

C. Report of the Secretary-General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (A/CN.9/168)*

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* 20 April 1979.

INTRODUCTION

1. At its tenth session, the United Nations Commission on International Trade Law considered certain recommendations of the Asian-African Legal Consultative Committee (AALCC) relating to international commercial arbitration and requested the Secretary-General to prepare studies on these matters, in consultation with the AALCC and other interested organizations.¹ Pursuant to that request, the Secretariat had consultations with representatives of AALCC, the International Council for Commercial Arbitration and the International Chamber of Commerce. One of the proposals generated during the above discussions and consultations was to examine the application and interpretation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 Convention).

2. Such a study, it was thought, could be useful in assisting the Commission in its considerations on further work in respect of international commercial arbitration as set out in a note by the Secretariat (A/CN.9/169).^{*} It could help to clarify the practical application of the 1958 Convention and its relevance to the proposals of AALCC and, as these proposals were not meant to be exclusive, to other issues in need of clarification. It could also facilitate the decision on the suggestion of AALCC to implement its proposals by way of a protocol to the 1958 Convention, the desirability and feasibility of which would, to a considerable degree, depend on the results of the survey on the practical experience with that Convention.

3. The survey examines judgements of many national courts concerning the application and interpretation of the 1958 Convention. It analyses these decisions, the extracts of which have been published in the *Yearbook Commercial Arbitration*,² in order to identify any divergencies, ambiguities, lacunae or similar problems and to assess the value of the 1958 Convention in its practical application. The study also relies on pertinent commentaries by Prof. Pieter Sanders (Netherlands), the general editor of the *Yearbook Commercial Arbitration*.³

I. SCOPE OF APPLICATION OF 1958 CONVENTION (ART. I)

A. Recognition and enforcement of arbitral awards made in the territory of another State

4. According to article I, paragraph 1, the 1958 Convention applies "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". The two requirements, i.e. that there be an arbitral award and that such award be of foreign origin, have apparently not caused any considerable difficulties or problems. This is also true with regard to the two exceptions to the second requirement provided for in the Convention, i.e. the extension to arbitral awards made in the country of enforcement but not considered as domestic under its law (art. I, para. 1, second sentence) and the possible restriction to awards made in another Contracting State (by virtue of a reciprocity reservation under para. 3).

5. On occasion, however, the first requirement has been interpreted in divergent and sometimes doubtful ways. For example, the Court of Appeal at The Hague, Netherlands, held that the Convention did not apply to a certain decision by two arbitrators because it was not an arbitral award under the law of the State where it was made.⁴ Yet, the Dutch Supreme Court expressed the opposite view that the question of what constitutes an arbitral award under article I is not to be answered on the basis of a particular national law because the 1958 Convention refers to such law only in connexion with the grounds for refusal (art. V).⁵

6. Another example is the recent decision of the Italian Supreme Court according to which the 1958 Convention also applies to awards made in a so-called "*arbitrato irrituale*" (free, informal arbitration).⁶ It has been questioned whether this interpretation corresponds with the view of those who drafted the Convention.⁷ Yet, the result in the particular case might have been the same, due to another doubtful point of reasoning. The Supreme Court qualified the arbitration procedure under the rules of the London Corn Trade Association as "*arbitrato irrituale*" although there would be good reasons to regard it as "*arbitraro rituale*" (as was done by the lower court, the Court of Appeal of Venice).⁸ It may be concluded that such uncertainties could hardly be avoided by any uniform rule due to the great variety of arbitration procedures and rules.

B. Awards arising out of differences between persons, whether physical or legal

7. As the applicability of the 1959 Convention depends on the requirements stated above, the nationality of the parties (unlike under the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards) is irrelevant even where a national law prohibits its nationals to exclude the jurisdiction of its courts by agreeing on foreign arbitration. This has been recognized, in

^{*} Reproduced in this volume, part two, III, D, below.

¹ UNCITRAL, report on the tenth session (A/32/17), para. 39, and annex II, paras. 27-37 (Yearbook . . . 1977, part one, II, A). The recommendations of AALCC are reproduced in A/CN.9/127 (*ibid.*, part two, III).

² See "Court decisions on the New York Convention 1958", *Yearbook Commercial Arbitration* (Deventer, Kluwer), vol. I-1976, pp. 182-206; vol. II-1977, pp. 232-253; vol. III-1978, pp. 274-295; vol. IV-1979 (to be published in May 1979), pp. 254-338.

³ *Yearbook Commercial Arbitration*, vol. I-1976, pp. 207-218; vol. II-1977, pp. 254-264; vol. IV-1979, pp. 231-253 (consolidated commentary for vols. III and IV by Prof. Pieter Sanders with the assistance of Dr. Albert Jan van den Berg). In the

following foot-notes the volumes of the *Yearbook Commercial Arbitration* will be referred to in the abbreviated term: "YCA I (1976)", "YCA II (1977)", "YCA III (1978)", and "YCA IV (1979)".

⁴ Hague Court of Appeal, decision of 8 September 1972, YCA I (1976), pp. 196, 197 (A).

