New York Convention of 1958
Annotated List of Topics

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Contents

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¶ 001 - Interpretation

The Convention itself does not contain provisions on the manner in which it is to be interpreted. The courts have held that the Convention has a "pro-enforcement bias."

Arts. 31-33 of the Vienna Convention on the Law of Treaties of 1969 **[check]** contains provisions regarding the interpretation of treaties. The courts, however, almost never refer to these provisions. Rather, most of the courts that mention the manner in which the Convention is to be interpreted refer to the rules of interpretation of statutes in their jurisdiction. This applies to courts in both States that have mono system for implementing treaties and those that have a dual system.

ARTICLE I – FIELD OF APPLICATION (ARBITRAL AWARDS)

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

¶ 101 - Award Made in the Territory of Another (Contracting) State (Paragraphs 1 and 3 – First Reservation)

The Convention's title refers to the recognition and enforcement of "foreign arbitral awards". Which arbitral awards are to be considered as "foreign", and hence which fall under the Convention's field of application, is defined in Art. I of the Convention.

Paragraph 1 of Art. I contains two definitions for a foreign award. The first is an award made in the territory of a State other than the State where recognition and enforcement are sought. Accordingly, paragraph 1 applies to awards made in *any* other State. When becoming Party to the Convention, a State can limit this field of application by using the first reservation of Art. I(3). The State making that reservation will apply the Convention to the recognition and enforcement of awards made in the territory of another *Contracting* State only (the so-called reciprocity reservation; for the general reciprocity reservation, see Art. XIV, ¶ 914 below). Approximately two-thirds of the Contracting States have made the first reservation.

The second definition for the Convention's field of application, i.e., non-domestic awards, is reviewed in ¶ 102 below. If a State has made use of the reciprocity reservation of Art. I(3), the question arises whether, and if so to what extent that reservation is to be applied to non-domestic awards. That question is also addressed in ¶ 102.

¶ 102 — Arbitral Award Not Considered as Domestic (Paragraph 1)

Art. I(1) provides not only that it applies to the recognition and enforcement of an arbitral award made in another State (first sentence, see ¶ 101). It also provides that it applies to the recognition and enforcement of an arbitral award which is not considered as a domestic award in the State where recognition and enforcement are sought (second sentence, the present section).

A first point is that the second definition of the Convention's scope in relation to arbitral awards constitutes an addition to the first definition. This can be inferred from the word "also" in the second sentence. In other words, if an arbitral award is made in another (Contracting) State, the Convention applies to it in any case according to the first definition.

A second point is that, in view of the first definition, the second definition is relevant only for an arbitral award made in the country where its recognition and enforcement are sought. Conceptually, an arbitral award made in another (Contracting) State can also be considered non-domestic, but for the purposes of the Convention's scope this appears to be irrelevant.

A third point is that, unlike the first definition, the second definition is discretionary. This can be inferred from the word "considered" in the second sentence. A court (or, for that matter, implementing legislation) may, but is not obliged to, treat an arbitral award made within its jurisdiction as non-domestic and determine that it is covered by the Convention.

Against the background of the foregoing, the "non-domestic" arbitral award may fall into three categories of awards:

(i) an award made in the enforcement State under the arbitration law of another State;
(ii) an award made in the enforcement State under the arbitration law of that State involving a foreign (or international) element;
(iii) an award that is regarded as "a-national" in that it is not governed by any arbitration law.

¶ 103 — Nationality of the Parties No Criterion

The Convention's predecessors, the Geneva Treaties of 1923 and 1927, required that the parties were subject to the jurisdiction of the States Party to the Treaties. Such condition for the field of application is not required by the New York Convention under which it suffices that the award be made in the territory of another (Contracting) State or in the enforcing State if it is considered as non-domestic.

However, within the framework of the question of non-domestic awards (Art. I(1)) and the reciprocity reservation (Art. I(3)), nationality may play a role in the sense that a court may be prepared to consider an award as non-domestic for the purposes of the Convention only if the parties (or at least one of them) comes from a Contracting State (see ¶ 102). This may also apply to the Convention's scope regarding arbitration agreements that can be enforced under it (see ¶¶ 214-216).

¶ 104 — Convention's (In)Applicability to Enforcement of a Domestic Arbitral Award and Setting Aside of an Arbitral Award

(a) Enforcement of a domestic arbitral award. According to Art. I(1), the Convention applies to the recognition and enforcement of an arbitral award made in another (Contracting) State (see ¶ 101 above) or an award which is considered non-domestic (see ¶ 102 above). These two definitions exclude the Convention's applicability to the recognition and enforcement of an arbitral award made in an enforcement State which is considered domestic in that State (see also the title of the Convention which refers to the recognition and enforcement of "foreign" arbitral awards).

A country may, however, unilaterally adopt the Convention's system for the enforcement of certain arbitral awards. An example is Switzerland where Chapter 12 of Private International Law Act of 1987, governing basically international arbitration in Switzerland, provides in Art. 192(2) that "[W]here the awards [made under the Act] are to be enforced in Switzerland, the New York Convention … shall apply by analogy". Another example is the UNCITRAL Model Law on International Commercial Arbitration of 1985 as amended in 2006, which contains in Arts. 35 and 36 a system that is almost

identical to Arts. IV-VI of the Convention for the enforcement of an arbitral award "irrespective of the country in which it was made".

(b) Setting aside of an arbitral award. The actions governed by the Convention do not include the setting aside (vacatur, annulment) of an arbitral award. The fact that an award that has been set aside in the country of origin is a ground for refusal of enforcement (see Art. V(1)(*e*), ¶ 516 below). The Convention may, however, have an influence on the action for setting aside the award in at least two respects.

First, it is a generally accepted rule that the setting aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country of origin (i.e., the country in which, or – rather theoretically – under the law of which, the award was made) and is to be adjudicated on the basis of the arbitration law of that country. This rule appears to underlie the ground for refusal of enforcement set forth in Art. V(1)(*e*) of the Convention ("The award … has been set aside … by a competent authority of the country in which, or under the law of which, that award was made"). The courts have affirmed this rule that the courts of the country of origin are exclusively competent to decide on an action for setting aside the award (e.g., Austrian Supreme Court, first decision, 1 February 1980, *Norsolor v. Pabalk*, Austria no. 4 sub 4 reported in Volume VII pp. 312-314; US no. 340 reported in Volume XXVI pp. 894-909). The courts in the other Contracting States may only decide under the Convention whether or not to grant enforcement of the award within their jurisdiction. The consequence is that setting aside of an award in the country of origin has extra-territorial effect as it precludes enforcement in the other Contracting States by virtue of ground *e* of Art. V(1) of the Convention (subject to the different theories reviewed in ¶ 516).

In contrast, the effect of a refusal of enforcement is limited to the jurisdiction within which a court refuses enforcement and courts in other Contracting States are in principle not bound by such refusal. Some courts regard Art. V(1)(*e*) in and of itself as being equivalent to a treaty provision concerning attribution of international jurisdiction. See also ¶ 516 below.

The foregoing can be graphically depicted as follows:

Table A - Actions		
Action	**Country of Origin**	**Abroad**
Enforcement	• National arbitration law • If "non-domestic": New York Convention	• New York Convention
Setting aside	• National arbitration law • Courts have exclusive jurisdiction	• Not possible

Table B - Effect		
Action	**Country of Origin**	**Abroad**
Refusal of enforcement	• Award cannot be enforced	• No effect
Grant of enforcement	• Execution of award	• No effect
Award set aside	• Award does not exist legally anymore	• Refusal of enforcement under Art. V(1)(e) New York Convention
Award not set aside	• Award can be enforced	• No effect

(c) Investment arbitration. Most Bilateral Investment Treaties (BITs) provide for ICSID arbitration (as do a number of Multilateral Investment Treaties and Investment Laws). A number of them also give a choice between ICSID and UNCITRAL arbitration. In terms of control, the differences are huge.

If the investment arbitration takes place on the basis of the UNCITRAL Arbitration Rules, the arbitration is governed by a national arbitration law, which is almost always the arbitration law of the place of arbitration. That is expressed in Article I(2) of the 1976 version of the Rules, as confirmed in Article I(3) of the 2010 version of the Rules: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

Thus, the award resulting from an investment arbitration conducted under the UNCITRAL Rules will be subject to the possibility of a setting aside action in the country of origin and to an enforcement action under the New York Convention in other countries, much in the same manner and with the same issues as apply to award resulting from international commercial arbitration.

That is fundamentally different for investment arbitration under the ICSID Convention (see ¶ 703A). Control is concentrated in the *ad hoc* annulment committee under Article 52 and enforcement of the award is automatic under Article 54 of the Washington Convention. The grounds for annulment set forth in Article 52(1) are in essence not much different from the generally accepted grounds for review in a national setting aside action (although the wording is not the same). However, there is a notable difference: the grounds for annulment in the ICSID Convention do not comprise a violation of public policy. Enforcement of an ICSID award is automatic, without the possibility of a national court reviewing (again) the award on the basis of grounds for refusal of enforcement. Article 54(1) of the Washington Convention provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Again, an alleged violation of public policy is not a ground for refusal of enforcement of an ICSID award.

Graphically, this difference can be depicted as follows:

Table C - Investment Arbitration		
Action	**Country of Origin**	**Abroad**
Enforcement UNCITRAL	• National arbitration law • If "non-domestic": New York Convention	• New York Convention
Enforcement ICSID	• No "Country of Origin" • Art. 54 ICSID Convention • Automatic enforcement in all Contracting States	
Setting aside UNCITRAL	• National arbitration law • Courts have exclusive jurisdiction	• Not possible
Setting aside ICSID	• No "Country of Origin" • Art. 52 ICSID Convention • *Ad hoc* Committee	

¶ 105 — "Persons, whether physical or legal" (Paragraph 1) (Including Sovereign Immunity)

The expression "persons, whether physical or legal" in paragraph 1 of Art. I refers, as it suggests, to both natural persons and entities having a separate legal identity, such as a company.

It is generally accepted that the expression also embraces persons of public law. .

¶ 106 - Questions Regarding the Identity of a Party

This heading covers various questions in the context of the enforcement an arbitral award. One question is whether an award rendered against a company can be enforced against another company which was not a party to the arbitration agreement but is closely connected with the former company (usually the parent company). This question of piercing the corporate veil (or other concepts such as alter ego, agency, and estoppel) is not dealt with by the Convention and is to be answered by the court on the basis of the law which it finds applicable. Another question is whether a legal successor is bound by an arbitration agreement concluded by its predecessor. A similar question may arise out of the assignment of a contract which includes an arbitration clause or an arbitral award to a third person.

Furthermore, in an increasing number of cases the respondent summoned in the arbitration asserts that it is not a party to the contract including the arbitration clause but that another party is, and therefore the arbitral tribunal lacks jurisdiction to decide the case as far as the summoned party is concerned. This defence usually occurs in one of two factual patterns. First, the respondent summoned is a State which asserts that it is not the State but some allegedly independent entity (State agency, Authority) that is a party to the contract. Second, the respondent summoned asserts that it is not a party but merely an agent for a(n) (un)disclosed principal. Again these questions are to be resolved on the basis of the law which the court in question finds to be applicable. Within the context of enforcement of an arbitral award, the foregoing defences can be considered to form part of the ground for refusal of enforcement of Art. V(1)(*a*).

The present section concerns the enforcement of an arbitral award (see also ¶ 505 below). Similar questions may arise at the time of enforcement of an arbitration agreement; they are addressed in ¶¶ 212 and 226 below.

¶ 107 - Second Reservation ("Commercial Reservation") (Paragraph 3)

The second reservation of Art. I(3) permits a State to reserve the applicability of the Convention "… only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". This reservation was inserted because at the New York Conference of 1958 it was believed that, without this clause, it would be impossible for certain Civil Law countries, which distinguish between commercial and non-commercial transactions, to adhere to the Convention. As of today approximately one third of the Contracting States have used the commercial reservation.

In practice, the commercial reservation generally has not caused problems as the courts tend to interpret the coverage of "commercial" broadly.

For the commercial reservation and the Convention's field of application with respect to the referral by a court to arbitration, see ¶¶ 214-216 below. For the commercial reservation and the general reciprocity reservation of Art. XIV, see ¶ 914 below.

The words "whether contractual or not" are intended to cover not only disputes arising out of contract but also tort (see ¶ 201 below).

¶ 108 - *Arbitrato Irrituale* (Italy) and other Procedures Akin to Arbitration

In Italy, two principal types of arbitration exist. The first is known as *arbitrato rituale* [formal arbitration] which is governed by the Italian Law on Arbitration set forth in the Code of Civil Procedure. The second is *arbitrato irrituale* [informal arbitration] which is entirely based on contract law and which is not governed by the provisions of the Law on Arbitration. The main difference between the two is that the decision rendered in *arbitrato irrituale* cannot be enforced as an arbitral award but only by means of a contract action.

A similar distinction exists in a number of other countries. For example, the distinction is made in Germany between *Schiedsgerichtsbarkeit* and *Schiedsgutachten* and in the Netherlands between *arbitrage* and *bindend advies*.

¶ 109 – Arbitral Award: "A-National" Award

An "a-national" award (sometimes called "transnational", "stateless" or "floating" award) is an award resulting from an arbitration which is detached from the ambit of a national arbitration law by means of a special agreement of the parties. Such arbitration, also called "de-nationalized" arbitration, rarely occurs in practice.

The question is whether an "a-national" award comes within the purview of the Convention.

¶ 110 - Arbitral Award: Types

The Convention does not provide for a definition as to what constitutes an "arbitral award". It therefore appears to depend on the law governing the award and, if agreed to, the applicable arbitration law whether a decision can be characterized as an arbitral award which, in turn, would qualify for enforcement under the Convention.

¶ 111 - Permanent Arbitral Bodies (Paragraph 2)

The Convention emphasizes in paragraph 2 of Art. I that it applies not only to arbitral awards rendered by arbitrators appointed for one specific arbitration, but also by arbitrators forming part of a permanent arbitral tribunal. This provision was inserted in the Convention at the specific request of the former USSR and Czechoslovakia.

Paragraph 2 can be deemed superfluous, as without this provision both types of arbitration would still have fallen under the Convention as long as the arbitration is voluntary, i.e., based on an agreement to arbitrate. The latter aspect is underscored by the expression "to which the parties have submitted".

¶ 112 - Retroactivity

The Convention does not contain a provision on the question of whether it applies retroactively. This point has given rise to a number of diverging court decisions in the past, although it is possible to discern a tendency in favour of retroactive application, whereby the Convention is applicable to the enforcement of an arbitration agreement and arbitral award no matter when they were made.

¶ 113 - Implementing Legislation

Certain countries have a Constitutional system under which an international convention becomes effective only after enactment of implementing legislation. In some of these countries such legislation has not been passed in respect of the New York Convention.

In June 2008, UNCITRAL's Secretariat published a "Report on the Survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (UN DOC A/CN.9/656 and A/CN.9/656 Add. 1, hereinafter "UNCITRAL Survey 2008"). Paragraphs 8-25 contain information on the ratification of, or and accession to, the Convention and its implementation in domestic legislation as

well as the impact of the adoption of a legislation implementing the Convention.

¶ 114 - Iran-US Claims Tribunal

By the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (the "Claims Settlement Declaration") of 19 January 1981, the Iran-US Claims Tribunal was established. The Iran-US Claims Tribunal's purpose is to decide claims of nationals of the United States against Iran and claims of nationals of Iran against the United States. The Tribunal also has jurisdiction over claims of the United States and Iran against each other.

The question has arisen whether arbitral awards rendered by the Iran-US Claims Tribunal fall under the New York Convention.

ARTICLE II(1) AND (2) - ARBITRATION AGREEMENT

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

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Overview

Paragraph 1 of Art. II sets forth the obligation for the Contracting States to recognize an arbitration agreement in writing. That obligation plays a role in the two actions contemplated by the Convention. In the case of enforcement of the arbitration agreement, Art. II(3) obliges a court of a Contracting State to refer parties to arbitration "when seized of a matter in respect of which the parties have made an agreement within the meaning of this article" (see ¶¶ 214-223 below). The second action is the enforcement of the arbitral award pursuant to Arts. III-VI. One of the grounds for refusal of enforcement is the invalidity of the arbitration agreement, which includes a mention of "the agreement referred to in article II" (Art. V(1)(*a*), see ¶ 504 below; see also Art. IV(1)(*a*), see ¶ 403 below).

Within the context of these two actions, the Convention's requirements with respect to the arbitration agreement apply only if an arbitration agreement and, as the case may be, an arbitral award fall under the Convention. The Convention's field of application with respect to the enforcement of the arbitration agreement, however, is not defined in the Convention. It is generally assumed that a purely domestic arbitration agreement does not come within its purview (see ¶¶ 214-216 below). The Convention's field of application with respect to arbitral awards is defined in Art. I (see ¶¶ 101-114 above).

