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The New York Arbitration Convention of 1958

Albert Jan van den Berg

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The New York Arbitration Convention of 1958

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Manufactured in the Netherlands.

In memory of Louise

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Text divisions

Main division:	Chapter	I, II or III
First sub-division:	Part	e.g., II–2
Second sub-division:	Section	e.g., II–2.4
Third sub-division:	Sub-section	e.g., II–2.4.3
Fourth sub-division:	Paragraph	e.g., II–2.4.3.2

Footnotes

For the reader's convenience the use of *abbreviations* is avoided as much as possible.

The *court decisions* on the New York Convention are identified between brackets by country and number. Full references for each court decision can be found in Annex D, Table of Court Decisions, under the country concerned, listed by number.

Cross-references are frequently given by means of *supra* and *infra* with the purpose of facilitating isolated reading of a Part, Section, Subsection, or Paragraph. The cross-references are, however, not intended as a replacement of the Table of Court Decisions (Annex D), the Index of Articles of the Convention and the Index of Subject Matters to be found at the end of this study.

The footnotes are *numbered* per Chapter (I, II and III). If a cross-reference is made to a footnote in a different Chapter, this is indicated by a Roman numeral before the number of the footnote (e.g., reference to footnote 31 in Chapter II is made in footnote 117 of Chapter I by means of "*infra* n. II.31").

Date of completion

The study was completed on February 1, 1981. With a few exceptions, no materials issued after this date have been used.

Introduction

A. Uniform Judicial Interpretation

1. It has become more and more recognized that for the settlement of disputes between parties to an international transaction, arbitration has clear advantages over litigation in national courts. The foreign court can be an alien environment for a businessman because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of the foreign judges. In contrast, with international commercial arbitration parties coming from different legal systems can provide for a procedure which is mutually acceptable. They can anticipate which law shall be applied: a particular law or even a *lex mercatoria* of a trade. They can also appoint a person of their choice having expert knowledge in the field.

These and other advantages are only potential until the necessary legal framework can be internationally secured. This legal framework should at least provide that the commitment to arbitrate is enforceable and that the arbitral decision can be executed in many countries, precluding the possibility that a national court review the merits of the decision.

One finds such a framework in the New York Convention. The Convention has been adhered to by 56 States at the time of this writing, among which are almost all important trading nations from the Capitalist and Socialist world as well as many developing countries. The Convention has frequently been applied in practice: the number of court decisions reported in Volumes I(1976) – VI(1981) of the *Yearbook Commercial Arbitration* [1] amounts to 137. Consequently the New York Convention can be considered as the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration.

2. The significance of the New York Convention for international commercial arbitration makes it even more important that the Convention is interpreted *uniformly* by the courts. A review of the court decisions on the Convention shows that such a uniform interpretation is lacking in several respects.[2] This may lead to an undesirable degree of uncertainty which can be detrimental to the effectiveness of international commercial arbitration.

1. The *Yearbook Commercial Arbitration* (Deventer, the Netherlands) is under the General Editorship of Prof. Pieter Sanders, and is published by the International Council for Commercial Arbitration (ICCA) with the cooperation (as of Volume IV (1979)) of the T.M.C. Asser Institute for International Law, The Hague. The Yearbook Commercial Arbitration will be referred to in this study as *Yearbook*.

2. See P. Sanders, "Commentary", in *Yearbook* Vol. I (1976) p. 207, Vol. II (1977) p. 254,

3. The lack of a uniform judicial interpretation of the Convention has recently led to proposals being made with a view to clarifying and complementing the New York Convention by means of revision in the form of a Protocol. The Asian-African Legal Consultative Committee (AALCC) in 1976 adopted a recommendation on international commercial arbitration by which it invited the United Nations Commission on International Trade Law (UNCITRAL) to consider the possibility of preparing such a Protocol.[3]

At UNCITRAL's tenth Session in May-June 1977, the predominant opinion was that, if it were decided at a later stage to implement the proposals of the AALCC, the preparation of a Protocol to the Convention would not be an appropriate approach.[4]

This may indeed be questioned. It will take time to establish such a Protocol. Moreover, assuming that a Protocol may clarify and complement the New York Convention, it will still take considerable time before all States Party to the New York Convention will also have become Party to the Protocol. In the meantime, uncertainty will exist as to whether the New York Convention or the Protocol, or even both, will be applicable. This uncertainty may be aggravated if certain States deem it unnecessary to join the Protocol. Furthermore, a Protocol, however good its provisions may be, will require time before a more or less uniform judicial interpretation can be achieved.

4. In view of these problems engendered by a revision of the Convention in the form of a Protocol, another approach would seem to be more appropriate, namely a unification of judicial interpretation by means of the comparative caselaw method. This approach has as objective to formulate one possibly acceptable interpretation on the basis of a comparison of the court decisions given in respect of the Convention, which interpretation could be followed by the courts in the Contracting States.

It is the latter approach which will be adopted in this study. However, if it appears that the unification of interpretation by means of the comparative caselaw method is unable to bridge the gap between the diverging interpretations or to fill a lacuna of the Convention, the question of a revision in the form of a Protocol will be reconsidered.

It may be mentioned that the Draft Convention of 1955 of the United Nations Economic and Social Council (ECOSOC), to be considered hereafter, contained an Article XIII to the effect that disputes between two or more Contracting States concerning the interpretation or application of the Convention, which could not be settled by negotiation, could, at the request of any Contracting State to the dis-

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and Vol. IV (1979) p. 231.

3. UN DOC A/CN.9/127. The recommendations are briefly commented upon in a note by the Secretariat of UNCITRAL (A/CN.9/127/Add.1).

4. UN DOC A/32/17 Ann. II para. 31.

pute, be referred to the International Court of Justice for a decision. It provided further that, when adhering to the Convention, a Contracting State could declare that this Article would not apply to it.[5]

Article XIII was opposed by the delegate from the U.S.S.R., stating that as it stood, it provided that States could be brought before the International Court of Justice without their consent. He argued that this was contrary to the principles of international law, in particular the principle that submission to the jurisdiction of the Court was voluntary.[6] He proposed an amendment that a dispute could be submitted to the Court only with the consent of the Parties.[7] Other delegates, especially those from non-Socialist countries, were opposed to the Soviet amendment and favoured the text as proposed by ECOSOC. Being deadlocked, the Conference decided not to insert in the Convention any provision concerning the resolution of disputes arising out of its interpretation and application.

It should be observed that even without a provision to this effect, the International Court of Justice, in virtue of Article 36(1) of the Statute of the Court, has jurisdiction over a dispute between Contracting States concerning the interpretation of the Convention. Its jurisdiction is, however, dependent on the consent of the Contracting States concerned to submit the dispute to the Court, unless a State has, in accordance with Article 36(2), declared that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court. Littera *a* of Article 36(2) mentions specifically "the interpretation of a treaty".

In any case, the Article proposed by ECOSOC would not have had, and Article 36 of the Statute of the Court does not have, much practical relevance as it is unlikely that States would be willing to submit disputes concerning the interpretation of the New York Convention to the International Court of Justice. The unification of interpretation of the Convention is therefore principally left to the volition of the courts of the Contracting States.

5. In choosing the approach of unifying the judicial interpretations of the Convention by means of the comparative caselaw method, the question of the rules of interpretation to be applied becomes particularly important.

For this question we should turn to the Vienna Convention on the Law of Treaties of 1969, which entered into force on January 27, 1980 (also called the "Treaty of Treaties").[8] The Convention lays down rules for the interpretation of Treaties in Article 31 (headed "General Rule of Interpretation"), Article 32 (headed "Supplementary Means of Interpretation"), and Article 33 (headed "Interpretation of Treaties Authenticated in Two or More Languages").

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5. UN DOC E/2704 and Corr. 1.
6. UN DOC E/CONF.26/SR.21.
7. UN DOC E/CONF.26/L.56.
8. *Tractatenblad* (Netherlands) 1972, no. 51. The Vienna Convention has not yet been adhered to by many States and applies, according to its Art. 4, only to treaties which are concluded by States after its entry into force with regard to such States. However, the Convention may be considered here, as it may be viewed as a codification of treaty law prevailing in international case law, custom and legal doctrine. See generally for Arts. 31 and 32 of the Vienna Convention, H. Köck, *Vertragsinterpretation und Vertragsrechtskonvention. Zur Bedeutung der Artikel 31* →

Article 31 provides in paragraph 1 that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". This general rule of interpretation will naturally be followed in this study. It goes without saying that a treaty is to be interpreted in good faith. Although Article 31(1) emphasizes the importance of the "ordinary meaning" of the terms of a treaty, what is "ordinary" for one person may not be so for another person. It is clear, however, that in any case an interpretation should not go squarely against the terms of the Convention. The ordinary meaning of the terms of the Convention is, pursuant to Article 31(1), also to be derived from the context in which the terms are used and the object and purpose of the treaty. The interpretation of the terms in their context is self-evident. As far as the object and purpose of the New York Convention are concerned, they are to facilitate the enforcement of arbitration agreements within its purview and of foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration.

Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, "including preparatory works of the treaty", when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable. This rule is also easily accepted. As far as the legislative history of the New York Convention is concerned, about which more later in this Introduction, a historic interpretation mainly based on the preparatory works (*travaux préparatoires*), may sometimes be difficult as it is not always easy to ascertain what was the consensus at the New York Conference of 1958. However, the legislative history of the Convention will be reviewed in this study to some extent in respect of certain provisions of the Convention as it has proven that it generally assists in their understanding.

In this connection it may be added that frequently a comparison is made with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, because the New York Convention was conceived as the follow-up treaty. The Geneva Treaties may therefore also be of assistance in interpreting the New York Convention.

Although the rules of interpretation of treaties are helpful and are generally relied upon in this study, it is no secret that how they are used (some may say "manipulated") may depend on the desired result. Such use is not extraordinary, and even preferable to a conceptual use

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und 32 der Wiener Vertragsrechtskonvention 1969 (Berlin 1976). An extensive bibliography is appended to this study.

of rules of interpretation, provided that it is made clear for which reason the use is made. Having regard to the object and purpose of the Convention and to the fact that the Convention is to be applied in so many countries with so many different legal systems and concepts, in this study the rules of interpretation are used in an attempt to provide for solutions that are workable in current practice and likely to be followed on a world-wide basis. It will be attempted to avoid overly sophisticated interpretations, in particular those which read more into the Convention than can be safely said to be provided by it.

6. The study primarily concerns the interpretations given by the courts of the Contracting States. Current international commercial arbitration cannot function without the assistance of the national courts.[9] The New York Convention is built upon this principle. It can even be said that the Convention effectively derives its authority from the national courts. The manner in which they interpret and apply the Convention is the main source of its effectiveness.

Almost all court decisions considered in this study are reported in the form of an extract in Volumes I(1976) – VI(1981) of the *Yearbook Commercial Arbitration*. However the judicial interpretations referred to are based on the text of the original decisions. It may therefore happen that a particular interpretation cannot be found in the extract reported in the *Yearbook*. Copies of approximately 70 per cent of the original court decisions are compiled in Prof. G. Gaja's *New York Convention.*[10]

Due to considerations of limited space and object, as well as the danger of not seeing the forest for looking at the trees, the study will not pay extensive attention to the more theoretical interpretations advanced in scholarly writings.

In certain countries specific legislation has been enacted for the implementation of the Convention. In some of these Acts attempts are made to clarify or complement the Convention. As the courts in these countries must as a rule base themselves on the enabling legislation, their provisions will be taken into account where it is necessary.

7. The study is divided into the three main subjects areas where the Convention is open to interpretaton: the field of application (Chapter I), the enforcement of the arbitration agreement (Chapter II), and the enforcement of the award (Chapter III). Within these areas the various

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9. See H. Holtzmann, *Arbitration and the Courts: Partners in a System of International Justice*, Report submitted to the VIth International Arbitration Congress, Mexico City, March 1978. A French translation entitled "L'arbitrage et les tribunaux: des associés dans un système de justice internationale" is published in *Revue de l'arbitrage* (1978) p. 253.

10. Dobbs Ferry 1978-1980. A full set of all original court decisions on the New York Convention is with the International Commercial Arbitration Library of the T.M.C. Asser Institute for International Law in The Hague.

issues are examined. For each issue a general explanation of those Convention provisions concerned is given and the relevant court decisions are analyzed and compared, identifying those issues on which a general consensus exists and those on which it does not. In respect of the diverging interpretations, an attempt is then made to arrive at one interpretation.

The Convention also involves certain questions on which a judicial interpretation has not yet been given, but which are likely to come up within the near future. Where it is appropriate, these questions are also examined.

At the end of each Part the proposals for uniform interpretation elaborated in respect of the Convention's issues as examined in that Part, are summarized under the heading "Uniform Interpretation".

B. History of the New York Convention

8. At the beginning of this century, as international commercial arbitration was becoming established, it had to rely solely on domestic arbitration laws. At that time national laws as well as the courts of many countries were often unfavourable towards arbitration. These laws were generally antiquated, and differed amongst themselves considerably; several judicial authorities actually regarded arbitration as their rival.

The increased use of international commercial arbitration after the First World War led the then newly established International Chamber of Commerce (ICC) in Paris to promote an international convention by which one of the major obstacles of that time, the unenforceability of the arbitral clause, referring future disputes to arbitration, would be removed. The initiative, taken over by the League of Nations, resulted in the Geneva Protocol on Arbitration Clauses of 1923.[11]

Article 1 of the Geneva Protocol declared valid arbitration agreements "whether relating to existing or future differences". The Protocol also provided for the obligation of a court of a Contracting State to refer the parties to arbitration if it was seized of a dispute regarding which it had been agreed to arbitrate.

The international validity and enforceability of the arbitral clause being established, the following step, the international enforcement of the arbitral award, did not take long. Under the auspices of the League of Nations, the Geneva Convention on the Execution of Foreign

11. 27 *League of Nations Treaty Series* 158 (1924). See *infra* I–4.5.

Awards was concluded in 1927.[12] It regulated the enforcement of arbitral awards made in pursuance of an arbitration agreement falling under the Geneva Protocol of 1923.[13]

Although the Geneva Treaties were undoubtedly an improvement in comparison with the previous situation, they were still considered inadequate.[14] Their field of application was limited: the parties had to be subject to the jurisdiction of different Contracting States, and the arbitral award should have been made in a Contracting State. The Geneva Convention placed upon the party seeking enforcement the heavy burden of proving the conditions necessary for the enforcement. One of these conditions was that the award had to become "final" in the country where it was made ("country of origin"). Many courts interpreted this condition as requiring a leave for enforcement (exequatur or the like) from the court of the country of origin. Since in the country where enforcement was sought a leave for enforcement was also needed, this interpretation amounted in practice to the system of the so-called "double-exequatur".

Another condition was that in any case the constitution of the arbitral tribunal and the arbitral procedure should have taken place in conformity with the law governing the arbitral procedure; this has almost always been the law of the country where the arbitration took place.

It was especially the last-mentioned condition which prompted the International Chamber of Commerce to launch a project for a new international convention after the Second World War. The Draft Convention, issued in 1953, aimed essentially at an arbitration which would not be governed by a national law.[15]

The idea of a truly international commercial arbitration solely based on an international convention was, however, unacceptable for most States. The United Nations Economic and Social Council (ECOSOC) to whom the ICC Draft Convention was presented, came forward in 1955 with another Draft Convention which remained much closer to the Geneva Treaties. The title of the ECOSOC Draft Convention previewed the difference: whilst the ICC Draft Convention referred to "*Interna-*

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12. 92 *League of Nations Treaty Series* 302 (1929-1930). See *infra* I–4.5.

13. See for the Geneva Treaties in general, H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957).

14. See E. Lorenzen, "Commercial Arbitration – International and Interstate Aspects", 43 *Yale Law Journal* (1933-1934) p. 716; "Commercial Arbitration – Enforcement of Foreign Awards", 45 *Yale Law Journal* (1935-1936) p. 39; E. Mezger, "Zur Auslegung und Bewertung der Genfer Schiedsabkommen von 1923 und 1927", 24 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1959) p. 222.

15. International Chamber of Commerce, *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention*, ICC Brochure no. 174 (Paris 1953), reproduced in UN DOC E/C.2/373.

tional Arbitral Awards" the ECOSOC Draft Convention mentioned "*Foreign* Arbitral Awards".[16]

The ECOSOC Draft Convention was sent for comments and observations to a number of governments and inter- and non-governmental organizations.[17] In the light of the comments received, ECOSOC decided to convene the "Conference on International Commercial Arbitration". The Conference was held at the Headquarters of the United Nations in New York from May 20 to June 10, 1958. The Conference, commonly called the New York Conference of 1958, resulted in the adoption of what has become known as the New York Convention of 1958.[18]

C. General Introduction to the New York Convention

9. A general introduction to the Convention may be best given by highlighting the improvements of the Convention in comparison with the Geneva Treaties.

The fundamental difference between the ICC Draft Convention of 1953 and the ECOSOC Draft Convention of 1955 was reconciled by a compromise reached at the Conference: on the one hand, the title of the Convention refers to a foreign award, which is defined in Article I(1) as an award made in another country; on the other hand, as far as the enforcement proceedings in another Contracting State are concerned, if the parties have made an agreement regarding the composition of the arbitral tribunal or the arbitral procedure, the arbitration law of the country where the arbitration took place has not, according to Article V(1)(d), to be taken into account. The latter provision is an improvement in comparison with the Geneva Convention of 1927 which required as a condition for the enforcement of an award in another Contracting State that the constitution of the tribunal and the arbitral procedure had always to be in conformity with the law of the place of arbitration.

The field of application of the New York Convention is broader than that of the Geneva Treaties. The New York Convention applies to an award made in any other State; it no longer requires that the parties be subject to the jurisdiction of different Contracting States. A State

16. UN DOC E/2704 and Corr. 1.

17. UN DOC E/2822 and Add. 1-6; E/CONF.26/3 and Add. 1; E/CONF.26/4.

18. The Summary Records of the New York Conference can be found in UN DOC E/CONF.26/SR. 1-25. The amendments submitted by the Government delegations, the reports of the Working Parties, and the text of the various Articles adopted at the Conference can be found in UN DOC E/CONF.26/7 and L. 7-63. These documents are reproduced in G. Gaja, *New York Convention* (Dobbs Ferry 1978-1980) Part III.

may, however, limit the applicability of the Convention to awards made in other Contracting States only. This so-called first reservation, to be found in Article I(3), has been used by two thirds of the Contracting States.

A further improvement is that the burden of proof is shifted from the party seeking enforcement to the party against whom the enforcement is sought. All the party seeking enforcement must do according to Article IV is to supply the arbitration agreement and the award. It is then up to the other party to prove the existence of one of the grounds for refusal limitatively set out in Article V(1). Article V(2) adds that enforcement may be refused by a court on its own motion if the subject matter of the difference is not capable of settlement by arbitration or if the award is contrary to the public policy of that country.

Another improvement in comparison with the Geneva Convention is the abolishment of the "double exequatur". The drafters of the New York Convention effected this by providing that the award must be "binding" on the parties, avoiding the more demanding term "final" as used in the Geneva Convention.

Originally, it was envisaged at the New York Conference of 1958 to provide the invalidity of the arbitration agreement under the applicable law as ground for refusal of the award only. It was the intention to leave the provisions concerning the formal validity of the arbitration agreement and the referral by a court to arbitration to a separate Protocol. A similar division existed under the Geneva Treaties. Not until the final days of the New York Conference was it realized that such a separation could seriously hamper the effectiveness of the new Convention. Consequently Article II was inserted in the Convention.

The Geneva Protocol of 1923 merely declared as valid an arbitration agreement "relating to existing or future differences". The Geneva Convention of 1927 required, in addition, as one of the conditions for enforcement of the award that the arbitration agreement be valid under the law applicable thereto. Which form the arbitration agreement should have was determined by that law. In comparison, the New York Convention provides an internationally uniform rule for the form of the arbitration agreement: the arbitration agreement must be in writing which is defined as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" (Art. II(2)).

The New York Convention does not provide for an overall regulation of international commercial arbitration as do, for example, the Washington Convention of 1965 [19] and, to a lesser extent, the Euro-

19. See *infra* I–4.4.3*a*.

pean Convention of 1961.[20] Nor is the Convention a uniform law on arbitration like, for instance, the European Uniform Law of 1966.[21] Rather, the New York Convention is in essence limited to two aspects of international commercial arbitration: the enforcement of those arbitration agreements which come within its purview (Art. II(3)) and the enforcement of foreign arbitral awards (Arts. I and III-VI).

20. See *infra* I–4.4.2.

21. The Uniform Law is attached to the European Convention on Arbitration, done at Strasbourg on January 20, 1966, *European Treaty Series* No. 56. The Convention has been signed only by Austria and Belgium. Belgium has also deposited the instrument of ratification on February 22, 1973, and has implemented the Uniform Law by a Law of July 4, 1972, *Moniteur belge* of August 8, 1972.

Chapter I

Field of Application

The field of application of the New York Convention is delimited in its title by the naming of "foreign arbitral awards". Article I of the Convention states that a foreign award is an award made in the territory of another State. This is, in fact, the definition of the scope of the Convention for the enforcement of the award. The various questions which have arisen from this definition will be examined in the first Part of this Chapter.

The Convention provides also for the enforcement of the arbitration agreement (Art. II(3)). However, it does not state specifically which arbitration agreements can be enforced under it. This question will be considered in Part 2.

The Convention is silent on the question whether it has retroactive effect. This question regarding the Convention's applicability will be examined in Part 3.

Other multilateral and bilateral treaties, as well as domestic law, may also form a basis for the enforcement of an agreement or award coming within the purview of the New York Convention. To this end the Convention contains in Article VII(1) a more-favourable-right-provision and a compatibility provision. These provisions incidental to the Convention's applicability are the subject matter of the fourth and last Part of this Chapter.

PART I–1 FOREIGN ARBITRAL AWARD (ART. I)

I–1.1 Universality and First Reservation

The title of the Convention refers to the "recognition and enforcement of *foreign* arbitral awards". What is understood by a foreign award can be found in Article I(1): an arbitral award made in the territory of a State other than the State where the recognition and enforcement of such award is sought. As no other condition is required, the scope of the Convention is very broad: an award made in *any* foreign country, whether in a Contracting State or not, falls under the New York Convention. Such a definition of the field of application can be said to be the modern tendency in international conventions. Traditionally, international conventions were conceived to regulate relations between Contracting States only. This was the case under the Geneva Convention of 1927 which required that the award be made in one of the Contracting States between persons who are subject to their jurisdiction. A more modern approach, as laid down in the first paragraph of Article I of the New York Convention, is to consider international conventions as the consensus on the state of international law – public or private – in a certain field. Under this principle of universality, awards made in Contracting and non-Contracting States are treated alike.

The principle of universality was, and still is, not generally accepted. For this reason the drafters of the Convention also gave way to a certain degree to the more traditional view. Accordingly, Article I(3) offers the possibility to the Contracting States to reserve the applicability of the Convention to "awards made only in the territory of another Contracting State". Approximately two-thirds of the Contracting States have used this reservation.[1]

An example of the universal applicability can be found in the enforcement under the Convention of an award made in the United Kingdom before its adherence to the Convention in 1975 by a Court of Appeal in Italy which country did not avail itself of any reservation.[2]

There are abundant examples of the application of the first reservation. A phrase which can frequently be found at the beginning of a judgment is that since country X – the country where the enforcement is sought – and country Y – the country where the award was made – have adhered to the New York Convention, the Convention is appli-

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1. See for the list of ratifications/accessions and reservations, Annex B.
2. Corte di Appello of Florence, October 22, 1976, S.A. Tradax Export *v.* Carapelli (Italy no. 18).

cable.[3] Conversely, the first reservation has precluded the application of the New York Convention in a certain number of cases. A Court of Appeal in F.R. Germany, which country has used the first reservation, refused to apply the Convention to an award made in the United Kingdom at the time it had not adhered to the Convention.[4] Similarly, the Federal Supreme Court of F.R. Germany did not apply the Convention to an award made in Yugoslavia, a country which has still not become a Party to the Convention.[5] In both these cases the enforcement was granted on another basis. The outcome was less favourable for the claimant seeking enforcement of an award made in the United Kingdom at the time it was not yet a Contracting State before the District Court of New York. Not only did the Court hold the Convention inapplicable, it also refused enforcement.[6]

The use of the first reservation has less and less impact on the applicability of the New York Convention because of the increase in the number of Contracting States. The principle of universality is therefore gradually being revitalized. Nevertheless, when selecting a place of arbitration, the parties should still take care that the country in question is a Contracting State. If the award is made in a non-Contracting State, enforcement cannot take place on the basis of the New York Convention in two-thirds of the Contracting States. This caution applies especially to the Latin-American world where a relatively small number of States are Party to the Convention.[7]

The first reservation is also called the *reciprocity reservation*. This must be understood in the sense that country A applies the Convention to awards made in coun-

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3. See, e.g., Court of First Instance of Piraeus, decision no. 1193 of 1968 (Greece no. 1): award made in F.R. Germany; Oberster Gerichtshof, November 17, 1965 (Austria no. 1): award made in the Netherlands; Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12): award made in Romania; Obergericht of Basle, June 3, 1971 (Switz. no. 5): award made in the Netherlands; Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18): award made in the United Kingdom; U.S. District Court of New York, S.D., March 21, 1977, Andros Compania Maritima S.A. *v.* André & Cie S.A. (U.S. no. 17): award made in the United Kingdom. The Landgericht of Hamburg, April 24, 1979 (F.R. Germ. no. 21) erred when holding the Convention not applicable to an award made in Belgium on June 21, 1978, arguing that Belgium had not become a Party to the Convention, whilst Belgium did ratify the Convention on August 18, 1975.

4. Oberlandesgericht of Hamburg, April 15, 1964 (F.R. Germ. no. 1).

5. Bundesgerichtshof, June 26, 1969. *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1970) no. 258.

6. U.S. District Court of New York, S.D., September 27, 1974, Splosna Plovba of Piran *v.* Agrelak Steamship Corp. (U.S. no. 6). The refusal of enforcement was based on the fact that the award had not been confirmed by the competent court in the United Kingdom. This decision must be considered out of line with previous decisions in which the courts in the United States have never required a confirmation of the award by the foreign court. See for the leading case on this point Gilbert *v.* Burnstine, 255 NY 348 (1931). See also *infra* III–4.5.2.3 ("Merger of Award into Judgment").

7. Chile, Columbia, Cuba, Ecuador, Mexico, and Trinidad and Tobago have adhered to the Convention. The ratification by Peru is pending according to information given by government

try B because the latter country, by adhering to the Convention, has declared that it will apply the Convention to awards made in country A.

The Russian delegate at the New York Conference of 1958 wished to make this abundantly clear by proposing the phrase "on the basis of reciprocity", which proposal found acceptance.[8] This addition must be deemed superfluous as the reciprocity in the above sense already ensues from the first reservation itself.

The express mention of reciprocity in the first reservation may even lead to confusion. The term reciprocity is commonly used in international law to denote 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. However, since the condition of the party's nationality is excluded as a condition for the Convention's applicability, as we will see in the following Section, the reciprocal treatment of subjects of States Party to the New York Convention is not to be taken into account. Accordingly, the term reciprocity in the first reservation is not to be understood in its ordinary sense in international law. An example of the confusion between these two meanings of reciprocity can be found in a decision of the District Court in Michigan to be discussed hereafter.[9]

In connection with the Convention's reciprocity provisions, mention should also be made of Article XIV. That Article provides:

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

This provision figured in the ECOSOC Draft Convention of 1955 as part of the federal state clause (which has become Art. XI [10]). 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. The New York Conference decided then to upgrade this provision to a general reciprocity clause in view of the fact that no corresponding provisions were found in the commercial reservation of Article I(3) (i.e., the second reservation) and the colonial clause (Art. X) and that a general provision could remedy these defects.[11]

The general reciprocity clause of Article XIV therefore renders the phrase "on the basis of reciprocity" in the first reservation of Article I(3) even more redundant, and it may be wondered why the phrase was not deleted when the general reciprocity clause was introduced.

Article XIV itself has not caused problems in practice. It has scarcely been referred to by the courts and has not precluded enforcement of an award so far. As far as the commercial reservation of Article I(3) is concerned, Article XIV might be invoked in a case where enforcment is sought in a Contracting State which has not used the commercial reservation, in respect of an award relating to a non-commercial matter made in a Contracting State which has used the commercial reservation. In such a case the court of the State where the enforcement is sought may be inclined to refuse enforcement on the basis of lack of reciprocity, that is to say, on the ground that the State in which the award was made would not enforce awards made in the forum State relating to non-commercial matters.[12]

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officials of this country. Instead, the Latin American countries have concluded the Panama Convention of 1975, modelled after the New York Convention. See *infra* I–4.4.3*c*.

8. UN DOC E/CONF.26/SR.21.

9. See *infra* at n. 23.

10. UN DOC E/2704 and Corr. 1, Art. X(2).

11. UN DOC E/CONF.26/SR.24.

12. But see G. Gaja, "Problems of Applicability of International Conventions on Commer- →

Another intriguing question, which has not been dealt with by the courts so far, is whether the general reciprocity clause of Article XIV applies also to the issue of arbitrable subject matters. If, for example, a court in a State refuses to enforce an award made in another State relating to transfer of technology because it considers this matter as not capable of settlement by arbitration, may a court in another State then reciprocate (or rather retaliate) by refusing enforcement of awards made in the first State relating to the same subject matter, although in the other State such subject matter is considered as capable of settlement by arbitration?[13]

I–1.2 Party's Nationality Excluded [14]

The field of application of the Convention does not depend on the nationality of the parties. Such a condition was contained in the Geneva Convention of 1927 which required that the parties be subject to the jurisdiction of different Contracting States.[15] The expression "subject to the jurisdiction" of a State had caused uncertainty, as some courts interpreted it as meaning nationality, whilst others considered it as domicile.[16] Moreover, as a consequence of the awakening principle of universality, there was no longer any reason to make a Convention in favour of subjects of a particular State only. Having omitted the condition, the New York Convention is broader and clearer in its scope than its predecessor.

The abolishment of the nationality condition means, for example, that a United States court will apply the Convention to an award made in France between a United States corporation and Ethiopian party, even though Ethiopia is not a Contracting State.[17] The Geneva Convention would not have been applicable in this case, assuming the United States had adhered to this Convention.

The Convention is also applicable to the situation where an award is made abroad in an arbitration between parties of the same nationality. This particular aspect has caused problems for the Italian courts.

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cial Arbitration", in *Commercial Arbitration – Essays in Memoriam Eugenio Minoli* (Turin 1974) p. 191 at p. 215. In this publication various other problems concerning the extent to which States are bound by the Convention are dealt with.

13. See J. McMahon, "Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States", 2 *Journal of Maritime Law & Commerce* (1970-1971) p. 735 at p. 759.

14. See for the meaning of "persons, whether physical or legal", *infra* III–4.1.2. ("State or Public Body as Party to the Arbitration Agreement"). In the text the term "party's nationality" is used as comprising the requirement that a party be subject to the jurisdiction of a State, whether it be domicile, place of (habitual) residence, place of incorporation, or (principal) place of business.

15. See *infra* n. 303.

16. See H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 13.

17. U.S. Court of Appeals (5th Cir.), July 19, 1976, Imperial Ethiopian Government *v.* Baruch Foster Corp. (U.S. no. 10).

Article 2 of the Italian Code of Civil Procedure provides namely:

> "Italian jurisdiction (*giurisdizione*) may not be derogated by agreement in favour of a foreign jurisdiction (*giurisdizione*) or arbitrators sitting abroad, unless it is in respect of a case relating to obligations between foreigners, or an alien and a citizen who neither resides nor is a domiciliary of the Republic, and the derogation is in the form of a written act." [18]

On the basis of this Article, the Court of First Instance of Ravenna refused to enforce an award made in London in an arbitration between two Italians.[19] The Italian Supreme Court, however, reversed the decision on this point. It held that the Convention, as *ius superveniens,* supersedes Article 2 of the Italian Code of Civil Procedure.[20]

The Court of First Instance of Milan had apparently not taken notice of this decision of its highest Court when shortly thereafter it refused, by virtue of Article 2 of the Italian Code of Civil Procedure, to enforce an award made in Hamburg between two Italians.[21] The Court of Appeal of Milan was needed to correct this "oversight".[22] In subsequent decisions the Italian courts have affirmed the decision of the Italian Supreme Court, and this issue now seems to be settled.

In other countries the abolishment of the nationality condition has not always been correctly applied either, although it has not led to holding the Convention inapplicable.

For example, the District Court in Michigan stated, in respect of an award made in Switzerland in an arbitration between a United States corporation and a company from West Germany:

> "Nor does the Court find any problem of lack of reciprocity that would preclude application of the Convention. Note 10 to that Convention (see U.S.C.A. par. 201, Cum.1976, p. 58) reciting the German declaration states that '. . . The Federal Republic of Germany will apply the Convention only to the recognition and enforcement of awards made *in the territory* of another Contracting State' (emphasis added by the Court)
>
> West Germany, Switzerland and the United States are all Contracting States and as the arbitration and award took place in Switzerland, it would be recognized by West Germany and also enforceable in the United States."[23]

The District Court apparently refers to F.R. Germany because of the German nationality of one of the parties involved. However, as the Convention excludes nationality as a requirement for its applicability, the Court missed the mark by inquiring whether F.R. Germany would also have enforced the award. The United

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18. See generally for Art. 2 of the Italian CCPr, G. Gaja, *La deroga alla giurisdizione italiana* (Milan 1971). See also G. Recchia, "An Italian Approach to International Conventions on Arbitration", in *Commercial Arbitration – Essays in Memoriam Eugenio Minoli* (Turin 1974) p. 393 at p. 406. Both authors deal with the term *giurisdizione* which has a somewhat different meaning than jurisdiction.

19. Tribunale of Ravenna, April 15, 1970, S.p.A. Paulo Agnesi *v.* Augusto Miserocchi (Italy no. 3).

20. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Augusto Miserocchi *v.* S.p.A. Paulo Agnesi (Italy no. 5).

21. Tribunale of Milan, December 11, 1972, Camillo *v.* CIPRA (Italy no. 6).

22. Corte di Appello of Milan, December 13, 1974, CIPRA *v.* Camillo, (Italy no. 12).

23. U.S. District Court, E.D. Michigan (South. Div.), August 9, 1976, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 11).

States having used the first reservation of Article I(3), it only mattered that the award was made in another Contracting State, namely Switzerland. As explained at the end of the preceding Section, it is in this limited sense of territorial applicability that the reciprocity underlying the first reservation is to be understood.

The law implementing the New York Convention in the United States introduces to a certain extent the nationality condition for the field of application as it declares in its Section 202:

> "An agreement or award . . . *which is entirely between citizens of the United States* shall be deemed not to fall under the Convention unless that relationship involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States" (emphasis added).

Section 202 excludes an award made in a foreign country between two United States citizens in respect of a domestic (U.S.) matter. As the Convention does not impose the nationality of the parties as a requirement for its applicability nor does it limit its scope to international commerce (see below), Section 202 must, in principle, be deemed to be incompatible with the New York Convention on this point. As will be explained in the following Section, reasons of public policy must be deemed not to play a role in this case.

I–1.3 No Internationality Required

The definition of a foreign award as "an award made in the territory of another (Contracting) State" has as consequence that in theory the Convention also applies to an award made in a foreign country in respect of a matter which is purely domestic for the country where the award was made. Thus, in Switzerland the enforcement of an award made in Paris in a dispute between a merchant from Bordeaux and a retailer in Nice concerning the sale of bottles of French wine will fall under the New York Convention. Although the Convention is primarily intended to facilitate arbitration in *international* commerce, it does not contain any indication that the underlying transaction should be international. An explanation of this absence is that, originally, the title of the ICC Draft Convention of 1953 referred to "international awards". As this expression was based on the concept of "a-national" awards – which concept was rejected in the subsequent ECOSOC Draft of 1955 and probably also at the New York Conference of 1958 – it was thought advisable to change the title to "foreign" awards. Moreover, it had proven difficult to find an appropriate definition of international commerce. The delegates therefore took it for granted that the Convention would also apply to foreign awards concerning domestic transactions.

It scarcely occurs in practice, and so far it has not occurred in any of the reported cases, that enforcement of an award concerning a domestic affair was sought abroad. However, one may conceive of the situation where the losing party has assets abroad, for example, a bank account. In principle there would not seem to exist an objection to enforcement of such awards under the Convention. It can be considered as a harmless "side-effect" of the broad definition of the scope of the Convention.

The possibility under the Convention for two parties of the same nationality to arbitrate abroad on a domestic transaction could be used in cases where their own arbitration law is unfavourable. For instance, two English parties may wish to arbitrate in Paris on a domestic (English) transaction in order to avoid the supervision of English courts over the arbitration.[24] For the enforcement in the United Kingdom, the award made in France would fall under the Convention thus excluding any form of judicial review of the merits of the arbitral decision. The possibility could also be used in those cases where the country of the parties does not have arbitration institutions for an adequate administration of the arbitration.

It may be asked whether an award made in these circumstances can be refused enforcement in the country of the parties by virtue of the public policy provision of Article V(2) of the Convention. We already touched upon this problem in the preceding Section in connection with Section 202 of the law implementing the Convention in the United States. This Section declares expressly that a foreign award made between two United States citizens in respect of a domestic (U.S.) transaction will not fall under the New York Convention.[25] The New York Convention does not, in my opinion, imply such a reserve. As noted before, the Convention conditions its scope neither upon the nationality of the parties nor upon the international nature of the transaction involved. The exclusion of these requirements cannot be re-introduced through the backdoor by use of public policy. By adhering to the Convention, a State therefore assumes a limitation on its public policy in regard to its own subjects.

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24. The much criticized English Special Case procedure under which a question of fact or law could be referred to the decision of the High Court has been abolished by the English Arbitration Act 1979. It is replaced by a right of appeal on a question of law to the High Court, which right cannot be contracted out before the dispute has arisen in the case of domestic transactions and a great number of international transactions. See C. Schmitthoff, "The United Kingdom Arbitration Act 1979", in *Yearbook* Vol. V (1980) p. 231; R. Clark and D. Lange, "Recent Changes in English Arbitration Practice Widen Opportunities for More Effective International Arbitrations", 35 *Business Lawyer* (1980) p. 1621; D. Lange, "Reform des englischen Schiedsgerichtsrechts", 26 *Recht der internationalen Wirtschaft* (1980) p. 616.

25. The reasonable relationship criterion of Sect. 202 is taken from Sect 1-105(1) of the U.S. Uniform Commercial Code. See Senate Rep. no. 91-702 p. 6. Under that Section the parties may designate the law of another State or of a foreign country to govern their transac-

This question must be distinguished from the question where parties of the same nationality arbitrated abroad with the purpose of evading, for example, mandatory tax laws. The enforcement of an award made in such a case will fall under the New York Convention, but, unlike the foregoing case, may, in my opinion, be refused by virtue of Article V(2)(b). This case is not different from the case where parties of different nationality have arbitrated abroad and the award violates mandatory tax laws of the country where enforcement is sought.

I–1.4 Convention Not Applicable in Country of Origin

I–1.4.1 *Enforcement*

The Convention is limited to the recognition and enforcement of a foreign award. It does not apply in the country in which, or under the law of which, that award was made (the "country of origin"). A United States Court of Appeals correctly did not apply the New York Convention to an award made in New York between a United States corporation and a Norwegian shipowner involving an international transaction.[26]

The non-applicability of the Convention to the enforcement of the award in the country of origin – in which country the award is a domestic award – does not matter so much since almost all countries provide for relatively easy proceedings for the enforcement of domestic awards.

It should, however, already be noted that, theoretically, the Convention may be applicable to the enforcement of an award in the country where it is made; according to the second criterion of Article I(1), the Convention "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought". As it will be explained later, the second criterion extends the field of application of the Convention to the enforcement in country A of those awards which are rendered in that country under the arbitration law of country B. The second criterion, however, has not been applied in any of the reported cases.[27]

I–1.4.2 *Setting aside*

According to Article V(1)(e) of the Convention, enforcement of an award may be refused if the party against whom the enforcement of the

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tion only if the transaction bears a reasonable relation with the State or country.

26. U.S. Court of Appeals (2nd Cir.), May 24, 1974, National Metal Converters Inc. *v.* I/S Stavborg (U.S. no. 2).

27. See *infra* I–1.5 ("Awards Not Considered as Domestic").

award is sought can prove that the award has been set aside in the country in which, or under the law of which, that award was made. This provision has a corollary provision in Article VI according to which, in the case of application for a setting aside of the award in the country of origin, the court before which enforcement of the award is sought under the Convention may, if it thinks it proper, adjourn the decision on enforcement. These provisions affirm the well-established principle of current international commercial arbitration that the court of the country of origin is exclusively competent to decide on the setting aside of the award.

We will examine the Convention's provisions relating to setting aside in more detail at a later stage.[28] For the present question concerning the Convention's field of application in regard of the arbitral award it suffices to observe that the Convention is not applicable in the action for setting aside the award. This has been unanimously affirmed by the courts.

An illustrative example is the Indian and French court decisions in the *Saint-Gobain* v. *FCIL*-case.[29] The French company Saint-Gobain had lost the arbitration conducted under the Arbitration Rules of the International Chamber of Commerce. Thereupon, two procedures were started. The French company applied for a declaration that the award had no legal effect – which is tantamount to setting aside – before the High Court of Delhi; the Indian corporation FCIL requested the enforcement of the award before the President of the Court of First Instance of Paris. Both courts demonstrated a good understanding of the Convention.

Before the High Court of Delhi, the Indian corporation FCIL opposed the application of Saint-Gobain by asserting that the award was not made in India but in Paris, and that therefore the Indian Arbitration Act of 1961, which implements the New York Convention in India, was applicable, which Act does not provide for the setting aside of the award. The High Court overruled the objection of FCIL. It found that the award had been made in India and hence Indian domestic arbitration law was applicable. Referring expressly to Article V(1)(e) of the Convention, the Court held that the Convention was not applicable and that it was competent to decide on the setting aside of the award on the basis of the Indian Arbitration Act of 1940 which applies to domestic arbitration. The High Court upheld the validity of the award under the latter law.

The French Judge also found that the award was made in India. He therefore held that the enforcement of the award was governed by the New York Convention. The Judge granted the enforcement.

Another example is a case in which the Court of First Instance in Hamburg had set aside an award made in the same city on the ground that the arbitration agreement did not comply with the written form as required by Article II(2) of the New York Convention.[30] The Court of Appeal of Hamburg rightly corrected the Court

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28. See *infra* III–4.5.3.

29. President of Tribunal de grande instance of Paris, May 15, 1970; Cour d'appel of Paris (1st Chamber), May 10, 1971 (France no. 1); High Court of Delhi, August 28, 1970, appeal rejected by the Supreme Court, November 17, 1970, Compagnie de Saint-Gobain Pont-à-Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (India no. 2).

30. Landgericht of Hamburg, March 16, 1977 (F.R. Germ. no. 13).

of First Instance on this point, by holding that the Convention was not applicable in this case, the award having been made in F.R. Germany.[31]

A further example is the Court of Appeal of Cologne which refused enforcement of an award, made in Denmark, under the Convention.[32] The German respondent, who had been blacklisted by the Copenhagen Arbitration Committee, had not only requested the refusal of the enforcement but also the setting aside of the award. The Court of Appeal observed that the blacklisting gave the German respondent a justified interest in his request. However, the Court held that a foreign award can only be refused enforcement, but that it cannot be set aside; the latter would be an inpermissible interference with foreign arbitration.

The decision of the Court of Appeal of Paris in the famous *GNMTC* v. *Götaverken*-case is worth mentioning at this juncture.[33] The case concerned an award made between the Swedish shipbuilder Götaverken and the Libyan State enterprise GNMTC. The arbitration had been conducted under the Arbitration Rules of the International Chamber of Commerce and the award indicated Paris as place of rendition.[34] The arbitral decision was that GNMTC had to take delivery of three vessels built by Götaverken and to pay the latter the last instalment of the purchase price, being US $ 30 million. GNMTC initiated before the Court of Appeal of Paris an action to have the award set aside (*appel en nullité*). The Court of Appeal dismissed the action on the ground that the award was not an award governed by French arbitration law. As far as the New York Convention was concerned, the Court of Appeal held this Convention inapplicable as follows:

> "That the provisions of the New York Convention, destined to facilitate the recognition and enforcement of arbitral awards, are not applicable if the request does not aim at the enforcement of an award rendered in an international arbitration;
>
> That no decisive argument can be drawn from the Convention for holding that the procedural law of the country where the arbitration takes place must be applied subsidiarily;
>
> That, in addition, it must be recalled that France has used the reservation contained in Article I(3) of the New York Convention by declaring that it will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State;"

The main reason for which the Court held the New York Convention inapplicable can be found in the first paragraph of the quoted part of the decision: The Convention concerns only the enforcement of foreign arbitral awards [35]; it is inapplicable to an action for setting aside on which the Court had to decide. On this point the Court was undoubtedly correct.[36]

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31. Oberlandesgericht of Hamburg, September 22, 1978 (F.R. Germ. no. 20).

32. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14).

33. Cour d'appel (1st Chamber) of Paris, February 21, 1980 (France no. 3).

34. ICC Award made in cases nos. 2977, 2978 and 3033 in 1978, published in J. Wetter, *The International Arbitral Process: Public and Private* (Dobbs Ferry 1979) Vol. II p. 179; an extensive extract of the award is published in *Yearbook* Vol. VI (1981) p. 133.

35. The Court mentions "the enforcement of an award rendered in an international arbitration". This should, in my opinion, have read "the enforcement of an award rendered in another Contracting State" or "the enforcement of an award which is not considered as domestic".

36. Fouchard in his comment on the Court of Appeal's decision (*Journal du Droit International* (1980) p. 669 at p. 673) is, in my opinion, not correct when he argues that the Convention is also applicable to means of recourse against an award. The author overlooks the fact that according to Art. I(1) of the Convention, the Convention applies only to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where

The decision is mentioned in this Sub-section because of the Court's reasoning in respect of the Convention's inappliability to the action for setting aside the award. In the two other paragraphs, quoted for completeness' sake, the Court expresses some additional – and, in my opinion, rather questionable – views regarding the Convention which will be examined at a later stage.[37]

It may be observed that the fact that the Convention does not apply in the action for setting aside the award in the country of origin, may, in theory, undermine the limitative character of the grounds for refusal of enforcement under the Convention and possibly also the uniform rule of the written form requirement of Article II(2) of the Convention. Thus, in the country of origin a losing party may obtain a setting aside on a ground not mentioned in Article V of the Convention. He can subsequently resist enforcement on ground *e* of Article V(1) that the award has been set aside in the country of origin. This has the effect that the grounds for refusal of enforcement of the Convention may indirectly be extended by the grounds for setting aside contained in the arbitration law of the country of origin. Although this may be considered as a defect of the Convention, in practice it has not led to difficulties.[38]

I–1.5 Awards Not Considered as Domestic

I–1.5.1 *Introduction*

In the preceding Sections we have examined the definition of a foreign award in Article I(1) of the Convention as being an award made in the territory of another State. Article I(1), however, also contains a second definition of a foreign award: "[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." In order to distinguish between the two definitions they will be called respectively the first and the second criterion for the field of application of the Convention.

As the outset it must be said that only the first criterion – an award made in another (Contracting) State – plays a role in practice. The second criterion – an award not considered as domestic – has remained a dead letter, and as explained below, should continue to do so. Nevertheless, this is a purposeful detour as the second criterion should not be

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the recognition and enforcement of such awards are sought". See P. Sanders, "Consolidated Commentary Vols. V and VI", in *Yearbook* Vol. VI (1981) p. 202 at p. 204.

37. See *infra* I–1.5 ("Awards Not Considered as Domestic"), and I–1.6 ("A-national Award").

38. See *infra* III–4.5.3.4 ("Is the Setting Aside of the Award in the Country of Origin a Necessary Ground for Refusal of Enforcement?").

gnored: it should be made clear that its non-application enhances a iniform application of the Convention.

How did the second criterion come in the Convention? For the nswer to this question we have to go back to the ECOSOC Draft of 955.[39] This Draft was based on the principle that an award is governed y the arbitration law of the country where the award is made. Certain ivil Law countries, like France and F.R. Germany, however, allow arties to agree that the award is to be governed by an arbitration law lifferent from the law of the country in which the award is to be nade. Thus if the parties have provided that an award is to be made in F.R. Germany under French arbitration law, a German court may egard such award as foreign and a French court may hold it domestic.

The delegates from France and F.R. Germany succeeded in advocating this concept at the New York Conference of 1958.[40] The definition of the ECOSOC Draft of 1955 that the Convention was to apply to arbitral awards made in another State remained in the Convention, but it was decided to add as a second criterion that the Convention was also to apply to awards not considered as domestic awards.

In view of this extension of the field of application, the text of the Convention was amended at two other places when the final text of the Convention was adopted at the New York Conference.[41] In the first place, the text provided that enforcement of the award could be refused if the arbitration agreement were invalid "under the law applicable to it". This was amended to the effect that it reads now: "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" (Art. V(1)(a)).[42] In the second place, the text provided that enforcement of the award could be refused if the award had been set aside "in the country in which it was made". This was amended to the effect that it reads now: "in the country in which, or under the law of which, that award was made" (Art. V(1)(e)).

The chosen formula for the second criterion, however, implies two limitations. The first limitation is that it only concerns awards made in the country where the enforcement is sought. The second limitation is that a court may apply the second criterion at its discretion. The reason for these two limitations is that the second criterion was added as a compromise. The idea was that if certain countries such as France and F.R. Germany wish to apply the Convention to awards governed by an

39. UN DOC E/2704 and Corr. 1; see *supra* Introduction at n. 16.

40. See Report of Working Party no. 1 concerning Article 1, paragraph 1 (UN DOC E/CONF. 26/L.42) and discussion at the Sixteenth Meeting of the Conference (UN DOC E/CONF.26/ SR.16).

41. UN DOC E/CONF.26/SR.23.

42. See for the legislative history, *infra* III–4.1.3.2.

arbitration law as chosen by the parties other than that of the country where made, it is their affair, but the countries which do not share this view should not be obliged to hold the Convention applicable to such awards. This compromise may have enhanced the conclusion of the Convention, but on paper it has made its field of application highly complex. An examination of both limitations may make this clear.

I–1.5.2 *First limitation: only awards made in the country where the enforcement is sought*

The first limitation that the second criterion applies only to an award made in the country where the enforcement is sought can be found in the text of the Convention: "It shall *also* apply to . . ." It is intended as an addition to the first criterion thereby widening the scope of the Convention.

The fact that the second criterion was conceived as an addition to the first criterion by the drafters of the Convention is clearly indicated in the Summary Records of the New York Conference: The Belgian delegate had proposed to amend the second criterion to the effect that it read: "Nevertheless, [the Convention] shall not apply to arbitral awards considered as domestic awards in the State where their recognition and enforcement are sought." To this proposal the Italian delegate, who formed part of Working Party no. 1, which prepared the text of the second criterion, replied that it was even more restrictive than the ECOSOC Draft "since it excluded even awards made abroad when they were regarded as domestic by the country in which enforcement was sought. Far from reflecting the Working Party's intentions, the Belgian amendment ran directly counter to them, and he would therefore be unable to support it." Thereupon the Belgian delegate withdrew his proposed amendment.[43]

The first criterion applies therefore in all cases where the award is made in another (Contracting) State, whatever may be the applicable arbitration law. The following example may clarify this.

The parties have agreed to arbitrate in country A under the arbitration law of country B. If country A allows to arbitrate under a foreign arbitration law, it will consider the award resulting from such arbitration as non-domestic. Thus, if the enforcement of the award is sought in country A, the Convention may be applicable by virtue of the second criterion. If the Convention had not contained the second criterion, it would not have been applicable as, according to the first criterion, it applies only to an award made in another State. In this sense the second criterion widens the scope of the Convention.

On the other hand, the second criterion does not narrow the scope of the Convention. As the second criterion is an addition to the first

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43. UN DOC E/CONF.26/SR.16.

criterion, both criteria cannot be used alternatively. Thus, if in the same example country B allows to arbitrate in another country – in our example country A – under its arbitration law, it will consider the award as domestic. Nevertheless, if the enforcement of the award made in country A, is sought in country B, the Convention will be applicable in country B in virtue of the first criterion. The second criterion is not applicable to this case. It applies only in those cases where the enforcement of an award is sought in the country where made and the award is governed by the arbitration of law of another country. A reasoning *a contrario* on the basis of the second criterion alone that in the country under whose law the award is made (country B) the Convention is not applicable because the award is considered as domestic, is precluded.

It should be pointed out that this consequence does not parallel the consequence of the definition of the scope of the Convention in the first criterion. As explained in I–1.4.1, the fact that the Convention applies to the enforcement of an award made in another country, precludes its applicability to the enforcement of the same award in the country where it is made. The second criterion can be regarded as an exception to this rule. However, one would have expected that if the award is made under the law of another country, the Convention would not be applicable to the enforcement of such award in that country. This mirror situation would have been logical. However, the formula used for the second criterion has broken down this logic.

Another consequence of the foregoing is also worth mentioning. Like the country under whose law the award is made, third countries are obliged to apply the Convention by virtue of the first criterion. Thus an award made in country A under the law of country B, will fall under the Convention if its enforcement is sought in country C, D, etc. However, as it can be seen in the ECOSOC Draft of 1955, the first criterion was based on the principle that the award is governed by the arbitration law of the country where it is made. It may now happen that the first criterion applies to an award which is not governed by the law of the place of rendition. The courts in country C, D, etc. must recognize the choice of a different arbitration law by the parties, not because of the second criterion of the field of application – they apply the first criterion – but because, as already mentioned, of what is provided in Article V(1)(a) and (e): "the law to which the parties have subjected" the arbitration agreement, and "in the country in which, or *under the law of which*" the award is made.

I–1.5.3 *Second limitation: second criterion is discretionary*

The second criterion will be applicable only if a court "*considers*" an award as non-domestic. It means that a court has the discretion whether or not to apply the second criterion, and hence the Convention, to an award made within its own territory. The discretionary power is the result of the second criterion being a compromise.

The discretion of a court whether or not to consider an award made within its own territory as domestic makes the faculty offered by the Convention to designate an arbitration law different from the country where the award is to be made, a hazardous undertaking.

When envisaging arbitration in country A under the arbitration law of country B, the parties should first ascertain whether the courts of country A allow such a procedure. But the inquiry should not stop here. They should also ascertain whether the courts of country B will recognize the possibility to arbitrate in another country – in our example country A – under its arbitration law.

It is well advised to check the attitude of the courts of both countries. This may be important for the purposes of knowing the court of which country is competent to render assistance in the arbitration, for example for the appointment of the arbitrators, and to exercise the control over the regularity of the arbitration and award, ordinarily carried out in an action for the setting aside of the award.

If country A does not recognize the faculty to designate a foreign arbitration law, it will hold the award made within its territory to be domestic. It will then also hold itself competent to entertain an action for the setting aside of the award. But if at the same time country B allows to arbitrate abroad under its arbitration law, it will also consider the award as domestic and may hold itself equally competent to entertain an action for the setting aside of the award. This may result in the undesirable situation where the setting aside of the award can be requested in two countries. The reverse situation may be equally undesirable: if country A recognizes the faculty, but country B does not allow to arbitrate abroad under its arbitration law, the setting aside cannot be sought in either country.

In other countries (C, D, etc.) the award made in country A will not be a problem. These countries can only deal with the enforcement of the award. As mentioned above, they have to apply the Convention by virtue of the first criterion, the award being made in another State.

It may be added that the use of the first reservation of Article I(3) according to which the Convention will be applied to arbitral awards made in other Contracting States only, does, in my opinion, not preclude the application of the second criterion. In this case, the first reservation is to be applied by analogy, in the sense that the arbitration law chosen by the parties must be the arbitration law of a Contracting State.

In the aforementioned decision of the Court of Appeal of Paris in the *GNMTC* v. *Götaverken*-case, the Court seems to adhere to the contrary view.[44] It may be re-

44. Cour d'appel (1st Chamber) of Paris, February 21, 1980 (France no. 3). The part of the Court's opinion concerning the New York Convention is quoted *supra* at n. 33.

called that the case concerned the application of the Libyan State enterprise GNTMC for the setting aside of an award rendered in Paris under the Arbitration Rules of the International Chamber of Commerce. The Court dismissed the application on the ground that the award was not an award governed by French arbitration law. The Court held the New York Convention inapplicable as the Convention is only concerned with enforcement of foreign arbitral awards.

As an additional argument for holding the Convention inapplicable, the Court referred to the fact that France has used the first reservation of Article I(3) of the Convention. Apparently the Court thought that the Convention might have been applicable on the basis of the second criterion because earlier in its opinion it had qualified the award as non-domestic. The Court then found an argument in the text of the Convention to preclude a possible applicability of the second criterion on the basis of the first reservation.

However, the use of the first reservation must be deemed not to limit the Convention's field of application to the first criterion only. If this were the case, it is unexplainable why France and F.R. Germany who introduced the second criterion into the Convention, have used the first reservation. Rather, the reciprocity idea underlying the first reservation indicates an interpretation by analogy. The idea is that a State wishes to enforce awards made in another Contracting States only because these other States have expressed their willingness to enforce awards made in the own State by adhering to the Convention. The idea can be applied *mutatis mutandis* to awards rendered in the own State under the arbitration law of another Contracting State.[45]

Moreover, the additional argument of the Court of Appeal was superfluous. Even if the Court had found that the first reservation does not preclude the application of the second criterion, then the Convention would still have been inapplicable as the case before it concerned an action for setting aside the award and not its enforcement.

I–1.5.4 *The German implementing Law*

The Law implementing the Convention in F.R. Germany [46] is probably the only law which deals to a certain degree with the second criterion. Section 2 of this Law provides:

> "(1) If an arbitral award falling under the Convention is made in another Contracting State under German procedural law, then the request for the setting aside of this award can be made in F.R. Germany. The setting aside is governed by Sections 1041, 1043, 1045(1) and 1046 of the Code of Civil Procedure.
> (2) If the request for enforcement of an award within the meaning of paragraph 1 is refused by virtue of Article V of the Convention, then the award shall be set aside at the same time in case one of the grounds for setting aside set forth in Section 1041 of the Code of Civil Procedure is present."

This Section only contemplates an award made in another country under German arbitration law. (In the example above the other country would be country A and F.R. Germany country B). It confirms the

45. See Fouchard in his comment on the Court's opinion in *Journal du Droit International* (1980) p. 669 at p. 673.

46. See for references, Annex C.

interpretation advanced in I–1.5.2 above that the Convention is applicable to the enforcement of an award rendered in another country under the law of the country in which the enforcement is sought. The Convention is applicable to the enforcement of such award, notwithstanding the fact that according to the Law the award is to be considered as domestic. The latter aspect can be inferred from the provision that a German court will be competent to set aside such award.

Section 2 is somewhat incomplete as it does not expressly regulate the situation where the award is made in F.R. Germany under a foreign arbitration law. It could have provided that in such a case no action for setting aside the award would be possible before the German courts. Probably, the German legislator deemed such a provision superfluous as it is the generally accepted view in Germany.[47]

Section 2 of the German Law was applied by a German Court of Appeal when it set aside an award made in Romania. This decision was rightly reversed by the German Federal Supreme Court holding that Section 2 was not applicable because the award was rendered in Romania under Romanian arbitration law.[48]

I–1.5.5 *Dead letter*

No court so far has held the Convention applicable to the enforcement of an award governed by a foreign arbitration law and made within its own territory. In none of the cases reported in respect of the Convention does it appear that the parties have expressly designated a foreign arbitration law. This is not surprising in view of the complications and uncertainties connected with this faculty as offered by the Convention. It is, therefore, justified to state that the second criterion has turned out to be a dead letter. It is submitted that it should remain so because the first criterion is much more reliable for determining the applicability of the Convention. It is here where practice has maintained uniformity in the application of the New York Convention.

I–1.6 "A-national" Award

Until now we have seen two types of awards which can be enforced under the Convention. The first type concerns the vast majority of cases and falls under the first criterion of Article I(1): the award made

47. K.H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 320.

48. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12). See also Landgericht of Munich, June 20, 1978 (F.R. Germ. no. 19), in which the Court observed: "As the Dutch arbitral tribunal has not applied German procedural law ... Sect. 2 of the implementing Act ... is not applicable."

in the territory of another State under the arbitration law of that State. The second type, falling under the second criterion of Article I(1), is the rather theoretical case of an award which is not considered as a domestic award because, although it is rendered in the State in which the enforcement is sought, it is made under the arbitration law of another State.

Since the beginning of the 50's there has been a tendency, in particular in French, German and Swiss legal thinking, to admit a third type of award, the so-called "a-national" award. This poses the question whether such an award can be recognized and enforced under the New York Convention. As it will be explained in this Section, the answer to this question is, in my opinion, negative.

First, the concept of an "a-national" award will be examined (I–1.6.1). Thereafter, the reasons will be given why such award is not contemplated by the Convention (I–1.6.2). Thirdly, it will be investigated how an allegedly "a-national" award can be refused enforcement under the Convention I–1.6.3). Finally, the decisions of the Dutch Supreme Court in the *SEEE* v. *Yugoslavia*-case will be discussed, as they are concerned with the question of the "a-national" award and the New York Convention (I–1.6.4).

I–1.6.1 *Concept of the "a-national" award*

The concept of an "a-national" award – sometimes also called a "supranational", "transnational", "expatriate", or "floating" award – consists in essence of an award resulting from an arbitration which is detached from the ambit of a national arbitration law by means of an agreement of the parties.[49] The authors have also invented a special term for such an arbitration: they call it "de-nationalized" arbitration.

The concept of "de-nationalized" arbitration has certain advantages. The parties may arrange the arbitration themselves, or authorize the arbitrator to do so, as they deem fit, without having regard to national arbitration laws which may contain domestically influenced particularities. The arbitration can take place anywhere as the place of arbitration would not entail the application of the arbitration law of the country concerned. The exclusion of the applicability of a national arbitration law may also have the effect that it excludes, in principle, the supervision or interference of the national courts over or with the arbitration. This type of arbitration may be especially appropriate for the settlement of disputes between States and foreign enterprises, as foreign enterprises do not like to arbitrate under the arbitration law of the

49. See, generally, Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 508; see also P. Sanders, "Trends in the Field of International Commercial Arbitration", *Recueil des Cours*, 1975-Vol. II, p. 207 at p. 270 and references given.

State concerned, and States do not like to be subjected to the (procedural) law and courts of other States.

The legal status of "de-nationalized" arbitration is, however, uncertain. It may encounter difficulties if the agreement on the composition of the arbitral tribunal and on the arbitral procedure does not regulate in sufficient detail the various aspects of these matters. These gaps cannot be filled by falling back on a national arbitration law because the parties have excluded its applicability.

Furthermore, arbitration, international as it may be, needs at least a supporting judicial authority (*autorité d'appui*), which is, failing an international authority competent in this respect, necessarily a national court. For example, the assistance of a national court may be needed for the appointment, replacement or challenge of an arbitrator. It is a generally accepted principle of the international division of judicial competence that the court of the country under the arbitration law of which the arbitration is to take, is taking, or took place, is the competent judicial authority in relation to arbitration. If the applicability of an arbitration law is excluded, it will be difficult to find such court.

This problem will be even more compelling for the setting aside of an award resulting from a "de-nationalized" arbitration. Before the court of which country should the setting aside of an "a-national" award be initiated? Yet, if in a "de-nationalized" arbitration, serious procedural violations have been committed, the aggrieved party must have the right to have such award set aside.

As far as the enforcement of an "a-national" award is concerned, the courts of only a few countries are willing to recognize an award as "a-national" and to enforce it as such.

In general, only a few countries, amongst which probably France, are willing to recognize "de-nationalized" arbitration. In most countries the concept of "de-nationalized" arbitration is unknown. In these countries the courts consider that arbitration is governed by the arbitration law of the country in which, or, rather theoretically, under the law of which, the arbitration is to take, is taking, or took place.

The Court of Appeal of Paris dismissed in the already mentioned *GNMTC* v. *Götaverken*-case the application for setting aside the award on the ground that the award was not governed by French arbitration law.[50] It reached this conclusion on the basis of the reasoning that (*a*) Article 11 of the Arbitration Rules of the Arbitration Rules of the International Chamber of Commerce of 1975, under which the arbitration had been conducted, excludes the applicability of a national arbitration law, (*b*) neither the parties nor the arbitrators had designated French arbitration law as the law applicable to the arbitration, (*c*) Paris was chosen as place of arbitration merely because of its neutrality.

50. Cour d'appel (1st Chamber) of Paris, February 21, 1980 (France no. 3); see also *supra* at n. 33 and *infra* at n. 54.