⁵ Supreme Court (Hoge Raad), decision of 26 October 1973, YCA I (1976), pp. 196, 197 (B).

⁶ Corte di Cassazione (Sez. Un.), decision of 18 September 1978, No. 4167, YCA IV (1979), p. 296.

⁷ Sanders, "Consolidated Commentary", YCA IV (1979), pp. 232-233.

⁸ Cf. Sanders, *ibid.*, p. 233; also Corte di Appello di Firenze, decision of 22 October 1976, YCA III (1978), p. 279.

contrast to decisions of lower courts,⁹ by the Italian Supreme Court in holding that the 1958 Convention supersedes the respective provision of national law (art. 2, Code of Civil Procedure).¹⁰

8. In other contexts, however, the nationality of the parties and the international character of their transaction may become relevant. It may, for instance, be used as a criterion for the applicability of article II specifying the arbitration agreement (see below, para. 18). It may also lead to non-application of national law in the context of arbitrability and public policy under article V, paragraph 2 (see below, paras. 45-47). Another example is provided by the decision of a Tunisian court which held that a public enterprise, irrespective of whether under domestic law it can agree to arbitration, has the capacity to do so where it is a party to an international transaction with a foreign enterprise.¹¹

9. As indicated by this decision, public enterprises are included under the term "differences between persons, whether physical or legal". The same can be said about a State proper and its agencies although it has been doubted whether that would be true in the case where a State acts "*iure imperii*", i.e. in the exercise of its sovereign authority.¹² It may be submitted that the issue of State immunity, to which the distinction between "*acta iure imperii*" and "*acta iure gestionis*" relates, is not a problem of the scope of application of the 1958 Convention and that the Convention, while generally applicable, does not itself answer the question whether a State can successfully invoke the plea of State immunity. The defence of State immunity may rather become relevant in the context of other issues, for example, the validity of the arbitration agreement (art. II, para. 3; art. V, para. 1 (a)) or the public policy of the country where recognition and enforcement are sought (art. V, para. 2 (b)).

10. This interpretation seems to be supported by most of the court decision in point, although it is not always clear under which provision or criterion the issue of State immunity is dealt with. For example, a United States District Court held that the arbitration clause in a salvage contract which had been signed by the captain of a navy vessel was null and void for reasons of sovereign immunity which only Congress could have waived.¹³

⁹ Tribunale di Milano, decision of 11 December 1972, YCA I (1976), p. 191; Tribunale di Ravenna, decision of 15 April 1970, YCA I (1976), p. 190.

¹⁰ Corte di Cassazione (Sez. Un.) decision of 13 December 1971, No. 3620, YCA I (1976), p. 190; also decision of 25 January 1977, No. 361, YCA IV (1979), p. 284.

¹¹ Court of First Instance of Tunis, decision of 22 March 1976, YCA III (1978), p. 283.

¹² Hague Court of Appeal, decision of 8 September 1972, YCA I (1976), p. 197 (sub. A). Also the Dutch Supreme Court (Hoge Raad), in its decision of 26 October 1973 (YCA I (1976), p. 197 (B)), apparently regarded sovereign immunity as an issue of the applicability of the 1958 Convention, without denying the applicability because of the nature of the transaction ("on equal footing") and in view of "an international tendency to restrict the cases in which a State can invoke in a foreign court its immunity".

¹³ United States District Court for the Southern District of New York, decision of 21 December 1976, YCA III (1978), p. 290. The Court ruled that the Public Vessels Act, 46 USC sect. 781, which permits suits against the United States in its District

Another United States District Court rejected the defence of sovereign immunity, invoked by a foreign State in a dispute arising out of a contract for the delivery of cement, on the grounds that a consent to arbitrate constituted a waiver of State immunity under the United States Foreign Sovereign Immunities Act of 1976.¹⁴

11. "Differences between persons" contemplated in article I, paragraph 1, are not limited to commercial transactions. While this was certainly the type of transaction envisaged, the Convention permits such restriction merely by way of a reservation under article I, paragraph 3. The restriction to "differences arising out of legal relationships which are considered as commercial under the national law of the State making such declaration" has been rather narrowly interpreted by an Indian court. The Bombay High Court, while acknowledging the commercial nature of plant construction contract, held nevertheless that this transaction was not covered by the reservation as embodied in section 3 of the Foreign Awards (Recognition and Enforcement) Act of 1961 because there was no statutory provision or operative legal principle in Indian Law which conferred the commercial character upon the transaction at hand.¹⁵

C. Retroactivity of 1958 Convention and of implementing legislation

12. Unlike the Geneva Convention of 1927, the 1958 Convention contains no provision on whether it is to be applied retroactively, i.e. to arbitral awards made, or arbitration agreements concluded, before its entry into force. This has led to a number of divergent court decisions. For example, some courts have held that the Convention could not be applied to arbitral awards made before its ratification or entry into force,¹⁶ while others have applied it retroactively, often based on the view that the 1958 Convention is essentially of a procedural nature.¹⁷

13. The argument of the procedural character of the Convention was also used in favour of retroactivity in cases where the contract containing the arbitral clause had been concluded before the entry into force of the Convention and even where the arbitration proceedings had been started before that point of time,¹⁸ yet, other

Courts, cannot be viewed as a waiver of sovereign immunity by Congress in relation to arbitration agreements.