According to paragraph 1 of Art. II, the "agreement in writing" encompasses an agreement "under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them". This means that the Convention treats alike the submission agreement (*acte de compromis*) by which an already existing dispute is referred to arbitration and the arbitration clause by which a possible future dispute shall be submitted to arbitration. This equal treatment is also reflected in other provisions of the Convention's text by using the general term "arbitration agreement". The equal treatment is presently accepted in most arbitration laws; the situation was different in 1958 as the arbitration clause was treated less favourably in a number of countries at that time.

What constitutes an "agreement in writing" is defined in paragraph 2 of Art. II. The text of this definition appears to be rather restrictive in the sense that it no longer seems to correspond fully with the present needs of international trade. The problems caused by it may be overcome to a certain extent by an appropriate interpretation (see ¶¶ 203-212 below).

Paragraph 1 of Art. II further states that the arbitration agreement must be "in respect of a defined legal relationship, whether contractual or not". What this means is addressed in ¶ 201 below.

The renewal (by novation or otherwise) or amendment of a contract containing an arbitration clause as well as a settlement agreement may pose specific questions in relation to Art. II(1)-(2) of the Convention. They are addressed in ¶ 213 below.

To the extent that resort must be had to the law applicable to the arbitration agreement, it is examined in ¶¶ 221 and 506 below.

Finally, paragraph 1 of Art. II requires that the arbitration agreement concern "a subject matter capable of settlement by arbitration". This requirement as stated in Art. II(1) is relevant for the enforcement of the arbitration agreement under Art. II(3) (see ¶ 223 below). With respect to the enforcement of the arbitral award, a separate ground for refusal is expressed in Art. V(2)(*a*): the enforcement court may, on its own motion, refuse enforcement if it finds that "The subject matter of the difference is not capable of settlement by arbitration under the law of that country" (see ¶ 519 below).

¶ 201 - Scope of Arbitration Agreement (Paragraph 1)

Art. II(1) provides that a dispute must arise "in respect of a defined legal relationship, whether contractual or not". In an increasing number of cases respondents assert that a certain dispute does not fall under the wording of the arbitration agreement.

Art. II(1) employs the expression "differences". For the purposes of an arbitration agreement it can be assumed that this is equivalent to "disputes" (or, for that matter, "controversies" or "claims"). What constitutes a dispute is addressed in ¶ 219 below.

The words "whether contractual or not" mean that the arbitration agreement need not only concern a specific contract or specific contracts, but also can embrace claims in tort. The same words appear in the commercial reservation of Art. I(3) (see ¶ 107 above). Whether a claim in tort comes within the scope of an arbitration agreement generally depends, according to case law, on the wording of the arbitration agreement and whether the claim in tort is sufficiently connected with the claim under the contract.

The foregoing questions concern the *scope* of the arbitration agreement, i.e., whether a certain dispute can be said to be covered by the wording of the arbitration agreement. A different question is whether a certain dispute is *arbitrable* (although in practice the latter expression is also used – particularly by courts in the United States – for questions regarding the scope of the arbitration agreement). The arbitrability of a dispute concerns the question whether a dispute is capable of settlement by arbitration under the applicable law. Thus, a dispute may be within the scope of the arbitration agreement but nevertheless be non-arbitrable because under the applicable law it may not be decided by arbitrators but by a court only. The question of arbitrability is discussed under Art. II(3) and Art. V(2)(*a*) (see for arbitrability ¶¶ 223 and 519 below).

Questions regarding the scope of the arbitration agreement can come up in both actions envisaged by the Convention. When referral to arbitration pursuant to Art. II(3) of the Convention is requested, referral can take place only if the dispute is within the scope of the arbitration agreement (Art. II(3), see ¶¶ 217-223 below). At the stage of enforcement of the award, a decision beyond the scope of the arbitration agreement may lead to a refusal of enforcement on the ground that the arbitrator exceeded his or her authority (Art. V(1)(*c*), see ¶ 512 below, which therefore is also to be consulted in connection with questions regarding the scope of the arbitration agreement).

¶ 202 - Contents of Arbitration Agreement (Paragraph 1)

The Convention does not impose particular requirements with respect to the contents of an arbitration agreement. It must appear from the agreement that the parties have submitted to arbitration disputes arising out of a defined legal relationship (usually a contract).

Courts generally uphold the so-called "short form" arbitration clause.

Furthermore, certain arbitration laws stipulate specific requirements for the contents of an arbitration agreement. These requirements are generally held fulfilled by reference in the arbitration agreement to arbitration rules of an arbitral institution.

The misnaming the arbitral institution in the arbitration clause had differing consequences in the reported cases.

¶¶ 203 and 204 - Formal Validity, Uniform Rule and Municipal Law

It was long believed that the definition of what constitutes a written arbitration agreement given in Art. II(2) could be deemed an internationally uniform rule which prevailed over any provisions of municipal law regarding the form of the arbitration agreement in those cases where the Convention was applicable. Accordingly, it prevails over the otherwise applicable law which may impose stricter requirements on the formal validity of the arbitration agreement (for example, some domestic laws require that the arbitration clause be signed separately). In other words, the Convention sets an international *maximum* requirement for the formal validity of the arbitration agreement.

However, it is increasingly questioned whether the text of Art. II(2) also constitutes an international *minimum* requirement for the formal validity of the arbitration agreement in view of the rather demanding conditions resulting from its text. In particular, the requirement of an exchange in writing is felt to be no longer in conformity with international trade practices where contracts are frequently formed by tacit acceptance.

¶ 205 - First Alternative: Contract Including Arbitration Clause or Arbitration Agreement Bearing Signatures

If a contract containing the arbitration clause or the separate arbitration agreement is signed by the parties, it will satisfy the first alternative of Art. II(2).

¶ 206 - Second Alternative: Contract Including Arbitration Clause or Separate Arbitration Agreement Contained in Exchange in Writing Without Signatures

The first alternative of Art. II(2) requires that the contract including the arbitration clause or the separate arbitration agreement bear the signatures of the parties. The second alternative was added to make allowances for the practices in international trade at the time (i.e., in 1958). According to this

alternative, it suffices that the contract including the arbitration clause or the separate arbitration agreement be contained in an exchange of letters or telegrams, without it being necessary that any of these documents be signed by the parties.

¶ 207 - Means of Telecommunication for Achieving the Exchange in Writing

It is generally accepted that the expression in Art. II(2) "contained in an exchange of letters or telegrams" should be interpreted broadly as to comprise also other means of communication, especially telexes. This is expressly provided in Art. I(2)(*a*) of the European Convention on International Commercial Arbitration of 1961, which is in part almost identical to Art. II(2) of the New York Convention. The relevant proviso in the European Convention of 1961 states: "contained in an exchange of letters, telegrams, or in a communication by teleprinter".

Other means of telecommunication, such as facsimile, can also be brought under the expression "contained in an exchange of letters or telegrams."

With the advent of electronic commerce ("e-commerce"), the question is raised whether an arbitration agreement concluded by email (or, for that matter, electronic contracting in general) meets the requirements of Art. II(2) of the Convention.

¶ 208 - Arbitration Clause in Sales or Purchase Confirmation

Sales or purchase confirmations are frequently used in today's international trade practice. It follows from what is observed in ¶ 205 and ¶ 206 above that an arbitration clause in a sales or purchase confirmation will meet the written form requirement of Art. II(2) if:

(a) the confirmation is signed by both parties (first alternative); or

(b) a duplicate is returned, whether signed or not (second alternative); or, possibly,

(c) the confirmation is subsequently accepted by means of another communication in writing from the party which received the confirmation to the party which dispatched it (see ¶ 206 above).

A tacit acceptance of the confirmation is in principle not sufficient for the purposes of Art. II(2), subject to the various approaches outlined in ¶¶ 203-204 above.

¶ 209 - Arbitration Clause in Standard Conditions[2]

The question of an arbitration clause in standard conditions and the written form requirement of Art. II(2) is important as standard conditions are frequently used in practice, but is also rather complex. The question is not only to be considered in different settings (clause amongst the printed conditions on the back of a contract; clause in a separate, usually printed, document to which the contract refers, etc.). It also bears consideration in connection with two main questions, that of adhesion contracts (protection of weaker parties) and of incorporation by reference (question when the "reference clause" or "incorporation clause" in the contract, referring to the external standard conditions, is sufficient).

The following trends regarding standard conditions and arbitration clauses can be discerned in the reported court decisions. The test appears to be that the other party is able to check the existence of an arbitration clause.

As regards contracts of adhesion, there is no case law in which the validity of the arbitration clause is denied on this ground under the Convention.

With respect to the question of incorporation by reference of the arbitration clause in the standard conditions into the body of the contract, two categories of standard conditions can be distinguished.

First, standard conditions printed on the back of a contract. In that case, a general reference clause in the contract is as a rule held sufficient since the other party is considered to be able to check the back of a contract.

Second, standard conditions in a separate document require a reference clause in which specific attention is drawn to the arbitration clause in the standard conditions (for example, "This Contract is governed by the General Conditions of Sale, including the arbitration clause contained therein…").

If, however, the standard conditions have been communicated to the other party, a general reference is usually deemed sufficient. Another exception is the case where the parties have a continuing trading relationship in which the same standard conditions are used. In that case too, a general reference is as a rule held sufficient. A third exception seems to be the case where the standard conditions are so well known in the international trade concerned that any party participating therein can be deemed to be fully aware of these conditions, although case law is not yet developed in this respect.

¶ 210 - Articles 1341 and 1342 Italian Civil Code

Arts. 1341 and 1342 of the Italian Civil Code require that an arbitration clause appearing in standard forms or conditions be specifically approved in writing. According to the Italian courts, this requirement implies two signatures: one for the contract as a whole and another relating specifically to the acceptance of the arbitration clause. Law no. 25 of 5 January 1994 introduced a new

2. Exclusive of Arts. 1341 and 1342 Italian Civil Code; see ¶ 210 below.

Chapter VI on International Arbitration into Italian arbitration law, applicable if at least one of the parties has its domicile or principal place of business abroad, or if a substantial part of the obligations to which the dispute relates is to be performed abroad. Pursuant to Art. 833 of this Law, Arts. 1342 and 1342 of the Italian Civil Code are inapplicable.

¶ 211 - Bill of Lading and Charter Party

Where a bill of lading refers to the terms and conditions contained in the charter party, the questions concerning the incorporation of the arbitration clause in the charter party into the bill of lading are similar to the questions posed in respect of standard conditions and incorporation by reference, reviewed at ¶ 209. However, the bill of lading also poses some distinct questions, which have been raised in the reported cases.

¶ 212 - Agent/Broker, etc.

Art. II(2) does not pose particular problems for the arbitration agreement – usually an arbitration clause in a contract – which is concluded through an agent between his principal and another party. Such an arbitration agreement must comply with Art. II(2) exactly as an arbitration agreement concluded directly between parties.

The question is whether the authorization granted by the principal to the agent to conclude the arbitration agreement on his behalf should also be in writing. The law of some countries requires that the authorization take the same form as the act for which it is intended.

¶ 213 - Renewal Agreement

If a contract containing an arbitration clause, which complies with the requirement of Art. II(2), is renewed (by extension, novation or otherwise) or amended in a form which does not comply with the requirements of Art. II(2) – for example, by oral agreement – the question may arise whether the renewed or amended contract is sufficient for compliance with Art. II(2).

A question may also arise with respect to an amendment of a contract (in the form of an addendum or the like) or a further (related) contract that, contrary to the original contract, does not contain an arbitration clause.

A question akin to these questions is a settlement agreement which, in contrast to the contract in respect of which the dispute was settled, does not include an arbitration clause.

It therefore appears that the above questions are to be resolved on the basis of both the applicable law and the scope of the arbitration clause in the original contract (see also ¶ 201 above).

ARTICLE II(3) - REFERRAL BY COURT TO ARBITRATION

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

¶¶ 214-216: Field of Application

The Convention only defines its field of application in respect of the arbitral award: a foreign award, i.e., an award made in another State. It does not state which arbitration agreements come within its purview if enforcement of such an agreement is sought pursuant to Art. II(3).

For resolving the question which arbitration agreement can be enforced under the Convention, it would be consistent to interpret Art. II(3) by analogy to Art. I, which is mainly based on the (foreign) place where the award is made. An analogy can also be made to the second definition of Art. I(1): an award that is considered to be non-domestic (see ¶ 102). The analogy, therefore, would require a place of arbitration abroad or some non-domestic element.

Following the analogy to Art. I, it would seem that Art. II(3) does not apply to an arbitration agreement providing for arbitration in the forum State between nationals of that State (which may be called a "purely domestic arbitration agreement"). On the other hand, the analogy does not exclude an arbitration agreement providing for arbitration abroad between two nationals of the forum State (cf. ¶ 103). In the context of determining which arbitration agreement comes within the scope of Art. II(3), some foreign element would seem to be decisive.

¶ 216A - Analogous applicability of Art. VII(1)

According to Art. VII(1), the provisions of the Convention shall not deprive any interested party of any right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. This so-called more-favourable-right (mfr) provision applies according to its text to the enforcement of the arbitral award (see ¶¶ 701-702 below). However, an expansive interpretation seems to be justified to the effect that the mfr provision of Art. VII(1) also applies to the enforcement of the arbitration agreement under Art. II(3). First, the omission to mention the arbitration agreement in Art. VII(1) is probably unintentional as Art. II was inserted in the Convention at a very late stage of the New York Conference in 1958. Second,

it would be contrary to the pro-enforcement bias of the Convention and would lead to inconsistent results if the mfr provision would not apply also to the enforcement of the arbitration agreement.

The foregoing is also the interpretation given by UNCITRAL in 2006, recommending that "article VII, paragraph 1, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

¶ 217 – Referral to Arbitration in General

The present section ¶ 217 concerns a number of general matters related to the referral to arbitration (also called "enforcement of the arbitration agreement") under Art. II(3) which are reviewed at various entries below.

Requirements. If an action is brought before a court in a Contracting State and a party, relying on Art. II(3) of the Convention, objects to the court's jurisdiction to hear the merits of the action because of the existence of an arbitration agreement relating to the subject matter of the action, the court must refer the parties to arbitration, provided that a number of requirements imposed by the Convention are fulfilled:

(a) the arbitration agreement must fall under the Convention, possibly limited by the first (reciprocity) and second (commercial) reservation of Art. I(3) (see ¶¶ 214-216 above);

(b) there must be a dispute (see ¶ 219 below);

(c) the dispute must have arisen in respect of a defined legal relationship and must come within the scope of the arbitration agreement (see ¶ 201 above; for the contents of the arbitration agreement, see ¶ 202 above);

(d) the arbitration agreement must be in writing in accordance with Art. II(2) (see ¶¶ 203-213 above);

(e) the arbitration agreement should not be "null and void, inoperative or incapable of being performed" (see ¶ 220 below); and

(f) the subject matter must be capable of settlement by arbitration (see ¶ 223 below).

At the request of a party. The words "at the request of one of the parties" in Art. II(3) indicate that a court may not refer the parties to arbitration on its own motion, but that a party should invoke the arbitration agreement. If a party does not invoke the arbitration agreement, the court will

retain jurisdiction to hear the case, unless it lacks jurisdiction for some other reason not related to an arbitration agreement.

Latest moment for making the request. The Convention does not specify what is the latest moment at which a party may invoke the arbitration agreement. Failing a provision in the Convention, this question is to be determined under the law of the forum.

Waiver or estoppel. Waiver and estoppel regarding the arbitration agreement may arise in two different situations.

The first situation concerns the plaintiff who may have waived the right to object that a request of a defendant for referral to arbitration should not be honoured because the defendant is a non-signatory to the arbitration agreement. That situation is examined in particular at ¶ 226 below.

The second situation concerns the defendant who may have failed to invoke the arbitration agreement before the court (mostly in a timely manner). The failure can be regarded as constituting a waiver or estoppel of the right to submit the dispute to arbitration. Such a waiver or estoppel can also have occurred earlier than the commencement of the court proceedings.

See also ¶¶ 220, 226 and 303 below.

Meaning and effect of "refer the parties to arbitration". This expression, which was copied from Art. 4(1) of the Geneva Protocol of 1923, may textually have two meanings: (1) the court directive staying the court proceedings; and (2) the court directive imposing arbitration. The first meaning can, for example, be found in Sect. 9 of the English Arbitration Act 1996. The second meaning is, for example, reflected in Sect. 206 of the implementing act of the United States, entitled "Order to Compel Arbitration".

The effect of the expression is that a court may not try the merits of the dispute when the arbitration agreement is invoked. However, the court may still retain jurisdiction for matters related to the arbitration. The jurisdiction of the court may be continued, for instance, where the arbitration is to take, or is taking, place within its jurisdiction: the court may be called upon to appoint or replace arbitrators if the parties have not made arrangements in this respect in their agreement, to administer evidence beyond the powers of the arbitrator, to decide on the setting aside of the award, etc. The jurisdiction of the court may also continue for the ordering of provisional remedies (see ¶ 228 below), especially an attachment for securing the sum or goods in dispute, irrespective of where the arbitration is or will be taking place.

