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## **Settlement of commercial disputes**

### **UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)**

#### **ARTICLE V(1)(b)**

*1. 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 to the competent authority where the recognition and enforcement is sought, proof that:*

*[...]*

*(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*

*[...]*

## INTRODUCTION

1. Article V(1)(b) addresses due process in arbitral proceedings. Specifically, it provides that parties must have had proper notice of the appointment of the arbitrators and of the arbitration proceedings as well as, more broadly, an opportunity to present their case.

2. Procedural irregularities under article V(1)(b) have to be raised and proven by the party resisting recognition and enforcement of an award, and cannot be raised by a court on its own motion.<sup>1</sup>

3. The drafters of the New York Convention followed the language of the 1927 Geneva Convention<sup>2</sup> but went further to enhance and facilitate enforcement.<sup>3</sup> In furtherance of this goal, although article V(1)(b) is modelled after article 2(b) of the 1927 Geneva Convention, it is more limited and is interpreted more narrowly.<sup>4</sup>

4. Article V(1)(b) also includes different requirements than its predecessor. As indicated in the *travaux préparatoires*, an early draft of what became article V(1)(b), mirroring article 2(b) of the 1927 Geneva Convention, stated that there were grounds for refusal of enforcement of an award where a party “was not given notice [...] of the arbitration proceedings in due form or in sufficient time to enable him to present his case”.<sup>5</sup> The drafters of the New York Convention retained the notice requirements of due process as they appeared in article 2(b) of the 1927 Geneva Convention. However, they wished to also cover other serious breaches of due process and thus included the inability of a party to present its own case as a separate requirement. The proposal of the delegate of the Netherlands to the Conference to draft article V(1)(b), as it now stands, was ultimately adopted.<sup>6</sup>

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<sup>1</sup> *Travaux préparatoires, Comments by Governments and Organisations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Annex I of E/2822/ADD.1*, at 2. See also, *Travaux préparatoires, Amendments to Articles 3, 4 and Suggestion of Additional Articles (Sweden), E/CONF.26/L.8*.

<sup>2</sup> Article 2(b) of the 1927 Geneva Convention states that “[...] recognition and enforcement of the award shall be refused if the Court is satisfied: That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented”.

<sup>3</sup> See, e.g., *Travaux préparatoires*, Memorandum by the Secretary General, E/2840, at 2, para. 4. See also Albert Jan van den Berg, *Summary of Court Decisions on the N.Y. Convention*, in *THE NEW YORK CONVENTION OF 1958*, ASA Special Series N° 9, M. Blessing ed., 1996, para. 508; *Consortio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (US)*, Court of Appeals, Fifth Circuit, United States of America, 26 November 2003, 01-30553 (5<sup>th</sup> Cir. 2003), (citing *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, Court of Appeals, Second Circuit, United States of America, 23 December 1974, 508 F.2d 969, 975 (2nd Cir. 1974)).

<sup>4</sup> See, Maxi Scherer, *Violation of Due Process, Article V(1)(b) in NEW YORK CONVENTION: CONVENTION OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 COMMENTARY*, Wolff ed., C.H. Beck, Hart, Nomos, 2012, paras. 132-135.

<sup>5</sup> *Travaux préparatoires*, Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Comments by Governments and Organizations, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704 and Annex, at 2.

<sup>6</sup> *Travaux préparatoires*, Summary Records of the United Nations Conference on International Commercial Arbitration, Twenty-third Meeting, E/CONF.26/SR.23, at 15.

5. Article V(1)(b) is often raised by parties resisting recognition and enforcement of an award despite the fact that the vast majority are unsuccessful in proving a breach.<sup>7</sup>

6. Courts are usually not formalistic in their approach to article V(1)(b), but focus on the actual facts and conduct of the parties, which leads to a restrictive application of article V(1)(b).<sup>8</sup>

7. As discussed in the chapter on article V(2),<sup>9</sup> article V(1)(b) has some interaction and overlap with article V(2)(b), the latter of which provides that a court may refuse to recognize or enforce an award if the award “would be contrary to the public policy of that country.” In many respects, due process is closely connected to public policy. It is therefore not unusual for parties to raise both provisions in their attempt to resist enforcement of an award. However, courts may not *sua sponte* raise possible breaches of article V(1)(b) whereas they may do so with respect to public policy under article V(2)(b).<sup>10</sup>

## ANALYSIS

### A. The requirement that the parties be given “proper notice”

8. Article V(1)(b) provides that parties against whom the award is invoked must have been given proper notice, failing which recognition and enforcement of the award may be refused.

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<sup>7</sup> See, Fouchard Gaillard Goldman on International Commercial Arbitration E. Gaillard, J. Savage eds., 1999, para. 1698; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at 297; Andrés Jana, Angie Armer, et al., *Article V(1)(b)*, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, H. Kronke, P. Nacimiento et al. eds., 2010, at 233; Pierre A. Karrer, *Must an Arbitral Tribunal Really Ensure that its Award is Enforceable?*, in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner*, G. Asken et al. eds., 2005, at 431.

<sup>8</sup> See, e.g., *X v. Y*, Bundesgericht [BLG], Switzerland, 4 October 2010, 4A\_124/2010; *OOO Sandora (Ukraine) v. OOO Euro-Import Group (Russia)*, Federal Arbitrazh Court, Moscow District, Russia, 12 November 2010, A40-51459/10-63-440; *Camera di esecuzione e fallimenti del Tribunale d’appello, Repubblica e Cantone Ticino, Switzerland*, 22 February 2010, 14.2009.104; *OA0 Byerezastroymaterialy (Belarus) v. Individual Entrepreneur D.V. Goryelov (Russia)*, Federal Arbitrazh Court, North Caucasus District, Russia, 14 September 2009, No. A01-342/2009; *Consorcio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (US)*, Court of Appeals, Fifth Circuit, United States of America, 26 November 2003, 01-30553 (5th Cir. 2003); *Geotech Lizenz A.G. v. Evergreen Systems, Inc.*, District Court, Eastern District of New York, United States of America, 27 October 1988, CV 88-1406 (697 F. Supp 1248 (E.D.N.Y. 1988)); *Union Générale de Cinéma SA (France) v. XYZ Desarrollos, SA (Spain)*, Supreme Court, Spain, 11 April 2000, XXXII Y. B. COM. ARB., 525 (2007); *M.F. Global Inc., et al. v. Elio D. Cattani, et al.*, District Court, Western District of Pennsylvania, United States of America, 6 March 2006, 04cv0593; *Karaha Bodas Co. (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*, Court of Appeals, Fifth Circuit, United States of America, 23 March 2004, 02-20042, 03-20602.