¹⁴ United States District Court for the District of Columbia, decision of 25 September 1978, YCA IV (1979), pp. 337, 338.

¹⁵ Bombay High Court, decision of 4 April 1977, YCA IV (1979), p. 271.

¹⁶ E.g. Cour de Justice civile de Genève, decision of 12 May 1967, YCA I (1976), p. 199; Obergericht of Basel, decision of 3 June 1971, YCA IV (1979), 309; High Court of Ghana, decision of 29 September 1965, YCA III (1978), p. 276 (based on an express provision against retroactivity of the Arbitration Act of 1961).

¹⁷ Hanseatisches Oberlandesgericht Hamburg, decision of 27 July 1978, YCA IV (1979), pp. 266, 267 (with regard to award made before entry into force of Convention in other Contracting State); United States District Court, Eastern District, New York, decision of 4 June 1974, YCA I (1976), p. 202; United States Court of Appeals for the Second Circuit, decision of 29 May 1975, YCA I (1976), p. 202.

¹⁸ Corte di Cassazione (Sez. Un.), decision of 13 December 1971, No. 3620, YCA I (1976), p. 190; also its decisions of 10 November 1973, No. 2969, YCA I (1976), p. 192, and of 25 January 1977, No. 361, YCA IV (1979), p. 284.

decisions stressed the substantive nature of the Convention and denied any retroactive effect under such circumstances.¹⁹

14. It may be suggested that this issue which is of particular relevance to newly adhering States be clarified in the legislation implementing the 1958 Convention. As to the substance of such provision, a solution in favour of retroactivity seems recommendable in view of the basically procedural nature of the Convention and also in view of the fact that the Diplomatic Conference on the 1958 Convention rejected a proposal to make the Convention applicable only to awards made after its entry into force.

II. VALID ARBITRATION AGREEMENT IN WRITING (ART. II AND ART. V, PARA. 1 (a))

A. *Field of application*

15. Article 2 defines the requirement of an arbitration agreement between the parties. It obliges each Contracting State to recognize such an agreement and, in particular, the courts of a Contracting State to refer the parties to arbitration when seized of an action in respect of a dispute which is the subject of such arbitration agreement. The requirement set out in article II is also relevant at a later stage, after an award has been made. Here, the defendant may invoke as ground for refusal under article V, paragraph 1 (a), that there was no valid arbitration agreement.

16. The interpretation and application of article II has given rise to a number of difficulties and divergencies that may, at least in part, be attributed to the haste with which this article was adopted in 1958: the provision on the recognition of arbitration agreements, originally reserved for a separate protocol, was incorporated into the 1958 Convention only on the last day of the Diplomatic Conference.

17. One of the questions not answered in the Convention is its scope of application in respect of the type or types of arbitration agreement. One possible criterion would be that the agreement provides for arbitration in a State other than the State where a court has to decide about the reference to arbitration. While this would correspond with the applicability of the Convention itself (under art. I), it should be noted that the issue dealt with here is different (as art. I relates to arbitral awards, not arbitration agreements) and that the above analogy is only rarely relied on.

18. Another criterion could be that at least one of the parties be a national of a State other than the one in which the court is seized with the matter at issue, although the nationality of the parties is irrelevant in the context of article I (see above, para. 7). This criterion has, for example, been adopted in the legislation imple-

menting the 1958 Convention in the United Kingdom of Great Britain and Northern Ireland (sect. 1, Arbitration Act of 1975) and the United States of America (9 USC S 202; with an extension to relationships between its nationals if reasonably related to a foreign State). Yet another possible criterion could be that the arbitration agreement concerns an international trade transaction (cf. art. I, para. 1 (a) of the European Convention of 1961). While the selection of the appropriate criterion is often made by the legislator, the following uncertainties and lacunae of the provision on arbitration agreements have been troubling the courts.

B. *Requirement as to form of agreement ("in writing")*

19. Article II, paragraph 1, requires an arbitration "agreement in writing" which is defined in paragraph 2 as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". This form requirement, which is also relevant in the context of article V, paragraph 1 (a), has given rise to a number of varying court decisions. The least problematic of the rather varied circumstances may be the case where parties agreed by telex to arbitration. Here, the Austrian Supreme Court, in contrast to the Lower Court, regarded this as equal to an exchange of telegrams (and added that the formal requirements for the arbitration agreement must not be judged by national law but exclusively by article II, paragraph 2, of the 1958 Convention).²¹

20. Less clear are the cases in which only one party signed the arbitration agreement and the other kept it without objecting. In one such case, where the other party protested against the arbitral clause only two months after the delivery of goods, a Dutch court interpreted article II rather extensively by holding that the form requirement was met because the parties had been aware of the existence of the arbitral clause.²² On the other hand, a very restrictive interpretation was adopted by the Italian Supreme Court in a similar case where, however, the other party had produced the contract in court, signed another copy, and appointed an arbitrator.²³ The ruling was based on the view that the admission of the existence of an arbitration agreement was not equal to a written document which under article II must clearly express the intent of both parties.