The Court's interpretation of Article 11 of the ICC Arbitration Rules seems to indicate that the Court is of the opinion that arbitration was "de-nationalized".[51] As it will be explained presently, it is submitted that this interpretation is erroneous. The decision is mentioned here in order to demonstrate to what unsatisfactory results the concept of "de-nationalized" arbitration may lead. Assuming that GNMTC has a justified interest in the setting aside of the award, where could it now initiate such action? There would be no other law than French arbitration law which could have governed this arbitration as the arbitration took place in Paris and the award was made in that city. In my opinion, the decision of the Court of Appeal of Paris is tantamount to a denial of justice.

A "de-nationalized" arbitration must be clearly distinguished from an arbitration which is "internationalized" within the limits imposed by a national arbitration law. Arbitration Rules of an arbitral institution specialized in international commercial arbitration may well make allowance for the international aspects of the arbitrations conducted under its Rules. For example, it can be provided that the nationality of the sole or presiding arbitrator may not be that of either party involved.[52] Such "internationalization" can be effectuated only to the extent that the mandatory provisions of the applicable arbitration law are not violated. In fact, when reference is made to "international commercial arbitration" , it is in the sense of an arbitration "internationalized" within the limits of an applicable national arbitration law, that this term is commonly used. The difference from the exceptional "de-nationalized" arbitration is that this concept relates to an arbitration which is conducted in disregard of any arbitration law, including its mandatory provisions.

At this juncture it is to be noted that none of the arbitral institutions which are specialized in international commercial arbitrations provide that the arbitrations conducted under their Arbitration Rules are entirely detached from the ambit of any national arbitration law. This is exemplified by the Arbitration Rules of 1976 of the United Nations Commission on International Trade Law (UNCITRAL) which provide in Article I(2): "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."

This applies, in my opinion, also to the arbitrations conducted under the Arbitration Rules of the International Chamber of Commerce. The "internationalization" of the ICC Rules goes only as far as is permitted by the non-stringent rules of the applicable arbitration law.

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51. This is also the sense in which Fouchard interprets this decision in his case comment in *Journal du Droit International* (1980) p. 669.

52. E.g., Art. 11 of the Arbitration Rules of 1979 of the Netherlands Arbitration Institute.

The Rules of Conciliation and Arbitration of the International Chamber of Commerce are sometimes described as "truly international" Arbitration Rules, thereby suggesting that the arbitral procedure under the ICC Rules is detached from the ambit of national arbitration laws. Such a "de-nationalization" of the arbitral procedure would be attained to even a larger degree in the latest edition of the Rules (1975, as amended in 1980 on some other minor points). Whereas Article 16 of the 1955 edition of the ICC Rules provided:

> "The rules by which the arbitration proceedings shall be governed shall be these Rules and, in the event of no provisions being made in these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings."

Article 11 of the 1975 edition of the ICC Rules provides:

> "The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, [and [53]] whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration."

The difference between both provisions had induced the Court of Appeal of Paris in the above mentioned *GNMTC* v. *Götaverken*-case to consider the award made in Paris as not being governed by French arbitration law because Article11 of the 1975 edition no longer attributes an even subsidiary applicability to the law of the place of arbitration.[54] It decided so notwithstanding the fact that the ICC had acknowledged that the award in question was subject to French arbitration law, and that before the Swedish Supreme Court – but not before the French Court! – the Swedish party had argued that the award was governed by French arbitration law.[55]

The opinion that under the ICC Arbitration Rules an arbitration can be "denationalized" is, in my opinion, incorrect. Although the ICC Arbitration Rules are served with an "international sauce", the arbitration under these Rules, too, must be deemed to be basically governed by the law of the place of arbitration or, theoretically, the different arbitration law chosen by the parties or the arbitrator.

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53. The word "and" appears in the English version of the 1975 edition of the Rules. This is presumably a printing error as the French text reads:

> "*Règles applicables à la procédure*:
> Les règles applicables à la procédure devant l'arbitre sont celles qui résultent du présent règlement et, dans le silence de ce dernier, celles que les parties, ou à défaut l'arbitre, determinent *en se référant ou non* à une loi interne de procédure applicable à l'arbitrage." (emphasis added)

54. Cour d'appel (1st Chamber) of Paris, February 21, 1980 (France no. 3); see also *supra* at n. 33 and 50. The dismissal of the action for setting aside the award on the ground that the award was not a "French" award may also have been influenced by the delicate issue caused by the allegation of GNMTC that the arbitrators had denatured the contracts in question by disregarding the applicability of the "Boycott of Israel"-clauses contained in them which pertain to public policy in Libya.

55. Supreme Court, August 13, 1979, Götaverken *v.* GNMTC (Sweden no. 1). The correspondence between the ICC and the arbitrators and the parties from which it appears that the ICC considered that the award was governed by French arbitration law is published in G. Wetter, *The International Arbitral Process: Public and Private* (Dobbs Ferry 1979),Vol. II pp. 200-230. In particular, by a letter of April 28, 1978, the Secretary of the ICC wrote to Götaverken, inter alia:

> "Under the applicable procedural law (Paris has been the place of arbitration) a dissenting arbitrator can refuse to sign the award which has to be confirmed by the two other arbitrators. Consequently, this award has been made in accordance with the ICC Rules of Conciliation and Arbitration and the procedural law applicable at the place of arbitration." (Wetter, pp. 229-230).

The crucial point is that an arbitral procedure – and award – can be considered to be "de-nationalized" really only if the mandatory provisions of national arbitration laws are made inapplicable.

The ICC Rules cannot be deemed to have gone to such extent. This is confirmed by Mr. Eisemann, the former Secretary-General of the ICC, who wrote when commenting upon the 1975 edition of the Rules:

> "In a certain number of contracts, the parties fix the place of arbitration, but in the majority of cases this is left to the Court of Arbitration to fix, bearing in mind the convenience of the parties and of the arbitrators and also *any possible difficulties as to mandatory procedural law* in any particular place which might otherwise be chosen. In so far as it is possible, the Rules try to avoid any confusion between the place of arbitration and the application of local procedural laws. *With the exception of mandatory provisions*, the Rules leave the choice of procedure to the parties or, in default of agreement between the parties, to the arbitrators." (emphasis added) [56]

The supremacy of the mandatory provisions of the arbitration law over the ICC Rules is also confirmed by the court decisions involving ICC arbitration, with the exception of the above quoted Court of Appeal of Paris.[57]

It should be emphasized that the question whether arbitration can be "de-nationalized", must be distinguished from the question whether the parties are free to provide that the arbitrator is not bound to apply a national law to the *substance* of the dispute. Whilst the legal status of "de-nationalized" arbitration is uncertain, the detachment of the substance from the ambit of national laws will generally not encounter difficulties. The main reason is that the national courts will as a rule not review the merits of the arbitrator's decision. The "de-nationalization" of the substance in international arbitration is, in fact, increasingly gaining acceptance.[58] This is a welcome development which may eventually lead to the establishment of a new arbitral *lex mercatoria*.

The concept of a "de-nationalized" arbitration and the ensuing "a-national" award is attractive and deserves more support then it has received so far. However, the insufficient legal basis and the absence of recognition by most national courts make the agreement for "de-nationalized" arbitration a hazardous undertaking full of legal pitfalls. It is therefore not surprising that only in very exceptional cases such an

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56. F. Eisemann, "The Revised Rules of Arbitration of the International Chamber of Commerce", in *Yearbook* Vol. I (1976) p. 167 at pp. 168-169. In this connection Arts. 12 and 22 may be quoted. Art. 12, headed "Place of Arbitration", provides:

> "The place of arbitration shall be fixed by the Court [of Arbitration], unless agreed upon by the parties."

Art. 22, headed "Making of Award", provides:

> "The arbitral award shall be deemed to be made at the place of the arbitration proceedings and on the date when it is signed by the arbitrator."

57. E.g., Tribunal Fédéral Suisse, March 17, 1976, Bucher-Guyer S.A. *v.* Meiki Co. Ltd., *Arrêts du Tribunal Fédéral* 102 Ia 493, reported in *Yearbook* Vol. V (1980) p. 220.

58. See generally, J. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry 1978); P. Sanders, "Trends in the Field of International Commercial Arbitration", *Recueil des Cours*, 1975 Vol. II, p. 207 at p. 238.

agreement is made. In most of those cases in which it is said that the parties had provided for a "de-nationalized" arbitration, it appears that this was the interpretation of certain authors *ex post,* but that the parties at the time of concluding the agreement had no idea that they were making such a daring agreement. In practice it is virtually always the understanding of the parties that that if they have provided for arbitration in a certain country, the arbitration law of that country is to govern their arbitration.

The sole realistic approach to providing the "de-nationalized" arbitration and hence the "a-national" award with a sufficient legal basis seems to be international conventions. Such a basis is provided for investment disputes between States and foreign enterprises by the Washington Convention of 1965.[59] This brings us to the main question of this Section, whether such a basis can also be found in the New York Convention.

I–1.6.2 *Does the "a-national" award fall under the Convention?*

It was the International Chamber of Commerce which first launched the idea of an arbitral award completely independent of any national arbitration law in its Draft Convention of 1953. This idea was not taken over in the ECOSOC Draft Convention of 1955. Although the extensive debates at the New York Conference are not entirely clear on this point, it can be assumed that the idea was also rejected by the majority of the delegates. The legislative history of the Convention therefore would indicate that the Convention is not to apply to an "a-national" award.

The Geneva Convention of 1927 provided in Article 1(2)(c) that to obtain enforcement of the award it was necessary:

> "That the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties *and* in conformity with the law governing the arbitration procedure." (emphasis added)

The "law governing the arbitration procedure" was in turn defined in Article 2(1) of the Geneva Protocol of 1923 as follows:

> "The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties *and* by the law of the country in whose territory the arbitration takes place." (emphasis added)

According to the prevailing interpretation, these provisions mean that even in the case of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, these matters had to comply with at least the mandatory provisions of the law of the country where the arbitration took place, when enforcement of an award was sought under the Geneva Convention of 1927.[60]

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59. See *infra* I–4.4.3*a*.

60. See H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 33 and p. 56.

Moreover, compliance of these matters with the governing law and, if any, the agreement of the parties had to be proven by the claimant "when necessary" according to Article 4(1)(3) of the Geneva Convention of 1927.

The International Chamber of Commerce considered the Geneva Convention's main defect to be that it provided for "the enforcement of only those awards that are strictly in accordance with the rules of procedure laid down in the law of the country where the arbitration took place". According to the ICC "there could be no progress without full recognition of the conception of international awards . . . i.e., an award completely independent of national laws".[61] It therefore proposed a Draft Convention for the enforcement of "international" arbitral awards. In pursuit of the idea of the international award, the ICC provided in Article III(b) of its Draft Convention of 1953 that it would be necessary in order to obtain enforcement:

> "that the composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where the arbitration took place."

The ECOSOC Committee was not charmed by the conception of the ICC of an "award completely independent of national laws", arguing that it might well involve ousting the jurisdiction of the courts of the country where the arbitration took place. This was, according to the Committee, unacceptable as the exclusion of any control by national courts might lead to injustice and abuse. The ECOSOC Committee therefore referred, for the scope of its Draft Convention of 1955, to the enforcement of "foreign" awards instead of "international" awards as the ICC Draft did. On the other hand, the Committee recognized that where the parties had agreed regarding the arbitral procedure, it might be unnecessary and perhaps cumbersome to prescribe that the composition of the arbitral tribunal and the arbitral procedure "should follow in all details the requirements of national laws".[62] The Committee conceived the following solution for this problem in its Draft Convention: Enforcement of the award may be refused if the court is satisfied:

> "that either the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties *to the extent that such agreement was lawful in the country where the arbitration took place,* or, failing such agreement between the parties in this respect, was not in accordance with the law of the country where the arbitration took place." (emphasis added)

This attempt of the ECOSOC Committee to find a compromise between the Geneva Convention of 1927 and the ICC Draft Convention of 1953 was doomed to failure: what should be understood by "lawful"? No wonder that the ECOSOC formula found strong opposition, inter alia, from the Governments of France, F.R. Germany and Switzerland. They pointed out that this provision could cause the frustration of awards if any differences, however small and insignificant, would be found to occur between the arbitral procedure agreed upon by the parties and the law of the country where the arbitration took place.[63] In other words, they interpreted the ECOSOC formula in the same sense as the Geneva Treaties.

During the New York Conference the ECOSOC Committee's proposal that the Convention was to apply to the enforcement of "foreign" awards was retained. However, the Committee's formula concerning the agreement regarding the compo-

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61. International Chamber of Commerce, *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention*, ICC Brochure no. 174 (Paris 1953) p. 7 (reproduced in UN DOC E/C.2/373).

62. UN DOC E/2704 and Corr. 1, paras. 43-44.

63. UN DOC E/2822 p. 8.

sition of the arbitral tribunal and the arbitral procedure was hotly debated. The delegates, inter alia, from Italy, Norway and Turkey, wished to keep the formula, arguing that the impression should not be left that the parties could agree on the composition of the arbitral tribunal and the arbitral procedure independent of any law. The French delegate responded that the "[The] Committee's Draft recognized the autonomy of the parties only to destroy it immediately".[64]

Working-Party No. 3, to which the drafting of the provision was referred, came up with a text which is identical to the present text of Article V(1)(d). As it had decided to delete the ECOSOC formula reading "to the extent that such agreement was lawful in the country where the arbitration took place", the text was similar to the one proposed by the International Chamber of Commerce in its Draft Convention of 1953.

The members of Working Party No. 3 gave seemingly contradictory explanations why the ECOSOC formula had been deleted. According to the Summary Records, the Chairman of the Working Party declared that according to paragraph 1(a):

> "the enforcement of the award can be refused if the agreement of the parties to submit to arbitration was not valid under the applicable law. In view of the added provision the Working Party agreed that there was no need to subordinate the arbitral procedure chosen by the parties to the law of the country where the arbitration took place . . ."[65].

On the other hand, the Italian member of Working Party No. 3 stated:

> "the text of paragraph 1(d) prepared by the Working Party, although similar to the proposal originally submitted by the International Chamber of Commerce, had been inserted on the understanding that the parties enjoyed discretion only to the extent that they could select the national law applicable in the matter. Consequently, the Working Party's text should not be interpreted to mean that the parties could agree to disregard all national laws and determine some special procedure applicable to their case alone."[66]

Considering the text proposed by the Working Party, the delegate from Yugoslavia moved for an amendment to reinstate the ECOSOC formula.[67] The delegate from the United Kingdom opposed to this amendment declaring that as a member of the ECOSOC Committee he had originally put forward the formula, but it was now incompatible with the terms of paragraph 1(a). The Yugoslav amendment did not attain the required majority.[68]

Apparently, the reference to paragraph 1(a), according to which enforcement of the award could be refused if the arbitration agreement was not valid "under the law applicable to it" (as the text stood at that stage of the Conference [69]), convinced the majority of the delegates that no mention of the applicable law was needed in paragraph 1(d). Presumably, they supposed that where the arbitration agreement is governed by a national law, the arbitral procedure would also be governed by a law. On the other hand, the deletion of the ECOSOC formula may be deemed to have been prompted by the desire to abandon the cumbersome requirement of the Geneva Convention of 1927 that in the enforcement proceedings of an award under the Convention, the law of the country could interfere in the case that the parties had made an agreement on the composition of the arbitral tribunal and the arbitral procedure. This could make clear that, although Article V(1)(d) of the Convention

64. UN DOC E/CONF.26/SR.12, 14 and 17.
65. UN DOC E/CONF.26/SR.17.
66. *Id*.
67. UN DOC E/CONF.26/L.45.
68. UN DOC E/CONF.26/SR.17.
69. See *infra* III–4.1.3.2 (legislative history of the conflict rules of Art. V(1) (a)).

is similar to the text proposed by the ICC in its Draft Convention of 1953 concerning "international" awards, it was not intended to provide in Article V(1)(d) for the "de-nationalized" agreement of the parties on the arbitral tribunal and arbitral procedure. Considered in this light, the seemingly contradictory explanations of the Chairman and the Italian member of Working Party No. 3 would point to the same thing, namely the extent of control by the court before which the enforcement of the award is sought under the Convention over the regularity of the composition of the arbitral tribunal and the arbitral procedure.

It is not only the legislative history of the Convention which seems to be contrary to the Convention's applicability to the "a-national" award. The system and text of the Convention too appear to be against such interpretation. The Convention applies to the enforcement of an award made in another State. Those who advocate the concept of the "a-national" award, on the other hand, deny that such award is made in any particular country ("*sentence flottante*", "*sentence apatride*"). How could such award then fit into the Convention's scope?

Leaving aside this argument, the true question for the problem of the Convention's applicability to the "a-national" award is whether the Convention *requires* for its field of application that the award be governed by a national arbitration law. The definition of the Convention's scope in Article I(1) and (3) does not state expressly that the award made in another (Contracting) State must be subject to a national arbitration law. However, this is clearly implied if Article I is read in conjunction with the other provisions of the Convention. According to Article V(1)(a) enforcement of an award may be refused if the respondent can prove that the arbitration agreement is invalid "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". Even more significant is Article V(1)(e) according to which enforcement of an award may be refused if the respondent can prove that the award has been set aside by a court of "the country in which, or under the law of which, that award was made". Especially the latter provision indicates that the Convention is built on the presumption that the award is governed by a national arbtiration law since the setting aside of an award belongs to the exclusive jurisdiction of the court under whose arbitration law the award is made. The argument that for the "a-national" award Article V(1)(a) and (e) can be considered as non-written would be an interpretation which goes squarely against the text of the Convention.

It is advanced that the second criterion of the Convention's field of application as contained in Article I(1), i.e., that the Convention applies also to arbitral awards which are not considered as domestic, would also include "a-national" awards.[70] However, the legislative history of the

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70. This is the opinion of Fouchard in his case comment on the Cour d'appel (1st Chamber)

Convention is unequivocally clear that this criterion was inserted for the enforcement of those awards, which are made in the State where the enforcement is sought, under the arbitration law of another State.[71] Such an award is definitely not an "a-national" award, and it has never been the intention to include this type of award when drafting the second criterion.[72] What was observed above for the relationship between the first criterion of Article I(1) and Article V(1)(a) and (e) must be deemed to apply with equal force to the relationship between the second criterion of Article I(1) and Article V(1)(a) and (e).

It is also argued that Article V(1)(d) would provide a basis for applying the Convention to the enforcement of an award which is not governed by a national arbitration law.[73] That provision declares that the enforcement of an award may be refused if the respondent can prove that:

> "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".

According to this provision, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first; only in the absence of such agreement the law of the country where the arbitration took place is to be taken into account.

The argument is based on two considerations. First, the legislative history of the Convention would indicate that by this provision the drafters of the Convention intended to provide for the possibility of a "de-nationalized" arbitration and hence an "a-national" award. The legislative history as outlined above, however, seems to negate such intent, or, at least, is unclear in this respect.

The second consideration is that since Article V(1)(d) is significantly different from Article V(1)(a) and (e), it must mean something different. Thus, Article V(1)(d) would have to be interpreted according to what it says: if there is an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, the agreement need not be governed by a national arbitration law.[74] It is, however, inconceiv-

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of Paris, February 21, 1980 (France no. 3) GNMTC *v.* Götaverken in *Journal du Droit International* (1980) p. 669 at 673.

71. See *supra* I–1.5 ("Awards Not Considered as Domestic").

72. Accord, P. Sanders, "Consolidated Commentary Vols. V and VI", in *Yearbook* Vol. VI (1981) p. 202 at p. 204.

73. This is the opinion of the Dutch Supreme Court, discussed *infra* I–1.6.4 The literature concerning Art. V(1) (d) and the question of "de-nationalization" is abundant. Extensive references can be found in G. Gaja, "Introduction", in *New York Convention* (1978-1980) I.C.3 at n. 67-70.

74. See P. Schlosser, *Das Recht der privaten internationalen Schiedsgerichtsbarkeit* (Tübingen 1975) no. 420; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 381; Ph.

able that, whereas Article V(1)(a) and (e) refer to a law applicable to the arbitration agreement and award, a "legal vacuum" could exist between the two in respect of the composition of the arbitral tribunal and the arbitral procedure.[75]

It is true that the present text of Article V(1)(d) is open to confusion. However, the arguments used by those who interpret this provision as including the "de-nationalized" arbitration do not sound convincing in view of the history, system and text of the Convention. It is submitted that a more realistic interpretation is that this provision is aimed at a reduction of the extent of judicial control over the regularity of the arbitration when the enforcement of the award is sought under the Convention in another State. This interpretation was already alluded to at the end of the discussion of the legislative history above.[76] The provision seems to be inspired by the concern of the drafters of the Convention about the extensive control which a court could exercise under the Geneva Convention of 1927. I will elaborate my interpretation of Article V(1)(d) when examining this provision as ground for refusal of enforcement of the award.[77] For the purposes of the present discussion it may suffice to mention that this interpretation means that if the parties have made an agreement in respect of the composition of the arbitral tribunal and the arbitral procedure, it is no ground for refusal of enforcement that such agreement violates the law governing the arbitration. For such a violation the aggrieved party should ask the setting aside of the award in the country of origin. If the setting aside is accorded in that country, then, and only then, the enforcement may be refused in another Contracting State on the basis of Article V(1)(e) of the Convention providing that enforcement of the award may be refused if 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".

It should be made patently clear that even if it were assumed that Article V(1)(d) of the Convention were to include "de-nationalized" arbitration, this would affect only the enforcement proceedings of the award resulting therefrom (the "a-national" award).[78] This would have two consequences.

Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 512.

75. Accord, F.-E. Klein, "La Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères", 57 *Revue Suisse de Jurisprudence* (1961) p. 229 at p. 248; A. Bülow, "La convention des parties relative à la procédure d'arbitrage visée à l'art. 5 al. 1 lit. d de la Convention de New York", in *Arbitrage Commercial – Essays in Memoriam Eugenio Minoli* (Turin 1974) p. 81.

76. See *supra* at n. 65-69.

77. See *infra* III–4.4.2 ("The Role of the Law of the Country Where the Arbitration Took Place According to Article V(1) (d)").

78. The reasoning as elaborated in the text applies *mutatis mutandis* to the enforcement of an agreement aiming at such award. In this case too, enforcement cannot be based on the Con-

The first consequence would be that a "de-nationalized" arbitration cannot be based on the Convention at other instances, as the Convention is inapplicable thereto. Thus, when the Court of Appeal of Paris observed in the *GNMTC* v. *Götaverken*-case that no argument can be drawn from the New York Convention that the law of the place of arbitration would apply subsidiarily [79], such statement is incorrect not only because the Convention does suppose that a national arbitration law is applicable, but also because the Court should not have applied the Convention at all, as the action before it concerned an action for setting aside the award.

The second consequence would be that, in any case, the Convention would give an insufficient legal basis for "de-nationalized" arbitration. It would not provide "de-nationalized" arbitration with an overall regulation as, for instance, the Washington Convention of 1965 does for investment disputes between States and foreign private parties.

I–1.6.3 *Refusal of enforcement of an "a-national" award*

Having concluded that the Convention requires for its field of application that the award be governed by a national arbitration law and that therefore an "a-national" award cannot be enforced on the basis of the Convention, a following question is how this requirement can be effectuated under the Convention.

It is submitted that, as an award not governed by any national arbitration law is so exceptional, the presumption must be that, if an award is made in the territory of another (Contracting) State, that award is governed by the arbitration law of that State. Accordingly, when seeking enforcement of an award under the Convention, the claimant need not prove that the award is governed by the law of the State in which it is made (which condition, moreover, he is not required to fulfil according to Art. IV). Nor does the court need to examine on its own motion whether the award is governed by a national arbitration law. It is the respondent who has the onus of proving that enforcement cannot be granted on the basis of the Convention because the award is not governed by a national law.

This burden of proof will be especially difficult for him as he may resist enforcement only on the grounds exhaustively listed in Article V(1). In fact, the only possibility to oppose to enforcement on the ground that the award is not governed by an arbitration law, is to obtain a declaration of the court in the country in which the award was made that the award is not an award within the purview of its arbitration law. This declaration can be equated to a setting aside for which enforcement may be refused according to Article V(1)(e).[80]

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vention (i.e., its Art. II(3)). When dealing with the question which arbitration agreements can be enforced under the Convention (see *infra* I–2), I will not refer again to this type of agreement.

79. Cour d'appel (1st Chamber) of Paris, February 21, 1980 (France no. 3). See *supra* at n. 33.

80. This, of course, does not apply if the claimant can in turn establish that the award is →

I–1.6.4 *Dutch Supreme Court: SEEE v. Yugoslavia*

The question whether an "a-national" award falls under the Convention has been decided affirmatively by the Dutch Supreme Court in the Dutch part of the "continuing story" – already lasting more than 25 years – of the *SEEE* v. *Yugoslavia* drama. The Supreme Court found, however, that the award in question did not constitute such an award.

In the arbitration, in which Yugoslavia did not participate, an award was made by two arbitrators, Messrs. Panchaud and Ripert, in the Canton Vaud, Switzerland.[81] After the award had been deposited by SEEE with the Tribunal of the Canton Vaud, Yugoslavia instituted an action for setting aside. The Tribunal did not set aside the award, but ordered that the award be given back to the party who had deposited it on the ground that the decision was not an arbitral award within the meaning of Article 516 of the Code of Civil Procedure of the Canton Vaud which required an odd number of arbitrators.[82]

After several unsuccessful attempts to have the award enforced in a number of countries, enforcement was sought in the Netherlands. The Hague Court of Appeal also refused enforcement, holding that the award was not an award within the meaning of the Convention.[83] The Court reasoned that, although Article V(1)(d) gives the parties the freedom to regulate the composition of the arbitral tribunal and the arbitral procedure, the award must by virtue of Article V(1)(e) be deemed to be governed by a national law. As the Tribunal of the Canton Vaud did not consider the award as governed by its Code of Civil Procedure, the Court deemed that the award had not been made in the territory of another Contracting State, and that, hence, the Convention was inapplicable.

The Court of Appeals was undoubtedly correct that Article V(1)(e) implies that the Convention applies only to an award which is governed by a national law. However, the Court ignored the system of the Convention that the fact that an award is not governed by a national law is to be proven on the basis of the grounds for refusal of enforcement enumerated in Article V(1). If it had reasoned that the giving back of the award by the Tribunal of the Canton Vaud was to be equated to a setting aside within the meaning of Article V(1)(e), the Dutch part in the drama would presumably have ended at the next round before the

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made under the arbitration law of a State other than the State where it is made. But this is a hypothetical case.

81. The award is published in French and English in *Journal du Droit International* (1959) p. 1074.

82. Tribunal of the Canton Vaud, February 12, 1957, affirmed by the Tribunal Fédéral (Chambre de droit public), September 18, 1957, published in *Revue critique de droit international privé* (1958) p. 358.

83. Hof of The Hague, September 8, 1972 (Neth. no. 2A).

Dutch Supreme Court. Instead, it took three more rounds before that became clear.

The Dutch Supreme Court quashed the decision of the Court of Appeal of The Hague.[84] The Supreme Court reasoned that the court before which the enforcement of a Convention award is sought may not, before giving its decision, examine the relationship between the award and the law of the country where it was made and, failing such relationship, refuse enforcement. According to the Supreme Court, the relationship between the award and the law of a particular country need only to be examined within the limits necessary for an examination to be carried out following the invocation that the grounds mentioned in Article V(1) exist, in particular, grounds, *a, d* and *e*. The Supreme Court concluded that the Court of Appeal had reached its decision on incorrect grounds because it had refused enforcement outside the limits for an examination of the grounds for refusal set forth in Article V(1).

The Supreme Court was right in holding that an enforcement court may not examine on its own motion whether the award is governed by a national law. The fact that the Supreme Court did not mention that the giving back of the award could be equated to a setting aside within the meaning of Article V(1)(e) is because the Court had something different in mind: it appeared from its second decision in this case that the Court meant with this reasoning the "a-national" award.

The Hague Court of Appeal again refused enforcement, this time based on a violation of public policy.[85] SEEE appealed thereupon for a second time to the Dutch Supreme Court. The latter reversed the Hague Court of Appeal on the public policy issue [86], but then reached the conclusion that the order of the Tribunal of the Canton Vaud was to be equated to a setting aside of the arbitral award as mentioned in Article V(1)(e) of the Convention.[87]

"All is well, that ends well", one would think. However, the Supreme Court added in an *obiter dictum* that it would have reached the same decision if, on the basis of Article V(1)(d) of the Convention, it is assumed that the Convention also includes the recognition of arbitral awards made by arbitrators which, as a consequence of the procedural rules adopted by the parties in their agreement, cannot be deemed to have been rendered according to the law of a particular country. By making this additional observation the Court indicated what it meant

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84. Hoge Raad, October 26, 1973 (Neth. no. 2B).
85. Hof of The Hague, October 25, 1974 (Neth. no. 2C).
86. See *infra* III–3.2 ("No Review of the Merits of the Arbitral Award").
87. Hoge Raad, November 7, 1975 (Neth. no. 2D). It is interesting to note that in his comment on the first decision of the Dutch Supreme Court in the SEEE *v.* Yugoslavia case, Prof. Battifol had suggested that the order of the Tribunal of the Canton Vaud to give back the award could be equated to a setting aside within the meaning of Art. V(1) (e), see *Revue de l'arbitrage* (1974) p. 326 at p. 330.

by its reasoning in its first decision in this case, i.e, the award resulting from an arbitration which is "de-nationalized" by the agreement of the parties. It is interesting to see how the Supreme Court reconciled both decisions: it argued that in the present case there could be no question of such an award since the arbitration agreement in question dated from long before the conclusion of the Convention and, hence, that the agreement could not have aimed at an "a-national" award as allegedly envisaged by the Convention.

The decisions of the Dutch Supreme Court imply a distinction between an award that is the result of an arbitration which is "de-nationalized" by the agreement of the parties – the "a-national" award – and an award which is not governed by an arbitration law for another reason. In the former case the Supreme Court considers on the basis of Article V(1)(d) that such award can be enforced under the Convention. In the latter case, as exemplified by the *SEEE* v. *Yugoslavia* award, the Supreme Court considers the award unenforceable under the Convention because of Article V(1)(e). There is no need to repeat here the arguments, elaborated in the preceding Sub-sections for which the view of the Supreme Court that an "a-national" award can be enforced under the Convention is to be rejected. The distinction implied by the Supreme Court is therefore unnecessary as the Convention must be deemed to imply the requirement that in any case an award be governed by a national law on arbitration. If it can be proven that an award is not governed by an arbitration law, it cannot be enforced under the Convention. The decision of the Supreme Court demonstrates that this proof can be furnished on the basis of Article V(1)(e).

It may be recalled that in the *GNMTC* v. *Götaverken*-case the Court of Appeal of Paris dismissed the application for setting aside the award made in Paris considering that the award was not an award governed by French arbitration law.[88] The Court's reasoning indicates that it regards the arbitration as "de-nationalized".[89] It may therefore be fortunate for Götaverken, which had sought the enforcement of the award in Sweden, that the Swedish Supreme Court refused to adjourn its decision on the enforcement and granted the enforcement of the award under the Convention before the Court of Appeal of Paris rendered its decision.[90] The Swedish Supreme Court had no difficulty in considering the award as having been made under French arbitration law. If the decision of the Court of Appeal of Paris had been rendered before the decision of the Swedish Supreme Court, the Swedish Supreme Court might have faced a problem similar to the one before the Dutch Supreme Court in the *SEEE* v. *Yugoslavia*-case.

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88. Cour d'appel (1st Chamber) of Paris, February 21, 1980, GNMTC *v.* Götaverken (France no. 3).

89. See *supra* at n. 50-51 and 54-56.

90. Swedish Supreme Court, August 13, 1979, Götaverken *v.* GNMTC (Sweden no. 1). See also *infra* III–4.5.3.3 ("Adjournment of the Decision on Enforcement (Art. VI)").

I–1.7 Arbitrato Irrituale etc.

The criteria whereby an award falls under the New York Convention have now been examined, except for the commercial reservation of Article I(3) about which in I–1.8 hereafter. We have, however, not yet dealt with the question of when an arbitral award can be considered as such under the Convention. This question has come up in practice in connection with the Italian institution known as *arbitrato irrituale* ("informal" or "free" arbitration).

The New York Convention itself does not give a definition of what must be understood by an arbitral award. It seems therefore appropriate to distill the notion of what constitutes an arbitral award from what is generally understood by arbitration in the national legal systems. Virtually all countries have a Law on Arbitration contained either in the provisions of the Code of Civil Procedure or in a separate Arbitration Act.[91] Although these Laws differ greatly amongst themselves, in principle, they have in common that arbitration is understood as the resolution of a dispute between two or more parties by a third person (arbitrator) who derives his powers from an agreement (arbitration agreement) of the parties, and whose decision is binding upon them. The gist of the notion of arbitration as regulated by most of the Laws on Arbitration is that it is conceived as a substitute for court litigation. Accordingly, the majority of the Laws on Arbitration imply that the matter submitted to the arbitrator must concern a judicially triable issue.

The matters which can generally not be submitted to arbitration are, for instance, the cases where the *sole* task entrusted to the third person is the determination of the amount due for losses under an insurance policy, the technical verification of a vessel under construction with the drawings, the determination of goods in conformity with contractual description [92], and the completion of terms of the contract which the parties have deliberately left open at the conclusion thereof (the so-called "filling of gaps").[93] It should be noted, however, that in certain countries some of

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91. An example of one of the few countries which does not (yet) have an Arbitration Law is Saudi Arabia. See S. Hejailan, "National Report Saudi Arabia", in *Yearbook* Vol. IV (1979) p. 162. On the other hand, there are still a considerable number of countries which do not have an adequate arbitration law, especially in Africa and Latin America, see my articles "Arbitration and the Third World", in the *Financial Times*, December 6, 1978, p. 11, and "Arbitrage commercial en Amérique latine", *Revue de l'arbitrage* (1979) p. 123.

92. The determination of whether the quality of goods is in conformity with the contractual description is commonly referred to as "quality arbitration". In many cases this is a misleading term as it is not arbitration proper but pertains legally to a procedure akin to arbitration. See for quality arbitration, K. Straatmann, "Die Qualitätsarbitrage. Eine Rechtsschöpfung des Ueberseehandels", in H.-P. Ipsen et al. eds., *Recht Ueber See. Festschrift für Rolf Stödter zum 70. Geburtstag am 22. April 1979* (Heidelberg 1979) p. 109.

93. See for a general discussion of the filling of gaps in a contract by third persons, *Fifth International Arbitration Congress, New Delhi 1975, Proceedings* (New Delhi 1976), Working Group 4. The reports and communications of Working Group 4 are reproduced in French in

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these matters are nevertheless considered to be arbitrable, or at least, it is current practice to do so.[94] It would carry too far to make in this study a comparative examination on this question, although there is, in my opinion, a great need for such examination.

As arbitration has the effect of excluding the competence of the courts, the statutory provisions on arbitration have been enacted to give this means of private settlement of disputes the necessary safeguards. The Laws on Arbitration therefore lay down – although with differing degrees of comprehensiveness – provisions for the form and contents of the arbitration agreement and for the arbitral procedure, and usually provide for a summary procedure for the enforcement of the award. The courts can be called upon for their assistance in the constitution of the arbitral tribunal and the proper functioning of the arbitral procedure, and they can exercise a control over the regularity of the arbitration and award, usually in a special procedure for setting aside the award or equivalent procedure.

For matters which can generally not be submitted to the decision of a court and hence not to arbitration as regulated by the Law on Arbitration, certain legal systems have developed procedures akin to what may be called arbitration proper. These procedures are, for instance, *Schiedsgutachten* in Austria and F.R. Germany (as opposed to *Schiedsgerichtsbarkeit* which is arbitration proper) [95], *bindend advies* in Indonesia and the Netherlands [96], valuation or appraisal in England and the United States [97], and *arbitrato irrituale* in Italy (see hereafter). As a rule, it is characteristic of these procedures that the proceedings are not adversary and that the third person makes the decision on the basis of his expert knowledge and experience. They are sometimes referred to as arbitration of civil law, as opposed to procedural law arbitration.[98]

Revue de l'arbitrage (1975) p. 3; see also P. Sanders, "Trends in the Field of International Commercial Arbitration", *Recueil des Cours*, 1975-Vol. II, p. 207 at p. 227. The International Chamber of Commerce has recently made available Rules for the Adaption of Contracts (in force as of June 1978, ICC Publication no. 326). In these Rules the ICC has based the adaption of contracts solely on contract. Accordingly, Art. 11(3) provides:

> "When the third person takes a decision, that decision is binding on the parties to the same extent as the contract in which it is deemed to be incorporated. The parties agree to give effect to such a decision as if it were the expression of their own will."

94. For example, in California and New York appraisal can be achieved by means of arbitration. See M. Domke, *infra* n. 97.

95. See generally, K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 5; O. Glossner, "National Report F.R. Germany", in *Yearbook* Vol. IV (1979) p. 60 at p. 61.

96. P. Sanders, "National Report Netherlands", in *Yearbook* Vol. VI (1981) p. 60 at p. 61; R. Soebekti "National Report Indonesia", in *Yearbook* Vol. V (1980) p. 84 at p. 86.

97. J. Paris, *The Law and Practice of Arbitration* (London 1974) p. 10; M. Domke, *The Law and Practice of Commercial Arbitration* (Mundelein 1968-1979) p. 6.

98. R. David, "L'arbitrage en droit civil, technique de régulation des contracts", in *Mélanges dédiés à Gabriel Marty* (Toulouse 1979) p. 383.

From the legal point of view, the above procedures are purely contractual. They are not governed by the provisions of the Law on Arbitration. Consequently, they are not subject to the procedural safeguards offered by that Law. They cannot, as a rule, benefit from the assistance of the courts, for instance, for the appointment of the third person in cases where the parties have failed to agree thereon. The decision of the third person merely has the force of a contract between the parties. It cannot be enforced as an award in a summary procedure, but only by means of an ordinary contract action, which may include a review by the court of the merits of the decision.

As already mentioned, failing a definition of what must be understood by an arbitral award under the New York Convention, this notion should be distilled from what is generally understood by arbitration under the national legal systems. This appears to be the procedures governed by the Law on Arbitration; procedures akin to arbitration not governed by the Law on Arbitration fall outside this notion. Accordingly, those decisions which are not considered as the result of arbitration proper in the country of origin must be deemed not to come within the purview of the New York Convention and cannot be enforced as a foreign arbitral award under it.[99] This may also be regarded as having been the understanding of the drafters of the Convention who did not discuss the topic at all.

This interpretation of the meaning of an arbitral award under the New York Convention is not followed by the Italian Supreme Court. The case, to be discussed hereafter, concerned the question whether *arbitrato irrituale* falls under the New York Convention, which question was answered in the affirmative by the Italian Supreme Court.

Before discussing the interpretation given by the Supreme Court, it may be appropriate for the proper understanding of the Court's decision to dedicate a few words to the Italian *arbitrato irrituale*.[100] Arbitration proper (*arbitrato rituale*, formal arbitration) is governed by Sections 806-831 of the Italian Code of Civil Procedure of 1942. As those provisions were felt to be quite burdensome – for instance, the award must, on pain of nullity, be deposited with the court within five days after rendition, and the deposit involves a tax of 2 per cent on the sum awarded – practice started to use the contractual institution, originally intended for valuation etc., as a substitute for formal arbitra-

99. This applies *mutatis mutandis* to the enforcement of an agreement concerning a procedure akin to arbitration. In this case too, the enforcement cannot be based on the Convention (i.e., its Art. II(3)). When dealing with the question which arbitration agreements can be enforced under the Convention (see *infra* I–2), I will not refer again to this type of agreement.

100. See generally, G. Bernini, "National Report Italy", in *Yearbook* Vol. VI (1981) p. 24; see also G. Recchia, "Arbitrato irrituale", in *Appendice del Novissimo Digesto Italiano* (Turin 1979) pp. 3-19, which includes an extensive bibliography.

tion. This procedure became known as *arbitrato irrituale* (informal or free arbitration) and was recognized as valid by the Italian courts. *Arbitrato irrituale* is a contractual institution, and the decision resulting therefrom represents an agreement concluded by the parties themselves. *Arbitrato irrituale* is not subject to any of the formalities prescribed for *arbitrato rituale* in the Italian Code of Civil Procedure. The decision (*lodo irrituale*) need not, for example, be filed with the court; and the enforcement cannot be effected as an award, but only on the basis of a contract action.

Against this domestic background in practice of *arbitrato irrituale* as a replacement for *arbitrato rituale*, it is not so suprising that the Italians wished that this practice be recognized under the New York Convention as well. The Italian Supreme Court fulfilled their wish in a case concerning the enforcement of an award rendered under the aegis of the London Corn Trade Association (LCTA) which award the Court qualified as rendered in an *arbitrato irrituale*.[101]

The Italian Supreme Court's main argument for holding the Convention applicable to *arbitrato irrituale* was that the Convention only requires the award to be *binding* on the parties (Art. V(1)(e)). The Geneva Convention of 1927, which is replaced by the New York Convention by virtue of Article VII(2), was generally interpreted as requiring a leave for enforcement (exequatur or the like) from the court of the country where the award was made. Because an exequatur can be obtained only in the case of formal arbitration, the Geneva Convention was limited to formal arbitration. Since the New York Convention abolishes the requirement of the exequatur from the country of origin, and prescribes the award only to be binding – a requirement with which *arbitrato irrituale* complies – the Convention also applies to free arbitration.

It is submitted that this interpretation is not in conformity with the intention of the drafters of the Convention. The Convention was devised with the purpose of facilitating the enforcement of foreign arbitral awards. For this reason, the requirement of an exequatur in the country of origin, as implicitly prescribed by the Geneva Convention of 1927, was abolished, because it was regarded as an unnecessary and time consuming hurdle. The drafters of the New York Convention therefore provided in Article V(1)(e) that enforcement of the award may be refused if the respondent proves that the award has not become "binding" on the parties (instead of "final" as required by the Geneva Convention). The word "binding" is to be interpreted as meaning that the award is no longer open to ordinary means of recourse (appeal

101. Corte di Cassazione (Sez. Un.), September 18, 1978, no. 4167, Butera *v.* Pagnan (Italy no. 33).

on the merits to a court or to an arbitral instance).[102] It was never the intention, by providing in Article V(1)(e) that the award has only to be binding on the parties to widen the scope of the Convention for procedures akin to arbitration, but taking place outside the Laws on Arbitration.

Moreover, the decision of the Italian Supreme Court implies a certain anomaly: A *lodo irrituale* cannot be enforced as an award if it is rendered in Italy, whilst such decision can be enforced as an award under the Convention if it is rendered abroad. The anomaly is that the Italian *lodo irrituale* can be enforced by means of a contract action only, including a possible review of the merits, while the foreign counterpart can be enforced in special proceedings within the confines of the Convention, i.e., with a limited number of defences and without a review of the merits. This was one of the main reasons for which the Court of First Instance of Hamburg, in my opinion rightly, declined to apply the Convention to the request for the enforcement of a *lodo irrituale* made in Italy, holding that such a decision is not an arbitral award within the meaning of the Convention.[103]

It may be observed that by qualifying arbitration of the London Corn Trade Association (LCTA) as *arbitrato irrituale,* the Italian Supreme Court misapprehends English arbitration law. LCTA arbitration is divided into two categories: quality arbitration and technical arbitration. The first category concerns the determination whether the goods delivered are in conformity with the contractual description and can therefore be considered as valuation which is not governed by the English Arbitration Act. The second category is technical arbitration which relates to questions of contract interpretation and the like, thus judicially triable issues. Leaving aside the question whether quality arbitration of the LCTA could be regarded as a counterpart of *arbitrato irrituale,* the case in question concerned the issue whether the seller was required under the contract to provide the buyer an import licence, which is beyond any doubt an issue to be resolved by technical arbitration falling under the English Arbitration Act. The Italian Supreme Court does not make this distinction, but considers the entire English arbitration as *arbitrato irrituale.* However, the English Arbitration Acts of 1950 and 1979 are the foremost examples of a counterpart of judicial proceedings. Thus, if the parties cannot agree on the appointment of the arbitrators, the court can be requested to appoint them (Sects. 8-10 of the 1950 Act). The award can be set aside (Sect. 23 of the 1950 Act) and is appealable to the court in a number of cases (Sects. 1-4 of the 1979 Act). The argument of the Supreme Court that an English award does not need an exequatur (leave for enforcement) "which would bring the decision on the judicial level", does not sound convincing. Section 16 of the 1950 Act provides that the award is final and binding on the parties. A leave for enforcement is only necessary if the enforcement of the award is sought (Sect. 26). This is different under Italian law where only the exequatur can confer the binding force upon the award (Art. 825(3) of the Italian Code of Civil Procedure). Presumably, this latter provision of Italian law put the Court on the wrong track.

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102. See *infra* III–4.5.2 ("Award Not 'Binding' ").

103. Landgericht of Hamburg, January 18, 1979 (F.R. Germ. no. 22).

The Court of Appeal of Venice in this case was more correct on this point by holding that the LCTA arbitration is arbitration proper. The latter view was also adhered to by the Court of Appeal of Florence in another case concerning arbitration under the Grain and Feed Trade Association (GAFTA) in London.[104]

Leaving aside the arguments based on the general notion of arbitration in the majority of national legal systems as well as on the Convention's history, should the Convention be interpreted as applying to *arbitrato irrituale,* because the matters submitted to it and the manner in which the parties and the third person proceed could *in fact* be equated to arbitration proper? This problem applies also to a certain extent to the Dutch *bindend advies,* which in practice sometimes has a great deal in common with arbitration proper as regulated by the Dutch Code of Civil Procedure. From the practical point of view, it would make sense. If practice so desires, but uses different legal institutions on the ground that the existing ones are insufficient, it should be recognized by means of an appropriate interpretation.

Nevertheless, the sociological approach is to be rejected in this case. In the first place, it would create uncertainty as to under which circumstances *arbitrato irrituale* or *bindend advies* could be equated to arbitration. In the second place, and this argument applies irrespective of the question whether the just mentioned distinction should be made, it should be recalled that within the system of the New York Convention, the arbitral award, international as it may be, is always governed by a national law.[105] If by this law, the Law on Arbitration only is meant, it will have the advantage that international commercial arbitration is surrounded by the procedural safeguards of that Law and is backed up by the courts. If, on the other hand, it would also include procedures akin to arbitration, no such safeguards and assistance are available and much uncertainty may be the result.[106]

A decision resulting from procedures akin to arbitration must be distinguished from a *settlement* recorded in the form of an award. The

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104. Corte di Appello of Florence, October 22, 1976, S.A. Tradax Export *v.* Carapelli (Italy no. 18). GAFTA (Grain and Feed Trade Association) is the result of a merger in 1971 of LCTA (London Corn Trade Association) with the London Cattle Food Trade Association (LCFTA). Arbitration under GAFTA is quite similar to the former LCTA arbitration. The Corte di Appello of Bari, May 30, 1973, Antonio Casulli *v.* Tradax England Ltd. (Italy no. 8) held also that LCTA arbitration was *arbitrato rituale.*

105. See *supra* I–1.6.2 ("Does the 'A-national' Award Fall under the Convention?").

106. Accord, P. Sanders, "Consolidated Commentary Vols. III and V", in *Yearbook* Vol. IV (1979) p. 231 at p. 233; K.-H. Schwab, *Schiedsgerichtsbarkeit,* 3d ed. (Munich 1979) p. 321; W. Wenger, *Zum obligationenrechtlichen Schiedsverfahren im Schweizerischen Recht* (Bern 1968) p. 184; see also, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 634; *Contra*, R. David, *supra* n. 98, at p. 402, and many Italian authors.

award on agreed terms, as this type of award is called, can be deemed to come within the purview of the Convention, provided that in the country of origin such award is considered as a genuine award, which is almost always the case.

It regularly occurs that the parties reach an settlement and that this settlement is recorded in the form of an arbitral award. This may facilitate a possible enforcement of the settlement if subsequently a party does not abide by its terms. Several Arbitration Rules contain express provisions to this effect.[107] In most countries such an award is treated as a genuine award and can be enforced as such.[108] There would therefore not exist an objection against the enforcement of the award on agreed terms under the Convention. The grounds for refusal of enforcement enumerated in Article V(1) can be applied by analogy. Conversely, if in the country of origin the award on agreed terms is not considered as a genuine award, no enforcement can be sought under the Convention.[109] Insofar as it could be researched, no case has been reported in which enforcement of the award on agreed terms was sought under the Convention.

In some countries, like Denmark and the Netherlands, a settlement between the parties can be easily made enforceable if certain formalities are fulfilled.[110] As this settlement in executory form does not constitute an arbitral award, its enforcement cannot be based on the Convention. For the purposes of a possible enforcement in other States it is therefore recommended to record the settlement in the form of an arbitral award if this is possible under the law of the country of origin.

Some countries, such as Austria, F.R. Germany, and Switzerland, provide in their Laws on Arbitration for a specific regulation for a settlement arrived at during an arbitration and recorded in the form of an "award" (*Schiedsvergleich*).[111] It is doubted whether the *Schiedsvergleich* falls under the Convention.[112] It is submitted that there is no place for such doubt as the *Schiedsvergleich* is essentially the same as an award on agreed terms for which specific statutory provisions have been enacted.[113] It may be added that in several bilateral treaties concluded by F.R. Germany with other countries concerning the reciprocal recognition and enforcement of judgments and arbitral awards the *Schiedsvergleich* is expressly equated to the arbitral award.[114] At the New York Conference of 1958, F.R. Ger-

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107. E.g., UNCITRAL Arbitration Rules, Art. 34; Arbitration Rules of the International Chamber of Commerce, Art. 17; Commercial Arbitration Rules of the American Arbitration Association, Sect. 43.

108. See the National Reports on the law and practice of arbitration in the *Yearbook* Vols. I (1976) – VI (1981), sub Chap. V.6 "Settlement". A difference exists as whether or not the arbitrators are obliged to record the settlement in the form of an award.

109. This is, for instance, the case in Colombia and the Netherlands. The situation is unclear in Costa Rica, Venezuela, P.R. China, Algeria and Libya.

110. See J. Trølle, "National Report Denmark", in *Yearbook* Vol. V (1980) p. 28 at p. 36; P. Sanders, "National Report Netherlands", in *Yearbook* Vol. VI (1981) p. 60 at p. 77.

111. Austria: Sect. 1 no. 16 of the Law on Execution; F.R. Germany: Sect. 1044a of the CCPr (See generally, F. Bauer, *Der schiedsrichterliche Vergleich* (Munich 1971)); Switzerland: Art. 34 of the Intercantonal Arbitration Convention (Concordat) of 1969.

112. H. Strohbach, "National Report German Democratic Republic", in *Yearbook* Vol. I (1976) p. 40 at p. 48; W. Melis, "National Report Austria", in *Yearbook* Vol. IV (1979) p. 21 at p. 36.

113. Accord, K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3 ed. (Munich) p. 442 and pp. 232-233.

114. Bilateral treaties with Switzerland of 1929 (Art. 9(3)), with Italy of 1936 (Art. 8(3)), with Belgium of 1958 (Art. 13(2)), with Austria of 1959 (Art. 12(2)), with Greece of 1961

many had submitted a proposal to apply the Convention also to "settlements arrived at before an arbitral authority with a view to terminating pending proceedings", which proposal was made to take "into consideration specific problems of German procedural law in respect of settlements" [115], but this proposal was neither discussed nor voted upon.

I–1.8 Second Reservation ("Commercial Reservation")

Article I(3) contains two possible reservations.[116] The first reservation concerning the enforcement of awards made in other Contracting States only has been discussed in I–1.1. The second reservation of Article 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 law of the State making such declaration."

The latter reservation was inserted because it was believed that, otherwise, it would be impossible for certain Civil Law countries, which distinguished between commercial and non-commercial transactions, to adhere to the Convention. As of today 20 Contracting States out of 56 have used the commercial reservation.

In France, for example, only arbitral clauses concerning commercial matters are valid: Article 631 of the Commercial Code (introduced by the Law of December 31, 1925).[117] At the New York Conference of 1958 it was said that Belgium could not adhere to the Convention if the Convention did not contain the possibility to limit the application to commercial transactions only.[118] Nevertheless, when adhering to the Convention on August 18, 1975, Belgium did not use the commercial reservation. On the other hand, France did use the second reservation.

The commercial reservation was already contained in Article I(2) the Geneva Protocol of 1923, and had not caused difficulties in practice. Under the New York Convention, most courts have so far also given a broad interpretation to the meaning of commercial. For example, the District Court in New York rejected the contention that an award concerning a contract to operate an electronics manufacturing industry on

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(Art. 14(2)), and with Tunisia of 1966 (Art. 52(2)). The text of these treaties can be found in Schwab, *supra* n. 113, Chapter 59.

115. UN DOC E/CONF.26/L.34 (Art. V quinter) and SR.14.

116. As far as the permissable reservations on the Convention are concerned, para. 14 of the Final Act (UN DOC E/CONF.26/8/Rev. 1 and E/CONF.26/9/Rev. 1) declares:

"The Conference decided that, without prejudice to the provisions of Articles I(3), X, XI and XIV, no reservations shall be admissible to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards."

117. See for the new French arbitration law and Art. 631 of the Commercial Code, *infra* n. II.31.

118. UN DOC E/CONF.26/SR.23.

the Island Curaçao, which would result in the creation of several thousand local jobs, was not commercial. Although the impact of the commercial reservation was not entirely clear for the Court, it supposed that the reservation excluded "matrimonial and other domestic relations awards, political awards, and the like".[119]

It should be noted that Section 202 of the law implementing the New York Convention in the United States states that "An arbitration agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial, including a transaction, contract, or agreement described in Section 2 of this title, falls under the Convention." Section 2 refers to maritime transactions or contracts evidencing commerce, which latter term is defined in Section 1 as "commerce among the several States or with foreign nations". Section 1 concludes with ". . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce".[120]

In one case, however, a United States District Court resorted to the commercial reservation in order to deny the application of the Convention.[121] We will discuss this decision at a later stage.[122] Here it may suffice to mention that the Court refused to refer the parties to arbitration in London in a dispute concerning salvage services rendered to a United States warship on the ground that under the Public Vessels Act, recovery against the Government can only take place by suit in the appropriate Federal District Court. With express reference to the commercial reservation, the Court observed: "Whatever uncertainties may arise when agencies of governments engage in commercial transactions, relations arising out of the activities of warships have never been regarded as 'commercial' within the context of sovereign immunity".

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119. U.S. District Court of New York, S.D., February 14, 1973, Island Territory of Curaçao *v.* Solitron Devices Inc. (U.S. no. 1). *Cf.* the same Court, June 28, 1976, Antco Shipping Co. Ltd. *v.* Sidermar S.p.A. (U.S. no. 9) at 215 n. 8: maritime contract for affreightment was expressly held to be commercial.

120. The U.S. District Court of New York, S.D., October 12, 1979, Sumito Corp. et al. *v.* Parakopi Compania Maritima S.A. (U.S. no. 31) held that "commerce" in Sect. 1 does not control the meaning of "commercial" in Sect. 202. The case involved a request under Sect. 203 for the appointment of a third arbitrator in an arbitration to take place in New York between a Japanese shipbuilder and a Greek principal concerning a bulk carrier constructed in Japan. The defendant had asserted the lack of jurisdiction of the Court on the ground that the Sect. 1 definition of "commerce" has been construed not to include purely foreign transactions and that therefore the dispute was excluded from the coverage of Sects. 202 and 203. The Court rejected the assertion arguing that no reference was made in Sect. 202 to Sect. 1.

See for a discussion of the commercial reservation and the United States: J. McMahon, "Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States", 2 *Journal of Maritime Law & Commerce* (1971) p. 735 at p. 742.

121. U.S. District Court of New York, S.D., December 21, 1976, B.V. Bureau Wijsmuller *v.* United States of America (U.S. no. 15).

122. See *infra* III–5.2 ("Non-arbitrable Subject Matter (Arts. V(2) (a) and II(1))").

This case must be considered as an exception in the long line of United States court decisions in which a favourable attitude towards the Convention has been expressed. Moreover, the case involves considerations of public policy rather than the true meaning of "commercial". It may be added that in the field of sovereign immunity it is not always easy to distinguish between commercial transactions (*acta jure gestionis*) and non-commercial ones (*acta jure imperii*).[123]

When it was agreed to insert the commercial reservation at the New York Conference of 1958, it was thought that it could not cause any harm.[124] However, more recently it has become apparent that "commercial" may be understood differently in various countries.

In a case involving, inter alia, transfer of technology, the High Court of Bombay gave a rather restrictive interpretation of the commercial reservation.[125] A group of United States corporations agreed by three agreements with an Indian company to construct a polyester staple fibre plant in India. The agreement included the supply of technical designs and transfer of technical information required for the implementation of the project. When a dispute arose between the parties, the Indian party sued the United States group before the Bombay High Court. The United States party applied for a stay of the proceedings by invoking the arbitral clauses, two of which provided for arbitration in London under the Arbitration Rules of the International Chamber of Commerce.

The Judge held that the application for the stay fell under the Indian Arbitration Act of 1961 which implements the New York Convention in India. Section 2 of this Act provides:

> "In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India . . ."

After having observed that the agreements in question "cover a broad spectrum of commercial activity", and that "the relationship established by the said agreements is commercial in character", the Judge said:

> "The inescapable conclusion that agreements are commercial however does not clinch the issue. Such a characterization does not amount to saying that the agreements between the plaintiffs and the defendants come within the purview of Section 2 read with Section 3 [concerning stay of court proceedings] of the 1961 Act. The expression occurring in Section 2 is legal relationships, whether contractual or not, considered as commercial *under the law in force in India* [emphasis supplied by the Judge]. In other words, before provisions of Section 3 can be invoked, the agreement must be an agreement embodying a relationship considered commercial under a provision of law. In my opinion, in order to invoke the provisions of Section 3, it is not enough to establish that an agreement is commercial. It must also be that it is commercial by virtue of a provision of law or an operative legal principle in force in India."

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123. See further for the question of the capacity of a State to agree to arbitration and the question of immunity, *infra* III–4.1.2.

124. UN DOC E/CONF.26/SR.23.

125. High Court of Bombay, April 4, 1977, India Organic Chemicals, Ltd. *v.* Chemtex Fibres Inc. et al. (India no. 4); see also *infra* at n. II.135-138.

As the counsel for the defendants was unable to call in aid any statutory provision or any operative legal principle in India, the Judge held that "the agreements though commercial do not fall within the coverage of Section 3 of the 1961 Act". Accordingly, the Judge refused to stay the court proceedings.

Such an overly literal and narrow interpretation of the term "commercial" is inconsistent with the underlying purpose of the Convention of facilitating enforcement within the framework of international commercial arbitration.[126] The expression "under the laws in force in India" may have been easily given a broader meaning.[127] One can only speculate as to what may have been the domestic reason behind this Indian decision. In any event, this interpretation will make foreign enterprises uncertain as to whether an arbitral clause contained in a contract concluded with an Indian party will be enforceable.[128]

The commercial reservation refers to the law of the forum for determining what is commercial. Apart from the problem of giving a satisfactory definition of commerce on an international level, the New York Convention does not offer the possibility of a uniform interpretation in this respect. The question whether the commercial reservation will effectively become a stumbling-block for a uniform application of the Convention, depends therefore on the attitude of the courts of the Contracting States towards the Convention. Perhaps, those courts whose domestic law gives a narrow definition of "commerce", could nevertheless interpret commerce under the Convention in a broader sense by applying by analogy the international public policy test. As we will later see, the courts in several countries have held that what is a violation of public policy under their domestic law, will not necessarily be a violation of public policy on the international level.[129] Thus, the field of international public policy is smaller than that of domestic public policy. *Mutatis mutandis* this test could be the test applied to "commerce": what is non-commercial in domestic relations may be considered as commercial for the purpose of the Convention.

I–1.9 Uniform Interpretation (and Summary)

The sole determining criterion for the question to which arbitral awards the New York Convention applies is, according to Article I(1), whether the arbitral award is made in the territory of another State. If

126. At an earlier occasion, the High Court of Bombay had held that transfer of technology cannot be submitted to arbitration: Kamani Engineering Corp. *v.* Société de Traction, *All India Reports* 1965 Bombay 114. This case was, however, distinguished in the Chemtex case which was considered by the Judge as covering more than transfer of technology.

127. See for criticism, P. Sanders, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231 at p. 236.

128. It may be mentioned that the Andean Pact countries, of which Colombia and Ecuador are New York Convention countries, seem not to allow arbitration in the field of transfer of technology either: Art. 51 of Decision no. 24 (Andean Foreign Investment Code) adopted on December 30, 1971, reproduced in 16 *International Legal Materials* (1977) p. 138 at p. 153.

129. See *infra* III–5.1 ("Public Policy in General").

the State where the enforcement is sought has used the first reservation of Article I(3), the Convention applies only to the enforcement of awards made in the territory of other Contracting States (pp. 12-15).

The nationality of the parties is not a criterion for the applicability of the New York Convention (pp. 15-17). Nor must the underlying transaction be international, although it scarcely occurs that enforcement of an award relating to a purely domestic affair will be sought in a foreign country (pp. 17-19).

The Convention does not apply to the enforcement of an award made in the country where the enforcement is sought (p. 19). Nor does it apply to the setting aside of an arbitral award, which matter the Convention refers to the exclusive competence of the court in the country in which, or under the law of which, the award is made (pp. 19-22).

The second criterion for the field of application as mentioned in Article I(1) of the Convention that it also applies to awards which are considered as non-domestic, forms merely an addition to the first criterion of an award made in another State. The first criterion applies therefore in all cases where the award is made in another (Contracting) State. The second criterion concerns only awards made in the territory of the State where the enforcement is sought. The courts have the discretion to consider such award non-domestic (i.e., that it is governed on the basis of an agreement of the parties by a foreign arbitration law). The second criterion is, however, predominantly a doctrinal curiosity, which has not been applied in practice so far, and which can, and should, be disregarded because of the intricacies resulting therefrom (pp. 22-29).

The Convention presupposes that an award is governed by a national arbitration law, which will almost always be the law of the country where the award is made, and excludes therefore the "a-national" award. No arguments can be drawn from Article V(1)(d) according to which the enforcement of an award may be refused if the composition of the arbitral tribunal 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, as this provision must be deemed not to apply to "de-nationalized" arbitration (pp. 29-43).

The Convention applies only to awards rendered in arbitration proper, i.e., arbitration governed by a Law on Arbitration. Decisions rendered in procedures not governed by Law on Arbitration, such as the Italian *arbitrato irrituale,* do not come within the purview of the scope of the Convention (pp. 44-51).

The uniform definition of the term "commercial" as used in the second reservation of Article I(3) may be achieved by applying the test of distinguishing between domestic and international commercial matters (pp. 51-54).

PART I–2 ARBITRATION AGREEMENT FALLING UNDER THE CONVENTION

I–2.1 Introduction

It may be recalled that the New York Convention basically contemplates two actions: the enforcement of the arbitral award and the enforcement of the arbitration agreement. Which arbitral awards can be enforced under the Convention has been examined in Part I–1. We will now examine which arbitration agreements can be enforced under the Convention.

The enforcement of the arbitration agreement is provided by Article II(3), which states that a 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 Article II, shall, at the request of one of the parties, refer the parties to arbitration.[130] If a court is to hold the New York Convention applicable to an action for the enforcement of the arbitration agreement, the agreement must meet a certain number of conditions amongst which that the agreement must be in writing as required by Article II(2) of the Convention.[131]

The Convention, however, only speaks definitively of its field of application in respect of the arbitral *award*, viz., a foreign award, which is an award made in another State. It does not define which arbitration *agreement* shall come within its purview if enforcement of such an agreement is sought pursuant to Article II(3).

The reason why the Convention does not define its scope in respect of the arbitration agreement was touched upon in the Introduction under no. 9. Originally, it was the intention to leave the provisions concerning the formal validity of the arbitration agreement and the obligatory referral to arbitration to a separate Protocol. At the end of the New York Conference of 1958, it was realized that this was not desirable. Article II was drafted in a race against time, with, as consequence, the omission of an indication as to which arbitration agreements the Convention would apply.

For resolving the question which arbitration agreement can be enforced under the Convention, it would be consistent to interpret Article

130. The Convention does not use the term "enforcement" with regard to the arbitration agreement, but speaks more in general about "recognition" (Art. II(1)). In order to identify the referral by the court to arbitration pursuant to Art. II(3), the more specific term "enforcement" is used in the text in a manner which corresponds to the term "enforcement" in connection with the arbitral award. See for the referral to arbitration *infra* II–1.