Finally, it is not a condition for referral to arbitration under Art. II(3) that the arbitration has already commenced.

Partial referral to arbitration. If a court decides that part of the dispute cannot be referred to arbitration, the question arises whether the court should stay the court action pending the arbitration on the other part of the dispute or should order a stay of the arbitration pending the court proceedings concerning the non-arbitrable part.

See also ¶ 227 below.

Condition precedent to commencement of arbitration. It happens from time to time in practice that the parties have agreed that, prior to the commencement of the arbitration, they should attempt a settlement or go through a process of mediation or conciliation. When a dispute has arisen the question may come up whether the condition precedent to the commencement of the arbitration has been fulfilled. This may in turn have an effect on the referral by the court to arbitration pursuant to Art. II(3).

¶ 218 – Referral is Mandatory

Art. II(3) states "the court … *shall*, at the request of one of the parties, refer the parties to arbitration" (emphasis added).

There is a general agreement amongst the courts that this language does not leave any discretion to a court for referring the parties to arbitration once the conditions mentioned at ¶ 217 above are fulfilled.

The mandatory character of the referral by a court pursuant to Art. II(3) can be deemed an internationally uniform rule. The rule supersedes domestic law which may provide that the court has a discretionary power in deciding whether or not to stay a court action brought in violation of an arbitration agreement.

¶ 219 – There Must Be a Dispute

Arbitration can take place only if there is a dispute between the parties. The Convention underscores this by providing the words in Art. II(1) "to submit to arbitration all or any differences". Some implementing acts explicitly list as one of the conditions for referral to arbitration that there be a dispute. The courts do not readily assume that a dispute does not exist.

¶ 220 – "Null and void", etc

According to the terminal words of Art. II(3), a court can refuse to refer the parties to arbitration if it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed". Neither the text of the Convention nor its legislative history gives much guidance as to how these words should be interpreted.

Several courts, especially in the United States, have held that, having regard to the "pro-enforcement-bias" of the Convention, the words should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only.

Textually, the words "null and void, inoperative or incapable of being performed" would appear to encompass a broad range of reasons for which an arbitration agreement can be invalid. The broad language, however, seems to have been provided upon the consideration that the Convention is to be applied in many different legal systems.

The broad wording has as consequence that certain reasons for invalidity of the arbitration agreement may fall under more than one expression. In addition, those courts which have applied the words "null and void, inoperative or incapable of being performed" do not always rely on one expression, but, rather, refer to the entire terminal part of Art. II(3).

The words *"null and void"* may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.

There appear to be two reasons for which lack of consent rarely occurs in practice. The first reason is that, in the countries where the separability doctrine is applied, the lack of consent must concern the arbitration clause specifically. Under this doctrine, which is accepted in a large number of countries, the lack of consent for the main contract does not necessarily constitute lack of consent for the arbitration clause contained in it (see ¶ 222 below). It must therefore be proven that the arbitration clause itself is tainted by misrepresentation, duress, fraud or undue influence. The second reason is that although the written form of the arbitration agreement as required by Art. II(2) does not concern questions regarding its formation, if this provision is met, a strong presumption exists that there is a "meeting of the minds" since the requirements of Art. II(2) are fairly strict (see ¶¶ 203-213 above).

The word *"inoperative"* can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.

The word "inoperative" may also include the case where a party has waived the right to arbitrate or is estopped from invoking the arbitration agreement. See ¶ 217 above.

A further matter that may fall under the word "inoperative" is the failure to comply with a statutory or contractual time limit for commencing arbitration, although it is submitted that this matter should preferably be dealt with by the arbitral tribunal (at least on a provisional basis).

The words *"incapable of being performed"* would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitral clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration.

In several reported cases, parties tried to oppose referral by maintaining that the agreed *place of arbitration* would be inconvenient and thus inappropriate within the meaning of Art. II(3). The courts have invariably rejected such contention.

A party's *financial incapacity* to submit to arbitration proceedings, let alone satisfy a possible award, was held not to be a reason for finding the arbitration agreement to be "incapable of being performed."

A defence which was raised in some of the reported cases concerns the *anticipated problems with the enforcement of the award*. These are generally not a ground for regarding an arbitration agreement to be null and void, inoperative

or incapable of being performed under Art. II(3) of the Convention becausethey are rather speculative.

Questions regarding the alleged incorrect reference to an arbitral institution in the arbitration clause are reviewed in ¶ 202 above.

It regularly occurs that an arbitration clause contains the requirement of "amicable settlement" or "friendly negotiation" as a condition precedent to the commencement of arbitration and that a party contends that this precondition is not fulfilled. That matter is reviewed in ¶ 217 above.

The *possibility of conflicting court decisions or arbitral awards* in connected cases is, in principle, not a reason to hold the arbitration agreement "inoperative" or "incapable of being performed". This question will be examined in more detail at ¶¶ 225 and 227 below, regarding multi-party disputes and referral to arbitration.

See in general also ¶ 202 (contents of arbitration agreement) above.

¶ 221 – Law Applicable to "null and void", etc..[3]

Since the ground for refusing referral to arbitration that the agreement is "null and void, inoperative or incapable of being performed" in Art. II(3) does not give much guidance as to what should be understood by these words (see ¶ 220 above), this matter may have to be assessed under a municipal law. The question then is as to which conflict of laws rules should be applied to determine that law.

A similar question of the applicable law applies to the scope of the arbitration agreement (in the United States referred to as "arbitrability") and its contents (see ¶¶ 201-202 above) and to arbitrability in the sense that the subject matter is capable of settlement by arbitration (see ¶ 223 below).

It may be emphasized here that the above question concerns a "residual validity" since, in particular, matters regarding form are in principle governed by the Convention itself (Art. II(1)-(2), see ¶¶ 203-213 above).

As regards the exception "null and void, inoperative or incapable of being performed" in Art. II(3), most courts apply by analogy the conflict rules contained in Art. V(1)(*a*): "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, the law of the country where the award was made" (see ¶ 506 below). The rationale for an analogous interpretation is consistency in results: both at the stage of enforcement of the arbitration agreement and the arbitral award the same law is applied to the validity of the arbitration agreement. The same solution is contained in Art. VI(2) of the European Convention of 1961.

The primary conflict rule of Art. V(1)(*a*) that the agreement is governed by the law chosen by the parties does not present a difficulty. The only question here is whether the choice of law of the parties for the main contract also applies to the arbitration clause or whether the choice of the place of

3. For formal validity and applicable law, see¶¶ 203-204 above.

arbitration implies a choice of the law of that place as being applicable to the arbitration clause. It is submitted that the latter possibility is more appropriate since the validity of the arbitration clause may in any event have to be determined under the arbitration law of the place of arbitration in the country of origin. Nevertheless, many courts rely on the former possibility.

The alternative conflict rule, referring to the law of the country where the award was made, can be read as the law of the country where the award *will* be made in the context of the exception "null and void, inoperative or incapable of being performed" in Art. II(3).

Only if the parties have not designated the law applicable to the arbitration agreement and the place where the arbitration is unknown at the time of a request for referral to arbitration, the conflict of laws rules of Art. V(1)(*a*) cannot be applied by analogy. In that case, it appears justified to apply the conflict laws rules of the forum.

A notable exception to the approach taken by the courts in most countries is the United States where the courts almost always apply US federal (arbitration) law to cases where the exception of "null and void, inoperative or incapable of being performed" was invoked.

¶ 222 - Arbitral Tribunal's Competence and Separability of the Arbitration Clause

Various issues may affect the jurisdiction of an arbitral tribunal. The first and foremost is the validity of the arbitration agreement itself (see ¶¶ 202-213 and 220 above, and ¶¶ 223, 505, 507 and 519 below). Another issue is whether the dispute comes within the scope of the arbitration agreement (see ¶ 201 above). A further issue may be that the arbitral tribunal deals with matters outside the submission to arbitration (which may be defined in a separate document – see, e.g., Terms of Reference as required by the ICC Arbitration Rules, see ¶ 512 below). For the purpose of the present section, the term "competence" is used interchangeably with the term "jurisdiction".

Although being interrelated, two questions need to be distinguished. First, may an arbitral tribunal decide on these issues itself? Second, does the validity of the contract in which the arbitration clause is included affect the validity of that clause? The answer to neither question can be found in the Convention.

Since the question of competence-competence and separability arise in actions for enforcement of the arbitral award as well, in particular under Art. V(1)(*a*) (see ¶ 507 below), these relevant cases are included in the review in the present section.

Competence-competence. It is a generally accepted rule that since an arbitration agreement has the effect of excluding the competence of the courts to hear the merits of a dispute, the courts have the last word on the validity of the arbitration agreement. However, many arbitration laws presently permit an arbitral tribunal to decide on matters affecting its competence, subject to subsequent court control. The reason for this rule is a practical one: if an

arbitral tribunal were not allowed to decide on its competence, a party could considerably delay an arbitration by raising a plea of an alleged lack of competence, with the result that this plea has to be decided by the courts and the arbitral tribunal has probably to stay the arbitration pending the court proceedings. It is believed that it makes more sense to let the arbitral tribunal rule provisionally on its competence and have its decision reviewed in subsequent enforcement or setting aside proceedings after the arbitration has been completed on the merits.

If an arbitral tribunal has ruled on its competence as a preliminary matter, a number of arbitration laws allow a party to submit the arbitral tribunal's decision to the scrutiny of a court pending the arbitral proceedings rather than obliging it to await the conclusion of the arbitration on the merits. In that case, an arbitral tribunal may have to stay the arbitral proceedings.

The Convention itself does not contain provisions on the power of an arbitral tribunal to rule on its competence. It therefore reverts to the applicable arbitration law whether, and if so, under what circumstances, this rule can be applied. The approach in the reported court decisions on Art. II(3) of the Convention differs among the courts as to the competence-competence rule.

Separability of the arbitration clause. The invalidity of the contract in which an arbitration clause is contained (the main contract) may or may not affect the competence of the arbitral tribunal and, hence, may or may not be subject to (subsequent) court control. This depends namely on the question whether the separability doctrine is applied (also referred to as "autonomy of the arbitration clause"). According to this doctrine, the arbitration clause constitutes an agreement independent of the contract in which it is included. Thus, if it is asserted that the main contract is tainted by some invalidity, this will in principle not apply to the arbitration clause as it is considered an independent agreement. The arbitral tribunal then can determine the validity of the main contract, without this being a decision on its own competence. Conversely, if the separability doctrine is not applied, the assertion of the invalidity of the main contract applies equally to the arbitration agreement and hence constitutes a question pertaining to the arbitral tribunal's competence.

The Convention itself does not contain provisions on the separability of the arbitration clause. It therefore reverts to municipal law to determine whether the clause is to be treated independently.

It is sometimes argued that Art. V(1)(*a*) implies the separability doctrine because it provides for conflict rules for determining the law applicable to the arbitration agreement which may have the effect that the arbitration agreement is governed by a law which is different from the law governing the main contract. Whilst the possibility of a different governing law might be a pointer to separability, it is submitted that it is not unusual, though not to be encouraged either, that various provisions in the same contract are governed by different laws (in the French doctrine known as *dépeçage*).

A distinct matter is that, as a consequence of the separability doctrine, the arbitration clause may be governed by a different law. The reverse reasoning

does not seem to be valid: the mere fact that the arbitration clause is governed by a law different from the main contract would not show that the separability doctrine applies.

As regards national law, it appears that the separability doctrine is increasingly accepted.

A controversial question is whether the allegation that a contract never came into existence or that it is null and void ab initio constitutes an exception to the separability doctrine. If the exception applies, a decision of the arbitral tribunal on the allegation of the inexistence of the main contract or the allegation that the main contract was null and void ab initio is subject to subsequent court control.

¶ 223 - Arbitrability

General. The matter of arbitrability is addressed in the final part of Art. II(1) which requires that the arbitration agreement concern "a subject matter capable of settlement by arbitration". The matter of arbitrability is also stated as a ground for refusal of enforcement of the arbitral award in Art. V(2)(*a*), which provides that the court may refuse enforcement on its own motion if it finds that "the subject matter of the difference is not capable of settlement by arbitration under the law of that country".

The term "arbitrability" is used by the courts in the United States as also referring to the question whether a dispute falls within the scope of the arbitration agreement. That question is considered under ¶ 201 - "Scope of Arbitration Agreement".

A distinction can be made between subjective arbitrability and objective arbitrability:

- Subjective arbitrability (*ratione personae*) relates to the question whether a party is, under the applicable law, permitted to agree to arbitration. It involves mostly States and State agencies. That aspect of arbitrability is reviewed in ¶ 505 below (see also ¶ 105 above).
- Objective arbitrability (*ratione materiae*) concerns the question whether the parties are, under the applicable law, permitted to submit a certain dispute to arbitration. Traditionally, this question is raised in a number of countries in respect of antitrust matters, securities, validity of patents, consumer affairs, and bankruptcy.

An increasing number of courts in several countries distinguish domestic from international cases for determining the question whether a dispute is arbitrable. A subject matter that may not be submitted to arbitration in domestic cases may, by virtue of the narrower international public policy, be submitted to arbitration in international cases. The same applies to States or State agencies which are, under their domestic law, prohibited to resort to arbitration but may do so in international relations. See ¶ 518 below.

In order to avoid unnecessary repetition, the question which matters are arbitrable is not included in the present section but is deferred to ¶ 519, where it is examined in the context of the enforcement of the award.

At the stage of enforcement of the arbitration agreement under Art. II(3), the requirement of arbitrability as set forth in the final part of Art. II(1) that the arbitration agreement concern "a subject matter capable of settlement by arbitration" must be deemed to be one of the conditions for referral to arbitration. This requirement can be said to be incorporated in Art. II(3) by the words "an agreement within the meaning of this Article" in that provision.

Public policy and enforcement of arbitration agreement. The foregoing may give rise to the question whether public policy constitutes a defence to enforcement of the arbitration agreement under Art. II(3). It is submitted that both grounds of Art. V(2) are to be read into Art. II(3)'s requirements for enforcing agreements to arbitrate. The distinction between arbitrability and public policy in Art. V(2) is an historical one and could have been dealt with in one ground for refusal of enforcement being public policy only (see ¶ 519 below). In the alternative, public policy can be regarded as falling under the words "null and void" appearing in the terminal part of Art. II(3).

Applicable law. Another question is which law a court has to apply to questions relating to arbitrability at the stage of enforcement of the arbitration agreement under Art. II(3). The final part of Art. II(1) does not refer to an applicable law. In contrast, Art. V(2) refers to the law of the forum.

Subjective arbitrability (*ratione personae*) is traditionally dealt with on the basis of national conflict of laws rules applicable to personal capacity. The more modern approach is to apply what is said to be substantive rules of international law to the effect that notwithstanding domestic prohibitions for States and State agencies to agree to arbitration, they are bound by arbitration agreements in international contracts. This rule is equivalent to the application of international public policy mentioned above. It may also be mentioned that the European Convention of 1961 provides in Art. II(1) that: "In the cases referred to in Art. I(1) of this Convention, legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements".

The law applicable to objective arbitrability (*ratione materiae*) at the stage of enforcement of the arbitration agreement (and during and after the arbitration for that matter) is subject to considerable debate in literature. A wide range of solutions is offered: (1) law of the forum; (2) law applicable to the arbitration agreement; (3) law of the place of arbitration; (4) law applicable to the merits; (5) law of the country where enforcement of the award will be sought; (6) substantive rule of international law; (7) a cumulative applicability of any two or more of the foregoing. The vast majority of the courts, on the other hand, is remarkably uniform in adopting the first solution by applying the law of the forum only, possibly attenuated by rules of international public policy. The same solution can be found in Art. VI(2) in fine of the European Convention of 1961: "The courts may also refuse recognition and enforcement of the

arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration".

Bankruptcy. A large number of mostly US cases involved bankruptcy. In virtually all cases the dispute was referred to arbitration notwithstanding the bankruptcy or similar proceedings. This applies also to cases where the bankruptcy occurs in the United States and the arbitration takes place abroad.

¶ 224 – Declaratory Judgment on Validity of Arbitration Agreement

Art. II(3) considers only the case where a court is seized of the merits of a dispute in which the other party objects to the competence of the court on the basis of an arbitration agreement. It does not provide expressly for the possibility of obtaining a declaratory judgment by a court on the validity of the arbitration agreement. Yet, a party may have good reasons to seek such declaratory judgment. If its doubts about the validity of the arbitration agreement turn out to be true in an action for enforcement of the ensuing award in another country (Art. V(1)(*a*)), it may have cost him lost time and money by going through arbitration proceedings which yielded nothing.

