

tional Center for Dispute Resolution ("ICDR") Rules provides that the "arbitral tribunal, any emergency arbitrator appointed under Article 7, and any consolidation arbitrator appointed under Article 9, shall interpret and apply these Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other Rules."[29]

These grants of procedural authority reflect the inherent nature of the adjudicative process (where adjudicators require the authority to prescribe and apply dispute resolution procedures) and the needs of the arbitral process, which seeks to provide efficient and flexible dispute resolution procedures.[30] Thus, even in the absence of specific provisions in institutional rules, like those cited above, granting the arbitral tribunal and arbitral institution broad procedural authority, that power is implied as an inherent aspect of the tribunal's (or institution's) mandate to provide an expeditious, final resolution of the parties' disputes. As one commentator has observed with respect to arbitral institutions, "the parties' agreement to 'institutional arbitration' . . . encompasses an agreement to submit to the authority of the institution to interpret its own rules."[31] Similarly, the arbitral tribunal's broad procedural authority is also inherent in their adjudicative mandate: "An inherent characteristic of the arbitral process is the tribunal's adjudicative role and responsibility for establishing and implementing the procedures necessary to resolve the parties' dispute. The tribunal's procedural authority is an implicit part of the parties' agreement to arbitrate and is an indispensable precondition for an effective arbitral process."[32]

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29. Int'l Ctr. For Disp. Resol., ICDR International Arbitration Rules for IFTA Arbitrations (Rules Effective January 1, 2022) art. 43 [hereinafter ICDR Rules].

30. Born (3d ed. 2021), *supra* note 3, § 15.03. *See* Blackaby et al., *supra* note 23, § 5.14 ("the arbitral tribunal enjoys a very broad power to determine the appropriate procedure. Indeed, this is one of the defining features of arbitration as opposed to courts, in which a fixed procedure exists.").

31. Rémy Gerbay, *An Overview of the Activities of Arbitral Institutions: Institutional Arbitration as a Multifaceted Reality*, *in* The Functions of Arbitral Institutions 96 (2016). *See also* Born (3d ed. 2021), *supra* note 3, § 9.03[B] ("Where . . . the parties have adopted [particular institutional arbitration] rules, the parties are also obligated to abide by the [relevant arbitral institution's] determinations under those rules.") (internal citations omitted).

32. Born (3d ed. 2021), *supra* note 3, § 15.03[A].

B. *Articles II(1) and V(1)(d): Language and History*

As discussed above, Articles II(1) and V(1)(d) of the New York Convention give effect to the procedural autonomy that parties are entitled to under their international arbitration agreements. Article II(1) provides:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."[33]

This rule is elaborated, and also provided an enforcement mechanism, in Article II(3) of the Convention, which requires the courts of Contracting States to refer parties to international arbitration agreements to arbitration unless "the said [arbitration] agreement is null and void, inoperative or incapable of being performed."[34] The better view is that Article II is self-executing in the United States,[35] but it is in any event given direct effect in U.S. courts by §201 of the Federal Arbitration Act ("FAA").[36]

By virtue of Article II of the Convention, international arbitration agreements are presumptively valid and enforceable, subject only to specifically-defined exceptions (identified in Article II(3)). Under the Convention, Contracting States are not free to fashion additional grounds for denying recognition of agreements to arbitrate, and are instead subject to the mandatory provisions of Articles II(1) and II(3). As one U.S. court

33. New York Convention, *supra* note 1, art. II(1).

34. *Id.* art. II(3) ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.").

35. *See* Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L. 115, 137 (2018) ("[T]here is substantial evidence that Article II of the Convention is self-executing. That conclusion is supported by the language, object, and purposes of Article II. It is confirmed by the terms of Chapter 2 of the [Federal Arbitration Act], the ratification and legislative history of both the Convention and Chapter 2, the weight of authority in U.S. state and federal courts considering the status of Article II, and the position of the U.S. government.").

36. 9 U.S.C. § 201.

put it, "[d]omestic defenses to arbitration are transferable to [the challenge to an arbitration agreement under the New York Convention] only if they fit within the limited scope of defenses [permitted by Article II]."[37]

Article II's rule of presumptive validity applies to, and requires recognition of, all material terms of an agreement to arbitrate; given the nature and subject matter of arbitration agreements (as procedural agreements regarding dispute resolution mechanisms), these terms are generally provisions regarding the arbitral procedures.[38] Among other things, Article II applies to provisions specifying the scope of the disputes subject to arbitration,[39] the selection of the arbitral seat,[40] the incorporation of institutional arbitration rules,[41] the composition and method of constitution of the arbitral tribunal,[42] the specification of the parties to the arbitration agreement,[43] the selection of the language of the arbitration,[44] the choice of the arbitral procedures,[45] and the confidentiality (or transparency) of the arbitral process.[46]

Article II of the Convention is paralleled, and in some nations implemented, by Articles 7 and 8 of the UNCITRAL Model Law. Article 8(1), like Article II(3) of the Convention, requires that courts refer parties to arbitration when the dispute is subject to an arbitration agreement.[47] The Model Law,

37. Bautista v. Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005).

38. Born (3d ed. 2021), *supra* note 3, § 4.04[B][2][b], § 4.05[A][2], § 4.06[A][1]. *See* Marike Paulsson, The 1958 New York Convention in Action 64 (2016) ("Courts must recognize arbitration agreements unless refusal to do so is warranted under Article II itself. . . . Article II creates a presumption of validity of the arbitration agreement.").

39. Born (3d ed. 2021), *supra* note 3, §§ 8.03, 9.02[C], 9.02[D][6].

40. *Id.* § 14.02[A][1].

41. *Id.* § 1.01[C]; § 15.08.

42. *Id.* §§ 12.01[B][2], 12.02[A].

43. *Id.* § 10.04.

44. *Id.* §§ 14.02[A][9], 15.08[M].

45. *Id.* § 15.02[A].

46. *Id.* § 20.10.

47. United Nations Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration, art. 8(1) [hereinafter UNCITRAL Model Law] ("A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."); New York Convention, *supra* note 1, art. II(3) ("The court of a Contracting State, when seized of an action

like the Convention, gives effect to the material procedural terms of parties' arbitration agreements.[48]

The parties' procedural autonomy is more specifically addressed in Article V(1)(d) of the Convention and parallel provisions of national law, including the UNCITRAL Model Law. Thus, Articles III, IV and V of the Convention require contracting states to recognize foreign and non-domestic awards, subject only to limited exceptions.[49] Among other things, Article V(1)(d) permits non-recognition of an award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[50] Article V(1)(d) does not require non-recognition of an award, even when it applies; it permits non-recognition, but does not mandate it.[51]

Article V(1)(d) is paralleled and implemented by Article 36(1)(a)(iv) of the UNCITRAL Model Law, which permits non-recognition of arbitral awards in the same circumstances as under the Convention.[52] Additionally, Article 34(2)(a)(iv) of the Model Law provides for annulment of awards (in the arbitral seat) in circumstances also paralleling those in Article V(1)(d) of the Convention.[53] In the words of one commentator, "Articles V(1)(a) to V(1)(d) of the New York Convention set out the same grounds

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in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.").

48. BORN (3d ed. 2021), *supra* note 3, § 8.03[A][2].

49. These exceptions are limited to those enumerated in Article V. New York Convention, *supra* note 1, art. V.

50. *Id.* art. V(1)(d).

51. *Id.* art. V ("[r]ecognition and enforcement of the award *may* be refused" if one of its enumerated grounds is met, including (1)(d), but it does not compel non-recognition or enforcement in such cases (emphasis added)).

52. UNCITRAL Model Law, *supra* note 47, art. 36(1)(a)(iv) ("(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: . . . (iv) [if] the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or . . . was not in accordance with the law of the country where the arbitration took place.").

53. UNCITRAL Model Law, *supra* note 47, art. 34(2)(a)(iv) ("[T]he composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.").

as Article 34(2)(a)(i) to 34(2)(a)(iv) of the Model Law in relation to the setting aside of awards."[54]

In applying Articles V(1)(d) and 36(1)(a)(iv), it does not matter if the arbitral procedure meets statutory or other external requirements of fairness, due process, or procedural regularity. Rather, the primary focus of both provisions is on whether the arbitral procedure was consistent with the parties' agreement concerning arbitral procedures. As one U.S. court observed in a related context, parties "are free to agree to inefficient arbitration procedures" and arbitrators are not entitled to impose procedures "to suit a personal view of the virtue of efficiency."[55]

Subsidiarily, Article V(1)(d) and Article 36(1)(a)(iv) also provide for non-recognition of an award if, in the absence of any agreement between the parties on the arbitral procedures, those procedures did not comply with the law of the arbitral seat.[56] In other words, under the Convention, the law of the seat applies subsidiarily as a gap filler if the parties have not agreed on arbitral procedures, and an award is subject to non-recognition if, in the absence of agreed arbitral procedures, the procedures applied by the tribunal are contrary to the law of the seat.[57]

In practice, the second prong of Articles V(1)(d) and 36(1)(a)(iv) is very seldom applied. In most instances, the procedural aspects of international arbitrations are addressed by the parties' arbitration agreement (particularly in institutional arbitrations).[58] Even where the parties' agreement does

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54. Weiyi Tan, *Allowing the Exclusion of Set-Aside Proceedings: An Innovative Means of Enhancing Singapore's Position as an Arbitration Hub*, 15 ASIAN INT'L ARB. J. 87, 100 (2019).

55. Polimaster Ltd. v. Rae Sys., Inc., 623 F.3d 832, 840, 842 (9th Cir. 2010).

56. BORN (3d ed. 2021), *supra* note 3, § 26.05[C][5][c]. *See* BLACKABY ET AL., *supra* note 23, §10.56 ("An award is also at risk of challenge where the composition of the arbitral tribunal and the procedure adopted in the arbitration are not in conformity with the agreement of the parties or, failing such agreement, with the law [of the seat].").

57. BORN (3d ed. 2021), *supra* note 3, §§ 11.05[B][4], 26.05[C][5][c][ii]. *See* DOROTHEE SCHRAMM, ELLIOTT GEISINGER, ET AL., *Article II, in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 55 (Herbert Kronke, Patricia Nacimiento, et al. eds., 2010) ("In the absence of a choice of law, the law of the country where the award was made, that is, the law of the place of arbitration, governs the arbitration agreement.").

58. *See* BORN (3d ed. 2021), *supra* note 3, § 26.05[C][5][c] ("[T]he law of the seat is only relevant, for purposes of Article V(1)(d), insofar as the parties

not address an aspect of the arbitral procedures, it is rare for national law to override an arbitral tribunal's exercise of its discretion.[59] The principal focus of Article V(1)(d), like that of Article 36(1)(a)(iv), is, therefore, on the parties' exercise of their procedural autonomy.

In that respect, Articles V(1)(d) and 36(1)(a)(iv) reinforce and implement the basic directive to Contracting States in Article II of the Convention—giving effect to the material terms, and particularly the procedural terms, of international arbitration agreements. As discussed above, Article II(1) requires Contracting States (and arbitral tribunals) to respect the parties' procedural autonomy and, where that autonomy is not respected, Article V(1)(d) permits non-recognition of the resulting award. Nonetheless, as discussed below, the Convention also involves other considerations, which are equally fundamental to the arbitral process.

C. *Articles II and V(1)(d): Competing Objectives*

The New York Convention does not give effect to the parties' procedural autonomy in all circumstances, or without regard to other considerations. Among other things, the Convention recognizes the possibility of non-enforcement of international arbitration agreements with respect to subject matters that are non-arbitrable,[60] as well as the possibility of non-recognition of awards on both non-arbitrability and public policy grounds,[61] and on the grounds that the arbitral procedures denied a party the opportunity to present its case.[62]

More fundamentally, the Convention is designed to facilitate the arbitral process and the recognition and enforcement

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have not agreed upon a particular issue."); BLACKABY ET AL., *supra* note 23, § 2.220 ("[I]nstitutions have generally attempted to give effect to arbitration agreements, notwithstanding a degree of uncertainty arising from the language chosen by the parties.").