131. See *infra* II–2 ("Written Form of the Arbitration Agreement").

II(3) in conformity with Article I, which is mainly based on the place of rendition of the award.[132] As the place of rendition of the award must be considered also the place of arbitration, we may examine hereafter three categories of arbitration agreements:

(1) an agreement providing for arbitration in another State than that where the agreement is invoked (I–2.2 *infra*)

(2) an agreement providing for an arbitration in the State where the agreement is invoked (I–2.3 *infra*)

(3) an agreement which does not indicate where the arbitration is to take place (I–2.4 *infra*).

I–2.2 Agreement Providing for Arbitration in Another State

In the case of an agreement providing for arbitration in another State, Article I of the Convention could be applied by analogy. As the Convention applies to the enforcement of an award made in another State, it could apply to the enforcement of an agreement providing for arbitration in another State.

An examination of the court decisions in which an application under Article II(3) was made, reveals that the majority of them involved an agreement providing for arbitration in another State.[133] The application of the Convention to this category of arbitration agreements appears to be so self-evident that almost no court gave an explanation why it applied the Convention. One of the few examples of an express reference regarding this category can be found in a decision of the Italian

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132. Accord, P. Sanders, "Consolidated Commentary Vols. III and IV" in *Yearbook* Vol. IV (1979) p. 231 at p. 237, and "Consolidated Commentary Vols. V and VI", in *Yearbook* Vol. VI (1981) p. 202 at p. 205. A somewhat different interpretation is that Art. II(3) applies to those arbitration agreements which may lead to an award which will fall under the Convention (e.g., K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 323; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 70). This interpretation, however, fails to provide for criteria according to which it can be determined that an arbitration agreement will result in an arbitral award which could possibly be enforced in another Contracting State. Moreover, it can by no means be ascertained at the time the enforcement of the arbitration agreement is sought, whether the enforcement will be requested in a Contracting State other than the State where the award will be made. This interpretation has not been adopted by any court so far, nor has it been laid down in any implementing Act.

133. E.g., Corte di Cassazione (Sez. Un.), February 27, 1970, no. 470, Dreyfus Corp. *v.* Oriana (Italy no. 2): arbitration in London; Moscow City Court (Civ. Dep't), May 6, 1968, Ingostrakh *v.* Aabis Rederi (U.S.S.R. no. 1): arbitration in London; Corte di Cassazione (Sez. Un.), April 8, 1975, no. 1269, Tomasos *v.* Sorveglianza (Italy no. 13): arbitration in London; Landgericht of Hamburg, April 20, 1977 (F.R. Germ. no. 15): arbitration in Zurich; House of Lords, February 16, 1977, Nova (Jersey) Knit Ltd. *v.* Kammgarn Spinnerei G.m.b.H. (U.K. no. 2): arbitration in F.R. Germany; U.S. District Court, C.D. California, December 2, 1976, Star-Kist Foods Inc. et al. *v.* Diaken Hope S.A. et al. (U.S. no. 14): arbitration in London; U.S. District Court of New York, S.D. December 27, 1977, Dale Metals Corp. *v.* KIWA Chemical Industry Corp. (U.S. no. 21); arbitration in Japan; Court of First Instance of Tunis, March 22, 1976, Société Tunisienne d'Electricité et de Gaz (STEG) *v.* Société Entrepose (Tunisia no. 1): arbitration in Geneva.

Supreme Court which declared parenthetically that the New York Convention was applicable because the agreement providing for arbitration in Paris could be considered as a "foreign arbitration agreement".[134]

A question concerning the applicability of Article II(3) of the Convention to an agreement providing for arbitration in another State is whether the agreement should have an international element. An arbitration agreement can be deemed "international"in its broad sense if, seen from the court before which is invoked, at least one of the parties to it is foreign, or if it involves a relationship (contract) which has legal (i.e., connected with legal norms in force in several States) and/or economic (i.e., transfer of money, goods or services across national borders) contacts with more than one State. These criteria, in my opinion, should not be used on a mutually exclusive basis, but can be used whenever applicable.[135]

It will rarely happen that an agreement invoked in a State other than the State where the arbitration takes, or is to take, place concerns a subject matter which has legal or economic contacts with the State where the arbitration is to take place only and involves parties who are both subject to the jurisdiction of the latter State. If such a case occurs, it may be pointed out that the Convention does not exclude the enforcement of an award made in another State in respect of a matter which is purely domestic for that State.[136]

It is, however, not so unlikely that an agreement provides for arbitration abroad between two parties who are both subject to the jurisdiction of the State where the agreement is invoked. Some places are quite popular for certain types of arbitration. An example is maritime arbitration in London. What has been observed in respect of an arbitral award made abroad between two nationals of the State where the enforcement is sought can be applied here by analogy.[137] As the Convention excludes the nationality of the parties from its scope for the enforcement of the award, by analogy, the enforcement of an agreement providing for arbitration abroad between two parties from the State where the agreement is invoked may be considered to fall under Article II(3).

This application by analogy has been confirmed by the Italian Supreme Court. As explained before, the exclusion of the parties' nationality from the Convention's scope had initially caused problems for

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134. Corte di Cassazione (Sez. Un.), November 10, 1973, no. 2969, Rodriquez *v.* Supramar A.G. (Italy no. 10).

135. See Ph. Fouchard, "Un arbitrage quand est-il international?", *Revue de l'arbitrage* (1970) p. 59. See more generally for the question when a contract can be considered international, G. Delaume, "What is an International Contract? An American and Gallic Dilemma", 28 *International and Comparative Law Quarterly* (1979) p. 258.

136. See *supra* I–1.3 ("No Internationality Required").

137. See *supra* I–1.2 ("Party's Nationality Excluded").

the Italian courts in view of Article 2 of the Italian Code of Civil Procedure which prohibits two Italians to arbitrate in a foreign country.[138] In the leading Supreme Court decision *Miserocchi* v. *Paolo Agnesi* it was held that the Convention supersedes Article 2 of the Italian Code of Civil Procedure in respect of an award made abroad between two Italian nationals.[139] In a subsequent decision, the Italian Supreme Court held the same for an action for the enforcement of an agreement providing for arbitration between two Italians in London.[140] It should, however, be noted that in the just mentioned Italian case the contract to which the arbitration agreement related, had contacts with several countries (i.e., a charter-party concluded in Paris) for which reason it could be considered as "international". If the contract had legally and economically been located in Italy only, it would have been questionable whether the Italian Supreme Court would have applied the New York Convention, although even in this case the Convention should, in my opinion, be applied. There is no such case in point, however, either in Italy or elsewhere.

The law implementing the Convention in the United States appears to exclude such a case from the Convention's applicability as Section 202 of that law provides that the Convention does not apply to an agreement providing for arbitration abroad between two United States citizens unless it involves a legal relationship which has some reasonable relation with one or more foreign States.[141] It may, however, be argued that even in this case an application by analogy to Article I is justified. The scope of the Convention is not limited to awards with an international element. It also covers the theoretical possibility of an award made abroad concerning an affair which is entirely domestic for the country where the enforcement is sought. If the enforcement of an award made abroad between two United States nationals concerning a purely domestic (U.S.) affair may not be refused for this reason only in the United States, the same would apply to the enforcement of the arbitration agreement. As was argued in respect of the enforcement of the award, Section 202 of the United States Act must be considered to be incompatible with the New York Convention in respect of the enforcement of the arbitration agreement on this point.[142] The Arbitration Act of 1975, which implements the Convention in the United Kingdom, does not provide for the restriction of Section 202 of the United States Act. Rather, this Act applies to the enforcement of any

138. *Id.*

139. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620 (Italy no. 5).

140. Corte di Cassazione (Sez. Un.), January 25, 1977, no. 361, Total *v.* Achille Lauro (Italy no. 26).

141. The same internationality is required for an agreement between two U.S. parties providing for arbitration *within* the United States, see *infra* I–2.3.3.

142. See *supra* I–1.3.

arbitration agreement providing for arbitration abroad, irrespective of the nationality of the parties or the internationality of the subject matter. The Act applies therefore to arbitration in Paris between two British nationals concerning a domestic (U.K.) transaction.[143]

It should be emphasized that the question of the applicability of Article II(3) to the case where the agreement providing for arbitration abroad does not have an international element, must be distinguished from the refusal of enforcement of the agreement because the subject matter of the agreement is not capable of settlement by arbitration (Art. II(1)) or the agreement is "null and void, inoperative or incapable of being performed" (Art. II(3)). These grounds cannot be applied on the sole ground that the agreement is not "international". On the other hand, if two parties of the same nationality have agreed to arbitrate abroad with the clear purpose of escaping, for example, from the application of mandatory tax laws, it can be argued that enforcement may be refused on the grounds just mentioned.

The application by analogy to Article I may give rise to another question: What may be considered the Convention's applicability to arbitration agreements providing for arbitration in another State if a State has reserved the Convention's applicability to awards made in other Contracting States only (the first reservation of Article I(3))? Is the Convention's applicability then also limited to agreements providing for arbitration in other Contracting States only? The same question can be asked for the commercial reservation.

Few courts have touched upon this question. In a case which involved arbitration in London, the District Court in New York held the Convention applicable, observing that: ". . . were England not a signatory to the Convention, the latter's applicability to the present case would not be so certain, notwithstanding the seemingly broad encompass of Section 202, in view of the reservation attaching to the United States' accession to the Convention."[144]

The doubts cast by the District Court must be deemed justified. If Article I is applied by analogy to the arbitration agreement providing for arbitration in another State, it seems illogical to confine the analogous application to the first paragraph of Article I only. The applicability of the Convention to arbitral awards is defined by both paragraph 1 and paragraph 3. It would be rather strange if a court of a country where the first reservation has been used would, under the New York Convention, not enforce an award made in a non-Contracting State, and yet could be obliged to apply the Convention in cases of referral to arbitration in such State. The same reasoning could apply to the commercial reservation as well.[145]

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143. See for the U.K. Act, *infra* I–2.3.2.

144. U.S. District Court of New York, S.D., March 21, 1977 Andros Compania Maritima S.A. *v.* André & Cie, S.A. (U.S. no. 17).

145. See, e.g., U.S. District Court of New York, S.D., April 25, 1978, Siderius Inc. *v.* Com-

I–2.3 Agreement Providing for Arbitration in the Forum's State

I–2.3.1 *Applicability of Article II(3)*

In the case of an agreement providing for arbitration in the State in which the agreement is invoked, Article I obviously cannot be applied by analogy. However, this would not be a reason to deny the applicability of the Convention to this category of arbitration agreements as the implementing Act of Sweden seems to do.

Section 1 of the Swedish Foreign Arbitration Agreements and Awards Act of 1971 (as amended in 1976) provides [146]:

> "An arbitration agreement shall be considered as 'foreign' if it stipulates that the proceedings are to take place outside Sweden.
> An arbitration agreement which does not indicate whether the proceedings are to take place within or outside Sweden shall be considered as 'foreign' if both parties were resident outside Sweden."

This provision seems to indicate that if the arbitration agreement provides *expressly* for arbitration *within* Sweden, the implementing Act, and hence the Convention, is not applicable. There may be one remote possibility that the Act nevertheless applies to arbitration within Sweden as may be inferred from the second paragraph: if the agreement does not indicate the place of arbitration and two non-Swedish are party to it, it may happen that for some reason the arbitration will take place in Sweden (for example, the parties, arbitrators, or arbitral institution concerned subsequently designate Sweden as place of arbitration).

This interpretation may be said to be too restrictive. Although the Convention does, in theory, not exclude domestic cases as we have seen in the foregoing Section, the primary goal of the Convention is to facilitate the enforcement of agreements and awards in international commercial arbitration. Accordingly, the main purpose of the Convention's provisions concerning the arbitration agreement is to give uniform rules for the form of the arbitration agreement ("in writing"), and to assure that international commercial arbitration will not be frustrated by court litigation on the same merits as covered by the arbitration agreement. It is obvious that the purposes of uniformity can be fulfilled only if the arbitration agreement is enforceable under Article II(3) in all Contracting States, including the State where the arbitration is to take place. Two examples may clarify this.

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pania de Arcero del Pacifio (U.S. no. 25).

The case concerned an arbitration taking place in Chile in respect of the quality and condition of steel delivered by the U.S. corporation Siderius to the Chilean company Compania de Arcero. The Court made an express link between Art. II and the commercial reservation of Art. I(3), and concluded that the dispute in question arose out of a classical commercial relationship.

146. See for references, Annex C.

In England the courts have discretionary power under domestic arbitration law whether to refer the parties to arbitration. In contrast, under the New York Convention they do not have this discretionary power, but must refer the parties, at the request of one of them, to arbitration.[147] If Article II(3) applied only to arbitration abroad, any international commercial arbitration taking place in London – and there are many of them – would fall outside the reach of this Article and its mandatory character. The drafters of the English Arbitration Act of 1975 did not follow this narrow interpretation, as we will see below.

The second example is the case where an arbitration agreement is valid under the Convention, but not under domestic law. In this case it could happen that the enforcement of an agreement, providing for international commercial arbitration within the country where that agreement is invoked, is refused, whilst the ensuing award could have been valid in other Contracting States.

The Supreme Court of Austria had to cope with the latter situation.[148] An arbitration agreement concluded between an Austrian and a Swiss party by an exchange of telexes provided for arbitration in Vienna. Under Austrian law an exchange of telexes does not meet the written form required for the arbitration agreement; it is generally considered, however, that such an exchange meets the requirement of Article II(2) of the Convention.[149] The Austrian Supreme Court held Article II of the Convention applicable, inter alia, on the ground that the agreement was "international", and upheld the validity of the arbitration agreement in question.

The broader interpretation that the Convention also applies to agreements providing for arbitration within the forum's State finds its most emphatic confirmation in Section 206 of the Law implementing the Convention in the United States. The Section reads: "A court having jurisdiction under this Chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, *whether that place is within or without the United States....*" (emphasis added)

The broader interpretation of the Convention on this point can also be found in the English Arbitration Act of 1975.[150] Similarly, in court decisions of both States as well as in those in Austria and the Netherlands, which will be discussed presently, the Convention has been held applicable to the enforcement of an agreement providing for arbitration within the own territory. The Swedish Act, which seems to limit the Convention's applicability to agreements providing for arbitration in another State only, can therefore be regarded as a minority opinion.

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147. See *infra* II–1.2.3 ("Referral Is Mandatory").
148. Oberster Gerichtshof, November 17, 1971 (Austria no. 2).
149. See *infra* II–2.4.1 ("Exchange of Telexes").
150. See *infra* I–2.3.2.

The principle being that Article II(3) of the Convention also applies to an agreement providing for arbitration in the State where its enforcement is sought, it remains to be determined to which arbitration agreements of this category Article II(3) applies. An acceptable interpretation would be that these agreements are only those which have an international element. The reason for the limitation in this category of agreements is that the primary goal of the Convention is international commercial arbitration. If any agreement providing for arbitration in the forum's State were to fall under the Convention, quite a number of domestic arbitration laws would be upset as they lay down rules for the formal validity of the arbitration agreement and the referral to arbitration which are different from Article II of the Convention.

For these reasons the opinion of some authors that *any* arbitration agreement falls under Article II of the Convention irrespective of the place of arbitration provided therein, is to be rejected.[151] It may be added that no court has interpreted the Convention is such a broad sense.[152] Nor is it provided in any implementing Act that Article II of the Convention supersedes domestic law in all cases.

The limitation to international cases for agreements providing for arbitration in the forum's State is confirmed by the aforementioned courts and implementing Acts of the United Kingdom and the United States. However, a certain degree of disagreement exists as to the question when an agreement can be considered as "international".[153] This disagreement is reflected in the court decisions and implementing Acts in regard to the agreement providing for arbitration in the forum's State. We will therefore examine the two main cirteria for considering an agreement "international" – the nationality of the parties and the subject matter of the agreement – in the following.

I–2.3.2 *Nationality of the parties*

The criterion that at least one of the parties be a foreign national for determining the applicability of Article II(3) to an agreement providing for arbitration in the State in which it is invoked, can be found in the English Arbitration Act of 1975. Section 1 concerning the "Effect of arbitration agreements on court proceedings" provides in its second

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151. This opinion is advanced, inter alia, by R. Luzzatto, "Accordi internazionali e diritto interno in materia di arbitrato: la Convenzione di New York del 1958", 4 *Rivista di Diritto Internazionale Privato e Processuale* (1968) p. 24 at p. 46.

152. A decision of the Landgericht of Hamburg, March 16, 1977 (F.R. Germ. no. 13) would imply that Art. II applies to any arbitration agreement. This view has rightly been corrected by the Oberlandesgericht of Hamburg, September 22, 1978 (F.R. Germ. no. 20). See *supra* at n. 30-31.

153. See *supra* n. 135.

paragraph: "This section applies to any arbitration agreement which is not a domestic arbitration agreement . . .".

What is understood by a "domestic agreement" is defined in paragraph 4 of Section 1 as follows:

> "In this Section 'domestic arbitration agreement' means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom *and* to which neither
> (a) an individual who is national of, or habitually resident in, any State other than the United Kingdom, nor
> (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom,
> is a party at the time the proceedings are commenced." (emphasis added)

Therefore, according to the English Arbitration Act of 1975, an arbitration agreement is domestic only if *two* conditions are met: (1) both parties must be British and (2) the agreement must provide for arbitration in the United Kingdom. Consequently, any arbitration agreement which does not meet one or both conditions will be "international" – although the English Act does not use this expression – and will fall under Article II(3) of the Convention.

It means, in the first place, that Article II(3) of the Convention applies to an agreement providing for arbitration outside the United Kingdom without any requirement as to the nationality of the parties or the internationality of the subject matter of the agreement. We need not come back on this (first) category of arbitration agreements as it was already discussed in I–2.2 *supra*.

It means for the (second) category of arbitration agreements presently under discussion that where the agreement provides for arbitration within the United Kingdom, such agreement will fall under Article II(3) of the Convention as soon as one of the parties is non-British. This aspect of Section 1(2) *jo* (4) of the Arbitration Act of 1975 has been applied by the English courts in three cases.

The first case concerned an agreement for the construction and operation of a pipeline in Zimbabwe (formerly Rhodesia) between a U.K. company and its Mozambique subsidiary on the one hand and a number of oil companies from various countries on the other.[154] When the U.K. company and its Mozambique subsidiary sued the defendant oil companies in the High Court of London, two of the oil companies moved for a stay of the court action on the basis of the clause contained in the agreement providing for arbitration in London. The Judge held the Arbitration Act of 1975 applicable to the arbitral clause in question:

> "Section 1 [of the 1975 Act] applies to any arbitration agreement which does not come within the definition of a domestic arbitration agreement. The [agree-

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154. High Court (Chancery Division), January 31, 1978, Lonrho Ltd. *v.* Shell et al. (U.K. no. 5).

ment in question] does not come within that definition because foreign corporations are party to it."

The second case concerned a dispute between a Mauritius and a U.K. company, on the one hand, and a Panamanian shipowner and his U.K. insurer on the other. The first mentioned sued the shipowner and his insurer for damages caused to cargo before the Admiralty Court on the basis of the bill of lading which incorporated the terms of the charter party including a clause providing for arbitration in London. The Judge held the Arbitration Act of 1975 applicable

"... since the shipowners were a body incorporated in Panama, and since their central management and control were exercised in Greece ..." [155]

The third case concerned a dispute arising out of a charter party between a United States corporation as shipowner and U.K. company as charterers. The shipowners sued for wrongful repudiation of the charter party by the charterers. On the basis of the clause contained in the charter party which provided for arbitration in London, the charterers applied for a stay of the court proceedings. Without any discussion on this point, the Judge held that the arbitral clause fell under the Arbitration Act of 1975.[156]

It should be recalled that in these three English cases the outcome could have been different if the arbitral clause was considered as not coming within the purview of the Arbitration Act of 1975. Under the latter Act the stay of court proceedings is mandatory, whereas under the English Arbitration Act of 1950 (i.e., domestic arbitration), the courts have a discretionary power to grant a stay.

The application of the criterion that a least one of the parties is a foreign national can also be found in a case decided by the Court of First Instance of Rotterdam.[157] The case involved a contract of sale between a Dutch and an Israeli company which contained an arbitral clause providing for arbitration in Rotterdam. Considering whether the Court should refer the parties to arbitration, it held the New York Convention applicable "because both the Netherlands and Israel have ratified this Convention".

The summary reasoning of the Rotterdam Court gives rise to a question in connection with the criterion under discussion: must the nationality of a party be that of a *Contracting* State if the forum State has used the first reservation of Article I(3)? We already saw the effect of the first reservation on the Convention's scope in respect of the arbitration agreement in the case where the agreement provides for arbitration in another State.[158] We see here another possible effect of the first reservation which is based on the principle of reciprocity.[159] However, as mentioned earlier, the principle of reciprocity applies only to a

155. Admiralty Court (Q.B. Div.), January 13, 1978, The Mauritius Sugar Syndicate et al. v. Black Lion Shipping Co. S.A. (U.K. no. 6).

156. Court of Appeal, July 20-21, 1977, Koch Shipping Inc. *v.* Associated Bulk Carriers Ltd. (U.K. no. 3).

157. Rechtbank of Rotterdam, June 26, 1970, Israel Chemicals & Phosphates Ltd. *v.* N.V. Algemene Oliehandel (Neth. no. 1).

158. See *supra* at n. 144.

159. See *supra* I–1.1 ("Universality and First Reservation").

reciprocal treatment of *awards* rendered in the territory of either State. Because the nationality of the parties is excluded for determining the scope of the Convention as far as the arbitral award is concerned, the general reciprocity clause of Article XIV, which is redundantly repeated in Article I(3), must be deemed not to apply to the nationality of the parties.[160]

The use of the criterion of a party's nationality for determining the field of application of the Convention in respect of an agreement providing for arbitration in the forum's State is based on a different purpose. It is a yardstick to determine whether such arbitration agreement is domestic or international. This has nothing to do with considerations of reciprocity. Accordingly, the nationality of a party need not be that of a Contracting State. This view is confirmed by the Arbitration Act of 1975, which does not require that the foreign party have nationality of another *Contracting* State.

The definition given in the Arbitration Act 1975 excludes the case where two British parties have agreed to arbitrate disputes arising out of an international transaction in London. This case would fall under the Arbitration of 1950. Although it has not yet happened in practice it is not unlikely that the case will come up. Many foreign companies have British subsidiaries which conclude international contracts providing for arbitration in London. In this respect the law of the United States appears to be broader, as we will see hereafter.

A complicated mixture of the first reservation, the law governing the arbitration and the party's nationality for determining the Convention's applicability to the enforcement of the arbitration agreement, including – contrary to the view expressed above – considerations of reciprocity in respect of the parties' nationality, can be found in the Australian implementing Act of 1974.[161] Section 7(1) of that Act provides:

"Where –

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

160. See *supra* I–1.2 ("Party's Nationality Excluded").
161. See for references, Annex C.

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country,
this section applies to the agreement."

I–2.3.3 *Subject matter of the arbitration agreement*

It was already observed in I–2.3.1 that the law implementing the New York Convention in the United States is the only one which expressly declares that a court may also direct that arbitration be held within the United States (Sect. 206). This rule is qualified by Section 202, second sentence, which reads as follows:

> "An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."

This part of Section 202 read in conjunction with Section 206 implies, in the first place, that Article II(3) of the Convention applies in any case to agreements to arbitrate to which at least one of the parties is non-American, irrespective whether the place of arbitration is within or without the United States.[162] Apparently, it is presumed that such agreement always relates to an international transaction.

Both Sections imply, in the second place, that Article II(3) also applies to agreements between two U.S. parties, irrespective whether the place of arbitration is within or without the United States, provided that the underlying transaction is international. The United States law therefore includes an agreement providing for arbitration in the United States between two American nationals if the agreement relates to a subject matter which is international.

This aspect of the United States Act was discussed in depth by the U.S. District Court for the Western District of Pennsylvania.[163] The case concerned a dispute between two U.S. corporations in respect of the construction of a drying and calcining plant in the Republic of

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162. Examples of cases in which arbitration agreements between an United States citizen and a foreign national, and between foreign nationals, providing for arbitration within the United States, were held to fall under the New York Convention are: U.S. District Court of New York, S.D., June 28, 1976, Antco Shipping Co. *v.* Sidermar (U.S. no. 9): agreement between Bahamian and Italian party providing for arbitration in New York; District Court of New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20): agreement between Italian and Canadian party providing for arbitration in New York; U.S. District Court of California, N.D., September 26, 1977, Carolina Power & Light Comp. *v.* G.I.E. URANEX (U.S. no. 23): agreement between United States and French party providing for arbitration in New York.

163. U.S. District Court of Pennsylvania, W.D., October 19, 1976, Fuller Company *v.* Compagnie des Bauxites de Guinee (U.S. no. 13).

Guinea. The arbitral clause in the contract provided for arbitration in Geneva under the Arbitration Rules of the International Chamber of Commerce. The parties had subsequently agreed that arbitration was to be held in Pennsylvania. Thereupon a controversy arose between the parties whether a certain meeting between them had amounted to a settlement. One of the parties went to the U.S. District Court for a declaratory judgment seeking a determination of the binding effect of the alleged settlement. The other party moved for a stay of the court proceedings in favour of arbitration. In determining whether it had jurisdiction under the law implementing the New York Convention in the United States, the Court stated that the jurisdictional requirement would be met if "*any one*" of the four conditions mentioned in Section 202 were met, viz.:

(1) The agreement involves property located abroad;
(2) The agreement envisages performance abroad;
(3) The agreement envisages enforcement abroad; or
(4) The agreement has some other reasonable relation with one or more foreign States.

The Court concluded that the contract in question bore a sufficient connection with the Republic of Guinea ("envisages performance abroad"). Accordingly, it could sustain jurisdiction under the New York Convention.

The U.S. District Court for the Southern District of New York came to an opposite conclusion in a dispute between an American corporation (Coastal), on the one hand, and a corporation incorporated in Panama (Zenith) and another American corporation (Sea-King) on the other.[164] Coastal sued to recover the value of oil which was aboard Zenith's ship that vanished without a trace on a transatlantic voyage from England to the United States. On the basis of the arbitral clause in the bill of lading providing for arbitration in New York, defendant Zenith moved for an order to refer the dispute to arbitration. The Court held that the arbitration agreement did not fall under the New York Convention:

> "The instant case, however, appears to fall within the exception of the Convention's applicability provided in 9 U.S.C. Sect. 202, in that this action arises out of a contract, i.e., a bill of lading, 'entirely between citizens of the United States'. Coastal is clearly an American corporation, and, while Zenith is a Panamanian corporation, it appears from the evidence in the case thus far adduced that it has its principal place of business in New York City, thereby making it a 'citizen of the United States' for the purposes of that Section, and removing the contract from the terms of the Convention."

One wonders why the Court did not apply the reasonable relation test of the second sentence of Section 202 in this case. If it had done so, the outcome could have been different as transport of oil from England to the United States can be deemed to be performance abroad or at least to have a reasonable relation with a foreign State.[165]

164. U.S. District Court of New York, S.D., August 18, 1977, Coastal States Trading Inc. *v.* Zenith Navigation S.A. (U.S. no. 19).

165. It should be noted that, curiously enough, the Court considered Zenith a "foreign cor-

As far as the agreement providing for arbitration in the State where it is invoked is concerned, the English Arbitration Act of 1975 makes the applicability of Article II(3) of the Convention dependent on the condition that at least one of the parties be a foreign national. The United States Act goes one step further by providing that an agreement between two American parties providing for arbitration in the United States will also fall under Article II(3) of the Convention if it involves a legal relationship which has a relation with one or more foreign States. By using these criteria both Acts attempt to distinguish domestic agreements from international ones. The United States Act can be said to be more complete in arriving at a satisfactory delimitation of an international agreement. This term can, however, only be inferred from both Acts as neither one uses the term "international" *expressis verbis.*

An outright qualification of "international" can be found in the already quoted decision of the Austrian Supreme Court.[166] In that case an arbitration agreement providing for arbitration at the Arbitration Court of the Vienna Commodity Exchange had been concluded between an Austrian and a Swiss party for settling a dispute arisen out of a contract of sale. The Court, however, did not state for which reason it considered the arbitration agreement international.

I–2.4 Agreement Does Not Indicate Place of Arbitration

Although it happens less and less frequently, parties may have omitted to indicate the place of arbitration in their agreement. It may also be that the parties have referred in their agreement to Arbitration Rules of an arbitration institute which Rules provide that the administering authority has to designate the place of arbitration, and that authority has not yet made the designation.[167] In addition, some arbitral clauses and Arbitration Rules provide that under certain conditions arbitration can be initiated in the country of either party (the so-called "home-on-home" arbitral clause).[168]

For determining whether such an arbitration agreement falls under Article II(3) of the Convention, the same test of internationality as ap-

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poration" for the purposes of the New York State attachment statute (NYCPLR Sect. 6201 et seq.).

166. Oberster Gerichtshof, November 17, 1971 (Austria no. 2). Cf. *supra* at n. 148.

167. Arbitration Rules usually provide that the administering authority will determine the place if the parties are unable to reach agreement thereon. See, e.g., ICC Rules Art. 12. Under Art. 16(1) of the UNCITRAL Arbitration Rules the arbitral tribunal shall determine the place of arbitration "having regard to the circumstances of the arbitration", unless the parties have agreed upon the place where the arbitration is to be held.

168. The RUCIP (*Règles et usages du commerce inter-européen de pommes de terre*) Arbitration Rules provide, for instance, that arbitration in first instance must be instituted in the country of the respondent (Art. 2 of the Rules).

plied to the agreement providing for arbitration in the State where the agreement is invoked, can be adopted. This seems to be the only possible solution as, failing the place of arbitration, Article I cannot be applied by analogy as was possible for the agreement providing for arbitration in another State.[169] On the other hand, the interpretation that *any* arbitration agreement would fall under the Convention has to be rejected as being too broad.[170]

One of the few examples in which the place of arbitration could not be determined at the time the enforcement of the agreement was sought can be found in a case decided by the German Court of First Instance of Heidelberg.[171] The case involved an exclusive distributorship agreement between a F.R. German manufacturer of rugs and a Dutch firm. The agreement referred the settlement of disputes to arbitration at the German-Dutch Chamber of Commerce. The Arbitration Rules of this Chamber of Commerce provide that arbitration can take place either in the Netherlands or in F.R. Germany. The Court held that the enforcement of the agreement was to be judged under the New York Convention because F.R. Germany and the Netherlands had ratified the Convention. Although the application of the Convention must be considered justified in this case as both the nationality of the parties was diverse and the subject matter of the agreement concerned a transaction across national borders, the reference of the Court to the fact that both countries had ratified the Convention is unfortunate. As explained earlier, it is not a requirement that the parties be nationals of a Contracting State, even if the State where the enforcement is sought has used the first reservation of Article I(3).[172] The mere fact that the parties have a different nationality would have been sufficient.

It may be recalled that Section 1(2) of the Swedish implementing Law, quoted at the beginning of I–2.3.1 *supra*, provides that an arbitration agreement which does not indicate whether the arbitration is to take place within or outside Sweden shall be considered as "foreign" if both parties were resident outside Sweden. It is submitted that this provision is too limited. It would exclude the applicability of the Convention where one of the parties is resident in Sweden and the other is resident outside Sweden, or where both parties are Swedish and the underlying transaction is international.

I–2.5 **Uniform Interpretation (and Summary)**

Failing an express definition as to which arbitration agreements can be enforced under Article II(3) of the Convention, the following interpretation may be adopted.

If the agreement provides for arbitration in another State, the Convention is applicable to the enforcement of such agreement. If the State

169. See *supra* I–1.2.2.

170. See *supra* I–1.2.3.1 at n. 151-152.

171. Landgericht of Heidelberg, October 23, 1972, affirmed by Oberlandesgericht of Karlsruhe, March 13, 1973 (F.R. Germ. no. 9).

172. See *supra* I–2.3.2 at n. 158-160.

where such agreement is invoked has used the first reservation of Article I(3), the agreement can be enforced under the Convention only if the State where the arbitration is to take, or is taking, place is a Contracting State. In both cases neither the nationality of the parties nor the internationality of the subject matter of the agreement is material. This interpretation is confirmed by the courts and the implementing Acts, except for the United States, in which country the agreement between United States parties must concern an international relationship (pp. 57-60).

If the agreement provides for arbitration in the forum's State, Article II(3) of the Convention will be applicable (*a*) if at least one of the parties is a foreign national or (*b*) if the underlying transaction is international. The conditions (*a*) and (*b*) may, of course, also be present in the same case. It is on this point where the U.S. Act contains more satisfactory provisions than the Act of the United Kingdom, which only provides for condition (*a*). The Swedish implementing Act must be deemed too restrictive as it excludes the Convention's applicability to the agreement providing for arbitration in the forum State (pp. 61-69).

If the agreement does not indicate the place of arbitration, the same test as applied to the agreement providing for arbitration in the forum's State may be adopted (pp. 69-70).

PART I–3 RETROACTIVITY

I–3.1 Introduction

After having examined which arbitral awards and arbitration agreements can be enforced under the New York Convention, the next aspect of the field of application of the Convention is the element of time: Does the Convention apply retroactively?

The Convention does not contain a provision on this question. The Geneva Convention of 1927 did contain such a provision in Article 6: "The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923."

At the New York Conference of 1958, Yugoslavia had proposed that it be provided that the Convention should apply only to arbitral *awards* rendered after the entry into force of the Convention.[173] This proposal was discussed at some length at the Conference.[174] On the other hand, the retroactivity in respect of the enforcement of the arbitration *agreement* was not discussed, as at that stage, the Conference had not yet adopted Article II.

The Turkish delegate supported the Yugoslav proposal, arguing that awards made many years ago and not enforced for one reason or another should be excluded from the application of the Convention; to permit the revival of such cases might cause great trouble and expense. The Swiss and Argentinean delegates replied that cases on which a court had rendered a judgment could not be reopened. The French delegate added to this reply that enforcement of an award is only necessary if a party does not abide by it voluntarily; the Convention would therefore apply retroactively only to those awards whose enforcement had been prevented by bad faith of the losing party.

The Israeli and Swiss delegates' objection to the Yugoslav proposal to deny the Convention retroactive effect was that, while it was a recognized rule that conventions and laws should not be made retroactive, this rule should not apply to purely procedural instruments; this was the case for the Convention whose primary purpose was to facilitate the recognition and enforcement of foreign arbitral awards. The Bulgarian, Turkish and Belgian delegates, however, stated that the Convention was not purely procedural, but also concerned questions of substance.

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173. UN DOC E/CONF.26/L.55.
174. UN DOC E/CONF.26/SR.21.

The result of the vote on the Yugsolav proposal was 17 in favour and 11 against, with 10 abstentions. It was therefore not adopted, having failed to obtain the required two-thirds majority.[175]

The commentators on the Convention generally interpret these discussions and the voting behaviour of the delegates as indicating an intent of the drafters of the Convention to give it retroactive application.[176] In view of the large number of abstaining votes, one may, however, doubt whether this intent is sufficiently clear. Moreover, the vote concerned only arbitral awards; the provisions concerning the arbitration agreement had not yet been included.

I–3.2 Implementing Acts

Express provisions on the retroactive effect of the Convention are contained in only some of the implementing Acts. The Act implementing the Convention in India declares that the Act applies to awards "made on or after the 11th day of October 1960".[177] Similarly, the Act implementing the Convention in Botswana provides that it applies to awards made after the coming into force of the Act.[178] The same provision denying retroactive effect can also be found in the Act implementing the Convention in Ghana.[179]

On the other hand, the Act implementing the Convention in Australia declares that the Convention does have retroactive effect. Section 14 of this Act reads: "The application of this Act extends to agreements and awards made before the date fixed under subsection 2(2), including agreements and awards made before the day referred to in subsection 2(1)."

It should be noted that, unlike the Acts of India, Botswana and Ghana, the Australian Act also mentions the arbitration agreement.

As far as it could be researched, no other implementing Act contains an express provision on the retroactive effect of the Convention.

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175. *Id.*

176. E.g., P. Sanders, "Commentary", in *Yearbook* I (1976) p. 207 at p. 210; G. Gaja "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.A. at p. 5-6; G. Recchia, "An Italian Approach to International Conventions on Arbitration", in *Commercial Arbitration-Essays in Memoriam Eugenio Minoli* (Turin 1974) p. 393 at p. 405; Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 107.

177. Foreign Awards (Recognition and Enforcement) Act. 1961, Act No. 45 of 1961 (November 30, 1961), Sect. 2.

178. Recognition and Enforcement of Foreign Arbitral Awards Act 1971, Act No. 49 of 1971 (December 22, 1971), Sect. 3(1).

179. Arbitration Act 1961, Act No. 38 of 1961 (March 16, 1961), Sect. 36(1).

I–3.3 Judicial Interpretations

No uniformity exists amongst the courts either as to whether the Convention has retroactive effect. Furthermore, when they do consider it retroactive, they differ in regard to the moment on which the retroactivity should be taken into account. This complicated situation can be best considered schematically:

As far as the arbitration is concerned, when the enforcement of the arbitration agreement or the arbitral award is sought two and three moments, respectively, can be distinguished:

(1) Making of the arbitral award (not applicable to the enforcement of the arbitration agreement);

(2) Conclusion of the arbitration agreement;

(3) Commencement of the proceedings for the enforcement of the agreement or award.

For the Convention three moments can also be distinguished:

(a) The date of the coming into force of the Convention (i.e., June 7, 1959);

(b) The date on which the Convention entered into force in the State where the enforcement of the arbitration agreement or award is sought (according to Art. XII(2) this date is the ninetieth day after deposit by such State of its instrument of ratification or accession);

(c) In addition to (b), the date on which the Convention entered into force in the foreign State where the arbitration is taking place or where the award is made. This may be relevant if the State where the enforcement is sought has used the first reservation of Article I(3).[180]

Considering the permutations of these time factors, there are at least *six* possible moments for which the retroactive effect of the Convention may be determined in the case of the enforcement of the arbitration agreement: (2)&(a), (2)&(b), (2)&(c), (3)&(a), (3)&(b) and (3)&(c). For the enforcement of the arbitral award there are at least *nine* possible moments: (1)&(a), (1)&(b), (1)&(c), (2)&(a), (2)&(b), (2)&(c), (3)&(a), (3)&(b) and (3)&(c). Thus, the first three permutations ((1)&(a), (1)&(b) and (1)&(c)) concern only the enforcement of the arbitral award; the remaining six concern both the enforcement of the arbitration agreement and the arbitral award.

Although this is woefully complicated, and would be unnecessary if one simple rule were adopted – i.e., the Convention is retroactively applicable in all cases – we need to examine each of the permutations separately, as in respect of most of them the courts have implicitly or expressly either rejected or accepted them.

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180. See *supra* I–1.1 ("Universality and First Reservation").

Ad (1)&(a): Award and entry into force of Convention on June 7, 1959

The Convention was applied by the Dutch Supreme Court in its first decision in respect of the *Yugoslavia* v. *SEEE* award which had been made on July 2, 1956 – thus well before the coming into force of the Convention on June 7, 1959 – without any discussions on this point.[181] No other court has been confronted with an award antedating the coming into force of the Convention and it is highly unlikely that it will occur as the Convention is almost twenty-five years old.

Ad (1)&(b): Award and entry into force of Convention in forum State

The Courts are divided on the question whether an award made before the entry into force of the Convention in the country where the enforcement is sought falls under the Convention. The U.S. Court of Appeals for the Second Circuit affirmed that the Convention did apply.[182] The contrary conclusion was reached by the Court of Appeal of the Canton Geneva [183] and by the High Court of Ghana.[184] As noted before, the implementing Acts of Ghana, India and Botswana deny retroactive application of the Convention to awards rendered before the commencement of the Acts.[185]

Ad (1)&(c): Award and entry into force of Convention in foreign State concerned

If a court declines to apply the Convention to awards made before entry into force of the Convention in its country (see (1)&(b)), it may, *in addition,* decline to apply the Convention if the State in which the award was made was not a Contracting State at the time of the making of the award, in view of the first reservation of Article I(3).

The Court of Appeal of Basle presumably relied on this possibility as a criterion for the applicability of the Convention.[186] The case concerned two Dutch awards made in 1969 and 1970. The Court of Appeal referred expressly to the date of entry into force of the Convention in both Switzerland (August 30, 1965) and the Netherlands (July 23, 1964). The Court added that "the present awards are without any doubt rendered after the coming into force of the Convention [in both countries]", and concluded that the Convention was applicable. *A contrario* it could be argued that the Court would not have applied the Convention if the Netherlands had not ratified the Convention at the time of the rendition of the awards.

The opposite view was expressed by the Court of Appeal of Hamburg concerning an award made in the United Kingdom before its adherence to the Convention.[187] The Court of Appeal expressly rejected the relevance of this date arguing that the Convention applies retroactively as it has a procedural character.

Ad (2)&(a): Agreement and entry into force of Convention on June 7, 1959

There is no court decision reported in which the conclusion of the arbitration agreement before the coming into force of the Convention has been mentioned in

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181. Hoge Raad, October 26, 1973 (Neth. no. 2B). The same was done by the Court of Appeal in this case, Hof of The Hague, September 8, 1972 (Neth. no. 2A).

182. U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v.* Fotochrome Inc. (U.S. no. 3).

183. Cour de Justice of the Canton Geneva, May 12, 1967, Commoditex S.A. *v.* Alexandria Commercial Co. (Switz. no. 2).

184. High Court of Ghana, September 29, 1965, Strojexport *v.* Edward Nasser and Co. Motors Ltd. (Ghana no. 1).

185. See *Supra* n. 177-179.

186. Obergericht of Basle, June 3, 1971 (Switz. no. 5).

187. Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18).

respect of the enforcement of the arbitration *agreement*.

The conclusion of the arbitration agreement before the coming into force of the Convention on June 7, 1959, in an action for the enforcement of the arbitral *award* was taken into account by the Dutch Supreme Court in the already cited *SEEE* v. *Yugoslavia*-case. The contract containing the arbitral clause was concluded in 1932. The dispute between the parties resulted in an award made in the Canton Vaud on July 2, 1956. In its first decision in the enforcement proceedings in the Netherlands, the Dutch Supreme Court was of the opinion that on the basis of the Convention, the parties can agree to an "a-national" arbitral award.[188] In its second decision the Supreme Court decided that the award in question could not be considered as such an "a-national" award because at the time of conclusion of the arbitration agreement, the parties could not have envisaged this faculty, the Convention not being in existence at that time.[189] This decision may be interpreted as meaning that the Dutch Supreme Court regards the faculty to "de-nationalize" the arbitration, which it supposes to exist under the Convention, as a provision which, unlike the Convention's other provisions, cannot have retroactive effect.

Ad (2)&(b): Agreement and entry into force of Convention in forum State

The Italian Supreme Court has repeatedly held in actions concerning the enforcement of the arbitration *agreement* that the Convention also applies to the enforcement of arbitration agreements concluded before the Convention entered into force in Italy.[190]

As far as the enforcement of the arbitral *award* is concerned, the Italian Supreme Court has also held that the Convention is to be applied irrespective of the date when the arbitration agreement was concluded, considering that the provisions of the Convention are principally of a procedural nature.[191]

Ad (2)&(c): Agreement and entry into force of the Convention in foreign State concerned

There is no court decision reported in which the conclusion of the arbitration agreement before the entry into force of the Convention in the State in which the arbitration is to take place, or is taking place, has been mentioned in respect of the enforcement of the arbitration *agreement*.

The criterion that the arbitration agreement was concluded before the Convention entered into force in the State where the *award* was made, was considered by the Court of Appeal of Hamburg.[192] The case concerned a contract containing an arbitral clause which was concluded between a U.S. and German party before the accession of the United States to the Convention. This was sufficient reason for the Court of Appeal to deny the application of the Convention, notwithstanding the fact that the award was made in New York after the date of accession by the United States to the Convention. However, the same Court of Appeal has apparently reversed its position in a subsequent decision, referred to above under permuta-

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188. Hoge Raad, October 26, 1973, SEEE *v.* Yugoslavia (Neth. no. 2B). See for the question of "a-national" award and the SEEE *v.* Yugoslavia case *supra* I–1.6.4.

189. Hoge Raad, November 7, 1975 (Neth. no. 2D).

190. Corte di Cassazione (Sez. Un.), January 25, 1977, no. 361 Total *v.* Achillo Lauro (Italy no. 26); Corte di Cassazione (Sez. Un.), May 12, 1977, no. 3989, Scherk Enterprises A.G. *v.* Société des Grandes Marques (Italy no. 28).

191. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5), reversing Tribunale of Ravenna, April 15, 1970 (Italy no. 3).

192. Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11).

tion (1)&(c), in which it held that the Convention applies retroactively on the ground that it has a procedural character.[193]

Ad (3)&(a): Enforcement proceedings and entry into force of Convention June 7, 1959

The situation where the enforcement proceedings on the arbitration agreement or award were started before the coming into force of the Convention on June 7, 1959, has not come up in practice.

Ad (3)&(b): Enforcement proceedings and entry into force of Convention in forum State

The initiation of enforcement proceedings in respect of an arbitral *award* before the Convention had entered into force in the State in which the enforcement was sought, was in 1969 a ground for refusal to apply the Convention for the Italian Supreme Court.[194] The Court argued that Article II of the Convention, because of its contents, is a rule of substantive law rather than a rule of procedure. In subsequent decisions, the Italian Supreme Court abandoned this view and held that the Convention has essentially a procedural nature.[195] It was, therefore, no surprise that in 1975 it held the Convention applicable to enforcement proceedings in respect of an arbitration *agreement* which had started already in 1967.[196] This was reaffirmed in a decision made in 1976 in regard to an enforcement action on an arbitration agreement which had been started in 1965.[197]

A rather narrow application of the retroactivity issue in respect of the enforcement of the arbitration agreement was given by the High Court of Kerala in India, whose law implementing the Convention, as noted above, already denies retroactive effect to awards made before its coming into force on October 11, 1960.[198] In 1971 the Indian Supreme Court had interpreted the expression "submission" in Section 3 of the 1961 Act implementing the Convention in India as meaning an actual submission or completed reference to arbitration, and not a mere agreement to refer or an arbitral clause.[199] An amendment by the Indian Parliament, which came into force on November 26, 1973, amended the Supreme Court's restrictive interpretation.[200] In the case before the High Court of Kerala, the action for enforcement of the arbitration agreement was initiated in 1969. In 1977 the High Court decided that the amended Section 3 applies only to suits that are commenced after the coming into force of the new Section, and, accordingly, refused to enforce the arbitration agreement. The Court reasoned that the "new provision can be

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193. Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18), see *supra* at n. 187.

194. Corte di Cassazione, April 30, 1969, no. 1403, Officine Fratelli Musso *v.* Società Sevplant (Italy no. 1). The Convention entered into force in Italy on April 29, 1969. The action in question was initiated on April 27, 1962.

195. See especially, Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5), see *supra* at n. 191.

196. Corte di Cassazione (Sez. Un.), April 8, 1975, no. 1269, Agenzia Marittima Constantino Tomasos Ltd. *v.* Sorveglianza S.I.P.A. (Italy no. 13).

197. Corte di Cassazione (Sez. Un.), November 8, 1976, no. 4082, Società Brisighello *v.* Casa Spedizione Internazionale Zoni & Festari (Italy no. 24). This case and the ones mentioned in *supra* n. 194 and 196 are a saddening demonstration how court actions in respect of international commercial arbitration can be dragged out in Italy.

198. See *supra* at n. 177.

199. Supreme Court of India, January 1971, V/O Tractoroexport *v.* Tarapore & Co. (India no. 1). See for this question, *infra* III–4.3.2 ("Submission to Arbitration").

200. Act No. 57 of 1973.

applied only prospectively since it deals not merely with matters that are procedural in nature, but also with substantive and vested rights".[201]

Ad (3)&(c): **Enforcement proceedings and entry into force of Convention in foreign State concerned**

There is no court decision reported in which the enforcement proceedings concerning the arbitration *agreement* were initiated before the Convention had entered into force in the State in which the arbitraton is to take place, or is taking place.

The situation where an enforcement action concerning an *award* was initiated before the Convention had entered into force in the State in which the award was made came up before the Supreme Court of Austria, which country has used the first reservation of Article I(3).[202] The award had been made in the Netherlands and the Austrian lower court had erroneously held that the Netherlands had at that time not yet ratified the Convention. The Supreme Court decided that the Convention was applicable, as at the time of the request for enforcement the Netherlands were already a Party to the Convention. This decision means in the first place that if at the time of commencement of the enforcement proceedings in Austria the Convention has not entered into force in the country where the award was made, the Convention is not applicable. As the Austrian Supreme Court relied on the date of the commencement of the enforcement proceedings, the decision may also mean that the country of rendition need not yet have been a Party to the Convention on the date when the award was made (cf., (1)&(c) above).

I–3.4 Retroactive Applicability in All Cases

The various permutations in which the courts have considered the retroactive effect of the Convention and have reached widely differing results, are dazzling. It is submitted that all these complicated permutations are unnecessary as one simple rule can be laid down: the Convention applies retroactively in *all* cases.

It is a well-established principle that international conventions do not have retroactive effect on the contractual relations of the parties, "unless a different intention appears from the treaty or is otherwise established".[203] At the beginning of this Part it was already observed that the preparatory works of the New York Convention do not do much to clarify the absence of an express provision on the retroactive effect of the Convention. However, another provision of the Convention – i.e., Article VII(2) – can be considered as "a different intention".

201. High Court of Kerala, January 31, 1977, Food Corporation of India *v.* Mardestine Compania Naviera (India no. 3).

202. Oberster Gerichtshof, November 17, 1965 (Austria no. 1).

203. See Art. 28 of the Vienna Convention on the Law of Treaties of May 23, 1969, *Tractatenblad* 1972 no. 51, entered into force on January 27, 1980, which reads under the heading "Non-retroactivity of Treaties":

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party."

Before commencing a textual interpretation, it may be worthwhile considering first whether the Convention contains substantive, as opposed to procedural, provisions. As has been observed by various delegates at the New York Conference of 1958, the purpose of the Convention is to facilitate the procedure for recognition and enforcement of agreements and awards. The procedural character of the Convention is the main argument used by the courts who favour retroactivity.[204] However, it is argued that certain provisions, especially those concerning the arbitration agreement, are of a substantive nature and consequently the Convention is not retroactively applicable in this respect.[205] It is submitted that this view gives too much credit to the nature of the provisions concerning the arbitration agreement. If an arbitration agreement does not meet the written form requirement of Article II of the Convention, it does not mean that for this reason the agreement is invalid; it only means that no enforcement under the Convention is possible. Enforcement by virtue of Article VII(1) may still be possible under other multilateral or bilateral treaties or the domestic law on enforcement of foreign arbitration agreements and awards.[206] The Convention merely provides for enforcement if its requirements are fulfilled. To this extent all provisions of the Convention can be considered as procedural.

Apart from these arguments based on the character of the provisions of the Convention, the Convention itself also contains an indication that it applies retroactively. Article VII(2) declares that the Geneva Protocol of 1923 and the Geneva Convention of 1927 shall cease to have effect between Contracting States on their becoming bound by the Convention. If the Convention were not retroactively applicable in countries which had adhered to the Geneva Treaties, a gap would exist in respect of arbitration agreements and awards made before these States became bound by the New York Convention. This category of agreements and awards would then fall neither under the New York Convention nor under the Geneva Treaties.[207]

It is obvious that this result was never the intent of the drafters of the Convention. Although the intent of the drafters of the Convention was not entirely clear when they voted on an express provision in respect of the retroactive applicability, Article VII(2) can be considered

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204. See, e.g., Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18); Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5); Corte di Cassazione (Sez. Un.), January 25, 1977, no. 361, Total *v.* Achille Lauro (Italy no. 26).

205. P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 107.

206. See *infra* I–4.

207. See also G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978) I.A.I.

as a sufficient indication for an acceptance of the retroactive effect.[208]
The question remains which is the relevant date for the retroactiv
effect. If it is accepted that the Convention applies retroactively, it i
difficult to understand why, for instance, the Convention would appl
to an award made before the entry into force of the Convention in th
country where enforcement is sought, but not to an award made befor
the coming into force of the Convention on June 7, 1959.[209] Uniform
ity would be better served if one clear rule were relied upon: th
Convention applies to the enforcement of an award whenever th
agreement or award has been made. The corollary applies to the en
forcement of the arbitration agreement.

I–3.5 Uniform Interpretation (and Summary)

Although the Convention does not contain a provision regarding it
retroactive effect, the Convention can be deemed to apply retroactivel
in all cases in which the enforcement of the arbitration agreement o
arbitral award is sought under the Convention, whenever the agreemen
or award has been made (pp. 72-80).

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208. In comparison, the European Court of Justice, Judgment of November 13, 1979, in th
case 25/79, *European Court Reports* [1979] p. 3423, Sanicentral G.m.b.H. *v.* René Colin, hel
that a forum selection agreement concluded before the entry into force of the European Con
vention on Jurisdiction and Enforcement of Civil and Commercial Judgments, signed at Brussels
September 27, 1968, falls also under this Convention. See for this Convention, *infra* II–2.
("Is a Revision of Article II(2) Needed?") at n. II.306-310.

209. The date on which the Convention entered into force in the country where the award
is made may, however, be relevant if the country where the enforcement is sought has used the
first reservation of Art. I(3). In view of the procedural character of the Convention, the relevant
date must be presumed to be the date on which the enforcement proceedings are initiated, and
not the date on which the award is made. See text at *supra* n. 202.

PART I–4 DOMESTIC LAW ON ENFORCEMENT AND OTHER TREATIES IN THE FIELD OF ARBITRATION (ART. VII)

I–4.1 Introduction

In the preceding Parts I–1 - I–3 we have examined both which and when arbitration agreements and arbitral awards fall under the New York Convention. Such an agreement or award may, however, also come within the purview of the domestic law concerning the recognition and enforcement of foreign arbitration agreements and awards. The same may happen with bilateral or other multilateral treaties in the field of arbitration. This situation of concurrent applicability poses the question of the relationship between the New York Convention, on the one hand, and domestic law and other treaties, on the other. On this question the New York Convention provides the following in Article VII:

"(1) 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.

(2) 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 first paragraph of this Article contains two provisions. One provision provides the freedom of a party to base his 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* (hereinafter abbreviated as "mfr-provision"). The other 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 relationship between the New York Convention and the domestic law concerning the enforcement of foreign arbitral awards is affected only by the mfr-provision. The domestic law is in a significant number of countries more cumbersome for the enforcement of foreign awards than the New York Convention, and probably for this reason has not led to many court decisions. This relationship will be dealt with in I–4.3 below.

The question of the relationship between the New York Convention and other treaties seems to be more complicated. In the first place, whereas according to its text the compatibility-provision concerns earlier treaties only [210], the applicability of the later treaties is not excluded because the mfr-provision refers to treaties in general. Consequently, both the compatibility-provision and the mfr-provision play a role for the question of the relationship between the New York Convention and other treaties. In the second place, the relationship between the New York Convention and the other treaties obviously cannot be determined by the New York Convention alone; here we have also to look at both the general rules of conflict of treaties and what the other treaties provide in this respect. Although the relationship with other treaties may seem to be a complicated one, it has not led to major problems in practice as will be seen when this relationship is examined in I–4.4.

The exception to the compatibility- and mfr-provision of the first paragraph of Article VII is stated in the second paragraph according to which the Geneva Protocol of 1923 and the Geneva Convention of 1927 shall cease to have effect between the States that become Party to the New York Convention. As all States which had adhered to the Geneva Treaties have not yet become a Party to the New York Convention – although their number decreases constantly – the provision of Article VII(2) has caused some problems which will be dealt with in I–4.5.

The mfr-provision is concerned with the relationship with domestic law and other treaties; the compatibility-provision is concerned only with other treaties. As the mfr-provision concerns both relationships, the general aspects of this provision will be examined first in I–4.2, before considering both relationships in particular.

I–4.2 More-favourable-right (mfr)-provision

I–4.2.1 *In general*

The mfr-provision is a consequence of the Convention's purpose to facilitate the enforcement of foreign arbitral awards. It embodies the principle that if the Convention's conditions are not met, the award can still be enforced on another basis. The Court of Appeal of Cologne expressed this as follows: "The rationale of this provision is to avoid depriving a party who seeks recognition of an award of more favourable possibilities under the national law of the State where enforcement is

210. See text *infra* at n. 232-233.

sought."[211] The Court could have added "or under the treaties to which the State where enforcement is sought has adhered". Leaving aside this omission, the Court clearly indicated the rationale of the mfr-provision in Article VII(1).

The mfr-provision's underlying idea is to make possible the enforcement of foreign awards in the greatest number of cases possible. Favourable to enforcement as that may be, it does not enhance the establishment of a uniform legal regime governing international commercial arbitration. Exclusive applicability of the Convention to the enforcement of foreign awards would increase the degree of certainty as to which awards are enforceable and which are not. As it now stands, those awards which do not comply with the Convention have an uncertain status. The exclusive applicability of the Convention could have put a greater pressure on practice to conform to the Convention's conditions.

The mfr-provision may also lead to unexpected situations for a party against whom enforcement is sought. An example, which will be elaborated hereafter, may be found in the F.R. German domestic law concerning the enforcement of foreign awards. Unlike Article V(1)(a) of the New York Convention, under the German domestic law, the invalidity of the arbitration agreement is not a ground for refusal of enforcement if that ground could have been asserted in an action for setting aside in the country where the award was made. If a defendant, faced with a foreign award based on an arbitration agreement which is invalid according to the law of the country where the award was made, does not initiate an action for setting aside the award in the country of rendition because he expects to have the possibility to invoke the invalidity of the agreement pursuant to Article V(1)(a) of the New York Convention in F.R. Germany, he may be caught by surprise if the plaintiff does not rely on the New York Convention, but rather, by virtue of the mfr-provision, on German domestic law. At that time the time limit for setting aside the award in the country of rendition may well have expired. Losing parties, residing or having assets in countries like F.R. Germany, should, therefore, be warned of this possibility offered to the winning party by Article VII(1) of the Convention.

The few court decisions in which the mfr-provision has been applied will be dealt with in the following two Sections (I–4.3 and I–4.4). The reason for the infrequent application may be that the parties are not aware of the possibilities offered by the mfr-provision which appears in the text of the Convention after its "heart". A more likely reason may be, however, that the Convention itself is more favourable for enforcement than many of the other bases.

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211. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14).

These few cases must be distinguished from the cases in which the enforcement of the award is based on a bilateral treaty or domestic law on enforcement without any mention of the Convention, and in particular its Article VII(1), although the award would have come within the Convention's scope. This applies especially to France where, in general, very few courts have dealt with the Convention. It is said that the reason behind this practice is that French lawyers and judges are unfamiliar with the New York Convention.[212] In my opinion, it would be legally more correct to refer in these cases to Article VII(1) of the Convention in order to make clear its relationship with the other bases.

The rare application of the mfr-provision makes it difficult to state the judicial interpretations of this provision. Anticipating possible diverging interpretations, three points may be mentioned.

I–4.2.2 *Who may invoke?*

According to the text of Article VII(1), "any interested party" may rely on the mfr-provision. This expression may suggest that both the party seeking enforcement and the party against whom enforcement is sought are meant by it. Such interpretation would be reinforced by the fact that in other provisions of the Convention a distinction is made between "the party applying for recognition and enforcement" (Art. IV(1)) and "the party against whom [the award] is invoked" (Art. V(1)).

Despite the seemingly broad meaning of the expression "any interested party", it cannot mean anything else than the party seeking enforcement. An award may be enforceable under the New York Convention, but not under domestic law, for example, because the latter requires a specific approval in writing for the arbitral clause.[213] If the party against whom the enforcement is sought would be permitted to invoke the domestic law, the enforcement could not be granted, although the award would be enforceable under the New York Convention. This result would be wholly inconsistent with the pro-enforcement bias of the Convention and the aim of the mfr-provision itself which is to provide for enforcement in the greatest number of cases possible.

Also the text of Article VII(1) appears to be against the reliance, by the party against whom the enforcement is sought, on domestic law or

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212. See P. Sanders, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231. An example in which, in my opinion, the Convention could have been applied is Cour de Cassation (1st Civil Chamber), March 18, 1980, Compagnie d'armement maritime *v.* Compagnie tunisienne de navigation, published in *Revue de l'arbitrage* (1980) p. 496, with comment by Mezger at p. 500, concerning the request for enforcement of an award made in London. This case was decided on the basis of French domestic case law concerning the enforcement of foreign arbitral awards.

213. Such a requirement is, for example, to be found in Arts. 1341 and 1342 of the Italian Civil Code, see *infra* II–2.4.3.2.

other treaties. Article VII(1) speaks, in fact, of two different rights. The first is the right a party may have to avail himself of an arbitral award. The second is the right to rely on another enforcement basis, thus the mfr-provision. Article VII(1) grants the right to rely on another enforcement basis (i.e., the second right) only to the party who can avail himself of a right of the arbitral award (i.e., the first right). Since, in principle, only the party seeking enforcement can be considered to have a right under the award, e.g., that he be paid damages, and the other party only an obligation, the right to rely on another enforcement basis, of Article VII(1), must logically be deemed to be limited only to the party seeking enforcement.

The interpretation that "any interested party" means only the party seeking enforcement, is apparently also understood in this sense in practice. In no case has a party against whom the enforcement was sought used Article VII(1) to argue that domestic law or another treaty would govern the enforcement instead of the New York Convention. It may be added that the above quoted sentence of the Court of Appeal of Cologne is one of the sparse decisions in which the mfr-provision is expressly linked with the party seeking enforcement.[214] The authors who have considered the expression "any interested party" adhere to the same interpretation.[215]

From the foregoing it follows that if a party seeking enforcement chooses to rely on another enforcement basis, for instance, because the arbitral clause in question does not comply with the written form as required by Article II(2) of the New York Convention, the other party must acquiesce in this choice. He cannot argue that the enforcement should be refused by virtue of the New York Convention because the Convention is "more favourable" to him. In I–4.2.1 it was seen that this may lead to unexpected situations for that party.

I–4.2.3 *No combination Convention with other possible bases*

If a party seeking enforcement choses to rely on the domestic law concerning enforcement of foreign awards or on another treaty by virtue of the mfr-provision of Article VII(1) of the New York Convention, he must rely on that other basis *in toto*, to the exclusion of the New York Convention.[216] He may not, for instance, rely on domestic law

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214. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14); see *supra* at n. 211. The Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12), also observed that "According to the more-favourable-right-provision of Art. VII of the New York Convention the *party seeking enforcement* has the liberty to base his request for enforcement on domestic law". (emphasis added)

215. P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 123; P. Sanders, "Commentary", in *Yearbook* Vol. II (1977) p. 254 at p. 263.

216. This question must be distinguished from the question whether a court may rely on

for the formal validity of the arbitration agreement, excluding thereby Article II(2) of the Convention, but for the other aspects of the enforcement still rely on the remaining provisions of the Convention. Such a combination would contradict the interdependence of the Convention's provisions which must be deemed to constitute a whole. The same principle of interdependence naturally also goes for the domestic law concerning the enforcement of foreign arbitral awards and the other treaties. The view that a combination of the Convention's provisions with the provisions of another enforcement basis is not allowed, was explicitly affirmed by the already mentioned Court of Appeal of Cologne.[217] Two treaties may, however, be combined where the treaties so imply. This is true of the European Convention of 1961 which complements the New York Convention in certain cases.[218]

I–4.2.4 *Mfr-provision and the arbitration agreement*

The mfr-provision of Article VII(1) mentions expressly only the enforcement of an arbitral award. It does not mention the enforcement of an arbitration agreement, which possibility is provided in Article II(3) of the Convention.[219] The mfr-provision may, however, also be important in this case. Although an arbitration agreement may fall under the New York Convention, it may happen that the form of the agreement is not in accordance with the written form as required by Article II(2), and hence the agreement may not be enforceable under the Convention. Under domestic law or another treaty, the agreement in question could still be enforceable. If the mfr-provision could not be applied in this case, the faculty to rely on another basis for enforcement would seem to be excluded.

The omission of an express mention of the arbitration agreement in Article VII(1) must be deemed unintentional as the provisions concerning the agreement were inserted in the Convention at a very late stage of the New York Conference of 1958. Rather, the text of the Convention hints that an extensive interpretation is required. As noted before, the general rule is the application of compatibility- and mfr-provision of the first paragraph of Article VII. As far as the enforcement of the arbitral award is concerned, the abrogation of the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 in the second paragraph of Article VII can be considered as an express exception to the general rule. However, the abrogation of the Geneva Protocol on Arbi-

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its own initiative on a more favourable basis for the enforcement. It is generally accepted that a court has such freedom. See Schlosser, *supra* n. 215, no. 128.

217. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14), See *supra* at n. 211.