Although this question has received little attention in the court decisions reported so far, by analogy to the text of Art. II(3), the declaratory judgment can be deemed possible under this provision for those cases where the arbitration agreement falls under the Convention (¶¶ 214-216 above), provided that the procedural law of the forum offers the possibility of such declaratory judgment. One of the few exceptions is the Italian Supreme Court which decided that a declaratory judgment was not possible for reasons of Italian domestic law on procedure.

Introduction to Multiparty Disputes

Multi-party disputes broadly fall into four categories:

(1) Two or more arbitrations involve partly or wholly common issues of law and fact. These arbitrations can be between the same parties or different parties. See ¶ 225 below.

(2) A non-signatory third party wishes, or is requested, to become a party to the arbitration. See ¶ 226 below.

(3) Court proceedings are conducted concurrent with arbitration proceedings involving partly or wholly common issues of law and fact, whilst the court action involves a party which is not a party to the arbitration agreement. See ¶ 227 below.

(4) An arbitration involves more than one claimant and/or more than one defendant. This is the so-called *Dutco* situation which may call into question the equality of the parties in the appointment of arbitrators. This situation arose in an ICC arbitration under the 1988 Rules in which two German companies, Siemens and BKMI, had entered a consortium agreement with Dutco, a Dubai company. When Dutco commenced ICC arbitration proceedings, Siemens and BKMI were forced to appoint a single arbitrator, but did so under protest. By a partial award, the ICC arbitral tribunal held that it had been properly constituted. The Paris Court of Appeal upheld, but the French Supreme Court reversed, finding that the principle of equality of the parties in appointing arbitrators is a matter of public policy and can be waived only after the dispute has arisen (Cour de Cassation, 7 January 1992 reported in Volume XVIII pp. 140-142; Art. 10 of the 1998 ICC Rules addresses this problem). No reported decision addressed this situation in relation to the Convention.

¶ 225 – Related Arbitrations, etc.

The Convention does not contain provisions for the situation of two related arbitrations. It merely provides that a court shall, at the request of one of the parties, refer them to arbitration. In this circumstance, the solution for the problem must be found in domestic law. As very few arbitration laws contain provisions relating to consolidation, solutions are mainly developed by case law. As regards case law, United States case law seems to be the most developed on the subject, where the courts have claimed to have a discretionary power to order consolidation. The English courts are inclined to seek the solution in appointing the same arbitrator in both arbitrations (so-called "parallel arbitrations").

The possibility of conflicting awards has also been discussed in the reported cases, when parties opposing arbitration have relied on it as a ground for the arbitration agreement being inoperative or incapable of being performed.

For the possibility of conflicting court decisions, see ¶ 227 below.

¶ 226 – Third Parties

The (alleged) involvement of a third party in an arbitration occurs more and more frequently in practice. Examples are an assignee of a contract containing an arbitration clause, a subsidiary of a party which has actually performed under the contract, a third party beneficiary of a contract, and a guarantor of a party's obligations under a contract.

Aside from the factual question whether a party is actually a party to the arbitration agreement (see ¶¶ 203-213 above), the question here is whether the party which is allegedly not bound by the arbitration agreement can be involved in the arbitration by joinder, intervention or otherwise.

The essence of arbitration being its voluntary nature, the joinder or intervention of a third party can, in principle, take place only if both the third party and the parties which are bound to the arbitration agreement consent to the joinder or intervention. Nevertheless, a court may still have some latitude for manoeuvring (see below).

Joinder and intervention may not be the only solutions. A typical example is the guarantor of the performance of one of the parties to the contract including the arbitration clause. The wording of the guarantee may be so broad as to incorporate the arbitration clause contained in the contract into the guarantee (see also ¶ 201 above). In such a case, the aggrieved party can commence a separate arbitration against the guarantor, which arbitration may be consolidated with the arbitration between that party and the party whose performance was the subject of the guarantee (see ¶ 225 above). Otherwise, a court may attempt to have the interested third party and the two original parties agree to one multi-party arbitration. Another solution is to stay the court proceedings against the third party until the arbitrators have rendered a decision.

All the above solutions have been adopted in the reported cases and share the advantage that they avoid inconsistent findings.

Insofar as the Convention is concerned, it does not provide a solution for non-signatory parties which have an interest in the arbitration. Again, it does not foreclose most solutions either, except that the Convention can apply only to the recognition and enforcement of arbitration agreements and arbitral awards involving parties that have in one way or the other consented to arbitration.

The present section concerns the enforcement of the arbitration agreement. Problems concerning the identity of a party at the time of enforcement of the arbitral award are reviewed in ¶ 106 above.

The cases address in particular the issue of the arbitration agreement and piercing the corporate veil, a subsidiary, an assignment, a guarantor, and a third party beneficiary.

¶ 227 – Concurrent Court Proceedings

This heading concerns the situation where a court action is pending in respect of the same subject matter as that of an arbitration, but the court action involves a party which is not a party to the arbitration agreement. For concurrent proceedings in foreign courts, see ¶ 229 below.

Most of the relevant cases decided under the Convention involve exclusive distributorship agreements. The classic scenario is that a manufacturer grants a foreign distributor the exclusive right to sell a product within a defined territory – usually the distributor's country – and during the term of the agreement the manufacturer markets the same product in that territory through another company. The aggrieved exclusive distributor then sues before the courts in his country both the third company and the manufacturer.

The distributorship agreement contains an arbitration clause, but the distributor has no contractual relation with the third company. The manufacturer then requests a stay of the court proceedings against him in favour of arbitration.

In such cases, the first question is whether the arbitration between the parties to the arbitration agreement can still take place. The Italian courts have long wavered with respect to the question whether the law suit absorbs the arbitration (due to the so-called *vis atractiva* of the court proceedings). Such absorption did not seem justified in view of the mandatory nature of the referral to arbitration under Art. II(3) of the Convention, and is now ruled out by the new Art. 819-bis of the Italian Code of Civil Procedure, introduced by the 1994 arbitration law reform.

The above theory is similar to what was called in the United States the "intertwining doctrine". According to this doctrine, which was intended to prevent the piecemeal adjudication of disputes, if a party asserts several causes of action, at least one of which falls within the exclusive jurisdiction of the courts, the entire dispute must remain in the federal court, notwithstanding the existence of an arbitration clause. The intertwining doctrine was rejected in 1985 by the US Supreme Court (*Dean Witter Reynolds v. Byrd*, 105 S.Ct. 1238 (1985).

A second question is whether the possibility of conflicting decisions rendered in the court and arbitration proceedings is a ground for the arbitration agreement being inoperative or incapable of being performed on the strength of the final part of Art. II(3) of the Convention. Although this may entail the possibility of a conflicting award in the related arbitration, it seems that the mandatory nature of the referral to arbitration under Art. II(3) would oppose holding an arbitration agreement "inoperative" or "incapable of being performed" on the ground that a related claim is to be decided in court proceedings.

Related Court Proceedings

¶ 228 – Pre-Award Attachment and Other Provisional Measures

Pre-award attachment. The Convention contains no express provisions on the matter of conservatory, provisional or interim measures issued by a court in aid of arbitration. Hence, their availability and procedure depend on the law of the court before which the measure is sought. National courts can indeed assist international arbitration in an effective manner in this respect. Depending on the applicable arbitration law, arbitrators may for instance order a party to refrain from calling a guarantee during arbitration. However, such order cannot be enforced in most countries (see also ¶ 110 above). At best, arbitrators may draw their conclusions from non-compliance with such an order, although it is not always clear what these conclusions may be. For these

reasons, parties prefer to go to a national court for an injunction or similar measure prohibiting a demand for payment under the guarantee, as is shown by some reported cases.

Modern arbitration acts expressly provide that it is not incompatible with an arbitration agreement for a party to request, before or during the arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure .

As regards an attachment in order to secure the subject matter in dispute or the payment under the award if rendered in favour of the party which applied for the attachment, most arbitration laws do not allow an arbitral tribunal to issue an attachment order. On the other hand, as the National Reports (at IV.5) on the laws of arbitration in the *International Handbook on Commercial Arbitration* demonstrate, there is almost no law which does not permit that a court be requested to order attachment as a provisional remedy in aid of arbitration (the so-called "pre-award attachment", which is an attachment before or during the arbitration).

No court in the reported cases has doubted that an attachment in connection with the enforcement of an arbitral *award*, or post-award attachment, in order to secure payment under the award, is compatible with the Convention.

The reported cases also leave no doubt as to the possibility of a pre-award attachment. However, doubts have arisen in the United States in a fairly large number of cases as to the compatibility of pre-award attachment with the Convention.

Other measures in aid of arbitration. One of the measures in aid of arbitration abroad is the assistance in obtaining evidence such as the examination of unwilling witnesses or discovery of documents.

¶ 229 – Foreign Court Proceedings: Anti-Suit Injunction; Foreign Judgment on Validity of Arbitration Agreement

Anti-suit injunction. In an increasing number of cases, a party seeks an injunction from a court restraining the other party from proceeding with court proceedings on the merits in a foreign court (also called "anti-suit injunction"). In terms of Art. II(3) of the Convention, it raises the question which court is empowered to decide on the referral to arbitration. In an ideal setting, both courts would refer the parties to arbitration under Art. II(3), assuming that both countries have acceded to the Convention. However, practice shows that such concordance of views is not always the case. Art. II(3) does not confer exclusive jurisdiction on the courts of a particular Contracting State.

Another question is whether a court of a Contracting State may interfere in court proceedings taking place in another Contracting State by issuing a

restraining order. The Convention itself does not preclude such an injunction, which is to be judged under the law of the forum.

Recognition of foreign judgment. A related matter is the case where a foreign court has rendered a decision on the validity of the arbitration agreement and a party seeks the recognition of such judgment. Particular problems arise if EU Council Regulation 44/2001) comes into play.

ARTICLE III - PROCEDURE FOR ENFORCEMENT

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

¶ 301 – In General

Art. III opens the provisions relating to the enforcement of arbitral awards falling under the Convention (Arts. III-VI). It contains the general obligation for the Contracting States to recognize Convention awards as binding and to enforce them in accordance with their rules of procedure "under the conditions laid down in the following articles". Thus, a clear distinction is made between the conditions for enforcement in respect of which the Convention alone is controlling and the procedure for enforcement in respect of which the procedural law of the forum governs.

With regard to the latter, generally speaking three possibilities exist in the Contracting States for regulating the procedure for enforcement of a Convention award: (1) enforcement procedure according to specific provisions laid down in a special Act, (2) enforcement procedure as for a foreign award in general, and (3) enforcement procedure as for a domestic award.

The general obligation to recognize Convention awards as binding under Art. III of the Convention can also be considered as the basis for the application of the procedural law of the forum to those aspects incidental to the enforcement which are not regulated by the Convention. Examples are discovery of evidence (see ¶ 302 below), estoppel or waiver (see ¶ 303 below), set-off or counterclaim against award (see ¶ 304 below), the entry of judgment clause (see ¶ 305 below), period of limitation for enforcement of a Convention award (see ¶ 306 below), and interest on the award (see ¶ 307 below).

The second sentence of Art. III, in which it is stated that there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of Convention awards than on the recognition and enforcement of domestic awards, is self-explanatory and has not led to problems in practice, except before the Dutch courts with respect to the availability of appeal against a decision granting enforcement of a Convention award.

Two studies are to be mentioned in connection with Art. III. First, the UNCITRAL Survey of 2008 mentioned at ¶ 113 above. Paragraphs 45-48 concern fees, levies, taxes or duties for enforcing a Convention award. With a few exceptions, the responses to the questionnaire confirmed that Contracting States had not imposed more onerous conditions or higher fees or charges for the recognition or enforcement of Convention awards compared to domestic awards. The Addendum to the Survey addresses matters such as competence of the national courts and other authorities concerning recognition and enforcement of Convention awards; time limits for applying for recognition and enforcement (see also ¶ 306 below); procedures and requirements applicable to a request for enforcement of a Convention award; objections to request for enforcement; and appeal against granting, or refusal to grant, enforcement.

The second is the Report of the ICC Commission on Arbitration, *Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards*, published in the ICC International Court Bulletin 2008 Special Supplement, updated in 2013 (hereinafter "ICC Guide"). The ICC Guide gives for more than 65 countries the following information: (a) the Contracting State and the Convention; (b) national sources of law; (c) limitation periods (see also (¶ 306 below); (d) national courts and court proceedings; (e) evidence required; (f) stay of enforcement (see also ¶ 601 below); (g) confidentiality; and (h) other issues (including enforcement of interim awards; enforcement of non-monetary relief; partial enforcement; enforcement of annulled awards; other procedural or practical requirements).

¶ 302 – Discovery of Evidence

The granting or denying of a request for the discovery of evidence to prove the grounds for refusal of enforcement listed in Art. V of the Convention may come within the purview of the forum's rules of procedure.

¶ 303 – Estoppel and Waiver

The Convention does not contain provisions concerning the question whether a party is estopped from asserting a ground for refusal of enforcement where it has participated without objection in the arbitral proceedings. Whilst the Convention can be considered as giving an opening for the estoppel because

the English text of the introductory sentence of Art. V(1) employs the permissive language to the effect that enforcement of the award "*may be refused*" rather than "shall be refused", in essence the question of estoppel reverts to municipal law. It is an open question whether the latter law is the law of the forum and/or the law applicable to the arbitration.

The estoppel may apply, inter alia, to the following cases: non-compliance with the written form of the arbitration agreement (Art. II(2)), lack of impartiality of arbitrator (Art. V(1)(*b*) and Art. V(2)(*b*)), excess by the arbitral tribunal of its authority (Art. V(1)(*c*)), and irregularities in the composition of the arbitral tribunal and the arbitral procedure (Art. V(1)(*d*) and Art. V(2)(*b*)).

The question of estoppel is to be distinguished from the question of a possible residual discretion to grant enforcement notwithstanding the presence of a ground for refusal of enforcement (see ¶ 500A below).

¶ 304 – Sett-Off and Counterclaim

The courts in the Contracting States are divided on the question whether a respondent can set off a claim against a Convention award which is sought to be enforced.

¶ 305 – Entry of Judgment Clause

Pursuant to Sect. 9 of Chapter 1 of the Federal Arbitration Act, which applies to domestic arbitration in the United States on the federal level, parties must have expressed in the agreement their consent that judgment of the court shall be entered upon the award. Thus, the arbitration agreement should provide "judgment upon the award may be entered in any court having jurisdiction hereof" or similar wording. If no entry of judgment clause is contained in the arbitration agreement, a federal court has no jurisdiction to enforce an award under Chapter 1 of the Federal Arbitration Act. Chapter 2 of the Federal Arbitration Act, which implements the Convention in the United States, does not expressly provide that the entry of judgment clause is also required for the enforcement of Convention awards, and the question has arisen whether such requirement is implied. It is held US Court of Appeals for the Second Circuit that in this respect Section 9 of Chapter 1 is pre-empted by Section 207 of Chapter 2 (US 509 sub 2-11).

¶ 306 – Period of Limitation for Enforcement

The Convention is silent in respect of the question whether a period of limitation applies to a request for enforcement of a Convention award. This question too reverts to municipal law, which can be presumed to be the law of forum.

The laws of the Contracting States differ on the period of limitation for enforcement. An Annex to UNCITRAL Survey 2008 referred to in ¶ 113 above contains a detailed list of the varying time limits in some 115 Contracting States for applying for recognition and enforcement of a Convention award (see also the Addendum at paragraphs 6-10 and 44). See also the ICC Guide referred to in ¶ 301 above at (C) of each country's report.

¶ 307 – Interest on Award

The issue of interest raises various questions. If the rate of interest as fixed in the award is significantly lower than the prevailing market rate or if the prevailing market rate significantly rises after the date of rendition of the award, the question arises whether additional interest can be claimed in enforcement proceedings. If the arbitral tribunal has not granted any interest at all, the question is whether it can be claimed in enforcement proceedings. A particular problem for English awards is that under former English arbitration law (see now Sect. 49 of the English Arbitration Act 1996), an arbitral tribunal lacks the power to award post-award interest. That raises the question whether an enforcement court can award post-award interest on an English award. The Convention itself is silent on the question of interest, which, therefore, has to be resolved under municipal law.

ARTICLE IV - CONDITIONS TO BE FULFILLED BY THE PETITIONER

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.

¶ 401 – In General

Art. IV is set up to facilitate enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement of a Convention award. That party has only to supply the duly authenticated original award or a

duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof (paragraph 1). If both documents are made in a language other than that of the country where the enforcement is sought, the party may also have to submit a translation. In fulfilling these conditions, the party seeking enforcement produces *prima facie* evidence entitling him to obtain enforcement of the award. It is then up to the other party to prove that enforcement should not be granted on the basis of the grounds enumerated exhaustively in the subsequent Art. V(1). It should be emphasized that the conditions mentioned in Art. IV are the only conditions with which the party seeking enforcement of a Convention award has to comply.

¶ 402 – Original or Copy of Arbitral Award

In a few cases reported so far, the courts held that the party seeking enforcement failed to submit a duly authenticated original award or duly certified copy thereof.