<sup>9</sup> See Chapter on Article V(2)(b).

<sup>10</sup> *X SA v. Y Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, P. 217/76. See also, Andrés Jana, Angie Armer, et al., *Article V(1)(b)*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION*, H. Kronke, P. Nacimiento, et al. eds., 2010, at 235.

**a. Courts consider the parties' knowledge and conduct in assessing "proper notice"**

9. Proper notice has been interpreted narrowly by courts, which usually apply more liberal standards than would be required for giving notice under domestic law. For example, a Mexican court held that parties waived Mexican procedural formalities on notice when they decided to submit their case to arbitration. Therefore, the fact that the notice did not comply with those formalities did not make the notice insufficient and did not prevent recognition and enforcement of the award.<sup>11</sup>

10. Some courts have been reluctant to graft external notice requirements onto article V(1)(b). For example, in two cases, Chinese courts refused to apply the additional treaty requirements on notice contained in the mutual legal assistance treaties between China and Korea. The courts found that notice was adequate for the purposes of the New York Convention even though it did not conform to the treaty's definition of notice.<sup>12</sup> In assessing notice, an Egyptian court found that notice was sufficient on the basis that it was adequate under Swedish law, which was the law governing the arbitration.<sup>13</sup> A German court took a similar approach and applied the law of the arbitration, in that case Ukrainian law, in assessing whether proper notice had been given.<sup>14</sup>

11. The burden to prove that notice was not properly given is on the party resisting recognition and enforcement and the evidence must be provided<sup>15</sup> and be clear.<sup>16</sup>

12. Courts have applied high standards regarding the burden of proof that notice was improperly given. For example, an Australian court rejected a party's insistence that it had never received notice of the arbitration when the carrier's records showed that someone signed for the papers even when the addressee himself was overseas at the time of delivery.<sup>17</sup> Additionally, where a claimant asserted that notice was sent and received and the resisting party could not provide evidence to the contrary, an Australian court and an Egyptian court both refused to find a breach of due process.<sup>18</sup>

13. Courts have upheld recognition and enforcement of awards in the face of notice challenges by looking beyond the notice itself to evaluate the parties' access to, and involvement in, the arbitration. This has been the case where parties were aware of a proceeding or hearing and thus able to participate in the

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<sup>11</sup> *Presse Office S.A. v. Centro Editorial Hoy S.A.*, High Court of Justice, Eighteenth Civil Court of First Instance, Federal District of Mexico, Mexico, 24 February 1977, IV Y. B. COM. ARB. 301 (1979), at 301.

<sup>12</sup> *TS Haimalu Co., Ltd. v. Daqing PoPeyes Food Co., Ltd.*, Supreme People's Court, China, 3 March 2006, Min Si Ta Zi No. 46; *Boertong Corp. (Group) v. Beijing Liantaichang Trade Co. Ltd.*, Supreme People's Court, China, 14 December 2006, Min Si Ta Zi No. 36.

<sup>13</sup> *Egyptian Concrete Company & Hashem Ali Maher v. STC Finance & Ismail Ibrahim Mahmoud Thabet & Sabishi Trading and Contracting Company*, Court of Cassation, Egypt, 27 March 1996, 2660/59.

<sup>14</sup> *Kammergericht [KG]*, Berlin, Germany, 17 April 2008, 20 Sch 02/08.

<sup>15</sup> *Egyptian Saudi Hotels Company v. Kurt & Daves Corporation*, Court of Cassation, Egypt, 16 July 1990, 2994/57.

<sup>16</sup> *Oberlandesgericht [OLG], Celle*, Higher Regional Court, of Celle, Germany, 14 December 2006, 8 Sch 14/05; *A v. B*, Federal Tribunal, Switzerland, 16 December 2011, 5A\_441/2011.

<sup>17</sup> *LKT Industrial Berhad (Malaysia) v. Chun*, Supreme Court of New South Wales, Australia, 13 September 2004, 50174 of 2003.

<sup>18</sup> *Egyptian Saudi Hotels Company v. Kurt & Daves Corporation*, Court of Cassation, Egypt, 16 July 1990, 2994/57; *Uganda Telecom Ltd. v. Hi-Tech Telecom Pty Ltd.*, Federal Court, Australia, 22 February 2011, NSD 171 of 2010.

arbitral proceedings.<sup>19</sup> For example, a Russian court rejected a party's argument that notice was insufficient when the party's representative attended the proceedings.<sup>20</sup> A Swiss court also refused to deny recognition and enforcement of an award when a party alleged insufficient notice because the court reasoned that the party had been able to present its case.<sup>21</sup> The Spanish Supreme Court likewise upheld the recognition and enforcement of an award in the face of a claim that notice was insufficient because there was proof in the record, including receipts for the delivery of registered letters, that notice was adequate.<sup>22</sup>

14. As a further illustration, an Italian court found that there was no breach where a party's actions demonstrated that it was aware of the proceedings.<sup>23</sup> A United States court similarly refused to find a breach where the party claiming it had not received notice had in fact been referred to arbitration by a court. Under the circumstances, the form and technicality of the notice itself did not matter.<sup>24</sup>

15. Article V(1)(b) has been applied to refuse recognition and enforcement of an award where there was clear proof that no notice had been given. For example, a Chinese court refused recognition and enforcement of an award on the basis that there was clearly no notice.<sup>25</sup> A Georgian court also refused recognition and enforcement when there was no evidence before the Georgian court that any notice was ever sent.<sup>26</sup> Similarly, a German court refused recognition and enforcement of an award when there was evidence that no effort had been made to find the defendant's current address to notify it of the arbitration.<sup>27</sup> Likewise, a Russian court denied recognition and enforcement of an award where there was no evidence that a party had received notice. In the absence of proof of delivery of the notice, combined with the fact that the party