218. See *infra* I–4.4.2.

219. See generally *infra* II–1 ("Referred by Court to Arbitration").

tration Clauses of 1923, also stated in the second paragraph, may be considered as an exception as well. The reason for this is that the New York Convention is conceived as a replacement of both the Geneva Protocol and the Geneva Convention. This is clearly indicated by the fact that both Geneva Treaties are abrogated in the same provision, which provision, moreover, is placed directly after the general rule that the New York Convention does not affect other treaties. Because the matters covered by the Geneva Protocol can be deemed to fall under the exception, they can be deemed to be included in the general rule. In other words, the exception clarifies the scope of the general rule. One of the matters regulated by the Geneva Protocol is the referral by the court to arbitration in its Article 4, which provision is similar to Article II(3) of the New York Convention.[220] This would lead to the conclusion that the general rule of having the freedom to rely on another basis for the enforcement includes the enforcement of the arbitration agreement.

In addition, it should be observed that it would seem contrary to the pro-enforcement bias of the Convention that the mfr-provision, which aims at making enforcement of awards possible in the greatest number of cases possible, would not apply also to the enforcement of the arbitration agreement. If it were otherwise, a curious situation could arise: if an arbitration agreement does not conform to the formal requirements of Article II(2), referral to arbitration would have to be rejected, whilst an award based on the same agreement could be enforced on another basis by virtue of the mfr-provision. This dichotomy obviously cannot have been the intention of the drafters of the New York Convention.[221]

The question of the applicability of the mfr-provision to the referral to arbitration has been mentioned only in anticipation of future cases. In practice, the above question has not yet come up, although it is not unlikely that it will, considering the rather stringent form for the arbitration agreement as required by Article II(2) of the Convention. For simplicity's sake the question will, in general, not be included in the following Sections, although the observations made therein will

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220. Art. 4 of the Geneva Protocol of 1923 provides:
"The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said Article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.
Such reference shall not prejudice the competence of the judicial tribunals, in case the agreement or the arbitration cannot proceed or becomes inoperative."

221. Accord, H.-V. von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen* (Berlin 1973) p. 53 n. 8; P. Sanders, "Consolidated Commentary Vols. V and VI", in *Yearbook* VI (1981) p. 202 at p. 217.

apply *mutatis mutandis*. It should be added that few bilateral and multilateral treaties contain a provision similar to Article II(3) of the Convention.[222] Consequently, what remains as an alternative basis for a request for referral to arbitration is generally domestic law.

I–4.3 Relationship Between Convention and Domestic Law on Enforcement of Foreign Awards

A consequence of the mfr-provision is that the New York Convention does not supersede the domestic law on the enforcement of foreign awards of the country where the enforcement is sought. A F.R. German Court of Appeal was of a different opinion regarding an arbitral award made in Romania, as it held that the New York Convention had superseded Section 1044 of the German Code of Civil Procedure which is the German domestic law on the enforcement of foreign awards. The German Federal Supreme Court corrected this view by holding that the New York Convention does not supersede Section 1044 of the German Code of Civil Procedure as, pursuant to Article VII(1) of the Convention, a party is free to base his request for enforcement on the domestic law of the country where the enforcement is sought.[223]

The domestic law on the enforcement of foreign awards has been relied upon for the enforcement of an award in connection with the New York Convention only in very few reported cases so far.[224] This is not surprising since, as observed, in many countries the domestic law on the enforcement of foreign arbitral awards is more cumbersome than the New York Convention.

F.R. Germany is one of the few countries where in certain cases the domestic law may be more favourable to the enforcement of foreign awards. For example, under German law the invalidity of the arbitration agreement is not, unlike Article V(1)(a) of the Convention, a ground for refusal of enforcement of a foreign award if the invalidity could have been asserted in an action for setting aside in the country where the award was made.[225]

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222. See for bilateral treaties, *infra* I–4.4.4.

223. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12).

224. E.g., Oberlandesgerichts of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8): the Court held that the New York Convention could not be applied to the enforcement of the arbitral award as the sales confirmation containing the arbitral clause had not been returned, which in insufficient for Art. II(2) (see *infra* II–2.4.2), but granted the enforcement on the basis of German domestic law concerning the enforcement of foreign arbitral awards. The Court did, however, not mention Art. VII(1) expressly.

225. See especially E. Mezger, "Die Anerkennung jugoslawischer und anderer osteuropäisscher Schiedssprüche in der Bundesrepublik", 15 *Neue Juristische Wochenschrift* (1962) p. 278 at p. 282.

The following case decided by the German Supreme Court is worth mentioning as an example of its application outside the New York Convention.[226]

The case concerned the request for enforcement of an award made in Yugoslavia which State was then, and is at the time of this writing still, not a Party to the New York Convention. As F.R. Germany has used the first reservation of Article I(3) according to which it will only apply the Convention to the enforcement of awards made in other Contracting States, the Convention could not be applied.

The German respondent had objected to the request for enforcement of the award that the arbitration agreement contained in a broker's note was invalid as it was not in writing. The Supreme Court rejected this objection. According to Section 1044(2) of the German Code of Civil Procedure a foreign award will be enforced in Germany unless it has not become legally binding (*rechtsunwirksam*) under the applicable arbitration law (i.e., Yugoslav law). Pursuant to Yugoslav arbitration law, a party has 30 days after the making of the award to apply to the court for setting aside on the ground of invalidity of the arbitration agreement. As the German respondent had not made such an application, the award had become binding under Yugoslav law, and there was no longer a possibility to assert the invalidity before the German courts.

If Yugoslavia were a Party to the New York Convention, the same would probably have happened. If the arbitral clause in question did not meet the written form as required by Article II(2) of the New York Convention, the Yugoslav claimant could, by virtue of Article VII(1), have relied on the German domestic law for enforcement of foreign arbitral awards. The decision of the Supreme Court would then have been the same.

The enforcement of foreign awards under domestic law is, in principle, not limited to actions based on specific statutory provisions. A possible action outside the statutory provisions may be the *actio ex contractu*. Under this action the award is considered as a contract between the parties. A variant of this action is to base it on the obligation assumed under the arbitration agreement to carry out the arbitral award.[227] The *actio ex contractu* is more complicated than the enforcement of foreign awards under the New York Convention and most of the domestic laws as it involves the bringing of an ordinary contract claim with all possible defences thereto. It is a last remedy which may be useful in cases where the other actions fail.[228]

It may be added that where a court of the country in which the award is made has confirmed or declared enforceable (leave for enforcement, exequatur and the like) the award, it may be enforced in another country as a foreign country judgment. This possibility will be considered in connection with the question whether in such a case the award

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226. Bundesgerichtshof, January 3, 1971, *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrecht* (1971) no. 158.

227. The possibility of the *actio ex contractu* was denied by the Corte di Appello of Bari, May 30, 1973, Casulli *v.* Tradax England Ltd. (Italy no. 8).

228. In the Common Law countries the action is called an *action on the award*, see my article, "Etude comparative du droit de l'arbitrage commercial dans les pays de Common Law", 19 *Rassegna dell'Arbitrato* (1979) p. 11 at p. 58.

can still be enforced as an award under the New York Convention or must be deemed to be absorbed by the judgment (i.e., the question of merger).[229]

I–4.4 Relationship Between Convention and Bilateral and Multilateral Treaties

I–4.4.1 *In general*

If an award falls under the definition of the field of application of the New York Convention and bilateral and multilateral treaties, 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 provisions of the other treaties will be examined subsequently; first some observations will be made in respect of the New York Convention and the rules of conflict of treaties.

The New York Convention is quite liberal concerning its relationship with other treaties. The compatibility-provision of Article VII(1) lays down as a general 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 his 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.[230] It would be beyond the scope of the present study to go into the question whether judges have not always done so implicitly. It may suffice to say that the fact that the principle is now being formulated openly has conferred upon it an "official" recognition, and makes it more workable in practice.

In the case of arbitration, the principle of maximum efficacy means that if an award is unenforceable under one treaty which could be applied, but enforceable under another which could also be applied, the

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229. See *infra* III–4.5.2.3 ("Merger of Award into Judgment").

230. See generally F. Majoros, *Les Conventions internationales en matière de droit privé* (Paris 1976).

other treaty will be applicable, irrespective of whether it is an earlier or later treaty, and irrespective of whether it is more general or specific.

The compatibility- and mfr-provision can be considered as a reflection of the principle of maximum efficacy. The principle can therefore be said to be implied in the New York Convention itself. Moreover, the main purpose of the Convention to facilitate enforcement can equally be held in accordance with this principle.

On the other hand, the Vienna Convention on the Law of Treaties of May 23, 1969, seems not to offer decisive solutions for the relationship between the New York Convention and other treaties.

The Vienna Convention [231] itself does not say anything on the principle of maximum efficacy, probably because the express formulation of this principle is quite recent. Some traditional principles concerning conflict of treaties, insofar as relevant for the present question, can be found in Article 30, entitled "Application of Succesive Treaties Relating to the Same Subject Matter". Worth mentioning is paragraph 2 of the Article 30 which reads:

> "When a treaty specifies that it is subject to, *or that it is not to be considered as incompatible with,* an earlier or later treaty, the provisions of that other treaty shall prevail." (emphasis added)

An isolated reading of the compatibility-provision contained in Article VII(2) of the New York Convention may suggest that it triggers the application of Article 30(2).

As regards treaties concluded prior to the coming into force of the New York Convention – i.e., on June 7, 1959 – Article 30(2) of the Vienna Convention would imply that they prevail over the New York Convention. The question whether this is the case for earlier multilateral treaties has little practical significance because the only important multilateral treaties concluded prior to the coming into force of the Convention were the Geneva Protocol of 1923 and the Geneva Convention of 1927, which are, however, abrogated by Article VII(2). For some earlier bilateral treaties, Article 30(2) of the Vienna Convention could create a problem.

As regards treaties concluded subsequent to the coming into force of the Convention, Article 30(2) of the Vienna Convention would also imply that they prevail over the New York Convention. It should, however, be pointed out that it is not altogether clear whether the compatibility-provision contained in Article VII(1) of the New York Convention also envisages treaties concluded later. The English text merely states "entered into". The French and Spanish texts, which are equally authentic by virtue of Article XVI of the Convention, are also vague, reading "*conclus*" and "*concertados*" respectively. The Russian text, which is also authentic, appears, however, to read "have concluded".[232] The German text, which is not authentic, supports this as it states "*geschlossen haben*".[233] It would therefore seem that the text of the Convention itself already excludes the applicability of Article 30(2) of the Vienna Convention to the relationship between the Convention and later treaties.

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231. *Tractatenblad* 1972 no. 51. See *supra* Introduction at n. 8.

232. Art. 33 of the Vienna Convention of 1969 concerning the "Interpretation of treaties authenticated in two or more languages" would support the view that there should be read "have entered into", as para 4. of this Article provides that in case of a difference of meaning in the authentic texts "the meaning which best reconciles the texts ... shall be adopted".

It is submitted, however, that Article 30(2) of the Vienna Convention does not apply to the compatibility-provision of the New York Convention. The compatibility-provision should not be read in isolation, but rather in conjunction with the mfr-provision and the purpose of the New York Convention. The mfr-provision allows a party to base his request for enforcement on other treaties without further limitation. The Convention's purpose, as expressed by the mfr-provision, is to provide for enforcement in the greatest number of cases possible, whether it be on the basis of its own provisions or on some other basis. The compatibility-provision of the New York Convention viewed in this light, therefore, does not qualify as an ordinary compatibility-provision to which Article 30(2) of the Vienna Convention applies. The true meaning of the compatibility-provision of the New York Convention is probably only that the Contracting States wish to express that by adhering to the New York Convention they do not intend to infringe upon their obligations under public international law in regard of other treaties adhered to by them in the field of arbitration.[234]

Having made some observations on the conflict of treaties provisions in the New York Convention and the relevant principles of conflict of treaties, other treaties will now be considered. The European Convention of 1961 will be covered first, it being the only multilateral arbitration convention that has been applied in connection with the New York Convention (I–4.4.2.). The relationship with some other multilateral treaties will then be covered briefly (I–4.4.3), and thirdly, the relationship with bilateral treaties will be examined (I–4.4.4). And finally, some attention will be given to the Geneva Protocol of 1923 and the Geneva Convention of 1927 because, although they have been abrogated by Article VII(2) between the Contracting States, they still appear to be troublesome for some courts (I–4.5).

I–4.4.2 *European Convention of 1961*

The object of the European Convention, concluded under the auspices of the United Nations Economic Commission for Europe, 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

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233. It should be noted that Art. X(7) of the European Convention of 1961, which provision is similar to the compatibility-provision of Art. VII(1) of the New York Convention, also uses "entered into", but that here the authentic French text uses "*conclus ou à conclure*". The French text appears to reflect the intent of the drafters of the European Convention, and the rather inaccurate wording "entered into" of the English text of Art. X(7) of the European Convention should be interpreted accordingly. See P. Pointet, "The Geneva Convention on International Commercial Arbitration", in P. Sanders ed., *International Commercial Arbitration* Vol. III (The Hague 1965) p. 263 at p. 295.

234. See P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 97.

term Eastern and Western European countries, its main purpose is arbitration in East-West trade.[235]

It is curious to note, however, that the Convention's main purpose has not obtained the desired results in practice as the Convention has virtually never been applied in East–West relations. This failure 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 of the Convention).

Although the main purpose of the Convention is arbitration in East-West relations, the Convention does not exclude its application to arbitration between parties of different Contracting States belonging to the same block. As far as arbitration in inter-Eastern European relations is concerned, the European Convention is, however, no longer applicable because of Article VI(1) of the Moscow Convention of 1972.[236] What remains is arbitration in inter-Western European relations.[237] It is in this category where the European Convention has been applied, be it rarely.

The European Convention applies, according to Article I(1):

> "(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 Article 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 Con-

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235. The European Convention has been adhered to by: Austria, Belgium, Bulgaria, Byelorussian S.S.R., Cuba, Czechoslovakia, Denmark, France, German D.R., F.R. Germany, Hungary, Italy, Poland, Romania, Spain, Ukrainian S.S.R., U.S.S.R., Upper Volta and Yugoslavia. Except for Upper Volta and Yugoslavia, all States are also Party to the New York Convention. See generally, P. Pointet, *supra* n. 233. See also P. Benjamin, "The European Convention on International Commercial Arbitration", *British Yearbook of International Law* (1961) p. 478.

236. See *infra* I–4.4.3*b*.

237. However, Art. IV is no longer applicable in inter-Western European arbitration because the Western European countries which have signed the European Convention of 1961 have concluded an Agreement Relating to the Application of the European Convention on International Commercial Arbitration, done at Paris, December 17, 1962, 523 *United Nations Treaty Series* 94 (1965). This Agreement provides that the European Convention's provisions regarding the constitution and functioning of the arbitral tribunal (i.e., Art. IV(2)-(7)) of the Convention do not apply; if any difficulties may arise therefrom, these difficulties have to be submitted to the competent court. At present the following States have adhered to the Agreement: Austria, Belgium, Denmark, France, F.R. Germany, Italy and Spain.

vention [238], in practice it does not make so much difference because none of the cases reported under the New York Convention concerned domestic arbitration.

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 object of the European Convention, i.e., arbitration in East-West trade. This requirement, which is also to be found in the Geneva Treaties of 1923 and 1927, is not contained in the New York Convention.[239]

At this juncture it should be noted that some courts have erred by referring to the European Convention in cases where one of the parties came from a country which had not adhered to that Convention. According to Article I(1)(a) the Convention applies only to parties having "their habitual place of residence or their seat in *different Contracting* States" (emphasis added). Thus, contrary to what the Court of Appeal of Florence implied, the Convention does not apply in Italy to an award made in London between an Italian and Panamanian party as Panama has not adhered to the European Convention.[240] Furthermore, unlike the opinion of the Italian Supreme Court, the Convention does not apply in Italy to an award made in London between two Italians.[241]

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 the European Convention. On the other hand, the European Convention contains provisions for stages of the arbitration to which the New York Convention does not apply, such as the organization and functioning of the arbitral tribunal. In this respect the coverage of the European Convention is broader than the New York Convention.

The European Convention can be deemed to complement 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. The relationship between both Conventions in the case of concurrent applicability is, however, conceived by certain courts and authors in terms of conflicts of treaties. It is submitted that this is not the nature of the relationship. An indication of the complementary nature of the European Convention can be found already in its Pre-

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238. See *supra* I–1.3 ("No Internationality Required").

239. See *supra* I–1.2 ("Party's Nationality Excluded").

240. Corte di Appello of Florence, October 22, 1976, Tradax *v.* Carapelli (Italy no. 18). On the other hand, the Corte di Appello of Venice, May 21, 1976, Pando *v.* Filmo (Italy no. 16) held rightly the European Convention not to be applicable in precisely the same situation. For the same reason the European Convention was held not to be applicable by the Oberlandesgericht of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8) to an award made between a Dutch and a F.R. German party because the Netherlands have not adhered to this Convention.

241. Corte di Cassazione (Sez. Un.), May 18, 1978, no. 2392, Atlas *v.* Concordia (Italy no. 35).

amble which refers, in so many words, to the New York Convention.

A complementary provision can be found in Article I(2)(a) which contains a definition of the arbitration agreement in writing which is similar to Article II(2) of the New York Convention [242]; it adds, however, 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.

Furthermore, Article VI of the European Convention can be considered as an elaboration of Article 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 Article 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 Article IV of the New York Convention. The party against whom the enforcement is sought may invoke the grounds for refusal of enforcement listed in Article V of the New York Convention.

The European Convention also contains a limitation on the right to invoke a ground for refusal listed in Article V of the New York Convention. It concerns the ground for refusal that the award has been set aside in the country where it was made, as provided in Article 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 Article 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

242. The definition of the arbitration agreement in writing as given in Art. I(2) (a) of the European Convention includes, unlike Art. II(2) of the New York Convention, also an exchange by telexes. According to the prevailing interpretation of Art. II(2) of the New York Convention, the exchange of telexes is, however, considered to be included in this definition as well (see *infra* II–2.4.1 ("Exchange of Telexes").

only if the award has been set aside on one of the grounds listed in Article IX(1) under *a-d.*[243] These grounds are substantially similar to the grounds mentioned in Article 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 Article 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.[244] Thus the limitation imposed by Article IX(2) of the European Convention, in particular, clearly indicates that the European Convention is conceived to apply in addition to the New York Convention.

As far as the enforcement of the agreement and award are concerned, the European Convention cannot function without the New York Convention as the former is built upon the latter in these cases.[245] 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 complementary nature of the European Convention in regard to the New York Convention implies also that what was observed in I–4.2.3 *supra* – that the New York Convention cannot be combined with other possible bases – does not apply to the relationship between

243. 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.

244. It was therefore not correct to refer to Art. V(1) (b) of the New York Convention and Art. IX(1) (b) of the European Convention for the question whether enforcement of a Danish award should be refused because a party had not been able to present his case as the Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14) did. Art. IX(1) (b) of the European Convention could only have been referred to if the award had been set aside on this ground in Denmark, which had not happened in this case. Cf. *supra* I–1.4.2.

245. It should be emphasized that in actions falling outside the applicability of the New York Convention, the European Convention can still be applicable. For example, if the setting aside of an award made in Hamburg between a German and an Italian party is sought in F.R. Germany, the New York Convention is not applicable. Cf. I–1.4.2. However, in such a case the European Convention may still be applicable, for instance, for determining the formal validity of the arbitration agreement pursuant to Art. I(2) (a) as this case comes within the purview of the definition of the field of application of the European Convention. See for this case Oberlandesgericht of Hamburg, September 22, 1978 (F.R. Germ. 20).

It may be added that where a country has adhered to the European Convention but not to the New York Convention, which is currently the case for Yugoslavia, the enforcement of the arbitration agreement or the arbitral award can evidently not be sought under the New York Convention, nor under the European Convention which does not provide for either action.

the New York and European Convention. Both Conventions are simultaneously applicable.

The question of the relationship between the New York Convention and the European Convention is examined here in some detail because, as mentioned earlier, some courts and authors have difficulties in appreciating it. Two cases decided by the German Federal Supreme Court provide examples.

The first case concerned the request for the enforcement of an award made in Austria.[246] Austria and F.R. Germany have ratified both the New York Convention and the European Convention. An Austrian firm had sold wool fibre to a German enterprise on the basis of a sales confirmation which was not returned by the latter. When a dispute arose between the parties, the Austrian seller initiated arbitration at the Vienna Commodity Exchange in accordance with the arbitral clause contained in the sales confirmation, and obtained an arbitral award in his favour. In the enforcement procedure before the German courts, the German buyer objected that the arbitration agreement was not in writing. The German Supreme Court upheld, however, the validity of the arbitration agreement under Article I(2)(a) of the European Convention. Under German law the arbitration agreement need not be in writing if it is concluded between merchants of full status (*Vollkaufleute*) and concerns a commercial transaction. The Supreme Court found that a similar rule exists under Austrian law. The reason for which the Supreme Court held the European Convention applicable was stated in an incidental observation: ". . . [the Convention] prevails as being of a younger date over . . . the New York Convention".

The German Supreme Court resorted apparently to the principle of conflict of treaties of *lex posterior*. The use of this principle misconceives the relationship between both Conventions. As explained above, the enforcement of an award cannot be sought under the European Convention alone as this Convention complements the New York Convention in this case. The New York Convention remained therefore applicable. The question was rather whether the complementary provisions of the European Convention were *also* applicable. Since the award made between an Austrian and F.R. German party fell under the European Convention, the Convention was indeed applicable in addition to the New York Convention.[247]

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246. Bundesgerichtshof, May 25, 1970 (F.R. Germ. no. 7).

247. The "conflict approach" with regard to the relationship between the New York and the European Convention can also be found amongst certain authors. Majoros, *supra* n. 230, at pp. 315-319, maintains that although the German Supreme Court used the principle of *lex posterior* in this case, the primary preoccupation of the Court was to uphold the validity of the arbitration agreement; the Court would therefore have used implicitly the principle of maximum efficacy for solving the presumed conflict between both Conventions. The principle of maximum efficacy deserves undoubtedly its recognition; it goes, however, too far to imply this principle in cases where no conflict exists. Mezger approves in 50 *Revue critique de droit international privé* (1971) p. 37 at p. 52, the German Supreme Court's opinion as follows:

> "The addition [in Art. I(2) (a) of the European Convention] was also meant to facilitate, and even above all, the recognition of awards within the framework of the New York Convention. The Supreme Court held therefore rightly that the Convention of 1961 prevails over the Convention of 1958 in this case."

The first sentence is beyond doubt true. One wonders, however, how the award could be enforced if the European Convention were applicable *instead of* the New York Convention as the second sentence suggests.

In a later decision the German Supreme Court still had difficulties in determining the relationship between the New York Convention and European Convention.[248] The case was already mentioned in I–4.3 in connection with the question whether the New York Convention superseded German domestic law concerning enforcement of foreign arbitral awards. The Court held that by virtue of the mfr-provision of Article VII(1) of the New York Convention this was not the case. The Court dealt with the European Convention as follows:

> "The European Convention on International Commercial Arbitration of April 21, 1961, which has entered into force in both States [i.e., F.R. Germany and Romania] . . . does not contain a more-favourable-right-provision. However, it does not affect the validity of other bilateral and multilateral conventions – which includes the more-favourable-right-provision of the New York Convention."

By referring to the compatibility-provision contained in Article X(7) of the European Convention according to which the Convention's provision "shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States", the Supreme Court dealt again with the relationship between both Conventions in terms of conflict of treaties. If the Court had adopted the view that the European Convention is merely applicable in addition to the New York Convention, there would not have been a difficulty in holding the New York Convention applicable.

The Court of Appeal of Florence was more accurate in considering the relationship between the New York and European Convention.[249] A Panamanian party sought enforcement of an award made in London against an Italian party. The lawyer for the Italian respondent objected to the enforcement that the New York Convention was not applicable because this Convention had been superseded by the European Convention, which Convention could in turn not be applied because Panama had not adhered to this Convention. The Court of Appeal rejected this objection; it correctly declared that the European Convention and the New York Convention are integrally related. In this connection the Court referred to the limitation of the grounds of setting aside in the country of origin as regulated in Article IX of the European Convention.[250]

I–4.4.3 *Other multilateral conventions*

(a) *Washington Convention of 1965*

The *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* concluded at Washington, March 18, 1965 [251], 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

248. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12). Cf. *supra* at n. 233.

249. Corte di Appello of Florence, October 22, 1976, Tradax *v.* Carapelli (Italy no. 18).

250. Although the observation of the Court is as such correct, the Court should also have said that the European Convention was not applicable since Panama is not Party to this Convention, see *supra* at n. 240.

251. 575 *United Nations Treaty Series* 160 (1960). The Convention is ratified by 78 States so far, ICSID/3/Rev. 37 (October 20, 1980). See generally A. Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", *Recueil des Cours*, 1972-Vol. II, p. 337.

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 Article 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 Article 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.[252] Article 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 the New York Convention. The main difference is that under the Washington Convention the arbitration is solely governed by the Convention, with the exclusion of any national arbitration law, whereas under the New York Convention the arbitration is governed by a national arbitration law.[253]

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.[254] Consequently, no conflict exists in practice between both Conventions. Even assuming that the New York Convention were concurrently applicable, no sensible 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.

It is to be noted that an arbitration agreement referring to, or an award made under, the "Additional Facility" of ICSID does fall under the New York Conven-

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252. These remedies are: interpretation (Art. 50); revision (Art. 51); and annulment by appeal arbitrators (Art. 52).

253. See *supra* I–1.6.2 ("Does the 'A-national Award' Fall under the Convention?").

254. See also *infra* III–4.1.2 ("State or Public Body as Party to the Arbitration Agreement").

tion. The "Additional Facility" was set up in 1978 in order to provide the administration of arbitration under the auspices of ICSID for cases which fall outside the scope of the Washington Convention *ratione personae* or *ratione materiae*. The "Additional Facility" can be used only if the underlying transaction has features which distinguish it from an ordinary commercial transaction; the submission to the "Additional Facility" is not possible unless the Secretary-General of ICSID has given his approval. It is further to be noted that Articles 20-21 of the Additional Facility Arbitration Rules require that the arbitration be held, and the award be rendered, in a New York Convention country. The purpose of this provision is "to assure the widest possible international recognition and enforcement of awards".[255]

(b) *Moscow Convention of 1972*

The *Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation,* signed at Moscow, May 26, 1972, provides that commercial disputes between economic organizations of different countries member to the Council for Mutual Economic Assistance (CMEA) shall compulsorily be settled by arbitration.[256] The dispute must result from, or arise in connection with, a contract, which contract must have been concluded within the framework of economic and scientific-technological co-operation between countries Party to the Moscow Convention (which are all CMEA countries). The arbitration is to take place at the Arbitration Courts attached to the Chambers of Commerce of the member countries, the jurisdiction of which is carefully partitioned by the Convention. The courts of the member countries must recognize *ex officio* the jurisdiction of the Arbitration Courts in those cases falling under the Convention. The arbitration takes place in accordance with the Uniform Rules of Procedure.[257] The arbitral award must be enforced in the same way as final decisions made by State courts of the country of enforcement. The grounds for refusal of enforcement are similar to those enumerated in Article V(1) of the New York Convention.

The relationship with other bilateral and multilateral treaties is dealt with in Article 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 Conven-

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255. A. Broches, "The 'Additional Facility' of the International Centre for Settlement of Investment Disputes", in *Yearbook* Vol. IV (1979) p. 373 at p. 379.

256. An unofficial English and French translation of the Moscow Convention is reproduced in Associazione Italiana per l'Arbitrato ed., *Multilateral Conventions and other Instruments on Arbitration* (Rome 1974) p. 190.

257. The Uniform Rules of Procedure, issued in 1974, are reproduced in *Yearbook* Vol. I (1976) p. 147. It should be noted that the jurisdiction of the Arbitration Courts is not limited to inter-CMEA arbitration. Disputes between parties from CMEA and non-CMEA countries and even between parties from non-CMEA countries alone can be submitted to these Arbitration Courts on the basis of an appropriate arbitration agreement. In the latter case the Moscow Convention is not applicable.

tion shall not be applied to the cases treated by this Convention. . ." This provision must be understood in the sense that arbitration between economic organizations of the CMEA countries to which the Moscow Convention applies is no longer governed by the New York Convention. The provision can be regarded as an express confirmation of the principle of *lex posterior* which does not leave room for the application of the principle of maximum efficacy.

It should be emphasized that the Moscow Convention does not apply when one or both parties do not come from a CMEA country. In this case the New York Convention remains applicable provided that the agreement or award comes within its purview.

(c) *Panama Convention of 1975* [258]

The *Inter-American Convention on International Commercial Arbitration,* concluded in Panama, January 30, 1975 [259], is modelled after the New York Convention, although not entirely. The Latin American countries, few of which have adhered to the New York Convention [260], deemed it appropriate to make their own arbitration Convention declaring that they do not "trust" world organizations, that they speak Iberian languages, and that they have a "propriety interest" in the Organization of American States.[261] The Panama Convention has hitherto been ratified by Chile, Costa Rica, El Salvador, Honduras, Mexico,

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258. The relationship between the New York Convention and the following Latin American Conventions is not examined as they contain incidental provisions on arbitration only:
– Treaty concerning the Union of South American States in respect of Procedural Law, signed at Montevideo, January 11, 1889, Organization of American States, *Treaty Series* no. 9, adhered to by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay; Arts. 5-7 concern the enforcement of arbitral awards;
– Bustamante Code (Convention on Private International Law), signed at Havana, February 20, 1928, 86 *League of Nations Treaty Series* 246 (1929), adhered to by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela; Arts. 210-211 and 423-433 concern the enforcement of arbitral awards;
– Treaty on International Procedural Law, signed at Montevideo, March 19, 1940, Organization of American States, *Treaty Series* no. 9, adhered to by Argentina, Paraguay and Uruguay;

259. The text of the Panama Convention is reproduced in *Yearbook* Vol. III (1978) p. 15, and in 14 *International Legal Materials* (1975) p. 336. The Convention entered into force on June 16, 1976. The Convention is signed by 13 countries: Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, United States, Uruguay and Venezuela. See for the legislative history, Organización de los Estados Americanos, *Actas y Documentos de la Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP)*, OEA/Ser.K/XXI.1 (Washington 1975), Vol. I: pp. 215-224 and p. 246 (CIDIP/64), pp. 293-300 (CIDIP/57), pp. 343-344 (CIDIP/25), and pp. 371-372; Vol. II: pp. 177-178 (CIDIP/51 Corr. 1), pp. 194-207 (CIDIP/60 Corr. 1), pp. 209-232 (CIDIP/61 Corr. 1), pp. 275-278, and p. 288. See for the Panama Convention also my article, "L'arbitrage commercial en l'Amérique latine", *Revue de l'arbitrage* (1979) p. 123 at p. 138 and p. 191.

260. These States are: Chile, Colombia, Cuba, Ecuador, Mexico, Trinidad and Tobago.

261. J. Lliteras, "The Panama Convention Strengthens Arbitration in the Americas", in *Inter-American Arbitration*, Inter-American Commercial Arbitration Commission (1975 2nd quarter) p. 1 at p. 2.

Panama, Paraguay and Uruguay. Of these States, Chile and Mexico are also Party to the New York Convention. Spain and the United States, which have both adhered to the New York Convention, are in the process of ratifying the Panama Convention. A judicial application of this Convention has not been reported so far.

The Panama Convention fails to give a definition of its field of application. As regards the enforcement of arbitral awards, it may be inferred from Article 5, which is almost identical to Article 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, but in view of the traditional Latin American tendency to protect national interests and to require reciprocity, it may be safe to assume that this condition is implied.

The Convention would therefore seem to have importance only for arbitration within the Latin American region. Parties coming from non-Contracting States probably cannot benefit from the Convention. It is to be regretted that the Latin American countries did not join the worldwide community of 56 States which has adhered at the time of this writing to the New York Convention.

This is the more regrettable since the Panama Convention shows a certain number of lacunae and obscurities in comparison with the New York Convention. The Panama Convention 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), 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 hereafter) and, as already mentioned, a definition of its field of application. 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 the majority of Latin American arbitration laws.[262]

The relationship between the Panama and New York Convention scarcely need be examined as it will be in a very few cases only that an arbitration agreement or award will fall under both Conventions at the

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262. This requirement is derived from former French arbitration law according to which the arbitral clause was merely an agreement to agree (*pactum de contrahendo*). See for the question whether the Panama Convention would require to conclude a submission agreement in the case of an arbitral clause, my article, *supra* n. 259, at p. 138. The requirement must be deemed to have been superseded by the New York Convention, see *infra* II–1.2.2.

same time. At present this may occur in arbitration between Chilean and Mexican parties as Chile and Mexico are the only countries which have adhered to both Conventions. This situation may change when the United States decides to adhere to the Panama Convention because trade relations between the United States and the Latin American States are fairly extensive.

As the Panama Convention is largely modelled after the New York Convention, it would not be necessary either to determine which Convention is applicable in the case of concurrent applicability. Article 3 of the Panama Convention, however, provides that: "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."[263] This type of provision is not found in the New York Convention. The latter Convention refers in Article V(1)(d) for the composition of the arbitral tribunal and the arbitral procedure to the agreement of the parties, and in the absence of such agreement to the arbitration law of the country where the arbitration took place.[264] In view of the specificity of Article 3 of the Panama Convention, it must be presumed that this provision prevails in the case of concurrent applicability with the New York Convention.

Curiously enough, the ground for refusal of enforcement of the award in the Panama Convention corresponding to Article V(1)(d) of the New York Convention is almost the same as in the latter Convention. Article 5(1)(d) of the Panama Convention namely provides that enforcement may be refused if the respondent proves that: "the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out *in accordance with the law of the State where the arbitration took place*" (emphasis added). The underscored part must be considered as being out of tune with Article 3 of the Panama Convention. There it should read, in my opinion, "in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission".

In the other cases of concurrent applicability, the relationship between the Panama and New York Convention could, at best, be that the New York Convention applies in those cases where the Panama Convention fails to provide appropriate provisions. In such a case the New York Convention applies to the exclusion of the Panama Convention, as the Panama Convention is not conceived as a complement to the New York Convention and no combination of different bases for enforcement is possible.[265] The application of the New York Convention in

263. The IACAC Arbitration Rules were changed in 1978 to the effect that they are virtually identical with the UNCITRAL Arbitration Rules. The IACAC Arbitration Rules are reproduced in *Yearbook* Vol. III (1978) p. 231.

264. See for Art. V(1) (d), *infra* III–4.4.

265. See *supra* I–4.2.3.

this case could be warranted by application of the principle of maximum efficacy. It is, however, to be feared that the courts in the Latin American States are not prepared to give way for the application of this principle, and prefer to consider the Panama Convention as a *lex posterior*. This would lead to the application of domestic law in all those cases where the Panama Convention is silent. In this connection it should be observed that the Panama Convention contains neither a compatibility-provision nor a mfr-provision. An intermediate solution could be to interpret the Panama Convention on the basis of the New York Convention for those cases where the Panama Convention is silent or unclear on the grounds that the Panama Convention is modelled after the New York Convention.

In an unpublished draft (September 1980) of the implementing legislation of the Panama Convention in the United States – to be known as Chapter 3 of the U.S. Arbitration Act – it is proposed to solve the above-mentioned problems as follows:

> "Section 304. *Awards falling under the Inter-American Convention.*
> Recognition and enforcement of foreign arbitral decisions or awards under this chapter shall apply only to those decisions or awards made in the territory of another Contracting State.
> Section 305. *Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.*
> When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:
> (1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are Member States of the Organization of American States, the Inter-American Convention shall apply.
> (2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 shall apply."

As far as the omission in the Panama Convention relating to the conditions to be fulfilled by the party seeking enforcement is concerned, this omission may in the future be filled by the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, signed at Montevideo, May 8, 1979, which Convention has not yet entered into force.[266]

Article 1(2) of this Convention provides that "The rules of this Convention shall apply to arbitral awards in all matters not covered by the Inter-American Convention on International Commercial Arbitration, signed in Panama on January 30, 1975." The main provisions of the Montevideo Convention are Articles 2 and 3. Article 2

266. The Montevideo Convention is reproduced in 18 *International Legal Materials* (1979) p. 1224.

sets forth the conditions under which judgments and arbitral awards have extraterritorial validity. According to Article 3, the party seeking enforcement must supply, inter alia, the following documents:

(a) a certified copy of the award;

(b) a certified copy of the document proving that the defendant has been summoned in due legal form substantially equivalent to that accepted by the law of the State where the award is to take effect, and that the parties have had an opportunity to present their case; and

(c) a certfied copy of the document stating that the award is final or has the force of *res judicata*.

Compared with the conditions required by Article IV of the New York Convention according to which the party seeking enforcement has to supply only the original of the arbitration agreement and the arbitral award or certified or authenticated copies thereof, the above conditions required by the Montevideo Convention would appear to be significantly more demanding. It should, however, be observed that conditions (b) and (c) of Article 3 of the Montevideo Convention, which are to be proven by the party *seeking* enforcement, are to a certain extent similar to the grounds for refusal of enforcement mentioned in Article 5(1)(b) and (e) of the Panama Convention, which are to be proven by the party *against whom* the enforcement is sought. This raises the question whether conditions (b) and (c) must be considered as "matters not covered" by the Panama Convention, within the meaning of Article 1(2) of the Montevideo Convention.

I–4.4.4 *Bilateral treaties*

It rarely occurs that bilateral treaties concern solely the recognition and enforcement of arbitral awards. Provisions relating to these matters are as a rule included in bilateral treaties concerning the recognition and enforcement of judgments. It is equally rare that a bilateral treaty contains provisions on the enforcement of the arbitration agreement and the organization of the arbitral procedure.[267]

The bilateral treaties containing provisions on the recognition and enforcement of arbitral awards almost all date from before the entry into force of the New York Convention in the respective countries. Their number varies from country to country. To cite a few examples, F.R. Germany, the United States (Treaties of Friendship, Commerce and Navigation – TFCN) and the U.S.S.R. have concluded quite a number of bilateral treaties including provisions on arbitral awards. In contrast, countries like Australia, India, Israel, South Africa and the United Kingdom have not concluded any bilateral treaty at all on this subject matter.[268]

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267. One of the few examples of a bilateral treaty containing rules governing the arbitral procedure is the Convention between Sweden and the U.S.S.R. concerning the Exchange of Goods and Payments (Arts. 14-15) and Protocol of September 7, 1940, published in *Agreements between Sweden and other Countries* (Stockholm 1946) nos. 22-23. See also the Treaty of Commerce and Navigation between Denmark and the U.S.S.R. (Arts. 14-15) and Protocol of August 17, 1946, 8 *United Nations Treaty Series* 201 (no. 124).

268. 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*

Although the provisions in the bilateral treaties differ in that some are very elaborate whilst others are rather summary, certain common features may be mentioned in comparison with the New York Convention. It should be emphasized, however, that the bilateral treaties are examined in their generality only, and that a certain feature may be different for a specific treaty. It therefore is recommended to consult the bilateral treaty for each case.

Concerning the *scope* of the bilateral treaties, almost all require that the award be rendered in the other Contracting State. This is the same under the New York Convention in those cases where a State has used the first reservation of Article I(3). The bilateral treaties are, however, divided on a second condition that the parties be subject to the jurisdiction of either Contracting State. As examined in I–1.2 *supra*, this condition was not inserted in the New York Convention. Some bilateral treaties provide in express terms for this condition.[269] Others declare to the contrary that the nationality of the parties is not a condition for the applicability of the treaty; according to these treaties, like the New York Convention, it is sufficient that the award be rendered in the other Contracting State.[270] Others are silent as to the condition of the nationality of the parties, and it is not always certain whether the condition is implied or not.[271] A third condition for the field of application of certain bilateral treaties is that some limit the applicability to commercial matters.[272] This limitation is also contained in the New York Convention as a possible reservation provided by the second sentence of Article I(3).[273]

Arbitral Awards and the Organization of Commercial Arbitration Procedure (Geneva August 1957) designated only by sales number 1957. II.E/Mim. 18. The bilateral treaties concluded by F.R. Germany are extensively dealt with by K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 433; the relationship between the bilateral treaties and the New York Convention is examined by the author at p. 332. See for the TFCN's concluded by the United States with a considerable number of other countries, M. Domke. *The Law and Practice of Commercial Arbitration* (Mundelein 1968-1979) Sect. 44.03. See for the other countries the National Reports under Chap. VII in Vols. I-VI of the *Yearbooks*.

269. E.g., the TFCN's *supra* n. 268; Convention between France and Italy regarding the Enforcement of Judgments in Civil and Commercial Matters of June 3, 1930, 153 *League of Nations Treaty Series* 135 (no. 3513), Art. 8; Treaty between Austria and the U.S.S.R. of Commerce and Navigation of October 17, 1955, *Vneschniaja Torgovlia* [Foreign Trade] (Moscow) 1955 p. 14 (no. 12), Art. 11.

270. E.g., Convention between Austria and Switzerland regarding the Recognition and Enforcement of Judicial Decisions of March 15, 1927, 87 *League of Nations Treaty Series* 351 (no. 1981), Art. 10 *jo* 1; Convention between Czechoslovakia and Spain regarding the Recognition and Enforcement of Judicial Decisions of November 26, 1927, 121 *League of Nations Treaty Series* 311 (no. 2793), Art. 8 *jo* 2.

271. E.g., Treaty between Spain and Switzerland on the Reciprocal Enforcement of Judgments or Decisions in Civil and Commercial Matters of November 19, 1896, 12 *Recueil systématique des Lois et Ordonnances* (Bern) p. 335.

272. E.g., Treaty of Commerce between Switzerland and the U.S.S.R. of March 17, 1948, *Recueil officiel des Lois et Ordonnances* (Bern) 1948 p. 869, Art. 11.

273. See *supra* I–1.8 ("Second Reservation ('Commercial Reservation')").

Regarding the *conditions for recognition and enforcement* of the award, some bilateral treaties refer to the Geneva Convention of 1927 or to the conventions which are in force, or which will enter into force, in both States.[274]

Most bilateral treaties provide, however, for conditions themselves. They are, generally speaking, the following:

(i) the arbitrator must have had jurisdiction in the case;

(ii) the parties must have been duly summoned;

(iii) the parties must have been able to present their case;

(iv) the award must have acquired the force of *res judicata* and be enforceable in the country where it has been made;

(v) the award may not be contrary to the rules of public policy of the country where the enforcement is sought.

Compared with the grounds for refusal of enforcement as enumerated in Article V of the New York Convention, the above grounds would appear to be less comprehensive. Thus, the invalidity of the arbitration agreement, the irregularity of the arbitral procedure, and the setting aside of the award in the country of origin are generally not mentioned in the bilateral treaties (cf., Art. V(1)(a), (d), and (e) of the New York Convention). However, the courts, as a rule, infer these grounds from the grounds expressly mentioned in the bilateral treaty.[275]

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274. Reference to the Geneva Convention of 1927, with the specification that the restriction in Art. I(1) of the Geneva Convention (see *infra* n. 303) shall not apply in the relations between the two Contracting States, can, for example, be found in: Convention between F.R. Germany and Italy concerning the Recognition and Enforcement of Judicial Decisions of March 9, 1936, *Reichsgesetzblatt* 1937 II 145, *Bundesgesetzblatt* 1952 II 986, Art. 8; Convention between F.R. Germany and Switzerland concerning the Recognition and Execution of Judicial Decisions and Arbitral Awards of November 2, 1929, 109 *League of Nations Treaty Series* 273 (no. 2544), Art. 9; Convention between Sweden and Switzerland regarding the Recognition and Enforcement of Judicial Decisions and Arbitral Awards of January 15, 1936, 169 *League of Nations Treaty Series* 347 (no. 2923), Art. 13; Convention between Italy and the Netherlands concerning the Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters of April 17, 1959, *Tractatenblad* (Netherlands) 1959, 137, Art. 7. References to the Geneva Convention of 1927 without the above specification, can be found in the TFCN between the Netherlands and the United States of March 27, 1956, *Tractatenblad* 1956, 40, Art. V(2) (b) (2) (Geneva Convention applicable as regards enforcement in the Netherlands only, see *infra* at n. 308-310). See for the relationship between this category of bilateral treaties and Art. VII(2) of the New York Convention, *infra* I–4.5.

An example of a bilateral treaty which refers for the conditions of the recognition and enforcement to the conventions "entered or to be entered into force" in both Contracting States is the Convention between F.R. Germany and the Netherlands concerning the Mutual Recognition and Enforcement of Judicial Decisions and other Enforceable Documents in Civil and Commercial Matters of August 30, 1962, *Tractatenblad* 1963, 50, Art. 17.

275. An example is the case decided by the German Federal Supreme Court, discussed *infra* at n. 283: although the Belgian-German Treaty, *infra* n. 278, provides that a violation of the rules of public policy is the only ground for refusal of enforcement, the Court examined in depth the validity of the arbitration agreement in this case. This examination might have been passed by if the claimant had relied on the German domestic law regarding the enforcement of foreign arbitral awards (see *supra* at n. 225-226).

The 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 uniform rule of Article II(2). Thus, a bilateral treaty will be more favourable if an arbitration agreement does not meet the written form as required by Article 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 in respect of condition (iv). They frequently require that the award be "enforceable" in the country where it has been made. It usually implies that a leave for enforcement (exequatur or the like) has to be obtained in the country where the award has been rendered.[276] This 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. As noted at various places, this sytem of "double-exequatur" has been abrogated under the New York Convention, which requires by Article V(1)(e) that the award only be "binding" on the parties.[277]

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.[278] 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 Article V. Reference will be made below to a case decided by the German Federal Supreme Court in which a bilateral treaty of this kind was applied.[279]

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276. The word "enforceable" can be interpreted as "inchoate for enforcement", without the necessity of a leave for enforcement of the court in the country of origin. However, where the enforceability of an award in the country of origin is to be proven by the party seeking enforcement, the most likely proof is the leave for enforcement issued in that country. Some courts already interpret the word "enforceable" as requiring a leave for enforcement from the country of origin. Such a restrictive interpretation was made, for instance, by the Dutch Supreme Court in respect of the word "enforceable" in the TFCN between the Netherlands and the United States of 1956, *supra* n. 274, Hoge Raad, April 18, 1969, Nagtegaal N.V. *v.* Weinstein International Corp., *Nederlandse Jurisprudentie*. 1969 no. 350. criticized by P. Sanders in *Weekblad voor Privaatrecht, Notariaat en Registratie* no. 5162 (1972) p. 94 at p. 95. See for this case also *infra* n. 308-310.

277. See generally, *infra* III–4.5.2 ("Award not 'binding' ").

278. E.g., Treaty between Belgium and F.R. Germany concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Official Documents in Civil and Commercial Matters of June 30, 1958, *Bundesgesetzblatt* 1959 II 766, Art. 13(1).

279. See *infra* at n. 283-286.

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 fulfills the conditions for enforcement.[280] 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 Article 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 Article V(1), whereas the court may refuse on its own initiative enforcement for reasons of public policy pursuant to Article 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 the bilateral treaties containing provisions on the recognition and enforcement of arbitral awards almost all 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.

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 Article VII(1) allows a party to base his request for enforcement on another treaty. Moreover, the compatibility-provision contained in the same Article VII(1) leaves earlier treaties untouched and could even lead to a prevalence of the earlier treaty over the Convention.[281] Where the earlier bilateral treaty

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280. E.g., Convention between Czechoslovakia and Switzerland concerning the Recognition and Enforcement of Judicial Decisions of December 21, 1926, 12 *Recueil systématique des Lois et Ordonnances* (Bern) p. 348, Art. 1; Convention between Belgium and the Netherlands concerning Territorial Jurisdiction, Bankruptcy and the Authority and Execution of Judgments, Arbitral Awards and Notarial Acts of March 28, 1925, 93 *League of Nations Treaty Series* 431 (no. 2131), Art. 15 *jo* 11; Convention between Austria and Switzerland, *supra* n. 270, Art. 1; Convention between Czechoslovakia and Spain, *supra* n. 270, Art. 2.

281. See for the compatibility-provision and Art. 30(2) of Vienna Convention in the Law of the Treaties of 1969, *supra* at n. 231-234.

contains a compatibility-provision, as some do [282], 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. Here again, however, the application of the earlier treaty is not precluded by virtue of the mfr-provision of Article 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*.

Although the relationship between the New York Convention and earlier bilateral treaties would not seem to create major difficulties, some courts are not unequivocal in respect of this matter.

An example is the German Federal Supreme Court in a case concerning the request for enforcement of an award made in Belgium.[283] The award in question had been declared enforceable by the President of the Court of First Instance in Brussels. The Supreme Court first examined the bilateral Treaty between Belgium and F.R. Germany of 1958.[284] Pursuant to Article 13(1) of this Treaty, an arbitral award which is declared enforceable in either State must be enforced in the other State unless it violates the public policy of that State. The Court then turned to the New York Convention which came into force between both States on November 16, 1975 [285], thus subsequent to the bilateral Treaty. The Court observed:

> "The Court need not to go into the relationship between the [New York Convention] and the Belgian-German Treaty, as the latter is more favourable in respect of the enforcement in those cases, where, as in the present case, the award has already been declared enforceable in Belgium. In those cases, Article VII(1) of the New York Convention . . . permits a party . . . to use the more favourable regulation of the bilateral Treaty."

Although the Supreme Court stated that it needed not go into the relationship between the New York Convention and the bilateral Treaty, it can be argued that it did implictly do so as it examined and applied the later New York Convention, i.e., Article VII(1), in order to arrive at the application of the Belgian-German bilateral Treaty.

The reason for which the Supreme Court probably refrained from dealing expressly with the relationship between the New York Convention and the Belgian-German bilateral Treaty is that the latter contains in Article 16 a compatibility-provision which says that it shall not affect treaties which are in force, or which will be in force, between both States. For this reason the Belgian-German Treaty is considered subsidiarily applicable to the other conventions.[286] As pointed out above,

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282. E.g., the Italy-Netherlands Treaty of 1959, *supra* n. 274, Art. 12.

283. Bundesgerichtshof, March 9, 1978 (F.R. Germ. no. 17).

284. See *Supra* n. 278.

285. This is the date on which the New York Convention entered into force in Belgium (ratification: August 18, 1975). F.R. Germany ratified the New York Convention on June 30, 1961.

286. R. Geimer and R. Schütze, *Internationale Urteilsanerkennung* Vol. II (Munich 1971) p. 323.

however, such a compatibility-provision in a bilateral treaty is immaterial for the New York Convention as the compatibility-provision of the latter neutralizes the compatibility-provision of the former and the mfr-provision of the latter permits to apply the bilateral treaty.

The Belgian Supreme Court was also equivocal on the relationship between an earlier bilateral treaty and the New York Convention.[287] The case involved an award rendered in Zurich in a dispute between a Belgian distributor and a German car manufacturer and decided in favour of the latter. The issue to be decided by the Supreme Court was the question whether the unilateral termination of a concession for an exclusive distributorship of an indefinite time is capable of settlement by arbitration under Belgian law.[288] Before the Supreme Court, the German manufacturer had invoked the bilateral Treaty between Belgium and Switzerland of 1959 [289] by virtue of the mfr-provision of Article VII(1) of the New York Convention. He had argued that, unlike the Article V(2)(a) of the New York Convention, the Belgian-Swiss Treaty did not contain the condition for recognition that the award concern a subject matter capable of settlement by arbitration and that, therefore, recognition could not be refused on this ground. The Supreme Court rejected this argument as follows:

> "Considering that the recognition of foreign arbitral awards by the Belgian judiciary is, in principle, subject to the condition that under Belgian law the dispute can be settled by arbitration and can therefore be withdrawn from the jurisdiction of the courts;
>
> "Considering that the Belgian-Swiss Treaty of 1959 . . . does not derogate from this rule which is applicable even if it is not expressly formulated by international conventions;
>
> Considering that this rule is confirmed by the New York Convention of 1958 . . . which provides in Article V(2)(a) that the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where the recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country;
>
> Considering that this Convention has been ratified by Switzerland;
>
> Considering that this assertion has therefore no legal basis."

The Supreme Court first interpreted the Belgian-Swiss Treaty as including the condition of arbitrability of the subject matter of the award, which is not surprising as the ground for refusal of violation of the public policy – which ground is expressly included in the Belgian-Swiss Treaty – is generally considered to comprise the issue of arbitrability as well. Article V(2)(a) is therefore considered as superfluous in view of Article V(2)(b). However, the Court then turned to the New York Convention in order to show that this ground is expressly provided under that Convention. The penultimate observation that the New York Convention has been ratified by Switzerland seems to indicate that the Court deemed either both the Convention and the Treaty applicable, or the New York Convention alone applicable. The first possibility must be deemed incorrect as the New York Convention cannot be combined with a bilateral treaty or other multilateral convention.[290] The second

287. Cour de Cassation (1st Chamber), June 28, 1979, Audi-NSU Auto Union A.G. *v.* S.A. Adelin Petit & Cie (Belgium no. 2).

288. See for this question, *infra* III–5.2 ("Non-arbitrable Subject Matter (Arts. V(2) (a) and II(1))").

289. Treaty between Belgium and Switzerland on the Recognition and Enforcement of Judgments and Arbitral Awards of April 29, 1959, *Moniteur Belge* of September 11, 1962.

290. See *supra* I–4.2.3.

possibility leaves the question unanswered why the Court deemed it necessary to imply the condition of arbitrability in the Belgian-Swiss Treaty and did not state that this Treaty was not applicable.

That the relationship between the New York Convention and bilateral treaties does not receive the due attention of the courts can also be seen from the Court of First Instance of Munich which observed in respect of the request for enforcement of an award made in the Netherlands that "In the absence of bilateral treaties, the present enforcement procedure is governed by the New York Convention . . .".[291] This incidental observation might suggest that if a bilateral treaty were applicable the Court would apply that treaty, but this construction is obviously by no means certain. It may be observed that in referring to the bilateral treaties, the Court could have pointed to a bilateral treaty which does exist between F.R. Germany and the Netherlands.[292] This Treaty refers for the conditions of recognition and enforcement arbitral awards to the conventions which are in force, or which will be in force, between both States, which Treaty would have led to the application of the New York Convention.

Finally, mention may be made of a United States Court of Appeals concerning an award made in Japan between a Japanese and a United States party.[293] The Court considered the applicability of the TFCN with Japan of 1953 which provides in Article IV(2) that awards, which are final and enforceable under the laws of the place where rendered, shall be declared enforceable by the courts of either State, except where found to be contrary to public policy. The Court reached the conclusion that where both States Party

> "to a bilateral Treaty, Japan and the United States, later become signatories to a multinational Convention covering the same subject matter, the Convention is intended to control . . . despite the saving clause preserving the validity of bilateral agreements between Contracting States" [i.e., Art. VII(1)].

In this connection the Court made a rather vague reference to the principle of *lex posterior:*

> "The adhesion of additional signatories does not affect the circumstance that each signatory, bound by bilateral agreement, is modifying its earlier engagement vis-à-vis the other, but only to the extent necessary."

It made also an indirect reference to the principle of *lex specialis:*

> "[I]nasmuch as both agreements further the same purpose, the one tending to further that purpose most forcefully, the Convention, should be given effect."

The Court, however, omitted to mention the mfr-provision of Article VII(1) of the Convention. Relying on this provision, the Court should, in my opinion, have come to another conclusion, i.e., that either the Convention or the TFCN could have been applied, depending on which would have led to the granting of enforcement of the award.

The foregoing cases are a few examples of the apparently difficult question for the courts of the relationship between the New York Convention and the bilateral treaties.[294] No court has dealt with later bilat-

291. Landgericht of Munich, June 20, 1978 (F.R. Germ. no. 19).
292. See *supra* n. 274.
293. U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v.* Fotochrome Inc. (U.S. no. 3) n. 4.
294. See also Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11): applica-

eral treaties, which is not surprising since, as noted before, they are almost non-existent.

For the rare 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.

I–4.5 Geneva Protocol of 1923 and Geneva Convention of 1927 (Art. VII(2))

The original purpose of establishing the New York Convention was to revise the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 as this Convention was too cumbersome for the party seeking enforcement and did not work satisfactorily in practice.[295] As the New York Convention was conceived as a replacement of the Geneva Convention, and to avoid any doubt as to whether this Convention could remain in force, it was decided at the New York Conference of 1958 to provide expressly that the Geneva Convention ceased to have effect between the States which became Party to the new Convention. At one of the last meetings of the New York Conference, the provisions relating to the validity of the arbitration agreement and the enforcement of the arbitration agreement were added to the new Convention (i.e., the present Art. II). These matters being covered by the Geneva Protocol on Arbitration Clauses of 1923, this Protocol was included in the new provision which abrogated the Geneva Convention of 1927.[296]

The final text of the provision abrogating the Geneva Protocol and Convention between the States Party to the New York Convention became the following:

> "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

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tion of the TFCN between F.R. Germany and the United States because the United States had ratified the New York Convention only after the parties had concluded the contract (cf. *supra* at n. 192); U.S. District Court, E.D. Michigan S.D., August 9, 1976, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 11): Court held without merit the argument of respondent that the claimant was required to exhaust its remedies under the TFCN between F.R. Germany and the United States.

295. See Introduction nos. 8-9.

296. UN DOC E/CONF.26/SR.24.

effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."

Originally, it was the intention to insert this provision at the end of the text of the Convention. However, at the instigation of the Polish delegate, it was added in the form of a second paragraph to the provisions of Article VII(1), the compatibility- and mfr-provision, in order to make clear that the abrogation is to be considered as an exception to these provisions.[297] It means that the rule is, as examined in the foregoing Sections, that the other treaties (as well as domestic law) concerning the enforcement of foreign arbitration agreements and arbitral awards are not superseded by the New York Convention, whereas the exception to this rule is constituted by the Geneva Protocol and Convention.

Several courts have affirmed Article VII(2) of the New York Convention that the Geneva Treaties have ceased to have effect between the States which have become Party to the New York Convention.[298] Nevertheless this provision has provoked certain questions before the courts which will be examined below. Because the questions before the courts have come up only in connection with the enforcement of the award, the examination will be limited to this type of action. However, the observations apply equally to the enforcement of the arbitration agreement (Geneva Protocol, Art. 4, and New York Convention, Art. II(3)).

The replacement of the Geneva Treaties by the New York Convention between the Contracting States is complete in the sense that the Geneva Treaties become extinct. It means that the Geneva Treaties do not "revive" if the New York Convention cannot be applied because one of its conditions has not been met. An example of the situation under which enforcement would have been granted under the Geneva Treaties but not under the New York Convention is the form of the arbitration agreement. The New York Convention contains in Article II(2) a uniform rule for the written form of the arbitration agreement. The Geneva Treaties do not contain such a uniform rule but leave this matter to the applicable national law. Where an arbitration agreement does not comply with Article II(2) of the New York Convention, the Convention cannot be applied. The form of the agreement may be valid under domestic law, but in such a case one cannot fall back on the Geneva Treaties.[299] The text of Article VII(2) is quite clear on this

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297. UN DOC E/CONF.26/SR.18.

298. E.g., Landgericht of Bremen, December 16, 1965 (F.R. Germ. no. 2); Corte di Cassazione (Sez. Un.), May 25, 1976, no. 1877, Begro B.V. *v.* Voccia (Italy no. 17); Court d'appel of Liège, May 12, 1977, Audi-NSU Auto Union A.G. *v.* S.A. Adelin Petit & Cie (Belgium no. 1).

299. In such a case a party seeking enforcement can, of course, still rely on another basis,

point as it states "shall cease to have effect . . . on their becoming bound." It may be added that the New York Conference expressly voted down a Swiss proposal to the effect that the Geneva Treaties could be relied upon insofar as they contained more liberal conditions.[300]

A possible revival of the Geneva Treaties cannot be based either on the last part of Article VII(2) reading "to the extent that they become bound." This expression was added with a view to the territorial applicability of the New York Convention as the United Kingdom delegate had pointed out that some Contracting States would not become bound by the Convention in respect of all their territories as regulated in Article X of the Convention (the so-called "colonial clause").[301] This was rightly recalled by the Court of Appeal of Düsseldorf when it ruled that the Geneva Treaties do not revive if an arbitral clause does not comply with Article II(2) of the New York Convention.[302]

The scope of the New York Convention is broader than that of the Geneva Treaties. The Geneva Convention of 1927 requires that the award be made in the territory of a Contracting State between parties which are subject to the jurisdiction of different Contracting States.[303] The "nationality requirement" has intentionally not been provided in the New York Convention, which only requires that the award be made in the territory of another State, and, if the first reservation of Article I(3) is used, that the award be made in the territory of another Contracting State. Thus, where an award is made in London between a Panamanian and an Italian party, the Geneva Convention of 1927 could not be applied to the enforcement in Italy although both the United Kingdom and Italy have adhered to the Geneva Treaties, Panama not being a Party. However, as both States have adhered to the New York Con-

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for example, domestic law on enforcement of foreign awards, by virtue of the mfr-provision of Art. VII(1).

300. UN DOC E/2822 p. 9; E/CONF.26/SR.18.

301. UN DOC E/CONF.26/SR.24.

302. Oberlandesgericht of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8).

303. The Geneva Protocol of 1923 applies to "an arbitration agreement ... between parties subject respectively to the jurisdiction of different Contracting States ... whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject." (Art. I(1)). The Geneva Convention of 1927 applies to "an arbitral award made in pursuance of an agreement covered by the [Geneva Protocol of 1923] ... provided that the said award has been made in a territory of one of the High Contracting Parties ... and between persons who are subject to the jurisdiction of one of the High Contracting States." (Art. 1(1)). The Geneva Convention can be ratified only by States who have ratified the Geneva Protocol of 1923 (Art. 7(2)). A combined reading of the definitions of the fields of application given in the Geneva Protocol and the Geneva Convention has as result that the Geneva Convention applies only to arbitral awards made in a Contracting State and between persons subject to the jurisdiction of *different* Contracting States. See for the differences between the Geneva Protocol and the Geneva Convention in respect of the field of application, H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 50.

vention, the Geneva Treaties are no longer applicable between them. The difference is that the enforcement of an award between the above parties can be judged under the New York Convention, as it does not provide for a "nationality requirement".[304] Similarly, an award made in F.R. Germany between two Italian parties could not have fallen under the Geneva Convention of 1927 in Italy as the parties were subject to the jurisdiction of the same Contracting State; in contrast, the New York Convention is now applicable to the enforcement of the same award.[305]

Because of these differences between the Geneva Treaties and the New York Convention in defining their fields of application, Article VII(2) may give rise to at least two problems with regard to the enforcement in a New York Convention country of an award made in a country which has adhered to the Geneva Treaties but not to the New York Convention. These countries are at the time of this writing: Ireland, Luxembourg, Mauritius Island, New Zealand, Portugal and Yugoslavia.

The *first problem* concerns the requirement of the Geneva Treaties that the parties be subject to the jurisdiction of different Contracting States in the case where the award is made in a country which is a Party to the Geneva Treaties only.

If an award is made in a State which has adhered to the Geneva Treaties only, between parties which are subject to the jurisdiction of States which have adhered to both the Geneva Treaties and the New York Convention, the enforcement of such award in one of the latter States may pose the problem whether the Geneva Convention can still be applied. For example, if in F.R. Germany enforcement is sought of an award made in Yugoslavia between a F.R. German and a Romanian party, the New York Convention cannot be applied because F.R. Germany has used the first reservation of Article I(3) according to which it shall apply the New York Convention to awards made in other Contracting States only. However, it can be argued that the Geneva Convention of 1927 also cannot be applied because by virtue of Article VII(2) the Geneva Treaties have ceased to have effect between F.R. Germany and Romania. This was the opinion of an Austrian Court of Appeal.[306] The Court of First Instance of Hamburg came to an opposite conclusion and applied the Geneva Convention of 1927 in this case.[307] It is submitted that the Hamburg Court

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304. Tribunale of Naples, June 30, 1976, Grancebaco *v*, Italgrani (Italy no. 22).

305. Corte di Appello of Milan, December 13, 1974, S.a.S. C.I.P.R.A. di Schmutz & Co. *v.* Pezzota Camillo (Italy no. 12).

306. The decision of the Court of Appeal is dealt with in Oberster Gerichtshof, November 17, 1965 (Austria no. 1). The award in this case was made in the Netherlands between an Austrian and a F.R. German party. The Court of Appeal had erroneously assumed that the Netherlands had only adhered to the Geneva Treaties and not to the New York Convention. The Austrian Supreme Court corrected this mistake and applied accordingly the New York Convention, without, however, discussing the question whether the Geneva Convention would have been applicable in this case if the Netherlands had not adhered to the New York Convention.

307. Landgericht of Hamburg, April 24, 1979 (F.R. Germ. no. 21). The award in this case

represents the better view. Article VII(2) has been inserted in the Convention in order to make clear that the Convention replaces the Geneva Treaties. It must therefore be deemed to apply only to those cases where the New York Convention and the Geneva Treaties could have been concurrently applicable. Moreover, the expression "between Contracting States" as used in Article VII(2) refers to States which have adhered both the New York Convention and the Geneva Treaties. The Geneva Treaties may, however, as in the present case, involve a tripartite State relationship. If in such a case one of the States has adhered to the Geneva Treaties only, the expression "between Contracting States" must be deemed not to be fulfilled.

