Pragmatism Above All: The New York Convention Translation Requirement from the Dutch Perspective

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Pursuant to the procedure envisaged by the New York Convention, a party seeking to recognize and enforce a foreign arbitral award shall translate the agreement to arbitrate and the arbitral award into an official language of the country where the enforcement is sought.

By and large, such a requirement would not be difficult to interpret. At the same time, the obligation to produce a translation often involves additional (and potentially) high costs to the already expensive arbitration process. Moreover, providing a translation from the language that the parties chose may be considered overly formalistic and going against the pro-enforcement spirit of the New York Convention. This would be particularly so in cases where the enforcement judge's language proficiency would be sufficient to evaluate the content of the award.

This article discusses the consequences of failing to produce a translation, including complicating factors that arise when only the relevant part of the award has been translated by a party applying for recognition and enforcement under the New York Convention.

Keywords: New York Convention, translation requirement, pragmatism, translation costs, disbursement, enforcement of arbitral award, pro-enforcement bias

1 INTRODUCTION

Different studies repeatedly confirm that the great majority of arbitral awards are voluntarily complied with by the award debtor.[1] There are times, however, when an award creditor must pursue a legal action to have the arbitral award enforced. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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[1] *See* e.g., Queen Mary University of London and PricewaterhouseCoopers, *2008 Survey on Corporate Attitudes: Recognition and Enforcement of Foreign Awards* 8, www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf (accessed 24 May 2022); Gary B. Born, *International Commercial Arbitration* 3139 (3d ed., Wolters Kluwer 2021) ('In practice, the vast majority of awards in international commercial arbitrations are voluntarily complied with, without the need for post-award enforcement proceedings'.).

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(the 'New York Convention' or the 'Convention')[2] provides – in principle – for a simple and swift procedure for the recognition and enforcement of foreign arbitral awards, which is considered one of the biggest advantages of international arbitration over court litigation. The New York Convention is dubbed as 'the most successful, multilateral instrument in the field of international trade law',[3] and currently has 170 contracting states, after Turkmenistan acceded to the Convention on 4 May 2022.[4]

Under the procedure envisaged by the Convention, the party seeking to recognize and enforce a foreign arbitral award *shall produce* a translation of the agreement to arbitrate, as well as the arbitral award, into an official language of the country where the enforcement is sought.

By and large, such a requirement should not create any interpretative difficulties. As observed by one author: '[t]he need for such translation is self-evident since the enforcing court would [otherwise] not be in a position to understand the contents of the documents'.[5] At the same time, the obligation to produce a translation often involves additional (and potentially) high costs to the already expensive arbitration process. Moreover, providing a translation from the language that the parties chose may be considered overly formalistic, going against the pro-enforcement spirit of the Convention.[6] This would be particularly so in cases where the enforcement judge's language proficiency would be sufficient to evaluate the content of the award.

This article discusses the consequences of failing to produce a translation, including complicating factors that arise when only the relevant part of the award has been translated by a party applying for recognition and enforcement under the Convention.

This study starts with a textual analysis of Article IV(2) of the Convention, including a review of the *travaux préparatoires*, as well as the Dutch courts' application of the translation requirement (sections 2 and 3). In turn, the study advocates in favour of the possibility to claim translation costs from the award debtor, for example as disbursements (section 4). The analysis shows that although the Dutch enforcement courts apply the Convention in a robust, dynamic pro-enforcement

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2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 Jun. 1958), TS No. 4739 ('New York Convention').

3 Pieter Sanders, *Foreword*, in *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* v (International Council for Commercial Arbitration ed. 2011).

4 *See* UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York 1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (accessed 23 May 2022).

5 Emilia Onyema, *Formalities of the Enforcement Procedure (Articles III and IV)*, in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* 610 (Emmanuel Gaillard & Domenico di Pietro eds, CMP Publishing 2009).

6 Born, *supra* n. 1, at 3702–3705 and authorities therein.

fashion, additional procedural tools and a pragmatic mindset are useful if the translation requested by the award debtor creates unnecessarily high costs for the award creditor (section 5).

2 TRANSLATION REQUIREMENT UNDER THE NEW YORK CONVENTION

Article IV of the Convention is part of the procedural framework[7] for the process of recognition and enforcement. For the arbitral award to benefit from the Convention's enforcement regime, it needs to satisfy certain evidentiary standards. According to Article IV of the Convention[8]:

> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
> (a) the duly authenticated original award or a duly certified copy thereof;
> (b) the original agreement referred to in article II or a duly certified copy thereof.
> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

One can immediately distinguish several criteria for the Article IV(2) translation requirement: (1) a translation *shall* be produced in cases when the award is *not* drafted in the official language of the enforcing state; (2) a translation of both the agreement to arbitrate and the arbitral award is required; and finally (3) a translation has to be certified by 'an official or sworn translator or by a diplomatic or consular agent'.

These criteria will be further discussed below (section 2.2) together with how they are applied by the enforcement courts in the Netherlands (section 2.3). In any event, it is relevant to start the analysis with a brief look at the Convention's drafting history to show that the majority of enforcement courts remain faithful to the Convention's spirit and purpose rather than strictly complying with its text (section 2.1). Brief reflections on van den Berg's proposal for the new enforcement Convention ('the Miami Draft') will also be included (section 2.3).

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7 Together with Art. III of the New York Convention.

8 *See* the authentic text and translation, www.newyorkconvention.org/new+york+convention+texts (accessed 23 May 2022). The Chinese, English, French, Russian and Spanish texts of the New York Convention have been declared to be equally authentic (New York Convention, Art. XVI, sub. 1).

2.1 Drafting history of the convention translation requirement

When compared to its predecessor,[9] Article IV went through a major overhaul to relax onerous evidentiary requirements that were required under a predecessor of the New York Convention enforcement regime, namely, the Geneva Convention.[10] When it comes to the translation requirement, however, the Geneva Convention, as well as initial drafts of the new enforcement convention, provided for a more relaxed system than the final stringent text of the New York Convention.[11]

When looking at the early drafts, specifically the ECOSOC Draft Convention of 1955[12] and a 'Dutch proposal' for the amendment of Articles III–IV,[13] one will notice that the language proposed envisaged that a translation 'may be required'. This follows the permissive text of the Geneva Convention, which in the relevant part of Article 4 provided that '[a] translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded'.[14]

During the drafting of the Convention, however, this ambiguous wording has been replaced by the counterproposal 'shall produce'. Van den Berg reports that '[t]he latter expression was taken over by Working Party No. 3 for no specified reason and adopted by the Conference without discussion'.[15] In a similar vein, Marike Paulsson concludes that 'the drafting history is scarce on the topic'.[16] All in all, the *travaux préparatoires* do not provide clarity on the intentions behind the choices made by the drafters.