59. *Id.* § 26.05[C][3][c] (discussing the generally "pro-enforcement approach to the application of Article V(1)(b)" by courts). *See* JEFFREY M. WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 992 (2012) ("Modern *lex arbitri* will generally indicate that a tribunal is bound by an agreement of the parties and absent such an agreement, a tribunal has a broad discretion.").

60. New York Convention, *supra* note 1, art. II(1).

61. *Id.* art. V(2)(a)–(b).

62. *Id.* art. V(1)(b).

of both international arbitration agreements and awards. These purposes have been recognized by courts in jurisdictions around the world. In the words of the U.S. Supreme Court:

> "[The Convention's purpose is] to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . . in the signatory countries."[63]

Or, as a Dutch decision held, "the purpose of the Convention to enhance the recognition and enforcement of foreign arbitral awards by subjecting the recognition and enforcement to a minimum number of conditions."[64]

These purposes are essential as safeguards for the parties' autonomy, and for a proper application of Articles II and V(1)(d) of the Convention and the parallel provisions of the Model Law. As courts and commentators have observed in other contexts, the fundamental purpose of most international arbitration agreements is to resolve the parties' disputes by arbitration.[65] Giving effect to that objective is a critical aspect of respecting the parties' autonomy, just as giving effect to the specific procedural terms of the parties' agreement is also a vital aspect of effectuating the parties' procedural autonomy. Several consequences follow from this conclusion.

First, Article V(1)(d), and parallel provisions of the Model Law, permit non-recognition of arbitral awards only where there has been a material breach of a material term of the parties' agreement on the arbitral procedures. Although the Convention requires that the parties' agreements regarding arbitral procedures be respected, it also limits the sanction of

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63. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974).

64. Rb. Amsterdam 12 juli 1984, X Y.B. COMM. ARB. 487, 489 (S. Pac. Props. (Middle E.) Ltd. v. Egypt) (Neth.). *See also* Yugraneft Corp. v. Rexx Mgt Corp., [2010] XXXV Y.B. COMM. ARB. 343, 345 (Can.) ("The purpose of the Convention is to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply worldwide.").

65. *See* Born & Angelini, *supra* note 13, at 55 ("[N]ational courts have applied a validation principle to give effect to commercial parties' dominant intention to resolve their international disputes by arbitration . . . . Such an approach is to be commended. It is mandated by the New York Convention and, ultimately, accords with the expectations of businesses engaged in international commerce and the pro-arbitration policies behind domestic arbitration law.").

non-recognition of awards to cases where there has been a very serious non-compliance with those agreements. As one court correctly stated: "[N]ot all formal violations of the [applicable] rules but only those violations that concretely harmed the rights of a party can lead to refusal of enforcement."[66] Likewise, another court held that a party resisting enforcement "must prove . . . that the arbitration tribunal did not observe the applicable arbitration procedure where the disregard constitutes a flagrant breach of procedural fairness."[67]

Conversely, immaterial or minor deviations from the parties' procedural agreement are not a basis for non-recognition of awards under Article V(1)(d) of the Convention or Article 36(1)(a)(iv) of the Model Law.[68] One U.S. court observed that it "[did] not believe that section 1(d) of Article V was intended . . . to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if any violation of [the] ICC procedures is found. Such an interpretation would directly conflict with the 'pro-enforcement' bias of the Convention and its intention to remove obstacles to confirmation of arbitral

66. Judgment of 15 January 2008, XXXVI Y.B. Comm. Arb. 296, 299 (Florence Corte di Appello) (2011).

67. Holding Tusculum BV v. Louis Dreyfus SAS, [2008] QCCS 5904, ¶ 126 (Can. Que. Super. Ct.). More generally, the UNCITRAL Secretariat Guide on the New York Convention notes that for Article V(1)(d) to apply, "[m]ost courts require a substantial defect in the arbitral procedure and/or a causal nexus between the defect and the award." UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Comm'n on Int'l Trade L., art. V(1)(d) ¶ 39 (1958).

68. *See* Born (3d ed. 2021), *supra* note 3, ch.26 § 26.05[C][5][b][v] ("[I]t is generally necessary for an award-debtor seeking non-recognition under Article V(1)(d)'s first prong to show that the violation of the parties' agreed arbitral procedures materially affected the party's rights. It is not enough merely to demonstrate that the arbitral procedures failed to comply with the provisions of the parties' agreement, including material provisions of that agreement."); Paulsson, *supra* note 38, at 174 ("Article V(1)[(d)] should not lead to refusal if the violation of one of the grounds of Article V is only marginally present and if its absence would still have led to the same award."); Int'l Council for Com. Arb., ICCA's Guide to the Interpretation of the New York Convention: A Handbook for Judges 98 (2011) ("This option of Article V(1)(d) is not aimed at refusing to recognize or enforce an award if the court called upon is of a different legal view than the arbitrators, regarding, for example, whether or not to hear a witness, to allow recross examination or how many written submissions they would like to allow. Rather . . . Article V(1)(d) is aimed at more fundamental deviations from the agreed procedure.").

awards."[69] Another court held that "in order to succeed" pursuant to Article V(1)(d) "[an] applicant must show a material breach of the arbitration agreement that was not an inconsequential irregularity."[70]

Second, and relatedly, if the tribunal's failure to follow the parties' chosen procedure does not materially affect the outcome of the case, there is generally no reason to refuse enforcement of the award.[71] For example, in *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co.*, the court held that the tribunal's failure to comply with the applicable American Arbitration Association ("AAA") Rules did not warrant non-recognition because the award-debtor "was not 'substantially prejudiced' by respondents' failure to comply with the AAA's procedural rules."[72] In another case, the tribunal's failure to abide by the China Economic and Trade Arbitration Center ("CIETAC") Rules requiring evidence collected by tribunal to be provided to parties for comment was not sufficient grounds for non-recognition, again due to a lack of prejudice to the award-debtor.[73]

There are some deviations from the parties' agreement on procedure that are sufficiently fundamental that Article V(1)(d) and Article 36(1)(a)(iv) would arguably apply without

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69. Compagnie des Bauxites de Guinee v. Hammermills, Inc., 1992 WL 122712, Civ. A. No. 90–0169 (JGP), at *5 (D.D.C. May 29, 1992).

70. Eastern European Engineering Ltd. v. Vijay Construction (Proprietary) Ltd. [2018] EWHC (Comm) 2713 [63], CL-2015-000613 (Eng.).

71. *See id.* ¶ 89 ("[T]he party challenging the award must also demonstrate that the outcome of the arbitration would have been different had there been no breach of natural justice.").

72. P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co., No. 92-CV-4623 (MGC), 1992 WL 400733, at *2 (S.D.N.Y. Dec. 23, 1992). *See also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936, 945 (S.D. Tex. 2001) (to succeed on an Article V(1)(d) defense, a party "must show that there is a violation of an arbitration agreement between the parties and that the violation actually caused [the party] substantial prejudice in the arbitration"); Flashbird Ltd v. Compagnie de Sécurité Privée et Industrielle SARL [2021] UKPC, ¶ 26 (Mauritius) (citing GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3908 (3d ed. 2021)) (finding that even if the appointment of a sole arbitrator was not in accordance with the parties' agreement, there was insufficient prejudice to justify the award being set aside).

73. *See* Calbex Mineral Ltd. v. ACC Res. Co., LP, 90 F. Supp. 3d 442, 461 (W.D. Pa. 2015) ("In order to overcome the strong presumption in favor of enforceability under the New York Convention, however, a party asserting an Article V(1)(d) defense must show there is evidence of record that it was *prejudiced* by the procedure used.").

a specific showing of harm or prejudice. Examples include the failure to comply with the parties' agreement on the choice of institutional rules, the language of the arbitration, the arbitral seat, or the number or means of appointment of the arbitrators. In each of these cases, the failure to comply with the parties' agreement may have a pervasive and fundamental impact on the arbitration—in contrast, for example, to a failure to comply strictly with time limits for written submissions, provisions regarding the scope or timing of disclosure, or the organization of hearings.[74] In the former categories of circumstances, non-recognition may be permitted, and appropriate, without a showing of specific harm to the award-debtor. Nonetheless, as a general matter, awards may be denied recognition under the Convention and Model Law only in cases where the award-debtor has demonstrated material prejudice as a consequence of non-compliance with the parties' procedural agreement.[75]

Third, Article V(1)(d) and Article 36(1)(a)(iv) are not invitations for judges on recognition courts to impose the arbitral procedures that they would have adopted had they been the arbitrators, or that they believe most appropriate. An essential aspect of the arbitral process is the arbitral tribunal's general procedural authority and discretion, which Article V(1)(d) does not permit national courts to second-guess. As one court put it, affirming the arbitrators' broad procedural discretion under Article V(1)(d) and granting enforcement of an award: "[A]rguments relating to the issue of notice, composition of the arbitral panel, and consolidation of the parties . . . are procedural matters within the broad discretion of the arbitral

74. *See* BORN (3d ed. 2021), *supra* note 3, ch.26 § 26.05[C][5][b][v] (Noting that the failure to comply with agreements regarding institutional rules, arbitral seat, language of the arbitration, or number of arbitrators "would generally constitute grounds for non-recognition under Article V(1)(d) without the need for a specific showing of material prejudice" because these "types of procedural agreements (in contrast to agreements on the length of hearing days, order of examination, or scope of disclosure) concern the basic architecture of the arbitration and typically have a substantial impact on the arbitral proceedings.").

75. *See id.* ch.26 § 26.05[C][5][b][vi] ("[T]he circumstances where Article V(1)(d) is properly applicable involve serious violations of material, and relatively unambiguous, terms of the parties' arbitration agreement, resulting in material prejudice to the award-debtor.").

panel."[76] Or as the U.S. Supreme Court held in the context of an annulment action:

> "The interpretation and application of a [procedural condition] is primarily for the arbitrators. Reviewing courts cannot review their decision *de novo*. Rather, they must do so with considerable deference."[77]

Among other things, the arbitral tribunal's procedural discretion includes the arbitrators' inevitable task of interpreting and applying the procedural provisions of the parties' agreement to arbitrate.[78] As discussed above, arbitration agreements are frequently ambiguous, incomplete, internally contradictory, or otherwise defective.[79] In such cases, courts are required by Article II and V(1) of the Convention to defer to the arbitral tribunal's interpretation of the agreements. As one court observed, in confirming a foreign award under the New York Convention, "procedural prerequisites are for the tribunal, not the Court, to interpret and apply."[80] Or, as another court put it, a court must defer to tribunals on procedural questions if "the arbitrator (even arguably) interpreted the parties' contract."[81]

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76. Karaha Boda Co., LLC v. Perusahaan Pertambangan Minyak Dan Bumi Negara, 2004 ABQB 918, [2004] A.J. No. 1440, ¶ 36 (Can.). *See* Anatolie Stati v. Republic of Kazakhstan, 302 F. Supp. 3d 187, 207 (D.D.C. 2018) (deferring to the tribunal's conclusion that a procedural requirement had been fulfilled); RESTATEMENT OF THE U.S. L. OF INT'L COM. AND INV.-STATE ARB. §4-13(b) (AM. L. INST. 2019) [hereinafter RESTATEMENT] ("In resolving challenges based on alleged violations under this Section [giving effect to Article V(1)(d)], a court affords substantial deference to the procedural decisions of the arbitral tribunal").

77. BG Group PLC v. Republic of Argentina, 572 U.S. 25, 41 (2014).

78. *See, e.g.*, Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 298 (5th Cir. 2004) (rejecting an Article V(1)(d) defense finding that "[t]he Tribunal reasonably interpreted the ESC's arbitration provisions").

79. See *supra* Section I.A.

80. Stati v. Republic of Kazakhstan, 199 F. Supp. 3d 179, 189 (D.D.C. 2016) (citing BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 34 (2014)).