An award made in a State which has adhered to the Geneva Treaties only may pose a *second problem* for the enforcement in a State which has adhered to both the Geneva Treaties and the New York Convention in the cases where the State in which the enforcement is sought has not used the first reservation of Article I(3) of the Convention.

If the latter State, as in the first problem, has used the first reservation of Article I(3), the Geneva Convention will be applicable. However, if that State has not used the first reservation, it will apply the New York Convention to awards made in any other State. The question then arises whether in this case the enforcement of an award made in a State which had adhered to the Geneva Treaties only, is governed by the Geneva Convention of 1927 or the New York Convention. For example, an award is made in Yugoslavia between an Italian and a Yugoslav party, and such award is sought to be enforced in Italy. Italy has adhered to both the Geneva Treaties and the New York Convention, and has not used the first reservation of Article I(3). Must the Italian court apply the Geneva Convention or the New York Convention? It is submitted that in this case an option exists to base the enforcement on either Convention. The compatibility-and mfr-provision of Article VII(1) lay down as general rule that the New York Convention does not constitute a *lex posterior*. The exception to this general rule is Article VII(2) which affirms that between Contracting States the New York Convention does constitute a *lex posterior* vis-à-vis the Geneva Treaties. *A contrario* the Geneva Treaties prevail over the New York Convention where the exception is not fulfilled, thus where one of the States involved has adhered to the Geneva Treaties only. However, the Geneva Convention contains in Article 5 a mfr-provision which is almost identical to the mfr-provision contained in Article VII(1) of the New York Convention. This would permit to base the enforcement on the New York Convention.

Although this problem has not yet arisen in practice, it may come up as companies especially in Yugoslavia, and to a lesser extent in Ireland, conclude more and more contracts providing for arbitration within their own country.

A combination of the first and the second problem may also occur: enforcement of an award made in a State which has adhered to the Geneva Treaties only between parties subject to the jurisdiction of States which have adhered to both the

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was made in Belgium between a Dutch and a F.R. German party. The Court did not apply the New York Convention because it assumed that Belgium had only adhered to the Geneva Treaties and not to the New York Convention. The Court's assumption was, however, erroneous: Belgium ratified the New York Convention on August 18, 1975 (entry into force: November 16, 1975) and was therefore already a Party to the Convention both at the time the award was made (i.e., June 21, 1978) and at the time the Court rendered its decision.

Geneva Treaties and the New York Convention, is sought in a State which has also adhered to both the Geneva Treaties and the New York Convention but which State has not used the first reservation of Article I(3) (for example, enforcement in Italy of an award made in Yugoslavia between an Italian and a Romanian party). This combined problem is to be solved along the same lines as the second problem.

As noted before, some bilateral treaties refer for the enforcement of the award to the Geneva Convention.[308] If both States concerned have subsequently adhered to the New York Convention, the Geneva Convention can no longer be applied.

On the one hand, Article VII(2) provides that between Contracting States the Geneva Treaties cease to have effect. On the other hand, Article VII(1) allows to rely on bilateral treaties, including those which refer to the Geneva Convention. The latter argument was used by the President of the Court of First Instance of The Hague for holding the enforcement of an award made in the United States to be governed by the Geneva Convention, although the Netherlands and the United States had already adhered to the New York Convention.[309] The Treaty of Friendship, Commerce and Navigation (TFCN) between the Netherlands and the United States of 1956 refers for the enforcement in the Netherlands to the Geneva Convention.[310] As the petitioner had not provided a Dutch translation of the arbitral award, which the President deemed to be compulsorily prescribed by Article IV(2) of the New York Convention, the President assumed that the petitioner had used the mfr-provision of Article VII(1) and relied on the Dutch-American TFCN, respectively the Geneva Convention.[311] The President did not mention Article VII(2) of the New York Convention. Nevertheless this provision must be deemed to apply also to an "indirect" reference to the Geneva Convention because the very purpose of Article VII(2) is to replace the Geneva Treaties. It may be added that the Dutch-American TFCN was concluded in 1956, thus well before the conclusion of the New York Convention. If the TFCN had been concluded subsequent to the New York Convention, it had certainly provided that the enforcement was to be governed by the New York Convention. It may therefore be presumed that those bilateral treaties which refer to the Geneva Convention become obsolete in those cases where the States concerned have become Party to the New York Convention.

I–4.6 Uniform Interpretation (and Summary)

Article VII(1) permits to rely on another basis for the enforcement of the arbitral award. The domestic law on the enforcement of foreign

308. See *supra* n. 274.

309. President of the Rechtbank of The Hague, June 23, 1972, Weinstein International Corp. *v.* Nagtegaal N.V. (Neth. no. 5). This decision was the second round of the enforcement proceedings in the Netherlands. See for the first round in which the enforcement was refused because Weinstein had not obtained a leave for enforcement in the United States, *supra* n. 276.

310. The United States has not adhered to the Geneva Treaties. For the enforcement in the United States the TFCN refers to the manner of enforcement of awards rendered in other States of the United States.

311. See for this, in my opinion, also erroneous view of the President, *infra* III–2.3 ("Trans-

arbitral awards of the court where the enforcement is sought can be taken as basis by virtue of the more-favourable-right (mfr)-provision, whilst the other multilateral and bilateral treaties can be taken as basis by virtue of both the mfr- and compatibility-provision of Article VII(1) (pp. 81-84).

The party who may rely on the other basis for enforcement, indicated by Article VII(1) as "any interested party", is only the party who seeks enforcement (pp. 84-85).

A combination of the provisions of the Convention with provisions of another basis for enforcement is not possible. An exception is the European Convention of 1961 (see below) (pp. 85-86).

Although Article VII(1) does not mention the arbitration agreement, the mfr-provision must be deemed to apply to the enforcement of the agreement as well (pp. 86-88).

The Convention does not supersede the domestic law on the enforcement of foreign arbitration agreements and arbitral awards in the sense that it is allowed to rely thereon in actions outside the Convention (pp. 88-90).

The relationship between the Convention and other multilateral and bilateral treaties can be determined in the most appropriate manner by using the principle of conflict of treaties of maximum efficacy according to which principle that treaty or convention is applicable which upholds validity in a given case. This principle is confirmed by the compatibility- and mfr-provision of the New York Convention (pp. 90-92).

The relationship with the European Convention of 1961 is such that as far as enforcement of the arbitration agreement and the arbitral award is concerned, the European Convention cannot function without the New York Convention. In case of concurrent applicability, the European Convention is to be applied in addition to the New York Convention (pp. 92-98).

As far as the other multilateral treaties are concerned, the principle of maximum efficacy may be applied in relation to the Panama Convention of 1975 (although this Convention is not entirely clear), and, if there is need for it, in relation to the Washington Convention of 1965. On the other hand, the New York Convention is not applicable in those cases where the Moscow Convention of 1972 is applicable (pp. 98-105).

As far as bilateral treaties are concerned, almost all of them were concluded prior to the coming into force of the New York Convention in the States concerned. Here also, the principle of maximum efficacy is the most appropriate rule to determine the relationship with the New York Convention (pp. 105-113).

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lation (Art. IV(2))") at n. III. 74.

The Geneva Protocol of 1923 and Convention of 1927, which cease to have effect between the Contracting States pursuant to Article VII(2), continue to be applicable in the following exceptional cases. They continue to be applicable in a State which has adhered to both the Geneva Treaties and the New York Convention, including the first reservation of Article I(3), if the enforcement of an award is sought which has been made in a State which has adhered to the Geneva Treaties only, provided that the parties are subject to the jurisdiction of both States. If in this case the State where the enforcement is sought has not used the first reservation of Article I(3), there is an option to rely either on the Geneva Treaties or on the New York Convention. On the other hand, reference in a bilateral treaty to the Geneva Convention becomes obsolete in those cases where the States concerned have become Party to the New York Convention (pp. 113-118).

Chapter II

Enforcement of the Arbitration Agreement

This Chapter concerns the first of the two actions of the New York Convention, which is the enforcement of the arbitration agreement pursuant to Article II(3).[1] The second action, the enforcement of the arbitral award, will be dealt with in Chapter III.

The Chapter is divided into two Parts. The first Part is concerned with the conditions for the enforcement of the arbitration agreement in general. It does not include an examination of the question which arbitration agreements fall under Article II(3) as this question regarding the scope of the Convention was already examined in Part 2 of Chapter I.

The second Part of this Chapter deals with the written form of the arbitration agreement as required by Article II(2) of the Convention. The reason that a separate Part is devoted to this question is that no other provision of the Convention has provoked so many decisions as Article II(2).

It should be pointed out that the written form requirement of Article II(2) does not only apply in the action for the enforcement of the agreement, but also in that of the arbitral award (Arts. IV(1)(b) and V(1)(a)).[2] It is merely for reasons of internal division in this study that this question is examined in the context of the enforcement of the agreement.

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1. It may be recalled that the Convention does not use the term "enforcement" with regard to the arbitration agreement, but speaks in a more general way about "recognition" (Art. II(1)). In order to identify the referral by the court to arbitration pursuant to Art. II(3), the more specific term "enforcement" is used in the text, in a manner which corresponds to the term "enforcement" in connection with the arbitral award.

2. See for this question, *infra* III–4.1.3.3 ("Applicability of Article II").

PART II–1 REFERRAL BY COURT TO ARBITRATION (ART. II(1) and (3))

II–1.1 Introduction

II–1.1.1 *Convention's provisions relating to referral*

In order to fully appreciate the conditions for the referral by a court to arbitration, it may be useful to quote the relevant provisions of the Convention, beginning with Article II:

"1. Each Contracting Party 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.

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

Article V(1)(a) may also be quoted. According to this provision, enforcement of an arbitral award may be refused if the party against whom the enforcement is sought proves that:

"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".

As will be subsequently explained, this provision can be deemed to be incorporated in the provisions for the enforcement of the arbitration agreement as set out in Article II.[3]

On the basis of the above quoted provisions of the Convention, the enforcement by a court of an arbitration agreement will be considered in this Part in three Sections: the first Section, headed "Referral to Arbitration in General", deals with the meaning and effect of the expression "refer the parties to arbitration" as well as the procedural aspects of the referral by the court to arbitration (II–1.2). The second Section,

3. See *infra* II–1.1.3 ("Determination of Law Applicable to Arbitration Agreement").

headed "Arbitration Agreement and Referral to Arbitration", is concerned with the conditions with which the arbitration agreement must comply in order to be enforceable under Article II(3) of the Convention (II–1.3). The third and last Section, headed "Multi-Party Disputes and Referral to Arbitration", deals with the problems connected with the situation where there are more than two parties, one of whom is not bound by the same arbitration agreement or no arbitration agreement at all, and the disputes involve identical or related claims. A separate Section is devoted to this topic as this type of situation occurs more and more frequently.

Before turning to these three topics, two preliminary observations should be made with regard to the relationship between the Convention's provisions and municipal law and the determination of the law applicable to the arbitration agreement.

II–1.1.2 *Convention's provisions and municipal law*

For the enforcement of the arbitration agreement, the Convention contains internationally uniform provisions, but it also leaves a number of matters to be determined under some municipal law.

The uniform provisions supersede the relevant provisions of municipal law. They include the Convention's provisions relating to the written form of the arbitration agreement, the mandatory nature of the referral by the court to arbitration, the defined legal relationship whether contractual or not, and the grounds for refusal of enforcement that the agreement is null and void, inoperative or incapable of being performed.

In this connection it should already be mentioned that, although the Convention's provision that the agreement not be null and void etc. is a *ground* for refusal of enforcement of the arbitration agreement which supersedes any other ground under municipal law, the question when an agreement is to be considered null and void etc. may again depend on some municipal law because the Convention does not give much guidance as to what should be understood by these words.

It may also be mentioned that Section 7(2) of the implementing Australian Act 1974 can be considered as not conforming to the uniform character of Article II(3) of the Convention as it provides that ". . . the court shall, by order, *upon such conditions (if any) as it thinks fit,* stay the proceedings . . .". (emphasis added)

The municipal law may be the law of the forum (inter alia, for the question of arbitrability and the procedural questions not regulated by the Convention), the law applicable to the arbitration agreement (inter alia, for determining its validity to the extent that it is not superseded by the Convention), or the law applicable to the parties (for determining the capacity to go to arbitration).

There may be questions which at the stage of enforcement of the arbitration agreement may have to be determined under the law governing the arbitral procedure, either under this law alone or cumulatively

with the law applicable to the arbitration agreement. These questions are, inter alia, the question whether the arbitration agreement has ceased to have effect due to the expiry of a time limit for arbitrating, the death of an arbitrator, the refusal of a third party designated in the arbitration agreement to appoint an arbitrator, etc.

This problem is rather academic and has not come up before the courts so far. It forms part of the more general question whether the arbitration agreement, the arbitral procedure, and the arbitral award could be governed by different laws. Although this is, in theory, possible under the New York Convention, in practice it appears that one and the same law applies.

As far as the law governing the arbitral *award* is concerned, this law is the law of the country in which, or under the law of which, the award is to be, or was, made (Art. V(1)(e)). Since the phrase "under the law of which" is concerned with the theoretical possibility that the parties have agreed on a law applicable to the award which is different from the law of the place of rendition (see I–1.5 *supra*), in practice the award is governed by the law of the place where it is made.

As far as the law governing arbitral *procedure* is concerned, this law is the law of the place of arbitration, subject to a specific regulation to be observed in the enforcement proceedings under the New York Convention (Art. V(1)(d), see hereafter).

As it virtually never occurs that in the award a place of rendition is indicated which is different from the place of arbitration, the law governing the arbitral procedure and the law governing the arbitral award are in almost all cases the same law.

As far as the arbitration *agreement* is concerned, according to the conflict rules of Article V(1)(a) – which are to be deemed applicable at the stage of the enforcement of the arbitration agreement as well, see II–1.1.3 hereafter – the parties may subject the agreement to the law of their choice, and, failing such choice, the arbitration agreement will be governed by the law of the country where the award is made. Since the choice of the law governing the arbitration agreement must be express [4], and such express choice is almost never made by the parties, the law governing the arbitration agreement is in practice almost always the same law as the law governing the arbitral procedure.

As the law governing the arbitral procedure is also the same law as the law governing the arbitral award, the result is that in practice one and the same law applies to all three stages of the arbitration, *viz.*, the arbitration agreement, the arbitral procedure and the arbitral award. Thus the problem whether at the stage of the enforcement of the arbitration agreement certain questions may (also) have to be determined under the law governing the arbitral procedure, is theoretically interesting, but has little relevance in practice. In view of the congruence of the applicable laws in practice, the reference made in the following to the law applicable to the arbitration agreement is made on the understanding that this is the same law as the law governing the arbitral procedure and the arbitral award.

4. See *infra* III–4.1.3.5(a) ("Determination of the Law Applicable to the Arbitration Agreement – Law to Which the Parties Have Subjected the Agreement").

Another theoretical question, which has not come up before the courts either, is whether the provisions of Article V(1)(d) apply by analogy at the stage of the enforcement of the arbitration agreement.

Article V(1)(d) provides that the enforcement of an award may be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. Article V(1)(d) contains a specific regulation in that only in the absence of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure these matters are to be judged under the law of the country where the arbitration took place. This may give rise to the question whether matters contained in the arbitration agreement relating to the composition of the arbitral tribunal (e.g., the number of arbitrators) and the arbitral procedure are not to be judged under the applicable law at the stage of the enforcement of the arbitration agreement. It is submitted that the provisions of Article V(1)(d) cannot be applied by analogy at the stage of enforcement of the arbitration agreement. The reason for this is that the specific regulation of Article V(1)(d) has merely the effect of reducing the control over the foreign *award* by the court before which its enforcement is sought.[5]

It should finally be observed that the role played by the law applicable to the arbitration agreement as described above when the enforcement of the arbitration agreement is sought, can be more extensive than when the enforcement of the arbitral award is sought. At the stage of the enforcement of the award few matters remain to be determined under the law governing the arbitration agreement.[6] At both stages, however, the most important role is played by the uniform rule of Article II(2) regarding the formal validity of the arbitration agreement.

This Chapter will not be concerned with the content of the municipal law when it is deemed to be applicable. It would by far exceed the scope of this study to make a comparative survey of the multiplicity of municipal laws for each question. Rather, the main object of this study being the unification of judicial interpretations of the Convention's provisions, it will aim to identify which matters are governed by the internationally uniform provisions of the Convention and which matters are governed by municipal law. By drawing the line between which matters are governed by the Convention's provisions and which are governed by municipal law, it will be attempted to bring as many matters as possible under the Convention's provisions. The desirability of reducing the role of municipal law was aptly stated by the District Court of New York, in referring to the United States Supreme Court [7]:

5. See for Art. V(1) (d), *infra* III–4.4.

6. Comp. *infra* III–4.1.3.4 ("Matters Left to the Law Applicable to Arbitration Agreement").

7. U.S. District Court of New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20), see *infra* II–2.4.3.3 ("Incorporation by Reference"). The Court quoted from the U.S. Supreme Court, June 17, 1974, Fritz Scherk *v.* Alberto Culver Co. (U.S. no. 4) at p. 520-521 n. 15.

> "[T]he Supreme Court has noted that 'the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements'. This concern would seem to be equally compelling whether the 'parochial view' is that of the forum or of another State with an alleged interest in the controversy."

II–1.1.3 *Determination of the law applicable to the arbitration agreement*

Although the role of the law of the forum is not insignificant, the municipal law which plays the most important role for the enforcement of the arbitration agreement under the Convention is the law applicable to the arbitration agreement if a matter cannot be brought under the Convention's uniform provisions. In the context of this Part of the study it raises the question of how the law applicable to the arbitration agreement should be determined at the stage of enforcement of the arbitration agreement.

Article V(1)(a) of the Convention provides that the law applicable to the arbitration agreement is "the law to which the parties have subjected it or, failing any indication thereon, . . . the law of the country where the award was made". This can be deemed to constitute uniform rules of conflict of laws which prevail over any other conflict rules, in particular those of the forum, for determining the law applicable to the arbitration agreement.[8]

The uniform conflict rules for determining the law applicable to the arbitration agreement are mentioned in the Convention only in connection with the enforcement of the arbitral *award.* The question is whether the same uniform conflict rules are to be applied in connection with the enforcement of the arbitration *agreement*. A systematic interpretation of the Convention, in principle, permits the application by analogy of the conflict rules of Article V(1)(a) to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of the enforcement of the agreement to apply possibly different conflict rules of the forum. It could lead to the undesirable situation of the same arbitration agreement being held to be governed by two different laws: one law determined according to the conflict rules of the forum at the time of the enforcement of the agreement, and the other determined according to Article V(1)(a) at the time of enforce-

8. See H.-V. von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen* (Berlin 1973) p. 99.

ment of the award. The silence of the Convention on this point in connection with the enforcement of the agreement is not to be interpreted *a contrario,* as it is due to the last minute insertion of the provisions relating to the arbitration agreement in the Convention, which, as previously noted, has entailed several omissions. Rather, the Convention's provisions must be interpreted on the basis of an integral interrelation between them. As Article V(1)(a) incorporates Article II – ". . . the agreement referred to in Article II . . ." – Article II can be deemed to incorporate Article V(1)(a).

As the uniform conflict rules of the Article V(1)(a) have been drafted for the enforcement of the award, the analogy is not complete.[9] No difficulty will arise with the first and primary conflict rule of Article V(1)(a) that the agreement be governed by the law chosen by the parties, although such choice will rarely happen in practice. The subsidiarily applicable conflict rule that, failing a designation by the parties of the law applicable to the arbitration agreement, the agreement is governed by the law of the country where the award was made, can be interpreted for the enforcement of the agreement by reading it as the law of the country where the award *will be made.* No application by analogy, however, is possible if the parties have not designated the law applicable to the arbitration agreement or the place where the arbitration is to be held is not known. Only here do the uniform conflict rules of Article V(1)(a) fall short. The solution would then appear to be the application of the conflict law of the forum.

The above interpretation concerning the applicability of the conflict rules of Article V(1)(a) at the stage of the enforcement of the arbitration agreement is confirmed by the Court of First Instance of Heidelberg.[10] The question before the Court was whether an arbitration agreement providing for appeal on the merits to a court was valid.[11] This question was judged by the Court under the law applicable to the arbitration agreement and Article II(3) of the Convention. As regards the applicable law, the Court determined that law with express reference to Article V(1)(a) of the Convention, and held that according to this provision the parties have the freedom to designate the law applicable to the arbitration agreement and, failing any indication thereon, the law of the country in which the award *will be made (ergehen soll)* is to be applied. In the case before the Court, the parties had not made a choice of law. Nor could the place where the award was to be made be determined, as the Arbitration Rules of the German-Dutch Chamber of Commerce, to which the parties had referred in the arbitration agreement, provide that arbitration can be initiated either in F.R. Germany or the Netherlands, in which cases German or Dutch arbi-

9. See for a discussion of the conflict rules of Art. V(1) (a), which at the stage of enforcement of the award play a less significant role, *infra* III–4.1.3.5 ("Determination of the Law Applicable to the Arbitration Agreement").

10. Landgericht of Heidelberg, October 23, 1972, affirmed by the Oberlandesgericht of Karlsruhe, March 13, 1973 (F.R. Germ. no. 9).

11. See *infra* II–1.3.4.2 ("Null and Void").

tration law respectively would be applicable. Faced with this situation, the Court determined the validity under both German and Dutch law.

In this connection the Austrian Supreme Court may also be quoted as it held also that the conflict rules of Article V(1)(a) apply by analogy [12]:

> "The Court of Appeal has rightly inferred from Article V(1)(a) of the New York Convention that, except for the parties' capacity to conclude the arbitration agreement, its validity or invalidity must, failing an agreement of the parties to the contrary, be judged under the law of the country in which the award will be made (*zu fällen ist*) . . ."

The interpretation that the conflict rules of Article V(1)(a) apply by analogy in an action for the enforcement of the arbitration agreement is also followed by the majority of authors.[13]

Finally we may mention the European Convention of 1961 [14] which provides in Article VI(2), first part, for a similar solution:

> "In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions
>
> (a) under the law to which the parties have subjected their arbitration agreement;
>
> (b) failing any indication thereon, under the law of the country in which the award is to be made;
>
> (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute."

It must be said, however, that the above interpretation by analogy is not shared by the courts in the United States. For various types of questions on the enforceability of the arbitration agreement under the Convention, they hold that the law of the forum governs.[15]

II–1.2 Referral to Arbitration in General

II–1.2.1 *Meaning and effect of "refer the parties to arbitration"*

When seized of an action in a matter in respect of which the parties have agreed to arbitrate, a court shall, according to the wording of Article II(3), "refer the parties to arbitration" if one of the parties requests

12. Oberster Gerichtshof, November 17, 1971 (Austria no. 2).

13. von Hülsen, *supra* n. 8, p. 100; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 337; J. Gentinetta, *Die Lex Fori internationaler Handelsschiedsgerichte* (Bern 1973) p. 297 and authors cited; J. McMahon, "Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States", 2 *Journal of Maritime Law & Commerce* (1971) p. 735 at p. 757.

14. See *supra* I–4.4.2.

15. E.g., U.S. Court of Appeals (3d Cir.), July 17, 1978, Becker Autoradio U.S.A. Inc. *v.* Becker Autoradiowerk G.m.b.H. (U.S. no. 26): question whether claim comes within the scope of arbitration agreement, see *infra* n. 91; U.S. District Court of Pennsylvania, W.D., October 19, 1976, Fuller Company *v.* Compagnie Des Bauxites de Guinee (U.S. no. 13): question whether settlement was reached between parties, see *infra* n. 113; U.S. District Court of New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20):

so. The expression "refer the parties to arbitration" already figured in Article 4(1) of the Geneva Protocol of 1923. Its use was continued in the New York Convention without any discussion. This is regrettable as a discussion might have led to a clearer wording. Whatever may be, the meaning of the expression in its technical procedural sense must be deemed to be the court directive staying the court proceedings on the merits. The effect of the expression is a partial incompetence of the court vis-à-vis arbitration.

(a) *Meaning: stay of court proceedings on the merits*

From the textual viewpoint the expression "refer the parties to arbitration" could have two technical procedural meanings:

(1) the court directive staying the court proceedings; and

(2) the court directive imposing arbitration.

The first meaning is to be inferred from the link which Article II(3) makes between the expression "refer the parties to arbitration" and the situation that the court is seized of an action in respect of which it is agreed to arbitrate. If the court refers the parties to arbitration in these circumstances, it implies automatically that the court proceedings are stayed.

Despite the semantic appearances of the word "refer", the expression is not to be taken as having the second meaning of the court directive obliging to arbitrate. Such a court directive is unknown in the majority of countries. Moreover, this directive would not make sense. It is up to the parties, or at least one of them, whether arbitration will effectively take place or proceed. The directive would only make sense if, without the directive, arbitration could not take place or proceed. This could be imagined in the case where, in spite of a valid arbitration agreement, the defendant is unwilling to participate in the arbitration. However, like most arbitration laws, the New York Convention does not imply the necessity of a court directive to go to arbitration if a party refuses to participate. It is generally accepted that an award can be made in the absence of an unwilling party without a court directive, provided that that party has been duly notified of the initiation of the arbitration.[16]

The above interpretation that the expression has only the first meaning is confirmed by the implementing Acts of India and the United Kingdom. In these Acts the expression "refer the parties to arbitration" is not reproduced, but is rephrased in its technical procedural sense as "to stay the court proceedings".[17]

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denial to apply Arts. 1341 and 1342 of the Italian Civil Code, see *infra* II–2.4.3.3. The attitude of the English courts is not entirely clear, see *infra* n. 90.

16. See *infra* III–4.2.3 (b) ("Unable to Present His Case").

17. India: Foreign Awards (Recognition and Enforcement) Act 1961, Sect. 3; United

Some confusion may arise from the United States implementing Act (i.e., Chapter 2 of the United States Arbitration Act). Whilst this Act must be deemed to imply the court directive staying the court proceedings [18], it provides in Section 206, captioned "Order to Compel Arbitration":

> "A court having jurisdiction under this Chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States . . . ."

However, the thrust of Section 206 is not the compulsion to arbitrate but rather the possibility for a United States court to direct that arbitration can be held in another country. Under Chapter 1 of the United States Arbitration Act – i.e., domestic arbitration law for federal cases – a court does not have such power.[19] As the Convention implies that the enforcement of an arbitration agreement providing for arbitration abroad will fall under it [20], it was deemed desirable to make this clear in the implementing Act. In this connection Mr. Gerald Aksen observes:

> "The power to order arbitration in a foreign country is certainly unique, because it goes beyond existing American law and is not required by the terms of the Convention. Article II(3) of the Convention states that the court of a country that is a Party to the Treaty should 'refer the parties to arbitration'. This could have been technically satisfied by staying litigation brought in violation of the arbitration agreement. By providing for enforcement abroad, Congress has clear-

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Kingdom: Arbitration Act 1975, Sect. 1 (1). It may be added that the only implementing Act in which the expression "refer the parties to arbitration" could be found is the Australian Arbitration (Foreign Awards and Agreements) Act 1974. Sect. 7(2) of this Act reads: "the court shall ... stay the proceedings ... and refer the parties to arbitration ...".

18. Chapter 1 of the United States Arbitration Act – i.e., the domestic law for arbitration on the federal level – provides in Sect. 3 for the power of the federal courts to stay a court action commenced in violation of an arbitration agreement. Sect. 3 reads:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall upon application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

On the basis of Sect. 208 of Chapter 2 of the United States Arbitration Act – i.e., the implementing legislation of the Convention in the United States – which Section provides that Chapter 1 applies to actions and proceedings brought under Chapter 2 so long as they are not in conflict with Chapter 2, it is generally accepted that Sect. 3 of Chapter 1 applies also to Chapter 2. See G. Aksen, "Application of the New York Convention by United States Courts", in *Yearbook* Vol. IV (1979) p. 341 at p. 348.

19. See D. Swisher, "Comment. International Commercial Arbitration under the United Nations Convention and the Amended Federal Arbitration Statute", 47 *Washington Law Review* (1972) p. 441 at p. 471.

20. See *supra* I–2.2 ("Agreement Providing for Arbitration in Another State").

ly indicated the extent to which the United States Government recognizes the propriety of international arbitration as a method of resolving foreign trade controversies."[21]

(b) *Effect: partial incompetence of the court*

The legal effect of the expression "refer the parties to arbitration" is that a court becomes incompetent to try the merits of the dispute when the arbitration agreement is invoked.[22] However, the court is not rendered completely incompetent; it may retain competence for matters related to the arbitration. The competence of the court may be continued, for instance, where the arbitration is to take, or is taking, place within its district: 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 competence of the court may also continue for the ordering of provisional remedies, especially attachment for securing the sum or goods in dispute, irrespective of whether the arbitration is to take, or is taking, place within its own district or in a foreign country. Article II(3) can therefore be said to have the effect of a partial incompetence of the court.[23]

An absolute incompetence of the court cannot be inferred from the fact that Article II(3) does not mention expressly the stay of court proceedings, but uses the expression "refer the parties to arbitration". A United States Court of Appeals had so argued and accordingly held that a pre-award attachment was incompatible with the Convention. The arguments why this opinion is to be rejected will be made in II–1.2.5 below in the consideration of the entire problem of pre-award attachment.

The effect being limited to an incompetence of the court to try the merits of the case, it may be observed that the Convention does not regulate the concurrence of the arbitrator's view on his competence to decide on the merits of the dispute with that of the court. Under almost all laws the court has the last word on the question whether the arbitrator has competence as arbitration excludes the competence of the courts. Most laws also allow the arbitrator to rule provisionally on the plea that he lacks competence and to proceed with the arbitration if he finds that he does have competence. However, the laws differ

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21. Aksen, *supra* n. 18, at p. 350. This is also the opinion of J. McMahon, "Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States", 2 *Journal of Maritime Law & Commerce* (1971) p. 735 at p. 753 n. 83.

22. The question whether the referral to arbitration affects the competence or jurisdiction of the court depends on the law of the forum, but has no consequences in practice. See G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.B.1.

23. See Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 226 (in French: *incompétence relative*).

whether the court can be requested by a party to scrutinize the arbitrator's view on his competence during the arbitration – which may cause delay in the arbitration – or only after the award is made.[24]

It is said that the absence of a provision in the Convention concerning the concurrence of the arbitrator's view on his competence with a questioning of this view in court during the arbitration, is not to be felt as an omission because this can be left to "the prudence of the courts".[25] An internationally uniform provision to this effect, however, could have erased the differences in the national laws on this point.[26]

II–1.2.2 *Actual submission to arbitration not required*

The Indian implementing Act of 1961 originally read in Section 3: ". . . if any party to a submission made in pursuance of an agreement to which the Convention applies . . .". This phraseology was taken over literally from the Indian Act of 1937 implementing the Geneva Protocol of 1923 and the Geneva Convention of 1927, which was, in turn, based on the Act of 1934 implementing the Geneva Treaties in the United Kingdom as later incorporated in Section 4(2) of the English Arbitration Act of 1950. This text is acknowledged to by a mistranslation of the French text of the Geneva Protocol of 1923; the English courts have easily straightened out the lapsus.[27] The Indian Supreme Court went the other way and the Indian Parlament was needed to rectify the Supreme Court's literal interpretation.

The Indian Supreme Court gave a literal interpretation of the words used in Section 3 of the 1961 Act as requiring an actual submission to arbitration, although the Court observed that "It is true that by taking the above view the purpose object behind . . . the Convention may not be fully carried out".[28] As the Russian defen-

24. During and after the arbitration: e.g., **Sweden** (see U. Holmbäck and N. Mangård, "National Report Sweden", in *Yearbook* Vol. III (1978) p. 161 at p. 172); **United Kingdom** (see W. Gill, "National Report United Kingdom", in *Yearbook* Vol. II (1977) p. 90 at p. 107). Only after the arbitration: e.g., **Austria** (see W. Melis, "National Report Austria", in *Yearbook* Vol. IV (1979) p. 21 at p. 35); **Belgium** (see L. Matray, "National Report Belgium", in *Yearbook* Vol. V (1980) p. 1 at p. 17).

25. P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 307.

26. See, for example, European Convention Providing a Uniform Law on Arbitration, Strasbourg, January 20, 1966, *European Treaty Series* no. 56, which provides in Art. 18(3):

"The arbitral tribunal's ruling that it has jurisdiction may not be contested before the judicial authority except at the same time as the award on the main issue and by the same procedure. The judicial authority may at the request of one of the parties decide whether a ruling that the arbitral tribunal has no jurisdiction is well founded."

27. The Merak, 2 *Weekly Law Reports* [1965] 250, in which the word "submission" was construed as "arbitration agreement", and the word "agreement" was construed as the contract to which the arbitration agreement relates.

28. Supreme Court of India, January 1971, V/O Tractoroexport *v*. Tarapore and Co. (India no. 1). This decision of India's highest court has been heavily criticized by U. Baxi, "Goodbye

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dant, sued before the Indian courts by the Indian plaintiff in this case, had initiated arbitration in Moscow only after the commencement of the court proceedings, the Indian Supreme Court refused a stay.

The Supreme Court had also observed in its judgment that "It would hardly be conducive to international commercial arbitration not to have legislation giving full and complete effect to what is provided by . . . the Covention". This hint was rapidly taken up by the Indian Parliament which enacted in 1973 an amendment to Section 3 of the 1961 Act to the effect that it now reads: " . . . if any party to an agreement to which Article II of the Convention . . . applies . . .".[29] It is disappointing to see that four years after this amendment an Indian High Court still applied the old text of Section 3 of the 1961 Act in refusing a request for a stay of the court proceedings for the sole reason that the court proceedings were started in 1969 and no retroactive effect could be given to the amendment.[30]

As rightly assumed by the Indian Supreme Court, the Convention itself does not limit the referral to arbitration to only those cases where arbitration has already been initiated. This cannot be read in the Convention's provisions, nor can it be inferred from the system of the Convention. The mere existence of a valid arbitration agreement, whether made in respect of existing disputes (the submission agreement) or in respect of future disputes (the arbitral clause), is sufficient.

It may be appropriate here to add that the Convention does not distinguish between the submission agreement and the arbitral clause but treats both types of arbitration agreements alike. Formerly, such a distinction was necessary because the arbitral clause was invalid in several countries due to a hostility towards arbitration.[31] It was for this very

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to Unification? The Indian Supreme Court and the United Nations Arbitration Convention", 15 *Journal of the Indian Law Institute* (1973) p. 353, who observed at p. 354:

> "The decision ... illustrates how an unconscious parochial concern for the value of national sovereignty can periclitate the modest progress sought to be made in the miniscule, but still important, area of conflictual unification of laws relating to international arbitral process."

29. The Foreign Awards (Recognition and Enforcement) Amendment Act 1973 (Act. no. 57 of 1973).

30. High Court of Kerala, January 31, 1977, Food Corporation of India *v.* Mardestine Compania Naviera (India no. 3).

31. In France, for example, the arbitral clause was without effect until 1925 (see for the leading case, Cour de Cassation (Civil Chamber), July 10, 1843, *Recueil Sirey* 1843.1.561). Under the influence of the Geneva Protocol of 1923, the French legislature provided for the validity of arbitral clauses in commercial matters by the Law of December 31, 1925, amending Art. 631 of the Commercial Code. However, the ineffectiveness of the arbitral clause in matters not governed by the Law of 1925 has been reinforced by the French legislature in 1972 by providing in Art. 2061 of the Civil Code that the arbitral clause is void unless otherwise provided by the law (Law no. 72-626 of July 5, 1972, *Journal Officiel de la République Française* of July 9, 1972, p. 7182). Unlike the old French arbitration law (Arts. 1005-1028 of the Code of Civil Procedure), which did not mention the arbitral clause at all, the new French arbitration law (Decree no. 80-354 of May 14, 1980, *Journal Officiel de la République Française* of May 18, 1980, p. 1230, in force as of October 1, 1980) gives a definition of the clause (Art. 2), prescribes that it be in writing (Art. 3), and lays down some rules about its nullity (Arts. 4(3) and 6). It must be emphasized that these provisions apply only to those cases in which the arbitral clause is permitted, i.e., commercial matters. See E. Mezger, "Kernpunkte der franzö-

reason that the Geneva Protocol on Arbitration Clauses of 1923, which declared the arbitral clause to be valid, was established.

When the New York Convention was drafted, the hostility towards the arbitral clause had disappeared in most countries.[32] There no longer being any need to distinguish, the Convention treats both types of agreements alike as can be seen from the first paragraph of Article II: ". . . to submit to arbitration all or any differences *which have arisen or which may arise* . . ." (emphasis added)

This can be considered a provision of uniform law which supersedes municipal law for those agreements falling under the Convention.[33]

The equal treatment of the arbitral clause and the submission agreement by the Convention also has as a consequence that the arbitral clause does not necessitate the conclusion of a submission agreement once the dispute has arisen. Some countries adhere to the antiquated view originating from the aforementioned hostility towards arbitration, that the arbitral clause merely constitutes an agreement to agree to resort to arbitration (*pactum de contrahendo*). Thus, once the dispute has arisen, the parties are still obliged to conclude a submission agreement before the arbitration can commence. This is, for instance, the case in many Latin American countries, although in the majority of them the failure of the parties to conclude a submission agreement – which is likely to happen – is not fatal for the setting into motion of the arbitration.[34] This time-consuming requirement is not needed if the arbitration agreement falls under the Convention. According to the above uniform law provision, the parties can start the arbitration directly once the dispute occurs when there is an arbitral clause. It should be noted, however, that various laws provide for a different treatment of the arbitral clause in some specific cases.

For example, Section 91(1) of the German Law on Restrictive Trade Practices of 1974 (*Gesetz gegen Wettbewerbsbeschränkungen*) declares null and void an agreement to arbitrate disputes which may arise in the future in connection with restrictive trade practices, unless such an arbitral clause allows the parties to choose between arbitration and court litigation at the time the dispute has acutally arisen. An already existing dispute in this field may be referred to arbitration by means of a submission agreement.[35] Another example is the English Arbitration Act of 1979.

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sischen Reform des Schiedsgerichtswesens", 26 *Recht der internationalen Wirtschaft* (1980) p. 677. See also Y. Derains, "National Report France", in *Yearbook* Vol. VI (1981) p. 1 at p. 4.

32. At present the arbitral clause is invalid in very few countries. They include Brazil (affirmed by the Supremo Tribunal Federal, June 2, 1967, Büromaschinen-Export G.m.b.H., Berlin *v.* Insubra S.A. Intercomercial Suco Brasileira, 42 *Rivista Trimestrial de Jurisprudencia* (1967) p. 212), and Venezuela (Art. 504(1) of the Code of Civil Procedure).

33. See Th. Bertheau, *Das New Yorker Abkommen vom 10 Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 36.

34. See for the Latin American countries, my article "L'arbitrage commercial en Amérique latine", *Revue de l'arbitrage* p. 123 at p. 135.

35. See R. Altenmüller, *Die schiedsrichterliche Entscheidung Kartellrechterlicher Streitig-*

According to Section 1 *jo* 3 of this Act, an agreement excluding appeal to the High Court may always be concluded after the dispute has arisen, but before, thus in the case of an arbitral clause, only if the agreement is non-domestic.[36] It is arguable that these provisions pertain to public policy and hence are *not* superseded by the uniform law provision of the Convention not to distinguish between both types of arbitration agreements.[37]

II–1.2.3 *Referral is mandatory*

Article II(3) says that "the court . . ., *shall,* at the request of one of the parties, refer the parties to arbitration".[38] There is a general agreement amongst the courts that this language does not leave any discretion to a court for referring to arbitration once the conditions for referral are fulfilled.[39] Thus, a United States Court of Appeals, reversing a denial by a District Court for a motion to stay court proceedings on discretionary grounds, observed: "There is nothing discretionary about Article II(3) of the Convention. It states that . . .courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration". (emphasis added by the Court) [40]

The mandatory character of the referral by a court to arbitration pursuant to Article II(3) is an internationally uniform rule. It supersedes domestic law which may provide that the court has a discretionary power whether or not to stay a court action brought in violation of an arbitration agreement. A good example of this is the difference between the English Arbitration Act of 1950 and the Act of 1975 implementing the Convention in the United Kingdom.

Section 4(1) of the 1950 Act, which is the English arbitration law for domestic cases, provides that a court "*may* make an order staying the proceedings". Under this Section the English courts have claimed wide discretionary powers whether or

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keiten (Tübingen 1973).

36. See C. Schmitthoff, "The United Kingdom Arbitration Act 1979", in *Yearbook* Vol. V (1980) p. 231 at p. 233.

37. See K.-H. Schwab, *Schiedsgerichtbarkeit*, 3d ed. (Munich 1979) p. 344; E. Mezger, "Das Europäische Ubereinkommen über die Handelsschiedsgerichtsbarkeit", 29 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1965) p. 231 at p. 246.

38. It may be noted that the word "shall" has been left out in the text of Article II(3) of the Convention as published in 330 *United Nations Treaty Series* (1959) p. 38 at p. 39. This text is relied upon in many publications. The omission must be considered as a printing error as the Final Act of the New York Conference of 1958 includes the word "shall" (UN DOC E/CONF. 26/8/Rev. 1 and E/CONF. 26/9/Rev. 1, p. 9).

39. One Indian High Court can be considered as having used a discretionary power as to whether to grant a stay of court proceedings in a case involving three related arbitration agreements providing for different places of arbitration; see *infra* at n. 135.

40. U.S. Court of Appeals (3d Cir.), July 8, 1974, CEAT S.p.A. *v.* McCreary Tire & Rubber Co. (U.S. no. 5) at p. 1032, quoted approvingly by United States District Court of New York, S.D., April 25, 1978, Siderius Inc. *v.* Compania de Acero del Pacifico S.A. (U.S. no. 25). See also, Corte di Cassazione (Sez. Un.), February 27, 1970, no. 470, Louis Dreyfus Corporation of New York *v.* Oriana Società di Navigazione S.p.A. (Italy no. 2); Supreme Court of New South

not to grant a stay. Grounds on which a stay may be refused comprise, inter alia, that the arbitration entails considerable expense, the charges of a personal character and delay.[41] These discretionary powers of the English courts are a specific feature of English arbitration law under which arbitration can be said to form part of the judicial process.[42]

In contrast, Section 1(1) of the Arbitration Act of 1975, which is the implementing legislation of the Convention in the United Kingdom, provides in pursuance of Article II(3) of the Convention that a court "*shall* make an order staying the proceedings". Concerning the effect of Section 1(1), Mr. Justice Brightman observed:

> "The effect of Section 1 is to deprive the court of any discretion whether a claim within a non-domestic arbitration agreement should be arbitrated or litigated. Unless I am satisfied either that the arbitration agreement is null and void, or that it is inoperative, or that it is incapable of being performed, or that there is in fact no dispute between the parties, I am compelled to order a stay. The Section is mandatory . . ."[43]

The mandatory character of Section 1(1) has been almost unanimously affirmed by the other English judges who have dealt with an application for a stay of court proceedings under the Arbitration Act of 1975.[44] It should be said that they accept this curtailment of their powers with reluctance. To quote High Court Judge Mr. Justice Kerr:

> "The shipowners have all the merits, and I suspect that the defendants have no merits whatsoever and are still trying to stave off the day of reckoning. I have to decide whether they have the law on their side. With reluctance, I have come to the conclusion that they have. I must therefore grant the charterers the stay which they ask." [45]

In this case the defendant charterers had admitted before the Judge that they owed the shipowners damages for wrongful repudiation of a charter party. The dispute concerned only the quantum of damages, and it was obvious that the charterers applied for the stay of proceedings for summary judgment with the purpose of putting off the day of payment. Under the Arbitration Act of 1950 this would probably have been a ground for a refusal of the stay on the basis of the discretionary powers of the courts. Under the Arbitration Act of 1975, the Judge, having no such powers, saw himself obliged to grant a stay.

The majority of the Court of Appeal affirmed the decision of the High Court Judge in this case. They reasoned that the shipowners were in fact asking for an in-

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Wales (Equity Division), September 5, 1979, Flakt Australia Ltd. *v.* Wilkins & Davis Construction Co. Ltd. (Australia no. 1).

41. See for a list of grounds for a refusal to stay on the basis of the discretionary power under English arbitration law for domestic cases, A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 191 et. seq.

42. See for the difference in concept of arbitration between England and its companion Common Law countries on the one hand and the majority of other countries on the other, my article, "Etude comparative du droit de l'arbitrage commercial dans les pays des Common Law", 19 *Rassegna dell'Arbitrato* (1979) p. 11 *passim*.

43. High Court of Justice (Chancery Division), January 31, 1978, Lonrho Ltd. *v.* Shell et al. (U.K. no. 5). See for non-domestic arbitration agreement under the Arbitration Act of 1975, *supra* I–2.3.2.

44. E.g., Court of Appeal, April 2-8, 1976, Kammgarn Spinnerei G.m.b.H. *v.* Nova (Jersey) Knit Ltd. (U.K. no. 1); House of Lords, February 16, 1977, Nova (Jersey) Knit Ltd. *v.* Kammgarn Spinnerei G.m.b.H. (U.K. no. 2); High Court of Justice (Chancery Division), October 4-6, 1977, Roussel-Uclaf *v.* G.D. Searle & Co. et al. (U.K. no. 4).

45. As quoted by the Court of Appeal, July 20-21, 1977, The Fuohsan Maru (U.K. no. 3).

terim payment on account of their claim so that they should not be prevented from receiving their money by a delay caused by the charterers. The Court held that it could not legitimately confer this power on itself. Under Section 1(1) of the 1975 Act, the Court had no choice but to grant the stay.

Lord Denning of the Court of Appeal dissented. To him it seemed that US $ 1,000,000 was "indisputably due" by way of damages. As far as the Arbitration Act of 1975 was concerned, he would only stay the action in respect of the balance.

The decision of the High Court Judge and the majority of the Judges of the Court of Appeal is to be approved. The case did not concern an arbitration agreement which was "null and void, inoperative, or incapable of being performed", and involved a dispute, albeit only as regards the quantum of damages. If the approach suggested by Lord Denning in his dissenting opinion were followed, it would amount to an examination by the court of the merits of the case. If the court had assessed in advance the amount of damages which it considered "indisputably due", the arbitrator would have faced a *fait accompli*. It is a fundamental principle of arbitration, and especially international commercial arbitration, that an arbitrator adjudicates the entire case and that a national court does not interfere with his decision-making powers. This is one of the main reasons why Article II(3) provides that the referral by a court to arbitration is mandatory.

This principle ought not to be tempered because there is a dispute only as to the quantum of damages or because the defendant is trying "to stave off the day of reckoning". The balance between an obstructive defendant and the exclusive power of an international arbitrator to decide a case must tip in favour of the latter. This does not, however, preclude that a plaintiff may request a court to order the defendant to give security in order to guarantee that he will pay the award in the event that he loses the case. The ordering of such interim measures is not precluded by the Convention as we will see in Sub-section II–1.2.5.

II–1.2.4 *At the request of one of the parties only*

The rule that a court can refer the parties to arbitration at the request of only one of them resulted in curious voting behaviour of the delegates at the New York Conference of 1958. The original proposal for what has become Article II(3) merely mentioned "at the request of one of the parties".[46] For some unclear reason, the delegate from the United Kingdom proposed to put the words "of their own motion or" before the words "at the request of one of the parties", and this proposal was adopted by the Conference.[47] At the following meeting the Turkish delegate urged that the words "of their own motion" be deleted, arguing that a court should not have the power to impose arbitration when the parties to the arbitration agreement both wished to have the dispute adjudicated by the ordinary court. However, the Turkish proposal was rejected.[48] At the subsequent meeting the Israeli delegate again

46. UN DOC E/CONF.26/L.52 and 54. The Working Party No. 2 which prepared the text was composed of delegates from Belgium, F.R. Germany, Poland, Sweden, Turkey, United Kingdom and U.S.S.R.

47. UN DOC E/CONF.26/SR.22 and L.59.

48. UN DOC E/CONF.26/SR.23.

proposed to delete the words from Article II(3), advancing reasons similar to those of the Turkish delegate. A surprising about-face occurred on the part of the delegates, and the Israeli proposal to delete the words "of its own motion or" was adopted unanimously.[49]

This brief historical account of the words "at the request of one of the parties" in Article II(3) shows the final prevailing view of the drafters of the Convention that a court can refer to arbitration only if one of the parties so requests. If a court is faced with a contract containing an arbitral clause falling under the New York Convention, but none of the parties objects to the competence of the court on the basis of that clause, the court may not refer the parties to arbitration on its own motion. Here again, we encounter an internationally uniform rule which supersedes domestic law (i.e., the law of the forum). Consequently, the rule to be found in some laws that a court may refer the parties to arbitration on its own motion is inapplicable where the arbitration agreement falls under the New York Convention.[50]

Furthermore, the history makes it clear that if a party does not invoke the arbitration agreement, the court will retain competence to hear the case. It also implies that the non-invocation by a party of the arbitration agreement must be considered as a waiver of the right to go to arbitration. This is the other side of the coin; having the freedom to agree to arbitration, the parties must also have the freedom to renounce, explicitly or tacitly, the agreement to arbitrate.

The original proposal for what has become Article II(3) provided that "Such action shall not prejudice the competence of the courts if, for any reason, the arbitration agreement, arbitral clause or arbitration has become null and void or inoperative."[51] A similar provision could be found in Article 4(2) of the Geneva Protocol on Arbitration Clauses of 1923. The provision was adopted by the Conference [52] but was deleted by the Drafting Commitee, presumably because it was deemed redundant.[53] The deletion was not discussed at the Conference meetings at which the text of the Convention as provisionally approved by the Drafting Committee was adopted.[54]

These aspects of Article II(3) have not caused any difficulties in practice. What is, however, particularly worrying from the point of view of uniformity is that the Convention does not state what is the latest moment at which a party may invoke the arbitration agreement. This is all the more regrettable since it would not have been difficult to pro-

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49. UN DOC E/CONF.26/SR.24.

50. This seems to apply especially to certain Socialist countries, see P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 387.

51. UN DOC E/CONF.26/L.52.

52. UN DOC E/CONF.26/SR.22.

53. UN DOC E/CONF.26/L.61.

54. UN DOC E/CONF.26/SR.23 and 24.

vide an internationally uniform rule also for this question. Failing a provision in the Convention, the question what is the latest moment at which a party may invoke the agreement is to be determined by the law of the forum. It would carry too far to make a comparative examination of the laws of the Contracting States regarding this question. It suffices to mention that the laws differ in this respect, and that for each case it is recommended to consult the law of the forum. It may be added that Ghana, India and the United Kingdom are, as far as it could be ascertained, the only Contracting States which have provided for an express provision on this question in the implementing Acts.[55]

In this connection Article VI(1) of the European Convention of 1961 [56] may be quoted:

> "A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance."

This provision does, however, not provide for a satisfactory degree of uniformity as it refers the qualification of the plea of incompetence to the law of the forum. It has therefore been rightly criticized.[57]

II–1.2.5 *Pre-award attachment not precluded*

The Convention contains no provision on the matter of attachment; thus the availability and procedure depend on the law of the court before which the attachment is sought.

No court has doubted that an attachment in connection with the enforcement of an arbitral *award* in order to secure payment under the award, is compatible with the New York Convention.

There also seems to be no doubt as to the possibility of a pre-award attachment, that is to say an attachment before or during the arbitration, in order to secure the subject matter in dispute or the payment under the award if rendered in favour of the party who has applied for

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55. **Ghana:** Arbitration Act 1961, Sect. 40: "... at any time after service of the writ of summons and before the date fixed for the hearing ..."; **India:** Foreign Awards (Recognition and Enforcement) Act 1961, Sect. 3: "... at any time after appearance and before filling a written statement or taking any other step in the proceedings ..."; **United Kingdom**: Arbitration Act 1975, Sect. 1(1): "... at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings ..."; see for the meaning of "step in the proceedings", High Court of Justice (Chancery Division), October 4-6, 1977, Roussel-Uclaf *v.* G.D. Searle & Co. et al. (U.K. no. 4). The Supreme Court of New South Wales (Equity Division), September 5, 1979, Flakt Australia Ltd. *v.* Wilkins & Davies Construction Co. Ltd. (Australia no. 1) held that the application for a stay of court proceedings can be made "before the pleadings are closed".

56. See *supra* I–4.4.2.

57. Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 227.

the attachment. In virtually all countries, attachment, like other provisional remedies involving coercion, cannot be ordered by the arbitrator, but has to be applied for at the court. The availability and procedure here also depend on the law of the court before which the attachment is requested, the Convention being silent on the matter of attachment.

Accordingly, the Italian Supreme Court has not hesitated to validate a pre-award attachment pursuant to Italian law in a case in which the arbitration agreement fell under the New York Convention.[58]

The English Admiralty Court had no difficulty, either, in upholding the arrest of a vessel in connection with an action *in rem* when it stayed the court proceedings on the merits in virtue of Section 1(1) of the Arbitration Act of 1975 (i.e., the implementing legislation of the Convention in the United Kingdom).[59] The Judge said:

> "There is nothing in Section 1(1) of the 1975 Act which obliges the Court, whenever it grants a stay of action *in rem* in which security has been obtained, to make an order for the unconditional release of such security."

Doubts have arisen, however, in the United States in a fairly large number of cases on the compatibility of pre-award attachment with the Convention. As the question has frequently come up in connection with the referral to arbitration, and the main argument for which the Convention would preclude pre-award attachment is drawn from Article II(3), the question may be considered here at the end of this Section concerning the referral to arbitration under Article II(3) in general.

For what reasons may it be considered that the Convention precludes pre-award attachment? The court decision which is frequently referred to in this regard in United States case law is the decision of the Court of Appeals for the Third Circuit in the case of *McCreary Tire & Rubber Company* v. *CEAT S.p.A.*[60]
The Court opined:

> "[R]esort to a Praecipe and Complaint in Foreign Attachment in the Court of Common Pleas of Pennsylvania is a violation of McCreary's agreement to submit the underlying disputes to arbitration . . . [T]he Convention obliges the District Court to recognize and enforce the agreement to arbitrate. Quite possibly foreign attachment may be available for the enforcement of an arbitration award.[61] This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects.

58. Corte di Cassazione (Sez. Un.) May 12, 1977, no. 3989, Scherk Enterprises A.G. *v.* Société des Grandes Marques (Italy no. 28), validating attachment pending arbitration in Zurich.
59. Admiralty Court (Queen's Bench Division), January 13, 1978, The Rena K (U.K. no. 6).
60. July 8, 1974 (U.S. no. 5).
61. The Court cited Art. III of the New York Convention.

> Unlike Section 3 of the Federal Act [62], Article II(3) of the Convention provides that the court of a Contracting State shall 'refer the parties to arbitration' rather than 'stay the trial of action'. The Convention forbids the courts of a Contracting State from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable . . . The obvious purpose of the enactment of Pub. L. 91-368 [i.e., the law implementing the Convention in the United States], permitting removal of all cases falling within the terms of the Treaty, was to prevent the vagaries of state law from impeding its full implementation.[63] Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with that purpose."

The *McCreary* case involved state law attachment. In two subsequent cases also involving state law attachment, the District Courts followed the *McCreary* doctrine.[64] However, *McCreary* has been distinguished in three other cases.[65] The reasoning was that state law attachment is, indeed, not available in relation to arbitration agreements falling under the Convention, but that maritime attachment under federal law pursuant to Section 8 of Chapter 1 of the United States Arbitration Act (i.e., domestic arbitration law for federal cases) [66] is not in conflict

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62. See for text of Sect. 3 of the United States Arbitration Act, *supra* n. 18. It may be noted that Sect. 4 of the Act, not mentioned by the Court, does contemplate the order to compel arbitration.

63. The removal of cases falling under the Convention from State courts to federal courts is provided in Sect. 205 of the implementing Act, which reads:

> "Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed."

See for the removal under Sect. 205, G. Aksen, "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 3 *Southwestern University Law Review* (1971) p. 1 at p. 20.

64. U.S. District Court of New York, S.D., December 22, 1975, Metropolitan World Tanker Corp. *v.* P.N. Pertambangan Minjakdangas Bumi Nasional (U.S. no. 12); August 18, 1977, Coastal States Trading Inc. *v.* Zenith Navigation S.A. et al (U.S. no. 19).

65. U.S. District Court of New York, S.D., March 21, 1977, Andros Compania Maritima S.A. *v.* André & Cie S.A. (U.S. no. 17); July 19, 1978, Atlas Chartering Services Inc. *v.* World Trade Group Inc. (U.S. no. 27); February 14, 1979, Paramount Carriers Corp. *v.* Cook Industries Inc. (U.S. no. 28).

66. Sect. 8, captioned "Proceedings Begun by Libel in Admiralty and Seizure of Vessel or Property", reads:

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have

with the Convention.[67]

However, even for state law attachment, the *McCreary* doctrine should be rejected as the Convention must be held, in general, not to preclude provisional remedies. The arguments of the Court of Appeals in the *McCreary* case against the availability of attachment under the Convention were soundly refuted by the District Court of California, the only court in the United States which has so far upheld the availability of attachment under the Convention without any restrictions[68]:

> "This court, however, does not find the reasoning of *McCreary* convincing. As mentioned above, nothing in the text of the Convention itself suggests that it precludes prejudgment attachment. [Chapter 1 of the] United States Arbitration Act . . ., which operates much like the Convention for domestic agreements involving maritime or interstate commerce, does not prohibit maintenance of a prejudgment attachment during a stay pending arbitration.[69] The *McCreary* court makes two rather elliptical comments to distinguish [Chapter 1 of the] United States Arbitration Act from the Convention. First, the court notes that the Arbitration Act only directs courts to 'stay the trial of the action', while the Convention requires a court to 'refer the parties to arbitration'. . . . From this difference the *McCreary* court apparently concludes that while the Arbitration Act might permit continued jurisdiction and even maintenance of a prejudgment attachment pending arbitration, application of the Convention completely ousts the court of jurisdiction. The use of the general term 'refer', however, might reflect little more than the fact that the Convention must be applied in many very different legal systems . . . . Furthermore, Section 4 of the United States Arbitration Act grants District Courts the power to actually order the parties to arbitration, but this provision has not been interpreted to deprive the courts of continuing jurisdiction over the action.
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> Second, the *McCreary* court found support for its position in the fact that the implementing statutes of the Convention provide for removal jurisdiction in the federal courts.[70] The Third Circuit concluded that: '(t)he obvious purpose (of providing for removal jurisdiction) . . . was to prevent the vagaries of state law from impeding its (the Convention's) full implementation. Permitting a continued resort to foreign attachment . . . is inconsistent with that purpose'. It must be noted, however, that any case falling within Section 4 of the United States Arbitration Act also would be subject to removal pursuant to 28 U.S.C. Section 1441. Furthermore, removal to federal court could have little impact on the 'vagaries' of state provisional remedies, for pursuant to Rule 64 of the Federal Rules of Civil Procedure the District Courts employ the procedures and remedies of the states where they sit. Finally, it should be noted that in other

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jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

67. See for another case in which a maritime attachment under federal law was upheld under the Convention, but in which state law was not discussed, U.S. Court of Appeals (2nd Cir.), June 20, 1977, Drys Shipping Corp. *v.* Freights etc. of the M.S. Drys et al. (U.S. no. 18).

68. U.S. District Court of California, N.D., September 26, 1977, Carolina Power & Light Company *v.* G.I.E. URANEX (U.S. no. 23).

69. The Court cited from the U.S. Supreme Court decision in Barge "Anaconda" *v.* American Sugar Refining Co., 322 *United States Supreme Court Reports* (1944) p. 42.

70. Sect. 205 of the implementing Act, quoted *supra* n. 63.

contexts the Supreme Court has concluded that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate."[71]

There is little to add to this clear opinion in respect of both the Convention and the particularities of the federal legal system of the United States. It may be recalled that the incompetence of the court as a consequence of a stay of court proceedings pursuant to Article II(3) is not complete.[72] The court has a continuing competence in matters related to arbitration including provisional remedies such as attachment. Furthermore, the Convention does not provide for a mechanism for settling disputes which is entirely different from arbitration under domestic law. In fact, an agreement and award falling under the Convention always relate to an arbitration governed by a national arbitration law.[73] The Convention has only the limited purpose of facilitating on an international level the enforcement of the agreement and award. Consequently, whether pre-award attachment is possible does not depend on, nor is it precluded by, the Convention, but is to be determined by the law of the forum. As the National Reports on the laws of arbitration in the *Yearbook 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.[74] It may be added that the reference to Article III of the Convention by the *McCreary* court in arguing that "quite possibly" post-award attachment is available for enforcement of the award under the Convention, would apply with equal force to the enforcement of the agreement. Article III provides that the procedure for the enforcement of the award is governed by the law of the court before which the enforcement is sought. Although the Convention does not state so expressly, the same must be deemed to apply to the enforcement of the agreement.

The question of the compatibility of pre-award attachment with the Convention has been dealt with at some length as attachment is a very important provisional remedy in arbitration. If pre-award attachment were not available, a winning party might obtain only a Pyrrhic victory, as the assets for satisfying the award could have disappeared in the interval. The question is limited to the United States, but there it has led to no less than eight diverging court decisions so far. It is to be hoped that in future court decisions, the United States courts will follow the above-cited California District Court's opinion.

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71. The Court referred to the U.S. Supreme Court decision in Boys Market Inc. *v.* Retail Clerks Union, 398 *United States Supreme Court Reports* (1970) p. 235.

72. See *supra* II–1.2.1 ("Meaning and Effect of 'Refer the Parties to Arbitration' ").

73. See *Supra* I–1.6.2 ("Does the A-national Award Fall under the Convention?").

74. Chap. IV.5 of each National Report.

Conversely, the Convention does not imply that a request for provisional remedies by a party would yield a renunciation of the agreement to arbitrate. Under some municipal laws this question is not quite clear. In order to avoid any uncertainty, several Arbitration Rules therefore provide expressly that a request for interim measures to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.[75] Although the Convention does not contain an express provision on this point, it can be argued that it is implied as under Article II(3) a court has competence to try the merits only if a party pleads as to the substance before the court without invoking the arbitration agreement and without objection of the other party.

In this connection Article VI(4) of the European Convention of 1961 [76] may be quoted:

> "A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court."

II–1.3 Arbitration Agreement and Referral to Arbitration

II–1.3.1 *Introduction*

II–1.3.1.1 *Conditions for referral relating to arbitration agreement*

In the preceding Section the meaning and effect as well as the procedural aspects of the expression "refer the parties to arbitration" of Article II(3) of the Convention have been dealt with. Obviously, no arbitration is possible without its very basis, the arbitration agreement. The subject of this Section is the conditions imposed by the Convention on the arbitration agreement itself for its enforceability.

The most obvious conditions with which the arbitration agreement must comply are those stated at the end of Article II(3): a court must refer the parties to arbitration unless the arbitration agreement is "null and void, inoperative or incapable of being performed". But the conditions relating to the arbitration agreement for its enforceability are not limited to this phrase. Article II(3) also states, "an agreement within the meaning of this Article". This phrase incorporates as conditions for referral three other conditions relating to the arbitration agreement mentioned in the preceding two paragraphs of Article II:

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75. E.g., UNCITRAL Arbitration Rules, Art. 26(3); ICC Arbitration Rules, Art. 8(5); AAA Commercial Arbitration Rules, Sect. 46(a).

76. See *supra* I–4.4.2.

– the difference must arise in respect of a defined legal relationship (Art. II(1));
– the subject matter of the arbitration agreement must be capable of settlement by arbitration (Art. II(1)); and
– the arbitration agreement must be in writing (Art. II(1)–(2)).
Of course, these three conditions could be interpreted without much difficulty as being covered by the words "null and void" etc. However, since the Convention lists them separately and includes them as conditions for referral to arbitration in Article II(3) by the words "an agreement within the meaning of this article", they are to be examined separately.

The first two of the conditions set forth in paragraphs 1 and 2 of Article II will be considered in II–1.3.2 and II–1.3.3. The third condition, that the arbitration agreement be in writing, will be examined separately in Part 2 of this Chapter in view of the multitude of judicial interpretations given in respect of Article II(2). What should be understood by the words "null and void, inoperative or incapable of being performed" will be considered in II–1.3.4.