In van den Berg's view, inclusion of the more mandatory wording 'shall produce' was due to the fact that a court would always require a translation of a document in its own language.[17] At the same time, already in 1981, he pointed out

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9 *See* Convention on the Execution of Foreign Arbitral Awards (26 Sep. 1927), 92 LNTS 301 ('Geneva Convention').

10 *See* inter alia, Maxi Scherer, *Article IV*, in *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary* 215–216 (Reinmar Wolff ed., 2d ed., Beck/Hart/Nomos 2019).

11 The obligatory language of Art. IV of the New York Convention ('shall produce a translation') can be contrasted with a more discretionary language of Art. 4 of the Geneva Convention which in the relevant part reads that '[a] translation […] may be demanded'.

12 Report of the Committee on the Enforcement of International Arbitral Awards, UN ECOSOC, 19th Session, Item 4, UN Doc. E/27C4, E/AC.424/Rev.1, Art. V(b) (1955): 'A duly certified translation of the award and of the other documents mentioned in this article into an official language of the country where the award is sought to be relied upon may be required'.

13 Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UN ECOSOC, UN Doc. E/CONF.26/L.34 (1958).

14 *See* Geneva Convention, Art. 4.

15 Albert Jan van den Berg, *The New York Convention of 1958* at 258 (Kluwer 1981).

16 Marike R. P. Paulsson, *The 1958 New York Convention in Action* 151 (Kluwer Law International 2016).

17 van den Berg, *supra* n. 15, at 258.

that this requirement ('shall produce') is to be considered 'somewhat out of date'[18] and that '[i]t would have been preferable if the permissive language of the Geneva Convention had remained'.[19]

Indeed, permissive language would be better placed to express the underlying pro-enforcement philosophy of the Convention and facilitate its uniform application. Arguably, it is further supported that permissive language is included in one of the pillars of the Convention's enforcement regime, namely Article V. This provision employs the language 'may be refused' when identifying grounds on which the enforcement court is allowed to refuse the recognition and enforcement of a foreign arbitral award.[20]

On the textual level, it is therefore difficult to reconcile linguistic choices made by the drafters which would facilitate a uniform application of the Convention.[21] As will be shown below,[22] however, it did not prevent the Dutch enforcement courts being guided by the Convention's ultimate spirit favouring the enforcement of arbitral awards.

2.2 Textual analysis of Article IV(2)

As already highlighted above,[23] arguably the major obstacle in applying the Convention is the mandatory 'shall' used in Article IV of the Convention. Before further discussing the potential consequences of the use of the words 'shall [produce translation]', it is useful to identify three other criteria to be fulfilled when it comes to the translation requirement: (1) a translation is necessary when the award is *not* drafted in an official language of the enforcing state; (2) a translation is required not only of the arbitral award but also of the underlying agreement to arbitrate as well; and finally (3) a translation has to be certified by 'an official or sworn translator or by a diplomatic or consular agent'.

The first two criteria are rather self-evident: if the arbitral award or arbitration agreement is not made in an official language of the country in which the award is

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18 *Ibid.*, at 258.

19 *Ibid. See also* van den Berg's proposal on the 'new' New York Convention discussed below in s. 2.3.

20 The extensive debate whether 'may' in Art. V gives a court discretion or rather obliges it to refuse recognition and enforcement of the award falls outside the scope of this article. For further reading, *see* inter alia, Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14(2) Arb. Int'l 227–230 (1998); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulments*, 6(2) Asia Pac. L. Rev. (1998); Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC Bull. 15 (1998).

21 When comparing mandatory 'shall' in Art. IV of the New York Convention with permissive 'may' in Art. V.

22 *See* ss 2.2–2.4.

23 *See* s. 2.

relied upon, the party applying to recognize and enforce the award should produce a translation of these documents into an official language of the enforcement court when applying for the recognition and enforcement.

The third criterion mentioned above requires that the translation 'shall be certified' by either (1) an official or sworn translator, or (2) a diplomatic or consular agent. Importantly, there are two interdependent elements of this requirement that show a pro-enforcement flexibility in the designed solution: firstly, it is not required that the designated entities (e.g., sworn translator) draft a translation (effectively allowing any translation to suffice when certified under Article IV); and secondly, the Convention does not specify the nationality of the designated certifiers – leaving the award creditor to decide.

In the context of unofficial translations, Onyema observes that:

> Article IV(2) does not specify who should translate the documents (award and arbitration agreement). However, it states that such translation 'shall be certified by an official or sworn translator or diplomatic or consular agent' … Thus, the documents can rightly be translated by anybody as long as such translation is duly certified by any of those office holders listed under paragraph 2 of Article IV.[24]

As regards the entities that potentially may certify the agreement to arbitrate and the arbitral award, it has been argued that these certifying diplomatic or consular agents may either be from the country where the award was made, or the country where the enforcement is sought.[25] In light of the pro-enforcement philosophy of the Convention, Scherer concludes that:

> In the interest of flexibility, the NYC does not specify the national origin of the competent authorities. Accordingly, national courts have generally accepted certification by sworn translators and diplomatic/consular agents from either the place of arbitration or the place of recognition and enforcement. The applicant is free to choose.[26]

Van den Berg is of a similar view, confirming that 'the drafters of the Convention appear to have had the intent to provide for the greatest possible flexibility for compliance with the positive conditions of enforcement of a Convention award'.[27] Indeed, it was aptly observed that 'Article IV was not drafted to allow courts to stop enforcement for want of compliance with

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[24] Onyema, *supra* n. 5, at 610. Similarly, Scherer, *supra* n. 10, at 229 ('Also, it is generally understood that the parties may agree that an unofficial (as opposed to certified) translation will suffice').

[25] UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 118, n. 554 (referring to Supreme Court, Austria, 11 Jun. 1969, II YCA 232 (1977)), https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf (accessed 23 May 2022). *Also* van den Berg, *supra* n. 15, at 260–261.

[26] Scherer, *supra* n. 10, at 228.

[27] van den Berg, *supra* n. 15, at 260.

formalities'.[28] The requirements of Article IV of the Convention, therefore, should be the maximum formal requirement.[29]

Arguably, when looking at the enhanced flexibility of Article IV in general, the obligatory 'shall' for the want of translation becomes an odd outlier, particularly considering that practice shows that the translation of an (often long) arbitral award is time-consuming, and moreover, a costly affair. The pragmatic approach to the issue (requiring the disregard of the common meaning of 'shall') is therefore necessary to comply with the underlying pro-enforcement goal of the Convention.