81. Bamberger Rosenheim, Ltd. v. OA Dev., Inc., 862 F.3d 1284, 1288 (11th Cir. 2017) (quoting Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013)); *See also* 245 Park Member LLC v. HNA Grp. (Int'l) Co., No. 22-CV-5136 (JGK), 2022 WL 2916578, at *4 (S.D.N.Y. July 25, 2022) (quoting Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 452 (2d Cir. 2011)) (rejecting the respondent's contention "that the procedure imposed by the arbitrator was contrary to the parties' arbitration agreement" in violation of Article V(1)(d) of the New York Convention and holding that "[i]f the arbitrator has

Arbitral tribunals are also accorded broad authority under the Convention and national arbitration legislation in interpreting institutional arbitration rules. Thus, as one court held, "[a]rbitration rules, such as those of the AAA, are intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation."[82] Or, as another court concluded: "[W]here, as here, a party's challenge involves an application of the arbitral institution's own rules, courts typically have deferred to the arbitral panel's interpretation of them."[83]

As noted above, the arbitrators' authority with regard to arbitral procedure, including interpreting an institution's procedural rules, is expressly recognized by most institutional rules. For example, Article 2.1 of the HKIAC Rules provides that the "arbitral tribunal shall interpret the Rules insofar as they relate to its powers and duties hereunder."[84] Similarly, Article 42 of the ICDR Rules provides that the "arbitral tribunal, any emergency arbitrator appointed under Article 7, and any consolidation arbitrator appointed under Article 9, shall interpret and apply these Rules insofar as they relate to their powers and duties."[85] In these cases, courts have held that "when parties have adopted rules conferring on an arbitral panel authority to interpret the rules governing arbitration, courts should defer to the panel's interpretation of the rules governing arbitration."[86] Indeed, giving effect to such provisions is mandated by Article II of the Convention and by the bedrock principle of party autonomy.[87] As noted above, however, even absent such provisions, arbitrators are accorded broad discretion under Article V(1)(d), and otherwise, to interpret and apply the terms of institutional arbitration rules.

The arbitral tribunal's discretion under Article V(1)(d) and parallel provisions of national arbitration legislation includes the authority to adopt procedures in the absence of express

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provided even a barely colorable justification for his or her interpretation of the contract, the award must stand").

82. Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1444 (11th Cir. 1998).

83. Belize Bank v. Government of Belize, 191 F. Supp. 3d 26, 27 (D.D.C. 2016).

84. HKIAC Rules, *supra* note 28, art. 2.1.

85. ICDR Rules, *supra* note 29, art. 43.

86. Ecopetrol S.A. v. Offshore Expl. & Prod. LLC, 46 F. Supp. 3d 327, 344 (S.D.N.Y. 2014).

87. *See supra* Section I.A; Born (3d ed. 2021), *supra* note 3, § 4.04[B][2][b].

agreement by the parties. That includes circumstances where the parties have reached no agreement at all on arbitral procedures or where they have reached some agreement on procedures, but not on a particular issue (for example on language, arbitral seat, or disclosure). In these circumstances, an arbitral tribunal has broad discretion to adopt the procedures that it considers best suited for resolution of the parties' dispute.[88]

A tribunal's interpretation of the procedural provisions of the parties' arbitration agreement or the institutional rules it incorporates is different from decisions regarding the validity or scope of the parties' arbitration agreement. Arbitrators' rulings on the existence or validity of an arbitration agreement are typically subject to *de novo* judicial review, often in both annulment and recognition proceedings.[89] These rulings go to the existence of any binding agreement to arbitrate between the parties and, as a consequence, the legitimacy of the arbitral tribunal itself.[90] Similar, albeit more limited and less certain, observations apply to rulings on the scope of the arbitration agreement.[91]

In contrast, rulings on the arbitral procedure, including interpretations of the parties' agreement regarding arbitral procedures, do not involve either the existence of a binding

88. BORN (3d ed. 2021), *supra* note 3, § 15.03[A]. *See* BLACKABY ET AL., *supra* note 23, § 5.14 ("In general terms, the arbitral tribunal enjoys a very broad power to determine the appropriate procedure.").

89. *See, e.g.*, Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1534 (9th Cir. 1987) ("We review *de novo* a contention that the subject matter of the arbitration lies outside the scope of a contract, since the arbitrability of a dispute concerns contract interpretation and only those disputes which a party has agreed to submit to arbitration may be so resolved."); Rusoro Mining Ltd. v. Venezuela, 300 F. Supp. 3d 137, 146 (D.D.C. 2018) ("There is a presumption that courts review arbitral tribunals' jurisdictional determinations *de novo*."); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 6, 1998, Bull. Civ. I No. 268, 187 ("[The Cour d'Appel] has sovereignly decided that the arbitrators had ruled after the arbitration agreement expired, following several extensions until 29 October 1979, and for this reason, which by itself justifies the refusal to recognize and enforce the arbitral award rendered abroad, [the court's] decision is legally justified."); Dalimpex Ltd. v. Janicki (2003), 64 O.R. 3d 737 (Can. Ont. C.A.); RESTATEMENT, *supra* note 76, § 4.12(d) ("A court determines de novo whether an arbitral award deals with matters that were not submitted to arbitration.").

90. BORN (3d ed. 2021), *supra* note 3, § 7.03[I][4].

91. *See* Cour d'appel [CA] [regional court of appeal] 1e ch., Paris, Feb. 19, 2013, *République Démocratique Populaire du Lao v. Thai Lao Lignite Co.* (reviewing tribunal's ruling regarding scope of arbitration clause de novo).

agreement to arbitrate or (in most cases) the legitimacy of the arbitral tribunal itself. Rather, these rulings involve a concededly legitimate arbitral tribunal, to whose authority the parties have also concededly consented, exercising its procedural authority. There is a fundamental difference between these two types of objections to arbitral awards: in the one, the parties' consent to arbitrate anything at all is challenged, while in the other, only the actions of a concededly legitimate arbitral tribunal, exercising concededly existent procedural powers, are challenged. Very different degrees of deference to a tribunal's rulings are appropriate in each of these cases.[92]

As a consequence, an award should ordinarily be subject to non-recognition under Articles V(1)(d) and 36(1)(a)(iv) only where an arbitral tribunal or institution has failed to comply in material respects with an unambiguous procedural agreement between the parties. Where an arbitral institution or tribunal interprets provisions of the parties' arbitration agreement that are ambiguous, incomplete, or otherwise defective, that interpretation should be accorded substantial deference. The tribunal's (or institution's) procedural decisions in those circumstances are no different from their decisions in cases involving no agreement on the arbitral procedures at all.

There are important reasons for deferring to an arbitral tribunal's (or arbitral institution's) interpretation of ambiguous or otherwise unclear procedural provisions of the parties' arbitration agreement. Most importantly, both the arbitral tribunal and arbitral institution are responsible for administering the arbitral proceedings;[93] as a consequence, they are familiar with

92. The U.S. Supreme Court has noted that "[o]n the one hand, courts presume that the parties intend courts, not arbitrators, to decide" disputes concerning the existence or scope of an arbitration agreement while "[o]n the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." BG Group PLC v. Republic of Argentina, 572 U.S. 25, 34 (2014).

93. Born (3d ed. 2021), *supra* note 3, § 13.03. *See* Arif Hyder Ali et al., The International Arbitration Rulebook: A Guide to Arbitral Regimes 1 (2019) (noting that arbitral tribunals have "extensive powers" to conduct the proceedings, but that nevertheless the institutions may perform a variety of functions, including: register or reject requests for arbitration and answers; determine the seat and/or language of the arbitration; decide preliminary questions of jurisdiction; apply expedited or emergency procedures; require the parties to make an advance on costs; calculate final costs; act as a conduit and repository for document submissions and communications; encourage the parties

the parties, their dispute, and their agreed arbitral procedures. By virtue of administering the arbitration, the tribunal and arbitral institution have a full view of the context of particular procedural agreements. Moreover, both arbitral tribunals and institutions have substantially greater experience and expertise involving the application of arbitral procedures and the interpretation of procedural agreements than do national courts.

As the U.S. Supreme Court has observed, "arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it."[94] Similarly, the Court has observed, with respect to a procedural provision in an investment treaty, that "[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations regarding the operation of the provision."[95] These considerations argue decisively for national courts to defer to the arbitral tribunal's or institution's interpretation of the parties' procedural agreement.

Likewise, deferring to the arbitral tribunal's or institution's interpretation of ambiguous or otherwise defective procedural agreements imposes few real costs (because there will always be uncertainty, regardless who decides the issue, regarding what the parties' procedural agreement really meant) and produces significant benefits (in terms of preserving the finality, efficiency and expedition of the arbitral process). In these circumstances, second-guessing of arbitral tribunals' (or arbitral institutions') procedural rulings by national courts offers very limited benefits, while imposing very serious costs.

Fourth, a party may be deemed to have waived the right to raise any procedural objections under Article V(1)(d) if these objections were not raised in a timely manner before the arbitral tribunal (or arbitral institution) during the arbitration.[96] In this regard, the Swiss Federal Tribunal has held that:

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to mediate their dispute; join additional parties; consolidate related cases; determine the number of arbitrators in a given case; appoint arbitrators; decide challenges to arbitrators; remove arbitrators; extend deadlines; calculate the arbitrators' fees; and scrutinize the tribunal's draft award.).

94. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).

95. BG Group PLC v. Republic of Argentina, 572 U.S. 25, 40 (2014).

96. Born (3d ed. 2021), *supra* note 3, § 26.05[C][5][d]. *See* Simon Greenberg, International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan 306, 307 (2018) ("Not only would it be wholly unfair to allow a party to withhold a jurisdictional or procedural objection, revealing it only

> [F]ormal objections that could have been raised at an earlier procedural stage may not be raised later in case of an unfavorable outcome. This principle applies also in respect of the reliance on procedural law grounds for refusal under the Convention that were not timely raised already in the arbitration.[97]

Many other national courts have similarly relied on the principles of waiver and good faith to reject objections to the recognition of foreign awards under Article V(1)(d).[98] The

later when it wants to annul the award, it would be extraordinarily inefficient from a time and cost perspective.").

97. Tribunal federal [TF] [Federal Supreme Court] Oct. 4, 2010, XXXVI Y.B. Comm. Arb. 340, ¶¶ 51, 59–60 (Switz.) (internal citations omitted).

98. *See, e.g.*, AO Techsnabexport v. Globe Nuclear Servs. & Supply GNSS, Ltd., 404 F. App'x 793 (4th Cir. 2010) (holding award-debtor waived Article V(1)(b) and Article V(1)(d) defenses by failing to object to arbitrator's alleged procedural errors during arbitral proceedings); Zeiler v. Deitsch, 500 F.3d 157, 168 (2d Cir. 2007) (waiver of statute of limitations objections); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 304 (5th Cir. 2004) (waiver of right to discovery); Tesco (Ireland) Ltd. v. Moffett [2015] NIQB 68, ¶ 23 (Comm) (N. Ir. High Ct. of Just.) (participation by defendant in quantum proceedings was "equivalent of an estoppel"); China Agribusiness Dev. Corp. v. Balli Trading [1998] EWHC (Comm), 2 Lloyd's Rep. 76, 82 (QB) (Eng.); Oberlandesgericht [OLG] [Higher Regional Court] Köln Feb. 26, 2015, 2014 SchiedsVZ 203, 206 (award-debtor made no objections during arbitral proceedings to Moldavian as procedural language); Oberlandesgericht [OLG] [Higher Regional Court] München Mar. 15, 2006, XXXIV Y.B. Comm. Arb. 499, ¶ 5 (rejecting Article V(1)(b) defense and noting: "The arbitral tribunal was indeed comprised of only one arbitrator . . . against the original agreement of the parties. In principle, a defect in the constitution of the arbitral tribunal leads to refusing recognition and enforcement. However, . . . the defendant did not object to the composition of the tribunal, of which he was aware, at any time during the proceedings.") (internal citations omitted); Oberlandesgericht {OLG] [Higher Regional Court] Dresden Feb. 20, 2001, XXVIII Y.B. Comm. Arb. 261 (finding no Article V(1)(d) objection where both parties nominated arbitrators who lacked contractually required qualifications); Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., XXIV Y.B. Comm. Arb. 652, 661 (H.K. Ct. Fin. App. 1999) (H.K.) ("a party . . . who wishes to rely on a non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed . . . as if there had been no non-compliance, keeping the point up his sleeve for later use"); China Nanhai Oil JSC Shenzhen Branch v. Gee Tai Holdings Co., [1994] 2 H.K.L.R. 215 (H.K.) (waiver of challenge to constitution of tribunal); S.T.S. Oct. 7, 2003, XXX Y.B. Comm. Arb. 617, 619 (Spain) (participation in constitution of tribunal without reservation was waiver of objections).

same rule is also provided for in the national arbitration legislation of a number of jurisdictions.[99]

III. Procedural Autonomy and Article V(1)(d) in Practice

The New York Convention and UNCITRAL Model Law represented significant advances in the resolution of international commercial disputes. Among other things, Articles II(1) and V(1)(d) of the Convention, and parallel provisions of the UNCITRAL Model Law, give effect to the parties' procedural autonomy, while also ensuring similar respect for the arbitral tribunal's procedural discretion and the finality of arbitral awards. Permitting these competing considerations to be reconciled is essential to the arbitral process, and contributes materially to the success of the Convention and Model Law.