II–1.3.1.2 *Separability of the arbitral clause*

Before examining the conditions relating to the arbitration agreement for its enforceability under the Convention, one preliminary observation should be made regarding the autonomous status of the arbitral clause vis-à-vis the contract in which the clause is included. In an increasing number of countries the arbitral clause is considered as an agreement independent from the main contract. This doctrine of the separability of the arbitral clause – also called the severability (United States) or autonomy (France and F.R. Germany) of the arbitral clause – has as its main effect that the invalidity of the main contract does, in principle, not entail the invalidity of the arbitral clause.[77] Thus, if a party contends that the arbitral clause is invalid because the main contract is invalid, and, hence, that no arbitration can take place, this contention does not hold water under those laws that accept the separability of the arbitral clause. An exception is the contention that the contract has never existed; such a contention must be deemed to apply equally to the arbitral clause.

The doctrine of separability may be mentioned here as a preliminary point with regard to the arbitration agreement and the referral to arbitration in order to make clear that the invalidity of the main contract is *not* a ground for refusal of referral to arbitration where the doctrine obtains.

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77. See generally, P. Sanders, "L'autonomie de la clause compromissoire", in International Chamber of Commerce, ed., *Hommage à Frédéric Eisemann* (Paris 1979) p. 31.

The New York Convention does not contain express provisions concerning the separability of the arbitral clause.[78] It is suggested that the Convention would imply the separability of the arbitral clause because Article V(1)(a) provides for conflict rules for determining the law applicable to the arbitration agreement. As this may have the effect that the arbitration agreement is governed by a law which is different from the law governing the main contract, the Convention would implicitly favour the autonomous status of the arbitral clause.[79] This argument does not sound convincing as it is not unusual, though not to be encouraged either, that one and the same contract is governed by several laws, for instance, one law governing the formation and another the performance of the contract.[80] The courts have not yet had an occasion to express an opinion on the separability in cases arising under the Convention.

As it must be presumed that the Convention is indifferent as to the separability of the arbitral clause, it reverts to municipal law whether the clause is to be treated independently. It would carry too far to go into the question of which municipal law would be controlling for determining whether the arbitral clause is to be considered as independent from the main contract. This question is, moreover, becoming less significant as more and more countries adhere to the separability doctrine.[81] Three laws could present themselves as possible candidates: the law applicable to the main contract, the law applicable to the arbitration agreement, or the law of the court before which the question is raised. Some of these laws may also be cumulatively applicable for determining the question. The selection of each law has its pros and cons, but the safest and most practical solution would, in my opinion, be the law of the forum.

II–1.3.2 *Difference in respect of a defined legal relationship*

II–1.3.2.1 *There must be a dispute*

It is obvious that arbitration can take place only if there is a dispute between the parties. The Convention underscores this by providing in

78. Compare, for example, with Art. 18(2) of the European Uniform Law of 1966, *supra* n. 26, reading:

"A ruling that the contract is invalid shall not entail *ipso jure* the nullity of the arbitration agreement contained in it."

79. P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 316.

80. See G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980) Sect. 1.03.

81. See F.-E. Klein, "Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international", *Revue de l'arbitrage* (1961) p. 48.

Article II(1) "to submit to arbitration all or any differences" (which may semantically be considered the same as disputes). Also, paragraphs 1 and 3 of Article I mention awards arising out of "differences". Accordingly, a court is not obliged to refer the parties to arbitration if there is not a dispute between them. As explained before, this condition of Article II(1), like the other conditions mentioned in paragraphs 1 and 2 of Article II, are incorporated in paragraph 3 of Article II through the words "an agreement within the meaning of this article" in the latter paragraph.

Some implementing Acts, however, explicitly list the condition that there be a dispute. Thus, the English Arbitration Act of 1975 provides in Section 1(1): ". . . unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that *there is not in fact any dispute between the parties with regard to the matter agreed to be referred* . . .". (emphasis added) The same wording can be found in Section 3 of the India implementing Act of 1961.

This explicit wording has some advantages in that it sets more clearly the conditions that there be a dispute, although its ommission would not have been fatal as the condition is self-evident. It should, however, not be readily assumed that a dispute does not exist.

This is illustrated by the already discussed decision of the English Court of Appeal.[82] In that case the plaintiffs had applied for a summary judgment, whilst the defendants, who had applied for a stay of the court proceedings in favour of arbitration, had admitted that they owed the plaintiffs damages for wrongful repudiation of the charter party; the only matter to be determined was the quantum of damages. Both the Judge of the High Court and the majority of the Judges of the Court of Appeal granted the application for a stay of the entire court proceedings as, despite the admission of liability, there was still a dispute as to the quantum of damages. As observed in II–1.2.3 *supra*, the majority of the Judges of the Court of Appeal rejected, rightly, the dissenting opinion of Lord Denning that the stay should be granted only in respect of the balance of the amount which, according to his own assessment, was "undisputably due".

A troublesome matter is a *bill of exchange* forming payment under a contract of sale which is the subject matter of arbitration. If a bill of exchange is not honoured, may a party claim the money due under the bill of exchange before the court in disregard of arbitration? The question depends, in the first place, on the question whether the arbitral clause in the contract extends to the bill of exchange, which question is to be considered in the following Paragraph (II–1.3.2.2). But it may also depend on the question whether there can be said to be a dispute on the bill of exchange. The English Court of Appeal and the House of Lords have differed on the latter question.[83] The Court of Appeal argued that there was a dispute as to the liability on the bills of exchange, the dispute being whether or not the bills

82. Court of Appeal, July 20-21, 1977, The Fuohsan Maru (U.K. no. 3), discussed *supra* II–1.2.3 at n. 45.

83. Court of Appeal, April 2-8, 1976, Kammgarn Spinnerei G.m.b.H. *v.* Nova (Jersey) Knit Ltd. (U.K. no. 1), House of Lords, February 16, 1977 (U.K. no. 2).

should be paid having regard to the cross-claim to be decided in arbitration. The House of Lords reversed the Court of Appeal: English law "clearly" does not allow reliance on unliquidated cross-claims to set-off a claim on a bill of exchange; in the case at the bar the amount cross-claimed by the defendants was not liquidated, but had still to be decided upon in arbitration.

The House of Lords therefore held that there was not a dispute as to the bills of exchange, which are to be "taken as equivalent to deferred instalments of cash". The commercial principle on which this decision was rested was that a bill of exchange is to be treated as an unconditionally payable instrument.

It may be added that the House of Lords held English law applicable to "all questions as to the effect or discharge of the bill of exchange" because in this case, the place of acceptance of the bills was London. As will be seen in the following Paragraph, the House of Lords applied German law to the question whether the arbitral clause in question extended to the bill of exchange.

II–1.3.2.2 *Dispute must arise out of a defined legal relationship, whether contractual or not*

Like Article 1 of the Geneva Protocol of 1923, the original text of Article II(1) provided "all or any differences . . . in respect of such *contract*" (emphasis added).[84] At the 1958 Conference the Italian delegate pointed out that arbitration is not limited to contractual relationships; there are also non-contractual matters which might be covered by an arbitration agreement: the question of damages resulting from a collision at sea, for example. He therefore proposed to replace the words "in respect of such contract" by "in respect of a determined legal relationship, or contract", which proposal was adopted by the Conference.[85] The Drafting Committee amended this text by providing "in respect of a defined legal relationship, whether contractual or not".

Similar wording was inserted in the commercial reservation of Article I(3) reading "differences arising out of legal relationships, whether contractual or not".

The final text has as main consequence that also actions framed in *tort* can be submitted to arbitration. This proviso supersedes a municipal law which regards arbitration possible only in respect of contractual claims. Of course, the claims framed in tort must come within the purview of the arbitration agreement.

One of the few cases reported under the Convention so far in which the issue of tort and arbitration has come up, is the dispute between Lonrho on the one hand and Shell and BP on the other concerning the construction and operation of a pipeline in Zimbabwe (formerly Rhodesia).[86] The agreement between the parties contained an arbitral

84. UN DOC E/CONF.26/L.52.
85. UN DOC E/CONF.26/SR.21.
86. High Court of Justice (Chancery Division), January 31, 1978, Lonrho Ltd. *v.* Shell et al.

clause which read in part: "All claims or questions arising out of or in connection with this Agreement shall . . . be referred to arbitration in London . . .". Alleging both breach of contract and conspiracy, Lonrho sued Shell and BP as well as 27 other oil companies before the High Court in London. Shell and BP moved for a stay of the court proceedings against them on the ground that the claims ought to be decided by arbitration and not litigation. The reasoning of the High Court is worthy of being quoted:

> "So far as the Plaintiffs' claims against Shell and BP are based on allegations that they have acted in breach of the express or implied terms of the . . . Agreement it is beyond argument that such claims arise 'out of' the . . . Agreement and are, therefore, within the arbitration clause. A question can only arise in relation to the claims against Shell and BP in tort. An arbitration clause is no doubt designed primarily to cover claims for breach of contract. Whether it covers claims in tort must depend on the wording of the clause. There are not many cases where the point has been argued."

The Judge considered the few cases in point. He adopted the test formulated in *The Damianos* [87]: "If the claim or the issue has a sufficiently close connection with the claim under the contract, then it comes within the arbitration clause." The Judge held that such a sufficient close connection existed in the case at hand, the claim in contract as well as in tort against Shell and BP being claims "arising out of or in connection with " the agreement.

The test used by the Judge as derived from English case law is certainly helpful for determining whether a claim in tort falls under the arbitration agreement. It is, however, regrettable that the Judge did not refer to the expression in Article II(1) of the Convention "defined legal relationship, *whether contractual or not*". This is probably due to the fact that these words have not been reproduced in the Arbitration Act of 1975.

The word "*defined*" in the phrase of Article II(1) under consideration denotes that an agreement providing for arbitration of all disputes relating to whatever matter which may arise between the parties in the future is invalid. The agreement must relate to a specific legal relationship which is usually a contract between the parties. There is practically no arbitration law with a different requirement.[88]

The dispute must also "*arise in respect of*" a defined legal relationship. In other words, the wording of the arbitration agreement must be sufficiently broad to cover the dispute. Whether a dispute falls under

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(U.K. no. 5).

87. [1971] 2 *Queen's Bench Division* 588.

88. In English arbitration law it seems that parties may refer to the arbitrator's decision "all matters in difference between the parties", which means that the arbitrator may consider all

the agreement would appear to be essentially a matter of construction. However, some courts have also resorted to municipal law for resolving the question whether a certain claim comes within the purview of an arbitration agreement. The following English and United States cases may be cited as examples. These examples show the difference as to whether the law applicable to the arbitration agreement or the law of the forum is to be applied for deciding on this question. It is submitted that it should not be readily assumed that a dispute does not fall under the arbitration agreement, having regard to the "pro-enforcement bias" of the Convention. However, in those cases where the pro-enforcement interpretation cannot help to solve the question, the question may be considered under the law applicable to the arbitration agreement.

The solution of determining the question under the law applicable to the arbitration agreement has been adopted by the English courts.[89] The case, already mentioned in II–1.3.2.1 *supra,* involved a partnership agreement between a German firm and an English company under which, inter alia, the German firm had bought textile machines from the English company. In part payment of the purchase price, the English company received 24 bills of exchange from the German firm. Alleging poor quality of the machines and mismanagement of the partnership on the part of the English company, the German firm did not meet a certain number of bills of exchange, and, on the basis of an arbitration agreement connected with the partnership agreement, started arbitration in Hamburg. The English company, in turn, sued the German firm before the English courts, claiming the money due on the bills. In the latter proceedings the German firm argued that the dispute with the English company ought to be dealt with in its entirety in the arbitration in F.R. Germany, and that it ought not to be ordered by the English courts to pay the money due on the bills of exchange until its cross-claims had been dealt with by the arbitrators.

For resolving the question whether the arbitration agreement, which read in its pertinent part "all disputes arising out of", extended to the claim of the English company on the bills of exchange, both the Court of Appeal and the House of Lords relied on German law, as neither the English company nor the German firm had disputed that the arbitration agreement was governed by this law and both had adduced evidence under this law.[90] The two Courts, however, reached different conclusions under German law. The Court of Appeal followed the opinion of the German expert brought in by the German firm that German law gives a bill of exchange priority in ordinary cases by not allowing cross-claims to be made to avoid or delay payment of the bill of exchange, but that in the case of a partnership greater importance is attached to arbitration because partners freely choose arbitra-

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questions affecting the parties' civil rights. See A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 91.

89. Court of Appeal, April 8, 1976, Kammgarn Spinnerei G.m.b.H. *v.* Nova (Jersey) Knit Ltd. (U.K. no. 1), House of Lords, February 16, 1977 (U.K. no. 2). The same opinion is adhered to by Schlosser, *supra* n. 79, no. 250.

90. The case does not reveal whether the parties had already agreed in the arbitration agreement that the latter agreement was to be governed by German law – which choice of law is unlikely to have been made – or agreed during the court proceedings on German law as governing the arbitration agreement. It may be noted the application of the conflict rules contained in Art. V(1) (a) of the Convention would have led to the same result, see *supra* II–1.1.3. That Article was, however, not mentioned by the Courts in this case.

tion in order to do better justice to their corporate relations. The House of Lords, on the other hand, followed the German expert brought in by the English company who was of the opinion that in no case does an arbitral clause extend to cover claims on bills of exchange.

The House of Lords considered this in itself sufficient to refuse a stay of the court proceedings on the bills of exchange, but also examined a second question whether there was a dispute as to the claim on the bills of exchange, presumably because it wished to correct the Court of Appeal also on this point. As mentioned in II–1.3.2.1 *supra*, the House of Lords held there was not a dispute as to the claim on the bills because English law, which was held to be applicable to this question, does not allow reliance on unliquidated cross-claims to set-off a claim on a bill of exchange. It may be questioned whether such a splitting up of questions under different laws is desirable, but the peculiarity of the bill of exchange might so require.

The question whether a claim comes within the scope of an arbitration agreement was decided on the basis of the law of the forum by a United States Court of Appeals.[91] A German manufacturer of car radios had granted to a United States corporation the exclusive right to sell the radios in the United States. The exclusive distributorship agreement contained an arbitral clause providing for arbitration of disputes "arising out of and about" the agreement in Karslruhe, F.R. Germany, under the Arbitration Rules of the International Chamber of Commerce. The agreement also provided that it was governed by German law. After the expiration of the agreement, the United States distributor sued the German manufacturer before the District Court of Pennsylvania, Eastern District, alleging that the German manufacturer had orally promised to renew the agreement. The District Court denied the motion of the German manufacturer for a stay of the court proceedings, reasoning that the alleged obligation of the German manufacturer to renew the agreement did not arise from the agreement, but rather from a separate and distinct oral agreement which was not subject to the arbitral clause in the original agreement.

On appeal, the Court of Appeals reversed the denial of the motion to stay. At the outset the Court of Appeals held that questions of interpretation and construction of arbitration agreements falling under the New York Convention are to be determined by reference to United States federal law. The Court further noted that there is a strong policy in the federal courts of the United States favouring arbitration, especially in the context of international contracts.[92] Moreover, any doubts as to whether a dispute falls under an arbitration agreement should be resolved in favour of arbitration unless it can be said with "positive assurances" that the dispute is not meant to be arbitrated. As it could not be said with positive assurances that the controversy between the German manufacturer and the United States distributor did not arise out of the original agreement, the Court held that this matter was to be decided by the arbitrator in F.R. Germany.

Although the Court of Appeals determined the question of the scope of the arbitration agreement under the law of the forum, the federal policy favouring arbitration as expressed by the Court coincides with the "pro-enforcement bias" of the Convention. This should be the guiding principle for resolving the question, and it should not be readily assumed that a dispute does not fall under an arbitration agreement. To this extent, the Convention prevails over municipal law if that law lays down stricter requirements. It is true, however, that there are particular cases which cannot be resolved by a pro-enforcement interpretation alone, but which

91. U.S. Court of Appeals (3d Cir.), July 17, 1978, Becker Autoradio U.S.A. Inc. *v.* Becker Autoradiowerk G.m.b.H. (U.S. no. 26).

92. The Court referred to the U.S. Supreme Court, June 17, 1974, Fritz Scherk *v.* Alberto-Culver Co. (U.S. no. 4).

may need the help of some municipal law. The problem of a bill of exchange can be deemed such a particular case. For solving this problem, it seems that the law applicable to the arbitration agreement is the most appropriate law, which solution was adopted by the House of Lords.

The reason why the law applicable to the arbitration agreement should be applied is that this law will almost always also be the law applicable to the arbitral procedure and arbitral award.[93] As it is this law under which the question of the scope of the agreement may come up again in an action for the setting aside of the award in the country where the arbitration has taken place, uniformity would require the application of the law applicable to the arbitration agreement.

II–1.3.3 *Subject matter not capable of settlement by arbitration*

Article II(1) requires in its final part that the arbitration agreement concern a subject matter which is capable of settlement by arbitration, which is the question of arbitrability. The same condition is stated as a ground for refusal of enforcement of the arbitral award in Article 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". In order to avoid unnecessary repetition, the question which matters are arbitrable is not included in this Chapter but is deferred to III–5.2 where it is examined in the context of the enforcement of the award.

A brief observation, however, may be made concerning the question *under which law* the arbitrability of the subject matter of the arbitration agreement is to be determined. For the enforcement of the arbitral award, the Convention refers in Article V(2)(a) to the law of the country where the enforcement is sought, i.e., the *lex fori*. For the enforcement of the arbitration agreement the Convention is silent on this point; Article II(1) merely states that the agreement must concern a "subject matter capable of settlement by arbitration". Notwithstanding this silence, it must be presumed that for the enforcement of the arbitration agreement also the *lex fori* governs the question of arbitrability.[94] Internal consistency of the Convention requires such an analogous interpretation. Also, the main effect of an arbitration agreement is the exclusion of the competence of the courts in favour of arbitration. As a court derives its competence as a rule from its own law, it should inquire under its own law whether the competence has lawfully been excluded in favour of arbitration. In this connection, it should be noted that the courts in several countries distinguish domestic from international cases for determining the question whether a dispute is arbi-

93. See *supra* II–1.1.2 ("Convention's Provisions and Municipal Law").

94. It may be noted that this is expressly provided by the European Convention of 1961, *supra* I–4.4.2, which provides in Art. VI(2), second part: "The courts may also refuse recognition of the arbitration agreement if *under the law of their country* the dispute is not capable of settlement by arbitration". (emphasis added)

trable. The field of non-arbitrable matters in international cases may then be smaller than that in domestic ones.[95]

If the arbitration is to take place, or is taking place, in a country other than the country where the enforcement of the arbitration agreement is sought, it may be asked whether the court before which the referral to arbitration is requested, should, in addition to its own law, also judge the arbitrability under the law of the other country. Those court decisions reported so far in which the issue of arbitrability came up in connection with the referral to arbitration involved this situation of arbitration abroad. It is significant to note that all courts decided the question of arbitrability exclusively under their own law and did not take account of the law of the country where the arbitration was to take place or was taking place.[96]

This attitude of the courts must be deemed fortunate. A court is less suited (*forum non conveniens*) for deciding on the arbitrability under the law of another country. Arbitrability under a foreign law is difficult to ascertain as it is generally not laid down in statutes, but developed by case law with all kinds of subtle distinctions. The courts of the country where the arbitration is to take, or is taking, place is the more convenient forum for the question of arbitrability. The division between the court referring to arbitration and the court of the place of arbitration enhances the international distribution of judicial control over the regularity of arbitration. It should be avoided that courts of two different countries judge on the same issue under the same law as this may create the possibility of unnecessary conflicting decisions. Thus, if a party wishes to challenge an arbitration agreement because it would relate to non-arbitrable matters under the law of the place of arbitration, he should do so in the country where the arbitration is to take, or is taking, place.

Similar considerations lead to the conclusion that neither the court before which the enforcement of the agreement nor that before which the enforcement of the

95. See *infra* III–5.1 ("Public Policy in General").

96. U.S. Supreme Court, June 17, 1974, Fritz Scherk *v.* Alberto Culver Co. (U.S. no. 4): question whether agreement providing for arbitration in Paris was arbitrable as it involved a sale of securities, was decided under United States law; U.S. District Court of New York, S.D., December 21, 1976, B.V. Bureau Wijsmuller *v.* United States of America (U.S. no. 15): question whether agreement providing for arbitration in London was arbitrable as it involved a United States warship, was decided under United States law; Corte di Cassazione (Sez. Un.), May 12, 1977 no. 3989, Scherk Enterprises A.G. *v.* Société des Grandes Marques (Italy no. 28): question whether agreement providing for arbitration in Zurich was arbitrable as it involved trademarks, was decided under Italian law; Corte di Cassazione (Sez. Un.), April 27, 1979, no. 2429, COGECO *v.* Piersanti (Italy no. 37): agreement providing for arbitration in Saudi Arabia in respect of an employment contract was held not to be arbitrable as under Italian law labour disputes cannot be submitted to arbitration (the contract was subjected to Saudi Arabian law under which, as the Supreme Court found, labour disputes can be submitted to arbitration).

award is sought has to take account of the arbitrability under the law applicable to the arbitration agreement in case that law is different from the law of the forum.[97]

It should be noted that the authors disagree on the question under which law the arbitrability is to be determined. The view expressed above that the law of the forum is controlling is adhered to by a number of authors.[98] Other authors refer the question to a cumulative application of the law of the forum and the law governing the arbitration agreement.[99] There are also certain authors who are of the opinion that the question is to be decided under the law governing the arbitration agreement alone.[100]

II–1.3.4. *Null and void, inoperative or incapable of being performed*

II–1.3.4.1 *Introduction*

The last part of Article II(3) provides that a court must refer the parties to arbitration unless the arbitration agreement is "null and void, inoperative or incapable of being performed". The Summary Records of the New York Conference of 1958 do not reveal any discussion regarding these words, nor have many courts interpreted them. Most judicial interpretations have been given in the context of multi-party disputes, the subject of the next Section (II–1.4). The authors, too, have rarely expressed an opinion as to their precise legal meaning. The following,

97. See *infra* III–4.1.3.4 ("Matters Left to the Law Applicable to the Arbitration Agreement") at n. III.166.

98. E.g., E. Minoli, "L'entrata en vigore della Convenzione di New York sul riconoscimento e l'esecuzione delle sentenze arbitrali straniere", 24 *Rivista di Diritto Processuale* (1969) p. 539 at p. 542 n. 3; J. Robert, "La Convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères", *Revue de l'arbitrage* (1958) p. 70 at p. 76; F.-E. Klein, "La Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères", 57 *Revue Suisse de Jurisprudence* (1961) p. 229 at p. 235.

99. E.g., Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) pp. 38-39; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 342; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 312.

100. E.g., Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 186. G. Aksen, "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 3 *Southwestern University Law Review* (1971) p. 1 at p. 8, observes "The question will somehow be decided by the law of the country where the agreement was signed, where the dispute arose, or the forum country". Perhaps abundantly, it should be made clear that the European Communities Convention on the Law Applicable to Contractual Obligations, done at Rome on June 19, 1980 (*Official Journal of the European Communities*, No. L 266/1, of October 9, 1980) does not apply to arbitration as is expressly provided in its Art. 1(2) (d). Thus the provision concerning mandatory rules of the law of another country as contained in Article 7(1) is not to be applied to arbitration and hence not to the question of arbitrability. Article 7(1) provides:

> "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

therefore, mainly concerns interpretations which anticipate possible future court decisions. The interpretations are based on the purpose and system of the Convention, as well as what would seem to be the most likely coverage of the words.

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. 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. To quote again from the District Court of New York: "[T]he drafters intended to impose on the ratifying States a 'broad undertaking' to give effect to agreements [falling under the Convention]." [101]

The broad wording has as consequence that certain reasons for invalidity of the arbitration agreement may fall under more than one word. In addition, those courts which have applied the words "null and void" etc., do not always rely on one word, but, rather, refer to the entire final part of Article II(3) in a given case. Nevertheless, in order to make a clearer distinction between the various reasons for the invalidity of the arbitration agreement, the following is divided into three parts according to the wording of Article II(3).

It may be recalled that Article II(3) makes a distinction between "an agreement within the meaning of this Article" and "null and void" etc.[102] This distinction has as consequence that the conditions mentioned in paragraphs 1 and 2 of Article II are conditions for referral which belong to "an agreement within the meaning of this Article". These conditions are: dispute must arise in respect of a defined legal relationship (Art. II(1)), subject matter must be capable of settlement by arbitration (Art II(1)), and arbitration agreement must be in writing (Art. II(1) and (2)). The words "null and void" therefore do not apply to these conditions. This is, however, merely a question of system and has no legal consequences.

II–1.3.4.2 *"Null and void"*

The words "null" and "void" are usually coupled together in statutes and international conventions, although both words have the same meaning and can therefore be considered as a tautology. In the French

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101. U.S. District Court of New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20). See also quotation from this court decision, *supra* at n. 7.

102. See *supra* II–1.3.1.1 ("Conditions for Referral Relating to Arbitration Agreement").

and Spanish text of Article II(3) one word is used for these words ("caduque" and "nulo", respectively).

The words may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning. It would then cover matters such as the lack of consent due to misrepresentation, duress, fraud or undue influence. However, there are two reasons for which these matters will rarely occur in practice, and have, indeed, not yet come up before the courts in relation to an action for the enforcement of an arbitration agreement under Article II(3). The first reason is that the lack of consent must concern the arbitral clause specifically, in those countries where the separability doctrine is applied. Under this doctrine, accepted in many countries, the lack of consent for the main contract does not necessarily constitute lack of consent for the arbitral clause contained in it.[103] It must therefore be proven that the arbitral 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 Article 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 Article II(2) are fairly strict.[104] It may be added that the words "null and void" etc. would also apply to the question of capacity of a party to agree to arbitration, which question is to be decided under his personal law or another law which a court may hold applicable to this issue according to its conflict rules.

A case concerning an arbitration agreement which provided for appeal on the merits from the arbitral decision to the court has been considered in connection with the words "null and void". The case decided by the Court of First Instance of Heidelberg [105] concerned a contract between a German manufacturer of rugs and a Dutch exclusive distributor which contract contained the following arbitral clause:

> "All disputes arising out of this contract shall, if no friendly settlement can be reached between [the parties], be submitted in first instance to an arbitral tribunal of the German-Dutch Chamber of Commerce. If the decision is not acceptable to either party, an ordinary court of law, to be designated by the claimant, will be competent." [106]

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103. See *supra* II–1.3.1.2 ("Separability of the Arbitral Clause").

104. See *infra* II–2.2.2 *in fine* ("Uniform Rule").

105. Landgericht of Heidelberg, October 23, 1972, affirmed, without further discussion of the question under consideration by Oberlandesgericht of Karlsruhe, March 13, 1973 (F.R. Germ. no. 9).

106. The arbitral clause was noticeably different from the one recommended by the German-Dutch Chamber of Commerce which reads:

"All disputes arising out of this contract or in respect of its validity shall be finally decided in accordance with the Arbitration Rules of the German-Dutch Chamber of Commerce with

Upon a dispute between the parties, the German manufacturer sued the Dutch distributor before the Court of First Instance of Heidelberg. The Dutch distributor objected to the competence of the Court, arguing that by virtue of the above-quoted clause the dispute should first be decided by arbitration.

At the outset the Court determined the law by which the validity of the arbitral clause was to be judged. The Court reached the conclusion that both German and Dutch law were applicable.[107]

The Court found that under both German and Dutch law an arbitration agreement is valid only if it is in accordance with the will of the parties that arbitrators decide instead of a court, in the sense that if the parties agreed to arbitration, the court cannot function as second instance (no *Instanzenzug*). The Court continued: "The New York Convention is also based on the principle that arbitration agreements within the meaning of the Convention are only those which exclude ordinary court proceedings (Art. II(3))."

The Court concluded that the "arbitration" as provided by the parties was, rather, an agreement for conciliation (*Sühneinstanz, Gütevertrag*), which cannot be invoked as barring the competence of a German court.[108]

An autonomous interpretation of Article II(3) as excluding appeal on the merits to a court, as the German Court incidentally did, would jeopardize a number of arbitration agreements.[109] It is true that the parties rarely agree on appeal to the court on the merits; this faculty is, moreover, not recommended. However, there are countries where appeal to the court on the merits of an arbitral decision cannot be excluded, such as Colombia, which has recently adhered to the Convention.[110] More important as far as the number of arbitration agreements is concerned, is England where the Arbitration Act of 1979 has introduced a kind of appeal on the merits to the High Court which cannot be excluded by agreement of the parties in a large number of cases.[111] An autonomous interpretation of Article II(3) on this point would create unnecessary

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the exclusion of the ordinary courts (*unter Ausschluss des ordentlichen Rechtsweges endgültig entschieden*)."

107. See *supra* at n. 10.

108. The Court referred to Stein-Jonas, *Kommentar zur Zivilprozessordnung* (Tübingen) Sect. 1044, A III comment IV.

109. The Court erroneously supposed that no appeal on the merits to a court is possible in the Netherlands. Art. 646(1) of the Dutch Code of Civil Procedure provides that "No appeal from an arbitral award to the court shall be allowed, unless such possibility has been reserved in the arbitration agreement." This possibility, however, is virtually never used in practice.

110. Art. 2022 *jo.* 379-385 of the Colombian Commercial Code of 1938 as amended in 1971. See my article, "L'arbitrage commercial en Amérique latine", *Revue de l'arbitrage* (1979) p. 123 at p. 187.

111. See generally, C. Schmitthoff, "The United Kingdom Arbitration Act 1979", in *Yearbook* Vol. V (1980) p. 231 at p. 233.

uncertainty. It is therefore preferable to leave this matter to the law applicable to the arbitration agreement, and, if that law is different (which is almost never the case), to the law governing the arbitral procedure.

II–1.3.4.3 *"Inoperative"*

The word "inoperative" can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing of effect of the arbitration agreement may occur for a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate. Another may be that the same dispute between the same parties has already been decided in arbitration or court proceedings (principles of *res judicata* and *ne bis in idem*).

An arbitration agreement may further be inoperative where the arbitration *has shipwrecked* for some reason, and for this reason, under the applicable law, the agreement ceases to have effect. Examples are the setting aside of the award, the stalemate of the votes of the arbitrators or the failure to render an award within the time limit for arbitration.[112]

Here again, the reasons are mere assumptions based on what would seem to be likely to correspond with the word "inoperative". They have not been considered by the courts in those cases reported under the Convention so far.

A *settlement* reached between the parties before arbitration has started may have the effect of rendering the arbitration agreement inoperative. This question did arise before a court in connection with a request for referral to arbitration in virtue of Article II(3).[113] A dispute arose between two United States corporations as to the construction of a drying and calcining plant in the Republic of Guinea. The parties held a meeting about which they subsequently disagreed as to whether it had amounted to a settlement. The District Court in Pennsylvania, confronted with the alleged settlement, referred this question to the arbitrator. It reasoned that under Pennsylvania law there is a favourable policy towards arbitration, but added that a strong preference for arbitration is also reflected in the legislative history of the Convention.

The view of the District Court is to be approved. It should not be assumed too soon that an arbitration agreement has lost its force because of a settlement; in case of doubt, it is in conformity with the purpose

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112. See for noticeable differences in this respect between French, German, English and United States law, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 411.

113. U.S. District Court of Pennsylvania, W.D., October 19, 1976, Fuller Company *v.* Compagnie des Bauxites de Guinee (U.S. no. 13); cf. *supra* at n. 15.

of the Convention to leave this question to be determined by the arbitrator.

Another reason, not considered by the courts in relation to the request for referral to arbitration, for the ceasing of effect of the arbitration agreement may be the expiry of the *time limit* for demanding arbitration. Such time limits are quite usual in commodity arbitrations. Here, also, it would seem to be preferable to leave it, at least provisionally, to the arbitrator to decide whether the time limit has expired or not.

In a case concerning the request for enforcement of an *award* made in Romania, the German Supreme Court considered that the addition to the arbitral clause "Any claim for arbitration formulated after 6 months from the date of arrival of the goods at the final station or port of destination is null" did not *expressis verbis* exclude the competence of the arbitral tribunal after this period.[114]

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".[115] This question will be examined in more detail in the following Section regarding multi-party disputes and referral to arbitration.

II–1.3.4.4 *"Incapable of being performed"*

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. It would also apply to cases where the arbitrator named in the agreement refuses to accept his nomination, or the appointing authority designated in the agreement refuses to make the appointment of the arbitrator. Under the law applicable to the arbitration agreement, these cases may cause the termination of the arbitration agreement; and, to this extent, there is not much difference between the words "incapable of being performed" and the word "inoperative".

Here again, the above cases have not arisen before the courts in an action for the enforcement of the agreement under Article II(3) of the Convention. But should such cases arise, doubts should also be resolved in favour of arbitration. It may be added that the above cases may be avoided by a careful drafting of the arbitration agreement.

The possibility of a lack of financial resources to satisfy an award must be deemed *not* to render an arbitration agreement incapable of being performed within the meaning of Article II(3).

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114. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12). See *infra* at n. III.237.
115. See *infra* at n. 125 and 136.

A plaintiff had argued before the English Admiralty Court that the request of the defendant for a stay of the court proceedings should be refused because the defendant did not have the financial resources to satisfy an award which might be made against him, the arbitration agreement being for this reason "incapable of being performed".[116] The Judge rejected this argument as follows:

> "It is an essential preliminary to the recognition and enforcement of arbitral awards that the arbitration agreements capable of resulting in such awards being made should themselves first be recognized and enforced . . . It follows from what is said above that the context in which the words 'incapable of being performed' are used is the context of the recognition and enforcement of arbitration agreements which, if valid and effective, will result in awards being made; and not the context of the recognition and enforcement of such awards themselves after they have been made. Having regard to that context it appears to me that the words 'incapable of being performed' should be construed as referring only to the question whether an arbitration agreement is capable of being performed up to the stage when it results in an award; and should not be construed as extending to the question whether, once an award has been made, the party against whom it is made will be capable of satisfying it."

A second case where an arbitration agreement must *not* be deemed incapable of being performed concerns the availability of foreign exchange. It may happen, especially in developing countries, that no foreign exchange is granted for arbitrating in another country, thus for the payment of the travel expenses of witnesses abroad, the fee of the arbitrator etc. This was an additional reason for which the Indian Supreme Court refused a stay of court proceedings in favour of arbitration in Moscow.[117] The same consideration was repeated by the High Court of Bombay in respect of arbitration in London.[118]

It is no secret that in the short run international commercial arbitration may be expensive, at least more expensive than litigation as, unlike a judge, an arbitrator is to be remunerated by the parties. The costs of international arbitration may indeed pose a serious problem for developing countries. It is equally true that most international commercial arbitrations still take place in the developed countries. These facts may encourage the developing countries to adopt more adequate arbitration laws and to create more appropriate arbitration facilities in their countries.[119] However, by adhering to the New York Convention, a

116. Admiralty Court (Queen's Bench Division), January 13, 1978, The Rena K (U.K. no. 6).

117. Supreme Court of India, January 1971, V/O Tractoroexport *v.* Tarapore and Co. (India no. 1). Cf. *supra* at n. 28.

118. High Court of Bombay, April 4, 1977, Indian Organic Chemicals Ltd. *v.* Chemtex Fibres Inc. et al. (India no. 4); see also *infra* at n. 135-138.

119. To this end UNCITRAL is envisaging the possibility of preparing a model uniform arbitration law (UN DOC A/34/17 para. 81). In setting up arbitration facilities, the developing countries may follow the examples of the Inter-American Commercial Arbitration Association (IACAC) and the Asian-African Legal Consultative Committee (AALCC) which adopted the UNCITRAL Arbitration Rules of 1976. In F.R. Germany it is argued that, if a party has no financial resources to pay the costs of arbitration (deposits in advance), the arbitration agreement may cease to have effect. See for this question under German law, W. Habscheid, "Die

country, whether developed or developing, must be deemed to have assumed the obligation to promote the settlement of international trade disputes by arbitration and not to frustrate its effectiveness by imposing physical or other restraints of whatever nature.

II–1.4 Multi-party Disputes and Referral to Arbitration

Multi-party disputes and arbitration is a highly complex problem. This is mainly due to the fact it may come up in so many different settings. The problem essentially arises where there are more than two parties, one of whom is not bound by the same arbitration agreement or no arbitration agreement at all, and the disputes to be referred to, or pending before, two different arbitrations, or an arbitration and a court, concern the same or similar subject matter, common questions of fact and law, and substantially similar issues and defences. The problem involves, from the legal point of view, procedural questions such as the consolidation of arbitrations into one arbitration; the joinder of a third party (the attempt of one or more of the parties to an arbitration to join a third party who is involved in the underlying dispute); and the intervention of a third party (the attempt of a third party involved in the underlying dispute to become a party to an arbitration between other parties).[120] The problem was subject to extensive debates at the Interim Meeting of the International Council for Commercial Arbitration (ICCA), held at Warsaw, June 30 – July 2, 1980.

This Section is concerned with a review of those cases decided under the Convention where the problem of multi-party disputes and the referral to arbitration pursuant to Article II(3) has been coped with. The review will be topical as the scope and limited space of this study do not permit a systematic and exhaustive treatment of the problem of multi-party disputes.[121] The object is solely to demonstrate that, although the Convention does not contain provisions regarding multi-party disputes, it does not pose obstacles for dealing with the problem either.

Most of the relevant cases decided under the Convention involve exclusive distributorship agreements. The classic scenario is that a manufacturer of a certain product grants a foreign distributor the exclusive right to sell the product within a defined territory – usually the latter's

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Kündigung des Schiedsvertrages aus wichtigem Grund", 41 *Konkurs-, Treuhand- und Schiedsgerichtswesen* (1980) p. 285.

120. See G. Aksen, *Multi-Party Arbitrations in the United States*, paper submitted to the Interim Meeting of the International Council for Commercial Arbitration, Warsaw, June 30 – July 2, 1980.

121. See the General Report of Prof. G. Bernini for the ICCA Interim Meeting in *Yearbook* Vol. V (1980) p. 291.

country – and during the term of the agreement the manufacturer markets the same product through another firm in that territory. The aggrieved exclusive distributor then sues before the courts in his country both the third firm and the manufacturer. The distributorship agreement contains an arbitral clause, but the distributor has no contractual relation with the third firm. The manufacturer then requests a stay of the court proceedings against him in favour of arbitration.

In this case of exclusive distributorship agreements, the *first question* is whether the arbitration between the manufacturer and the distributor can still take place. In two cases, the Court of First Instance of Milan held that this was not possible, and that the Court had become competent to deal with the claims against both the manufacturer and the third party.

In the first case the aggrieved distributor had claimed a 10 per cent commission on the parallel imports through the third firm.[122] The Court reasoned that the claim was not one arising out of the distributorship agreement, notwithstanding the fact that the arbitral clause in question was broadly worded ("Any controversy which may arise out of this contract . . .").

In the second case the distributor alleged that the manufacturer had established an Italian firm through which he marketed the product to which the distributor had acquired the exclusive rights to the Italian market.[123] Hence, the distributor sued the manufacturer for breach of contract and the Italian firm for unfair competition. The Court refused to refer the dispute between the distributor and the manufacturer to arbitration in Zurich as provided in the distributorship agreement. The Court reasoned, this time, that according to the Italian Supreme Court an arbitration agreement ceases to have effect when two connected (*conesse*) claims, one of which pertains to the competence of the arbitrators and the other to that of the Italian courts, are brought before the court. In such a case the competence of the court absorbs the competence of the arbitrator as it is inadmissible for two decisions regarding the same matter to coexist.[124] The Court observed that it is true that pursuant to Article II(3) of the New York Convention the court must refer the parties to arbitration at the request of one of them, but that is equally true that a court may refuse to refer if the agreement is "null and void, inoperative or incapable of being performed". The Court held the latter to be present because of the force of attraction (*vis attractiva*) exerted by the competence of the court to decide on the claim against the Italian firm over the claim against the manufacturer which would otherwise have been within the competence of the arbitrator.

On the other hand, the English High Court did not give such a narrow interpretation of the final part of the Article II(3) of the Convention.

122. Tribunale of Milan, November 11, 1976, S.p.A. SIAGA *v.* Solna Offset A.G. Printing Equipment et al. (Italy no. 19).

123. Tribunale of Milan, March 22, 1976, Sopac Italiana S.p.A. *v.* Bukama G.m.b.H. and FIMM (Italy no. 14).

124. Corte di Cassazione, August 4, 1969, no. 2949; February 11, 1969, no. 457. A similar rule probably also exists in France: Art. 333 Code of Civil Procedure – Cf. Art. 6(2) of the European Communities Judgments Convention of 1968, *infra* n. 306.

The case did not involve an exclusive distributorship agreement, but the reasoning can be considered to have equal force for the interpretation of Article II(3) on this point.[125] The Judge observed:

> "I am not satisfied that it can truly be said that the arbitration agreement is, in these circumstances, inoperative. No procedural difficulty would arise if, for example, the claims in contract . . . were first decided in arbitration proceedings between the Plaintiffs and the [Defendants bound by the arbitration agreement], followed, if necessary, by court proceedings to establish liability, if any, in tort of those who are not parties to the . . . Agreement. I agree that there is a theoretical possibility that different conclusions on the same matters of fact and law might be reached in the two sets of proceedings. Although this would be an extremely unfortunate result, in my opinion such a duplication of proceedings and consequent risk of inconsistent findings are not factors which can be said to render the arbitration proceedings sterile or of no practical operation, or as serving no useful purpose."

In another case, again involving an exclusive distrbutorship situation, the English High Court apparently considered it self-evident that the arbitration would proceed between the manufacturer and the distributor as it did not even question it.[126] It is submitted that these decisions are correct. The mandatory nature of the referral to arbitration under Article 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.

A *second question* is whether the party who is not bound by the arbitration agreement can be joined, or can intervene, as party to the arbitration. 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 who are bound to the arbitration agreement consent to the joinder or intervention. Nevertheless, a court may still have some latitude for manoeuvring. A sensible approach towards the problem of joinder was adopted by the District Court in New York.[127] The Court granted the motion to stay the court proceedings on the conditions that:

> "[the third parties] all agree in writing within thirty days to submit to the pending arbitration proceedings and to be bound by any award granted by the arbitrators . . . . In the event [the third parties] do not accept the conditions stated, the motion to stay will be denied upon further application."

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125. High Court of Justice (Chancery Division), January 31, 1978, Lonrho Ltd. *v.* Shell et al. (U.K. no. 5), discussed *supra* at n. 115.

126. High Court of Justice (Chancery Division), October 4-6, 1977, Roussel-Uclaf *v.* G.D. Searle & Co. Ltd. and G.D. Searle & Co. (U.K. no. 4). The same attitude can also be found in the U.S. District Court of New York, *infra* n. 127.

127. U.S. District Court of New York, S.D., December 27, 1977, Dale Metals Corp. and Overseas Development Corp. *v.* KIWA Chemical Industry Co. Ltd. et al. (U.S. no. 21).

The joinder or intervention of a third party may be less troublesome if that party is a subsidiary of one of the parties to the arbitration agreement. An English case may illustrate this.[128]

A United States parent corporation disagreed with a distributor as to whether a certain pharmaceutical product fell under the distributorship agreement in the territory of the United Kingdom. The distributor sued both the parent corporation and its English subsidiary before the High Court in London. Both the parent and the subsidiary requested a stay of the court proceedings on the basis of the arbitral clause included in the distributorship agreement to which agreement the subsidiary was not a party. The English Arbitration Act of 1975, which implements the New York Convention in the United Kingdom, provides that the person asking for a stay must be party to the arbitration agreement or must claim "through or under" such a party. The question was whether the subsidiary, although being a separate legal entity and not a party to the arbitration agreement, could claim "through or under" the parent corporation. The Judge held that this was possible:

> ". . . I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is 'claiming through or under' the parent, to do what it is in fact doing whether ultimately held to be wrongful or not."

The problem of multi-party disputes and referral to arbitration has also arisen in cases decided under the Convention outside the situation of exclusive distributorship agreements. One instance was whether an action brought in court against a guarantor of a charterer could be consolidated in the arbitration between the charterer and the shipowner. The District Court in New York granted a request to this effect made by the shipowner.[129] The Court considered that the arbitral clause in the charter party covering "any and all difference and disputes of whatsoever nature arising out of this charter" did not exclude arbitration against the guarantor and that the guarantor by declaring "hereby guarantees to fulfil and perform any and all legal obligations that Antco may be liable for as Charterers" undertook broad obligations which included arbitration. In so deciding, the District Court followed an earlier decision of the Court of Appeals for the Third

128. High Court of Justice (Chancery Division), October 4-6, 1977, Roussel-Uclaf *v.* G.D. Searle & Co. Ltd. and G.D. Searle & Co. (U.K. no. 4).

129. U.S. District Court of New York, S.D., June 28, 1976, Sidermar S.p.A. *v.* Antco Shipping Co. Ltd. and New England Petroleum Corp. (U.S. no. 9).

Circuit in a case involving almost identical facts.[130] As observed by the District Court, the request for consolidation would not have been granted if the arbitral clause in the charter party would have been limited to "disputes between the Owner and Charterers" and the guarantee would have been confined to performance only.[131]

The above case can also be regarded as pertaining to the problem of incorporation by reference.[132] It involves a consolidation of cases concerning identical claims which, if no consolidation had been ordered, might have led to two different proceedings: the arbitration between the shipowners and the charterers, and a court action between the shipowner and the guarantor. It is evident that the concentration of the identical claims in one set of proceedings (i.e., arbitration) is to be preferred. In deciding on the question of consolidation the Court relied entirely on United States law and did not mention the Convention. This is correct as the Convention neither contains a provision on consolidation nor prevents it being ordered under the law of the forum if arbitration is to take place there (i.e., New York).[133] In the United States the general rule is that a court *may* order consolidation in arbitration proceedings where the parties are not the same if the issues are substantially the same and if no substantial right is prejudiced.[134]

Another case decided under the Convention involving a multi-party dispute which is worthy of being mentioned is the decision of the High Court of Bombay.[135] The United States group Chemtex agreed with Indian Chemicals to erect a polyester staple fibre plant in India. Three agreements were involved. The first agreement was concluded between Indian Chemicals and subsidiary 1 of the Chemtex, under which agreement subsidiary 1 was to supply machinery, equipment, drawings etc. as well as technical information. The agreement provided for arbitration in London under the Arbitration Rules of the International Chamber of Commerce. The second agreement was concluded between Indian Chemicals and subsidiary 2 of the Chemtex, under which agreement subsidiary 2 was to supply certain machinery, equipment, technical designs etc., and technical information required for the implementation of the project, as well as training facilities to the engineers designated by Indian Chemicals. The second agreement contained the same arbitral clause as the first agreement, except that this time it provided for arbitration in India. The third agreement – headed "Four Party Agreement" – was concluded between

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130. Compania Espanola de Petroleos S.A. *v.* Nereus Shipping S.A., 527 *Federal Reporter Second Series* 966 (2nd Cir. 1975).

131. For these reasons the District Court of New York, S.D., had held that guarantor was not obliged to arbitrate, Taiwan Navigation Co. *v.* Seven Seas Merchants Corp., 172 *Federal Supplement* 721 (1959).

132. See *infra* II–2.4.3.3 ("Incorporation by Reference").

133. The problem may be more complicated if arbitration is to take place in another country. This problem will not be dealt with as it is rather beyond the scope of this study.

134. See M. Domke, *The Law and Practice of Commercial Arbitration* (Mundelein 1968-1979) Sect. 27.02. See also Aksen, *supra* n. 120.

135. High Court of Bombay, April 4, 1977, Indian Organic Chemicals Ltd. *v.* Chemtex Fibres Inc. et al. (India no. 4).

Indian Chemicals on the one hand and the Chemtex parent and subsidiary 1 and 2 on the other. Under this agreement the parent guaranteed the proper performance of its two subsidiaries. This agreement contained the same arbitral clause as the first agreement, thus arbitration in London.

When a dispute arose, Indian Chemicals sued the parent and its two subsidiaries before the High Court in Bombay. The parent and the two subsidiaries applied for a stay of the court proceedings under the Indian Act of 1961, which implements the Convention in India. The High Court Judge rejected the application and held that he had competence to hear the entire dispute.

Two points of the reasoning of the Judge have already been discussed.[136] Three other points considered by the Judge in refusing the stay are of interest here.

The first concerned the contention of Indian Chemicals that the arbitration agreements were "incapable of being performed" within the meaning of Section 3 of the 1961 Act, which Section implements Article II(3) of the Convention, because the agreements could lead to conflicting awards. The Judge rejected this contention:

> "May be that having regard to the three different arbitrations contemplated by the said clauses or the different principles of law governing the said arbitrations, there might be a possibility of conflicting awards. The conflicting awards, however, would not render the arbitration agreements incapable of performance. The possibility of conflicting awards merely makes invocation of the arbitral provisions undesirable or improper or inexpedient. But that would not be the same thing as 'incapable of being performed' within the meaning of the said expression occurring in Section 3 of the 1961 Act."

The rejection of this contention by the Judge is to be approved. As it was held by the Judge of the English High Court quoted above [137], the possibility of a conflicting court decision in a related case is not a ground for holding the arbitration agreement "inoperative", or "incapable of being performed". The same must be deemed to apply to the possibility of conflicting awards in related cases as might occur in the Indian case under discussion.

The second point concerned the language of Section 3 of the 1961 Act. The Judge saw an obstacle to granting the stay of court proceedings because that Section reads "an agreement". The Judge said:

> "The use of the word 'an' indicates the intendment of the Section. The Section has no application to a situation where plurality of agreements converge on disputes and differences which arise out of a single transaction or a series of transactions which are inextricably linked with each other. . . . Section 3 of the 1961 Act has application only to such a case, where there exists one agreement which provides for a particular arbitral forum and a suit is commenced by a party to such an agreement or by a person claiming through him in respect of a matter which is covered by such an agreement."

The singular "an agreement" is also used in Article II(3) of the Convention. However, the use of the singular is purely for semantic reasons. If the reasoning of the Indian High Court were adopted throughout, it would lead to the absurd conclusion that the Convention applies only where the enforcement of more than one award is sought because Article I uses the plural "arbitral awards". Such an overly literal interpretaiton of the text of the Convention is obviously not a sound argu-

136. The two other points are: the agreement for the construction of a turn-key factory is not commercial under Sect. 3 of 1961 Act, see *supra* at n. I.125; the non-availability of foreign exchange for arbitrating abroad may render the arbitration agreement incapable of being performed, see *supra* at n. 117-118.

137. See *supra* at n. 125.

ment for refusing a stay of court proceedings where several arbitration agreements which are related to each other are involved.

The third point concerned the question whether the "Four Party Agreement" could govern the disputes arising out of the two other agreements between the subsidiaries and Indian Chemicals. The Judge declined to accept this proposition. He reasoned that the cause of action against the defendants arose under three agreements. The claims against subsidiary 1 and 2 were wholly outside the purview of the arbitral clause contained in the "Four Party Agreement".

The reasoning could, however, also have been the other way round. The Four Party Agreement was a guarantee agreement in respect of the agreement with subsidiary 1 and 2. Thus, if under the latter agreements the subsidiaries would have been found at fault in the arbitrations, the parent could also be held to be at fault. In addition, there was a parent-subsidiary relationship involved. It may also be significant that the agreement was headed "*Four* Party Agreement", which subsidiary 1 and 2 had also effectively signed. All these elements would have been sufficient to hold the Four Party Agreement as governing the disputes arising out of the two other agreements. In this connection it may be recalled that the District Court in New York granted the request for a consolidation of a court action against a guarantor in arbitration, and the English High Court did the same with respect to a subsidiary. Although these two cases involved situations distinct from that before the Indian High Court as the latter involved related arbitration agreements, the arguments used would have equal force for staying the court proceedings with regard to all parties.

The Indian Judge concluded that all this could better be dealt with in the lawsuit which "has been properly framed, having regard to the terms and conditions of the said three agreements and the facts of the case". The Judge observed also:

> "The balance of convenience also requires that this Court should decline stay of the proceedings in the suit. The arbitrations under plaintiffs' agreements with the defendants 1 and the defendants 3 are to be held in London. The arbitration under the agreement with the defendants 2 has its venue some place in India. The entire evidence will be in India inasmuch as the plaintiffs' claim that the defendants 1 and 2 committed breaches of the obligations which had to be performed in India. The reports in regard to the test runs and other vital issues on the matter would be in India."

This observation of the Judge reveals that he is in fact using a discretionary power in deciding whether or not to grant a stay. However, the referral to arbitration under Article II(3) of the Convention is mandatory as explained in II–1.2.3 *supra*. It is true that the lawyers who prepared the agreements did a bad job: the arbitral clauses were not attuned to each other, and no possibility of consolidation of the arbitrations was provided for.[138] But if the parties have agreed on three different sets of arbitration proceedings in two different countries, notwithstanding the fact that the arbitrations are closely related to each other, such agreement should be honoured.

As it was said at the beginning of this Section, the scope of this study does not allow to treat the problem of multi-party disputes and arbitration in a systematic and exhaustive manner. It has merely been a review of the cases decided under the Convention in which the problem of

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138. The Arbitration Rules of the International Chamber of Commerce, to which the arbitral clauses in question referred, do not provide for the possibility of consolidation with a related arbitration.

multi-party disputes and referral to arbitration pursuant to Article II(3) has occurred.

The review of cases shows that the Convention, making no provisions for multi-party disputes, does not obstruct the solutions for coping with the problem. Two aspects of the Convention are, however, relevant for resolving the problem of multi-party disputes and referral to arbitration. Firstly, the possibility of conflicting awards or court decisions in related cases must be deemed not to render the arbitration agreement "inoperative" or "incapable of being performed". Secondly, the mandatory character of the referral to arbitration under Article II(3) supersedes the rule which may exist under the law of the forum, like in Italy, that if a related case is brought before the court, the latter absorbs the competence of the arbitrator.

II–1.5. Uniform Interpretation (and Summary)

The order staying court proceedings is what is meant by the expression "refer the parties to arbitration" in Article II(3) of the Convention. The effect of the expression is that the court becomes partially incompetent, that is to say, incompetent to try the merits of the case. The court, however, retains competence for matters relating to arbitration. This applies in particular to the ordering of provisional remedies, including pre-award attachment, under the law of the court, these remedies not being precluded by the Convention (pp. 128-132 and 139-144).

It is not a prerequisite for the referral by the court that the arbitration has been initiated. Nor is it required in the case of an arbitral clause that the parties must conclude a submission agreement. These rules implied by the Convention supersede any rule of municipal law to the contrary (pp. 132-135).

The court has no discretionary power in staying the court proceedings, but must refer the parties to arbitration. A court may, however, not refer the parties to arbitration on its own motion, but only at the request of one of the parties. Both rules of the Convention supersede any rule to the contrary of the law of the forum. (pp. 135-139).

The court may refuse to refer the parties to arbitration if the conditions set out in the Convention relating to the arbitration agreement are not complied with. As a general rule, the "pro-enforcement bias" of the Convention mandates that non-compliance should not be readily assumed, and that cases of doubt are to be resolved by the arbitrator rather than the court. To this extent any municipal law to the contrary is superseded (pp. 144-161 *passim*).

The first condition is that there be a dispute. If there is only one aspect of the case in dispute, the entire case must nevertheless be adjudi-

cated by the arbitrator. The dispute must be in respect of a defined legal relationship, whether contractual or not. This includes non-contractual claims, provided that they are within the scope of the arbitration agreement. These rules too supersede the more stringent rules of municipal law. The question whether a dispute falls under the arbitration agreement is, in the first place, to be decided on the basis of construction alone; in exceptional cases the question is to be resolved under the law applicable to the arbitration agreement (pp. 146-152).

The second condition is that the subject matter of the arbitration agreement be capable of settlement by arbitration. This issue of arbitrability is to be decided under the law of the forum only. This law may distinguish between domestic and international public policy; in the latter case the field of non-arbitrable matters may be smaller (pp. 152-154).

The third condition is that the agreement be not "null and void, inoperative or incapable of being performed". Although the content of these words is, in principle, to be determined under the law applicable to the arbitration agreement, they must be construed narrowly (pp. 154-155). The words "null and void" denote an arbitration agreement which is affected by some invalidity right from the beginning (pp. 155-158). The word "inoperative" refers to an arbitration agreement which has ceased to have effect (pp. 158-159). The words "incapable of being performed" apply to cases where the arbitration cannot be set into motion (pp. 159-161).

The Convention does not contain provisions for multi-party disputes and the referral to arbitration, but does not hamper the solution of this problem either. However, an arbitration agreement does not become "inoperative" or "incapable of being performed" if there is a possibility of conflicting arbitral awards or court decisions in related cases. Furthermore, the competence of the arbitrator is not absorbed by the competence of the court, if a claim, related to the claim in arbitration, is brought before the court (pp. 161-168).

For those cases which are to be judged under the law applicable to the arbitration agreement, that law is to be determined by application by analogy of the conflict rules of Article V(1)(a) (pp. 126-128).

PART II–2 WRITTEN FORM OF THE ARBITRATION AGREEMENT (ART. II(2))

II–2.1 Introduction

Article II(1) requires that "Each Contracting State shall recognize an [arbitration] agreement in writing . . . ". The second paragraph of Article II specifies what should be understood by an arbitration agreement in writing: "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." The obligation of the Contracting States to recognize such agreement plays a role at two stages. The first stage is the enforcement of the arbitration agreement; in this regard Article II(3) refers to "an agreement within the meaning of this article". The second stage is the enforcement of the arbitral award; both Article IV(1)(b) and Article V(1)(a) mention the "agreement referred to in article II".[139]

The written form of the arbitration agreement as required by Article II(2) receives separate attention in this study because this provision ranks first amongst the Convention's provisions dealt with by the courts.[140] Reviewing these decisions, at first impression it may seem that most of the problems and confusion stem from the Italian courts. This is true to a large extent, but the courts in other countries as well, especially F.R. Germany, the Netherlands and Switzerland, have given differing and sometimes unclear interpretations of Article II(2). It is no exaggeration to state that the harmonization of interpretation of Article II(2) should have first priority for a better functioning of the Convention.

In Section II–2.2 we will first deal with the character of the written form requirement of Article II(2). With the exception of many Italian courts and certain authors, the courts have held that Article II(2) supersedes domestic law regarding the form of the arbitration agreement in those cases where the agreement falls under the Convention. In my opinion, Article II(2) can therefore be considered as a uniform rule. Three possible consequences of this uniform rule character are then to be considered separately: minimum and/or maximum requirement; proof of existence of the arbitration agreement by other means; and estoppel from invoking non-compliance with Article II(2). A question to be considered at the end of Section II–2.2 is whether the uniform

139. See for the applicability of Art. II(2) at the stage of enforcement of the award, *infra* III–4.1.3.3.

140. See also G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980) in Sect. 13.02.

rule character is such that it must be observed by international arbitrators.

After having investigated the character of Article II(2), it will be examined in Section II–2.3 when its definition of an arbitration agreement in writing can be deemed to be fulfilled. Article II(2) can be divided into two alternatives: an arbitral clause in a contract or a submission agreement, the contract or agreement being signed by the parties, and an arbitral clause in a contract or a submission agreement contained in an exchange of letters or telegrams. It is especially the second alternative which has been subject to diverse interpretations. The basic problem is when an exchange has taken place, which involves questions such as whether signatures are necessary and when is there an acceptance.

This examination will be the basis for considering in Section II–2.4 whether and when four specific cases, which frequently occur in practice, can be deemed to comply with Article II(2). These cases are: the arbitration agreement concluded by exchange of telexes, the sales or purchase confirmation containing an arbitral clause sent after the conclusion of the contract, the arbitral clause in standard conditions, and the arbitration agreement concluded through the intermediary of an agent.

II–2.2 Character of the Written Form Requirement of Article II(2)

II–2.2.1 *Introduction*

The majority of the national arbitration laws require that the arbitration agreement be in writing. The purpose of this is to ensure that a party is aware that he is agreeing to arbitration.

There are various notable exceptions. According to Article 1027 of the German (F.R.) Code of Civil Procedure, an arbitration agreement concluded in the framework of a commercial transaction (*Handelsgeschäft*) between parties who are qualified as full merchants (*Vollkaufleute*) does not require a specific form; the agreement may be concluded orally or even tacitly if it is customary to resort to arbitration in the branch of trade concerned. Another exception is Dutch law under which the arbitral clause, unlike the submission agreement which must always be in written form, may be concluded orally or even by mere custom.[141] Furthermore, the arbitration agreement need, in theory, not have a specific form in Denmark, Japan and Sweden.[142] It should also be noted that many Common Law countries

141. See P. Sanders, "National Report Netherlands", in *Yearbook* Vol. VI (1981) p. 60 at p. 63.

142. See J. Trølle, "National Report Denmark", in *Yearbook* Vol. V (1980) p. 28 at p. 29; T. Doi, "National Report Japan", in *Yearbook* Vol. IV (1979) p. 115 at p. 120; U. Holmbäck and N. Mangård, "National Report Sweden", in *Yearbook* Vol. III (1978) p. 161 at p. 162.

admit the validity of an orally concluded arbitration agreement; such agreement, however, does not fall under the applicability of the Arbitration Acts.[143]

The purpose generally being the same, the national laws differ as to when the written form of the arbitration agreement is met. They range from a tacit acceptance of a contract containing an arbitral clause to a specific approval in writing of an arbitral clause in contract forms and standard conditions.

Neither the Geneva Protocol of 1923 nor the Geneva Convention of 1927 required any specific form for the abitration agreement. Consequently, the question whether an arbitration agreement had to comply with any requirement as to its form had to be determined under some national law, usually the law of the place where the arbitration agreement was concluded. In view of the differences in national laws, the formal validity of the arbitration agreement was subject to much uncertainty under the Geneva Treaties.[144]

The ECOSOC Draft Convention of 1955 prescribed the written form for the arbitration agreement. It provided that, in order to obtain enforcement of an award, the party seeking enforcement had to prove that the parties had agreed "in writing" to settle their differences by means of arbitration.[145] However, it failed to state what constituted an agreement in writing, and this question would presumably have reverted again to municipal law.[146]

The latter worried the Dutch delegate, and right at the beginning of the New York Conference he proposed to add that "Agreement in writing shall be held to include exchange of letters or telegrams".[147] Subsequent to the submission of this proposal, the Conference decided to prepare an additional Protocol concerning the validity of arbitration agreements.[148] The Working Party No. 2 in charge of preparing the Pro-

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143. See for England, A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 57.

144. See H.-W. Greminger, *Die Genfer Abkommen von 1923 and 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) pp. 26-27.

145. Art. III(a), UN DOC E/2704 and Corr. 1. The same provision was contained in Art. III(a) of the ICC Draft of 1953, UN DOC E/C.2/373.

146. The Committee of ECOSOC in its Report accompanying the Draft Convention gave the following explanation of Art. III(a):

> "The provision that the parties must have 'agreed in writing either by a special agreement or by an arbitral clause in a contract' was intended to cover all the possible ways in which the parties might enter into a written agreement to arbitrate their differences. The Committee was aware that in the practice of international trade an agreement to arbitrate might be made by an exchange of letters or telegrams. So long as the agreement was genuine and had been reduced to written form, the Committee thought it should be considered valid for the purpose of this paragraph. Similarly, the Committee did not intend to exclude common form submission (*contrats types*) and other standard forms." (para. 30 of the Report, UN DOC E/2704 and Corr. 1).

147. UN DOC E/CONF.26/L.17.

148. UN DOC E/CONF.26/SR.9.

tocol based its draft on the Dutch proposal and elaborated it as the present text of Article II(2).[149] What happened thereafter has already been mentioned: at one of the last sessions of the New York Conference it was decided to insert in the new Convention itself the provisions which were intended for the additional Protocol.[150] Such was the genesis of Article II(2).

The Summary Records of the New York Conference do not reveal much discussion about what finally became Article II(2). It is interesting to note that the delegates wanted to have a definition of an arbitration agreement in writing in the Convention as seen by the rejection of a Belgian proposal to delete Article II(2).[151] Notwithstanding the sparse discussion, two points can be deduced from the legislative history.

The first is that the purpose of the written form as required by Article II(2) can be assumed to be the same as it is, in general, for the national laws on arbitration. As noted above, that purpose is to ensure that a party is aware that he is agreeing to arbitration. This purpose was apparently so self-evident that it was not even discussed at all. The reason for this is that the delegates were rather apprehensive about the second point.

The second point is that the object of defining what constitutes an arbitration agreement in writing in the Convention was to remedy the divergence of the national laws regarding the form of the arbitration agreement. The fact that a definition is provided in the Convention makes it clear that the intention of the drafters was to replace the differing provisions of the national laws in this respect. In other words, their object can be presumed to be to provide for a uniform rule for the formal validity of the arbitration agreement.

II–2.2.2 *Uniform rule*

This history of Article II(2) indicates that the definition of an arbitration agreement in writing given in that provision is conceived as a uniform rule which prevails over any provision of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable. It means that where in the enforcement action concerning the arbitration agreement, the agreement falls under the Convention, or in the enforcement action concerning the arbitral award, the award falls under the Convention, the enforcement cannot be pursued on the basis of the Convention if the arbitration agreement does not meet the written form as required by Article II(2). In such a

149. UN DOC E/CONF.26/L.52.
150. UN DOC E/CONF.26/SR.22.
151. *Id.*

case, the enforcement is to be founded on another basis in virtue of Article VII(1) of the Convention.