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<sup>19</sup> *OOO Sandora (Ukraine) v. OOO Euro-Import Group (Russia)*, Federal Arbitrazh Court, District of Moscow, Russia, 12 November 2010, A40-51459/10-63-440; Camera di esecuzione e fallimenti del Tribunale d'appello, Repubblica e Cantone Ticino, Switzerland, 22 February 2010, 14.2009.104; *Consortio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (US)*, Court of Appeals, Fifth Circuit, United States of America, 26 November 2003, 01-30553 (5th Cir. 2003); *Geotech Lizenz A.G. v. Evergreen Systems, Inc.*, District Court, Eastern District of New York, United States of America, 27 October 1988, CV 88-1406 (697 F. Supp 1248 (E.D.N.Y. 1988)); *Union Générale de Cinéma SA (France) v. XYZ Desarrollos, SA (Spain)*, Supreme Court, Spain, 11 April 2000, XXXII Y. B. COM. ARB. 525 (2007); *R.M.F. Global Inc., et al. v. Elio D. Cattan, et al.*, District Court, Western District of Pennsylvania, United States of America, 6 March 2006, 04cv0593.

<sup>20</sup> *OOO Sandora (Ukraine) v. OOO Euro-Import Group (Russia)*, Federal Arbitrazh Court, District of Moscow, Russia, 12 November 2010, A40-51459/10-63-440.

<sup>21</sup> Camera di esecuzione e fallimenti del Tribunale d'appello, Repubblica e Cantone Ticino, Switzerland, 22 February 2010, 14.2009.104.

<sup>22</sup> *Union Générale de Cinéma SA (France) v. XYZ Desarrollos, SA (Spain)*, Supreme Court, Spain, 11 April 2000, XXXII Y. B. COM. ARB. 525 (2007).

<sup>23</sup> *Bobbie Brooks Inc. v. Lanificio Walter Bucci s.a.s.*, Court of Appeal, Florence, Italy, 8 October 1977, IV Y. B. COM. ARB. 289 (1979).

<sup>24</sup> *R.M.F. Global Inc., et al. v. Elio D. Cattan et al.*, District Court, Western District of Pennsylvania, United States, 6 March 2006, 04cv0593.

<sup>25</sup> *Aiduoladuo (Mongolia) Co., Ltd. v. Zhejiang Zhancheng Construction Group Co., Ltd.* Supreme People's Court, China, 8 December 2009, Min Si Ta Zi No. 46; *Cosmos Marine Managements S.A. v. Tianjin Kaiqiang Trading Ltd.*, Supreme People's Court, China, 10 January 2007, Min Si Ta Zi No. 34.

<sup>26</sup> *The Kiev [...] Institute v. "M"*, Scientific-Industrial Technological Institute of Tbilisi, Supreme Court, Georgia, 17 March 2003, 3a-17-02.

<sup>27</sup> *Bayerisches Oberstes Landesgericht [BayObLG]*, Germany, 16 March 2000, 4 Z Sch 50/99.

was not present at the proceedings, the court concluded that notice was insufficient.<sup>28</sup>

#### **b. Content of the notice**

16. Article V(1)(b) requires that the parties be given proper notice of the appointment of the arbitrator and of the arbitration proceedings.

##### ***i. Proper notice of the appointment of the arbitrator***

17. Article V(1)(b) is silent as to what the notice of an appointment of the arbitrator must include. What is clear from the plain language of the text is that parties must receive some notice of the appointment of an arbitrator. In the absence of any notice, a court may refuse to enforce an award.<sup>29</sup> Courts have therefore been left to draw the contours of this notice requirement.

18. For instance, a Spanish court found that notification of the request to appoint an arbitrator, of the appointment, and confirmation thereof was sufficient notice.<sup>30</sup> Certain courts have confirmed that parties should receive a request to nominate an arbitrator.<sup>31</sup>

19. Courts have considered whether the notice of the appointment of the arbitrators must necessarily include the names of the arbitrators. A German court held that notice of the appointment of the arbitrators was insufficient where the notice did not include the names of the arbitrators, even if, in that case, the applicable arbitral rules prohibited disclosure of the arbitrators' names.<sup>32</sup>

##### ***ii. Proper notice of the arbitration proceedings***

20. Article V(1)(b) requires that a party be given notice of the arbitration proceedings. Notice of the arbitration proceedings requires that all respondents are notified of an arbitration so that they are aware of the proceedings.<sup>33</sup>

21. Some courts have held that this notice requirement continues as the arbitration progresses requiring that all parties be informed of the arbitration procedures, including the dates, times and locations of any hearings so that parties can participate in the arbitration proceedings.<sup>34</sup> However, as noted by the

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<sup>28</sup> OAO Byerezastroymaterialy (Belarus) v. Individual Entrepreneur D.V. Gorelov (Russia), Federal Arbitrazh Court, North Caucasus District, Russia, 14 September 2009, No. A01-342/2009.

<sup>29</sup> *Cosmos Marine Managements S.A. v. Tianjin Kaiqiang Trading Ltd.*, Supreme People's Court, China, 10 January 2007, Min Si Ta Zi No. 34.

<sup>30</sup> *English Company X v. Spanish Company Y*, Supreme Court, Spain, 10 February 1984, X Y. B. COM. ARB. 493 (1985).

<sup>31</sup> Oberlandesgericht, Celle, Germany, 14 December 2006, 8 Sch 14/05; *Guang Dong Light Headgear Factory Co. v. ACI International Inc.*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR.

<sup>32</sup> *Danish Buyer v. German (F.R.) Seller*, Oberlandesgericht [OLG], Koln, Germany, 10 June 1976, IV Y. B. COM. ARB. 258 (1979).

<sup>33</sup> *Cosmos Marine Managements S.A. v. Tianjin Kaiqiang Trading Ltd.*, Supreme People's Court, China, 10 January 2007, Min Si Ta Zi No. 34; *Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A.*, Supreme Court of Justice, Colombia, 27 July 2011, 11001-0203-000-2007-01956-00; *Guang Dong Light Headgear Factory Co. v. ACI International Inc.*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR.

<sup>34</sup> *Loral Space & Communications Holdings Corporation (US) v. ZAO Globalstar – Space Telecommunications (Russia)*, Presidium of the Highest Court of the Russian Federation, Russia, 20 January 2009, A40-31732/07-30-319; *Consortio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (US)*, Court of Appeals, Fifth Circuit, United States of America, 26 November 2003, 01-30553 (5th Cir. 2003).