21. Yet, according to another Italian court the intention of the parties need not be expressed in the same document, as the agreement may under article II, paragraph 2, be contained in an exchange of letters or telegrams. Thus, an arbitral clause in purchase orders, not signed or returned by the seller, was held to be valid in view of that fact that invoices referring to the purchase orders were signed by him.²⁴ A similar reasoning underlies two decisions which held that a written manifestation

²¹ Oberster Gerichtshof, decision of 17 November 1971, YCA I (1976), p. 183.

²² Rechtbank Rotterdam, decision of 26 June 1970, YCA I (1976), p. 195.

²³ Corte di Cassazione, decision of 18 September 1978, No. 4167, YCA IV (1979), pp. 296, 300.

²⁴ Corte di Appello di Firenze, decision of 8 October 1977, YCA IV (1979), p. 289.

¹⁹ Corte di Cassazione (Sez. Un.), decision of 30 April 1969, No. 1403, YCA I (1976), p. 189; Tribunale di Ravenna, decision of 15 April 1970, YCA I (1976), p. 190.

²⁰ Corte di Cassazione (Sez. Un.), decision of 10 November 1973, No. 2469, YCA I (1976), p. 192.

of the will of the parties suffices as the 1958 Convention does not require the signature of both parties in case of an exchange of letters.²⁵ Thus, if not both parties have signed, at least an exchange of written communications would be required.

22. This requirement is rarely met in the case of a sales confirmation, a rather common trade practice. Where, as is often the case, the confirmation of sale was not returned to the other party, the arbitration agreement was held not to be valid under article II of the Convention, regardless of the *lex loci* which may not require the written form,²⁶ even where the parties had followed the same procedure before without objection.²⁷ It should be noted, however, that this result excludes recognition and enforcement of the arbitration agreement only under the 1958 Convention; as provided for under article VII, the Convention does not deprive parties from rights to enforcement under other legal instruments, for example, a national arbitration law,²⁸ a bilateral treaty²⁹ or another Convention (e.g. the European Convention of 1961).³⁰

23. Additional problems arise where third persons such as agents or brokers are involved. In one case, for example, a broker had sent a note containing an arbitration clause to the parties who, without signing it, acknowledged receipt. He had also sent them sales confirmations which were signed and returned to the broker but not forwarded to the other party. The confirmation of the sales terms by both parties was held to be sufficient on the ground that the applicable national law authorized the broker to receive the written declarations of the will of the parties.³¹ In a similar case, the signing of an agreement by brokers was held to be sufficient as such signing was equal to party signatures under the applicable national law.³²

24. The applicable national law was also relied on in answering the related question whether the power of attorney must be in writing, as required for the conclusion of the arbitration agreement under article II. The Italian Supreme Court held that under French law (in contrast to Italian law) a power of attorney may be granted orally (and proven by testimony).³³ Yet, other courts decided that the form requirement of article II

should also be applied to the power of attorney,³⁴ because otherwise the purpose of article II would be defeated.³⁵

25. A different problem arises in the rather common fact situation that the contract does not contain an arbitral clause as a result of express agreement but that the parties refer to general conditions, or use a standard form, containing an arbitral clause. Here, one could hesitate to recognize such reference as a valid arbitration agreement in view of the purpose of the form requirement under article II. Most courts, however, have regarded the incorporation as sufficient, for example, with regard to general conditions,³⁶ to standard forms of contract,³⁷ and charter parties referred to in bills of lading.³⁸

26. The same result was reached by Italian courts in regarding article II as a uniform rule which supercedes domestic law and, therefore, not applying provisions of Italian law which require specific approval in writing of the arbitral clause if contained in general conditions or model contracts.³⁹ However, the Italian Supreme Court held that a mere reference is not sufficient,⁴⁰ even where the arbitral clause is contained in the contract form signed by the parties.⁴¹ Following the rationale of the domestic law rule, i.e. to ensure awareness of the parties, the Supreme Court has made an exception where the contract was the result of specific negotiations which made the parties aware of the consequences agreed to.⁴² Another obvious exception would be where the Italian law is not applicable, for example, to a contract concluded in another State.⁴³

C. Referral to arbitration (art. II, para. 3)

27. According to paragraph 3 of article II, parties to a valid arbitration agreement shall, upon request by one of them, be referred to arbitration by any court seized of an action relating to the same subject-matter. The decision about a stay of court proceedings is in some cases complicated by the fact that more than two

²⁵ Obergericht of Basel, decision of 3 June 1971, YCA IV (1979), pp. 309, 310; Landgericht Zweibrücken, 11 January 1978, YCA IV (1979), pp. 262, 263.

²⁶ Corte di Appello di Napoli, decision of 13 December 1974, YCA I (1976), p. 193; Tribunal du canton de Genève, decision of 6 June 1967, YCA I (1976), p. 199.

²⁷ Oberlandesgericht Düsseldorf, decision of 8 November 1971, YCA II (1977), p. 237.