With the exception of the Italian courts, about which more presently, all other courts have affirmed this character of Article II(2). The Cantonal Court of First Instance of Geneva, for example, declared [152]: "Article II(2) . . . has introduced a new form which is distinct from the written form under Swiss law." The Austrian Supreme Court was even more specific [153]: "The requirement of the written form of the arbitration agreement is exclusively governed by the New York Convention." Similarly, the German Federal Supreme Court pointed out that Article II(2) is "directly applicable".[154]

The majority of the Italian courts, and especially the Italian Supreme Court, have denied for a long time that Article II(2) of the Convention prevails over domestic law.[155] In a certain number of cases falling under the Convention, the Italian Supreme Court, whilst quoting Article II(2), has determined the formal validity under the law applicable according to the conflict rules contained in Article 26 of the Italian General Provisions of Law.

That Article provides three alternative criteria for determining the law applicable to what the Italians call an *inter vivos* act: (1) the law of the place where the act is made, (2) the law which governs the substance of the act, and (3) the law of the nationality of the disposing party, or of the contracting parties, if they have a common nationality. Although the first criterion is most frequently used, it has been held that the most favourable of them must be applied with the purpose of upholding the validity of the act.[156]

Almost all of these Italian cases involved an arbitral clause in contract forms or standard conditions. In respect of other questions regarding the formal validity of the arbitration agreement the Italian Supreme Court applies Article II(2) outright, albeit that the interpretations given are rather restrictive and largely influenced by Italian law.[157] As far as the arbitral clause in contract forms and standard condi-

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152. Tribunal of the Canton Geneva (6th Chamber), June 8, 1967, J.A. van Walsum N.V. *v.* Chevalines S.A. (Switz. no. 1); cf. *infra* n. 212.

153. Oberster Gerichtshof, November 17, 1971 (Austria no. 2).

154. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12).

155. E.g., Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* S.p.A. Paolo Agnesi (Italy no. 5); April 8, 1975, no. 1269, Constantino Tomasos Ltd. *v.* Sorveglianza S.I.P.A. (Italy no. 13); May 25, 1976, no. 1877, Begro B.V. *v.* Voccia (Italy no. 17); January 25, 1977, no. 361, Total *v.* Achillo Lauro (Italy no. 26); May 18, 1978, no. 2392, Atlas General Timbers S.p.A. *v.* Agenzia Concordia Line S.p.A. (Italy no. 35). Corte di Apello of Venice, July 13, 1970, Società GAPAG K.G. *v.* Veronese (Italy no. 4); Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27). See for criticism F. Berlingieri, "Note on Enforcement in Italy of Foreign Arbitration Awards", *GAFTA Newsletter*, December 1980, Annex I, who qualifies Art. II(2) as a "uniform provision in an international Convention".

156. Corte di Cassazione (Sez. Un.), November 8, 1976, no. 4082, Società Brisighello *v.* Chemapol (Italy no. 24).

157. See, for example, the question whether signatures are required, *infra* II–2.3.2. The question of an arbitration agreement concluded through the intermediary of an agent is also resolved by the Italian courts on the basis of the applicable law. This does, however, not deviate from the prevailing interpretation of Art. II(2) in respect of this question, see *infra* II–2.4.4.

tions is concerned, Articles 1341 and 1342 of the Italian Civil Code require that it be specifically approved in writing. These Articles will be examined in II–2.4.3.2 below. For the present question it may suffice to mention that the Italian Supreme Court resorts to the conflict rules of Article 26 of the Italian General Provisions of Law presumably because it is embarrased by the requirements of Article 1341 and 1342 which, at least for international trade, are excessive.

Formerly, the Italian Supreme Court had adhered to the view that the arbitral clause was an act pertaining to procedure. This had as consequence that if contract forms or standard conditions including an arbitral clause were questioned before Italian courts, Italian law – i.e., Articles 1341 and 1342 – was always applicable by virtue of Article 27 of the Italian General Provisions of Law which provides that procedural acts are governed by the law of the place where the procedure is being held. In 1960, the Italian Supreme Court changed its mind and decided that an arbitration agreement is an act of substance, and hence the law applicable to the form thereof was to be determined under Article 26 of the Italian General Provisions of Law.[158]

This constituted an achievement as it restricted the applicability of Articles 1341 and 1342 mainly to contracts concluded in Italy. It is submitted, however, that in cases falling under the New York Convention it is not warranted even to resort to the conflict rules of Article 26 of the Italian General Provisions of Law, nor any other conflict rules, for determining a law governing the formal validity of the arbitration agreement, since, as explained above, municipal law is superseded by the uniform rule character of Article II(2) of the Convention.

In a decision of 1979, the Italian Supreme Court had to deal with an arbitral clause in a bill of lading providing for arbitration in Marseille, which bill of lading was issued in the same city.[159] The Supreme Court first found that Article 1341 of the Italian Civil Code was not applicable because, by virtue of Article 26 of the General Provisions of Law, the bill of lading was governed by French law. The Supreme Court added, however, that not only does French law not contain a requirement similar to Article 1341, but also "the New York Convention in its Article II exclusively regulates the form of the arbitration agreement without requiring what Article 1341 prescribes."

This adddition sounds promising for the future. Nevertheless, one wonders what the Supreme Court would have decided if it had found that the bill of lading had been issued in Italy. This uncertainty can be removed only if the Supreme Court relies solely on Article II(2) for the formal validity of the arbitral clause, without reference to the applicable law.

It must be added that certain Italian courts of appeal have for a long time underwritten the uniform rule character of Article II(2) of the Convention.

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158. Corte di Cassazione (Sez. Un.), May 2, 1960, no. 968, Hugo Trumphy *v.* Salgoil, *Rivista di Diritto Internazionale* (1960) p. 686.

159. Corte di Cassazione (Sez. Un.), September 11, 1979, no. 4746, Lloyd Continental *v.* S.p.A. Navigazione Alga (Italy no. 38).

To quote the Court of Appeal of Turin in a case concerning the enforcement of an arbitral award [160]:

"In order to avoid uncertainties, which would allow to circumvent the Convention, the Convention establishes the precise concept of an 'agreement in writing', thereby laying down a uniform rule which is valid for all Contracting States and which prevails over and derogates from the rules of municipal law. For this reason it is unnecessary to ascertain, as the defendant maintains, whether the clause inserted in the contract complies with Articles 1341 and 1342 of the Civil Code, nor is it necessary to hold, as the petitioner argues, that similar provisions are not to be found in Austrian law [i.e., the place where the contract was concluded] because they are irrelevant in the present case."[161]

Although the Italian Supreme Court now seems inclined to accept that Article II(2) constitutes a uniform rule for the form of the arbitration agreement, it should be observed that in another recent decision the Supreme Court has limited this to the enforcement stage of the arbitration *agreement* under Article II(3).[162] At the stage of the enforcement of the arbitral *award*, the Court deems Article II(2) inapplicable. This interpretation, which is, in my opinion, inconsistent with the text, system and history of the Convention will be dealt with later.[163]

An indication that Article II(2) of the Convention is intended to supersede municipal law in those cases where the enforcement of the arbitration agreement or arbitral award falls under the Convention, can also be found in Article I(2)(a) of the European Convention.

As observed before, this Convention complements the New York Convention primarily for arbitration in East-West trade in the case of enforcement of an arbitration agreement or arbitral award coming within the purview of both Conventions.[164] Article I(2)(a) of this Convention provides:

"2. For the purpose of this Convention,

(a) the term 'arbitration agreement' shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being

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160. Corte di Appello of Turin, March 30, 1973, Barthl Mayer O.H.G. *v.* Pannelli F.G.B. (Italy no. 7). The case involved a printed contract form in which the arbitral clause providing for arbitration at the Vienna Commodity Exchange was contained. According to Art. 1342 the arbitral clause should have been specifically approved in writing in this case.

161. In the same sense as the Corte di Appello of Turin, Corte di Appello of Naples, December 13, 1974, Frey et al. *v.* F. Cuccaro e figli (Italy no. 11) in which it was held that Art. II(2) renders it superfluous to inquire as to the validity of the arbitral clause under the *lex loci*. The Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21) held unequivocally that Art. II(2) of the Convention supersedes the specific approval in writing requirement of Arts. 1341 and 1342 of the Italian Civil Code in wording parts of which being remarkably similar to those employed by the Corte di Appello of Turin; however, somewhat further on in the opinion, the Court observed also that Arts. 1341 and 1342 were not applicable because the contract in question had been concluded in England.

162. Corte di Cassazione (Sez. I), April 15, 1980, no. 2448, Lanificio Walter Banci S.a.S. *v.* Bobbie Brooks Inc. (Italy no. 40).

163. See *infra* III–4.1.3.3 ("Applicability of Article II").

164. See *supra* I–4.4.2.

> signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter [i.e., the first part] and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws [i.e., the second part]."

The first part is almost identical to Article II(2) of the New York Convention. The second part was added with the intention to uphold the formal validity of the arbitration agreement in a greater number of cases.[165] Whereas the second part refers to municipal law, the first part does not do so. This difference indicates the understanding of the drafters of the European Convention, who were largely the same as those who participated in the drafting of the New York Convention inasmuch as the European countries are concerned, that municipal law was not to play a role for the first part and hence for Article II(2) of the New York Convention.

It should be emphasized that the uniform rule character of Article II(2) concerns only the *form* of the arbitration agreement. It does not concern other aspects of the validity of the arbitration agreement – also called the substantial validity – which aspects have, in principle, to be judged under the applicable law.[166] Conversely the law applicable to the arbitration agreement for determining its validity to which Article V(1)(a) refers, does not include the questions regarding the formal validity of the arbitration agreement.

In principle, the form of the arbitration agreement does not concern questions concerning its *formation*. Formation includes such questions as the moment on which a contract can be deemed to be concluded – i.e., when there is a "meeting of the minds" in the case of contracts concluded by correspondence – and the question of lack of consent – i.e., misrepresentation, duress, fraud, or undue influence. These questions too have to be judged under the applicable law. It may be pointed out, however, that if an arbitration agreement conforms to the requirements of Article II(2), there exists a strong presumption that there is a "meeting of the minds" between the parties since the requirements of Article II(2) are fairly strict. It may even be argued that, as far as the arbitration agreement is concerned, if Article II(2) of the Convention is complied with, the parties can be deemed to have consented to arbitration, except where lack of consent can be proven. The latter exception rarely occurs in practice, and has not come up in a single case decided under the Convention.

It may be observed that as to the question of the formation of contracts in general there is a divergence of views regarding the question which law should be applied

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165. It may be doubted whether this is true. The second part of Art. I(2) (a) stands out because of its vagueness as it is not clear what should be understood by "in relations between States whose laws". See for criticism, Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 144 et seq.

166. See for the question of the applicable law in particular, *supra* II–1.1.2 ("Convention's Provisions and Municipal Law") and II–1.1.3 ("Determination of the Applicable Law").

to this issue. The better view seems to be that the issue is to be decided under the "putative proper law".[167] The putative proper law applicable to the formation of arbitration agreements falling under the New York Convention could then be determined on the basis of the conflict rules contained in Article V(1)(a).

II–2.2.3 *Consequences of the uniform rule*

The judicial interpretation of Article II(2) that it supersedes municipal law regarding the form of the arbitration agreement is well-established, with the exception of the Italian courts. The uniform rule character of Article II(2) may have three possible consequences, which consequences, although closely interrelated may be distinguished. These consequences can be phrased in the form of the following questions:

(a) Is it a maximum and minimum requirement or a maximum requirement only?

(b) May the existence of the arbitration agreement be proven by other means?

(c) Can a party be estopped from invoking non-compliance with Article II(2)?

Questions (a) and (b) have not appeared to be troublesome for the courts, but have been answered differently by certain commentators. These two questions will be commented upon briefly in order to appreciate fully the character of Article II(2). In contrast, the third question (c) has led to diverging judicial interpretations.

(a) *Maximum and minimum rule*

With the exception of the majority of the Italian courts in respect of the specific approval in writing as required by Articles 1341 and 1342 of the Italian Civil Code, no court, nor non-Italian author, has doubted that Article II(2) means, in the first place, that it supersedes those requirements of municipal law which are *more* demanding than those laid down in that Article. Some authors have, however, argued that Article II(2) permits, but does not oblige, a court to accept *less* demanding requirements, whilst the Convention remains applicable. In other words, Article II(2) would be a maximum requirement only.[168] This opinion is not tenable. Article II(2) must in principle be deemed to be both a

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167. See G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980) Sect. 2.02.

168. In this sense, Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 30-31 and 36. E. Mezger had adhered to the same opinion in his case comment appearing in *Revue critique de droit international privé* (1962) p. 129 at p. 138-141; he has retracted this opinion in his case comment appearing in *Revue critique de droit international privé* (1971) p. 37 at p. 60 n. 1. The Arbitral Tribunal of the Hamburg Friendly Arbitration, award of January 15, 1976, published in *Yearbook* Vol. III (1978) p. 212, seems also to be of the opinion that the Conven-

maximum and a minimum requirement: a court may not require more, but may also not accept less than is provided by Article II(2) for the form of the arbitration agreement.

It is true that the English text of Article II(2) may create some confusion, It reads "The term '[arbitration] agreement in writing' shall *include* . . .". This may give the impression that there should be read: "includes, but is not limited to", an expression regularly found in contracts drafted in English. It could have as consequence that Article II(2) would allow arbitration agreements concluded in a form different from what is stipulated therein, especially those which require less, to be considered valid on the basis of some municipal law. However, "include" should be understood as "mean". This becomes apparent from the French and Spanish texts which are equally authentic by virtue of Article XVI of the Convention: "On *entend* par 'convention écrite' . . ." and "La expresión 'acuerdo por escrito' *denotará* . . .". It may be added that the first part of Article I(2)(a) of the European Convention of 1961, which is similar to Article II(2) of the New York Convention, reads in the English text "The term 'arbitration agreement' shall *mean* . . .", whereas the French text is on this point identical to the French text of Article II(2) of the New York Convention ("On *entend* par . . .").

Therefore, there is no textual argument for considering Article II(2) a maximum requirement only. To the contrary, since the text appears to be all-inclusive, the uniform rule character applies to its fullest extent in that it does not leave any room for the application of municipal law. This seems also to have been the intent of the drafters of the Convention, however sparse their discussion concerning Article II(2) may have been. Not only did they reject a proposal to delete Article II(2) altogether, but they also rejected a proposal to add to the definition of the arbitration agreement in writing the non-objection to a confirmation including an arbitral clause.[169] The latter proposal and the voting thereon, in particular, indicates that the drafters had in mind that the definition of the written form of the arbitration agreement in the Convention was to be all-inclusive, thus also including a minimum.

In this connection it may be recalled that the Convention contains in Article VII(1) a more-favourable-right-provision which permits a party seeking enforcement of an award – and by inference of an arbitration

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tion would allow arbitration agreements which do not meet the written form as defined in Art. II(2). The Tribunal observed in particular:

> "In any case, the Convention does not prevent the parties from concluding an arbitration agreement orally or in another form: insofar as the national laws do not require a specific form for the arbitral clause even an enforcement of the arbitral award pursuant to the Convention will be possible."

169. UN DOC E/CONF.26/L.54 and SR.22, see *infra* at n. 217-218.

agreement – to base his request on domestic law or other treaties.[170] It is the mfr-provision of Article VII(1) which should be used for the situation where the arbitration agreement does not comply with Article II(2). If the interpretation that Article II(2) is a maximum requirement only were accepted, it would render Article VII(1) meaningless in a number of cases. Article VII(1) of the Convention may therefore be considered as an additional argument against this interpretation. At this point it should also be recalled that if the mfr-provision of Article VII(1) is resorted to, the Convention becomes inapplicable *in toto*, and the enforcement has to be sought exclusively on the other basis.[171] Thus it is not allowed to base the request for enforcement on the New York Convention, with the exception of the form of the arbitration agreement which would be based on some municipal law. This too can be considered as an argument against the interpretation that Article II(2) would be a maximum requirement only, allowing the application of a more favourable municipal law.

The courts have implicitly affirmed that Article II(2) also constitutes a minimum requirement. This can be inferred from the fact that in those cases where they found that an arbitration agreement did not comply with Article II(2) of the Convention, they generally declined to apply the Convention, and attempted to decide the entire enforcement on a different basis in virtue of Article VII(1).[172] This opinion prevails also amongst the majority of the authors.[173]

(b) *Proof by other means not possible*

The second question concerning Article II(2) for the form of the arbitration agreement is whether it may be proven by other means. Some French authors maintain the view that Article II(2) is based on the same written form requirement as obtained under French law.[174]

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170. See *supra* I–4.

171. See *supra* I–4.2.3.

172. E.g., Oberlandesgericht of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8): the Court refused to grant the enforcement of the award under the New York Convention as the sales confirmation containing the arbitral clause had not been returned which is insufficient for Art. II(2). The Court granted the enforcement on the basis of German domestic law concerning the enforcement of foreign arbitral awards.

173. E.g., A. Bülow, "Zwischenstaatliche Fragen der Schiedsgerichtsbarkeit nach dem UN-Übereinkommen vom 10. Juni 1958", 83 *Juristische Blätter* (1961) p. 305 at p. 306; H.-V. von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen* (Berlin 1973) p. 52; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) pp. 346-347; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 339; P. Sanders, "A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 13 *The International Lawyer* (1979) p. 269 at p. 278.

174. J. Robert, "La Convention de New York du 10 juin 1958 sur la reconnaissance et l'exécution des sentences arbitrales étrangères", *Revue de l'arbitrage* (1958) p. 70 at p. 75, quoted apparently approvingly by J.-D. Bredin, "The New York Convention of June 10th

French law considered the written form of the arbitral clause not as an *acte solennel* [solemn act] but only as a matter of evidence.[175] It meant that the arbitral clause could be proven by other means.[176]

This interpretation, rejected by the majority of the commentators of the Convention [177], would seem to be at odds with both the text and the history of the Convention. The text of the Convention is not limited to the requirement that the agreement be in writing as French law required. It specifically sets out what should be understood by an agreement in writing. The specification would loose a great deal of its meaning if it could be disregarded or be considered as a "guideline" only.

This history does not indicate that the French concept should underlie the written form requirement of Article II(2). In fact, France barely took part in the drafting of this provision. It originated with the Dutch delegate [178] and was elaborated by a Working Party in which France was not represented.[179]

Furthermore, if the conclusion of an arbitration agreement could be proven by other means, it would create much uncertainty as to which proof would be allowed and which not, the question pertaining to the law of procedure of the forum before which the agreement is invoked.

It is therefore not surprising that there is no judicial support for the French interpretation. To the contrary, as we will see, the courts stick to the application of what is provided by the text of Article II(2) and generally do not take into account possibilities of concluding arbitration agreements which are beyond interpretations based on the text of Article II(2).

It would be tempting to infer from the interpretation that Article II(2) does not allow to prove the existence of the arbitration agreement by other means, that the formal requirement is a requirement *ad validitatem* (also called *ad substantiam*), i.e., that it is constitutive, as opposed to the requirement *ad probationem*, i.e., that it is a matter of evidence only. This inference has indeed been made by the majority of the Italian courts. However, as one must be cautious in doing so in

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1958 for the Recognition and Enforcement of Foreign Arbitral Awards", 87 *Journal du droit international* (1960) p. 1003 at p. 1017.

175. This is different under the new French arbitration law, Decree nr. 80-354 of May 14, 1980, *Journal Officiel de la République Française* of May 18, 1980, p. 1238, in force as of October 1, 1980. Art. 3(1) of the new law provides: "The arbitral clause must, on pain of nullity, be stipulated in writing in the main contract or in a document to which the main contract refers."

176. See J. Robert, *Arbitrage civil et commercial* (Paris 1967) no. 37 (submission agreement) and no. 140 (arbitral clause).

177. E.g., von Hülsen, *supra* n. 173, p. 55; Schlosser, *supra* n. 173, no. 341; Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 140.

178. See *supra* at n. 147.

179. The Working Party was composed of delegates from Belgium, F.R. Germany, Poland, Sweden, Turkey, United Kingdom, and the U.S.S.R.

general, this legal labeling is not the preferred method because it has the danger that it precludes practical considerations as to whether the textual interpretation of Article II(2) should be adhered to under all circumstances. The third question of estoppel, to which we will turn now, is an example of this.

(c) *Estoppel*

In respect of the two foregoing questions, it was found that Article II(2) is a maximum and minimum requirement and that it precludes the proof of the arbitration agreement by other means. Thus, an arbitration agreement cannot be enforced under the Convention if it does not have the written form as defined in Article II(2). There is, however, one case in which this may be questioned: if a party has acted specifically in respect of the arbitration agreement without objection, thereby implying that he considers it valid, is he then subsequently estopped from invoking the lack of compliance of the agreement with the written form as required by Article II(2)? This case may, for instance, come up where a party has co-operated in the appointment of the arbitrator(s), has participated in the arbitration, or has invoked the arbitration agreement for objecting to the competence of a court to try the merits of the dispute.

The question forms part of a more general question whether a party can be estopped from invoking any of the provisions of the Convention. The question is, however, dealt with here in the context of the character of Article II(2) because of the particularities ensuing from the uniform rule and, also, because in practice the question mainly plays a role for this provision of the Convention.[180]

The courts appear to be divided on the question of estoppel and Article II(2). The Court of Appeal of Düsseldorf explicitly denied that the lack of the written form as prescribed by Article II(2) of the Convention can be cured by appearance of a party before the arbitrator.[181]

The same opinion can also be inferred from the Italian Supreme Court. In one case the buyer had sent an unsigned confirmation of the transaction to the seller who signed and returned it.[182] When a dispute arose, the seller as well as the buyer appointed an arbitrator in London in conformity with the arbitral clause in the confirmation. Thereafter, the buyer apparently preferred another course and started an action on the merits against the seller before the Italian courts. In support of this

180. See for the court decisions reported under the Convention on which the issue of estoppel has come up outside Art. II(2), *infra* at n. III.88-92.

181. Oberlandesgericht of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8); cf. *supra* n. 172.

182. Corte di Cassazione (Sez. Un.), September 18, 1978, no. 4167, Butera *v.* Pagnan (Italy no. 33).

action the buyer filed the confirmation which was signed only by the seller. The Italian Supreme Court rejected the objection of the seller against the competence of the Italian courts on the basis of the arbitral clause in the confirmation. The Court argued that the confirmation should have been signed by both parties in order to be formally valid under Article II(2) of the Convention. The fact that the buyer had appointed his arbitrator and that he, himself, had filed the confirmation, in the Court's opinion, could not cure the lack of compliance with Article II(2).

This decision of the Italian Supreme Court is, to say the least, unsatisfactory. The buyer had proposed the arbitration, which proposal had been accepted by the seller, and had appointed his arbitrator. He should not then be allowed to act capriciously and subsequently start court proceedings in the belief that this would be more advantageous to him.

The case is also a good example of the unreasonable results to which the labeling of the written form requirement of Article II(2) as *ad validitatem,* as the Italian Supreme Court did in this case, may lead. It may be added that the qualification by the Italian Supreme Court that the written form of the arbitration agreement of Article II(2) as a requirement *ad validitatem,* "coincides" with Italian law as far as formal arbitration (*arbitrato rituale*) is concerned.[183] Moreover, and that is the bitter irony of this case, Article II(2) can be considered to have been complied with as an exchange of documents had taken place in which case the signatures of the parties can be dispensed with.[184]

Various courts have gone in the other direction as illustrated by the following case decided by the Court of Appeal of Hamburg.[185] In a dispute between an English seller and a German (F.R.) buyer, the former had sued the latter before the Court of First Instance of Hamburg. The German party succesfully invoked the incompetence of the Hamburg Court on the basis of the clause providing for arbitration in London contained in the sales confirmation which had been exchanged between the parties. After the English party had prevailed in the arbitration, in which the German party had participated, he sought enforcement of the award in F.R. Germany. This time the German party objected to the request for enforcement by asserting that the English party had failed to supply an original or copy of the arbitration agreement "referred to in article II" as required by Article IV(1)(b) of the Convention. The Court of Appeal of Hamburg held that Article II(2) had been met as the sales confirmation had been signed and returned.

183. See for *arbitrato rituale* and *arbitrato irrituale* under Italian law, *supra* I–1.7.
184. See *infra* at n. 216.
185. Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18).

Of interest for our question of estoppel and Article II(2) is the additional observation of the Court that the invocation of the formal invalidity of the arbitration agreement by the German party was in contradiction with his attitude at the time he objected, on the basis of the arbitral clause, to the competence of the Hamburg Court of First Instance. Moreover, the Court observed, the German party had stated in a letter that the dispute should arbitrated.

The President of a Dutch Court of First Instance similarly rejected the invocation of the formal invalidity of the arbitration agreement.[186] The Judge observed that from the minutes of the hearing before the arbitrators, at which the respondent was assisted by a lawyer, it appeared that neither the respondent nor his lawyer had objected to the form or contents of the arbitration agreement. The Judge held that ". . . *at present* [emphasis by the Judge], more than two years after the hearing . . . the respondent is estopped from his right to question the validity of the arbitration agreement . . .".

For the question of estoppel from invoking the non-compliance with the written form of the arbitration agreement as required by Article II(2), three solutions seem to be possible. The first solution is to regard the written form as prescribed by Article II(2) as a condition for the enforcement of the agreement and award which must be complied with under all circumstances. This solution has been adopted by the Italian Supreme Court and the Court of Appeal of Düsseldorf. Thus, even if a party has relied on the arbitration agreement, this cannot heal the lack of the prescribed form of the arbitration agreement and the Convention cannot be applied to the enforcement, the remaining possibility being to found the request for enforcement on another basis, if any, in virtue of the mfr-provision contained in Article VII(1) of the Convention.[187]

The second solution is to regard the question of estoppel in respect of Article II as not being regulated by the Convention, and, to decide this question on the basis of municipal law. The latter law is presumably the law of the forum. Under this solution the Convention remains applicable to the enforcement, whilst the estoppel from invoking the non-compliance with Article II(2) is to be decided according to municipal law. Thus, under this solution it may happen that the enforcement can be pursued on the basis of the Convention although the written form of Article II(2) is not met, because under the law of the forum a party is deemed to be estopped from invoking the non-compliance. It may be noted that the national laws are divided on the question of

186. President of Rechtbank of The Hague, April 26, 1973 (Neth. no. 3).

187. This is the opinion of E. Mezger, "Die Anerkennung jugoslawischer und anderer ost europäischer Schiedssprüche in der Bundesrepublik", 15 *Neue Juristische Wochenschrift* (1962) p. 278 at p. 282 n. 30.

estoppel.[188] The more modern arbitration statutes tend towards an acceptance of estoppel in the case of a lack of the written form of the arbitration agreement.

E.g., the European Uniform Law of 1966, while requiring in Article 2 that the arbitration agreement be in writing, provides in Article 25(4) that the invalidity of the arbitration agreement shall be deemed not to constitute a ground for setting aside an award where the party availing himself of it had knowledge of it during the arbitration proceedings and did not invoke it at the time.[189]

The third solution is to regard the question of estoppel as a fundamental principle of good faith, which principle overrides the formalities required by Article II(2). Under this solution the Convention would also remain applicable, differing from the second solution in that it does not depend on the diverse municipal laws. The principle of good faith may be deemed enshrined in the Convention's provisions. The legal basis would be that Article V(1) provides that a court *may* refuse enforcement if the respondent proves one of the grounds for refusal of enforcement listed in that Article. The permissive language can be taken as basis for those cases where a party asserts a ground for refusal contrary to good faith.

It is submitted that the third solution is, in principle, to be preferred. It would, for example, exclude the unsatisfactory result of the aforementioned decision of the Italian Supreme Court. It would also correspond with the trend in the more modern arbitration laws. And, finally, it has the advantage that the question would not depend on municipal law as would be the case if the second solution were adopted. Although the Court of Appeal of Hamburg and the Dutch Court of First Instance have not expressly held so, it can be said that they implicitly favour the third solution.

II–2.2.4 *Should an international arbitrator apply Article II(2)?*

In the foregoing we have seen that in the enforcement proceedings of the arbitration agreement and award under the Convention, a court must observe Article II(2) alone, with the possible exception of estoppel. It may also be questioned whether the uniform rule character of Article II(2) should be observed by arbitrators. This question also forms part of a more general question: the question whether arbitrators are obliged to observe any of the relevant provisions of the Convention, in particular the conflict rules contained in Article V(1)(a), (d) and (e).

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188. See P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 330.

189. European Law Providing for a Uniform Law on Arbitration, done at Strasbourg, January 20, 1966, *European Treaty Series* no. 56.

It is, however, appropriate to examine this question in connection with the uniform rule character of Article II(2) as this provision in particular has caused problems in practice.

It should be recalled that Article II, in general, does not have the effect that it supersedes municipal law in all cases. As explained in I–2, the action for the enforcement of the arbitration agreement pursuant to Article II(3), which refers in turn to Article II(2), applies only to those arbitration agreements which can be deemed to fall under the Convention. Article II does not have the effect of superseding the law relating to domestic arbitration agreements. Thus the question whether arbitrators have to observe Article II(2) is relevant only for those agreements which fall under the Convention in case the enforcement of the agreement were sought under Article II(3).

Arbitrators have different opinions on the Convention's applicability in this case. Before an arbitral tribunal constituted under the auspices of the Netherlands Oils, Fats and Oilseeds Trade Association (NOFOTA), the Tunisian respondent had asserted that the arbitrators lacked competence because the arbitral clause was not in writing as required by Article II(2) of the New York Convention.[190] The arbitrators, however, denied the Convention's applicability:

> "The Convention invoked by the respondent deals only with the recognition and enforcement in a Contracting State of arbitral awards made in another Contracting State. The Convention does not contain substantive provisions which are directly applicable to the determination as to the competence of arbitrators according to the law of the country in which the arbitral award is rendered. The arbitrators are therefore not bound by the Convention in determining their competence. The question whether in the present case there exists 'a written agreement' within the meaning of Article II(2) of the Convention therefore does not have to be answered by the arbitrators."

It may be noted that the arbitrators overlooked the fact that the Convention also applies to the enforcement of the arbitration agreement pursuant to Article II(3). Whether this is material will be dealt with presently.

In several other awards Article II(2) was applied by the arbitrators. An arbitral tribunal constituted under the Rules of Arbitration for Overseas Hides and/or Skins of the Netherlands Hide and Leather Exchanges Association in Rotterdam held that the arbitral clause in question was valid according to Article II(2) of the Convention.[191] Another example is an arbitral tribunal of the Hamburg Friendly Arbitration which also considered Article II(2), but which reached the – erroneous

190. Award of March 20, 1977, published in *Yearbook* Vol. III (1978) p. 225 at p. 226.

191. Award of December 3, 1979, published in *Tijdschrift voor Arbitrage* (Neth.) (1981 no. 1) p. 13, award no. 5. Cf. *infra* at n. 232.

– conclusion that it could require less for the form of the arbitration agreement than is prescribed by Article II(2).[192] Further, the Arbitration Court at the Bulgarian Chamber of Commerce and Industry rejected the objection of the Italian respondent based on Articles 1341 and 1342 of the Italian Civil Code, reasoning that these provisions have been superseded by Article II(2) of the Convention.[193]

It may also be interesting to note that an arbitral tribunal constituted according to the Arbitration Rules of the Netherlands Arbitration Institute (NAI) even devoted an interim award to the question whether the arbitral clause before it had the written form as required by Article II(2) of the Convention.[194] It gave the petitioner the opportunity to prove the compliance with Article II(2). The arbitrators added:

> "The undersigned are not in a position to restrict themselves to ascertain whether an arbitration agreement within the meaning of Article II exists between the parties or not. Should they reach the conclusion that there is no such agreement, then they will have to ascertain whether there is an agreement to arbitrate which is valid under some applicable domestic law or under some treaty other than the New York Convention. This is confirmed by the first sub-paragraph of Article VII of that Convention."

The most comprehensive reasoning regarding the question under discussion can be found in an arbitral award rendered by another arbitral tribunal constituted under the Rules of Arbitration for Overseas Hides and/or Skins of the Netherlands Hide and Leather Exchanges Association in Rotterdam.[195] After a dispute had arisen between a Dutch seller and an Italian buyer about Argentinean hides, the Dutch seller had initiated arbitration at the Association. The Italian buyer opposed the competence of the arbitrators in Rotterdam, asserting that the arbitral clause in the contract in question did not have the written form as prescribed by Articles 806-808 of the Italian Code of Civil Procedure, and arguing that Italian law was applicable because the contract would have been concluded in Italy. The arbitrators rejected this assertion as follows:

> "However, the formal validity of an arbitral clause in the case as the one at hand involving an Italian and Dutch party, is exclusively governed by Article II, paragraphs 1 and 2, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, which Convention was acceded to by Italy on January 31, 1969, and was ratified by the Netherlands on

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192. Award of January 15, 1976, published in *Yearbook* Vol. III (1978) p. 212. Cf. *supra* n. 168.

193. Award of May 12, 1971, published in *Yearbook* Vol. IV (1979) p. 191.

194. Interim Award of September 15, 1977, published in *Yearbook* Vol. VI (1981), p. 142. The case was settled after the issuance of this interim award.

195. Award of October 30, 1980, published in *Tijdschrift voor Arbitrage* (Neth.) (1980 no. 6) p. 169, award no. 40.

April 24, 1964. Article II, paragraph 1, of this Convention requires that the arbitration agreement be in writing. Article II, paragraph 2, provides that '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." According to the prevailing interpretation by the courts in the various Contracting States, Article II, paragraphs 1 and 2, constitutes an internationally uniform rule for the formal validity of an arbitration agreement, which rule does not leave any room for the applicability of domestic law. Consequently, Articles 806-808 of the Italian Code of Civil Procedure are inapplicable in the present case.
The arbitral clause in question complies with Article II, paragraph 2, of the Convention: Contract no. 546-V is signed by the claimants and is expressly referred to by the defendants by number 546-V in the aforementioned cable of June 5, 1980. This constitutes an exchange in writing within the meaning of Article II, paragraph 2, of the Convention.
It may be added that if the Convention were not to be applied in virtue of its Article VII, paragraph 1, the formal validity of the arbitral clause is still to be upheld. Clause 24.1 of the International Hide & Skin Contract No. 1 provides that 'for the purpose of arbitration, appeal and any other legal proceedings and for the purpose of establishing *formal* and essential validity, this contract *shall be deemed to have been made in the country of the place of arbitration* and to be performed there so that the law of such country shall be the proper law of the contract, any correspondence or reference to the offer, the acceptance, the place of payment, the place of appeal or otherwise notwithstanding.' [emphasis added by the arbitrators]. This clause would lead to the applicability of Dutch law to the contract, including the arbitral clause in question, under which law the arbitral clause is valid beyond any doubt."

For solving the question whether arbitrators have to apply Article II(2) in those cases where the arbitration agreement can be deemed to fall under the Convention, two lines of reasoning appear to be possible, both of which may lead to inapplicability of the Convention.

The first line of reasoning is that the Convention applies only to the enforcement by a court of the arbitration agreement and award. The Convention has specifically been drafted for the courts and does not contain any provision, nor indication, which declares that it is to be applied by arbitrators. In addition, the arbitrators would not be obliged to render an award which is enforceable under the Convention, the more so since it is by no means certain that the enforcement will be governed by the Convention (i.e., that the enforcement will be sought in another Contracting State).[196] This line of reasoning apparently underlies the above quoted NOFOTA award.

The second line of reasoning is that since the arbitration agreement excludes the competence of the courts, it must be valid to its fullest extent. That is to say, if an arbitration agreement falls under the Con-

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196. See for the question whether an arbitrator has the duty to render an enforceable award, J. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry 1978) nos. 158, 271 and 410.

vention, a court will stay the court proceedings brought before it in violation of the agreement only if the agreement is valid according to the Convention, which validity includes the formal validity pursuant to Article II(2). As arbitrators have the duty to examine whether they have been regularly vested with competence vis-à-vis the courts, they must also take into account the formal validity of the arbitration agreement under Article II(2). However, as can be done in enforcement proceedings before the court, if the arbitrators find that the agreement does not conform to the requirements of Article II(2), another basis can still be relied on in virtue of the mfr-provision contained in Article VII(1) of the Convention.[197] This was apparently the line of reasoning of the arbitrators in the above mentioned NAI and Netherlands Hide and Leather Exchanges Association cases.

The second line of reasoning is built upon the presumption that the arbitrators must examine their competence vis-à-vis the court which would have been competent to deal with the dispute if no arbitration had been agreed to. As 56 States have adhered to the Convention, such a court will in most cases be located in a Contracting State.

It is difficult to say which line of reasoning can be considered the better one. As far as it could be researched, the question has not been raised in literature. The second line of reasoning has the advantage that the applicability of Article II(2) would lead to a discarding of more demanding requirements as to the form of the arbitration agreement under the otherwise applicable law, such as Articles 806-808 and 1341-1342 of the Italian Civil Code. On the other hand, the fact that it is uncertain whether the enforcement of the award will be governed by the Convention may be an argument against the obligation of the arbitrator to apply Article II(2). If it turns out that the enforcement of the award is limited to the country where it is made, in which case the Convention is inapplicable, it may be rather strange that the arbitrator had to apply rules to the formal validity of the arbitration agreement (i.e., Art. II(2) of the Convention) which were stricter than those of the arbitration law of the country where he was sitting. However, the same dichotomy will also occur if the arbitration agreement is invoked before the court of a Contracting State, in which case Article II(2) of the Convention is to be applied, and subsequently the enforcement or setting aside of the award is sought in the same country, in which case the Convention is inapplicable.[198] On balance, therefore, the second line of reasoning that the arbitrator is competent to the extent that a court is incompetent is to be preferred. It means that an international arbitrator

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197. See for the question whether the mfr-provision of Art. VII(1) also applies in the action for the enforcement of the arbitration agreement under Art. II(3), *supra* I–4.2.4.

198. See *supra* I–1.4 ("Convention Not Applicable in Country of Origin").

has to apply the Convention, including Article II(2), but that the mfr-provision of Article VII(1) offers him an escape.

II–2.3 When is the Written Form Requirement of Article II(2) Met?

II–2.3.1 *Introduction*

The character of Article II(2) that it is a uniform rule superseding municipal law regarding the form of the arbitration agreement for those agreements which fall under the New York Convention, makes it extra important to determine when an arbitration agreement complies with this provision.

Article II(1)-(2) requires that in any case the arbitration agreement must be *in writing*; an orally concluded arbitration agreement will not suffice. We need not dwell on this aspect which appears unequivocally in the text of Article II.

The question is when is an arbitration agreement sufficiently set out in the written form. Article II(2) defines the agreement in writing as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The definition raises a preliminary point of terminology for the English text of Article II(2): the term "arbitration agreement" appears somewhat confusingly to mean "submission agreement" (*acte de compromis*).

As observed before, the Convention does not distinguish between the arbitral clause, by which future disputes are referred to arbitration, and the submission agreement, by which an already existing dispute is referred to arbitration. Both types of agreements are treated alike by the Convention and covered by the general term "arbitration agreement".[199] However, the English text of the Convention is not quite consistent with this terminology. Article II(2) states ". . . an arbitral clause in a contract or an *arbitration agreement*, signed by the parties . . ." (emphasis added). The arbitration agreement covering both the arbitral clause and the submission agreement, it should have read ". . . an arbitral clause in a contract or a *submission agreement*, signed by the parties . . ." (emphasis added). The French and Spanish texts, which are equally authentic by virtue of Article XVI of the Convention, are clearer on this point; they read for the term arbitration agreement in Article II(2) *compromis* and *compromiso* as distinct from *convention* and *acuerdo*, respectively, when referring to the arbitration agreement in general.

This poses, however, a problem for an exceptional type of arbitration agreement. It may happen in certain trades that the parties conclude a separate agreement by which all disputes which may arise out of contracts which will be concluded by them in the future in respect of a certain commodity, shall be referred to arbitration. In my opinion, this type of agreement cannot be brought under the term "arbitration agreement" in the English text of Article II(2), because the French and Spanish text clearly limit this term to the submission agreement. It is arguable that

199. See *supra* II–1.2.2 ("Actual Submission to Arbitration Not Required").

by means of an extensive interpretation of the term "arbitral clause in a contract" in Article II(2), this type of agreement for future disputes could be brought under the latter term.

Article II(2) may be divided into two alternatives for an arbitration agreement in writing:

first alternative: an arbitral clause in a contract or a submission agreement, the contract or agreement being signed by the parties;

second alternative: an arbitral clause in a contract or a submission agreement, contained in an exchange of letters or telegrams.

Whilst the first alternative has not created major problems, the second alternative has appeared to be troublesome for the courts. The second alternative was added in the desire to make allowances for the current practices of international trade of concluding contracts by correspondence.[200] Whether this attempt has been successful is another question. In any event, the purpose of the addition of the second alternative to enlarge the possibilities of concluding arbitration agreements in international trade is an important factor for interpreting Article II(2).

The question *how* Article II(2) should be interpreted for determining which cases comply with it, has been subject to diverging views. Some courts, in particular the Italian ones, maintain that Article II(2) should be interpreted strictly.[201] Others, to the contrary, argue that Article II(2) should be interpreted according to its "spirit". The latter view was, for instance, advanced by the Court of First Instance of Rotterdam which observed [202]:

> "The Court is of the opinion that the spirit of this provision is that on the basis of written documents each party to the contract must be given information in a sufficient manner that the other party knows and agrees that disputes which may arise out of the contract shall be submitted to arbitration."

In view of the purpose for which the second alternative was added, one can agree to a large extent with the view of the Rotterdam Court. However, the interpretation according to the "spirit" of Article II(2) does have its limits: an interpretation contrary to what is specifically

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200. A. Büllow, "Das UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche", 20 *Konkurs-, Treuhand und Schiedsgerichtswesen* (1959) p. 1 at p. 3. See also Tribunal of the Canton Geneva (6th Chamber), June 8, 1967, J.A. van Walsum N.V. *v.* Chevalines S.A. (Switz. no. 1) text quoted *infra* at n. 212.

201. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5); see for the relevant observation of the Court, *infra* at n. 282; but see also *infra* at n. 204-206.

202. Rechtbank of Rotterdam, June 26, 1970, Israel Chemicals & Phosphates Ltd. *v.* N.V. Algemene Oliehandel (Neth. no. 1). See also P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 309.

provided by the text is unacceptable. For instance, where the text requires an exchange of letters, there must have been a mutual transfer of documents; the mere transmission of one document by a party to the other cannot linguistically fulfil the word "exchange".

There is another reason for which Article II(2) should not be interpreted too strictly. Article II(2) contains fairly demanding requirements for the form of the arbitration agreement. If these requirements were interpreted strictly, a great number of international contracts containing an arbitral clause would fall outside Article II(2), as in current international trade practice contracts tend to be concluded in a rather informal way. The consequence would be that the enforcement of agreements and awards in these cases would have to be based, according to Article VII(1), on municipal law or some other treaty, if any. This would create a situation of disparity and uncertainty which the New York Convention was intended to prevent.

The question when the written form requirement of Article II(2) can be deemed to be met may be considered in this Section from the angle of three general problems: whether signatures are necessary, the exclusion of oral and tacit acceptance, and when the acceptance in writing of a contract containing an arbitral clause can be deemed sufficient in the case of an exchange. These general problems relate mainly to the arbitral clause; at the end of this Section some brief observations will be made concerning the submission agreement and Article II(2). In the following Section we will consider the question in respect of four specific cases of arbitration agreements.

II–2.3.2 *Whether signatures are necessary*

In the case of the *first alternative*, there is no doubt that the signatures of the parties are required because the text of Article II(2) states so explicitly.[203]

It may be mentioned that in the case of an arbitral clause in a contract, it is not the arbitral clause which need be signed; the signatures for the contract as a whole will suffice.

The English text of Article II(2) reads ". . . an arbitral clause in a contract or an arbitration agreement, signed by the parties . . ." which may cast a doubt as to whether the word "signed" refers to the word contract or to the arbitral clause. The French and Spanish text, which are equally authentic by virtue of Article XVI, are not unequivocal either: ". . . une clause compromissoire inserée dans un contrat, ou

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203. As far as the first alternative is concerned, German authors differ on the question whether a stamped or a printed signature would be sufficient. It is affirmed by von Hülsen, *supra* n. 173, p. 54, but denied by Schlosser, *supra* n. 188, no. 343. This question has not come up before the courts.

un compromis, signés par les parties . . .", and ". . . una cláusula compromisoria incluida en un contrato o un compromiso, firmados por las partes . . . ." The German translation is clearer, but is not authentic: ". . . eine Schiedsklausel in einem Vertrag oder eine Schiedsabrede . . ., sofern der Vertrag oder die Schiedsabrede von den Parteien unterzeichnet . . . ist".

In one case the Italian Supreme Court opined at the beginning of a judgment that, grammatically the word "signed" refers to an arbitral clause in a contract and not the contract itself.[204] The Court noted in this respect a difference with Article I(2)(a) of the European Convention of 1961 which reads ". . . either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties . . . ." It is submitted that the text of the European Convention is merely the result of a more careful drafting, but that it has essentially the same meaning as Article II(2) of the New York Convention.

The Court considered, however, its grammatical interpretation too strict, saying that it is not in conformity with the reality of international trade for which a separate signature for the arbitral caluse would be a too heavy burden. It concluded that the interpretation should be more liberal in the sense that the signature for the contract as a whole is sufficient.

This last interpretation of the Italian Supreme Court would at first sight appear to be encouraging as on earlier occasions the Supreme Court had held that under Article II(2) a specific approval in writing was needed for the arbitral clause, in particular, if the clause figured in a contract form or standard conditions.[205] Nevertheless, the interpretation of the Court was *ǎ titre gratuit* as it found that the signatures for the contract as a whole were, in fact, lacking. Moreover, at the end of the opinion, the Court repeated that the written form required for the arbitration agreement must be interpreted in a restricted sense. So the Court gave with one hand and took with the other.[206]

In the case of the *second alternative*, there may be cases where the signature of one of the parties, or even both, does not appear on the documents exchanged. Especially, in the case of telegrams or telexes, it may be questioned whether the indication of the sender can be equated to a signature. It may also happen that a party sends an unsigned confirmation which is accepted by the other party in writing, either by returning a duplicate or by other means (for instance, by telex).[207]

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204. Corte di Cassazione (Sez. Un.), May 18, 1978, no. 2392, Società Atlas General Timbers S.p.A. *v.* Agenzia Concordia Line S.p.A. (Italy no. 35). The Court relied on the Italian translation of Art. II(2) reading: "... una clausola compromissoria inserita in un contratto, o un compromesso, sottoscritti dalle parti o contenuti in uno scambio di lettere o di telegrammi."

205. It applies especially to the arbitral clause in a contract form or standard conditions, see *infra* II–2.4.3.2. Furthermore, the Supreme Court also requires the signatures of the parties in the case of the second alternative of Art. II(2), see *infra* at n. 214-216.

206. The case concerned an action for damages caused to the goods during the transport, by the holder of the bill of lading against the Italian shipping agent of the carrier. The latter objected to the jurisdiction of the Italian courts on the basis of the arbitral clause in the bill of lading. The Court found that the signature of the Indian agent of the carrier was not sufficient since his power of attorney was not in writing as prescribed by Art. 1392 of the Italian Civil Code (see *infra* II–2.4.4). The Court further found that the signature of the other party, the shipper, was also lacking. The shipper had endorsed the bill of lading. In the opinion of the Court, this is not a substitute for the signature, since the endorsement concerns only a transfer of title, whilst the signature is necessary for the formation of the contract.

207. See for an arbitral clause in sales or purchase confirmation, *infra* II–2.4.2.

The sending of an unsigned sales or purchase confirmation to the other party with the request to sign (!) and return it appears indeed to happen in practice: Court of First Instance of Zweibrücken: a Dutch company sold to a German firm a certain quantity of hides, which sale was confirmed by a sales confirmation including an arbitral clause sent by the Dutch company to the German firm. From the facts of the case it appeared that only the German firm had signed the sales confirmation. *Held* – arbitral clause complies with Article II(2) as the sales confirmation had been returned to the Dutch company.[208] Court of Appeal of Basle: the duplicate of the sales confirmation including an arbitral clause contained only the signature of the party who had returned it. *Held* – arbitral clause complies with Article II(2).[209] See also the decision of the Italian Supreme Court discussed in II–2.2.3(c) above.

It has been said that, as in the case of the first alternative, the signatures of both parties are required in the case of the second alternative.[210] An interpretation insisting that the signature requirement also be met in the case of the second alternative is not warranted. In the first place, the requirement of signatures of both sides is expressly provided by Article II(2) only in respect of the first alternative. In the second place, a contract signed by both parties expresses the mutual intentions and consent of the parties; the signatures certify their knowledge and acceptance. This is different in the case of a contract concluded by an exchange of communications in writing. By means of the exchange, the parties inform each other of their respective intentions, and if the communications correspond, the exchange itself constitutes a mutuality of consent. It is therefore the exchange in writing which certifies knowledge and acceptance. In this context the absence of one or both signatures does not nullify the acceptance; it merely removes the certainty that a communication emanates from a party. The latter can, however, be proven or assumed.

Several courts have affirmed the interpretation that in the case of the second alternative the signatures of the parties are not required.[211] The Court of First Instance of the Canton Geneva may be quoted as an example [212]:

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208. Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16).

209. Obergericht of Basle, June 3, 1971 (Switz. no. 5).

210. Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965), who states at no. 140:

"... [L]a lettre même du texte exige un écrit signé par les deux parties, qu'il s'agisse d'un contrat plus large, d'un compromis, *ou d'un échange de correspondance*, quelle qu'en soit la forme." (emphasis added)

In the same sense, E. Mezger in his case comment in *Revue critique de droit international privé* (1962) p. 132 at p. 137.

211. E.g., Landgericht of Hamburg, December 19, 1967 (F.R. Germ. no. 4); Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16); Rechtbank of Rotterdam, June 26, 1970, Israel Chemicals & Phosphates Ltd. *v.* N.V. Algemene Oliehandel (Neth. no. 1), but see *infra* at n. 222-224; U.S. District Court of New York, S.D., April 3, 1979, Beromun A.G. *v.* Società Industriale Agricola "Tresse" (U.S. no. 29).

212. Tribunal of the Canton Geneva (6th Chamber), June 8, 1967, J.A. van Walsum N.V. *v.* Chevalines S.A. (Switz. no. 1).

> "Article II(2) . . . as the petitioner has rightly argued . . . has introduced a new form which is distinct from the written form under Swiss law which requires the signatures of the parties (Art. 13 of the Code of Obligations). This innovation, as explained by the petitioner, was necessitated by the needs of international trade practice which uses telexes and telegrams rather than letters and contracts [embodied in a single document]."

In the same sense the Court of Appeal of Basle which observed [213]:

> "Although the agreement contained only the signature of the respondent, it cannot be said that the claimant limited himself to an oral agreement. Rather, the agreement was concluded by an exchange of letters in accordance with Article II(2) . . . . In the opinion of the Court, an exchange of letters does not only exist when letters signed by the parties can be produced, but also when a written manifestation of both parties can be submitted. If the New York Convention had required a signature in the case of letters, then it would have declared so expressly."

The Italian Supreme Court seems to have changed its mind on the question whether the signatures of both parties are required in the case of the second alternative of Article II(2). In a decision of 1971, the Supreme Court observed [214]:

> "[I]t can only be inferred from the last part of paragraph 2 [of Art. II] that, when the copy delivered to the other party of a telegram, which by its nature, does not contain the personal and autographed signature (cf., Art. 2705 of the Civil Code), and similarly, when in the case of an agreement concluded by an exchange of letters, both letters, or either of them, do not contain such signature, the requirement of a written form must be considered to be met if the personal origin of the reciprocal as well as specific declarations in writing can be ascertained in some other way."

This statement was almost literally repeated in a decision of 1976.[215] However, in a decision of 1978, the formal validity of an arbitral clause in a sales confirmation was denied because, although having been exchanged between the parties, the confirmation did not contain the signature of one of the parties.[216] From what has been argued above, it is evident that this interpretation is too restrictive.

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213. Obergericht of Basle, June 3, 1971 (Switz. no. 5).

214. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5).

215. Corte di Cassazione (Sez. Un.), May 25, 1976, no. 1877, Begro B.V. *v.* Voccia (Italy no. 17).

216. Corte di Cassazione (Sez. Un.), September 18, 1978, no. 4167, Butera *v.* Pagnan (Italy no. 33), discussed *supra* at n. 182. Compare with Corte di Cassazione (Sez. Un.), November 19, 1978, no. 6017, Metallgesellschaft A.G. *v.* Motosi and I.P.I.M. (Italy no. 39), in which the Court held that the arbitral clause in question complied with Art. II(3) of the Convention because the contract, prepared by Metallgesellschaft, was signed and accepted by Motosi and returned to the German company.

II–2.3.3 *Orally and tacitly accepted arbitration agreements excluded*

As regards the *first alternative* of Article II(2), the fact that the text of this provision explicitly requires that the contract containing an arbitral clause or the submission agreement be signed, excludes an oral or tacit acceptance. As no court has had any difficulty with this case, we need not consider it further.

In the case of the *second alternative* of Article II(2), an oral or tacit acceptance is also excluded. It is essential for the exchange requirement that both the proposal to arbitrate and the acceptance thereof are communicated between the parties. The text of Article II(2) does not leave any doubt on this point either: an exchange of letters or telegrams cannot mean anything else than that they are forwarded and replied to in written form. It means that an arbitration agreement which is proposed in writing and accepted orally or tacitly does not constitute an exchange of letters or telegrams.

The history of Article II(2) confirms that the drafters of the Convention wished to exclude the oral or tacit acceptance of a written proposal to arbitrate. Not without commercial sense, the Dutch delegate had proposed to add to Article II(2): "confirmation in writing by one of the parties [which is kept] without contestation by the other party".[217] The New York Conference was, however, open to the objections of the English and U.S.S.R. delegate to this proposal and rejected it.[218] Although the Dutch proposal concerned only the case of a sales or purchase confirmation, the voting of the delegates indicates that they deemed only the written acceptance of a proposal to arbitrate sufficient for the written form of the arbitration agreement.

It is the question of tacit acceptance, in particular, which has come up in practice in relation to the second alternative of Article II(2). With the exception of a Dutch Court of First Instance, the courts have unanimously affirmed that the tacit acceptance does not meet the written form requirement of Article II(2). Most of these cases involved a sales or purchase confirmation which will be discussed later.[219]

A decision of the Court of Appeal of Naples exemplifies clearly the distinction between tacit acceptance and acceptance in writing.[220] Four

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217. UN DOC E/CONF.26/L.54. The proposal was based on Art. 2(2) of the Convention on Jurisdiction of the Selected Forum in the Case of International Sales of Goods, The Hague, April 15, 1958 (not entered into force), translation in 5 *American Journal of Comparative Law* p. 653, which reads:

> "When an oral sale includes designation of the forum, such designation is valid only if it has been expressed or confirmed by a declaration in writing by one of the parties or by a broker, without having been contested."

218. UN DOC E/CONF.26/SR.22.

219. See *infra* II–2.4.2.

220. Corte di Apello of Naples, December 13, 1974, Frey et al. *v.* Cuccaro e Figli (Italy no. 11).

Austrian firms had sold and delivered to an Italian firm a certain quantity of wood. All four contracts contained an arbitral clause providing for arbitration at the Vienna Commodity Exchange. For some undisclosed reason, the Italian buyer had signed and returned only two contracts. When the Italian buyer delayed payment for the wood delivered to him, the four Austrian sellers initiated arbitration at the Vienna Commodity Exchange and obtained four awards in their favour. The Court of Appeal of Naples granted enforcement of the two awards which were based on the returned contracts, but refused to enforce the other two which were based on the contracts which had not been returned. The Court held that the arbitral clause in the non-returned contracts did not meet the written form of Article II(2) as no exchange had occurred.

This decision of the Court of Appeal of Naples also makes clear the difference between the validity of the contract in general and the formal validity of the arbitral clause contained therein under Article II(2) of the Convention. The arbitral tribunal in this case had held that the two non-returned contracts had also been validly concluded as the Italian buyer had taken delivery of the wood which amounted to tacit acceptance. The arbitral tribunal apparently considered that this also applied to the arbitral clause as it was presumably of the opinion that it was not concerned with Article II(2) of the Convention.[221] However, when it came to enforcement abroad, the Convention became applicable, and, irrespective of the validity of the other conditions in the contract under some domestic law, the arbitral clause was invalid as it did not meet the requirements of Article II(2).

The sole exception to the unanimous judicial affirmation that tacit acceptance does not comply with Article II(2) is a decision of the Court of First Instance of Rotterdam.[222] By a purchase order dated August 31, 1969, an Israeli buyer requested a Dutch seller to deliver a certain quantity of a chemical product. The Dutch seller confirmed the sale by the sending of a contract which included "Special Conditions". One of the Special Conditions was a clause providing for arbitration in Rotterdam. The Israeli buyer received the contract on September 16, 1969, but did not return the copy as was requested. Upon arrival of the goods in Haifa, the Israeli buyer complained about the quality. Thereafter, he requested the dissolution of the contract and damages before the Court of First Instance of Rotterdam. The Dutch seller objected to the competence of the Court on the basis of the arbitral clause in the contract sent by him to the Israeli buyer.

The Court accepted the objection of the Dutch seller, reasoning that there was a consent of the parties as regards the goods, price, quality, time and manner of delivery, and payment; the silence of the Israeli buyer in respect of the arbitral clause must be considered as a behaviour on the ground of which his acceptance of the

221. See for the question whether international arbitrators should observe Art. II(2) of the Convention, *supra* II–2.2.4.

222. Rechtbank of Rotterdam, June 26, 1970, Israel Chemical & Phosphates Ltd. *v.* N.V. Algemene Oliehandel (Neth. no. 1).

arbitral clause must be deemed to exist. The Court continued by observing that the arbitral clause was conspicuously printed, and that the Israeli buyer had only objected to it two months after the delivery. It held that under these circumstances the arbitral clause complied with Article II(2) of the Convention on the ground that this provision should interpreted according to its "spirit".[223]

Although the "spirit" of Article II(2) should indeed be taken into account in interpreting this provision, the decision of the Rotterdam Court is not in conformity with either the text of Article II(2) or the intent of its drafters. The sales confirmation should have been accepted in writing in this case, either by returning the copy or by some other means. The Court seems to have been influenced by Dutch law which indeed regards an arbitral clause valid in the above circumstances. The decision has, therefore, been rightly criticized.[224]

It may be questioned, however, whether the consequence of the exchange in writing requirement of Article II(2) that tacit acceptance is excluded conforms to the current practices of international trade. One may especially think of the situation where a contract including an arbitral clause is kept by a party without objection and that party performs under the contract. In such a case the conduct of the party indicates that he has accepted the contract. He can therefore be deemed to have consented to the arbitral clause in the contract, or, at least, the other party may be deemed to be entitled to expect so. In these circumstances the international business community generally regards the silent party as bound by the conditions set forth in the contract and considers it a "sham" when a party later objects for purely formalistic reasons. It must, however, be observed that this is not generally accepted for a sales and purchase confirmation sent after the conclusion of the transaction and in which conditions appear which have not been mentioned previously.

Whatever the generally accepted view of the international business community may be, Article II(2) would not allow a more liberal interpretation which would include the case of tacit acceptance. Nevertheless, this rather rigid aspect of Article II(2) may be migitated if the requirement of the written acceptance is liberally interpreted; in other words it should be readily assumed that a written acceptance is communicated. This interpretation will be elaborated in the following Subsection.

II–2.3.4 *Acceptance in writing of a contract containing an arbitral clause in the case of an exchange.*

In the foregoing we saw that an arbitral clause contained in a contract which is orally concluded, or orally or tacitly accepted, does not meet the written form requirement of Article II(2) of the Convention. In these cases there is neither an arbitral clause in a contract, the con-

223. The opinion of the Court in respect of Art. II(2) is quoted *supra* at n. 202.

224. P. Sanders, "Commentary", in *Yearbook* Vol. I (1976) p. 207 at p. 211. It may be

tract being signed by the parties (the first alternative) nor an arbitral clause in a contract contained in an exchange of letters or telegrams (the second alternative).

Leaving aside the first alternative, the *second alternative* of the exchange implies that there must be a written proposal to arbitrate which proposal is accepted in writing by the other party, and that acceptance is communicated to the party who made the proposal to arbitrate. The question to be considered here is when the requirement of such communication of acceptance in writing as imposed by the second alternative of Article II(2) can be deemed to be fulfilled. The question is essentially how specific the acceptance in writing should be.

The acceptance need not relate *specifically* to the arbitral clause in the contract. In II–2.3.2. *supra* it was explained that in the case of the first alternative the signatures for the contract including the arbitral clause as a whole were sufficient and that the arbitral claused need not be signed specifically. In the case of the second alternative the signatures are not essential, but the same principle must be deemed to apply by analogy. The acceptance in writing by whatever means need not be directed specifically to the arbitral clause in the contract; the acceptance of the contract as a whole fulfils the exchange requirement of Article II(2). If it were otherwise, it would mean that in all cases of a contract including an arbitral clause concluded by correspondence, the arbitral clause should be specifically approved in writing. It is obvious that this was never the intent of the drafters of the Convention who actually wished to enlarge the possibilities of agreeing to arbitration in the international context by adding the second alternative.

Accordingly, the view of the majority of the Italian courts that an arbitral clause in contract forms or standard conditions should be specifically approved in writing is contrary to Article II(2). These decisions are either an application of Articles 1341 and 1342 of the Italian Civil Code or are influenced by these Articles. They will be considered in a separate Paragraph.[225]

The Court of First Instance of the Canton Geneva seems also to be of the opinion that a specific acceptance of the arbitral clause is needed for the fulfilment of the second alternative of Article II(2).[226]

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added that this case is not to be viewed from the angle of estoppel (see *supra* II–2.2.3(c)) on the ground that the Israeli buyer had objected to the arbitral clause only two months after delivery. Estoppel in the sense as used in the text assumes that the party has acted specifically in respect of the arbitral clause as if he considered himself bound by it.

225. See *infra* II–2.4.3.2 concerning Arts. 1341 and 1342 of the Italian Civil Code.

226. Tribunal of the Canton Geneva (6th Chamber), June 8, 1967, J.A. van Walsum N.V. *v.* Chevalines S.A. (Switz. no. 1), comment by M. Schwartz, "La forme écrite de l'art. II, al. 2 de la Convention de New-York pour la reconnaissance et l'exécution des sentences arbitrales étrangères, du 10 juin 1958", 64 *Revue Suisse de Jurisprudence* (1968) p. 49.

Although the case involved a sales confirmation, which will be dealt with later [227], it may be discussed in the context of the present question of specific acceptance because the requirements of Article II(2) for an arbitral clause in a contract are basically the same as for an arbitral clause in a confirmation.

A Swiss company had reached an oral agreement with a Dutch company concerning a certain quantity of Argentinean horse meat. Thereupon, on June 3, 1966, the Dutch seller sent a sales confirmation containing an arbitral clause providing for arbitration in Rotterdam under the Arbitration Rules of the Netherlands Oils, Fats and Oilseeds Association (NOFOTA). The Swiss buyer did not answer the sales confirmation, but on June 15, 1966, he opened a letter of credit in favour of the Dutch seller. When a dispute arose, the Swiss buyer refused to appear before the arbitral tribunal, asserting that it lacked competence as he had not agreed to arbitration. In the award the arbitral tribunal held that it did have competence on the ground that the Swiss buyer had kept the sales confirmation without objection. It awarded in favour of the Dutch seller.

The Court of First Instance of the Canton Geneva refused the enforcement of the award essentially because the sales confirmation had not been accepted in writing by the Swiss buyer, and hence no exchange in writing within the meaning of Article II(2) had occurred. To this point the reasoning of the Geneva Court can be considered to be in conformity with the prevailing interpretation of Article II(2). The Court added, however, that the latest document was the letter of credit, which document, as the Court said, "did not mention the arbitral clause or the arbitral tribunal." This gives rise to the question what the Court would have held if the letter of credit had referred to the sales confirmation in general. Would the Court have considered this sufficient for compliance with Article II(2)? This would probably not have been the case because the Court did not mention that after the sending of the sales confirmation, an exchange of telexes had taken place between the parties. From this exchange it appeared that the Swiss buyer considered himself bound by the sales confirmation. The arbitral clause was, however, not specifically mentioned in this exchange.[228] The omission to mention these facts has presumably been prompted by the view that a specific acceptance of the arbitral clause is needed for the arbitral clause. As explained before, this view must be deemed inconsistent with Article II(2) for the second alternative as, it may be repeated, it is the case for the first alternative.[229]

It has been advanced that the decision of the Geneva Court is an application of the separability doctrine according to which the arbitral clause is an agreement independent from the contract in which it is contained.[230] This opinion carries the separability doctrine too far. The doctrine has been developed in order to preclude that the invalidity of the main contract would entail the invalidity of the arbitral clause contained therein. From the purely theoretical point of view, two agreements are indeed concluded: the main contract and the arbitral clause in that contract. But this does not require that consent be given twice. It has never been doubted that consent for the main contract signifies at the same time consent for the arbitral clause.