Supreme Court of Colombia, if a party chooses not to participate in the proceedings, it cannot then avail itself of the provisions of article V(1)(b).<sup>35</sup>

**c. Mechanics of the “notice” requirement**

**i. Form of notice**

22. Article V(1)(b) is silent as to the form of notice. As a result, no specific form is required for notice.

23. The *travaux préparatoires* reveal that the drafters of the New York Convention contemplated the possibility of specifying the form of notice. One of the early drafts of the clause included the term “due form.” The delegates to the Conference discussed the notion of “due form” and ultimately rejected it. The German delegation questioned the criteria that would be applied to determine “due form” and suggested its deletion.<sup>36</sup> The delegates of the Federal Republic of Germany suggested that “due form” be removed because it would be difficult to determine in practice what constitutes “due form.” The delegates of the United Kingdom and of the former Union of Soviet Socialist Republics suggested that “due form” be replaced with “notified ... in writing.”<sup>37</sup> Furthermore, it was highlighted that “due form” did not appear in article 2(b) of the 1927 Geneva Convention, and therefore should be deleted.<sup>38</sup> “Due form” was ultimately removed and the drafters of the New York Convention did not add a requirement that notice be in writing or in any other specific form.

24. Courts are thus left to interpret what is acceptable notice and what constitutes a breach.<sup>39</sup> For example, the Swiss Federal Tribunal stated that a simple letter would constitute adequate notice and thus did not require any particular form.<sup>40</sup>

**ii. Service of notice**

25. Article V(1)(b) is also silent on the service of notice. Thus there are no formal requirements under the Convention for service of notice either.<sup>41</sup>

26. The delivery and receipt of notice have been interpreted practically and flexibly, the courts having generally considered the conduct of the parties, not the technicalities of service, to evaluate whether or not the parties knew or ought to have known of the existence of the arbitration.<sup>42</sup> In that vein, the reasonable attempt by a claimant to notify a respondent is relevant even if a respondent does

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<sup>35</sup> *Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A.*, Supreme Court of Justice, Colombia, 27 July 2011, 11001-0203-000-2007-01956-00.

<sup>36</sup> *Travaux préparatoires*, Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, 31 January 1956, E/2822, Annex I, at 23.

<sup>37</sup> *Travaux préparatoires*, Committee on the Enforcement of International Arbitral Awards, Sixth Meeting, E/AC.42/SR.6, at 4.

<sup>38</sup> *Travaux préparatoires*, Comments by Governments and Organisations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Annex I of E/2822, at 23.

<sup>39</sup> Albert Jan van den Berg, *Summary of Court Decisions on the N.Y. Convention*, in THE NEW YORK CONVENTION OF 1958, ASA Special Series N° 9, M. Blessing ed., 1996, para 509.

<sup>40</sup> *Y v. X*, Federal Tribunal, Switzerland, 3 January 2006, 5P.292/2005.

<sup>41</sup> *Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A.*, Supreme Court of Justice, Colombia, 27 July 2011, 11001-0203-000-2007-01956-00; *Drummond Ltd. v. Ferrovias en Liquidacion, Ferrocarriles Nacionales de Colombia S.A. (FENOCO)*, Supreme Court of Justice, Colombia, 19 December 2011, 11001-0203-000-2008-01760-00; *Y v. X*, Federal Tribunal, Switzerland, 3 January 2006, 5P.292/2005.

<sup>42</sup> *Project XJ220 Ltd. v. Mohamed Yassin D. (Spain)*, Supreme Court, Spain, 1 February 2000, XXXII Y. B. COM. ARB. 507 (2007).

not receive the notice. For example, notice delivered by registered mail was held to be sufficient despite the fact that the addressee never picked it up.<sup>43</sup>

27. The majority of courts have not been formalistic with regards to who receives notice. Arguments that the party who received the notice was not the legal representative, authorized agent or precise legal entity have generally failed.<sup>44</sup>

**iii. Whether the notice should be served in a timely manner**

28. Article V(1)(b) does not provide that notice of the appointment of the arbitrator or of the arbitration proceedings should be served in a timely manner. The language “in sufficient time”, contained in article 2(b) of the 1927 Geneva Convention and in the early drafts of the article<sup>45</sup>, was later deleted.

29. Generally, timeliness of notice has been interpreted narrowly and with a focus on substance rather than form. As noted by the Supreme Court of Lithuania, late notice is not necessarily improper if the party was still able to participate in the proceedings.<sup>46</sup> Similarly, a Russian court held that late notice of a hearing, which prevented a party from obtaining visas to attend the hearing, was not a violation of the obligation to give proper notice because the party was otherwise aware several months in advance that the hearings would be held in London.<sup>47</sup>

**B. Evidence that a party was “unable to present his case”**

30. Article V(1)(b) also provides that a court may refuse to recognize or enforce an award if the party against whom the award is invoked successfully proves that it was unable to present its case.

**a. Meaning of “unable to present his case”**

31. This second protection in article V(1)(b) means that parties should have been provided with an opportunity to present their case;<sup>48</sup> that they should have had an opportunity to be heard regarding their claims, evidence and defences.

32. Some courts in the United States have interpreted this provision to mean that parties must have an opportunity to be heard at a “meaningful time and in a meaningful manner”.<sup>49</sup> As stated by the Swiss Federal Tribunal, “[b]y its general wording, this provision covers any restriction, whatever its nature, of the

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<sup>43</sup> Kammergericht [KG], Germany, 17 April 2008, 20 Sch 02/08.

<sup>44</sup> *Uganda Telecom Ltd. v. Hi-Tech Telecom Pty Ltd.*, Federal Court, Australia, 22 February 2011, NSD 171 of 2010; *Consortium Codest Engineering (Italy) v. OOO Gruppya Most (Russia)*, Highest Arbitrazh Court, Russia, 22 February 2005, A40-47341/03-25-179; *TH&T International Corp. v. Chengdu Hualong Auto Parts Co., Ltd.*, Sichuan Higher People's Court, China, 12 December 2003, Cheng Min Chu Zi No. 531; *Altain Khuder LLC v. IMC Mining Inc.*, Supreme Court of Victoria, Australia, 28 January 2011, 3827 of 2010; *A v. B*, Federal Tribunal, Switzerland, 16 December 2011, 5A\_441/2011.