¶ 403 – Original or Copy of Arbitration Agreement

Art. IV(1)(*b*) should not be confused with Art. V(1)(*a*). The former provision is merely concerned with what the party seeking enforcement must supply to the enforcing court. If the original or certified copy of the document is *prima facie* an arbitration agreement, the party seeking enforcement need not prove whether the agreement is in accordance with the written form as required by Art. II(2) or is valid under the applicable law. It is the party against whom enforcement is sought who has to prove the contrary according to Art. V(1)(*a*).

¶ 404 – Authentication and Certification

Art. IV(1) requires the party seeking enforcement to supply the "duly authenticated" original award or a "duly certified" copy thereof as well as the original arbitration agreement or a "duly certified" copy thereof. The authentication of a document is the formality by which the signature thereon is attested to be genuine. The certification of a copy is the formality by which the copy is attested to be a true copy of the original.

Art. IV(1) does not mention according to which law the authentication and certification should take place. Some courts hold that these formalities can be carried out either under the law of the country where the award was made or under the law of the country where the enforcement of the award is sought. Others are of the opinion that the required conditions for authenticity must be ascertained according to the law of the forum. A number of courts have not addressed this question but appear to accept readily that an authentication or certification is sufficient for the purposes of Art. IV(1).

The UNCITRAL Survey referred to in ¶ 113 above shows a wide variety of approaches to the authentication and certification (paragraphs 49-55) and the Commission was recommended to consider whether assistance should be provided to avoid uncertainty resulting from such disparity (Add. para. 41).

¶ 405 – At the Time of Application

The words "shall, at the time of application, supply" have led the Italian Supreme Court to decide in a case where a petitioner had not supplied the arbitration agreement at the moment he made the application for enforcement, to refuse enforcement of the award. The Austrian and Spanish Supreme Courts allow a petitioner to cure such defect in the application subsequent to the filing thereof.

The UNCITRAL Survey 2008 noted that the phrase "at the time of application" appeared no longer to be an obstacle in practice and there was a general trend in favour of granting parties the opportunity to correct defects in the application (Add. paragraph 42).

¶ 406 – Translation (Paragraph 2)

The second paragraph of Art. IV provides that a party seeking enforcement has to produce a translation of the arbitral award and the arbitration agreement if they are not made in the official language of the country where enforcement of the award is sought.

The courts generally accept that the translation is made by an official or sworn translator either of the country in which the award was made or of the country in which enforcement of the award is sought, or that the translation is certified as correct by an official or sworn translator of either country. The certification of the translation by a diplomatic or consular agent of either country also appears to be sufficient.

Although the language of Art. IV(2) suggests that the submission of a translation of the arbitration agreement and arbitral award is mandatory ("shall produce"), it is held that a translation is not required when the judge knows the foreign language sufficiently well "to have taken full cognizance of the contents of these documents" (Netherlands no. 10 sub 1 reported in Volume X p. 487).

See also the ICC Guide under (E) for the manner in which the various Contracting States interpret and apply Art. IV(2).

ARTICLE V - GROUNDS FOR REFUSAL OF ENFORCEMENT

¶ 500 – Grounds for Refusal of Enforcement in General

Art. V is divided into two parts. The first paragraph of Art. V lists the grounds for refusal of enforcement which are to be proven by the respondent. The second paragraph of Art. V, which concerns violation of public policy under the law of the forum, lists the grounds on which a court may refuse enforcement on its own motion.

The overall scheme of Arts. IV-VI is the facilitation of the enforcement of the award. The scheme reflects a "pro-enforcement bias" as certain courts in the United States have said. This is also the manner in which Arts. IV-VI are generally interpreted by the courts. As far as the grounds for refusal of enforcement of the award as enumerated in Art. V are concerned, it means that they are to be construed narrowly. More specifically, concerning the grounds of refusal of Art. V(1) to be proven by the respondent, it means that their existence is accepted in serious cases only. Concerning the ground for refusal of Art. V(2) to be applied by the court on its own motion, it means that a court accepts a public policy violation in extreme cases only, thereby using the distinction between domestic and international public policy.

The three main features of the grounds for refusal of enforcement of an award under Art. V are the following: Grounds Are Exhaustive, ¶ 501; No Re-examination on the Merits of the Arbitral Award, ¶ 502; and Burden of Proof on Respondent, ¶ 503.

¶ 500A – Residual Power to Enforce Notwithstanding the Existence of a Ground for Refusal of Enforcement

One of the characteristics of the grounds for refusal of recognition and enforcement named in Article V of the New York Convention is that they constitute a limitative enumeration. Recognition and enforcement *"may be refused . . . only if"*. Thus, the exequatur court may not refuse recognition and enforcement on the basis of a ground that is not named in the Convention. That principle has been generally accepted in the case law under the Convention.

Conversely, however, the question arises of whether an enforcement court must refuse recognition and enforcement under all circumstances if one of the grounds expressly named in Art. V(1) has been advanced and proved. If this question is answered in the affirmative, the next question is whether such a power can be applied to all the grounds named in Art. V(1).

In a number of judgments under the Convention, courts (especially in Hong Kong), have taken the position that Art. V(1) of the Convention can be interpreted in such a way that the court deciding on enforcement has a

"*residual discretionary power*" to allow enforcement despite the fact that a ground for refusal of enforcement has been advanced and proved.

This power is based specifically on the wording of the English text of article V(1) of the Convention: "Recognition and enforcement of the award *may* be refused . . ." (italics added), wording that also appears in the Chinese, Russian, and Spanish texts. In contrast, the French text of article V(1) appears to offer no leeway for a residual discretionary power: "*seront refusées*" [shall be refused].

Contrary to what some commentators opine, the authors of the Convention appear not to have consciously chosen the word "*may*". The *traveaux préparatoires* do not mention any discussion regarding a choice between "*may*" and "*shall*" in relation to Art. V(1)(e).

To the extent that courts in the Contracting States interpret the Convention as giving them a residual discretionary power with regard to the recognition and enforcement of arbitral awards, they make use of it with restraint, and only in two situations: (1) the ground for refusal concerns a *de minimis* case (e.g., an insignificant violation of the applicable rules of arbitration), and (2) if the party that invokes the ground for refusal has neglected to invoke that ground in a timely fashion in the arbitral procedure.

Within the framework of the Convention it is difficult to conceive that the residual power to enforce would also apply to the case where the award has been set aside in the country of origin (ground *e*, see ¶ 516 below) as the award no longer legally exists.

The question of the residual power to enforce is to be distinguished from the question whether a party is estopped from asserting a ground for refusal of enforcement (see ¶ 303 above).

¶ 501 – Ground Are Exhaustive

The first main feature is that the grounds for refusal of enforcement mentioned in Art. V are exhaustive. Enforcement may be refused "only if" the party against whom the award is invoked is able to prove one of the grounds listed in Art. V(1) or if the court finds that the enforcement of the award would violate its (international) public policy (Art. V(2)). This main feature is almost unanimously affirmed by the courts.

¶ 502 – No Re-Examination of the Merits of the Arbitral Award

The second feature of the grounds for refusal of enforcement, which follows from the first feature, is that the court before which the enforcement of a Convention award is sought, may not review the merits of the award because a mistake in fact or law by the arbitral tribunal is not included in the list of

grounds for refusal enumerated in Art. V. This feature too is generally accepted by the courts.

The principle that a court may not subject an arbitral award to a review on the merits is not unfettered, in the sense that the court may examine the award for the purposes of verifying the grounds for refusal of enforcement, e.g., excess by the arbitral tribunal of its authority.

¶ 503 – Burden of Proof on Respondent

The introductory sentence of Art. V(1) makes clear that the party against which enforcement of the award is sought has the burden of proving the grounds for refusal of enforcement listed in the first paragraph. This third main feature of the grounds for refusal of enforcement, again, is almost unanimously affirmed by the courts.

ARTICLE V(1) - GROUNDS FOR REFUSAL OF ENFORCEMENT TO BE PROVEN BY THE RESPONDENT

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:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*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; or

(*c*) The award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Ground *A*: Invalidity of the Arbitration Agreement

¶ 504 – Agreement referred to in Article II

The Italian Supreme Court has expressed doubts whether the words "the agreement referred to in article II" in ground *a* of Art. V(1) imply that the lack of the written form of the arbitration agreement as required by Art. II(2) constitutes a ground for refusal of enforcement of an arbitral award. It is submitted that the view as expounded by the Italian Supreme Court is erroneous.

¶ 505 – Incapacity of a Party

See Index of Cases. See also ¶¶ 105, 106, 212 and 226 above.

¶ 506 – Law Applicable to the Arbitration Agreement

Art. V(1)(*a*) contains two conflict rules for determining the law governing the arbitration agreement. The first rule is the primary rule of party autonomy according to which the parties are at liberty to subject the arbitration agreement to a law of their choice. The second rule is a subsidiary rule according to which the arbitration agreement, failing a choice of law by the parties, is governed by the law of the country where the award was made. Although some courts overlook these conflict rules, no court has questioned that they are to be interpreted as internationally uniform rules which supersede the domestic conflict rules of the country in which the award is relied upon with respect to awards governed by the Convention.

It should be noted that matters regarding the form of the arbitration agreement are not to be determined under the law governing the arbitration agreement but under the uniform rule of Art. II(2) (which is most often invoked under Art. V(1)(*a*)). Furthermore, in the few cases in which the invalidity of the arbitration agreement is invoked under the law applicable pursuant to the conflict rules of Art. V(1)(*a*), the courts virtually always found that the subsidiary rule applied, i.e., that the arbitration agreement is governed by the law of the country where the award was made.

¶ 507 – Miscellaneous Cases regarding the Arbitration Agreement

See Index of Cases. See also: ¶ 222 - Arbitral Tribunal's Competence and Separability of the Arbitration Clause.

Ground *B*: Violation of Due Process

¶ 508 – In General

When considering ground *b* of Art. V(1), a US Court of Appeals (Second Circuit) stated "[T]his provision essentially sanctions the application of the forum state's standards of due process" (*Parsons & Whittemore v. RAKTA*, US no. 7 reported in Volume I p. 205, 508 F.2d 969, 975 (2nd Cir. 1974)). This statement phrases concisely the object of ground *b*. It concerns the fundamental principle of procedure, that of a fair hearing and adversary proceedings, also referred to as *audi et alteram partem*.

The courts appear to accept a violation of due process in serious cases only, thereby applying the general rule of interpretation of Art. V that the grounds for refusal of enforcement are to be construed narrowly. The narrow interpretation of Art. V(1)(*b*) becomes particularly evident where the courts hold that a violation of domestic notions of due process does not necessarily constitute a violation of due process in a case where the award is foreign (see Art. V(2) sub "Distinction Domestic – International Public Policy", ¶ 518 below). One of the rare examples of the court accepting a violation of due process is a case in which the German respondent was, according to the judgment, not notified of the arbitral proceedings in Russia.

Art. V(1)(*b*) cannot be considered as having the effect that a violation of due process would not also fall under the public policy provision of Art. V(2)(*b*) because due process generally is conceived as pertaining to public policy. Thus, a court may also on its own motion refuse enforcement of an award for violation of due process on the basis of Art. V(2)(*b*).

¶ 509 – Proper Notice

Ground *b* requires that the party against whom the award is invoked was properly notified of the appointment of the arbitrator and of the arbitral proceedings. The question when a notice can be considered as proper depends on the facts of the case. The test is whether the notice is adequate to inform the party of the appointment of the arbitrators and the arbitral proceedings. It is generally accepted that, arbitration being a private manner of settlement of disputes, the notice need not be in a specific (official) form as is laid down in certain laws for domestic arbitration or court proceedings. Although, therefore, an ordinary letter suffices, it is nevertheless recommended to send letters by registered mail with return receipt requested, or by telefax, in order to avoid the objection, which recurs in practice, that no letter was received. Courts have held specifically that the manner of serving notices agreed to by the parties (usually in arbitration rules) is sufficient.

¶ 510 – Time Limits and Notice Periods

The shortness of time limits for the appointment of an arbitrator and the preparation of the defence, and of the notice period to appear at the hearing generally is held by the courts not to be a violation of due process under Art. V(1)(*b*). In particular, the time limits and notice periods applicable in court proceedings do not apply to arbitration. The test is whether the time limit or notice period was such that it in fact precluded a party from appointing its arbitrator, preparing its defence or appearing at a hearing.

¶ 511 – Otherwise Unable to Present His Case

The proper notice for the appointment of the arbitrator and the arbitration proceedings can be considered as specific categories of the general principle that a party must have been able to present its case. Again, the test is whether a party was in fact precluded from presenting its case in arbitration. Most of these cases in which the defence of the inability of presenting the case was raised, which defence was rarely successful, are mentioned under Art. V(2)(*b*) "Irregularities in the arbitral procedure", ¶ 523 below.

Ground *C*: Excess by Arbitral Tribunal of Its Authority

Ground *c* is divided into two parts. The first part is concerned with the award which contains decisions in excess of the arbitral tribunal's authority (see ¶ 512 below). The second part deals with the possibility of a partial (refusal of) enforcement of an award which contains both decisions within the arbitral tribunal's authority and decisions outside that authority (see ¶ 512A below).

¶ 512 – Excess of authority

Meaning. Art. V(1)(*c*) does not relate to the case where the arbitral tribunal had no competence at all because of lack of a valid arbitration agreement. That case is to be determined under ground *a* of Art. V(1) (see ¶¶ 504-507 above). Ground *c* concerns the case where the arbitration agreement may be valid as such, but the arbitral tribunal has given decisions which do not fall within the scope of the arbitration agreement and/or the matters submitted to it by the parties. The scope of the arbitration agreement is reviewed under Art. II(1) (see ¶ 201 above).

Although not questioned in the court decisions reported to date and being somewhat obscure and repetitive, the expression "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration" implies a two prong test (based on a combined reading of the equally authentic English and French texts of the Convention).

First, it requires a determination of what constitutes the scope of the arbitration clause (see ¶ 201 above). Second, having determined the scope, it requires a determination of the matters that the parties have submitted to the resolution by the arbitral tribunal in question. The latter is also referred to as the tribunal's mandate (in ICC arbitration: Terms of Reference). In certain cases, the matters submitted by the parties to the arbitral tribunal's decision (i.e., its mandate) may be narrower than the scope of the arbitration clause. However, the tribunal's mandate may be broadened by the parties' submissions beyond the scope of the arbitration clause if during the arbitration both parties explicitly or tacitly agreed to such an extension.

The foregoing is relevant for the arbitration clause (referring future disputes to arbitration). In the case of a submission agreement (referring existing disputes to arbitration) matters concerning scope and mandate usually coincide.

Award *infra petita*. Ground *c* (or any other ground for refusal of enforcement listed in Art. V of the Convention) does not mention an arbitral award in which not all (counter) claims submitted to the arbitral tribunal have been disposed of (the so-called award *infra petita*). Considering that one of the main features of Art. V is that it lists the grounds for refusal exhaustively, an award *infra petita* does not qualify for refusal of enforcement. Most modern arbitration laws provide for the possibility of obtaining an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award. The additional award can in turn be enforced under the Convention.

¶ 512A – Partial Enforcement

Partial enforcement of award *extra petita*. As mentioned, the second part of Art. V(1)(*c*) allows partial (refusal of) enforcement of an arbitral award in those cases where some but not all decisions are outside the scope/mandate of the arbitral tribunal. The text of the New York Convention requires that partial recognition and enforcement can be granted only if "matters submitted to arbitration can be *separated* from those not so submitted" (emphasis added).

Partial enforcement if violation of public policy. A related matter is whether a court can grant partial enforcement in cases where it is found that a part of the award violates public policy as referred to in Art. V(2)(*b*). This may be possible by analogy with Art. V(1)(*c*) of the Convention, as it is held by courts in Hong Kong and the United States.

Partial enforcement at the petitioner's election. A further related matter is whether a party itself can seek partial enforcement of an arbitral award under the Convention. Such a request may be desirable for example in a case where the award contains several decisions of which one or more require a rectification by the arbitral tribunal for arithmetical errors. Pending rectification, a party may have an interest in enforcement of the other decisions in the award without awaiting the outcome of the rectification proceedings. Court decisions would support the admissibility of such a request

for partial enforcement, provided that the parts that are requested to be enforced can be separated from those that are not subject to the request for enforcement.

Ground *D*: Irregularity in the Composition of the Arbitral Tribunal or Arbitral Procedure (¶ 513)

Ground *d* lays down the rule that enforcement of the award can be refused if the respondent can prove that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, in the absence of an agreement on these matters, was not in accordance with the law of the country where the arbitration took place. According to its text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first, and only in the absence of an agreement on these matters, the arbitration law of the country where the arbitration took place must be taken into account.