As discussed above, most national court decisions have applied Articles II(1) and V(1)(d) of the Convention and the parallel provisions of the Model Law properly, giving balanced effect to both the parties' procedural autonomy and the arbitrator's procedural discretion. There have, however, been outliers, including in jurisdictions where courts have ordinarily applied the Convention and Model Law in a manner consistent with their drafters' intentions and with the objectives of the arbitral process. These decisions misinterpret Article V(1)(d), and parallel provisions of the Model Law, producing results that would, if followed elsewhere, undermine the objectives of the Convention and Model Law and compromise the efficiency and finality of the arbitral process.

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99. *See, e.g.*, Lov nr. 553 af 24.6.2005 [Danish Arbitration Act], § 3; Lov om voldgift 1. januar 2005 [Norwegian Arbitration Act], § 4; [Arbitration Act of Korea] art. 6083, art. 5 (S. Kor.) ("A party who knows that [the Act or the arbitration agreement] has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay . . . shall be deemed to have waived his right to object."); Bulgarian Private International Law Code, art. 120(2) ("The defendant in the proceedings on the recognition and enforcement of the foreign decision may not refer to violations under Article 117, item 2, that he could have raised before the foreign court."); Law no. 27 of 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters [Egyptian Arbitration Law], art. 8 ("If either party to a dispute knows that [the arbitration agreement or this Law] has not been complied with, yet proceeds with the arbitration without invoking his objection…, the party shall be deemed to have waived his right to object."); Decree 67-95 [Guatemalan Arbitration Law], art. 7.

A. *Seat of Arbitration*

As noted earlier, failure to respect the parties' choice of arbitral seat can provide grounds for refusing to recognize an arbitral award under Article V(1)(d) of the Convention and Article 36(1)(a)(iv) of the Model Law. In many cases, the parties' choice of seat will be clear,[100] providing simply: "The seat of the arbitration shall be [city/nation]." [101]

In other cases, however, the parties' choice of arbitral seat may be unclear or defective, requiring the arbitral tribunal (or, under some institutional rules, arbitral institution) to determine the arbitral seat. For the reasons discussed above, a tribunal's interpretation of an ambiguous, incomplete, or otherwise defective agreement on the arbitral seat should be accorded substantial deference under both the Convention and Model Law. Despite that, as discussed below, a few recent decisions have taken a different approach and ignored the interpretations of ambiguous provisions by arbitral tribunals (or institutions), instead substituting their own judgment for that of the arbitrators or arbitral institution.

1. *Three U.S. Decisions: Judicial Deference*

Three appellate decisions in the United States illustrate the issues that can arise when the parties' choice of arbitral seat is ambiguous or impracticable. The decisions adopt different approaches to Article V(1)(d) and the provisions of the FAA, with two U.S. courts doing so properly and the other failing to do so.

First, a U.S. Court of Appeals decision in *Bamberger Rosenheim, Ltd. v. OA Development* considered an arbitration agreement in which the parties' choice of the arbitral seat was ambiguous.[102] In that case, the arbitration agreement between an Israeli company, Bamberger Rosenheim, Ltd. ("Profimex"), and a U.S. company, OA Development, Inc. ("OAD"), provided for ICC arbitration seated in Atlanta, Georgia (if Profimex submitted the dispute to arbitration) or in Tel Aviv, Israel (if OAD

100. Born (3d ed. 2021), *supra* note 3, § 14.01.

101. Born (6th ed. 2021), *supra* note 9, § 3[A][4][d].

102. Bamberger Rosenheim, Ltd. v. OA Dev., Inc., 862 F.3d 1284 (11th Cir. 2017).

submitted the dispute).[103] When disputes arose, Profimex initiated an ICC arbitration seated in Atlanta and OAD asserted counterclaims in the same arbitration. Profimex objected, arguing that OAD's counterclaims had to be brought in a separate arbitration seated in Tel Aviv.[104] The arbitrator rejected Profimex's objection, reasoning that the dispute had been submitted to arbitration by Profimex, that the arbitration was therefore properly seated in Atlanta, and that the counterclaim was properly asserted within the context of that arbitration.[105] The arbitrator then found in favor of OAD on the counterclaim and, in subsequent recognition proceedings, the District Court confirmed the award under the Convention.[106]

On appeal, Profimex argued that "the arbitral procedure was not in accordance with the agreement of the parties" and that the award should be denied recognition under Article V(1)(d).[107] The Court of Appeals said that the "dispositive issue" was whether the court was required to "defer to the arbitrator's venue determination."[108] The court concluded that it was, and that its review was therefore "limited to whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[109] Applying this standard, the court held that the arbitrator had sought to interpret the parties' agreement and that the tribunal's interpretation was entitled to substantial deference. The court distinguished the case before it from one in which an arbitrator disregarded an unambiguous provision that provided for arbitration: in that

103. *Id.* at 1286. The parties' agreement provided: "Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings . . . Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex." *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1286–87.

107. *Id.* at 1287 (citing New York Convention, *supra* note 1, art. V(1)(d) ("Recognition and enforcement of the award may be refused [if] . . . (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.")).

108. *Bamberger Rosenheim, Ltd.*, 862 F.3d at 1287.

109. *Id.* at 1288.

case, "it could not be said that the arbitrator even arguably interpreted the parties' contract."[110]

Second, another U.S. Court of Appeals reached a different conclusion with respect to a similar arbitration agreement. In *Polimaster Ltd. v. RAE Systems, Inc*, the parties' agreement provided that disputes that could not be settled by means of negotiation "should be settled by means of arbitration at the defendant's side."[111] The parties agreed that "side" meant "site," that is, the geographical location of the defendant's place of business.[112] When disputes arose, Polimaster brought a JAMS arbitration in California (RAE's site),[113] but expressly reserved its position that no counterclaim could be brought against it on the grounds that all claims against it had to be brought in Belarus (Polimaster's site). RAE nevertheless filed counterclaims in the California-seated arbitration.[114]

The arbitrator concluded that the parties' agreement did not specify where counterclaims should be brought and looked to fill this perceived gap in the parties' agreement by applying procedural rules regarding counterclaims, which he drew from the Federal Rules of Procedure, the California Rules of Civil Procedure, and the JAMS Rules.[115] The arbitrator decided that, as a matter of efficiency and fairness, it did not make sense for RAE to bring counterclaims in Belarus when they were almost identical to RAE's affirmative defenses against Polimaster's claims in the arbitration in California.[116] RAE subsequently prevailed on its counterclaims and the district court confirmed the arbitrator's award.[117]

On appeal, however, the Court of Appeals reversed and refused to recognize the award, citing Article V(1)(d), and concluded that "the arbitral procedure was not in accordance with the agreement of the parties."[118] The Court held that the par-

110. *Id.* at 1289.

111. *See* Polimaster Ltd. v. Rae Sys., Inc., 623 F.3d 832, 834 (9th Cir. 2010) ("9.2 In case of failure to settle the mentioned disputes by means of negotiations they should be settled by means of arbitration at the defendant's side.").

112. *Id.*

113. The Judicial Arbitration and Mediation Services, Inc. (JAMS) is a U.S.-based for-profit alternative dispute resolution organization.

114. *Polimaster Ltd.*, 623 F.3d at 835.

115. *Id.* at 835.

116. *Id.*

117. *Id.*

118. *Id.* at 836.

ties' agreement was not ambiguous, and that it clearly required "all requests for affirmative relief, whether styled as claims or counterclaims, be arbitrated at the defendant's site."[119] A dissenting opinion observed, with considerable force, that the majority's conclusion that the parties' agreement on the arbitral seat was unambiguous was belied by the fact that the arbitrator, the district court, and the dissent all disagreed with the majority's interpretation of the agreement.[120] The dissent concluded, again with considerable force, that "as a result of its refusal to recognize the ambiguity of the contractual language, the majority opinion usurps the arbitrator's authority to interpret an ambiguous contractual term."[121]

The better approach is that of the Court of Appeals in *Bamberger Rosenheim*. Consistent with the substantial weight of U.S. authority,[122] where a tribunal has plausibly interpreted the procedural terms of the parties' arbitration agreement, a court should defer to that interpretation in both annulment and recognition proceedings except in cases where the agreement is clear and unambiguous. By contrast, the majority in *Polimaster Ltd*. adopted a highly unsatisfactory approach, straining to conclude that a fairly obviously ambiguous agreement was clear and then second-guessing the tribunal's interpretation of that provision. In so doing, the Court of Appeals implicitly found that the arbitral tribunal, the district court, and the dissenting circuit judge all misunderstood a supposedly unambiguous contract. The correct standard, which is adopted by most U.S. decisions under Article V(1)(d) and the FAA, is one of substantial deference to an arbitral tribunal's or institution's interpretation of an ambiguous, incomplete or otherwise defective procedural agreement; application of that standard in *Polimaster Ltd*. would have avoided both the court's implausible conclusion that the parties' agreement was unambiguous and the resulting "usurp[ation of] the arbitrator's authority to interpret an ambiguous contract term."[123]

Third, a recent U.S. Court of Appeals decision in *Northrup Grumman Ship Systems v. Ministry of Defense of the Republic of*

119. *Id.* at 837.
120. *Id.* at 844.
121. *Id.*
122. *See supra* at 12–15 (discussing procedures and grounds for non-recognition of awards under the New York Convention, *supra* note 1).
123. *Polimaster Ltd.*, 623 F.3d at 844.

Venezuela considered whether the court should recognize an award that was made in a different arbitral seat than that specified in the agreement.[124] In that case, the arbitration agreement between Northrup Grumman and the Venezuelan Ministry of Defense contained a provision fairly clearly specifying Caracas, Venezuela as the arbitral seat.[125] After events in Venezuela following Hugo Chávez's rise to power, however, Northrop Grumman argued that the parties' agreement on Caracas was invalid.[126] Following a series of disputes in U.S. courts, the tribunal ruled that the parties' agreement on Caracas as the seat was impracticable and instead chose Rio de Janeiro, Brazil as the arbitral seat.[127] The tribunal then made an award in favor of Northrup Grumman, which sought recognition of the award in the United States.[128]

The Venezuelan Ministry of Defense resisted recognition of the award under Article 5(1)(d) of the Inter-American Convention on International Commercial Arbitration (which is identical to Article V(1)(d) of the New York Convention),[129] arguing that the arbitration had not been conducted in accordance with the parties' agreement on the arbitral seat.[130] The Court of Appeals rejected Venezuela's defense and recognized the award, holding that its review of the tribunal's decision to move the arbitral seat was "very deferential."[131] The court concluded that the tribunal had properly exercised its authority in determining the arbitral seat,[132] noting that, following extraordinary

124. Northrop Grumman Ship Sys. v. Ministry of Def. of Venezuela, 850 F. App'x 218 (5th Cir. 2021).

125. *Id.* at 221.

126. *Id.*

127. *Id.* at 224.

128. *Id.*

129. *Cf.* Inter-American Convention on international commercial arbitration, art. 5(1)(d), Jan. 30, 1975, 1438 U.N.T.S. 245. [hereinafter the Panama Convention] with Art. V(1)(d) of the New York Convention, *supra* note 1. The FAA's third chapter, §§ 301–07, incorporates the Panama Convention, and it is broadly similar to the New York Convention, the main difference being that it generally governs international arbitrations in the Americas. However, the Panama Convention and New York Convention have "substantively identical" provisions regarding the enforcement of arbitral awards. TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 933 (D.C. Cir. 2007).