Such an interpretation of Article IV(2) is also advocated by the scholarly writings (and the majority of courts, as will also be explained below).[30] For example, van den Berg already in 1981 explained that:

> Currently most international arbitral awards are made in English and judges generally have a good command of English. It would have been preferable if the permissive language of the Geneva Convention had remained. The costs of translating documents are substantial, especially where recent arbitral awards sometimes tend to be as lengthy as a doctorate thesis.[31]

Also, Scherer points out that:

> Whereas Article IV's wording ('shall produce') seems to suggest that a translation is mandatory … national courts have generally exercised great discretion in applying this criterion. Some courts have held that a translation is not required in cases where the court is familiar with the foreign language, and neither the court nor the opposing party requests a translation, positing that in such circumstances the added expense of a translation seems unreasonably high.[32]

Finally, Born concludes that '[w]here a court has sufficient knowledge of the original text of the award, or a translation or a complete translation is otherwise deemed unnecessary or unduly costly, the requirements in Article IV should not be treated as a basis for non-recognition'.[33] This is an important consideration because the closed catalogue of grounds for refusal of recognition and enforcement of foreign arbitral awards is prescribed in Article V of the Convention. In other words, formal requirements of Article IV of the Convention cannot be used to broaden Article V's exhaustive list justifying non-recognition of an arbitral award.[34]

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28 Paulsson, *supra* n. 16, at 138.

29 *See* e.g., *ibid*. ('As always, one should recall that the Convention is absolutely permissive with respect to enforcement; Article VII explicitly allows enforcement applicants to rely on more pro-enforcement outcomes if they exist in the relevant jurisdiction'). van den Berg, *supra* n. 15, at 246.

30 *See* s. 2.3.

31 van den Berg, *supra* n. 15, at 258.

32 Scherer, *supra* n. 10, at 229.

33 Born, *supra* n. 1, at 3702. *See also* Paulsson, *supra* n. 16, at 152–153.

34 *See also* Scherer, *supra* n. 10, at 229 ('Article IV contains only evidentiary rules and not mandatory procedural requirements').

The general view therefore is *not* to treat the 'shall' in the context of production of a translation as a constitutive element that may affect the fate of the arbitral award.[35] In the words of Marike Paulsson: 'Courts must also include notions of estoppel in their pragmatic approach: if respondent has not challenged the authenticity of certification, courts may be lenient towards applicant. Estoppel trumps any *ex officio* application of Article IV'.[36] The sections below will further explore the enforcement courts' approach to this issue,[37] as well as further recommendations inspired by different enforcement proceedings.[38]

2.3 Benefits of the 'Miami Draft'

On the fiftieth birthday of the Convention, van den Berg proposed a new revamped text of the Convention that would cure any apparent shortcomings that had proved to be problematic over the half-century of use of the Convention.[39] Although it faced considerable scepticism – amongst other things because of how successful the Convention became – it continues to be a sensible yardstick for the interpretation of the Convention.[40]

In the revision of Article IV(2) of the Convention, van den Berg proposed that:

> If the arbitral award is not in an official language of the court before which enforcement is sought, the party seeking enforcement shall, at the request of the other party or the court, submit a translation. The translation shall be in such form as directed by the court.[41]

He explained that:

> Paragraph 4 is also less formal than Article IV(2) of the New York Convention which prescribes a translation that in all cases is certified by 'an official or sworn translator or by a diplomatic or consular agent'. A number of courts no longer require the translation of

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35 Notably, the obligatory 'shall' is also used in the context of certification ('translation shall be certified'). However, it is fully justified to require public officials to acknowledge authenticity of the content of the award because the translation in itself can be unofficial.

36 Paulsson, *supra* n. 16, at 154.

37 *See* s. 2.3.

38 *See* s. 3.

39 Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, in *50 Years of New York Convention* 649–667 (Albert Jan van den Berg ed., Kluwer Law International 2009), www.newyorkconvention.org/draft+convention (accessed 23 May 2022).

40 Marike R. P. Paulsson, *The Miami Draft: the Good Twin of the NYC*, http://arbitrationblog.kluwerarbitration.com/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/ (accessed 23 May 2022). ('It is like a magical mirror that offers a face-lift without surgery, gently reworking the defects that decades of use have revealed in the old syntax. The purpose of the Miami Draft is of course that of the NYC itself, and nothing else: to facilitate the recognition and enforcement of foreign arbitration agreements and arbitral awards'.).

41 Miami Draft, Art. 4(4); van den Berg, *supra* n. 39, at 667–669.

> documents if they are familiar with the foreign language in question (notably English). The main reason for this attitude is to avoid unnecessary costs as it is commonly known that the translation of an arbitral award can be expensive. Paragraph 4 reflects that practice.[42]

Indeed, the Miami Draft could be a beneficial interpretative instrument for the Article IV(2) translation requirement. Its welcome developments manifest themselves in reversing the default requirement of the translation and by giving the court discretion to decide on the form of the translation (thus recognizing the use of the unofficial translation).

3 APPLICATION OF ARTICLE IV(2) OF THE CONVENTION BY THE DUTCH ENFORCEMENT COURTS

This article focuses on three important aspects related to the Article IV(2) translation requirement from a Dutch law perspective. In light of Article III of the Convention, the general translation requirement of the Dutch procedural law will be briefly explained (section 3.1). Secondly, the relevant statutory framework related to enforcing foreign arbitral awards will be identified (section 3.2). Finally, the third section will give an overview of the relevant case law (section 3.3).

3.1 General requirements of Dutch procedural law for producing a translation in state court application proceedings

In many instances when foreign documents are adduced in Dutch courts, a translation will not be necessary because Dutch judges are considered able to comprehend (alongside the Dutch language and in some cases Frisian) at least the English, German and French languages. This conclusion (and various others) follows from a judgment of the Dutch Supreme Court, which held that 'in principle, the submission of a translation of an exhibit is not necessary if the production is written in English, German or French'.[43]

Similarly, Article 1.1.1.15 of the Procedural Rules for application proceedings in commercial and insolvency matters before the Courts of Appeal in the Netherlands (*Procesreglement verzoekschriftprocedures handels- en insolventiezaken gerechtshoven*)[44] provides that:

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[42] van den Berg, *supra* n. 39, at 659.

[43] Supreme Court of the Netherlands 15 Jan. 2016, RvdW 2016/143, ECLI:NL:HR:2016:65, § 3.4.4 ('Het overleggen van een vertaling van een productie is in beginsel niet noodzakelijk als die productie is gesteld in de Engelse, Duitse of Franse taal').