Under the New York Convention's predecessor, the Geneva Convention of 1927, enforcement of the award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with *both* the agreement of the parties *and* the law of the country where the arbitration took place. The International Chamber of Commerce (ICC), which took the initiative of establishing a new Convention, considered the Geneva Convention's main defect to be that it provided for the enforcement of only those awards that were strictly in accordance with the procedural law of the country where the arbitration took place. The ICC therefore proposed a Draft Convention in 1955 for the enforcement of truly international awards, i.e., arbitral awards which are not governed by a national arbitration law (see Art. I sub "Arbitral Award: 'A-national' Award", ¶ 109 above), in which the present text of ground *d* was inserted. The concept of truly international arbitration was subsequently rejected by the drafters of the Convention who substituted the wording "foreign awards" for "international awards", thereby making references in Art. V(1) to an applicable national arbitration law. The drafters recognized, however, that enforcement could be frustrated if it were to be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law. Various solutions for this problem were proposed, but the final result of the long discussions was that the ICC text was retained. Ground *d* has led to a few refusals on enforcement (see Index of Cases).

Ground *E*: Award Not Binding, Suspended or Set Aside

¶ 514 - Binding

Ground *e* of Art. V(1) provides in the first place that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has not become "binding". The Convention's predecessor, the Geneva Convention of 1927, required that the award had become "final" in the country of origin. The word "final" was interpreted by many courts at the time as requiring a leave for enforcement (*exequatur* and the like) from the court in the country of origin. Since the country where enforcement was sought also required a leave for enforcement, the interpretation amounted in practice to the system of the so-called "double-exequatur". The drafters of the New York Convention, considering this system as too cumbersome, abolished it by providing the word "binding" instead of the word "final". Accordingly, no leave for enforcement in the country of origin is required under the New York Convention. This principle is almost unanimously affirmed by the courts.

The courts, however, differ with respect to the question whether the binding force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Indeed, a number of courts investigate the applicable law in order to find out whether the award has become binding under that law.

Other courts interpret the word "binding", without reference to an applicable law, as meaning that the award is no longer open to a genuine appeal on the merits to a second arbitral instance or to a court.

An argument in support of the autonomous interpretation is that if the applicable law provides that an award becomes binding only after a leave of enforcement is granted by the court, the "double-exequatur" is in fact re-introduced into the Convention, thus defeating the attempt of the drafters of the Convention to abolish this requirement. Further, the autonomous interpretation has the advantage that it dispenses with compliance with local requirements imposed on awards, such as deposit with a court or even a leave for enforcement from the court in the country of origin, which requirements are unnecessary and cumbersome for enforcement abroad.

A third interpretation, which may be combined with the second interpretation, is to rely on the agreement of the parties when an award becomes binding, which agreement is usually contained in the applicable Arbitration Rules.

¶ 515 – Merger of Award into Judgment

If, in the country of origin, a leave for enforcement is issued by the court on the award, the leave may constitute a court judgment in that country. Such judgment may have the effect of absorbing the award into the judgment in that

country. If in this case the enforcement is sought in another Contracting State, the question arises whether the award can be enforced as a foreign award under the Convention or as a foreign judgment on another basis.

Most courts hold that the merger of the award into the judgment in the country of origin does not have extra-territorial effect and that therefore the award remains a cause of action for enforcement in other countries on the basis of the Convention.

On the other hand, the judgment on the award in the country of origin may be separately enforceable as a foreign judgment in other countries

¶ 516 –Set Aside

Ground *e* further provides that enforcement of an award can be refused if the party against whom the award is invoked asserts and proves that the award has been set aside (annulled, vacated) by a court of the country in which, or under the law of which, the award was made ("the country of origin"). According to Art. VI of the Convention, a court may adjourn its decision on enforcement if the respondent has applied for a setting aside of the award in the country of origin (see ¶ 601).

The reference to "under the law of which" is a rather theoretical case (see ¶ 102 above). The expression "competent authority" is normally a court having competence to entertain an action for setting aside in the country of origin (see ¶ 104 above).

It rarely occurs that an action for setting aside the award in the country of origin is successful. In fact, out of the more than 1750 reported court decisions, in only a few cases a court in the country of origin had set aside an award which led to the refusal of enforcement under the Convention abroad.

As is reviewed in ¶ 104 above (including case law), whilst the setting aside of an award cannot be requested under the Convention, the Convention may have an influence on the action for setting aside the award in a number of respects. First, Art. V(1)(*e*) reflects the generally accepted rule that, unlike the enforcement of an arbitral award which can in principle be adjudicated anywhere, the setting aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country of origin and is to be adjudicated on the basis of the arbitration law of that country. Some courts regard Art. V(1)(*e*) in and of itself as being equivalent to a treaty provision concerning attribution of international jurisdiction. Second, a country may adopt all or most of the grounds for refusal of enforcement set forth in Art. V as grounds for setting aside arbitral awards made within its jurisdiction. This applies in particular to non-domestic awards (see ¶ 104).

If an arbitral award has been set aside by a court in a country in which, or under the law of which, the award was not made (the country of origin, also referred to as the court having primary jurisdiction), it does not constitute a ground for refusal of enforcement under Art. V(1)(e) of the Convention.

On the other hand, if an arbitral award has been set aside in the country of origin, it is questioned whether this should lead to a refusal of enforcement under the Convention. The French view is that a setting aside in the country of origin should be ignored altogether. The French courts arrive at this result by relying on their domestic law concerning the enforcement of foreign (international) awards in virtue of the more-favourable-right-provision of Art. VII(1) of the Convention (see ¶ 702). French domestic law on enforcement of foreign (international) awards does not include as ground for refusal of enforcement that the award has been set aside in another country. Another view is that enforcement of a Convention award should be refused on the basis of Art. V(1)(*e*) only if the setting aside in the country of origin occurred on grounds equivalent to the grounds for refusal of enforcement listed in grounds (*a*) - (*d*) of the Convention. This system prevails under Art. IX of the European Convention on International Commercial Arbitration of 1961. As far as the New York Convention is concerned, the legal basis for that concept is said to be the residual discretion to grant enforcement even though a ground for refusal has been established (see ¶ 500A above) and/or the more-favourable-right-provision of Art. VII(1) (see ¶ 702 below). This system was applied by the District Court for the District of Columbia in *Chromalloy* (US no. 230 reported in Volume XXII pp. 1001-1012). The Chromalloy case is probably overtaken by a number of other decisions by the US courts. Yet another view is that the judgment setting aside the award needs to be recognized as a foreign court judgment (on the basis of the rules for recognition and enforcement of foreign court judgments of the forum) as a condition precedent to the acceptance of the ground for refusal of enforcement that the award has been set aside by a court in the country of origin. The is the view of the Court of Appeal in Amsterdam **[check ref]**.

The question has also been raised whether estoppel or similar concepts can play a role with respect to Art. V(1)(*e*). This may occur in two situations. The first situation is where the respondent has not instituted setting aside proceedings in the country of origin. The second situation is where a party has instituted setting aside proceedings in the country of origin but has failed to raise a point in those proceedings which it raises in the enforcement country as a ground for refusal of enforcement under the Convention. It is questioned whether such a failure amounts to an estoppel or a want of bona fides such as to justify the court of enforcement in enforcing the award.

If no action for setting aside is available in the country of origin (for example, until recently in Belgium in cases where no Belgian entities were involved), this does probably not preclude enforcement under the Convention. On the other hand, if in such a case enforcement is to be refused abroad under the Convention, it may create problems.

The Convention is silent on the question what happens if enforcement has been granted under the Convention and subsequently the award is set aside in the country of origin. The German Arbitration Act of 1998 provides in Art. 1061(3): "If the award is set aside abroad after having been declared

enforceable, application for setting aside the declaration of enforceability may be made."

¶ 517 – Suspended

Ground *e* also provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been suspended by a court of the country in which, or under the law of which, the award was made. According to Art. VI of the Convention, a court may adjourn its decision on enforcement if the respondent has applied for a suspension of the award in the country of origin.

Although it is not entirely clear what the drafters of the Convention exactly meant by the suspension of an award, it refers presumably to a suspension of the enforceability or enforcement of the award by the court in the country of origin.

ARTICLE V(2) - PUBLIC POLICY AS GROUND FOR REFUSAL OF ENFORCEMENT *EX OFFICIO*

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Distinction between Domestic and International Public Policy (¶ 518)

The distinction between domestic and international public policy means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as falling under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purposes of domestic and international relations.

In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts. They apply it to both the question of arbitrability (ground *a* of Art. V(2)) and other cases of public policy (ground *b* of Art. V(2)). An example of the former is the decision of the US Supreme Court in the *Scherk v. Alberto-Culver Co.* case (US no. 4 reported in Volume I p. 203). In that case the Supreme Court held that, although disputes arising out of

securities transactions cannot be submitted to arbitration if the contract is domestic, disputes arising out of such transactions are arbitrable if the contract is international. on in the international context (US no. 59 reported in Volume XI pp. 555-566).

An example of an application of the distinction in other cases of public policy (ground *b* of Art. V(2)) is the award without reasons. In a number of countries it is mandatory that an award contain the reasons on which the arbitral decision is based. In contrast, in several Common Law countries it is customary not to give reasons for the award. By applying the distinction between domestic and international public policy, the courts of the countries under whose law the giving of reasons is mandatory enforce awards made in countries where such awards are valid.

The application of the distinction between domestic and international public policy in cases falling under the Convention also can be seen as a consequence of the general rule of interpretation to construe narrowly the grounds for refusal of enforcement in Art. V of the Convention.

Ground *A*: Arbitrability (¶ 519)

Art. V(2)(*a*) permits a court to refuse enforcement of an award on its own motion if the subject matter of the difference is not capable of settlement by arbitration under its law. The non-arbitrability of a subject matter reflects a special national interest in judicial, rather than arbitrable resolution of a dispute. This ground can be deemed superfluous as the question of the non-arbitrable subject matter is generally regarded as forming part of the general concept of public policy set forth in Art. V(2)(*b*).

Although the non-arbitrable subject matters differ from country to country, the question of a non-arbitrable subject matter is raised in a relatively small number of cases under the Convention. It has led to a refusal of enforcement in a few cases only.

Ground *B*: Public Policy

¶ 520 – Default of a Party

Due process, which pertains to public policy, implies as a fundamental principle, that the parties have an equal opportunity to be heard. This principle demands that each party must have been effectively offered such opportunity. But if, after having been duly notified, a party refuses to participate or remains inactive in the arbitration, it must be deemed to have deliberately forfeited the opportunity. Default in arbitration, after having been duly notified, has been invariably held not to bar enforcement of a Convention award. In other words,

the counterpart of due process is an active participation in the arbitration. See also Article V(1)(*b*), "Proper notice", ¶ 509 above.

¶ 521 – Lack of impartiality or independence of an arbitrator

The arbitrator's impartiality is also a fundamental requirement for every arbitration. This condition requires that the arbitrator have no personal interest in the case and is independent vis-à-vis the parties.

Whilst clearly confirming this principle in the cases decided under the Convention, the courts generally distinguish between the case where there are circumstances which might have created the lack of impartiality on the part of the arbitrator ("imputed bias" or "appearance of bias"), and the case where the arbitrator has effectively not acted in an impartial manner ("actual bias"). As a rule, it is in the latter case only where the courts are prepared to refuse enforcement of the award.

¶ 522 – Lack of Reasons in Award

As mentioned before, the arbitration laws of a number of countries prescribe mandatorily that the award must contain the reasons on which the arbitral decision is based. In these countries it is considered fundamental that the parties are informed how justice has been done in their case. In contrast, in several Common Law countries it is not mandatory to give reasons in the award. By applying the distinction between domestic and international public policy, the courts of the countries under the law of which the giving of reasons is mandatory, generally enforce awards without reasons made in countries where such awards are valid.

¶ 523 – Irregularities in the Arbitral Procedure

This heading concerns the question whether a fundamental rule of due process is violated in the arbitral procedure. An example is the case where the names of the arbitrators are not communicated to the parties. The conduct of the arbitral procedure also may violate due process, for example, if an important letter submitted by one party was not forwarded by the arbitrators to the other party.

¶ 524 – Other Cases

The foregoing nos. 1-4 concern specific cases decided by the courts in relation to the public policy provision of Art. V(2)(*b*). There are a number of other

diverse cases in which the question of public policy was raised (see Index of Cases).

ARTICLE VI - ADJOURNMENT OF DECISION ON ENFORCEMENT (¶ 601)

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

According to Art. VI, if the setting aside or suspension of the award is requested in the country in which, or under the law of which, the award was made, the court may adjourn, "if it considers it proper", the decision on the enforcement and may also, on the application of the petitioner, order the respondent to put up suitable security.

The words "may adjourn" and "if it considers it proper" indicate that the court has discretionary power to adjourn its decision on enforcement of the award and to order the respondent to provide security, pending the setting aside or suspension proceedings in the country of origin.

The courts have generally considered that the case for adjournment is stronger where the setting aside action is likely to succeed and where the period of time within which the decision on setting aside is to be expected is short, in which case the posting of security may then be less necessary.

Art. VI offers a balanced solution between the application for setting aside made for reasons of delay only (of which there are a substantial number of cases in practice) and the right of a bona fide party to contest the validity of the award in the country of origin.

It should be emphasized that Art. VI applies only if an application for setting aside or suspension of the award is made in the country of origin. If the award is effectively set aside or suspended in the country of origin, enforcement of the award can be refused on the basis of Art. V(1)(*e*).

See also ICC Guide referred to in ¶ 301 under (F) for the interpretation and application of Art. VI in the various Contracting States.

ARTICLE VII(1) – MORE-FAVOURABLE-RIGHT-PROVISION; COMPATIBILITY PROVISION

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and

enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Introduction

Paragraph 1 of Art. VII contains two provisions. The first provision is that the New York Convention does not affect the validity of other treaties in the field of arbitration. This provision may be called the *compatibility provision*. The second provision provides for the freedom of a party to base its request for enforcement of an arbitral award on the domestic law concerning enforcement of foreign arbitral awards or other treaties, instead of the New York Convention. This provision may be called the *more-favourable-right provision* (the "mfr-provision"). The compatibility and mfr-provision provisions are examined under the following headings:

¶ 701 - More-Favourable-Right-Provision in General
¶ 702 - Domestic Law on Enforcement of Foreign Awards
¶ 703 - Multilateral and Bilateral Treaties in General
¶ 703A - Multilateral Treaties
¶ 704 - European Convention of 1961
¶ 704A - Panama Convention of 1975
¶ 704B - Bilateral Treaties
¶ 704C - European Community.

Paragraph 2 of Art. VII contains an exception to the compatibility and mfr-provision of Art. VII(1) in that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the "Geneva Treaties") shall cease to have effect between the States that become Party to the New York Convention. As, with very few exceptions, all States which had adhered to the Geneva Treaties have by now become a Party to the New York Convention, Art. VII(2) has progressively lost relevance. The Geneva Treaties will be dealt with under ¶ 705.

The mfr-provision was copied from Art. 5 of the Geneva Convention of 1927 and adopted at the New York Conference in 1958 without any substantive discussion. The compatibility provision was added as from the inception of the New York Conference and was not subject to any substantive discussion either. In contrast, paragraph 2 concerning the Geneva Treaties was subject to considerable debate (see in particular UN DOC E/conf.26/SR.18 and 19).

As mentioned in ¶ 216A above, UNCITRAL made the recommendation in 2006 that "article VII, paragraph 1, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an

arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

¶ 701 – More-Favourable-Right Provision in General

Rationale. The rationale underlying the mfr-provision is that the New York Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon. In other words, if a party can seek enforcement on the basis of a domestic law concerning the enforcement of foreign awards or another treaty that is more favourable than the New York Convention, a party is allowed to do so.

Art. VII(1) goes to the heart of the meaning of the Convention. The Convention's purpose is to ensure the international efficacy of an arbitral award and to that end the Convention sets forth the minimum criteria under which a court in a Contracting State must enforce an award falling under it. Art. VII(1) signifies that the Convention does not contain a uniform regime for enforcement of foreign arbitral awards; a Contracting State is free to adopt a regime that is more favourable. The result may be less desirable in terms of harmonization of the legal regime governing international arbitration: depending on the law of the country where enforcement is sought, a foreign award that does not comply with the Convention can or cannot be enforced.

Furthermore, the wording of the mfr-provision in Art. VII(1) is not felicitous as the following matters may demonstrate.

Mutually exclusive basis. The legislative history of Art. 5 of the Geneva Convention of 1927 shows that it was the intent of the drafters that a party could not pick and choose between the Convention and another basis for enforcement of a foreign award (the "all-or-nothing proposition"). Under this interpretation, it is, for instance, not allowed to base the request for enforcement on the Convention, to the exception of the written form of the arbitration agreement as required by Art. II(2) which would be based on some domestic law. This is made clear for example in Arts. 1075 and 1076 of the Netherlands Arbitration Act 1986: the former concerns enforcement under a treaty (notably, the Convention), whilst the latter contains a regime for enforcement of foreign arbitral awards "if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought". It may be added that a few countries have a separate statutory regime for the enforcement of foreign arbitral awards. In a number of other countries such a regime is developed by case law.