130. *Northrop Grumman*, 850 F. App'x at 230; Panama Convention, *supra* note 129, art. 5(1)(d).

131. *Northrop Grumman*, 850 F. App'x at 225.

132. *Id.* at 230.

changes in Venezuela, the tribunal had relocated the arbitral seat to "safeguard both the neutrality and integrity of the arbitration" given the impracticable conditions in Venezuela.[133]

The Court of Appeals' decision accorded the arbitral tribunal's application of the parties' agreement substantial deference. That was true notwithstanding the fact that the case did not involve interpretation of an ambiguous or internally-contradictory arbitration agreement; the parties' selection of the arbitral seat was unambiguous and the case instead involved application of disputed rules of contract law (i.e., impracticability and changed circumstances) to the terms of that agreement. In these circumstances, according the arbitrators' ruling substantial deference (as the U.S. court did) is arguably not required by the New York Convention—but nonetheless reflects sound policy and good judgment.

2. *Singapore Court of Appeal: Judicial Excess*

In contrast to the weight of U.S. authority, the Singapore Court of Appeal's decision in *ST Group Co. Ltd v. Sanum Invs. Ltd.* is a recent example of judicial misapplication of Article 36(1)(a)(iv) of the UNCITRAL Model Law, and by implication, Article V(1)(d) of the Convention.[134] There, the Court adopted the untenable view that the arbitral tribunal's interpretation of a concededly ambiguous agreement on the arbitral seat was not entitled to any judicial deference whatsoever in a subsequent recognition proceedings.

The underlying dispute in *ST Group* arose from a joint venture agreement between several Lao individuals and entities (the "Lao parties") and Sanum Investment Ltd. ("Sanum") for the establishment of gaming facilities in Laos. Sanum initiated arbitral proceedings when the Lao parties refused to turn over ownership of one of the gaming facilities, the Thanaleng Slot Club, as agreed.[135] Two contracts between the parties arguably applied to the dispute, a "Master Agreement," and a subsequently-concluded "Participation Agreement." The Participation Agreement provided for arbitration under the rules of the Singapore International Arbitration Centre ("SIAC"), seated in

133. *Id.*
134. ST Grp. Co. v. Sanum Invs. Ltd., [2019] SGCA 65 (Sing. Ct. App.).
135. *Id.* ¶ 16.

Singapore, with a tribunal of three arbitrators, while the Master Agreement was ambiguous, providing only that the parties would "arbitrate [a] dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC."[136]

In its Notice of Arbitration, Sanum took the position that the arbitration was subject to the SIAC Rules and that Macau was the seat of the arbitration.[137] The Lao parties objected in correspondence with SIAC, arguing that SIAC arbitration was not in conformity with the arbitration clause in the Master Agreement.[138] After consideration, SIAC informed the parties it was *prima facie* satisfied that a valid arbitration agreement under the SIAC Rules existed (with a final decision on this issue being left for the arbitral tribunal).[139] Thereafter, however, the Lao parties did not participate further in the arbitration.[140]

In its subsequent award, the arbitral tribunal ruled that it had jurisdiction to determine the claims made by Sanum against the Lao parties because they were signatories to the Master Agreement and/or the Participation Agreement. In the tribunal's view, the subsequently-concluded Participation Agreement "amplifie[d] and supplement[ed] the dispute resolution procedure set out in the Master Agreement."[141] The tribunal also concluded that the dispute arose from both agreements. Further, the tribunal held that Clause 19 of the Participation Agreement specifically provided for SIAC arbitration in Singapore and, accordingly, the tribunal was satisfied that Singapore (rather than Macau, as initially indicated by the Claimants) was the seat of arbitration.[142] The tribunal consulted Sanum on this point during the arbitration, and Sanum did not object to the tribunal holding the arbitral seat to be Singapore, instead agreeing that "the weight of evidence suggests that [the seat] is indeed Singapore."[143] On the merits, the tribunal decided for Sanum and awarded damages amounting to US$200 million for breach of contract, as well as further sums

136. *Id.* ¶¶ 8–11.
137. *Id.* ¶ 20.
138. *Id.* ¶ 21.
139. *Id.* ¶ 22.
140. *ST Grp. Co.*, SGCA 65 ¶ 22.
141. *Id.* ¶ 24.
142. *Id.*
143. *Id.*

for legal expenses and the costs of the arbitration. The tribunal also awarded interest on the sums awarded.[144]

Sanum sought to enforce the award in Singapore and the Lao parties resisted on the grounds that the arbitral tribunal had lacked jurisdiction and had not complied with the arbitral procedure agreed by the parties. The Singapore High Court held that it would review jurisdictional objections *de novo*.[145] The Lao parties argued that the tribunal lacked jurisdiction because neither the Master Agreement nor the Participation Agreement had anything to do with the turnover of the Thanaleng Slot Club; in turn, Sanum replied that the dispute arose under both agreements. The High Court disagreed with both positions. It held that the Participation Agreement did not contain any obligation to turn over the club, but that this obligation did exist in the Master Agreement. Accordingly, the Court held that the tribunal had jurisdiction under the Master Agreement's arbitration agreement.[146]

The Singapore High Court then examined the Lao parties' two procedural objections under Article 36(1)(a)(iv) of the UNCITRAL Model Law. First, the Lao parties argued that the seat of the arbitration should have been Macau, rather than Singapore. Second, the Lao parties argued the tribunal should have consisted of one arbitrator rather than three. The High Court did not indicate the standard of review it would use in reviewing these two procedural objections.[147]

To identify the proper arbitral seat, the Court referred to its earlier analysis of whether the parties had agreed to arbitration under the SIAC Rules. That analysis focused on the language

144. *Id.* ¶ 25.

145. Sanum Invs. Ltd. v ST Grp. Co, Ltd, [2018] SGHC 141 ¶ 39 (Sing. High Ct.).

146. *Id.* ¶¶ 63, 107. In reaching this conclusion, the High Court rejected the tribunal's approach of reconciling the arbitration clauses in the two agreements. The Court observed that "in determining its own jurisdiction . . . the tribunal must have combined and reconciled the inconsistencies between Clause 2(10) of the Master Agreement and Clause 19 of the Participation Agreement." *Id.* ¶ 61. The High Court rejected this approach: "While the Participation Agreement . . . makes reference to the Master Agreement, the reference serves only to incorporate the terms of the Master Agreement into the Participation Agreement . . . but the converse situation is not true. . . . Accordingly, any suggestion that Clause 2(10) of the Master Agreement and Clause 19 of the Participation Agreement . . . should be combined and reconciled must be rejected." *Id.* ¶ 62.

147. *Id.* ¶ 109.

of Clause 2(10) of the Master Agreement, which provided for arbitration "using an internationally recognized mediation/arbitration company in Macau, SAR PRC." The Court observed that this provision was ambiguous. That observation was clearly correct. The language of the parties' clause departed from all leading model arbitration clauses, both those recommended by arbitral institutions and commentators, and did so in a poorly-drafted manner; indeed, it is difficult to determine what, if anything, the parties intended by this provision with respect to their selection of the arbitral seat.

Faced with ambiguity, the High Court set out the three possible interpretations of Clause 2(10):

> (a) Parties shall arbitrate such dispute using an internationally-recognised arbitration company in Macau ("Interpretation (a)").
>
> (b) Parties shall arbitrate such dispute using an international arbitration company recognised in Macau ("Interpretation (b)").
>
> (c) Parties shall arbitrate such dispute, using an internationally recognised arbitration company, in Macau ("Interpretation (c)").[148]

Sanum had argued for Interpretation (b). This interpretation permitted arbitration under the SIAC Rules, because SIAC was an "international arbitration company" recognized in Macau, and because Clause 2(10) did not specify any particular seat, making it possible for the tribunal to have chosen Singapore seat as the default seat under the SIAC Rules or by reading Clause 2(10) together with Article 19 of the Participation Agreement. Under the latter interpretation, Article 19 would fill the gap in Clause 2(10) with respect to the seat.

The High Court rejected this reading of Clause 2(10) because, among other reasons, it would assertedly require "amending the words and sentence structure of Clause 2(10)."[149] The Court also thought that the Participation Agreement was not relevant to the dispute because "the failure to 'turnover' the Thanaleng Slot Club was a breach of the Master Agreement only."[150]

148. *Id.* ¶ 94.
149. *Id.* ¶ 98.
150. *Id.*

The Court also rejected Interpretation (a) because there was no international arbitration company (at all) physically located in Macau.[151] The Court was therefore left with Interpretation (c), which would allow the party initiating arbitration to choose an "internationally recognized" arbitration company while fixing Macau as the seat of arbitration. The Court also said that this was the only interpretation "sufficiently detailed and precise to be enforced as an arbitration agreement without straining the language of the clause."[152] In addition to holding that the tribunal selected the wrong arbitral seat, the High Court also held that there should have been only one arbitrator rather than three (further discussed in Section III.B.1 below).

Finally, however, the High Court concluded that these breaches of the parties' arbitration agreement should only lead to non-recognition of the award if the Lao parties could show they were harmed by them, thus "demonstrating the seriousness of the breach (*i.e.*, the consequences of having an incorrectly seated arbitration or incorrect number of arbitrators on the arbitral procedure.)."[153] Because the Lao parties did not "produce any evidence of prejudice arising out of the procedural irregularities in the Award," the High Court confirmed the award.[154] (The Court did not consider whether, by failing to participate in the arbitration or object to either the number of arbitrators or the tribunal's selection of the arbitral seat, the Lao parties had waived objections to that selection.)

The Singapore Court of Appeal reversed, in a lengthy opinion that seriously misinterprets Article 36(1)(a)(iv) of the Model Law in several material respects. The Court of Appeal agreed with the High Court that the dispute arose from the Master Agreement and that the Participation Agreement was therefore supposedly not relevant.[155] Like the High Court, the Court of Appeal also observed that it was "common ground

151. *Sanum Invs.*, SGHC 141 ¶ 101.

152. *Id.* ¶ 106.

153. *Id.* ¶ 114. The Court noted that "material prejudice is ordinarily required for non-recognition (which by implication, goes towards non-enforcement)." *Id.* ¶ 112 (citing Gary B. Born, International Commercial Arbitration 3560–5 (2d ed. 2014)).

154. *Sanum Invs.*, SGHC 141 ¶ 112.

155. *Id.* ¶ 53. Indeed, the Court of Appeal concluded that in the arbitration Sanum did not rely on the Participation Agreement "so much for the Dispute as for the arbitration clause it contained which specified arbitration at the SIAC, Singapore in accordance with [the] SIAC rules." *Id.* at ¶ 52.

that the last paragraph of [Clause] 2(10) [wa]s ambiguous,"[156] while also concluding that the most natural interpretation of the clause was the one adopted by the High Court, namely, that the parties' agreed arbitral seat was Macau.[157]

Unlike the High Court, however, the Court of Appeal did not consider it necessary to find specific prejudice to refuse enforcement of the award. The Court reasoned that the seat of the arbitration is a key aspect of an arbitration agreement.[158] The Court declared, rightly, that arbitrations "derive their force and binding character from the parties' freely chosen agreement," and then went on to say:

> Bearing this in mind and the legal consequences of differing choices of seat, when the parties do make such a choice as part of their arbitration agreement, the court must give the same full effect . . . [O]nce an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions because such an award had not been obtained in accordance with the parties' arbitration agreement.[159]

Unfortunately, and uncharacteristically,[160] the Court of Appeal's decision in *ST Group* illustrates how *not* to apply either Article V(1)(d) of the New York Convention or Article 36(1)(a)(iv) of the UNCITRAL Model Law. That is true in multiple important respects.

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156. *ST Group*, [2019] SGCA 65 ¶ 79.

157. *Id.* at ¶ 85.