<sup>45</sup> *Travaux préparatoires*, Report by the Secretary General, Recognition and Enforcement of Foreign Arbitral Awards, 31 January 1956, Annex II of E/2822, at 19.

<sup>46</sup> *Jusimi Corporation v. UAB “Cygnus”*, Supreme Court, Lithuania, 8 September 2003, 3K-3-782/2003.

<sup>47</sup> *Loral Space & Communications Holdings Corporation (US) v. ZAO Globalstar – Space Telecommunications (Russia)*, Presidium of the Highest Arbitrazh Court, Russia, 20 January 2009, A40-31732/07-30-319.

<sup>48</sup> See, Fouchard Gaillard Goldman on International Commercial Arbitration, E. Gaillard, J. Savage eds., 1999, para. 1698.

<sup>49</sup> *Iran Aircraft Indus. v. Avco Corp.*, Courts of Appeals, Second Circuit, United States of America, 24 November 1992, 92-7217, 980 F.2d 141, 146 (2d Cir. 1992); *Karaha Bodas Co. (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*, Court of Appeals, Fifth Circuit, United States of America, 23 March 2004, 02-20042, 03-20602.

parties' rights. It appears to contemplate, amongst others, the violation of the right to be heard".<sup>50</sup>

33. In practice, courts have refused recognition and enforcement of awards on the grounds in article V(1)(b) where the process has been particularly egregious or where the arbitration radically strayed from standards of due process, such as when a party was prevented from submitting crucial evidence<sup>51</sup> or from receiving or commenting on evidence from an opposing party.<sup>52</sup> For example, a court found a breach of due process when an arbitral tribunal declared inadmissible the submission filed by a party after the closing of the proceedings while relying on a subsequent submission filed thereafter by the other party.<sup>53</sup> Similarly, a Dutch court found a breach of due process when a party was denied the right to comment on or respond to evidence and arguments from the opposing party.<sup>54</sup>

34. Exceptional circumstances may also lead to a finding of a breach of due process. For example, an Italian court found that a month had not been enough time for a party to prepare and present its case in light of the fact that there had been a recent earthquake.<sup>55</sup>

35. The onus is on the parties to present their cases and there will not be a breach where a party could have presented its case but did not.<sup>56</sup> Courts have usually considered that there is no breach of due process where a party has impeded its own ability to present its case, such as by failing to demand an extension of time or by otherwise failing to participate in the arbitral proceedings.<sup>57</sup>

36. In the same vein, most courts have been strict in refusing to find breaches where parties did not remedy their own defaults. The United States Court of Appeals for the First Circuit rejected an alleged breach of due process when a party claimed that its counsel was not representing it meaningfully. The Court reasoned that it was the fault of its own representatives.<sup>58</sup> Another United States

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<sup>50</sup> *Chrome Resources S.A. v. Léopold Lazarus Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, XI Y. B. COM. ARB. 538 (1986).

<sup>51</sup> *Iran Aircraft Indus v. Avco Corp.*, Court of Appeals, Second Circuit, United States of America, 24 November 1992, 92-7217 (2nd Cir. 1992).

<sup>52</sup> *M. Adeossi v. Sonapra*, Court of First Instance, Cotonou, Benin, 25 January 1994, Ordonnance No. 19/94; Landgericht [LG]Regional Court, Bremen, Germany, 20 January 1983, 12-O-184/1981.

<sup>53</sup> *M. Adeossi v. Sonapra*, Court of First Instance, Cotonou, Benin, 25 January 1994, Ordonnance No. 19/94.

<sup>54</sup> *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV*, Court of Appeal, The Hague, Netherlands, 28 April 1998, XXIII Y. B. COM. ARB. 731 (1998).

<sup>55</sup> *Bauer & Grobmann OHG v. Fratelli Cerrone Alfredo e Raffaele*, Court of Appeal, Naples, Salerno Section, Italy, 18 May 1982, X Y. B. COM. ARB. (1985), at 461.

<sup>56</sup> *First State Ins. Co. (US) v. Banco de Seguros Del Estado (Uruguay)*, Court of Appeals, First Circuit, United States of America, 27 June 2001, 00-2454 (254 F.3d 354); *Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indus. Y Commercial*, District Court, Southern District of New York, United States of America, 24 August 1990, 90 Civ. 0720 (KC); *D v. Franz J*, Supreme Court, Austria, 1 September 2010, 3 Ob 122/10b. See also, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, E. Gaillard and J. Savage eds., 1999, para. 1698.

<sup>57</sup> *Dutch Seller v. German (F.R.) Buyer*, Regional Court, Zweibrücken, Germany, 11 January 1978; *Bobbie Brooks Inc. v. Lanificio Walter Bucci s.a.s.*, Court of Appeal, Florence, Italy, 8 October 1977, IV Y. B. COM. ARB. 289 (1979).

<sup>58</sup> *First State Ins. Co. (US) v. Banco de Seguros Del Estado (Uruguay)*, Court of Appeals, First Circuit, United States of America, 27 June 2001, 00-2454 (254 F.3d 354).

Court held that there was no breach of due process when a party complained about a tribunal-appointed expert because that party never objected to the expert or requested a copy of the report.<sup>59</sup> An Italian court held that article V(1)(b) “concerns the impossibility rather than the difficulty of presenting one’s case.”<sup>60</sup> Similarly, a Swiss court found that a party had ample opportunity to present its case when its counsel resigned and it failed to appoint new counsel. The Court reasoned that the party had the time to appoint new counsel but failed to do so.<sup>61</sup>

**b. Tribunals’ discretion to organise and control the arbitral proceedings**

37. Courts have uniformly emphasized that parties who had the opportunity to correct an issue or procedural flaw but did not, will not benefit from the protections of article V(1)(b). In addition to respecting the spirit and the pro-enforcement bias of the New York Convention, the majority of courts have taken into account the wide discretion vested in arbitral tribunals to organize and control the arbitral proceedings.