[44] The Procedural Rules originate from an initiative of the Project Procedural Rules (Project procesreglementen), which is part of the Civil Sectors Programme (Programma Civiele Sectoren), and has been developed by an initiated and facilitated working group of the National Consolation of the Presidents of the Civil Sectors Courts (Landelijk Overleg van de Voorzitters van de Civiele sectoren-

> In principle, it is not necessary to submit a translation of a supporting document if the supporting document is in English, German or French. The Court of Appeal may require a translation if it considers this necessary or desirable for the handling of the case, also in view of the interests of the other interested parties.
>
> In principle, a translation is necessary if documentary evidence is in a foreign language other than English, German or French.
>
> The court may determine that a translation must be submitted that has been drawn up and signed by a sworn translator.[45]

The above general procedure shows that a judge will have discretion and – if necessary or desirable in handling the case while considering the parties' interests – may require the parties to submit a Dutch translation of documents, along with a French, German or English translation or a combination of the three languages. In principle, as explained by the Dutch Supreme Court, 'a translation would always be required if an exhibit is made up in another language'.[46]

Additionally, if a translation is missing, but the judge considers that such a translation is necessary or desirable in handling the case, she may require a party to produce a translation.[47] This request can be made by the court *ex officio* or at the request of the counterparty. Naturally, a party to whom such a request is directed will be obliged to comply.

The Dutch Supreme Court – with a seemingly clear (albeit implicit) reference to the procedural rules of the Courts of Appeal – decided in the aforementioned case that:

Hoven or 'LOVC-H'), in consultation with the Dutch Bar Association. On 12 Jun. 2008, the LOVC-H approved the procedural rules, after which all Courts of Appeal adopted the procedural regulations as their own regulations, *see* at 9 of the Procedural Rules for application proceedings in commercial and insolvency matters before the Courts of Appeal in the Netherlands (Procesreglement verzoekschriftprocedures handels- en insolventiezaken gerechtshoven) which can be found in Dutch at de Rechtspraak, *Procesreglement verzoekschriftprocedures handels- en insolventiezaken gerechtshoven*, https://www.rechtspraak.nl/SiteCollectionDocuments/procesreglement-verzoekschriftprocedures-handels-en-insolventiezaken-gerechtshoven-042021.pdf (accessed 23 May 2022). To further clarify, the Procedural Rules can be seen as judge-made rules (rechtersregelingen). *See* e.g., Karlijn Teuben, *Rechtersregelingen in het burgerlijk (proces)recht (Burgerlijk Proces & Praktijk nr. II)* 7 (Kluwer 2004).

45 Procedural Rules for application proceedings in commercial and insolvency matters, Art. 1.1.1.15 ('Het overleggen van een vertaling van een bewijsstuk is in beginsel niet noodzakelijk indien de bewijsstuk is gesteld in de Engelse, Duitse of Franse taal. Het hof kan een vertaling verlangen, indien het dat nodig of wenselijk acht voor de behandeling van de zaak, mede gelet op de belangen van de overige belanghebbenden. Een vertaling is in beginsel wel noodzakelijk indien een bewijsstuk is gesteld in een andere buitenlandse taal dan in de Engelse, Duitse of Franse taal. Het hof kan bepalen dat een vertaling wordt overgelegd die is opgemaakt en ondertekend door een beëdigd vertaler'.), available at De Rechtspraak, *supra* n. 44. *See also* n. 48.

46 Supreme Court of the Netherlands, 15 Jan. 2016, RvdW 2016/143, ECLI:NL:HR:2016:65, § 3.4.4 ('Een vertaling is in beginsel wel noodzakelijk als een productie is gesteld in een andere vreemde taal'). *See also* Procedural Rules for application proceedings in commercial and insolvency matters, Art. 1.1.1.15, available at De Rechtspraak, *supra* n. 44.

47 *See* Dutch Code of Civil Procedure (DCCP), Art. 986(3).

> when a translation is missing, but such translation would be necessary or desirable according to the court's ex officio judgment or at the request of the other party, the party that submitted the exhibit should be given the opportunity to provide a translation of that exhibit, unless the principles of due process dictate otherwise. The court may also determine that such translation must be drawn up and signed by a certified translator.[48]

These general procedural rules offer great flexibility in handling foreign documents and prevent the outlay of unnecessary costs for redundant translations. In turn, it offers a solid and pragmatic framework when dealing with enforcement of foreign arbitral agreements and awards.

3.2 Implementation of the Convention under Dutch procedural law

When it comes to enforcing the foreign arbitral award, Dutch arbitration law recognizes two separate enforcement regimes, namely, (1) one that is governed by the applicable enforcement treaty; and (2) one with no applicable international treaty framework. Naturally, in the context of the current analysis, the system introduced in Article 1075 of the Dutch Code of Civil Procedure (DCCP) is relevant.

According to the relevant parts of Article 1075 of the DCCP:

> (1) An arbitral award made in a foreign State to which a treaty concerning recognition and enforcement is applicable may, at the request of any of the parties, be recognised and enforced in the Netherlands.
> (2) Articles 985 to 991 inclusive shall apply mutatis mutandis insofar as the treaty does not contain provisions in derogation thereof and it being understood that the Court of Appeal shall be substituted for the district court and the time-limit for appeal in cassation shall be three months.[49]

This shows that the Dutch legislator opted for a very basic structure to implement the New York Convention, essentially allowing (1) the direct application of the Convention's provisions, which is only (2) supplemented by the relevant general provisions applicable to the enforcement of the foreign judgments (through *mutatis mutandis* application of Articles 985 to 991 of the DCCP).[50]

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[48] Supreme Court of the Netherlands, 15 Jan. 2016, RvdW 2016/143, ECLI:NL:HR:2016:65, § 3.4.5: ('In gevallen waarin een vertaling ontbreekt, maar deze naar het – ambtshalve of op verzoek van de wederpartij gegeven – oordeel van de rechter noodzakelijk of wenselijk is, behoort de partij die de productie heeft overgelegd, gelegenheid te krijgen een vertaling daarvan in het geding te brengen, tenzij de eisen van een goede procesorde zich daartegen verzetten. De rechter kan bepalen dat die vertaling door een beëdigd vertaler moet zijn opgemaakt en ondertekend'.).

[49] *See* DCCP, Art. 1075(1) and (2). Translation available at, www.nai-nl.org/downloads/Text%20Dutch%20Code%20Civil%20Procedure.pdf (accessed 23 May 2022).

[50] It should be noted that DCCP, Art. 1075(3) refers further back to DCCP, Arts 261–291, to the extent issues are not covered by DCCP, Art. 1075(1) and (2). DCCP, Arts 261–291 are general provisions dealing with the procedure before the court of first instance.