158. *Id.* at ¶ 103. The Court of Appeal discussed the importance of the arbitral seat in international arbitration at some length, observing that the "choice of an arbitral seat is one of the most important matters for parties to consider when negotiating an arbitration agreement because the choice of seat carries with it the national law under whose auspices the arbitration shall be conducted." *Id.* at ¶ 96. . . . The Court of Appeal added: "Gary Born explains . . . that the arbitral seat is the legal or juridical home of the arbitration and that therefore the choice results in a number of significant legal consequences. Under the Model Law it is the law of the seat that governs a number of important matters relating to the arbitration." *Id.* at ¶97 (citing GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (2d ed. 2015).

159. *Id.* at ¶ 102.

160. The Singapore courts have rendered a number of well-reasoned and thoughtful decisions involving international arbitration. The *ST Group* ruling is an unusual exception.

First, the Singapore courts applied the wrong standard of review to the arbitral tribunal's selection of Singapore as the arbitral seat. For its part, although not expressly addressing the issue, the High Court appeared to apply a *de novo* standard of review to the question of whether the arbitral tribunal had properly seated the arbitration in Singapore, including to the tribunal's interpretation of the parties' putative agreement regarding the arbitral seat. In turn, the Court of Appeals also did not indicate what standard of review it applied to the issue, but again apparently applied a *de novo* standard—simply interpreting the parties' agreement regarding the arbitral seat without any deference to the arbitrators' construction of the provision.

As discussed above, that type of *de novo* review of an arbitral tribunal's procedural rulings is exactly what the New York Convention and UNCITRAL Model Law do not authorize national courts to do. Rather, in cases of ambiguous or incomplete procedural agreements, both the Convention and the Model Law mandate deference to the arbitral tribunal's (and arbitral institution's) interpretation of the parties' agreement. That ensures that the more experienced, expert and informed decisionmakers—which are, in the case of procedural issues, such as the choice of the arbitral seat, the arbitral tribunal and arbitral institution—will be responsible for selecting the arbitral seat. It also ensures that the parties' shared desire for efficiency, expedition and finality in the resolution of their disputes will be fulfilled, rather than frustrated by requiring re-litigation of a dispute years after it has been resolved once.

The Court of Appeal's description of the vital role that the arbitral seat plays in an arbitration is correct. And if the parties' contractual choice of an arbitral seat had been clear, the tribunal would have been obliged to honor it. Critically, however, the Court of Appeal ignored its own (obviously correct) conclusion that Clause 2(10) was ambiguous; given that conclusion, however, it was the arbitral tribunal, not the courts, that should have had the primary authority to interpret and apply the parties' agreement. In focusing on what it considered the proper interpretation of an ambiguous agreement with respect to the seat, the Court of Appeal failed to respect a central aspect of the Convention, the Model Law and most arbitration agreements—namely, that the arbitral tribunal has the primary authority to interpret and apply the procedural provisions of the parties'

agreement, particularly in cases of ambiguity. By refusing to recognize the resulting arbitral award, the Court of Appeal was not safeguarding the parties' autonomy, as it asserted, but was rather undermining both that freedom and the terms of the Model Law and the Convention.

Second, as also discussed above, the Singapore courts properly concluded, as all parties had conceded, that the parties' arbitration clause was "ambiguous" with respect to the selection of the arbitral seat. As already noted, that observation was obviously correct. Nonetheless, both the Court of Appeal and High Court then proceeded to ignore the arbitral tribunal's entirely plausible interpretation of the parties' ambiguous agreement, instead substituting their own construction of that agreement.

Here, the Singapore courts' interpretation of the parties' agreement on the arbitral seat illustrates why deference to a tribunal's ruling on this issue is both appropriate and necessary. There is no question but that Clause 2(10) was very poorly drafted (providing that the parties agreed to "arbitrate [a] dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC"[161]); on any view, it is very difficult to say what this unusual language was intended to mean.

The Singapore courts concluded that Clause 2(10) constituted the selection of an arbitral seat (in Macau). Even apart from deference to the arbitral tribunal, however, the arbitrators fairly clearly had the better of the various efforts to give meaning to Clause 2(10). Notably, nothing in Clause 2(10) refers to a "seat" or "place" of arbitration (which is how arbitral seats are specified in all model and recommended arbitration clauses[162] and virtually all clauses used in practice), or even to a "venue," "situs," "location," "forum," or the like. In that regard, it also bears emphasis that the parties knew perfectly well how to select an arbitral seat (having done so very clearly in their Participation Agreement),[163] but did not do so in Clause 2(10).

161. *ST Grp. Co.*, SGCA 65 ¶ 8–11.

162. Born (6th ed. 2021), *supra* note 9, § 3[A][4][a]; Born (3d ed. 2021), *supra* note 3, ch.14 § 14.01. *See* Friedland, *supra* note 9, at 65 ("The way to provide for the place of arbitration is, simply, to add a sentence to the arbitration clause, as follows: 'The place of arbitration shall be [city and country].'").

163. ST Grp. Co. v. Sanum Invs. Ltd., [2019] SGCA 65 (Sing. Ct. App.), ¶ 11. The Participation Agreement contained a dispute resolution clause which stated "If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/

It takes a considerable interpretive leap to transmute the selection of an arbitral institution in Macau into the selection of an arbitral seat in Macau, as the Court of Appeal did. That leap is (just barely) conceivable, but the much more sensible interpretation of the parties' agreements is that the parties chose an arbitral institution in Macau, and left it to that institution and/or the arbitral tribunal to select the arbitral seat, which they did not specify.

Part of the reason for courts to defer to the arbitrators' decision as to the arbitral seat is their greater expertise with respect to matters of arbitral procedure and their greater familiarity with the evidence and the parties' agreements. The tribunal's conclusion that, in context, the parties had left the choice of arbitral seat under Clause 2(10) to the arbitrators is fairly clearly the more sensible construction of what was, on any view, a poorly-drafted agreement. Substituting the arbitrators' conclusion with a judicial construction, imposed after-the-fact by national court judges outside the arbitral process, risks not only usurping the arbitrators' procedural discretion, but also reaching inadequately-informed, and therefore erroneous and unpredictable, results.

Failing to accord the arbitrators' procedural rulings deference can have particularly unsatisfactory consequences when this decision is imposed, as often occurs, years after the arbitral process has concluded, requiring expensive and time-consuming re-litigation of a dispute that was already resolved. *ST Group* illustrates these unfortunate consequences with great clarity. Even if one thought, incorrectly, that the Singapore courts' interpretations of Clause 2(10) were correct, it would be impossible to have any real confidence that this was what the parties genuinely intended; Clause 2(10) started out being ambiguous and no matter how many interpretive tools are employed, that is also where it ends up. In those circumstances, denying recognition of an otherwise valid award, and requiring relitigation of the dispute, produces very little by way of benefits, even if one were to accept the Court of Appeal's interpretation of Clause 2(10), while imposing very substantial costs.

Third, in the Court of Appeal, Sanum argued for the first time that the Lao parties waived objections to the selection of

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arbitration at the Singapore International Arbitration Centre (SIAC), Singapore and the rules of SIAC shall be applied." *Id.* ¶ 8.

the arbitral seat. The Court of Appeal dismissed this argument, holding with little analysis that the doctrine of waiver could not be applied to prevent the Lao parties from raising objections to the choice of Singapore as the arbitral seat even where they had chosen not to participate in the arbitration.[164] It is very difficult to see how this could be the case.

As noted above, procedural objections are almost always considered waived or precluded if not raised during the arbitration.[165] In the words of one court: "a party . . . who wishes to rely on a non-compliance with the rules governing an arbitration shall [raise its objection] promptly and shall not proceed . . . as if there had been no non-compliance, keeping the point up his sleeve for later use."[166] (There are limited circumstances, involving issues of public policy and/or non-arbitrability, where concepts of waiver arguably do not apply,[167] but the *Sanum* case presented no such issues.)

In *ST Group*, the Lao parties refused to participate in the arbitration once SIAC notified the parties that it was *prima facie* satisfied there was a valid arbitration agreement under the SIAC Rules. The Lao parties had every opportunity to participate in the ensuing arbitration, and to object to the arbitral tribunal's subsequent choice of the arbitral seat, but they did not avail themselves of those opportunities. As a consequence, they waived any objections to the procedural choices the tribunal subsequently made.[168] The Singapore courts ignored that waiver, instead denying recognition of an otherwise perfectly valid arbitral award years after it was made.

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164. ST Grp. Co. v. Sanum Invs. Ltd., [2019] SGCA 65 ¶ 90–92 (Sing. Ct. App.).

165. *See supra* Section I.C.

166. Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., XXIV Y.B. Comm. Arb. 652, 662 (H.K. Ct. Fin. App. 1999) (H.K.).

167. Born (3d ed. 2021), *supra* note 3, ch.15 § 15.05; Fouchard, Gaillard, Goldman on International Commercial Arbitration ¶¶ 565 *et seq.* (Emmanuel Gaillard & John Savage eds., 1999).

168. *See, e.g.*, Hainan Mach. Imp. & Exp. Corp. v. Donald & McArthy Pte Ltd., [1995] SGHC 232, XXII Y.B. Comm. Arb. 771, 776 (Sing. High Ct. 1995) ("The defendants themselves were given every opportunity by the Commission to present their case in reply to the claim. They chose deliberately to reject that opportunity. It appeared to me that having chosen not to attend they had very little right to criticise the way in which the arbitration had been conducted.").

In sum, the Singapore courts made a series of significant errors in the application of the Model Law, and by implication the New York Convention, in *ST Group*. Those courts professed to respect the parties' autonomy, but in reality disregarded both the terms and objectives of the Model Law and New York Convention, and of the parties' agreement to arbitrate. In substituting their own interpretation of an admittedly ambiguous agreement for that of an expert arbitral tribunal, the Singapore courts very likely misconstrued the parties' agreement. More fundamentally, however, those courts inserted their own post hoc interpretation of the parties' ambiguous agreement into the arbitral process—resulting in, at very best, no better construction of the parties' agreement, which resulted in annulment of an otherwise valid award, arrived at after seven years of litigation. That result badly frustrates the objectives of both the Convention and Model Law, and of the parties' agreement to arbitrate.

B. *Number, Method of Appointment, and Qualifications of Arbitrators*

The selection of the arbitrator(s) in international arbitrations is, in many cases, made by an arbitral institution. The institution's role in constituting the arbitral tribunal is typically provided for either by institutional arbitration rules, incorporated into the parties' arbitration agreement, or by the parties' agreement itself. In these cases, Article V(1)(d) of the New York Convention and Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the UNCITRAL Model Law may apply if the terms of the parties' arbitration agreement regarding the number, method of selection or required qualifications of the arbitrators are not complied with.

As in other contexts, national courts will typically defer to an institution's decision in this regard. In *Belize Bank Ltd. v. Government of Belize*, for example, the District Court held that it was within the LCIA's discretion to reject a party's request to reconstitute the arbitral tribunal after the resignation of one of the arbitrators.[169] The court stated that "[i]t is not for this court . . . to second-guess the Division's interpretation of LCIA's

169. Belize Bank Ltd. v. Government of Belize, 191 F. Supp. 3d 26, 37 (D.D.C. 2016).

conflict rules."[170] Similarly, in *Devas Multimedia Private Ltd. v. Antrix Corp.*, the District Court rejected respondent's argument that the ICC's appointment of an arbitrator on the respondent's behalf was contrary to the parties' agreement and violated Article V(1)(d). The court held that the respondent's "repeated refusal to appoint an arbitrator . . . essentially operated as a forfeiture of its right to do so."[171] The court concluded by holding that the ICC "properly made the appointment in accordance with the ICC Rules and the Agreement itself, which expressly incorporated the ICC Rules."[172]

In contrast to these decisions, a different approach was taken by the courts in the decisions described below. This latter approach is wrong, again misapplying Article V(1)(d) of the Convention.