38. Courts allow arbitral tribunals significant discretion to establish procedural rules and control their implementation.<sup>62</sup> For instance, a German court found no breach of due process when an arbitral tribunal refused applications to submit evidence.<sup>63</sup> The United States District Court for the Southern District of New York similarly found no breach of due process when an arbitral tribunal imposed the United States Federal Rules of Civil Procedure on an arbitration at the last minute. The Court held that arbitrators have broad discretion to determine arbitral procedure and noted that they had, in that case, referred to the Federal Rules of Civil Procedure for guidance.<sup>64</sup>

39. Courts have considered that the rules imposed by arbitral tribunals do not need to conform to domestic standards of due process.<sup>65</sup> A German court found that there was no breach of due process when a tribunal did not hold oral hearings because that was within its discretion and the arbitral rules so permitted.<sup>66</sup> A Swiss court likewise found that an arbitral tribunal had the discretion to consult an industry expert *ex parte* and thus upheld the recognition and enforcement of the award.<sup>67</sup> The United States District Court for the Northern District of California held that discovery was not guaranteed in arbitration and that its absence does not interfere with the ability of a party to

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<sup>59</sup> *Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Commercial*, District Court, Southern District of New York, United States of America, 24 August 1990, 90 Civ. 0720 (KC).

<sup>60</sup> *De Maio Giuseppe e Fratelli snc v. Interskins Ltd.*, Court of Cassation, Italy, 21 January 2000, 671, XXVII Y. B. COM. ARB., 492 (2002).

<sup>61</sup> *X v. Y*, Camera di esecuzione e fallimenti del Tribunale d’appello, Repubblica e Cantone Ticino, Switzerland, 7 August 1995, 14.9400021.

<sup>62</sup> Oberlandesgericht [OLG], Celle, Germany, 31 May 2007, 8 Sch 06/06; *Century Indemnity Company, et al. v. Axa Belgium (f/k/a Royale Belge Incendie Reassurance)*, District Court, Southern District of New York, United States of America, 24 September 2012, 11 Civ. 7263 (JMF); *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, District Court, District of Columbia, United States of America, 29 May 1992, 90-0169.

<sup>63</sup> Oberlandesgericht [OLG], Celle, Germany, 31 May 2007, 8 Sch 06/06.

<sup>64</sup> *Century Indemnity Company, et al. v. Axa Belgium (f/k/a Royale Belge Incendie Reassurance)*, District Court, Southern District of New York, United States of America, 24 September 2012, 11 Civ. 7263 (JMF).

<sup>65</sup> Hanseatisches Oberlandesgericht [OLG], Hamburg, Germany, 30 July 1998, 6 Sch 3/98; *X S.A. v. Y Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, P.217/76; *L Ltd. v. C S.A. (GE)*, Court of Justice, Geneva, Switzerland, 17 September 1976, 549.

<sup>66</sup> Hanseatisches Oberlandesgericht [OLG], Hamburg, Germany, 30 July 1998, 6 Sch 3/98.

<sup>67</sup> *X S.A. v. Y Ltd.*, Federal Tribunal, Switzerland, 8 February 1978, P.217/76; *L Ltd. v. C S.A. (GE)*, Court of Justice, Geneva, Switzerland, 17 September 1976, 549.

present its case.<sup>68</sup> The United States Court of Appeals for the Fifth Circuit also upheld the recognition and enforcement of an award where an arbitral tribunal refused additional discovery because the parties already had sufficient opportunity to present their cases.<sup>69</sup>

40. Courts have held that arbitral tribunals are not obliged to consider every issue raised by a party,<sup>70</sup> nor are they required to divulge every detail of their reasoning.<sup>71</sup> Arbitral tribunals similarly have the power to reformulate the issues presented by the parties.<sup>72</sup>

41. Arbitral tribunals can exercise their discretion to determine what is necessary for a party to present its case and most courts have demonstrated that they give tribunals great leeway in so doing.<sup>73</sup> For example, the Paris Court of Appeal decided to recognize and uphold an award when the complaining party alleged that it had not received documents used by an expert because neither the tribunal nor the opposing party had relied on those documents.<sup>74</sup> Similarly, the Supreme Court of Austria rejected an alleged breach of due process, when a party claimed that the tribunal failed to investigate facts and refused certain evidence, because the party was still able to present its case.<sup>75</sup>

**c. Narrow interpretation of “unable to present his case”**

**i. Presence of parties and witnesses**

42. A number of courts have interpreted the notion of being “unable to present his case” narrowly when parties have been unable to attend proceedings or hearings.<sup>76</sup>

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<sup>68</sup> *Anthony N. LaPine v. Kyosera Corporation*, District Court, Northern District of California, United States of America, 22 May 2008, C 07-06132 MHP.

<sup>69</sup> *Karaha Bodas Co. (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*, Court of Appeals, Fifth Circuit, United States of America, 23 March 2004, 02-20042, 03-20602.

<sup>70</sup> *Budejovicky Budvar, N.P. v. Czech Beer Importers, Inc.*, District Court, District of Connecticut, United States of America, 10 July 2006, 1246 (JBA); Oberlandesgericht [OLG] Frankfurt, Germany, 27 August 2009, 26 SchH 03/09.

<sup>71</sup> *Gas Natural Aproxvisionamientos SDG S.A. v. Atlantic LNG Company of Trinidad and Tobago*, District Court, Southern District of New York, United States of America, 16 September 2008, 08 Civ. 1109 (DLC); Oberlandesgericht [OLG], Frankfurt, Germany, 27 August 2009, 26 SchH 03/09.

<sup>72</sup> *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of Appeal, Brussels, Belgium, 24 January 1997, XXII Y. B. COM. ARB. 643 (1997).

<sup>73</sup> *Société Unichips Finanziaria SPA et Société Unichips International BV v. Consorts Gesnouin*, Court of Appeal, Paris, France, 12 February 1993, 92-14017; Oberlandesgericht [OLG], Munich, Germany, 14 November 2011, 34, Sch 10/11; Bundesgerichtshof [BGH], Germany, 14 April 1988, III ZR 12/87; *Ministry of Defense & Support for the Armed Forces of Iran v. Cubic Defense Systems, Inc.*, District Court, Southern District of California, United States of America, 7 December 1998, 98-1165-B; *Austria C v. Vladimir Z*, Supreme Court, Austria, 31 March 2005, XXXI Y. B. COM. ARB. 583 (2006).

<sup>74</sup> *Société Unichips Finanziaria SPA et Société Unichips International BV v. Consorts Gesnouin*, Court of Appeal, Paris, France, 12 February 1993, 92-14017.