"[T]he law". It is in the just mentioned sense that the reference to "the law" in Art. VII(1) is to be understood ("deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent *allowed by the law* or treaties of the country where such award is sought to be relied upon" - emphasis added). The expression "the law" refers to a statutory or case law regime for the enforcement of foreign arbitral awards outside a treaty. It also follows from the juxtaposition of "the law" with "the

treaties" which cannot have any other meaning than treaties concerning the recognition and enforcement of foreign arbitral awards (see below).

Some courts and commentators, however, interpret Art. VII(1) expansively in the sense that the right of a party to avail itself of an arbitral award in the manner and to the extent allowed by its law is extended to the right that a party may have in respect of a domestic award. The result is, for example, that the written form is no longer assessed under Art. II(2) of the Convention but rather the (arbitration) law of the forum. One can view this interpretation in two ways. First, it may mean that, whilst remaining applicable, the Convention itself allows to replace one or more of its provisions by more liberal provisions of domestic law that, for some reason, a court in a Contracting State deems applicable or appropriate. Second, it may mean that, in lieu of applying the Convention, a court in a Contracting State is fashioning by case law a regime of domestic law concerning the enforcement of foreign arbitral awards that incorporates certain features of the Convention. Either way may be looking at a glass that is half full or half empty. The difference between the two techniques, however, is that the former undermines the uniform interpretation and application of the Convention, whilst the latter technique seems in any case to be permitted by the Convention.

In any event, two treaties may be combined where the treaties so imply. This is true for the European Convention of 1961 which complements the New York Convention in certain cases (see ¶ 704 below).

"[T]he treaties". The reference to "the treaties" in the mfr-provision could be meaningful only if it was preceded by the compatibility provision in Art. VII(1). The expression "the treaties" in the mfr-provision therefore refers to multilateral and bilateral treaties concerning the recognition and enforcement of arbitral awards as the text of the compatibility provision makes clear ("multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards"). The relevant treaties are surveyed in ¶¶ 703A - 704B below.

If a treaty refers for the enforcement of an arbitral award to the New York Convention (as a number of them do), it does not mean that a party can no longer base its request for enforcement on domestic law on the enforcement of foreign arbitral.

"[A]ny interested party". According to the text of Art. VII(1), "any interested party" shall not be deprived of "any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon". It is generally accepted that this expression refers to the party seeking enforcement of the award.

Application by court on its own motion. Another question is whether a court may also on its own motion apply the mfr-provision of Art. VII(1). The French Supreme Court answered this question in the affirmative in *Norsolor v. Pabalk* (France no. 7 sub 9-20 reported in Volume XI pp. 484-491; see also France no. 25 sub 4 reported in Volume XXII pp. 682-690). The Swiss

Supreme Court answered it in the negative in *Tracomin v. Sudan Oil* (Switzerland no. 14 reported in Volume XII pp. 511-514).

Enforcement of arbitration agreement. The mfr-provision of Art. VII(1) does not mention the enforcement of an arbitration agreement, which possibility is provided for in Art. II(3) of the Convention. An analogous interpretation appears to be justified as is explained in ¶ 216A above (which includes UNCITRAL's Recommendation of 2006).

¶ 702 – Domestic Law on Enforcement of Foreign Awards

Introduction. A consequence of the mfr-provision of Art. VII(1) (see ¶ 701 above) is that a party is free to base its request for the enforcement of a foreign arbitral award on domestic law concerning enforcement of foreign arbitral awards. A review of the National Reports published in the *International Handbook on Commercial Arbitration* (Chapter VII of each National Report) and other sources shows a wide variety of approaches. A caveat must be made that in a number of countries the situation is unclear (e.g., Denmark, Egypt, Norway, Oman, Saudi Arabia, Turkey). To compound this complex subject matter, an approach is not always based on statutory provisions; a number of countries have also developed a regime for the enforcement of foreign awards by case law (either modelled after provisions relating to the enforcement of foreign judgments or as a stand alone approach). Most of these approaches are to the effect that they are less favourable than the New York Convention for the enforcement of foreign arbitral awards. This may provide a reason why reliance on domestic law for the enforcement of foreign arbitral awards in lieu of the Convention is reported in a few cases so far.

Specific exclusion of a non-treaty basis. The laws of a number of countries specifically exclude enforcement of a foreign arbitral award without a treaty. Examples are Austria, Bulgaria, Japan, and Poland. In these countries, therefore, the mfr-provision of Art. VII(1) is meaningless insofar as domestic law on the enforcement of foreign awards is concerned.

Specific reference to the New York Convention. The laws of a number of other countries explicitly provide that enforcement of a foreign award is to take place pursuant to the New York Convention. This is the case, for example, in Switzerland (Art. 194 of the Swiss Private International Law Act of 1987), and nowadays Germany (Art. 1061 of the Arbitration Act 1998, see below). Such a specific reference, however, does not clarify whether another basis for enforcement outside the Convention is available in the country concerned.

Foreign judgment. A number of laws provide explicitly or impliedly that a foreign award can be enforced if the court in the country of origin has entered a judgment on the award, declaring the award enforceable in that country. Examples are Colombia, Italy and Korea. This raises also the question of merger of the award into the judgment (see ¶ 515 above).

Specific provisions. Certain laws contain specific provisions for the enforcement of foreign awards outside a treaty. This occurs in two ways. One is that in the context of statutory provisions relating to the enforcement of foreign judgements, the law adds a provision to the effect that these provisions apply accordingly (or similarly) to the enforcement of foreign arbitral awards. Examples include Romania and Spain.

The other form consists of specific statutory provisions contained in the arbitration act relating to the enforcement of foreign arbitral awards. This is, for instance, the case in France (Arts. 1492-1507 of the New Code of Civil Procedure) and the Netherlands (Art. 1076 of the Code of Civil Procedure). Both are reviewed in more detail below.

Special action. Some countries allow enforcement of a foreign award in an action that is based on the original arbitration agreement or in which the arbitral award is considered a contract between the parties (*actio ex contractu*).Certain Common Law countries also have the action at Common Law (e.g., Bermuda, England and India). Again, another possibility is to bring a law suit in which the foreign award is submitted as evidence of a debt (e.g., Singapore). The special action is usually more cumbersome than the New York Convention and is a remedy of last resort.

UNCITRAL Model Law. Art. 35(1) of the Model Law on International Commercial Arbitration of 1985, as amended in 2006, provides that "An arbitral award, *irrespective of the country in which it was made*, shall be recognized as binding and, upon the application in writing to the competent court, shall be enforced subject to the provisions of this article and article 36". It therefore applies also to foreign awards that come within the scope of the New York Convention. However, Art. 35(2) contains provisions similar to those set forth in Art. IV of the Convention, whilst Art. 36 is almost identical to Arts. V and VI of the Convention. As a result, the Model Law does essentially not contain a regime for the enforcement of foreign arbitral awards that is more favourable than the Convention. A petitioner has little interest in basing its request for enforcement on Art. 35 and 36 of the Model Law in a country that has adopted it in lieu of the Convention itself (which a petitioner is permitted to do in virtue of the mfr-provision of Art. VII(1) of the Convention). This may be different if the petitioner prefers to rely for the form of the arbitration agreement on Art. 7 of the Model Law, referred to in Art. 36(1)(a)(i), rather than Art. II(2) of the Convention. That is likely the case if the State in question has used the second option for Art. 7 provided by the Model Law amendment of 2006 which dispenses with the written form altogether. It may further depend on the manner in which Art. II(2) is interpreted. (See ¶¶ 203-204 above).

¶ 703 – Multilateral and Bilateral Treaties in General

If an award falls under the definition of the field of application of both the New York Convention and a bilateral or multilateral treaty, the question of the

relationship between both instruments is to be determined by three sets of provisions: (1) the provisions of the New York Convention, (2) the rules of conflict of treaties, and (3) the provisions of the other treaty in question.

The New York Convention is quite tolerant concerning its relationship with other treaties. The compatibility provision of Art. VII(1) lays down as a central rule that the Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States. The mfr-provision adds to this that a party may base its request for enforcement of the award on the treaties in force in the country where the enforcement is sought.

As regards conflict of treaties, the two traditional main principles are *lex posterior derogat priori* and *lex specialis derogat generali*. More recently, doctrine and case law have developed a third principle: *la règle d'efficacité maximale*. This principle of maximum efficacy, replacing where appropriate the two traditional ones, stands for the proposition that the treaty will be applied which upholds validity in a given case.

It may be added that Art. 30 of the Vienna Convention on the Law of Treaties of 1969 appears not to offer decisive solutions for the relationship between the New York Convention and other treaties.

A survey of the relevant multilateral and bilateral treaties is given in ¶¶ 703a through 704b below.

¶ 703A – Multilateral Treaties

There are a fair number of multilateral treaties in the field of international arbitration. At present, a certain movement can be witnessed under which multilateral treaties are concluded on a regional scale. This movement seems to be inspired by political considerations rather than global legal unification and harmonization. The current state of adherence of most of the multilateral treaties can be ascertained at UNCITRAL's web site (www.uncitral.org).

Geneva Treaties of 1923 and 1927. See ¶ 705 below.

Cairo Convention of 1952. The Cairo Convention of 14 September 1952 on the enforcement of judgments among States of the Arab League is declared applicable to arbitral awards made in a State that is member of the League (Art. 3). It is similar to the Geneva Convention of 1927. There are no reported court decisions on the Cairo Convention involving its relationship with the New York Convention.

European Convention of 1961. See ¶ 704 below.

Washington Convention of 1965. An annually updated list of the Contracting States is reproduced in Part V-C of each *Yearbook*.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, concluded at Washington on 25 March 1965, provides for a self-sufficient system of truly international arbitration in the field of investment disputes. Arbitration under the Washington Convention is administered by the International Centre for Settlement of Investment

Disputes (ICSID) in Washington, solely on the basis of the provisions of the Convention and the Rules and Regulations issued thereunder. According to Art. 25(1), arbitration will be governed by the Convention if there is a legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State which the parties to the dispute have consented in writing to submit to ICSID. By virtue of Art. 53 the award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in the Convention. Art. 54(1) further provides that each Contracting State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

In view of these provisions it is evident that the scheme of the Washington Convention is entirely different from that of the New York Convention. The main difference is that under the Washington Convention the arbitration is solely governed by the Convention, to the exclusion of any national arbitration law, whereas under the New York Convention the arbitration is as a rule governed by a national arbitration law (see ¶ 109 above).

Although the New York Convention does not exclude from its field of application an arbitration agreement or award between a State and a foreign national relating to an investment dispute, it must be assumed that the Washington Convention applies once the parties have fulfilled its jurisdictional requirements, including the consent in writing to submit to ICSID (see also ¶ 105 above). Consequently, no conflict exists in practice between both Conventions. Even assuming that the New York Convention were concurrently applicable, it is unlikely that claimant would rely on the New York Convention, since an award rendered pursuant to the Washington Convention is enforceable within the Contracting States without the possibility of resisting enforcement by asserting any ground for refusal. From the technical-legal point of view, the Washington Convention can be considered as falling under both traditional principles of conflict of treaties, i.e., *lex specialis* and *lex posterior*. But if enforcement of an award would not be possible for one reason or the other under the Washington Convention, the New York Convention may still be applied by virtue of the principle of maximum efficacy.

At present, ICSID arbitration is most frequently used in the context of Bilateral Investment Treaties (BITs).

Moscow Convention of 1972. The status of the Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Cooperation, signed at Moscow, 26 May 1972, is uncertain after the political and constitutional changes of the early nineties in the Central European countries. The relationship with other bilateral and multilateral treaties is dealt with in Art. VI of the Moscow Convention. The relevant provision for the relationship with the New York Convention is the first paragraph of this Article, reading: "The provisions of previously concluded bilateral and multilateral agreements of countries Parties to the Convention shall not be applied to the cases treated by this Convention…"**]**

Panama Convention of 1975. See ¶ 704A below (including related treaties).

¶ 704 – European Convention of 1961

General. An annually updated list of the Contracting States is reproduced in Part V-B of each *Yearbook*.

The object of the European Convention, done at Geneva on 21 April 1961 under the auspices of the United Nations Economic Commission for Europe (ECE), is, according to its Preamble, to promote "the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries".

Although the text of the Convention avoids using the term Eastern and Western European countries, its main purpose was arbitration in the East-West trade. However, the Convention has rarely been applied in East-West relations, a failure which is not strange in the light of the complexity of the Convention's provisions, especially those concerning the constitution and functioning of the arbitral tribunal (Art. IV). Art. IV(2)-(7), however, is not applicable among Western European countries which also adhered to the Agreement Relating to the Application of the European Convention on International Commercial Arbitration, done at Paris, 17 December 1962.

The Convention being a typical product of the former East-West division, the ECE Working Party on International Contract Practices in Industry (WP.5) is currently studying whether the Convention should be revised.

The European Convention does not exclude its application to arbitration between parties of different Contracting States belonging to the same (former) block. As far as arbitration in inter-Eastern European relations is concerned, however, the application of the European Convention was excluded because of Art. VI(1) of the Moscow Convention of 1972 (see ¶ 703a above). As mentioned above under ¶ 703a, the status of the latter Convention is at present uncertain, and so is the possible role of the European Convention in filling any gaps. What remains is arbitration in inter-Western European relations, and it is indeed in this category where the European Convention has been applied, be it infrequently (see cases reported in Part V-B of the *Yearbook*, totalling to date some 15 **[check]** decisions compared to over 1,750 decisions reported under the New York Convention.

Field of application. According to its Art. I(1), the European Convention applies: "(a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual residence or their seat in different Contracting States; (b) to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above".

Compared with the definition of the field of application as given in Art. I of the New York Convention, which applies to the enforcement of arbitral awards made in another (Contracting) State, two differences may be mentioned.

The first difference is that the European Convention applies to arbitration in international trade. Although the limitation to international cases cannot be found in the New York Convention, in practice it does not make so much difference as virtually none of the cases reported under the New York Convention concerned domestic arbitration (see ¶ 101 above).

The second difference is that the European Convention requires that the parties to the arbitration agreement come from different Contracting States. The reason behind this requirement is the unstated original object of the European Convention, i.e., arbitration in East-West trade. This nationality requirement, which is also to be found in the Geneva Treaties of 1923 and 1927, is not contained in the New York Convention (see ¶ 103 above).

These two differences show that, as far as the arbitration agreement and the arbitral award are concerned, the field of application of the New York Convention is broader than that of the European Convention.

A complicating factor is that, whilst the European Convention requires that the parties come from (different) States that are Party to the Convention, it does not require that the arbitration take place or the award be rendered in a Contracting State (although, arguably, this requirement can be inferred from Art. IX, see limitation on setting aside below). This is an explicit requirement under the New York Convention if a State has used the first (reciprocity) reservation of Art. I(3) (see ¶ 101 above). To compound this complication, it appears that the European Convention's limitation on the grounds for setting aside (see below) applies only to a setting aside in a State Party to the European Convention.

Other provisions. The European Convention contains extensive provisions for stages of the arbitration to which the New York Convention does not apply, such as the constitution of the arbitral tribunal, pleas as to the arbitral jurisdiction, the jurisdiction of the courts in relation to arbitration, the law applicable to the substance of the dispute, reasons for the award, and the setting aside of the award. In this respect the coverage of the European Convention is broader than the New York Convention.

Complementary nature. Like the New York Convention, the European Convention contains a compatibility provision: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States" (Art. X(7)). This includes, in particular, the New York Convention. However, the European Convention goes further than a mere compatibility: it actually complements the New York Convention in those cases where the arbitration agreement or award falls under the definition of the field of application of both Conventions.

A precursor of the complementary nature of the European Convention can be found already in its Preamble which refers, in so many words, to the New York Convention.

A complementary provision can also be found in Art. I(2)(a), which contains a definition of the arbitration agreement in writing which is similar to Art. II(2) of the New York Convention. Art. I(2)(a) merely adds that the written form is also met if, in relations between States whose laws do not require that an arbitration agreement be made in writing, the agreement is concluded in the form authorized by these laws.

Also, Art. VI of the European Convention can be considered as an elaboration of Art. II(3) of the New York Convention concerning the action for the enforcement of the arbitration agreement by a court. It contains provisions concerning the estoppel for raising the defence of the existence of an arbitration agreement, the conflict rules for determining the validity of the arbitration agreement, the stay of the court's ruling on the arbitrator's jurisdiction until the award is made, and the compatibility of interim measures with arbitration. The action for enforcement of the arbitration agreement itself (i.e., referral to arbitration) is not provided for in the European Convention; this matter was not included precisely because it was already regulated by Art. II(3) of the New York Convention.