²⁸ E.g. decision above, foot-note 27.

²⁹ E.g. Bundesgerichtshof, Federal Republic of Germany, decision of 9 March 1978, YCA IV (1979), p. 264.

³⁰ E.g. Bundesgerichtshof, Federal Republic of Germany, decision of 25 May 1970, YCA II (1977), p. 237.

³¹ Landgericht Hamburg, decision of 19 December 1967, YCA II (1977), p. 235.

³² Corte di Cassazione (Sez. Un.), decision of 8 April 1975, No. 1269, YCA II (1977), p. 247. The court added that the arbitration clause was binding since this document made express reference to the clause contained in the charter party.

³³ Corte di Cassazione (Sez. Un.), decision of 25 January 1977, No. 361, YCA IV (1979), p. 284.

³⁴ Supreme Court of Greece, decision of 14 January 1977, No. 88/1977, YCA IV (1979), p. 269.

³⁵ Landgericht Hamburg, decision of 16 March 1977, YCA III (1978), p. 274.

³⁶ Tribunal de Strasbourg, decision of 9 October 1970, YCA II (1977), p. 244; Bundesgerichtshof, decision of 12 February 1976, YCA II (1977), p. 242 (with the requirement that the general conditions be inserted in the contract or attached to it).

³⁷ E.g. United States District Court of the Southern District of New York, decision of 2 December 1977, YCA IV (1979), p. 331.

³⁸ Queen's Bench Division (admiralty court), decision of 13 January 1978, YCA IV (1979), p. 323; United States District Court of the Southern District of New York, decision of 18 August 1977, YCA IV (1979), p. 329.

³⁹ Corte di Appello di Firenze, decision of 8 October 1977, YCA IV (1979), p. 289; Corte di Appello di Napoli, decision of 20 February 1975, YCA IV (1979), p. 275; Corte di Appello di Torino, decision of 30 March 1973, YCA I (1976), p. 191.

⁴⁰ Corte di Cassazione (Sez. Un.), decision of 22 April 1976, No. 1439, YCA II (1977), p. 249.

⁴¹ Corte di Cassazione (Sez. Un.), decision of 25 May 1976, No. 1877, YCA III (1978), p. 279.

⁴² Corte di Cassazione (Sez. Un.), decisions of 18 April 1978, No. 1842, YCA IV (1979), p. 282, and of 12 May 1977, No. 3989, YCA IV (1979), p. 286; also Tribunale di Napoli, decision of 30 June 1976, YCA IV (1979), p. 277.

⁴³ Corte di Cassazione (Sez. Un.), decision of 8 November 1976, No. 4082, YCA IV (1979), p. 280.

parties are involved, not all of whom are bound by arbitration agreements. For example, where a parent company and its wholly owned subsidiary were sued, but only the parent company had concluded an arbitration agreement, the request of the subsidiary for a stay of court proceedings was granted.⁴⁴ However, where a distributor sued both the other party to the contract and a new distributor, allegedly appointed contrary to the sole distribution agreement, the arbitration clause in the contract was not viewed as an obstacle to joint court proceedings because both defendants were sued on substantially the same grounds and in order to avoid conflicting results.⁴⁵

28. On the other hand, substantial similarity of claims is no compelling reason for disregarding an arbitration agreement of two potentially liable parties. For example, in holding a time-charterer liable to an insurance company, the Moscow City Court observed that the defendant might obtain compensation from the shipowner under the charter party but that it could not decide that matter in view of the arbitration clause contained in the charter contract.⁴⁶ Even a claim which arose out of a relationship not governed by an arbitration agreement was referred to arbitration after it had been assigned (by a consignee) to a third person (charterer) who had agreed on arbitration with the defendant (in the charter party).⁴⁷

29. Another question relating to court jurisdiction is whether an arbitration agreement precludes an attachment or similar measure. Where such a procedure is not part of the normal enforcement of an award but requested during or even before arbitration proceedings, the answer depends on the understanding of the aim of the 1958 Convention, in particular, article II. Some courts have held that such pre-award attachments were not consistent with the arbitration agreements and the purpose of the 1958 Convention because they would in fact impede expeditious arbitration proceedings.⁴⁸ Yet, other courts have granted such attachments on the ground that these would not discourage resort to arbitration or obstruct the course of arbitral proceedings but would rather make the later award meaningful by preserving the subject-matter or assets intact within the jurisdictions.⁴⁹ It may be suggested that this issue possibly justifies a uniform rule of recommendation.

⁴⁴ High Court of Justice, Chancery Division, London, decision of 6 October 1977, YCA IV (1979), p. 317.

⁴⁵ Tribunale di Milano, decision of 22 March 1976, YCA II (1977), p. 248.

⁴⁶ Moscow City Court (Civil Dept.), decision of 6 May 1968, YCA I (1976), p. 206.

⁴⁷ United States District Court, C. D. California, decision of 2 December 1976, YCA III (1978), p. 289.