As already mentioned above,[51] it is always possible to deviate from the requirements of Article IV of the Convention should there be a more liberal framework available.[52] Marike Paulsson highlights that '[a]s always, one should recall that the Convention is absolutely permissive with respect to enforcement; Article VII explicitly allows enforcement applicants to rely on more pro-enforcement outcomes if they exist in the relevant jurisdiction'.[53]

Indeed, when it comes to the translation requirement, it seems that the general Dutch procedural law can be more liberal. In particular, one could argue that by applying Article VII of the Convention, Dutch procedural law takes precedence over the Article IV(2) translation requirement in relation to the part where the translation of the award is strictly demanded ('shall produce a translation').[54] This may be evidenced by the application of Article 986(3) of the DCCP which in relevant part reads that: '[the court] may also demand that the decision and the other documents submitted be translated into Dutch'.[55] Therefore the enforcement court is provided with a much needed discretion and flexibility ('may demand') which is missing in the Article IV(2) translation requirement ('shall produce').[56] In any such case, as will be observed below, the practice of Dutch courts shows that judges use their discretion to ensure that the underlying enforcement goal of the Convention is reached without unnecessary delay.

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51 *See* s. 2.2.

52 As the Convention does not generally prevent the application of a more favourable regime for the recognition and enforcement of foreign arbitral awards, other Conventions – which (also) provide for the recognition and enforcement of arbitral awards and to which the Netherlands is a party – are of importance. *See* e.g., the Belgium-Netherlands Enforcement Treaty that in some instances is more liberal than the Convention. *See* Gerard J. Meijer, *Commentary on Article 1075 DCCP, Note 1,* in *Tekst en Commentaar Wetboek van Burgerlijke Rechtsvordering* (Toon I. M. van Mierlo & Constant J. J. C. van Nispen eds, 9th ed., Wolters Kluwer 2020), with a reference to the Convention on Jurisdiction and Enforcement between Belgium and the Netherlands, Belgium-Netherlands Enforcement Treaty 1925 (Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België betreffende de territoriale rechterlijke bevoegdheid, betreffende het faillissement en betreffende het gezag en de tenuitvoerlegging van rechterlijke beslissingen, van scheidsrechterlijke uitspraken en van authentieke akten), 28 Mar. 1925, Dutch Bulletin on Acts and Decrees (Stb.) 1929, at 405.

53 *See* e.g., Paulsson, *supra* n. 16, at 138.

54 *See also* s. 2.2.

55 *See* DCCP, Art. 986(3) ('Zij kan tevens eisen, dat de beslissing en de overige overgelegde stukken worden vertaald in het Nederlands').

56 Albert Jan van den Berg & Gerard J. Meijer, *National Report for The Netherlands (2020 Through 2021)*, in *ICCA International Handbook on Commercial Arbitration* 65 (Lise Bosman ed., Kluwer Law International 2020) ('Art. IV(2) provides that the petitioner shall produce a translation in the official language of the country in which the award is relied upon. It is held that, under Dutch law, no translation is necessary if the foreign language is, e.g., English'.).

3.3 Approach of Dutch courts to the Article IV(2) translation requirement

Practice shows that the phrase 'shall produce a translation' may become an unnecessary procedural hurdle because recalcitrant award debtors may make use of it to delay the enforcement of the foreign arbitral award. In such case, as explained below, the Dutch enforcement courts are generally unimpressed with the persuasiveness of these arguments when brought forward. At the same time, Dutch courts are also faithful to the Convention pro-enforcement spirit and do not make *ex officio* use of Article IV(2) of the Convention to deny the recognition and enforcement of awards.[57] The reflections below primarily deal with the Dutch courts' approach to translation requirements invoked by an awards debtor.

As early as in 1984, in *SPP (Middle East) Ltd v. Arab Republic of Egypt*, which was one of the first cases in the Netherlands where the requirement to produce a translation under Article IV(2) of the Convention was discussed, the President of the District Court of Amsterdam considered that:

> Petitioner has submitted duly certified copies of the arbitral award and the arbitration agreement. The aforementioned award and agreement are drawn up in the English language which language we master sufficiently to have taken full cognizance of the contents of these documents. We therefore consider that the provisions of [Article IV(2) of the Convention] are complied with.[58]

The excerpt of this decision reported in the *Yearbook of Commercial Arbitration* does not indicate whether the award debtor raised any issues with the English version of the arbitration agreement and award, but it illustrates the pragmatic approach to the translation requirement from an early application of the Convention.

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[57] *See* ss 2.1–2.2. *Also ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* 14–16 (International Council for Commercial Arbitration 2011). Even when the Art. IV(2) translation requirement was recognized by the court *ex officio* (when the defendant did not appear before the court), it did not lead to refusal of the recognition and enforcement of the award; *see* Hague Court of Appeal, 17 Jul. 2020, ECLI:NL:GHDHA:2020:2113 § 5.2: 'On the basis of paragraph 2 of art. [IV] of the New York Convention 1958 requirement for a translation of the arbitral award and the charterparty from English into Dutch or Frisian has not been met, but the Court of Appeal does not need this because it has sufficient command of the English language to be able to take note of the content of these documents'. ('Aan het uit lid 2 van art. VI van het Verdrag van New York 1958 voortvloeiende vereiste van een vertaling van het arbitraal vonnis en de charterparty uit het Engels in het Nederlands of het Fries is weliswaar niet voldaan, maar daaraan heeft het hof geen behoefte omdat het de Engelse taal voldoende machtig is om kennis te kunnen nemen van de inhoud van deze stukken'.).

[58] *SPP (Middle East) Ltd v. Arab Republic of Egypt*, President of the District Court of Amsterdam, the Netherlands (decided 12 Jul. 1984), X YCA 487, 487–492 (1985).

In another case in 2009, where the President of the District Court of Amsterdam had to decide on the translation issue, *LoJack Equipment Ireland Ltd (Ireland) v. A*,[59] a party resisting enforcement argued that the lack of translation made the award creditor's enforcement efforts inadmissible. However, the court disagreed. The court explained that the argument failed because (1) it had neither been argued by the respondent, nor had it become evident that the respondent did not understand the contents of the documents; and (2) the court itself had sufficient command of the English language to understand the contents of the documents submitted.[60] Additionally, the court held that Article IV imposed no sanctions for failure to comply with formal requirements, let alone required the rejection of the enforcement application *in toto*.[61] It concluded that a reasonable interpretation of Article IV(1) of the Convention entailed that the requirements stated in it served to determine the existence and content of the agreement to arbitrate and the existence of the arbitral award itself.[62] The decision in *LoJack Equipment Ireland Ltd (Ireland) v. A* serves as another illustration that it is generally redundant to produce the translation when the award is made in English, unless the award debtor can prove its inability to comprehend the content of the arbitral award.