<sup>75</sup> *Austria C v. Dr. Vladimir Z*, Supreme Court, Austria, 31 March 2005, XXXI Y. B. COM. ARB., 583 (2006).

<sup>76</sup> *Ukraine Kryukovskiy Car Building Works v. Shenyang Changcheng Economic and Trade Company*, Shenyang Intermediate People's Court, China, 22 April 2003, Shen Min Zi No. 16; Oberlandesgericht [OLG], Dusseldorf, Germany, 15 December 2009, I-4 Sch 10/09; *Geotech Lizenz A.G. v. Evergreen Systems, Inc.*, District Court, Eastern District of New York, United States of America, 27 October 1988, CV 88-1406 (697 F. Supp 1248 (E.D.N.Y. 1988)).

43. For example, a Chinese court found that there was no breach of due process where a party, unable to attend the proceedings, sent its defences in a letter.<sup>77</sup> As a further illustration, a German court found that there was no breach of due process despite the fact that the complaining party was unable to attend a hearing because the court reasoned that it could have sent a representative in its stead.<sup>78</sup> The United States Court of Appeals for the Fifth Circuit similarly found that there was no breach where a party alleged that it was unable to present its case because it could not be present due to a fear of being arrested. The Court noted that physical presence was not necessary to participate in a hearing and that the party could have sent a representative or participated remotely.<sup>79</sup> Likewise, the Supreme Court of Victoria in Australia held that even if a party itself did not present its own case, the requirements of article V(1)(b) have been met as long as a related entity has done so.<sup>80</sup>

44. United States courts have applied the same narrow interpretation where the presence of a party's representative is concerned.<sup>81</sup> For example, a United States court held that there was no violation when the tribunal refused to adjourn the proceedings when the Chief Executive Officer of one of the parties was medically unfit to attend.<sup>82</sup>

45. In addition, in a series of decisions, United States courts have held that the inability to cross-examine or present witnesses does not constitute a breach of a party's ability to present its case.<sup>83</sup>

## **ii. Language of the arbitration**

46. Arguments that the language of the proceeding affected a party's ability to present its case have generally failed.<sup>84</sup>

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<sup>77</sup> *Ukraine Kryukovskiy Car Building Works v. Shenyang Changcheng Economic and Trade Company*, Shenyang Intermediate People's Court, China, 22 April 2003, Shen Min Zi No. 16.

<sup>78</sup> Oberlandesgericht [OLG], Karlsruhe, Germany, 27 March 2006, 9 Sch 02/05.

<sup>79</sup> *Consortio Rive S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (US)*, Court of Appeals, Fifth Circuit, United States of America, 26 November 2003, 01-30553 (5th Cir. 2003).

<sup>80</sup> *Altain Khuder LLC v. IMC Mining Inc.*, Supreme Court of Victoria, Australia, 28 January 2011, 3827 of 2010.

<sup>81</sup> *Jiangsu Changlong Chemicals Co. (China) v. Burlington Bio-Medical & Scientific Corp. (US)*, District Court, Eastern District of New York, United States of America, 22 November 2005, CV 05-2082; *Budejovicky Budvar, N.P. v. Czech Beer Importers, Inc.*, District Court, District of Connecticut, 10 July 2006, 1246 (JBA).

<sup>82</sup> *China National Building Material Investment Co. Ltd. v. BNK International LLC*, District Court, Western District of Texas, Austin Division, United States of America, 3 December 2009, A-09-CA-488-SS.

<sup>83</sup> *Generica Ltd. v. Pharma Basics, Inc.*, Court of Appeals, Seventh Circuit, United States of America, 29 September 1997, 96-4004; *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA)*, Court of Appeals, Second Circuit, United States of America, 23 December 1974, 74-1642, 74-1676; *Sonera Holdings B.V. v. Cukurova Holding A.S.*, District Court, Southern District of New York, United States of America, 10 September 2012, 11 Civ. 8909 (DLC); *Agility Public Warehousing CO. K.S.C., Professional Contract Administrators, Inc. v. Supreme Foodservice GMBH*, Court of Appeals, Second Circuit, United States of America, 6 September 2012, 11-5201-CV; *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, Court of Appeals, Second Circuit, United States of America, 10 December 2004, 03-9000; *Dalmine S.p.A. v. M. & M. Sheet Metal Forming Machinery A.G.*, Court of Cassation, Italy, 23 April 1997, 10229, XXIV Y. B. COM. ARB. 709 (1999).

<sup>84</sup> *Kastrup Trae-Aluvinduet A/S (Denmark) v. Aluwood Concepts Ltd. (Ireland)*, High Court, Ireland, 13 November 2009, 2009 169 MCA, XXXV Y. B. COM. ARB., 404 (2009).

47. Most courts consider the context of the language used in the arbitration in assessing whether or not there is a breach of due process. For example, the Spanish Supreme Court did not find a breach of due process when a party complained that the proceedings were conducted in English, explaining that English was the common language in international commercial transactions.<sup>85</sup> A German Court found that there was no breach when the proceedings and correspondence were in Russian and the respondent could not understand Russian because the burden was on the respondent to find a translator or interpreter and it should have done so.<sup>86</sup>

48. Some courts take into consideration the arbitration agreement<sup>87</sup> or the applicable procedural rules<sup>88</sup> to determine the language chosen by the parties and have been reluctant to grant any relief when parties have previously agreed to the language of an arbitration even if that later poses difficulties. For example, the Supreme Court of Colombia upheld recognition and enforcement of an award when the complaining party was unable to afford the costs of translators or interpreters and could not understand the language of the arbitration.<sup>89</sup>

### C. Procedural hurdles to showing a breach of article V(1)(b)

#### a. Outcome determinative requirement

49. It is not uncommon for courts to require parties resisting enforcement under article V(1)(b) to prove not only a breach of due process, but also that the outcome of the case would have been different had the alleged breach not occurred.<sup>90</sup>

50. In a recent German decision, a higher regional court found that there was no basis for rejecting enforcement on the grounds of a violation of the right to be heard under article V(1)(b), as the alleged failure to properly inform the buyer of the constitution of the arbitral tribunal was not relevant because it had failed to show that it would have raised any additional defences had it been properly informed of such constitution.<sup>91</sup> The court followed the same reasoning in relation to the alleged failure to duly summon the buyer to the oral hearing. As stated by the higher regional court, violations of the right to be heard would only

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<sup>85</sup> *Precious Stones Shipping Limited (Thailand) v. Quercus Alimentaria SL (Spain)*, Supreme Court, Spain, 28 November 2000, 2658 of 1999, XXXII Y. B. COM. ARB. 540 (2007).