⁴⁸ United States Court of Appeals for the Third Circuit, decision of 8 July 1974, YCA I (1976), p. 204; United States District Court of the Southern District of New York, decisions of 22 December 1975, YCA III (1978), p. 286, and of 18 August 1977, YCA IV (1979), p. 329.

⁴⁹ United States District Court of the Southern District of New York, decision of 21 March 1977, YCA III (1978), p. 293 (based on sect. 8 of the US Arbitration Act, 9 USC); United States Court of Appeals, Second Circuit, decision of 20 June 1977, YCA IV (1979), p. 328; Queen's Bench Division (admiralty court), decision of 13 January 1978, YCA IV (1979), p. 323; Corte di Cassazione (Sez. Un.), decision of 12 May 1977, No. 3989, YCA IV (1979), p. 286.

III. PROCEDURAL RULES ON RECOGNITION AND ENFORCEMENT OF AWARDS (ARTS. III, IV)

30. Article III provides for recognition and enforcement of awards as governed by the 1958 Convention "in accordance with the rules of procedure of the territory where the award is relied upon". National procedural provisions which supplement the rules of the Convention have been applied in a number of cases reported in the *Yearbook Commercial Arbitration*.⁵⁰ The decisions relate, for example, to discovery of evidence, estoppel, set-off, consolidation or entry of judgement. However, these judgements do not warrant a close examination here as they reveal no particular difficulty with the interpretation of the Convention itself and pertain more to the interpretation of domestic laws.

31. Few decisions have been reported and apparently no serious problems encountered with regard to article IV which sets out the technical formalities for obtaining recognition and enforcement of an award.⁵¹ This should be welcomed in view of the importance of article IV: by requiring merely the furnishing of the award and the agreement, the Convention eliminates the former requirement of double-exequatur and concentrates judicial control in the country of enforcement. A party furnishing these two documents produces *prima facie* evidence of his right to enforcement of the award. His request is to be granted if none of the following grounds of refusal are proven by the other party (art. V, para. 1) or found by the court (para. 2).

IV. GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT (ART. V)

A. *Violation of principles of due process (para. 1 (b))*

32. As the ground for refusal under paragraph 1 (a) has already been dealt with in connexion with article II, the first reason to be considered now is the one contained in subparagraph (b). This provision sets basic standards of due process by requiring proper notice of the appointment of the arbitrator and of the arbitration proceedings and by ensuring the party's ability to present his case.

33. Adequate information about the arbitrator and the proceedings is of particular importance in case of an award against an absent party.⁵² While this ground for refusal has been invoked in a number of cases, it was accepted in only one reported case.⁵³ Here, the names of the arbitrators were not made known to the parties, except for the president of the tribunal who signed the award. This procedure was held to violate standards of due process in that it precluded a party from effectively challenging an arbitrator. As to the formal requirements of the notice to the parties, two Mexican courts have

⁵⁰ Cf. commentaries to article III, YCA I (1976), p. 212; YCA II (1977), p. 258; YCA IV (1979), p. 243.

⁵¹ Cf. commentaries to art. IV, YCA I (1976), p. 213; YCA II (1977), p. 260; YCA IV (1979), p. 245.

⁵² Cf. Corte di Appello di Roma, decision of 24 September 1973, YCA I (1976), p. 192.

⁵³ Oberlandesgericht Köln, decision of 10 June 1976, YCA IV (1979), p. 258.

held that a specific national provision was not applicable on the ground that the parties had impliedly waived it by agreeing on a certain set of arbitration rules.⁵⁴

34. The principle of due process that parties should be able to present their case is regarded as very fundamental (and usually as part of a State's public policy). Yet, not every limitation or obstacle to a full presentation of the case leads to refusal of enforcement. For example, no violation was found where arbitrators did not postpone a hearing although a witness could not appear due to his prior commitment to lecture at university.⁵⁵ Also, where a party had not disclosed certain facts and the other party could not fully substantiate his claim, the defence was rejected on the ground that paragraph 1 (b) was not concerned with maturation of claims or other factual conditions for substantiation but merely secured the procedural right to present the case as possible at the time.⁵⁶

B. Decision on matters beyond scope of arbitration agreement (para. 1 (c))

35. Recognition and enforcement may be refused under paragraph 1 (c) if the award deals with a difference, or contains a decision on a matter, beyond the scope of the submission to arbitration. The few reported decisions dealing with this ground for refusal allow the conclusion that arbitrators very rarely exceed the substantive limits drawn by the parties. Where this defence was invoked it was either due to misinterpretation or based on objections not directly in point.

36. For example, one party alleged that a certain award was beyond the scope of submission because it was a declaratory award. That was rejected by the court on the ground that paragraph 1 (c) was concerned with substance, not procedure, and that a declaratory award is merely a procedure for deciding the substantive claim.⁵⁷

37. Another defendant based his objection under paragraph 1 (c) on the ground that the arbitration agreement was invalid because it did not clearly specify the disputes covered by it. This defence, which pertains more to subparagraph (a) than (c), was rejected because the defendant did not in fact assert a decision beyond the (allegedly indefinite) scope of submissions and for reasons of estoppel.⁵⁸ In another case, a party contended that the arbitrators had exceeded the terms of the arbitration agreement because the proceedings were

⁵⁴ Tribunal Superior de Justicia, Eighteenth Civil Court of First Instance for the Federal District of Mexico, decision of 24 February 1977, YCA IV (1979), p. 301; Tribunal Superior de Justicia, Court of Appeals (Fifth Chamber) for the Federal District of Mexico, decision of 1 August 1977, YCA IV (1979), p. 302.