1. *Singapore Court of Appeal: Misapplying Article V(1)(d)[173] Again*

In addition to the choice of seat, the Singaporean courts in *ST Group* (discussed above) also held that the arbitration had proceeded with the wrong number of arbitrators, specifically, three instead of one. The High Court held that because Clause 2(10) does not indicate the number of arbitrators, "the default would be prescribed by the institutional rules of the parties[']chosen institution."[174] In turn, Article 6.1 of the SIAC Rules 2013 provides that an arbitration should proceed with one arbitrator unless, in the discretion of the Registrar, the complexity of the case or quantum involved warrants the appointment of three arbitrators.[175] The SIAC Registrar in *ST Group* appointed

170. *Id.*

171. Devas Multimedia Priv. Ltd. v Antrix Corp., No. C18-1360 TSZ, 2020 WL 6286813, at *5 (W.D. Wash. Oct. 27, 2020).

172. *Id.* at *13.

173. Strictly speaking, the Singapore courts misapplied Article 36(1)(a)(iv) of the Model Law, not Article V(1)(d) of the New York Convention. The analysis is the same, however, under either provision.

174. Sanum Invs. Ltd. v ST Grp. Co, Ltd, [2018] SGHC 141 ¶ 110 (Sing. High Ct.).

175. Sing. Int'l Arb. Ctr., Arbitration Rules of the Singapore International Arbitration Center art. 6.1 (5th ed. 2013) [hereinafter 2013 SIAC Rules] ("A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators.").

three arbitrators in accordance with Clause 19 of the Participation Agreement. The High Court held that, absent the Participation Agreement, which it had concluded was irrelevant to the dispute, the arbitration would have proceeded with one arbitrator by default under Article 6.1 of the SIAC Rules. Accordingly, the High Court held that the Registrar's "appointment of a three-member tribunal was incorrect."[176]

The Court of Appeal agreed. The Court rejected Sanum's argument that the appointment of three arbitrators should be upheld on the grounds that the Registrar had the discretion to appoint three arbitrators. The Court of Appeal found that the Registrar's discretion was beside the point because the tribunal "was not constituted pursuant to any such exercise of discretion."[177]

There were no practical consequences from the Singapore courts' ruling on the number of arbitrators. The High Court had concluded that this procedural error was insufficient to justify non-recognition of the award without a showing of prejudice (which it held was lacking).[178] The Court of Appeal did not reach this question because, as discussed above, it held that the award should not be enforced because the tribunal's choice of seat was contrary to the parties' agreement.[179]

The Singapore courts' decisions regarding the number of arbitrators are impossible to justify under either Article V(1)(d) of the Convention or Articles 34(2)(a)(iv) or 36(1)(a)(iv) of the Model Law. They again uncharacteristically committed a number of important errors in applying these provisions.

First, as discussed above, only material violations of the parties' agreed arbitral procedures warrant non-recognition or annulment of an arbitral award.[180] It is very difficult to con-

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Article 6.1 of the 2013 SIAC Arbitration Rules was updated and renamed as Article 9.1 in the 2016 SIAC Arbitration Rules. Sing. Int'l Arb. Ctr., Arbitration Rules of the Singapore International Arbitration Center art. 9.1 (6th ed. 2016) [hereinafter 2016 SIAC Rules] ("A sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed; or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators.").

176. *Sanum Invs.,* SGHC 141 ¶ 110.

177. ST Grp. Co. v. Sanum Invs. Ltd., [2019] SGCA 65 ¶ 89 (Sing. Ct. App.).

178. *Sanum Invs.*, SGHC 141 ¶ 114.

179. *ST Grp. Co.,*SGCA 65 ¶¶ 102, 103, 107, 108.

180. *See supra* Section I.C.

clude that such a material violation of the parties' agreement occurred in *ST Group*. Clause 2(10) is silent as to both the number of arbitrators and the method of appointment of the arbitrators, because that provision did not refer to the SIAC Rules; the SIAC Rules were applicable in the arbitration only because the claimant (Sanum) commenced the arbitration under those Rules, pursuant to the ambiguous provisions of the parties' poorly-drafted arbitration agreement. As a consequence, even assuming that the SIAC Registrar's selection of three arbitrators (rather than one) was a violation of the SIAC Rules, it was at worst only a minor non-compliance with the parties' arbitration agreement. The selection of three arbitrators was not contrary to an express or implied choice by the parties of the number of arbitrators, nor contrary to incorporated provisions of institutional rules making such a choice.

Instead, the selection of three arbitrators was, at worst, contrary only to a non-mandatory default rule, in turn incorporated only by virtue of the claimant's after-the-fact choice of institutional rules. Elevating that sort of asserted non-compliance with the parties' agreement to arbitrate into a violation of either Article V(1)(d) or Articles 34(2)(a)(iv) or 36(1)(a)(iv) is a considerable leap that accords little weight to the parties' underlying objectives of finality and expedition in agreeing to arbitrate.

Second, and in any event, the SIAC Registrar's selection of three arbitrators was not a violation of the SIAC Rules, particularly given the deference properly due an arbitral institution's application of its rules. The Singapore courts held that, absent its improper reliance on the Participation Agreement, the SIAC Registrar would have appointed a sole arbitrator under the SIAC Rules' default provision. That conclusion is at best entirely speculative and at worst plainly wrong: In fact, the SIAC Rules provide that, where the parties have not agreed upon the number of arbitrators, then the SIAC Registrar has discretion as to the number of arbitrators.[181] As a consequence, the selection of three arbitrators did not violate any default rule; the default

181. 2016 SIAC Rules, *supra* note 175, art. 9.1 ("A sole arbitrator shall be appointed in any arbitration under these Rules unless the parties have otherwise agreed or it appears to the Registrar, giving due regard to any proposals by the parties, that the complexity, the quantum involved or other relevant circumstances of the dispute, warrants the appointment of three arbitrators.").

rule was inapplicable because the SIAC Registrar had discretion as to the choice of the number of arbitrators.

Moreover, there is no indication in the Singapore courts' decisions that the SIAC Registrar would have exercised its discretion in any different way in the absence of the Participation Agreement. On the contrary, it is clear that almost any international arbitral institution, and certainly SIAC, would have exercised its discretion to appoint a three-person tribunal, not a one-person tribunal, in a case like *ST Group*.

The arbitration in *ST Group* was complex and large, involving multiple parties (including state-related parties), multiple agreements and claims in excess of $200 million. In these circumstances, the obvious, and virtually inevitable, choice of the number of arbitrators was three, not one. There is a wealth of institutional experience and commentary demonstrating that these factors virtually always result in appointment of a three-person tribunal.[182] The Singapore courts ignored that experience.

Furthermore, the Court of Appeal misunderstood the role and authority of arbitral institutions in the arbitral process. As noted above, the request for arbitration in *ST Group* invoked the arbitration agreements in both the Master Agreement and the Participation Agreement.[183] The SIAC Registrar had no authority to dismiss either the request for arbitration or Sanum's

182. *See* BORN (3d ed. 2021), *supra* note 3, ch.12 §12.02[D]; 2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Arbitration Rules ¶ 40 ("Without prejudice to other relevant circumstances that may lead to the constitution of a three-member arbitral tribunal, the Court will normally decide in favour of a sole arbitrator where the amount in dispute is less than US$ 10,000,000 and in favour of three arbitrators where the amount in dispute exceeds US$ 30,000,000."); U.N. Comm'n on Int'l Trade L., Report on the Work of Its Eighth Session, U.N. Doc. A/10017, ¶ 39 at 50 (1975) ("[I]t was stated that it was the commonly accepted practice in international commercial arbitration to have a tribunal with three arbitrators. Further, in a major arbitration involving a substantial sum of money, the presence of three arbitrators was necessary to ensure that the tribunal possessed a sufficient degree of competence and expertise."); BLACKABY ET AL., *supra* note 23, § 4.21 ("In practice, there is usually a preference for the appointment of three arbitrators in all but the smallest cases."); Wendy Miles, *Practical Issues for Appointment of Arbitrators*, 20 J. INT'L ARB. 219, 227 (2003) ("The accepted practice is that, unless a dispute is relatively straightforward and involves a reasonably small sum, three arbitrators are preferable to one.").

183. ST Grp. Co. v. Sanum Invs. Ltd., [2019] SGCA 65 ¶¶ 8–11 (Sing. Ct. App.).

invocation of the arbitration agreement in either Master Agreement or the Participation Agreement;[184] any such action was within the authority of the arbitral tribunal, not within SIAC's authority. Consequently, the SIAC Registrar was required to constitute an arbitral tribunal that could *potentially* satisfy the requirements of both the Master Agreement (not specifying the number of arbitrators) and the Participation Agreement (requiring a three-person tribunal). In these circumstances, the appropriate course was plainly to select a three-person tribunal which would comply with the provision of any arbitration agreement(s) that the arbitral tribunal eventually determined to be applicable. Again, the Singapore courts ignored these considerations (understandably, because those courts do not administer arbitrations or constitute arbitral tribunals).

The Singapore courts' conclusion that the SIAC Registrar had misapplied her own rules thus ignored both the institution's discretion in interpreting and applying the institution's rules and the virtually certain manner in which that discretion would have been exercised in practice. The courts' unfamiliarity with how international arbitrations are conducted under the SIAC (and other) institutional rules is understandable and, in a sense, excusable. But it again illustrates why courts in most jurisdictions accord substantial deference to institutions' applications and interpretations of their own rules and why the failure to do so in *ST Group* was a serious error.

Third, as with the seat of arbitration, both the Court of Appeal and the High Court were silent on the question of the award-debtor's waiver of objections to the selection of a three-person tribunal. That silence is surprising, because it would again appear fairly clear that the Lao parties waived any objection to the composition of the tribunal when they refused to participate in the arbitration. The Lao parties were informed of SIAC's determination that the tribunal would be composed

184. Under the 2013 SIAC Arbitration Rules, the only circumstance in which SIAC could decide not to refer a dispute to an arbitral tribunal would be if the SIAC Court of Arbitration found that it was not satisfied that *prima facie* a valid arbitration agreement existed. *See* 2013 SIAC Rules, *supra* note 175, art. 25.1. Note that Article 25.1 of the 2013 SIAC Arbitration Rules was updated and renamed as Article 28.1 in the 2016 SIAC Arbitration Rules.

Nothing in the SIAC Arbitration Rules would permit SIAC to otherwise dismiss or alter the Claimant's allegations.

of three arbitrators and invited to appoint an arbitrator.[185] They chose neither to object to the selection of a three-person tribunal nor to appoint an arbitrator, instead making no further submissions in the arbitration. It is virtually impossible not to regard this as a waiver of subsequent objections to the number of arbitrators.

2. *Shanghai Appellate Decision: Misapplying Article V(1)(d)*

Another misapplication of Article V(1)(d) occurred in *Noble Res. Int'l Pte Ltd. v. Shanghai Xintai Int'l Trade Co. Ltd.*,[186] which involved an application to recognize and enforce a Singaporean arbitral award in China. In *Xintai*, a Shanghai appellate court rejected SIAC's interpretation of its own institutional rules (which had been approved by the courts of the arbitral seat) and refused to recognize an award rendered by a sole arbitrator under SIAC's expedited arbitration procedure.[187] That decision fairly clearly misapplied the New York Convention.

The dispute in *Xintai* arose from a sale and purchase agreement (SPA) for iron ore, which incorporated a standard iron ore trade agreement. The standard agreement contained an arbitration clause that provided for SIAC arbitration under SIAC's then effective institutional arbitration rules with a tribunal of three arbitrators.[188]

When disputes arose, Noble commenced a SIAC arbitration, seated in Singapore, requesting that the arbitration be conducted on an expedited basis pursuant to Article 5.1 of the 2013 SIAC Rules. Article 5.1 of those Rules provided that SIAC had the authority to order expedited arbitration in cases where the value of the dispute is under SG$5 million dollars[189] (and in certain other cases).[190] Article 5.2 provided that in an expedited

185. *ST Grp. Co.*, [2019] SGCA 65 ¶ 23.

186. Noble Res. Int'l Pte Ltd v. Shanghai Xintai Int'l Trade Co. Ltd., XLII Y.B. Comm. Arb. 367 (Shanghai Interm. People's Ct. Aug. 11, 2017) (China).

187. *Noble Res.*, XLII Y.B. Comm. Arb. ¶ 10.