In the third case, *Marvesa AG v. OOO Gamma-Trade*,[63] the Rotterdam District Court concluded that a distinction should be made between Article IV and Article V of the Convention: whereas Article IV regulates which documents must be submitted with the request for enforcement, Article V restricts the grounds on which the requested leave is refused.[64] Notably, the court emphasized that non-compliance with the formal requirement of Article IV was not included as a ground allowing the enforcement court to refuse the recognition and enforcement of a foreign arbitral award.[65] This decision (following the reasoning of *LoJack Equipment Ireland Ltd (Ireland) v. A*) is another affirmation that the purpose of Article IV is to determine the existence and content of the agreement to arbitrate and the arbitral award.[66]

A final example where the award debtor attempted to resist the enforcement of the award based on the Article IV(2) translation requirement was based on a somewhat unusual factual matrix. In *HMH v. TVM*,[67] the enforcement was

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[59] District Court of Amsterdam, 18 Jun. 2009, ECLI:NL:RBAMS:2009:BI9930; also published in the Yearbook Commercial Arbitration as *LoJack Equipment Ireland Ltd v. A*, District Court of Amsterdam, the Netherlands (decided on 18 Jun. 2009), XXXIV YCA 715, 715–721 (2009).

[60] District Court of Amsterdam, 18 Jun. 2009, ECLI:NL:RBAMS:2009:BI9930, § 5.6.

[61] *Ibid.*, § 5.5.

[62] *Ibid.*, § 5.6.

[63] District Court of Rotterdam, 5 Aug. 2015, ECLI:NL:RBROT:2015:5767.

[64] *Ibid.*, § 2.8.

[65] *Ibid.*

[66] *Ibid.*, § 2.9.

[67] District Court of the North-Netherlands, 28 Nov. 2017, ECLI:NL:RBNNE:2017:4536.

requested only in connection with the costs portion of the award (which was drafted in Danish) rendered in Denmark.[68] In this case, the enforcement of a single sentence included in the operative part of the arbitral award was effectively sought.

Consequently, HMH produced a translation of the first page of the award and of its last page which included the operative part of the cost award. This partial translation was certified by the Danish Chamber of Commerce and apostilled by the Danish Ministry of Foreign affairs,[69] thus complying with all the requirements of Article IV(2) of the Convention.[70] Such a solution – according to the applicant – was justified for two reasons: (1) the body of the award was immaterial for the tribunal's decision on costs; and (2) the production of a translation of the full award would be a relatively costly endeavour amounting to around 12% of the relief sought (i.e., of the costs portion of the award).[71]

TVM, respondent in this case, claimed that HMH should have produced a full translation of the award because the enforcement court should be able to review the full content of the arbitral award.[72] Additionally, TVM alleged that, by not producing a full translation of the award, HMH wilfully misrepresented the facts of this case because HMH would ultimately owe TVM a much higher amount than the costs portion of the award (because the dispute between the parties had now been settled in favour of TVM).[73] Consequently, in TVM's view, HMH's request must be rejected since (1) it did not meet the 'minimum requirements' of Article IV(2) of the Convention[74]; and (2) HMH had given an incorrect and incomplete explanation of the arbitral award, which prevented the judge from making a correct assessment as to whether a translation was deemed necessary.[75]

The preliminary relief judge took a pragmatic approach and enforced the requested costs part of the award. The court stressed again that the Convention does not impose sanctions for non-compliance with requirements of Article IV of the Convention and, thus, these formalities in specific circumstances of the case could be ignored.[76] It meant that the enforcement of the award was not

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68 The costs portion of the award amounted roughly to EUR 33,800. Thomas Stouten and Lennart Baijer have been involved in the case, hence the knowledge of the amounts involved.

69 As per 3 Jul. 2017, all translated documents in Denmark have to be signed by a notary public or by the Confederation of Danish Enterprise/Danish Industry (Dansk Erhverv/Dansk Industri) before the Ministry of Foreign Affairs can legalize/apostille the document, *see* Ministry of Foreign Affairs of Denmark, *Translations*, available at, https://um.dk/en/travel-and-residence/legalisation-frontpage/legalisation-danish/translations (accessed 23 May 2022).

70 *See also* s. 2.2.

71 *Supra* n. 68.

72 District Court of the North-Netherlands 28 Nov. 2017, ECLI:NL:RBNNE:2017:4536, § 3.3.

73 *Ibid.*, § 3.3.

74 *Ibid.*, § 4.6.

75 *Ibid.*

76 *Ibid.*, § 4.7 with reference to District Court of Amsterdam, 18 Jun. 2009, ECLI:NL:RBAMS:2009:BI9930 (*see also* above). Henk J. Snijders, *Art. 1076 DCCP Note 9,* in *Groene Serie Burgerlijke*

conditioned upon the strict formal compliance with Article IV of the Convention.[77]

Other reported cases further show that relying on the lack of a translation of the agreement to arbitrate or arbitral award to resist enforcement will likely fail.[78]

Although a lack of translation of the award might be insufficient to influence the fate of the award creditor's enforcement efforts, it may (occasionally) be enough to persuade the court that the translation indeed affects the assessment of the enforceability of the award. In turn, it may increase enforcement costs, although unnecessarily at times. This leads to a question addressed further below[79] of who should bear these translation expenses if the argument on the translation requirement is raised due to the award debtor's tactical considerations.

4 CLAIMING TRANSLATION COSTS AS DISBURSEMENTS

As previously mentioned, according to Article IV(2) of the Convention, the default rule for the party applying for recognition and enforcement is to supply a translation of the award and the arbitration agreement in the official language of the country where enforcement is sought at the time of the application. At the same time, it has been considered on numerous occasions that the translation costs can be unreasonably high, even if considerably lower when compared to the entire costs of arbitral proceedings. Therefore, one should reflect further whether the costs of the obligatory translation of the documents mentioned under Article IV(1) of the Convention could be claimed from the counterparty as disbursements when applying for recognition and enforcement before the Dutch courts.

Rechtsvordering (Paul Vlas & Eric Tjong Tjin Tai eds, Wolters Kluwer) (last updated 1 Jul. 2021). Snijders concluded that: '[t]he New York Convention requires the production of a safeguarded translation of non-Dutch documents, even though the exequatur court may explain this requirement flexibly' ('Het Verdrag van New York stelt een met waarborgen omklede vertaling van over te leggen niet-Nederlandstalige stukken verplicht (ook al zal de exequaturrechter die eis soepel kunnen uitleggen)').