⁵⁵ United States Court of Appeals, Second Circuit, decision of 23 December 1974, YCA I (1976), p. 205.

⁵⁶ United States District Court, District of New Jersey, decision of 12 May 1976, YCA II (1977), p. 250.

⁵⁷ United States District Court, Eastern District of Michigan, Southern Division, decision of 15 March 1977, YCA III (1978), p. 291.

⁵⁸ President of Rechtbank, The Hague, decision of 26 April 1973, YCA IV (1979), p. 305 (the estoppel was based on the fact that the defendant, assisted by a lawyer, had two years earlier participated in negotiations and not objected to the conditions of the arbitration agreement).

started after the expiration of an agreed period for arbitration claims. The Court of Appeals which had accordingly denied the competence of the arbitral tribunal was ordered to reconsider its decision in view of the ambiguity of the agreement clause invoked.⁵⁹

C. Irregularity in composition of arbitral authority or arbitration procedure (para. 1 (d))

38. Recognition and enforcement of an award may be refused under paragraph 1 (d) if "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". This provision implements the principle of the freedom of the parties in respect of the composition of the arbitration tribunal and the arbitral procedure primarily by the rules agreed upon by the parties and only then by the law of the place of arbitration if the parties have not exercised their freedom in regulating the procedural point at issue. This priority given to the parties' wishes, which is merely limited by the public policy ground under paragraph 2 (b), has been recognized in reported court decisions.

39. For example, where an arbitration had been conducted in two stages (first a quality arbitration by two experts, then the arbitration proper with three arbitrators), the court refused enforcement of the award on the grounds that this procedure, even if customary at the place of arbitration, was contrary to the express agreement (to settle "all disputes in one and the same arbitral proceedings") and unknown to the objecting party who had justifiably relied on the printed rules of local usage which did not mention such a two-stage procedure.⁶⁰ The same result was reached, and the prevailing nature of the agreement over national law underlined, where parties had agreed on arbitration by three arbitrators, the third to be chosen by the two party-appointees.⁶¹ Relying on a national law provision under which the third arbitrator would only act as umpire, the two arbitrators, after agreeing on a decision, had not regarded it as necessary to appoint a third arbitrator.

40. An interesting contrast becomes apparent in respect of another case where the same composition had been envisaged by the parties.⁶² Here, the responding party refused to appoint his arbitrator and the claimant designated the one arbitrator, appointed by him, as a sole arbitrator as provided for in the law of the country where the arbitration took place. Enforcement of the award was granted on the ground that such appointment procedure was in accordance with the national law although a different composition of the arbitral tribunal had been agreed upon by the parties. The supplementary

⁵⁹ Bundesgerichtshof, Federal Republic of Germany, decision of 12 February 1976, YCA II (1977), p. 242 (including the decision of the Lower Court).

⁶⁰ Appellationsgericht Kanton Baselstadt, decision of 6 September 1968, YCA I (1976), p. 200.

⁶¹ Corte di Appello di Firenze, decision of 13 April 1978, YCA IV (1979), p. 294.

⁶² Corte di Appello di Venezia, decision of 21 May 1976, YCA III (1978), p. 277.

reliance on national law ("failing such agreement") was justified in view of the fact that the arbitration agreement did not contain a provision for the particular contingency of a refusal by one party to appoint his arbitrator. It may be added that this judgement also deals with another aspect pertaining to paragraph 1 (d), i.e. qualification of the arbitrator. Objections based on bias or non-qualification are apparently not uncommon but without success at the stage of enforcement.⁶³

D. *Award not yet binding or has been set aside*
(para. 1 (e))

41. Under article V, paragraph 1 (e), recognition and enforcement may be refused if "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". As already mentioned in the context of article IV (see above, para. 31), the 1958 Convention does not require a double-exequatur or an enforcement order of the country of origin but merely that the award has become binding. "Binding" means that the award is no longer open to ordinary means of recourse, such as appeals to a court or a second arbitration instance;⁶⁴ extraordinary means of recourse, which may lead to setting aside, annulment or suspension, are relevant as ground for refusal only after they have been successful (cf. text of para. 1 (e) and of art. VI).

42. This interpretation has been generally adopted in the reported decisions, except for few inconsistent remarks, e.g. "the award is entitled to confirmation since it attained the status of judgment in the country where it was made"; "the awards became binding at the moment they were deposited with the court of the place of arbitration".⁶⁵ The same positive assessment is justified with regard to annulment as the second ground for refusal under paragraph 1 (e).