<sup>86</sup> Oberlandesgericht [OLG], Celle, Germany, 2 October 2001, 8 Sch 3/01.

<sup>87</sup> *Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A.*, Supreme Court of Justice, Colombia, 27 July 2011, 11001-0203-000-2007-01956-00; *K (Ukraine) v. F AG (Austria)*, Supreme Court, Austria, 23 October 2007, XXXIII Y. B. COM. ARB. 354 (2008).

<sup>88</sup> Oberlandesgericht [OLG], Munich, Germany, 22 June 2009, 34 Sch 26/08.

<sup>89</sup> *Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A.*, Supreme Court of Justice, Colombia, 27 July 2011, 11001-0203-000-2007-01956-00.

<sup>90</sup> *Firm P v. Firm F*, Oberlandesgericht [OLG], Hamburg, Germany, 3 April 1975, II Y. B. COM. ARB. 241 (1977); *German (F.R.) charterer v. Romanian shipowner*, Bundesgerichtshof [BGH], Germany, 15 May 1986, XII Y. B. COM. ARB. 489 (1987); *Seller v. Buyer*, Bundesgerichtshof [BGH], Germany, 26 April 1990, XXI Y. B. COM. ARB. 532 (1996); *Manufacturer (Slovenia) v. Exclusive Distributor (Germany)*, Oberlandesgericht [OLG], Schleswig, Germany, 24 June 1999, 16 SchH 01/99; *Buyer v. Seller*, Oberlandesgericht [OLG], Frankfurt, Germany, 27 August 2009, 26 SchH 03/09, XXXV Y. B. COM. ARB. 377 (2010); *Apex Tech Investment Ltd. (China) v. Chuang's Development (China) Ltd.*, Court of Appeal, Hong Kong, 15 March 1996, CACV000231/1995; *Polytek Engineering Company Limited v. Hebei Import & Export Corporation*, High Court of the Hong Kong Special Administrative Region, Court of Appeal, Hong Kong, 16 January 1998, 116 of 1997; Oberlandesgericht [OLG], Frankfurt, Germany, 18 October 2007, 26 Sch 1/07.

<sup>91</sup> Oberlandesgericht [OLG], Frankfurt, Germany, 18 October 2007, 26 Sch 1/07.

form the basis for rejecting enforcement if such violations had in fact prevented the affected party from raising its claims and defences. It concluded that in this case, the buyer knew of the arbitration proceedings and could thus have raised its defences, but failed to do so.<sup>92</sup>

#### **b. Waiver**

51. Violation of due process, under article V(1)(b), may, as a general matter, be waived, subject to limitations.

52. A number of courts have considered that parties ought to object promptly to any violation of due process, rather than waiting until the enforcement stage to raise the issue for the first time. Courts have not found a violation of due process under article V(1)(b) where parties have waited until after the arbitration to raise a due process issue for the first time.<sup>93</sup> For example, in the face of a party's objection at the enforcement stage that one of the arbitrator's had given an opinion in a related case, the Paris Court of Appeal found that the party should have objected to the arbitrator's appointment at the time of the arbitral proceedings.<sup>94</sup> A German court similarly refused to find a breach when a party claimed that it had not been timely informed of the opposing party's counterclaims because it failed to object promptly at the time of the arbitral proceedings.<sup>95</sup> As stated by an Indian court, "if the Defendant after receipt of the interim award failed to contest the matter, the blame cannot be laid at the door of the arbitrators for no fault of theirs."<sup>96</sup>

53. Even though Article V(1)(b) does not mention the possibility of advance waivers, German courts have accepted limited waivers of certain procedures or deadlines,<sup>97</sup> but not complete waivers of all due process requirements.<sup>98</sup>

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<sup>92</sup> Oberlandesgericht [OLG], Frankfurt, Germany, 18 October 2007, 26 Sch 1/07.

<sup>93</sup> *AO Techsnabexport v. Globe Nuclear Services and Supply GNSS Lmt.*, Court of Appeals, Fourth Circuit, United States of America, 15 December 2010, 09-2064; Hanseatisches Oberlandesgericht [OLG], Germany, 26 January 1989, 6 U 71/88; *Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Commercial*, District Court, Southern District of New York, United States of America, 24 August 1990, 90 Civ. 0720 (KC); Oberlandesgericht [OLG], Hamm, Germany, 2 November 1983, 20 U 57/83; *Consultant company (UK) v. Painting contractors (Germany)*, Oberlandesgericht [OLG], Munich, Germany, 28 November 2005, XXXI Y. B. COM. ARB. 722 (2006); Oberlandesgericht [OLG], Karlsruhe, Germany, 27 March 2006, 9 Sch 02/05, XXXII Y. B. COM. ARB. 342 (2007); *Shenzhen Nan Da Industrial and Trade United Co Ltd v. FM International Ltd*, High Court, Supreme Court, Hong Kong, 2 March 1992, MP 12492.

<sup>94</sup> *Compagnie Francaise d'études et de construction Technip (Technip) v. Entreprise nationale des engrais et des produits phyosanitaires (Asmidal)*, Court of Appeal, Paris, France, 2 April 1998, 97/6929.

<sup>95</sup> Hanseatisches Oberlandesgericht [OLG], Germany, 26 January 1989, 6 U 71/88.

<sup>96</sup> *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain*, High Court, Delhi, India, 27 November 2008.

<sup>97</sup> *K Trading Company (Syria) v. Bayerischen Motoren Werke AG (Germany)*, Bayerisches Oberstes Landesgericht [BayObLG], Germany, 23 September 2004, 4Z Sch 05-04, XXX Y. B. COM. ARB. 568 (2005).

<sup>98</sup> *Danish Buyer v. German (F.R.) Seller*, Oberlandesgericht, Koln, Germany, 10 June 1976, IV Y. B. COM. ARB. 256 (1979). On the fact that due process is often considered as an integral part of public policy, see above at para. 7.