77 *See also* Scherer, *supra* n. 10, at 229 ('Article IV contains only evidentiary rules and not mandatory procedural requirements').

78 *See* e.g., *China Packaging Design Corp. v. SCA Recycling Reukema Trading BV*, Court of First Instance of Zutphen, the Netherlands, 11 Nov. 1998, XXIV YCA 724 (1999) ('The fact that the agreement has not been supplied in Dutch is immaterial as the agreement is written in an understandable language'); *Econet Wireless Ltd v. Bharti Airtel Nigeria BV*, Court of First Instance of Amsterdam, the Netherlands, 22 Jan. 2015, XL YCA 471, 471–474 ('As argued by CNBV, Econet indeed did not supply a Dutch translation of the Final Award and the arbitration agreement. However, this circumstance cannot be invoked against Econet, since the content of the documents supplied by Econet, in English, are sufficiently clear to the parties and the president in the context of the present proceeding'); *Dunav Re ADO Beograd v. Dutch Marine Insurance BV*, Court of Appeal of The Hague, Amsterdam, 17 Apr. 2018, XLIII YCA 535, 535–537 (2018) ('Hence, it is unnecessary to supply (after all) a Dutch translation within the meaning of Art. IV(2) of the Convention and there is no reason to hold Dunav Re's application inadmissible or to dismiss it because of the lack of a translation').

79 *See* s. 3.

In principle, Dutch procedural law recognizes the 'loser pays' principle under Article 237 DCCP, with the important caveat that the costs that are to be paid by the losing party – in general – only entail a forfeited amount of lawyers' fees and disbursements under Article 239 DCCP. For the rest, parties are required to bear their own costs. These elements of the general Dutch procedural rules (which will apply to enforcement of arbitral awards under the Convention)[80] will be explained below.

First of all, Article 237(1) of the DCCP provides a basic rule that:

> The party that is found to be unsuccessful by judgment is ordered to pay the costs … The court can also charge the costs that were used or caused unnecessarily by the party that used or caused these costs.

Importantly, one may observe that the court may charge the costs that were *unnecessarily* employed or caused by the party that has employed or caused these costs.[81] The judge examines the costs order on a case-by-case basis.[82] The fact that the costs will be awarded – in particular, in cases of dilatory tactics of the losing party – does not immediately mean that *all* costs incurred by the prevailing party may be transferred to the opposing party.[83] In this context, it should be noted that translation costs either in state court proceedings or in arbitration are not mentioned explicitly in the DCCP. At the same time, the winning party can claim disbursements from the losing party.

Accordingly, pursuant to Article 239 of the DCCP:

> In cases in which the parties cannot litigate in person, of the costs of the other party, only the salaries and disbursements of the lawyer of that other party can be charged to the unsuccessful party.[84]

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[80] The method of application is rather convoluted because DCCP, Arts 237 and 239 are applicable in accordance with DCCP, Art. 988(3) in conjunction with Arts 985 et seq., which applies to the Convention enforcement proceedings *mutatis mutandis* pursuant to DCCP, Art. 1075. For further reading *see* s. 3.1. Please note that for petitions (*verzoekschriften*) – not being a request for recognition and leave for enforcement – DCCP, Art. 289 applies, which decides that a final order (*eindbeschikking*) may also include an order to pay the costs of the proceedings.

[81] DCCP, Art. 237: *See also* Paul Sluijter, *Sturen met proceskosten. Wie betaalt de prijs van verstorend procesgedrag? (Burgerlijk Proces & Praktijk, nr. XII)* (Kluwer 2011).

[82] *See* e.g., for the general overview Rijksoverheid, *Wie betaalt de kosten van een rechtzaak*, www.rijksoverheid.nl/onderwerpen/rechtspraak-en-geschiloplossing/vraag-en-antwoord/wie-betaalt-de-kosten-van-een-rechtszaak#:~:text=De%20kosten%20voor%20een%20procedure,strafzaak%20kost%20u%20geen%20geld (accessed 23 May 2022).

[83] Nevertheless, in extraordinary circumstances, a court may order a defendant to pay the (full) legal costs, if it finds that (1) litigation is unlawful or, for example, (2) when a party makes abuse of their procedural law by conducting unnecessary proceedings, *see* e.g., Supreme Court of the Netherlands, 6 Apr. 2012, ECLI:NL:HR:2012:BV7828, NJ 2012/233 (*Duka v. Achmea*); Supreme Court of the Netherlands, 15 Sep. 2017, ECLI:NL:HR:2017:2366, NJ 2018/165; Supreme Court of the Netherlands, 29 Jun. 2007, ECLI:NL:HR:2007:ba3516, NJ 2007/353 (*Waterschappen v. Milieutech*).

[84] DCCP, Art. 239. ('In zaken waarin partijen niet in persoon kunnen procederen, kunnen van de kosten van de wederpartij slechts de salarissen en verschotten van de advocaat van die wederpartij ten laste van de in het ongelijk gestelde partij worden gebracht'.).

Succinctly put, Article 239 of the DCCP provides that there are two categories of costs that can be charged to the other party, namely, (1) attorney's fees, and (2) disbursements.

By default, the attorney's fees do not cover the costs actually made, because they are calculated on the basis of a liquidated tariff ('*liquidatietarief*').[85] This tariff essentially operates as a closed system with fixed amounts to be awarded for pursuing specific procedural steps. However, the catalogue of disbursements is much broader and includes various fees (according to the legal history of the DCCP), including bailiff costs, court fees, advanced witness costs and expert's fees.[86] In turn, one should reflect further whether translation costs may constitute a disbursement of the party's representative in the meaning of Article 239 DCCP, even though this category of costs is not explicitly mentioned in the DCCP.

At face value, the word 'only' in Article 239 of the DCCP would likely imply that a party cannot be ordered to pay costs other than lawyers' fees and disbursements.[87] Consequently, translation costs, being the party's own expenses, would not fit into the list in Article 239 of the DCCP.[88] This is further emphasized by the wording of Article 57 of the predecessor of Article 239 of the DCCP, which provides that '[f]or the rest, each party bears its own costs'.[89]

Nonetheless, there are instances where Dutch courts have been willing to award translation costs. For example, translation costs are usually awarded in intellectual property law cases.[90] In those cases, translation costs are often incurred for the benefit of the infringement action, which means that costs are no longer regarded as one party's 'own' costs (i.e., simply for the client to understand the court documents), but are necessary for a proper handling of the case. In other types of cases before the Dutch courts, no definite answer can be given because there are examples of both (1) when the losing parties were ordered to pay translation costs as part of the costs of the proceedings ('*proceskosten*') or the

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85 De Rechtspraak, *Liquidation Tariff for Courts and Courts of Appeal per 1 February 2021* (*liquidatietarief rechtbanken en gerechtshoven*), www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/Paginas/Liquidatietarief.aspx (accessed 23 May 2022). Please also note that in extraordinary cases, full lawyers' fees may be awarded, *see supra* n. 83.