43. It may be noted that the 1958 Convention does not determine the grounds on which an award may be set aside, unlike the European Convention of 1961 (art. IX) which allows setting aside only on the grounds set out as reasons for refusal in paragraph 1 (a) to (d) of the 1958 Convention. Thus, the 1958 Convention, in effect, lends force to reasons which may be rather unexpected due to the disparity of national laws or which may be so much geared to particular local circumstances that their forced recognition in the country of enforcement would seem inappropriate.

E. *Dispute not arbitrable under law of country where enforcement is sought* (para. 2 (a))

44. According to article V, paragraph 2 (a), recognition and enforcement may be refused if the subject-matter of the difference is not capable of settlement by

⁶³ E.g. also United States Court of Appeals for the Fifth Circuit, decision of 19 July 1976, YCA II (1977), p. 252.

⁶⁴ Thus, e.g., Tribunale di Napoli, decision of 30 June 1976, YCA IV (1979), p. 277; Landgericht Bremen, decision of 8 June 1967, YCA II (1977), p. 234.

⁶⁵ Cf. commentaries to article V 1 (e), YCA I (1976), p. 218 ("Enforcement in U.S.A.", (3)), and YCA II (1977), p. 262.

arbitration under the law of the country where recognition and enforcement is sought. This and the other reason contained in article V, i.e. enforcement "contrary to public policy", paragraph 2 (b), are to be taken into account by the competent authority *ex officio* because they are within the substantive domain of the country of enforcement and intended to serve its interests.

45. However, enforcement of awards has rarely been refused on the ground of non-arbitrability.⁶⁶ That is in conformity with a recognizable trend to interpret the grounds for refusal narrowly. Restrictive national laws are often applied in a more lenient way to international agreements than to purely domestic transactions or even interpreted as merely governing domestic affairs.⁶⁷

F. *Enforcement contrary to public policy* (para. 2 (b))

46. The same tendency of restraint is particularly apparent in decisions considering the public policy ground (para. 2 (b)). Here, the hesitation to impose domestic standards on international transactions is expressed by a distinction between international public order and domestic public order or by a restriction to extreme, intolerable cases.⁶⁸ For example, in the above reported case where a sole arbitrator had made the award although the agreement had provided for three arbitrators (see para. 40), the court granted enforcement although the procedure was contrary to domestic public policy.⁶⁹ Various courts held that the enforcement of foreign awards which did not state the reasons was not contrary to public policy under paragraph 2 (b) although the lack of reasons in domestic awards would violate domestic public policy.⁷⁰

47. In a similar vein, the mere fact that only nationals of the country of arbitration had been allowed as arbitrators was not viewed as a violation of public policy.⁷¹ As these examples indicate, the public policy ground is often examined where none of the other grounds for refusal could be invoked. Yet, the experience gathered from the reported decisions leads to the conclusion that enforcement of foreign arbitral awards is refused only in exceptional cases.

CONCLUSIONS

48. The survey reveals that there are wide areas within the realm of the 1958 Convention which have not

⁶⁶ Cour d'appel de Liège (Belgium), decision of 12 May 1977, YCA IV (1979), p. 254.

⁶⁷ E.g. United States Supreme Court, decision of 17 June 1974, YCA I (1976), p. 203.

⁶⁸ Obergericht Basel, decision of 3 June 1971, YCA IV (1979), p. 309.

⁶⁹ Corte di Appello di Venezia, decision of 21 May 1976, YCA III (1978), p. 277.

⁷⁰ E.g. Corte di Appello di Firenze, decision of 8 October 1977, YCA IV (1979), p. 289; Hanseatisches Oberlandesgericht Hamburg, decision of 27 July 1978, YCA IV (1979), p. 266; Corte di Appello di Napoli, decision of 20 February 1975, YCA IV (1979), p. 275.

⁷¹ Bundesgericht (Switzerland), decision of 3 May 1967, YCA I (1976), p. 200; Oberster Gerichtshof (Austria), decision of 11 June 1969, YCA II (1977), p. 232; Bundesgerichtshof (Federal Republic of Germany), decision of 6 March 1969, YCA II (1977), p. 235.

given rise to any noteworthy problems. The same can be said about the articles which have not been specifically dealt with here. Certain difficulties and divergencies have been discovered in the application and interpretation of articles II and V, and, to a lesser degree, article I.

49. The problems encountered are sometimes due to the fact that the 1958 Convention does not regulate certain issues. This has on occasions led to uncertainty about the applicable law, e.g. in respect of the validity of the arbitration agreement, and, due to the disparity of national laws, to different results. One possible way of improvement could be to attempt to reduce that disparity by recommending uniform rules which would take into account the specific features of international arbitration agreements and awards. That would be in con-

formity with the discernible trend of national restraint in international contexts.

50. However, the problems identified in this report are not of such a magnitude that their existence would justify the preparation of a protocol to the 1958 Convention. In the light of the more than 100 reported decisions on the 1958 Convention, one cannot but conclude that this Convention has satisfactorily met the general purpose for which it was adopted and that, for that reason, it would, at least at this juncture, be inadvisable to amend its provisions. Notwithstanding this, other steps designed to eliminate certain problem areas could well be taken which, if successful, would facilitate the application of the Convention. These steps are discussed in document A/CN.9/169.