The complementary nature of the European Convention also becomes apparent from the absence of provisions governing the enforcement of the award. For this matter one has to refer back to the New York Convention (Arts. III-VI). Consequently, a party seeking enforcement of an award falling under both the New York and European Convention, has to submit the documents required by Art. IV of the New York Convention. The party against whom the enforcement is sought may invoke the grounds for refusal of enforcement listed in Art. V of the New York Convention.

As far as the enforcement of the agreement and award is concerned, the European Convention cannot function without the New York Convention as the former is built upon the latter in these cases. If in the case of enforcement of an agreement or award under the New York Convention the agreement or award also falls under the European Convention, the question is whether, in addition, the European Convention must be applied. It is submitted that this is indeed so, as the European Convention does not contain any indication that it should not be applied in this case. The question is, however, rather theoretical as a party seeking enforcement will as a rule benefit from the complementary provisions of the European Convention.

The limitation imposed by Art. IX(2) of the European Convention regarding the grounds for refusal of enforcement listed in the New York Convention (see below), again, shows that the European Convention is conceived to apply in addition to the New York Convention.

The complementary nature of the European Convention in regard to the New York Convention implies also that what was observed in ¶ 701 above, that the New York Convention cannot be combined with other possible bases, does not apply to the relationship between the New York and European Convention. Both Conventions are simultaneously applicable when the requirements of the field of application of both are met.

Limitation on setting aside. The European Convention contains a limitation on the right to invoke the grounds for refusal of enforcement listed in Art. V of the New York Convention. The limitation concerns the ground for refusal that the award has been set aside in the country where it was made, as provided in Art. V(1)(*e*) of the New York Convention. Under the New York Convention, the grounds on which the award has been set aside in the country of origin can be any ground set out in the arbitration law of that country. The European Convention has limited these grounds. According to its Art. IX(2), "in relations between Contracting States that are also Parties to the New York Convention", the enforcement may be refused in case the award has been set aside in the country where the award was made only if the award has been set aside on one of the grounds listed in Art. IX(1) under (a)-(d). These grounds are substantially similar to the grounds for refusal of enforcement mentioned in Art. V(1) under (*a*)-(*d*) of the New York Convention. One of the reasons for this limitation was to exclude the setting aside in the country of origin for reasons of public policy of that country. It should be emphasized that this is only a limitation of the second part of ground (*e*) of Art. V(1) of the New York Convention; the other grounds for refusal may still be invoked by the party against whom the enforcement is sought.

There are very few cases in which Art. IX of the European Convention has been applied to an award annulled in the country of origin.

It should be noted that Art. IX(1) mentions "the setting aside in a Contracting State". The limitation of Art. IX seems therefore not to be applicable if the award has been set aside in a State which is not Party to the European Convention. This makes the scheme rather complex since, as mentioned above, whilst the European Convention requires that the parties come from (different) States that are Party to the Convention, it does not require that the arbitration take place or the award be rendered in a Contracting State.

Another remarkable aspect of Art. IX is that it applies in States Party to the European Convention only. Accordingly, if an award has been set aside in a State Party to the European Convention, its enforcement cannot be refused under the New York Convention in other States Party to the European Convention. However, if enforcement of the same annulled award is sought in a New York Convention country that is not a Party to the European Convention (and there are many of them), enforcement is to be refused under Art. V(1)(*e*) of the New York Convention (see ¶ 516 above). It is submitted that this inconsistency is a typical result of a regional approach to international conventions and would not have arisen under a global approach as currently advocated by UNCITRAL.

¶ 704A – Panama Convention f 1975

An annually updated list of the Contracting States to the Inter-American Convention on International Commercial Arbitration, concluded in Panama,

30 January 1975, is reproduced in Part V-D of each *Yearbook*. All States that are Party to the Panama Convention are also Party to the New York Convention, with the exception of Canada, Dominican Republic, Netherlands Antilles, and Trinidad and Tobago which have adhered to the New York Convention only.

The Panama Convention is modelled after the New York Convention, although not entirely. Since the drafting of the Panama Convention, however, an increasing number of Latin American countries has also adhered to the New York Convention.

The Panama Convention does not give a definition of its field of application. As regards the enforcement of arbitral awards, it may be inferred from Art. 5, which is almost identical to Art. V of the New York Convention, that the Convention applies to awards made in another State. The word "Inter-American" in the title suggests that the foreign State where the award is made must be a Contracting State. Taking again into account the title of the Convention, the award must presumably also relate to an international transaction. Whether it is a condition for the field of application that the parties be subject to the jurisdiction of (different ?) Contracting States is unclear.

The Panama Convention shows further lacunae in comparison with the New York Convention. Besides the definition of its field of application, it fails to provide, inter alia, for the action for the enforcement of the arbitration agreement (cf., Art. II(3) of the New York Convention), the procedure for enforcement (cf., Art. III of the New York Convention), and the conditions to be fulfilled by the party seeking enforcement (cf., Art. IV of the New York Convention: see, however, the Montevideo Convention of 1979). Moreover, it is unclear whether in the case of an arbitral clause referring future disputes to arbitration the parties are still obliged to conclude a submission agreement once the dispute has arisen, which requirement is imposed by some Latin American arbitration laws.

A rather unusual treaty provision, which has no counterpart in the New York Convention, is to be found in Art. 3: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission". The IACAC Arbitration Rules, as amended in 1978, are virtually identical to the UNCITRAL Arbitration Rules of 1976. The legislation implementing the Panama Convention in the United States has frozen the applicable version of the IACAC Rules to the one of 1978, unless the Secretary of State prescribes otherwise (9 U.S.C. Sect. 306). The US Department of State has determined that the IACAC Rules as amended in 2002 should become effective in the United States. Doubt remains, however, whether the IACAC Rules prevail over local arbitration law in view of the provisions of Art. 5(1)(d) of the Panama Convention (which is literally the same as Art. V(1)(*d*) of the New York Convention). Furthermore, the purported supremacy of the IACAC Rules may be jeopardised by a provision in the Rules themselves. Art. 1(2) provides: "These Rules shall govern the arbitration, except that where any such rule is in conflict with any provision of

the law applicable to the arbitration from which the parties cannot derogate, that provision shall apply".

When enforcement of an award made in another State is sought, the award may fall under both the New York and Panama Conventions. Such situation may, for instance, arise if the award is made in a State which is Party to both Conventions (see above). Similarly, if an arbitration agreement is invoked in court proceedings brought in violation of that agreement, both Conventions may be applicable. In these situations, the question may arise which Convention is to be applied. The relevance of this question is twofold. First, the New York Convention provides a clearer regulation for the enforcement of foreign arbitral awards and referral to arbitration than the Panama Convention which, as mentioned above, contains a number of lacunae. Second, if the Panama Convention applies, the IACAC Rules are to be followed unless the parties have agreed on the appointment of the arbitrators and the arbitral procedure.

As explained in ¶ 703A above, the New York Convention is quite liberal in its relationship with other treaties considering that Art. VII(1) contains a compatibility and mfr-provision. On the other hand, both provisions are lacking in the Panama Convention, except that it refers to execution in accordance with "provisions of international treaties" in Art. 4. Leaving that unclear reference aside, it seems realistic to assume that the traditional principle of conflict of treaties of *lex posterior* will be applied in practice. It is in accord with the Latin American tradition. It is also provided in the implementing legislation in the United States (9 U.S.C. Sect. 305, which, however, provides for the possibility for the parties to agree on the applicability of the New York Convention rather than the Panama Convention).

As a result, if for example in a contract between a Mexican and a US party arbitration is agreed to, but no agreement is made on the appointment of the arbitrators or the arbitral procedure, the arbitration must be conducted in accordance with the IACAC Rules. If this rule is ignored, enforcement of the ensuing award may be refused under the Panama Convention. The New York Convention might have yielded a more positive result. That result could be achieved by applying the more modern rule of conflict of treaties of maximum efficacy.

The Panama Convention has been applied in some cases in connection with the New York Convention (for court decisions under the Panama Convention in general, see Part V-D of the Yearbook).

¶ 704B – Bilateral Treaties

Most of the bilateral treaties containing provisions on the recognition and enforcement of arbitral awards date from before the entry into force of the New York Convention in the respective countries. See for a list of bilateral treaties entered into by the European countries until 1957, the United Nations

publication, *Table of Bilateral Conventions Relating to the Enforcement of Arbitral Awards and the Organization of Commercial Arbitration Procedure* (Geneva, August 1957) designated only by sales number 1957.II.E/Mim. 18.

Bilateral treaties may be more favourable than the New York Convention **as** far as the formal validity of the arbitration agreement is concerned. This matter has to be judged under the applicable law in the case of bilateral treaties, whereas in the case of the New York Convention it has to be determined under the requirements of Art. II(2). Thus, a bilateral treaty will be more favourable if an arbitration agreement does not meet the written form as required by Art. II(2) of the Convention, but complies with requirements of the law applicable under the bilateral treaty.

On the other hand, the New York Convention may be regarded as more favourable than many of the bilateral treaties as they frequently require that the award be "enforceable" in the country where it has been made. This usually implies that a leave for enforcement (exequatur or the like) has to be obtained in the country where the award has been rendered, and amounts to the system of so-called "double-exequatur", since a leave for enforcement has also to be obtained in the country where the enforcement is sought. This system of "double-exequatur" has been abrogated under the New York Convention, which requires by Art. V(1)(e) that the award only be "binding" on the parties (see on "binding", ¶ 514 above).

It should be noted, however, that some bilateral treaties provide that once the leave for enforcement has been obtained in the country of origin, the enforcement can be refused in the other Contracting State only on the ground that the award violates the public policy of that country. If the party seeking enforcement has obtained the leave for enforcement in the country of origin, such a bilateral treaty is more favourable than the New York Convention as the latter Convention allows the party against whom the enforcement is sought to assert the grounds for refusal listed in Art. V.

The bilateral treaties are divided on the question whether the party seeking enforcement must prove the conditions for enforcement. A limited number of treaties provide that the court before which the enforcement is sought must verify on its own initiative whether the award fulfils the conditions for enforcement. The majority is silent on this question. In the absence of provisions on this point, it is likely that the party seeking enforcement must supply proof of the fulfilment of the conditions. If this is the case, these treaties are less favourable than the New York Convention. Pursuant to Art. IV of the Convention, the party seeking enforcement has only to submit the original of the arbitration agreement and the arbitral award or certified or authenticated copies thereof; the party against whom the enforcement is sought has to prove the grounds for refusal listed in Art. V(1), whereas the court may refuse on its own initiative enforcement for reasons of public policy pursuant to Art. V(2).

The foregoing observations demonstrate that the bilateral treaties are sometimes less and sometimes more favourable than the New York Convention for the enforcement of the arbitral award. This depends on the bilateral treaty

in question and the circumstances surrounding the award. It is therefore important to determine whether the Convention or a bilateral treaty is to be applied in those cases where the award comes within the scope of both.

As regards the concurrent applicability of the Convention and a bilateral treaty, a distinction may be made between bilateral treaties concluded prior to the Convention and subsequent thereto. As most of the bilateral treaties containing provisions on the recognition and enforcement of arbitral awards date from before the entry into force of the New York Convention in the respective countries, the question of the relationship between the New York Convention and the bilateral treaties is mainly confined to this category of bilateral treaties (earlier bilateral treaties). The use of the traditional principle of conflict of treaties of *lex posterior* for determining the relationship between the earlier treaties and the New York Convention would lead to the applicability of the Convention. This would, however, not preclude the application of the earlier bilateral treaty since the mfr-provision of Art. VII(1) allows a party to base its request for enforcement on another treaty. Moreover, the compatibility provision contained in the same Art. VII(1) leaves earlier treaties untouched and could even lead to a prevalence of the earlier treaty over the Convention. Where the earlier bilateral treaty contains a compatibility provision, as some do, the compatibility provision in the earlier bilateral treaty and the New York Convention would neutralize each other, which would again lead, according to the principle of *lex posterior*, to the applicability of the New York Convention (e.g., bilateral treaty between Italy and the Netherlands of 1959, Art. 12). Here again, however, the application of the earlier treaty is not precluded by virtue of the mfr-provision of Art. VII(1) of the New York Convention. It is submitted that this going back and forward between the Convention and the treaty can be avoided if the principle of maximum efficacy is resorted to. This principle could also override the use of the other traditional conflict of treaties principle of *lex specialis*.

A number of bilateral treaties between Member States of the European Community are superseded by Council Regulation 44/2001 insofar as they concern matters to which the Regulation applies (Arts. 69-70, see ¶ 704C below).

No court has dealt with later bilateral treaties, which is not surprising since, as noted before, they are very rare. For the exceptional case that the relationship between the New York Convention and a later bilateral treaty need to be determined, the principle of *lex posterior* would foreclose the application of the New York Convention unless the bilateral treaty contains a compatibility provision. In the case where the later bilateral treaty is less favourable than the New York Convention, this would be detrimental to the party seeking enforcement. The solution may be in this case also to resort to the principle of maximum efficacy.

Bilateral Investment Treaties ("BIT") may also be mentioned under this heading in relation to arbitral awards rendered under them. The courts apply the New York Convention to awards rendered under BITs.

¶ 704C – European Community

General. The European Community was created by the Treaty Establishing the European Community, Rome, 1957 (as revised per 1999), hereafter the "Treaty of Rome". The Treaty of Rome contains various compatibility provisions (see, in particular, Art. 307 – ex Art. 234 – the first paragraph of which provides: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty".). These compatibility provisions have not affected the New York Convention in practice. However, the Treaty of Rome has given rise to various questions with respect to arbitration.

Preliminary ruling. The question is whether an arbitral tribunal is allowed to submit to the European Court of Justice in Luxembourg an application for a preliminary ruling concerning community law as contemplated for "any court or tribunal" by Art. 234 (ex Art. 177) of the Treaty of Rome. The Court of Justice has answered this question in the negative (*Nordsee*, 1982 reported in Volume VIII pp. 183-191).

Competition law. Another question is whether national public policy in annulment (setting aside) proceedings encompasses European competition law. The European Court of Justice answered that question in the affirmative in *Eco Swiss China Time Ltd. v. Benetton International N.V.*

Council Regulation (EC) 44/2001. Art. 293 (ex Art. 220) of the Rome Treaty calls for the Member States to enter into negotiations with each other for the "simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitral awards". In pursuance of this article, the European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters was adopted in Brussels, 27 September 1968, amended by the Accession Conventions of 1978, 1982 and 1989 (the "Brussels Convention"). An almost identical treaty was concluded between Member States of the European Community and Member States of the European Free Trade Association (EFTA, including Iceland, Norway and Switzerland) in Lugano on 16 September 1988. Within the European Community, the Brussels Convention is now replaced by Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters (entry into force in March 2002).

Regulation 44/2001 contains a compatibility provision (Art. 71: "This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements".)

Art. I(2) of the Regulation provides: "The Regulation shall not apply to: … (d) arbitration" (previously, Art. 1(4) of the Brussels Convention). The exclusion was at the time explained by reference to the existence of international conventions on arbitration.

In the case of *West Tankers* (10 February 2009, reported in Volume XXXIV pp. 485-493) the ECJ set forth the following test regarding the scope of the The Regulation:

> "[I]n order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (*Rich*, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (*Van Uden*, paragraph 33)."

The ECJ also held:

> "It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

The ECJ observed that its finding is supported by Art. II(3) of the New York Convention.

Article VII(2) – Geneva Treaties

¶ 705 - Relationship with Geneva Treaties of 1923 and 1927

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

The New York Convention provides expressly in the second paragraph of Art. VII that its predecessors, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, shall cease to have effect between the States which have become Party to the New York Convention. Several courts have affirmed this rule. The last part of the provision reading "to the extent that they became bound" was added by the Convention's drafters in view of the territorial applicability of the New York Convention in the sense that some Contracting States might not become bound by the Convention in respect of all their territories (see Art. X of the Convention).

Article XIV – General Reciprocity Clause (¶ 914) [4]

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

The drafters of the Convention originally inserted this provision as part of the federal-state-clause contained in Art. XI of the Convention. The intention was to provide that if a constituent State or province of a Contracting State was not bound to apply the Convention, other Contracting States were not bound to apply the Convention to awards made in such constituent State or province. It was then decided to upgrade this provision to a general reciprocity clause because some conference delegates observed that no corresponding provisions were found in the second reservation of Art. I(3) ("commercial reservation") and in Art. X, and that a general provision could remedy these defects.

The general reciprocity clause is not a reciprocity clause as commonly used in international law meaning that in relations between two States each State gives the subjects of the other State certain privileges on the condition that its own subjects shall enjoy similar privileges in the other State, because the party's nationality is excluded as a condition for the Convention's applicability (see Art. I sub "Nationality of the Parties No Criterion", ¶ 103 above).

Art. XIV is referred to in a few court decisions only and has not precluded enforcement of an award so far.

4. The other Articles of the Convention are typical treaty provisions of a technical nature. They are not reproduced as they have not been subject to judicial interpretation in the court decisions reported to date.