86 Henriëtte van Dam-Lely, *Commentary on Article 239 Rv Note 3*, in *Tekst en Commentaar Wetboek van Burgerlijke Rechtsvordering* 663 (Toon I. M. van Mierlo & Constant J. J. C. van Nispen eds, 9th ed., Wolters Kluwer 2020); Ruth H. de Bock, *Art. 239 DCCP, Note 5*, in *Groene Serie Burgerlijke Rechtsvordering* (Paul Vlas & Eric Tjong Tjin Tai eds, Wolters Kluwer, online) (last updated 1 Jul. 2021).

87 Charlotte J. S. Vrendenbarg, *Proceskostenveroordeling en toegang tot de rechter in IE-zaken. Regelingen over proceskosten getoetst aan het EU-recht (Burgerlijk Proces & Praktijk nr. XIX)* 118, referring to Asser Procesrecht/Van Schaick 2 2016/218 (Kluwer 2018).

88 *Ibid*.

89 DCCP, Art. 57 (repealed) ('[v]oor het overige betaalt elke partij haar eigen kosten').

90 *See* Marjolein Driessen, *De willekeur van de proceskostenveroordeling, BIE* 340, 343 et seq. (2007).

translation costs were included as a separate category in the judgment, as well as (2) other cases in which the awarding of translation costs was explicitly excluded.

As regards the first category when translation costs were successfully reimbursed, courts requested that these translation costs to be clearly specified. This was the situation in several cases, where the translation costs were awarded because the court concluded that the costs were sufficiently specified.[91] Finally, this was also the case when the award creditor applied for the recognition and enforcement of a foreign arbitral award, and the translation costs were awarded by the Court of Appeal Den Bosch.[92]

At the same time, other courts did not allow collection of translation costs from the losing party. In one case, the Hague Court of Appeal considered that costs of party-appointed experts, interpreters and translators do not fall within the list of costs that can be claimed under Article 239 of the DCCP.[93] Similarly, in the *Promnefstroy v. Yukos Finance* case,[94] the Dutch Supreme Court held that translation costs of certain tax files, which could have had significance in the context of the question whether recognition of a Russian bankruptcy order conflicted with the public order, were not to be understood to fall under Article 237(1) of the DCCP and therefore could not be claimed. This shows that the Dutch courts are currently divided in their approach to translation costs.

In any event, translation costs may very well belong to the category of *unnecessary costs* under the above-mentioned Article 237(1) of the DCCP. In the context of recognition and enforcement proceedings under the Convention, this would arguably be the case when an award debtor requests a translation of the arbitration agreement and the arbitral award in cases (1) where it is clear that a translation does not serve to determine the existence and content of the agreement to arbitrate and the existence of the arbitral award; or (2) when an enforcement court does not require a translation to assess whether there is a ground for refusal of recognition under Article V of the Convention.[95]

The better view, therefore, is that the party against whom enforcement is sought should pay all costs and expenses, provided that (1) leave for enforcement is granted by the court; (2) the translation requested by the award debtor proves to be irrelevant to determine the prima facie existence of the agreement to arbitrate and the arbitral award or unhelpful for the court's evaluation of the existence of grounds for refusal of recognition of the award; and (3) the award creditor is

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91 *See* e.g., District Court of Oost-Brabant, 28 Dec. 2017, ECLI:NL:RBOBR:2017:6856 § 2.9; District Court of Oost-Brabant, 14 Feb. 2013, ECLI:NL:RBOBR:2013:BZ1395, § 3.11.

92 Court of Appeal of Den Bosch, 25 Oct. 2018, ECLI:NL:GHSHE:2018:4448, § 5.8 and § 6.

93 Court of Appeal of The Hague, 2 Feb. 2016, ECLI:NL:GHDHA:2016:152, BIE 2016/6, § 5.8.

94 Supreme Court of the Netherlands, 13 Sep. 2013, ECLI:NL:HR:2013:BZ5668, NJ 2014/454, § 4.4.1.

95 *See* further s. 3.3.

able to sufficiently specify the costs incurred for the translation and submits the relevant invoices as exhibits to its petition. This practice would create a barrier against award creditors' dilatory tactics and would fit well with both the 'loser pays all' approach of arbitration, and the pro-enforcement spirit of the Convention.

5 CONCLUSION

The analysis shows that the mandatory language of Article IV(2) of the Convention used by the drafters goes against the Convention's underlying philosophy. As aptly noted by one author:

> In the end, the example of Article IV(1) and IV(2) of the New York Convention shows that some issues cannot be resolved solely based on an autonomous and uniform interpretation of the New York Convention or by having regard to the general principles on which it is based. However, in these situations, a certain degree of flexibility in selecting the applicable domestic rules ensures that the substantive goal of the New York Convention is still achieved.[96]

The rationale for producing a translation is twofold: a translation serves to determine the existence and content of the agreement in which arbitration has been agreed and of the existence of the arbitral award. In the alternative, producing the translation may be justified when the enforcing court needs to assess whether there is a ground for refusal of recognition under Article V of the Convention.

In practice, Dutch enforcement courts take a rather robust approach in requesting the translation of the agreement to arbitrate and the award from the award creditor. In many instances, they will disregard the Article IV(2) translation requirement, especially when they are familiar with the language of the award, or even if the uncontested translation is provided in a foreign language familiar to them (e.g., in English).[97] If a court deems a translation unnecessary for the understanding of the case, or for evaluating that there are no grounds for refusal of recognition under Article V of the Convention, a defect under Article IV of the Convention should not be used as a formal defence. Such a pro-enforcement policy makes the Netherlands an attractive enforcement forum.

In any event, there is a room to argue that disproportionately high or unnecessary translation costs insisted on by an award debtor are within its own sphere of risks. Consequently, there may be grounds under Dutch procedural law for the winning party to claim the translation costs as disbursements.

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[96] Fabrizio M. Buonaiuti, *The Formal Requirements for Enforcing an Arbitral Award Under the 1958 New York Convention, Between Autonomous Interpretation and References to Domestic Legal Systems*, in *Autonomous Versus Domestic Concepts Under the New York Convention* 122 (Franco Ferrari & Friedrich J. Rosenfeld eds, Kluwer Law International 2021).

[97] *See* Court of Appeal of The Hague, 10 Sep. 2019, ECLI:NL:GHDHA:2019:2461, § 8.