188. *Id.*

189. Which equates to approximately US$3.74 million.

190. 2013 SIAC Rules, *supra* note 175, art. 5.1 ("Prior to the constitution of the Tribunal, a party may file an application with the Registrar for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule, provided that any of the following criteria is satisfied: a. the amount in dispute does not exceed the equivalent amount of S$6,000,000,

proceeding certain procedures applied, aimed at providing an award in less than six months, including a provision that: "the case shall be referred to a sole arbitrator, unless the President determines otherwise."[191]

In *Xintai*, SIAC ruled that expedited arbitration was warranted and, after the SIAC President did not determine otherwise, referred the dispute to a sole arbitrator pursuant to Article 5.2 of the SIAC Rules. Xintai objected, and requested that the arbitration not be expedited and that the tribunal consist of three arbitrators. Xintai also indicated that it would refuse to participate in the arbitration if SIAC did not accept its proposal. SIAC did not accede to Xintai's request, and the arbitration proceeded before a sole arbitrator without Xintai's participation, with the arbitrator making an award in favor of Noble.[192]

Noble subsequently sought to enforce the award under the New York Convention in the Shanghai No. 1 Intermediate People's Court. The Court refused to recognize the award, citing Article V(1)(d) of the Convention and the fact that the arbitration was conducted by a sole arbitrator rather than three arbitrators. The Court acknowledged that the SIAC Rules provided for the possibility of an application of SIAC's expedited procedures, given the small amount in dispute and the fact that the parties' arbitration agreement provided for the application of the SIAC Rules without excluding the expedited procedures.[193]

Nonetheless, the Shanghai Court held that SIAC's expedited procedure rules did not mandate one arbitrator, but rather gave the Registrar discretion to appoint one arbitrator in expedited procedure cases. Accordingly, the Court reasoned that the Registrar had an obligation to exercise such discretion to appoint three arbitrators in accordance with the parties' arbitration agreement and that the Registrar's failure to do so warranted non-recognition of the award.[194] Like the Singapore Court of Appeal in *ST Group*, the Chinese court characterized

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representing the aggregate of the claim, counterclaim and any defence of set-off; b. the parties so agree; or c. in cases of exceptional urgency.").

191. 2013 SIAC Rules, *supra* note 175, art. 5.2(b). Note that Article 5.2(b) remains the same in the 2016 SIAC Arbitration Rules. 2016 SIAC Rules, *supra* note 175, art. 5.2(b).

192. *Noble Res.*, XLII Y.B. Comm. Arb. pp. 368–69.

193. *Id*, ¶ 6.

194. *Id*. ¶¶ 9–10.

its decision as safeguarding the parties' autonomy, declaring that "party autonomy is the cornerstone" of arbitration and that "the constitution of the Arbitral Tribunal is a fundamental procedure of arbitration."[195] Also like *ST Group*, however, the Shanghai Court's decision in *Xintai* erred badly in applying Article V(1)(d) of the Convention.

First, and most fundamentally, the Court accorded no deference to the arbitral institution's interpretation of its own institutional rules and, equally seriously, no deference to the interpretation of those rules by the courts of the arbitral seat (here, Singapore). As discussed above, the Convention mandates deference to arbitral institutions (and arbitral tribunals) in their interpretation and application of institutional arbitration rules.[196] That deference reflects the institution's (and tribunal's) greater experience with its rules, greater expertise in international arbitration and familiarity with the parties and their dispute. Failure to accord such deference violates both the Convention and the parties' arbitration agreement, which grant the arbitral institution and arbitral tribunal broad procedural discretion in interpreting and applying institutional rules.[197]

Here, there was at a minimum ambiguity as to how the parties' arbitration agreement and the SIAC Rules were to be interpreted. On the one hand, the parties' agreement provided for a three-person tribunal. On the other hand, that same agreement incorporated the SIAC Rules, including their expedited procedure provisions (which the parties could have, but did not, exclude); in turn, those procedures provided expressly for the possibility of a sole arbitrator, notwithstanding a contrary choice in the parties' agreement, in expedited procedure cases.[198] At a minimum, the parties' agreement was ambiguous as to which of these two provisions of the parties' agreement should be applied. And, as discussed above,[199] in cases of ambiguity, the arbitral institution's (or arbitral tribunal's) interpretation should be entitled to substantial deference.

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195. *Id.* ¶ 10.

196. *See supra* Section I.C.

197. *Id.*

198. 2013 SIAC Rules, *supra* note 175, art. 5.2. Note that Article 5.2 remains the same in the 2016 SIAC Arbitration Rules. 2016 SIAC Rules, *supra* note 175, art. 5.2.

199. *See supra* Section I.C.

Courts in other jurisdictions accord substantial deference to arbitral institutions' interpretations of their own institutional rules. Thus, in the words of one U.S. court: "Given the parties' designation of the AAA as the supervisory authority regarding the resolution of disputes under the agreement, the AAA's view of the meaning of its rules is of considerable significance."[200] Or, as another court decided, the ICC Court's determination on arbitrability must be "respected" when "[t]he parties have agreed to refer their dispute, including ultimately the question of arbitrability, to arbitration by the ICC under its particular rules."[201] This type of deference is particularly appropriate under Article V(1)(d), where national courts lack the expertise and procedural experience that arbitral institutions possess and where the Convention's pro-enforcement objectives are applicable. By failing to afford SIAC, and its interpretation of its own rules, deference, the Shanghai court misapplied Article V(1)(d) of the Convention.

Second, the Shanghai Court's interpretation of the SIAC Rules was fairly clearly erroneous, even apart from deference to SIAC's own interpretation of those rules. Those Rules clearly provided that, in expedited procedure cases, "the case *shall be referred to a sole arbitrator*, unless the President determines otherwise."[202] The SIAC Rules left no question but that, in expedited proceedings, this provision would generally qualify contrary specifications of the number of arbitrators in arbitration agreements.

Importantly, the SIAC Rules did not invalidate the parties' selection of three (or some other number of) arbitrators generally, but instead provided only that in certain small value cases, which had been expedited, the expedited procedure rules would permit appointment of a sole arbitrator. As SIAC concluded, in both *Xintai* and more generally the parties'

200. York Rsch. Corp. v. Landgarten, 927 F.2d 119, 123 (2d Cir. 1991). *See also* Belize Bank Ltd. v. Government of Belize, 191 F. Supp. 3d 26, 37 (D.D.C. 2016) (finding "no error in the LCIA's and the Division's rejection of Belize's demand to reconstitute the arbitral panel anew after Landau's resignation . . . [as the] decision was well within LCIA's 'complete discretion' under Article 11.1 [of the LCIA Arbitration Rules]").

201. Global Gold Mining, LLC v. Robinson, 533 F. Supp. 2d 442, 446 (S.D.N.Y. 2008).

202. 2013 SIAC Rules, *supra* note 175, art. 5.2 (emphasis added). Note that Article 5.2 remains the same in the 2016 SIAC Arbitration Rules. 2016 SIAC Rules, *supra* note 175, art. 5.2.

agreement to the SIAC Rules, without excluding or modifying their expedited procedure provisions, authorized SIAC to appoint a sole arbitrator in expedited procedure cases notwithstanding a general provision for a three-person tribunal.

This interpretation gives effect to both the parties' arbitration agreement (selecting, as a general matter, three arbitrators) and the SIAC expedited procedure rules (qualifying general provisions regarding the number of arbitrators in expedited proceedings).[203] In contrast, the Shanghai Court's interpretation of the parties' agreement as mandating three arbitrators without qualification denies effect to the SIAC expedited procedure rules, while also making expedited arbitrations very difficult or impossible to conduct in practice.

In any case, as noted above,[204] the Shanghai Court also erred in affording no deference to the Registrar's interpretation of the SIAC Rules. The parties' arbitration agreement selected SIAC, not the Shanghai Intermediate Court, as the administering institution for the arbitration. SIAC, not the Chinese court, had the authority to make these procedural decisions regarding the arbitration and to interpret its own institutional rules.

Third, the Shanghai court also ignored the position of Singaporean courts regarding the interpretation and application of the SIAC Rules in Singapore-seated arbitrations. Singaporean courts have upheld awards by sole arbitrators in expedited procedure arbitrations under the SIAC Rules, including in cases where a sole arbitrator, rather than a three-person tribunal provided for generally in the arbitration agreement, was appointed.[205] In doing so, they have adopted the same interpretation, as a matter of Singaporean law, of the SIAC Rules and parties' arbitration agreement as SIAC itself.

Just as it is appropriate, and required by the Convention, for recognition courts to defer to an arbitral institution's interpretation of its own rules, it is also appropriate to defer to the interpretations by a national court in the arbitral seat of its own

203. This interpretation also makes the most practical sense. If the parties agreed to expedited procedures for small value claims, as the Shanghai Court found, it makes sense that they would want one arbitrator to reduce the cost and increase the speed of the arbitration. Indeed, as a practical matter, it is difficult to conduct an expedited procedure arbitration with a three-person tribunal.

204. *See supra* Section II.B.2.

205. AQZ v ARA, [2015] SGHC 49 (Sing. High Ct.).

law. Here, in a Singaporean-seated arbitration, Singaporean courts had interpreted Singaporean law as applied to international arbitration agreements, concluding that the proper interpretation of an agreement to arbitrate under the SIAC Rules, specifying a three-person tribunal, was to permit appointment of a sole arbitrator in expedited procedure arbitrations. The Chinese court's failure to defer to that conclusion, in a Singapore-seated arbitration, was another serious misapplication of Article V(1)(d) of the Convention.

Fourth, like the Singaporean courts in *ST Group*, the Chinese court in *Xintai* defended its refusal to recognize an otherwise valid arbitral award on the putative grounds of party autonomy. That defense is unpersuasive.

The parties' procedural autonomy includes the autonomy to confer authority on arbitral tribunals and arbitral institutions to interpret ambiguous, incomplete or otherwise defective arbitration agreements (as in *ST Group*) and to reconcile assertedly conflicting provisions of arbitration agreements (as in *Xintai*). As discussed above, that authority is conferred expressly under virtually all institutional arbitration rules and is recognized, even in the absence of such provisions, by the overwhelming weight of national court authority.[206] Similarly, the parties' exercise of their autonomy also includes their mutual commitments to the expeditious and final resolution of their disputes by arbitration, with the New York Convention and Model Law providing the means for doing so.[207]

The *ST Group* and *Xintai* decisions are unfortunate anomalies, which depart from the weight of national court authority and from the objectives of the New York Convention and UNCITRAL Model Law. Ironically, those decisions seek to justify non-recognition of arbitral awards on the grounds of party autonomy. In reality, however, the courts' decisions in both cases seriously undermine both the parties' autonomy and the efficacy of the arbitral process.

IV. Conclusion

The New York Convention safeguards parties' autonomy to agree to arbitration by providing, under Article II(1), that

206. *See supra* Sections I.A, I.C.
207. *See supra* notes 22–31 and accompanying text.

contracting states "shall recognize" international arbitration agreements and, under Article II(3), by "refer[ring] parties to arbitration" at the request of one of the parties to an arbitration agreement. Article V(1)(d) specifically protects parties' right to agree upon particular arbitral procedures, allowing a court to refuse enforcement when such choice was not respected by the arbitral tribunal.

Importantly, however, it is essential to reconcile Article V(1)(d)'s safeguards for the parties' procedural autonomy and the New York Convention's broader purpose of giving effect to international arbitration agreements under Article II. In agreeing to arbitrate, parties choose to have an arbitral tribunal interpret their agreements on procedures and grant the tribunal significant discretion in deciding procedural matters. Interpreting Article V(1)(d) in isolation, without reference to these fundamental terms and objectives of the Convention and of the parties' arbitration agreements, frustrates both the Convention and those agreements. Instead, Article V(1)(d) and parallel provisions of national law require courts to defer to arbitral tribunals' interpretations of the parties' agreement on procedural matters, allowing non-recognition of awards only if the tribunal failed to comply in a material respect with the parties' unambiguous procedural agreements.

Unfortunately, recent case law suggests that some courts are still struggling to properly apply Article V(1)(d). As with the application of other provisions of the Convention, however, these missteps are inevitable, but hopefully short-lived, detours in the interpretation of the Convention and the development of the international arbitral process.