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227. See *infra* II–2.4.2.

228. This fact was revealed by Schwartz, *supra* at n. 226, p. 49 and 51.

229. In the same critical sense, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 347. Schwartz, *supra* at n. 226, p. 51, considered the decision "très satisfaisant".

230. Schwartz, *supra* at n. 226, p. 51. See for the separability of the arbitral clause, *supra* II–1.3.1.2.

The specific acceptance of the arbitral clause not being necessary, when can the exchange then be deemed accomplished by written acceptance? Obviously there is such acceptance if a party writes, cables or telexes back stating explicitly that he accepts the contract or confirmation. Similarly, if a party returns a duplicate of the same, the exchange of Article II(2) can be held to be completed.

But we may go further. It frequently occurs that whilst a contract or confirmation including an arbitral clause is not explicitly accepted in writing as such, the other party *refers to it* in a subsequent letter, telegram, telex, invoice, letter of credit, etc. Such a corresponding declaration in writing may also be considered as a completion of the exchange in writing within the meaning of Article II(2). It is on this point where an interpretation according to the "spirit" of Article II(2) may be justified. The text of Article II(2) itself would not preclude such interpretation. It could result in the upholding of the formal validity of the arbitration agreement in a greater number of cases under the Convention, and thus help to mitigate the rather demanding requirements of its Article II(2).

The courts have so far paid little attention to this aspect of the exchange in writing under Article II(2). One of the few cases in support of the above interpretation is a decision of the Court of Appeal of Florence, which, like several other Italian courts of appeal, has shown itself to be more Convention-minded than the highest Court.[231] The case involved the following facts. Bobbie Brooks from Ohio had bought from the Italian wool factory Walter Banci a certain quantity of textiles by three purchase orders which included a clause providing for arbitration in Ohio according to the Arbitration Rules of the American Arbitration Association. The invoices directed to Bobbie Brooks were made by Walter Banci and referred specifically to the numbers of the purchase orders.

When a dispute evolved about the quality and the quantity of the wool delivered, Bobbie Brooks started arbitration, but Walter Banci refused to participate. The award was made in favour of Bobbie Brooks. Before the Court of Appeal of Florence, Walter Banci opposed the request for enforcement, inter alia, on the ground that he had not agreed to arbitration. The Court of Appeal held that the contrary was true: the invoices originating from Walter Banci mentioned specifically the numbers of the purchase orders. The Court considered that this

231. Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29). It should, however, be observed that, apparently for "security's sake" but nevertheless improperly, the Court considered the formal validity of the arbitral clause also under United States law. The Corte di Cassazione in this case (Italy no. 40) held that Art. II(2) was inapplicable because it concerned the enforcement of an *award*; see *infra* II–4.1.3.3. See for another example of the pro-Convention attitude of certain Italian courts of appeal, *supra* at n. 161-162.

constituted an exchange of documents within the meaning of Article II(2) of the Convention.

The view of the Court of Appeal of Florence reflects an interpretation which takes due account of the reality of international trade. The Court does not require a specific acceptance of the arbitral clause. Nor does the Court require an explicit acceptance of the document containing the arbitral clause – i.e., the purchase orders. It regards the indication of the numbers of the purchase orders on the invoices communicated to the other party as a sufficient written manifestation of the will to be bound by the conditions contained in the purchase orders, including the provision for arbitration.

It may be added that some international arbitrators have interpreted Article II(2) in the same liberal sense. An illustrative example is an award rendered under the auspices of the Netherlands Hide and Leather Exchanges Association.[232] On March 8, 1979, a Dutch company had sold, through its Italian agent, 5.000 calf-skins to an Italian company, to be delivered in March-April 1979. On the same day the Dutch seller sent a sales confirmation identified by a number. The confirmation contained the essentials of the agreement as well as the provision for arbitration "in Rotterdam as per the terms of the [Netherlands Hide and Leather Exchanges]" and referred further to the conditions of the International Hide & Skin Contract No. 1. The Italian buyer did not return a copy of the sales confirmation. On April 5, 1979, he sent a telex to the agents of the Dutch seller in which he referred to the number of the sales confirmation and asked to postpone the shipment for two months as he had no storage available for the skins. After a further exchange of telexes, the Italian buyer refused to take delivery and asserted that he was not bound by the sales confirmation as he had not returned it. The arbitrators rejected this assertion. As regards the arbitral clause in the sales confirmation, the arbitrators observed that "the arbitral clause must be considered as being contained in an exchange of letters or telegrams and is therefore valid according to Article II(2)".

II–2.3.5 *The submission agreement*

The foregoing Sub-sections were concerned mainly with the formal validity pursuant to Article II(2) of the clause in a contract to submit future disputes to arbitration. The question when a submission agreement, by which an already existing dispute is submitted to arbitration, complies with Article II(2) was mentioned only incidentally because almost all cases reported under the Convention concerned the arbitral clause. Submission agreements are concluded relatively rarely in prac-

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232. Award of December 3, 1979, published in *Tijdschrift voor Arbitrage* (Neth.) (1981 no. 1) p. 13, award no. 5. See for the question whether international arbitrators should observe Art. II(2) of the Convention, *supra* II–2.2.4. In the same sense award of October 30, 1980, published in *Tijdschrift voor Arbitrage* (1980 no. 6) p. 169, award no. 40, in which the arbitrators held that Art. II(2) was complied with because the party who contested the formal validity of the arbitral clause contained in the contract had referred to the contract number in a subsequent cable. See text quoted *supra* at n. 195.

tice; consequently, arbitral clauses, being one of the terms of a contract, are open to more problems.

As noted before, the Convention follows the modern trend not to distinguish between the arbitral clause and the submission agreement and puts both types of arbitration agreement on the same footing.[233] By the same reasoning, the observations made in the foregoing Subsections apply to the submission agreement in those cases where they are relevant for this type of arbitration agreement. It means, in essence, that the submission agreement must either be signed by both parties, or be concluded by an exchange of written communications. An orally concluded submission agreement, or a written submission agreement which is orally or tacitly accepted, does not comply with Article II(2).

One of the rare cases in which the conclusion of a submission agreement has been questioned under the Convention concerned the second alternative of a conclusion by an exchange of letters. The case was decided by the Court of First Instance of Bremen.[234]

A German buyer and a French seller had a dispute with respect to a transaction in wool products. By two letters dated December 5, 1964, and February 5, 1965, the French seller mentioned "international arbitration". In a subsequent letter, dated April 1, 1965, the French seller referred to "International Wool Arbitration". On June 14, 1965, the German buyer wrote back: ". . . We have no other possibility than to go to arbitration. You have already proposed this possibility in your letter of December 5, 1964. We, from our side, are prepared to do so."

Pursuant to Article III of the London International Wool Arbitration Agreement, arbitration must take place in the country of the seller, which was in this case France. In this connection the International Wool Arbitration Agreement refers to the "Arbitration Rules Concerning the Application of the Arbitral Procedure in France". When the French seller initiated arbitration at the Arbitral Tribunal of the Central Wool Committee in Paris in conformity with these Arbitration Rules, the German buyer refused to participate, arguing that he had not agreed to this specific type of arbitration.

He used the same argument for opposing, before the Court of First Instance of Bremen, the enforcement of the award made in favour of the French seller. The Court rejected the argument of the German buyer by stating that:

> "It appears unequivocally from the context that 'international arbitration' means the International Arbitral Tribunal of the Central Wool Committee in Paris . . . . The respondent has agreed in his letter of June 14, 1965, with the proposal of the claimant to resort to arbitration at the Central Wool Committee. It is true that the respondent referred to 'an arbitration' in this letter. However, it cannot be inferred therefrom, as the respondent maintains, that they had merely agreed to go to some arbitral tribunal on which they still would have to agree. The respondent has agreed by referring to the letter of December 5, 1964, to resort to the arbitral tribunal proposed therein . . .".

Although one can agree with the result, the reasoning of the Bremen Court is not

233. See *supra* II–1.2.2 ("Actual Submission to Arbitration Not Required").

234. Landgericht of Bremen, June 8, 1967 (F.R. Germ. no. 3). See for another case involving a submission agreement, Oberster Gerichtshof, November 17, 1971 (Austria no. 2), discussed *infra* at n. 237.

entirely satisfying. In fact, the German buyer agreed to the proposal contained in the letter of December 5, 1964, which, according to its wording, referred to international arbitration in general only. The German buyer did not refer expressly to the letter of April 1, 1965, in which a specific reference was made to international wool arbitration. Of course, the argument of the German buyer was weak: both parties were conversant with wool trade and well knew what was meant by arbitration in their trade. The Court could have said so explicitly, instead of using vague words like "the context". On the other hand, the Court was probably right in not mentioning the non-objection to the letter of April 1, 1965, in which reference was made to international *wool* arbitration. This could have been considered as to amount to a tacit acceptance which is excluded from Article II(2) of the New York Convention.

II–2.4 Specific Cases

II-2.4.1 *Exchange of telexes*

It is generally accepted that the expression in Article II(2) "contained in an exchange of letters or telegrams" should be interpreted broadly as to also comprise other means of communication, especially telexes.[235] This interpretation is justified by the already mentioned purpose for which the second alternative was added to Article II(2) of taking account of the current practices of concluding contracts in international trade. It is further clarified in the first part of Article I(2)(a) of the European Convention of 1961 which, as noted, is almost identical to Article II(2) of the New York Convention, as it states "contained in an exchange of letters, telegrams, *or in a communication by teleprinter*" (emphasis added).[236]

The question whether telexes are to be considered as included in Article II(2) of the Convention has been dealt with by the Austrian Supreme Court.[237] The case involved a submission agreement between a Swiss and an Austrian party concluded by an exchange of telexes, providing for arbitration at the Vienna Commodity Exchange. The Austrian party asserted that under Austrian law an exchange of telexes is not sufficient for the written form of the arbitration agreement.[238] After having determined that the arbitration agreement fell under the Convention as it had an international character and that the form of the arbitration agreement was exclusively governed by Article II(2), the

235. K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 345; Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 31 n. 10; P. Schlosser, *Das Recht der Internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 343, who retracted explicitly his earlier view that domestic law should determine this question (at n. 3); G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.B.3 and authors cited at n. 45.

236. See text to *supra* n. 164-165.

237. Oberster Gerichtshof, November 17, 1971 (Austria no. 2).

238. This is indeed the case under Austrian law, see W. Melis, "National Report Austria", in *Yearbook* Vol. IV (1979) p. 21 at p. 24.

Court held that telexes were to be equated to telegrams. In this connection the Court referred to the above-mentioned Article I(2)(a) of the European Convention of 1961.[239]

There are other means of communication, not mentioned by Article II(2), which are to be considered on the same basis as telexes, by which an exchange in writing within the meaning of Article II(2) can be achieved. This would apply, for instance, to telecopiers and computer networks. So far no court has dealt with these other means of communication in relation to Article II(2).

II–2.4.2 *Sales and purchase confirmation*

As we have already encountered the sales or purchase confirmation at various places in this Part, we may be relatively brief in discussing this specific case of Article II(2). Nevertheless, a separate discussion is necessary because of the particularities of the confirmation and the important role it plays in international trade.

The use of the sales or purchase confirmation is widespread in international trade, especially the commodity branch. It is quite common that the parties reach an oral agreement by telephone on the essentials of the transaction, and that thereafter the seller or buyer sends a confirmation of the transaction in which the essentials are reduced to writing. Invariably the confirmation also contains, or refers to [240], the other conditions of sale or purchase which may include an arbitral clause. This has given rise to the question, dealt with in a fairly large number of court decisions, of when the arbitral clause in the confirmation meets Article II(2) of the Convention.

Basically, as far as the arbitral clause in the confirmation is concerned, it must comply with the formal requirements of Article II(2) just as an arbitral clause in an ordinary contract must do. For the confirmation it means that either

– the first alternative: the same confirmation is signed by both parties (see II–2.3.2 *supra*); or

– the second alternative: the duplicate is returned whether signed or not (see II–2.3.2 and 3 *supra*); or

– the second alternative: the confirmation is subsequently accepted by means of another communication in writing (see II–2.3.4 *supra*).

A classic scenario for the confirmation is that a duplicate is enclosed with the request to sign and return it, but that the latter is not

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239. The Tribunal of the Canton Geneva (6th Chamber), June 8, 1967, J.A. van Walsum N.V. *v.* Chevalines S.A. (Switz. no. 1) considered it self-evident that Art. II(2) includes an exchange of telexes as it referred to it without discussion, see text of decision quoted *supra* at n. 212. See also the award discussed *supra* at n. 232.

240. See for the question of incorporation by reference, *infra* II–2.4.3.3.

done, whilst no objection is made to the conditions in the confirmation either.[241] National laws differ on the question whether this silence by the other party in regard to the conditions can be equated to an acceptance thereof. A distinction is sometimes made between the case where the transaction is subsequently performed and where it is not, and between the case where the parties are accustomed to contract on the basis of the same conditions and where the transaction is an one-off deal, but these distinctions are not generally accepted.[242]

Whatever may be the binding force of the other conditions in the confirmation under the applicable law, the arbitral clause does not comply in this case with the written form as required by Article II(2) of the Convention as a tacit acceptance is not sufficient for compliance with Article II(2). This also applies, of course, to an oral acceptance. Similarly, if the parties agreed upon certain conditions including an arbitral clause when concluding the transaction orally, and a party subsequently sends a confirmation containing these conditions, but the confirmation is not accepted in writing by the other party, the arbitral clause does not meet Article II(2).

It may be recalled that one of the few discussions at the New York Conference concerning Article II(2) had precisely as object the confirmation. The Conference rejected the proposal to add to Article II(2) "confirmation in writing by one of the parties [which is kept] without contestation by the other party".[243] It makes unequivocally clear the intent of the drafters of the Convention to exclude from Article II(2) the formal validity of an arbitral clause in a confirmation which is not accepted in writing.

The rule that an arbitral clause in a confirmation in respect of which the recipient has remained silent does not comply with Article II(2) of the Convention is almost universally affirmed by the courts. The only exception is the Court of First Instance of Rotterdam, which decision has been discussed before.[244] The courts also decided for non-compliance with Article II(2) in those cases where the party who had not reacted to the confirmation, had performed under the agreement.

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241. Another classic scenario is that each party sends his own confirmation with differing conditions. This problem is known as the "*battle of forms*". As this problem has not yet come up in relation with Art. II(2) of the Convention, it will not be discussed. It may be argued that if the arbitral clauses in both confirmations conflict with each other, there is no acceptance in writing for either clause, and Art. II(2) is not met in this case.

242. There exist only a few comparative studies on the problems posed by sales and purchase confirmations. They are dealt with *passim* in R. Schlessinger ed., *Formation of Contracts. A Study of the Common Core of Legal Systems* (Dobbs Ferry 1968). See also O. Sandrock ed., *Handbuch der Internationalen Vertragsgestaltung* (Heidelberg 1980) Vol. I, Part B, nos. 38-40, 83, 108, 119, 135, 144, 149, 152 and 161.

243. See *supra* n. 217–218.

244. Rechtbank of Rotterdam, June 26, 1970, Israel Chemicals & Phosphates Ltd. *v.* N.V. Algemene Oliehandel (Neth. no. 1), discussed *supra* at n. 222-224.

However, in the case where the confirmation itself, or the duplicate, was found not to have been returned, few courts investigated whether mention was made of the confirmation in subsequent communications in writing emanating from the other party, such as a letter, telex, invoice, letter of credit etc.[245] As explained in II–2.3.4 *supra*, the latter can also be deemed to complete the exchange in writing of Article II(2).

Examples of the court decisions concerning Article II(2) and the confirmation including an arbitral clause are the following.

Court of First Instance of Zweibrücken: without having signed, Dutch seller sent sales confirmation to German buyer who signed and returned it. *Held* – arbitral clause in confirmation complies with Article II(2).[246]

Court of Appeal of Düsseldorf: sales confirmation sent by Dutch seller was not returned nor objected to by German buyer who took delivery and subsequently complained about the inferior quality of the goods. The parties had regularly done business on the basis of the same sales confirmation. *Held* – the arbitral clause in the sales confirmation does not comply with Article II(2).[247] The same was held in an identical case by the Court of First Instance of Munich.[248]

Court of First Instance of Biella: sales confirmation sent by French seller was signed and returned by Italian buyer who took partial delivery but refused the remaining part. *Held* – arbitral clause in sales confirmation complies with Article II(2).[249]

German Supreme Court: *Schlussbrief* (sales note) of the Vienna Commodity Exchange sent by Austrian seller was not returned nor objected to by German buyer who took delivery and subsequently complained about the inferior quality of the goods. *Held* – the arbitral clause in the *Schlussbrief* does not comply with the first part of Article I(2)(a) of the European Convention of 1961 (which is almost identical to Art. II(2) of the New York Convention).[250]

It should be observed that the German Supreme Court considered in this case the *Schlussbrief* (sales note) as synonymous with the sales confirmation which is called in German *Bestätigungsschreiben*. It appears, however, that under Austrian law a *Schlussbrief* is legally different from a sales confirmation in that the former is constitutive whilst the latter is confirmative.[251]

See also the Court of First Instance of Geneva which is discussed in II–2.3.4 above.

245. In this sense, for example, the award of December 3, 1979, of the Netherlands Hides and Skins Exchanges, discussed *supra* at n. 232.

246. Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16).

247. Oberlandesgericht of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8).

248. Landgericht of Munich, June 20, 1978 (F.R. Germ. no. 19).

249. Tribunale of Biella, February 7, 1978, Filatura Abate Giuseppe e Figli S.a.S. *v.* S.A. Paul Azais et Cie (Italy 31).

250. Bundesgerichtshof, May 25, 1970 (F.R. Germ. no. 7). See for the text of Art. I(2)(a) of the European Convention of 1961, *supra* at n. 164-165.

251. See E. Mezger in his comment on this decision, "Du consentement en matière 'd'electio juris' et de clause compromissoire", 50 *Revue critique de droit international privé* (1971) p. 37 at p. 58. See also W. Melis, "National Report Austria", in *Yearbook* Vol. IV (1979) p. 21 at p. 24.

II–2.4.3 *Standard conditions*

II–2.4.3.1 *Autonomous interpretation of Article II(2)*

Currently the great bulk of international transactions is concluded on the basis of standard conditions. This applies especially to the international commodity trade, transport, construction, shipbuilding, and insurance. The phenomenon has led certain authors to regard standard conditions as a major source for an emerging new *lex mercatoria.*[252]

Despite the widespread use of standard conditions in international trade, it is surprising how little has been published regarding their legal implications.[253] It contrasts sharply with the abundance of literature relating to standard conditions as used in the domestic field and which is especially concerned with consumer protection. The absence of literature concerning the legal aspects of standard conditions in international trade is also felt for the question of standard conditions and Article II(2) of the Convention. Although it has been subject to a fairly large number of court decisions in the Contracting States, few authors have paid attention to the question when an arbitral clause in standard conditions can be deemed to comply with Article II(2).[254]

For the purposes of this question, the appearance of standard conditions may be roughly divided into three categories:

(i) in the body of the contract;
(ii) on the back of the contract;
(iii) in a separate document.

Under the national laws these categories have two main questionable issues. The first question, pertaining to all three categories, is that various national laws treat standard conditions as adhesion contracts and accordingly, subject them, or certain clauses contained in them, such as the arbitral clause, to specific requirements. The second question, pertaining to categories (ii) and (iii), is the incorporation by reference. Generally, a reference in the body of the contract is required;

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252. J. Kropholler, *Internationales Einheitsrecht – Allgemeine Lehren* (Tübingen 1975) p. 119; C. Schmitthoff, "The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions", 17 *International and Comparative Law Quarterly* (1968) p. 551. A problem is that still no uniformity of standard conditions exists in the various branches of international trade; see for a survey of the attempts to unify standard conditions, C. Schmitthoff, *The Export Trade*, 7th ed. (London 1979) p. 41.

253. The authors cited in *supra* n. 252 deal mainly with standard conditions in international trade as a possibility for a new *lex mercatoria*. One of the few comparative studies regarding standard conditions is the dissertation of E. Hondius, *Standaardvoorwaarden* [Standard Conditions] (Deventer 1978), with a summary in English at p. 845. See also O. Sandrock, *Handbuch der Internationalen Vertragsgestaltung* (Heidelberg 1980) Vol. I, Part B, nos. 31-179.

254. As far as it could be researched, the only author who has dealt with this problem to a certain extent is P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 348. A few other authors have made some incidental observations regarding this problem; they will be mentioned where appropriate.

however, the national laws differ on the degree of specificity required for the reference clause in order to incorporate effectively the standard conditions, and especially the arbitral clause contained in them, into the contract.

The text of Article II(2) is silent in respect of an arbitral clause in standard conditions. Must the two aforementioned questions then be resolved on the basis of some muncipal law, or is an autonomous interpretation of Article II(2) for both questions possible? The following arguments favour such an autonomous interpretation.

At the outset it should be observed that if municipal law were to play a role in resolving both questions, the unifying effect of Article II(2) in regard to the form of the arbitration agreement would be greatly undermined since the vast majority of international contracts is based on standard conditions. The interference of municipal laws would create much uncertainty as they differ on the question of the treating of standard conditions as adhesion contracts and the degree of specificity required for the reference clause. This uncertainty would be aggravated by the question which municipal law is to be applied for resolving both questions. It is obvious that such interference is undesirable. Moreover, it may be deemed unnecessary, as will be explained for each question individually.

As far as the treatment of standard conditions as adhesion contracts s concerned (i.e., the first question), for which reason several national aws impose specific requirements for standard conditions or certain clauses contained therein such as the arbitral clause, Article II(2) can be aid to meet, to a large extent, the concerns of the national legislators. The specific requirements under the national laws are generally enacted o protect the weaker party and to ensure that he has the freedom to consent. Article II(2) itself poses fairly demanding requirements for the orm of the arbitration agreement, as it requires either a contract signed by both parties or an exchange in writing in which case the acceptance oo must be in writing. It offers therefore, in principle, an opportunity or a party to reject a proposed arbitral clause contained in standard onditions. Of course, the opportunity must also really exist. Thus, where the contract refers to standard conditions including an arbitral lause to be found in another document, the other party must be able o check the reference. We will subsequently refer to this aspect.

Article II(2) may therefore be interpreted autonomously as far as the dhesion contract aspect is concerned. It means that if the otherwise pplicable law poses a requirement which is more demanding than Article II(2) because of the adhesion contract character of the arbitral lause in standard conditions, that requirement is superseded by Article I(2). This applies especially to the requirement of a specific approval in writing of an arbitral clause in contract forms and standard conditions s imposed by Articles 1341 and 1342 of the Italian Civil Code. In fact,

the question of Article II(2) and standard conditions including an arbitral clause as adhesion contract has only come up before the courts in relation with these provisions of Italian law, which will be examined separately in the following Paragraph. The Italian courts do not adhere to an autonomous interpretation on this question, but resort to municipal law. On the other hand, one United States court overruled the applicability of these provisions of Italian law.[255] Other courts have not yet had an occasion to deal with the question of the adhesion contract character of standard conditions including an arbitral clause in relation to Article II(2).

The second question of the incorporation of the arbitral clause in the standard conditions into the body of the contract may also be solved by means of an autonomous interpretation of Article II(2). The text of Article II(2) of the Convention implies that a reference to the standard conditions including an arbitral clause is required in any case. This is made clear by the wording "an arbitral clause *in* a contract . . . or contained *in* an exchange of letters of telegrams". If there is no reference, the arbitral clause cannot be considered to be "*in*" the contract. Accordingly, some sort of a reference in the body of the contract to the standard conditions is, in any case, necessary for compliance with Article II(2). Thus where some municipal laws regard mere custom sufficient for the applicability of the arbitral clause in the standard conditions [256], this does not comply with the written form requirement of Article II(2).

The question is, however, in which cases the reference can be deemed sufficient for compliance with Article II(2). The national laws differ in this respect as to the degree of specificity needed for the reference clause. They range from a general reference to a reiteration of the arbitral clause in the reference clause. The courts have been generally vague as to whether this question is to be solved on the basis of some municipal law or an interpretation of Article II(2).

The autonomous interpretation for the second question could be based on the purpose of the written form requirement of Article II(2). As explained earlier, that purpose is to ensure that a party is aware that he is agreeing to arbitration. For determining when this purpose is fulfilled in the case of a reference to standard conditions including an arbitral clause, the test could then be whether the reference can be checked by a party exercising reasonable care.[257]

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255. U.S. District Court for New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20), discussed at *infra* n. 274.

256. This is for example the case under Dutch law.

257. A similar text has been adopted by the European Court of Justice in respect of the form of the forum selection agreement as required by Art. 17(1) of the European Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments, signed at Brussels, September 27, 1968. Art. 17 requires a forum selection agreement to be concluded "in writing or

The second question of incorporation by reference will be examined in more detail for the categories (ii) and (iii) of standard conditions in II–2.4.3.3 *infra*. Before making this examination, we will first deal with the famous Articles 1341 and 1342 of the Italian Civil Code, which provisions relate to both questions.

II–2.4.3.2 *Articles 1341 and 1342 of the Italian Civil Code*

Article 1341 of the Italian Civil Code provides:

"1. Le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell' altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l'ordinaria diligenza.

2. In ogni caso non hanno effetto, se non sono specificamente approvate per iscritto, le condizioni che stabiliscono, a favore di colui che le ha predisposte, limitazioni di responsabilità, facoltà di recedere dal contratto o di sospenderne l'esecuzione, ovvero sanciscono a carico dell'altro contraente decadenze, limitazioni alla facoltà di opporre eccezioni, restrizioni alla libertà contrattuale nei rapporti con terzi, tacita proproga o rinnovazione del contratto, clausole compromissorie o deroghe alla competenza dell'autorità giudiziaria."

"1. The standard conditions prepared in advance by one of the parties are effective as to the other if at the time of the conclusion of the contract the latter knew of them or should have known of them by using ordinary diligence.

2. In any case conditions are ineffective unless specifically approved in writing, which establish, in favour of him who has prepared them in advance, limitations on liability, the power of withdrawing from the contract or of suspending its performance, or which stipulate to the detriment of the other party time limits, limitations on his power to raise defences, restrictions on his contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitral clauses or clauses by which the competence of the judiciary is derogated from."

Article 1342 of the Italian Civil Code provides:

"1. Nei contratti conclusi mediante la sottoscrizione di moduli o formulari, predisposti per disciplinare in maniera uniforme determinati rapporti contrattuali, le clausole aggiunte al modulo o al formulario prevalgono su quelle del modulo o del formulario qualora siano incompatibili con esse, anche se queste ultime non sono state cancellate.

"1. In those contracts concluded by means of signing models or forms which are prepared in advance in order to regulate certain contractual relations in a uniform manner, the clauses added to the model or form prevail over those of the model or form in case the latter are incompatible with the former, even if the latter have not been striken off.

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by an oral agreement confirmed in writing". See the judgment of the Court of December 14, 1976, in the case 24/76, Colzani *v.* Rüwa, quoted *infra* at n. 309.

2. Si osserva inoltre la disposizione del secondo comma dell'articolo precedente."	2. In addition, the provisions of the second paragraph of the preceding Article are applicable." [258]

Article 1341 regulates in the first paragraph the more general problem of incorporation of standard conditions. In the second paragraph it regulates the more specific problem of so-called "one-sided clauses", one of which is the arbitral clause. It requires that the one-sided clauses be specifically approved in writing. Article 1342 regulates in the first paragraph that for contract forms added clauses prevail over the printed ones. The second paragraph provides that in contract forms, too, the one-sided clauses must be specifically approved in writing.[259]

According to its text Article 1341 applies only if a party has prepared the standard conditions in advance. The Italian courts have interpreted this as referring to the situation where one of the parties *uses* standard conditions for the *generality* of his customers. The conditions need therefore not be prepared by himself; what is decisive is that he uses the same standard conditions for his customers.[260] This is different for Article 1342 under which it is immaterial whether the contract form is used by a party as his standard conditions.

Important for Article II(2) of the Convention is that Articles 1341 and 1342 require that an arbitral clause in standard conditions or in contract forms 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

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258. These provisions have been taken over literally in Libyan law: Arts. 150-151 of the Al-Qanun al Madani [Civil Code] of 1953, cited by Hondius, *supra* n. 253, at p. 176; see also A. Buzghaia "National Report Libya", in *Yearbook* Vol. IV (1979) p. 148 at p. 149. In this connection Art. 750 of the Egyptian Civil Code of 1948 may also be quoted: "The following clauses are null and void: ... 3. The arbitral clause contained in general conditions on a printed policy, which is not in the form of a special agreement distinct from the general conditions." (cited by Hondius at p. 173).

259. See generally, G. Gorla, "Standard Conditions and Form Contracts in Italian Law", 11 *American Journal of Comparative Law* (1962) p. 1. This is one of the sparse articles in English language which could be found on Arts. 1341 and 1342 of the Italian Civil Code. The Italian literature is abundant which is mainly due to (or has led to?) the flood of court decisions to which Arts. 1341 and 1342 have given rise. A survey of the court decisions can be found in R. Nicolò and M. Stella Richter, *Rassegna di giurisprudenza sul Codice civile*, Book IV, Part II (Arts. 1321-1410), 2nd ed. by A. de Martini and G. Ruoppolo (Milan 1971).

260. Gorla, *supra* n. 259 at p. 4 and 8. In this sense must be understood the observation of the Italian Supreme Court in its decision no. 3989 of May 12, 1977, Scherk Enterprises A.G. *v.* Société des Grandes Marques (Italy no. 28) that the specific written approval of an arbitral clause is required by Art. 1341 if the arbitral clause is contained in standard conditions which have been fixed in advance by one of the parties in order to regulate in a uniform manner an unlimited series of contractual relationships. The same applies to Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27) in which it was observed that the standard conditions in question (i.e., Grain Contract No. 14 of Paris) had not been determined by one of the parties, in which case there exists an adhesion contract as envisaged by Art. 1341, but by a third person, and hence the specific approval in writing requirement was not applicable.

the arbitral clause.[261] There are several exceptions to this formal requirement.[262] We may mention two of them. The first exception we have seen: the specific approval in writing requirement is not applicable if the contract is concluded abroad.[263] The second exception is that no specific approval in writing is required if the contract results from negotiations between the parties.[264]

The specific approval in writing as required by Articles 1341 and 1342 of the Italian Civil Code is evidently more demanding than Article II(2) of the Convention, which requires only a signature for the contract as a whole, or even no signature at all in the case of a contract concluded by an exchange of letters or telegrams.[265] This raises the question whether the specific approval in writing requirement of Articles 1341 and 1342 for an arbitral clause in standard conditions and contract forms is superseded by Article II(2) of the Convention. The majority of the Italian courts, and especially the Italian Supreme Court, answer the question in the negative. They consider this question from the angle of the applicable law as determined by the conflict rules contained in Article 26 of the Italian General Provisions of Law.[266] After what has been argued in the foregoing it will be clear that, in my opinion, the answer must be deemed to be affirmative. In II–2.2.2 *supra* it was argued that Article II(2) constitutes an internationally uniform rule for the form of the arbitration agreement. It would be superfluous to repeat here the Italian decisions and my arguments against them mentioned in that Sub-section. Furthermore, the underlying policy of Articles 1341 and 1342 to remedy the abuse of standard conditions and of contract forms can be deemed to be largely met by the rather demanding requirements for the written form of the arbitration agreement of Article II(2). That aspect has been discussed in the preceding Paragraph. The view of the majority of the Italian courts that

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261. Gorla, *supra* at n. 259, p. 12.

262. See for a list of these exceptions, Gorla, *supra* n. 259, p. 15.

263. See *supra* II–2.2.2.

264. E.g., Corte di Cassazione (Sez. I), April 18, 1978, no. 1842, Eugenio Menaguale *v.* Intercommerce (Italy no. 25): specific approval in writing requirement of Art. 1341 was held not to be applicable because the contract resulted from negotiations between the parties and both parties had cooperated in the selection of documents to be referred to. Corte di Cassazione (Sez. Un.), May 12, 1977, no. 3989, Scherk Enterprises A.G. *v.* Société des Grandes Marques (Italy no. 28): specific approval in writing requirement of Art. 1341 was held not to be applicable, inter alia, on the ground that the license agreement in question resulted from negotiations of the parties in view of a specific contract which could be inferred from the nature of the agreement, the relationship between the parties and the manner in which the negotiations took place, especially the correspondence between the parties.

265. See for the question of signatures and Art. II(2), *supra* II–2.3.2.

266. See for Art. 26 of the General Provisions of Law, *supra* II–2.2.2. There are, however, some indications that the Italian Supreme Court may be prepared to accept the exclusivity of Art. II(2) for the formal validity of the arbitration agreement, see Corte di Cassazione (Sez. Un.), September 11, 1979, no. 4746, Lloyd Continental *v.* S.p.A. Navigazione Alga (Italy no. 38), discussed *supra* at n. 159.

Articles 1341 and 1342 are not superseded by Article II(2) has been criticized by many authors and has been qualified as "parochial".[267]

It is said that the Italian Supreme Court has not ruled on the question but has limited itself to affirming that Articles 1341 and 1342 do not apply to contracts concluded abroad.[268] However, there is at least one decision in which the Supreme Court can be deemed to have applied Articles 1341 and 1342; it is its decision of 1977 in the matter of *Begro* v. *Voccia.*[269]

The Italian firm Voccia sued another Italian firm, Lamberti, before the Italian courts for non-delivery of a certain quantity of potatoes. Lamberti requested in turn the joinder of its supplier, the Dutch firm Begro. Begro objected to the competence of the Italian courts to hear the dispute on the basis of the arbitral clause contained in the printed contract form concluded between it and Lamberti. The case was finally brought before the Supreme Court on the jurisdictional issue. The latter Court determined first that the contract was concluded in the Netherlands, which, in the opinion of the Court, would entail the applicability of Dutch law by virtue of Article 26 of the General Provisions of Law. However, the Court held that it had to apply Italian law as no proof of Dutch law had been submitted.[270] This part of the reasoning can still be understood, albeit with disapproval, as Article II(2) must be considered as superseding municipal law for questions regarding the form of the arbitration agreement. Thereupon the Court referred to its leading decision of 1971 in which it was held that a general reference to standard conditions including an arbitral clause is not sufficient for compliance with Article II(2), but that a specific reference to the arbitral clause is needed.[271] The Court then made a curious *saltus:* it deduced from that earlier decision that an arbitral clause contained in a printed contract must be specifically approved. The mention of the 1971 decision is, however, erroneous as that case concerned an arbitral clause in standard conditions to be found elsewhere, whilst the case before the Court concerned an arbitral clause in a contract form. Although the Court did not mention Articles 1341 and 1342 of the Italian Civil Code expressly in this part of its reasoning, the "error" can be

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267. E.g., F. Berlingieri, "Note on the Enforcement in Italy of Foreign Arbitration Awards", *GAFTA Newsletter*, December 1980, Annex I no. 2; G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.B.3 and authors cited at n. 49. See also U.S. District Court of New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20) in which the applicability of Arts. 1341 and 1342 was rejected and was characterized as parochial; see *infra* at n. 274.

268. G. Mirabelli, "Application of the New York Convention by the Italian Courts", in *Yearbook* Vol. IV (1979) p. 362 at p. 367.

269. Corte di Cassazione (Sez. Un.), May 25, 1976, no. 1877 (Italy no. 17). See also Corte di Cassazione (Sez. Un.), September 11, 1979, no. 4746, Lloyd Continental *v.* S.p.A. Navigazione Alga (Italy no. 38), discussed *supra* at n. 159, and the two decisions mentioned in *supra* n. 264.

270. "La legge olandese ... è ignota a questa Corte Suprema ..." concluded the Court. That is apparently different for German law: in its decision no. 272 of January 20, 1977, S.p.A. Nosegno e Morando *v.* Bohne Friedrich und Co-Import-Export (Italy no. 23) the Court observed that an Italian court may take the steps it deems appropriate to find the contents of a foreign law if the parties fail to provide such information, and specified that it knew *ex officio* that Sect. 1027 of the German Code of Civil Procedure prescribing the written form for the arbitration agreement does not apply to commercial parties; see for this case, *infra* at. n. III.154.

271. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5). Cf. *infra* at n. 282.

explained only by the fact that the Court had these provisions of Italian law in mind.

The 1977 decision of the Italian Supreme Court in the case *Begro* v. *Voccia* reflects the confusion which reigns in the majority of Italian courts in respect of an arbitral clause in standard conditions and contract forms and Article II(2) of the Convention. The confusion stems partially from the fact that Article 1341 of the Italian Civil Code regulates at the same time the questions of incorporation of standard conditions (in para. 1) and that of the adhesion character of an arbitral clause included in standard conditions (in para. 2). Both questions are solved by most of the Italian courts on the basis of municipal law, with Italian law in the forefront. Thus, even if the specific approval in writing requirement is held not to be applicable because the contract is concluded abroad, the question of incorporation by reference is still resolved on the basis of Italian case law as developed in domestic cases under Article 1341(1).

This confusion is again aggravated by the use of another notion of Italian law in respect of both questions, that of the *relatio (im)perfecta*, the meaning of which is difficult to grasp.

On the one hand, it would mean that the reference clause in the contract must be specific enough to establish a sufficient link between the contract and an exterior arbitral clause. The Italian Supreme Court must apparently be understood in this sense when it considered in a decision the question of a reference in a bill of lading to a charter party including an arbitral clause under the notion of *relatio perfecta*.[272] On the other hand, it could also mean that a contract has been concluded between the parties on equal footing. It is in this sense that the Italian Supreme Court must apparently be understood when it reasoned in another decision that the contract was concluded *per relationem perfectam* as both parties had co-operated in the selection of the documents to be referred to.[273]

II–2.4.3.3 *Incorporation by reference*

The question of incorporation by reference of the arbitral clause in standard conditions into the body of the contract may be solved by an autonomous interpretation of Article II(2) of the Convention. For this question two categories of standard conditions may be distinguished:

(a) the standard conditions on the back of the contract, and

(b) those contained in a separate document.

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272. Corte di Cassazione (Sez. Un.), April 8, 1975, no. 1269, Constantino Tomasos Ltd. *v.* Sorveglianza S.I.P.A. (Italy no. 13).

273. Corte di Cassazione (Sez. I), April 18, 1978, no. 1842, Eugenio Menaguale *v.* Intercommerce (Italy no. 25), see *supra* n. 264. In this sense apparently also, Mirabelli, *supra* at n. 268, p. 366.

(a) *Standard conditions on the back of the contract*

If the standard conditions including an arbitral clause are printed on the reverse side of the contract and a reference clause refers to these conditions, the test for fulfilling the purpose of Article II(2) can be deemed to be met. There must be a reference, but the reference may be general and need not call specific attention to the arbitral clause. The fact that the conditions are printed on the back of the contract offers a sufficient opportunity for a party to check the reference and to become aware of the arbitral clause contained therein.

There are not many decisions in which the formal validity of the arbitral clause included in standard conditions appearing on the back of the contract has been questioned in connection with Article II(2) of the Convention. One of the few courts is a District Court in New York.[274] The case is interesting because the Court considered in fact both questions of standard conditions. Before the Court the Italian defendant asserted that the arbitral clause included in the standard conditions on the back of Contract No. 5 of the North American Export Grain Association (NAEGA 5) was not binding because it was not approved specifically in writing as required by Articles 1341 and 1342 of the Italian Civil Code, and that he had no knowledge of the arbitral clause as this clause was neither disclosed nor mentioned during the negotiations. The conditions were referred to on the face of the contract by the legends "on the conditions and rules incorporated herein" and "see conditions and rules on the other side". The New York Court brushed aside the alleged applicability of the rule of Italian law. It quoted in this connection the Supreme Court of the United States [275]:

> "[T]he delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements."

As regards the assertion of the Italian party that he had no knowledge of the arbitral clause, the Court rejected this as follows:

> "There is no doubt that the quoted legends on the face of NAEGA 5 are sufficient to give notice to a reasonably prudent person of the arbitration provisions and other things appearing on the back."

This is one of the rare decisions involving the Convention in which the test for fulfilling the purpose of Article II(2) in the case of a refer-

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274. U.S. District Court of New York, S.D., December 2, 1977, Ferrara S.p.A. *v.* United Grain Growers Ltd. (U.S. no. 20).

275. U.S. Supreme Court, June 17, 1974, Fritz Scherk *v.* Alberto Culver Comp. (U.S. no. 4).

ence to standard conditions is stated in so many words. It is regrettable that the Court did not link the observation with Article II(2) expressly.

Another case which may be mentioned is the decision of the Court of Appeal of Florence.[276] The case concerned purchase orders which at the bottom of the front-page referred to the conditions on the reverse side by the words "subject to the conditions on the reverse side" amongst which the arbitral clause figured. The Court found that this met the written form of the arbitration agreement as required by Article II(2) of the Convention. In this connection the Court observed that it was in accordance with the interpretation given by the Italian Supreme Court that the written form of Article II(2) is complied with if, in any manner, the arbitral clause is clearly mentioned.[277] This observation gives too much credit to the Italian Supreme Court which is much stricter in interpreting Article II(2).

From the fact that a general reference to the standard conditions on the back of the contract can be deemed to meet Article II(2), it follows *a fortiori* that Article II(2) is also fulfilled if the body of the contract contains an arbitral clause in short form (e.g., "Arbitration: London") which is elaborated in the standard conditions on the reverse side, or if the reference clause calls specific attention to the arbitral clause appearing on the back of the contract.

The Court of First Instance of Zweibrücken had no difficulty with this type of situation.[278] The Court upheld the formal validity of the arbitral clause under Article II(2) in a case which concerned a sales confirmation containing the clause "Arbitration Rotterdam" with reference to the International Contract CIF/C&F/FOB for Hides no. 15 and an arbitral clause appearing amongst the standard conditions printed on the reverse side of the confirmation. Similarly, the Court of Appeal of Naples upheld the formal validity of the arbitral clause under Article II(2) in a case concerning the contract form of the International Council of Hide and Skin Shippers Association.[279] The contract form mentioned on the front page that the place of arbitration was London whilst the conditions on the reverse side contained an elaborate arbitral clause.

(b) *Standard conditions contained in a separate document*

If the contract refers to standard conditions including an arbitral clause embodied in a separate document, a distinction should be made

276. Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29), cf. *supra* at n. 231. The Court held Art. 1341 inapplicable as the contract was concluded in the United States. The Corte di Cassazione in this case (Italy no. 40) did not deal with the question of standard conditions.

277. The Court referred to Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620 (Italy no. 5), cf. *infra* at n. 282, and May 25, 1976, no. 1877 (Italy no. 17), cf. *supra* at n. 269.

278. Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16).

279. Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21): the Court held that Arts. 1341 and 1342 of the Italian Civil Code were

between the case where the reference clause calls specific attention to the arbitral clause in the conditions and where it does not.

A reference clause which specifically mentions the arbitral clause (for example, ". . . including the arbitral clause . . .") may be called a *specific reference.* When there is a specific reference, the test for fulfilling the purpose of Article II(2) in the case of standard conditions can be deemed to be met as the other party is notified of the existence of the arbitral clause and may be expected to check the reference. Moreover, this can even be considered to comply with the text of Article II(2) itself as the clause, short as it may be, is contained "in" the contract.

If, on the other hand, the reference clause in the contract is expressed in general terms only – which may be called a *general reference* – the test must be deemed not to be met. A party is then not notified of the existence of the clause and is generally neither able nor expected to check the reference.

The authors who have examined the question of Article II(2) and standard conditions including an arbitral clause do not make the above distinction for the category of standard conditions contained in a separate document; they merely say that a reference to standard conditions to be found elsewhere is insufficient for compliance with Article II(2).[280] Nevertheless, the court decisions reported on the Convention so far point towards the distinction between a specific and a general reference. It should be noted that few courts link the question of a reference to standard conditions including an arbitral clause to be found in another document with Article II(2) in express terms. Therefore there is still considerable uncertainty regarding this problem.

At the outset it should be mentioned that one French court was even more generous by implying that a general reference to standard conditions including an arbitral clause to be found in a separate document already met Article II(2) of the Convention.[281] Considering this situation

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superseded by Art. II(2) of the Convention and were in any case inapplicable because the contract was concluded in England, see *supra* n. 161.

280. P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 348; H.-V. von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen* (Berlin 1973) p. 59; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 346.

281. Tribunal de grande instance (Commercial Chamber) of Strasbourg, October 9, 1970, Animalfeeds International Corp. *v.* S.A. A. Becker et Cie (France no. 2). It may be mentioned that the new French arbitration law (Decree no. 80-354 of May 14, 1980, *Journal Officiel de la République Française* of May 18, 1980, p. 1238, in force as of October 1, 1980) provides in Art. 3(1): "The arbitral clause must, on pain of nullity, be stipulated in writing in the main contract *or in a document to which the main contract refers*." ["La clause compromissoire doit, à peine de nullité, être stipulée par écrit dans la convention principale *ou dans un document auquel celle-ci se réfère*."] (emphasis added). As far as it is known, this is the only law which contains an express provision relating to an arbitral clause contained in another document.

the Court stated briefly ". . . this arbitral tribunal was competent to render the awards . . .".

On the other hand, the Italian Supreme Court has explicitly held that a general refernce is insufficient for compliance with Article II(2).[282] The contract in question, concerning the sale of grain, referred in a general way to Contract No. 27 of the London Corn Trade Association (LCTA) which provides in clause 32 for arbitration in London. It may, however, be observed that the Court's interpretation of Article II(2) of the Convention that a general reference to standard conditions including an arbitral clause to be found elsewhere is insufficient "coincides" with Italian law as may be seen from the following statement of the Court:

> "The entry into force of the New York Convention has not introduced any novelty in the Italian legal system as far as the constitutive written form [of the arbitration agreement] barring Italian jurisdiction is concerned in that it has a strict meaning and excludes a conclusion by means of a general reference."

In a subsequent decision the Italian Supreme Court, has, however, indicated that it may be prepared to accept the distinction between specific and general reference.[283] The case involved a general reference in an insurance policy to the Rules of an underwriters association including an arbitral clause – which Rules can be equated to standard conditions. The Court held again that a general reference does not meet the written form of the arbitration agreement as required by Article II(2). However, the Court added in an *obiter dictum:*

> "In the present case [the respondent] has not consented in writing to the arbitral clause. The consent is even not expressed by means of a simple reference to the arbitral clause which could have shown that the clause had been brought to the attention of [the respondent] and that he has consented to it."

Mention may also be made of the Court of Appeal of Milan in which it was held sufficient that the sales confirmation referred explicitly to the arbitral clause in the standard conditions.[284]

In another Italian case the contract itself contained an arbitral clause and made further reference to Contract No. 80 of the London Corn Trade Association which

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282. Corte di Cassazione (Sez. Un.), December 13, 1971, no. 3620, Miserocchi *v.* Paolo Agnesi (Italy no. 5). Although the Court observed in this case too that the form of the arbitration agreement has to be judged under the law determined according to Art. 26 of the Italian General Provisions of Law, it did not decide on the applicability of the specific approval in writing requirement of Art. 1341 of the Italian Civil Code. It may be recalled that confusingly enough the reference problem under Italian law is also based on Art. 1341 (its first paragraph and case law decided thereunder); see *supra* II–2.4.3.2.

283. Corte di Cassazione (Sez. Un.), April 22, 1976, no. 1439, Junakovic *v.* Seagull Shipping Comp. (Italy no. 15). The Court did not mention Art. 1341 of the Italian Civil Code, but it referred to its earlier decision cited *supra* n. 282.

284. Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27).

includes Arbitration Rules. The Italian Supreme Court considered that the arbitral clause was duly in writing as it was contained in the contract itself and that the reference had as sole object to complete the arbitral clause by a procedural regulation.[285] The reference to Arbitration Rules is a different type from the one under discussion. The reference in an arbitral clause to Arbitration Rules is undoubtedly sufficient to incorporate the Rules into the arbitral clause, but it has little to do with the question of standard conditions and Article II(2).

The case of a reference in a *bill of lading* to the terms and conditions of a charter party may also be considered as pertaining to the category of standard conditions embodied in another document. It is therefore justified to mention in the present context an English court which held that the arbitral clause in the charter party was validly incorporated in the bill of lading because the reference clause in the bill of lading specifically mentioned the arbitral clause.[286] It should be noted, however, that, although the case arose under the Convention, the Court did not link the question of the arbitral clause with Article II(2) of the Convention.

As regards the question of incorporation of an arbitral clause contained in a charter party into a bill of lading, English law seems to be somewhat more refined: the incorporation can be achieved either by express words in the bill of lading itself (e.g., "including the arbitral clause") or by express words in the charter party (e.g., "any dispute arising out of this charter party or any bill of lading issued thereunder").[287]

This is different from United States law under which a general reference in the bill of lading to the charter party has been held sufficient provided that the arbitral clause in the charter party is not so worded as to preclude its application to the bill of lading dispute (e.g., that the clause applies only to disputes between owners and charterers). For example, the District Court in New York had to consider the case where the reference clause read "All conditions and exceptions of the charter party being considered embodied in this bill of lading" and the arbitral clause in the charter party "Any and all differences and disputes of whatsoever nature arising out of this charter . . .". The Court held that this effectively incorporated the arbitral clause into the bill of lading.[288]

A further distinction for the case of a general reference may be derived from the circumstances whether or not the standard conditions including the arbitral clause *have been communicated to the other party.* In the case of a specific reference the party proposing the inclu-

285. Corte di Cassazione (Sez. Un.), September 18, 1978, no. 4167, Butera *v.* Pagnan (Italy no. 33): the formal validity of the arbitral clause was, however, rejected because the signature of one of the parties under the contract was lacking, see *supra* at n. 182.

286. Admiralty Court (Queen's Bench Division), January 13, 1978, The Rena K (U.K. no. 6).

287. See A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) pp. 50-52 and cases cited.

288. U.S. District Court of New York, S.D., August 18, 1977, Coastal States Trading Inc. *v.* Zenith Navigation S.A. (U.S. no. 19): the New York Convention was held inapplicable in this case, see *supra* at n.I.164. See for a comparison on this question between English and United States law, J. McMahon, "The Hague Rules and Incorporation of Charter Party Arbitration Clauses Into Bills of Lading", 2 *Journal of Maritime Law & Commerce* (1970) p. 1 at p. 6. See

sion of the standard conditions is not obliged to send the conditions; the other party is notified of the existence of the arbitral clause and it is up to him to request the standard conditions. That may be expected from a person exercising reasonable care. In the case of a general reference such duty should not be assigned to the other party as far as the arbitral clause is concerned, because he is not notified of the existence of that clause. However, if in the case of a general reference the standard conditions have been communicated to the other party, this situation has much resemblance with standard conditions appearing on the back of the contract. As seen above, in this case a general reference is sufficient for compliance with Article II(2) of the Convention. There is one court decision in support of this qualification to the rule that a general reference to standard conditions contained in another document does not meet the written form requirement of Article II(2): the German Supreme Court held that the written form of Article II(2) was fulfilled in a case where the contract made only a general reference to the standard conditions including an arbitral clause, but which conditions had been added to the contract as an annex.[289]

The foregoing observation brings us on the problem of a *continuing trading relationship.* Especially in the international commodity trade it is quite common that the same parties regularly do business with each other on the basis of the same standard conditions including an arbitral clause. The applicability of the standard conditions by custom only is, of course, not sufficient for compliance with Article II(2) in respect of the formal validity of the arbitral clause contained in the standard conditions. A reference to the conditions is required for each transaction in any case. However, if a party already has the standard conditions in his possession, there is no need each time to call specific attention to the arbitral clause in the reference clause.

The question of a continuing trading relationship involving a general reference to standard conditions, like the other questions connected with the continuing trading relationship and Article II(2), has not yet been dealt with by the courts. The interpretation advanced above that a general reference to standard conditions including an arbitral clause to be found in a separate document which is already in the possession of the other party would comply with Article II(2) as regards the formal validity of the arbitral clause, would especially be appropriate for the case of a continuing trading relationship. It could alleviate the rather rigid formalism of a special reference in a number of cases. It would also be in conformity with practice, as parties belonging to a certain

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also P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 351.

289. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12).

trade are well aware that their disputes are to be solved by arbitration as provided in the relevant standard conditions.

For the question of continuing relationship it may be worthy to quote from a decision of the European Court of Justice, in which it was held in respect of the written form required by Article 17 of the European Judgments Convention of 1968 for the forum selection agreement that

> "The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction."[290]

Another problem which has not yet come up before the courts in cases arisen under the Convention is *the reference in telexes or telegrams* to standard conditions including an arbitral clause. It frequently occurs that by an exchange of telexes, and to a lesser extent telegrams, the parties agree on the essentials of the contract – goods, price, time and manner of delivery and payment – and that they further agree that the transaction is governed by certain standard conditions. A general reference would not suffice for the formal validity of the arbitral clause in the standard conditions under Article II(2), unless, if the interpretation advanced above is accepted, the standard conditions are in the possession of the other party. A solution may then be to make a specific reference in the telex by mentioning specifically "including the arbitral clause" or similar words. It is doubtful, however, whether, in the case of a telex, merchants are prepared to do so in practice. Another solution could be to send a sales or purchase confirmation subsequently in which the arbitral clause is contained or referred to. The confirmation must then be accepted in writing.

II–2.4.4 *Agency*

Agency relationships have posed a particular question for the written form of the arbitration agreement as required by Article II(2) of the Convention.[291] There is no particular question for the arbitration agreement as such – usually an arbitral clause in a contract – which is concluded through an agent between his principal and a third party. Such

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290. Court of Justice of the European Communities, Judgment of December 14, 1976, in the case 25/76, Segoura *v.* Bonakdarian, *infra* n. 310.

291. Agency in international relations is a notoriously difficult subject matter. This is mainly due to the differences in the various national legal systems in respect of both the theories on agency and the types of agent. See generally, C. Schmitthoff, "Agency in International Law", *Recueil des Cours*, 1970-Vol. I, p. 115; O. Sandrock, *Handbuch der Internationalen Vertragsgestaltung* (Heidelberg 1980) Vol. II Part D.

arbitration agreement must comply with Article II(2) exactly as an arbitration agreement concluded between parties without an intermediate agent. The particular 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.

A few laws require that the authorization take the same form as the act for which it is intended. This is, for instance, the case for Articles 216 and 217 of the Greek Civil Code and Article 1392 of the Italian Civil Code.

Article 216 of the Greek Civil Code provides:

> "The right of representation is given by the relevant contract (power of attorney)."

Article 217 provides:

> "The power of attorney is given by declaration to the authorized person or to the person with whom the contract is undertaken. The declaration, if something else is not to be deduced, is subjected to the form which is required for the contract to which the power of attorney relates."[292]

Article 1392 of the Italian Civil Code provides:

> "The power of attorney has no effect if it is not made in accordance with the form prescribed for the contract which the representative has to conclude."[293]

The provisions mean that if the authorization relates to the conclusion of an arbitration agreement which falls under the New York Convention, the authorization too must be in written form. Thus, because of the law governing the form of the authorization, Article II(2) has a "spin-off" effect on the form of the authorization.

Must the "spin-off" effect of Article II(2) on the form of the authorization also be deemed to exist irrespective of the law applicable to the form of the authorization? This seems to be the view of the Court of First Instance of Hamburg.[294] The facts of this case will be given later; for the present question it may suffice to mention that in an additional observation the Court opined that in order to safeguard the interests of the parties, the requirement of the written form for the arbitration agreement of Article II(2) should be extended to the authorization to conclude an arbitration agreement on the principal's behalf as otherwise "by means of a mere oral grant of authorization the form required by Article II(2) of the Convention could be circumvented."

This reasoning does not sound convincing. One wonders to what interest of the parties it may be that the written form requirement of

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292. Translation kindly supplied by Me Antonias Dimolitsa, Athens.
293. Translation by the author.
294. Landgericht of Hamburg, March 16, 1977 (F.R. Germ. no. 13).

Article II(2) of the Convention be extended to the authorization. Few laws require that the authorization take the same form as the act for which it is intended; most laws do not pose this requirement. For instance, in English law the authorization to conclude an arbitration agreement may be granted orally, but the arbitration agreement must be in writing.[295] Why then should this be different if the arbitration agreement falls under the New York Convention? As the arbitration agreement itself must comply with Article II(2), it is difficult to conceive how its written form requirement could be "circumvented" by an oral authorization. It would pose an additional burden for concluding contracts in international trade in which it is quite usual to grant authorization orally.

The view of the Hamburg Court that Article II(2) extends to the form of the authorization is not shared by the other courts. They limit themselves to the inquiry whether some municipal law prescribes that the authorization take the same form as the act for which it is intended. Confusingly enough, the Court of First Instance of Hamburg made also this inquiry as, before making the additional observation that Article II(2) extends to the form of the authorization, the Court determined whether the law governing the authorization contained a required as to its form.

The courts, however, appear to differ on the question under which law the form of the authorization is to be determined.[296]

The case before the above-mentioned Court of First Instance of Hamburg concerned two contracts concerning canned prunes concluded through the mediation of an Italian firm between an Italian seller and a German buyer. The contracts provided for arbitration at the Hamburg Commodity Exchange. Only the German buyer returned the contracts to the Italian intermediary. Contrary to the Court of Appeal in this case, the Court of First Instance considered the Italian intermediary as acting as agent on behalf of the Italian seller.[297] The Court reasoned that no clear conflict rule exists in F.R. Germany for determining the law governing the validity of an authorization. It resorted then to the method of connecting factors and found that

295. A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 37.

296. The Hague Convention on the Law Applicable to Agency of 1978 in Art. 2(b) excludes from its field of application requirements as to the form. The Explanatory Report by I. Karsten observes in this respect under para. 128:

> "The exclusion of the formal requirements by article 2(b) is intended to leave the court free to apply its own rules of private international law to questions of form. Depending on these rules, the court may, in order to uphold the validity of the transaction, hold that the formal requirements may be satisfied by compliance either with the law applicable under the Convention or with another law, such as the *lex loci actus*."

The Convention and the Explanatory Report are published in Hague Conference on Private International Law ed., *Actes et documents*, Tome IV "Agency" (The Hague 1979).

297. The Oberlandesgericht of Hamburg, September 22, 1978 (F.R. Germ. no. 20) considered the Italian intermediary as a commercial broker (*Handelsmakler*) and qualified the contracts in question as broker's notes (*Schlussnoten*), see *infra* at n. 304.

they pointed to Italian law, mainly because the intermediary had his business establishment in Italy. Hence, Article 1392 of the Italian Civil Code was applicable. Consequently, as Article II(2) requires that the arbitration agreement be in writing, the authorization to conclude the arbitration agreement should also have been in writing. The Court found that the Italian seller had not given a written authorization.

The Italian courts are of a different opinion. They resort to the conflict rules contained in Article 26 of the General Provisions of Law [298], and hold that the place where the arbitration agreement is concluded determines whether a specific form for the authorization is needed. For example, an Italian charterer and an Italian shipowner concluded a charter party agreement including an arbitral clause, which agreement was concluded on behalf of the shipowner by his agent. The Italian Supreme Court found that the charter party agreement had been concluded in Paris and that, by virtue of Article 26 of the General Provisions of Law, French law was applicable to the form of the authorization to conclude the arbitration agreement. French law does not contain a provision similar to Article 1392 of the Italian Civil Code, but allows an oral authorization which may be proven by testimony. The Court held that the oral authorization given by the shipowner to his agent was sufficient for concluding the arbitration agreement in respect of the charter party.[299]

The Greek Supreme Court is less clear in respect of the present question.[300] Sesler, the New York agent for the Greek export firm Agrimpex, had sold for the latter to the New York import firm Braun a quantity of raisins. Braun and Agrimpex differed thereafter as to what should be done first: the opening of the letter of credit by Braun or the sending of a sample by air by Agrimpex. Braun initiated arbitration in accordance with the arbitral clause in the contract signed by him and Sesler. The Greek Supreme Court refused to enforce the award rendered in New York in favour of Braun. After having referred to Article II(2) of the Convention, the Court argued that Sesler had not received a written authorization from his principal to conclude an arbitration agreement as is required by Articles 216 and 217 of the Greek Civil Code.

The decision does not reveal why the Court deemed Greek law applicable to the form of the authorization. One would have expected that New York State law was applicable at New York was the site of the business establishment of the agent.[301]

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298. See for Art. 26 of the Italian General Provision of Law, *supra* II–2.2.2.

299. Corte di Cassazione (Sez. Un.), January 25, 1977, no. 361, Total *v.* Achillo Lauro (Italy no. 26). See also Corte di Cassazione (Sez. Un.), February 27, 1970, no. 470, Louis Dreyfuss Corp. *v.* Oriana (Italy no. 2): charter party including an arbitral clause concluded between Italian shipowner and United States charterer through the intermediary of the latter's agent in London; *held*, the oral grant of authority to the charterer's agent was sufficient as English law does not provide for a requirement similar to Art. 1392 of the Italian Civil Code. Corte di Cassazione (Sez. Un.), April 8, 1975, no. 1269, Constatino Tomasos *v.* Sorveglianza (Italy no. 13): same decision in respect of charter party including an arbitral clause concluded in London. Corte di Cassazione (Sez. Un.), May 18, 1978, no. 2392, Atlas General Timbers S.p.A. *v.* Concordia Line S.p.A. (Italy no. 35): bill of lading including an arbitral clause was signed by the agent of the carrier; *held*, although the bill of lading was issued in India, no proof of Indian law was given by the party relying thereon, and consequently Italian law is applicable; the signature of the agent is not sufficient since his authorization was not in writing as prescribed by Art. 1392 of the Italian Civil Code.

300. Areios Pagos, January 14, 1977, no. 88/1977, Agrimpex S.A. *v.* J.F. Braun & Sons Inc. (Greece no. 5).

301. The Supreme Court added that the lack of the written authorization could have been cured if the parties had appeared before the arbitrators and participated in the proceedings

The New York Convention does not provide a solution for the question under which law the form of the authorization to conclude an arbitration agreement is to be judged. The ground for refusal mentioned in Article V(1)(a) that "the parties to the agreement . . . were, under the law applicable to them, under some incapacity" does not help very much as it leaves the determination of the law applicable to a party to the conflict rules of the forum.[302] Moreover, it is doubtful whether this provision could even be taken into consideration for the case of an agent who is not duly authorized. Consequently, questions regarding the authorization of an agent, including its form, have to be judged under the applicable law determined on the basis of the conflict rules of the forum. As seen above, these conflict rules vary from country to country. The only conclusion which can be deduced from the Convention is that Article II(2) does not have the effect that the authorization to conclude an arbitration agreement should always have the written form.

The question of Article II(2) and agency has also come up in respect of the *commercial broker*, known in countries like F.R. Germany where he is called *Handelsmakler.* He is an independent businessman who in the ordinary course of business negotiates contracts for two parties without being entrusted by them with this duty on a permanent basis.[303] He does not conclude the transaction in his own name, but acts as agent for both parties. After he has brought about an agreement between the parties, he sends to each party an identical broker's note (in German *Schluszschein* or *Schlussnote*), which usually contains an arbitral clause. It is essential for compliance with Article II(2) that the broker's note be returned by each party to the broker; only then is there an exchange in writing.[304] It is generally not required that the broker forward the returned note to the other party; under most laws he is authorized to receive the written declarations of the parties.[305]

II–2.5 Uniform Interpretation (and Summary)

The written form of the arbitration agreement as required by Article II(2) of the Convention – i.e., being "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an

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without making any reservation. It found, however, that Agrimpex had not participated in the arbitration, but only its agent, Sesler. This poses another interesting question whether an agent can be deemed authorized to initiate arbitration on his principal's behalf. The answer to this question would seem to depend on the extent of the authorization, the law governing the authorization, and the law applicable to the arbitration.

302. See *infra* III–4.1.1 ("Incapacity of a Party").

303. Schmitthoff, *supra* at n. 291, p. 125.

304. Oberlandesgericht of Hamburg, May 21, 1969 (F.R. Germ. no. 6); September 22, 1978 (F.R. Germ. no. 20). The latter case was the appeal decision of the decision of the Landgericht of Hamburg discussed *supra* at n. 294 and 297. The decision of Court of Appeal is critized on several grounds by E. Mezger in 25 *Recht der internationlen Wirtschaft* (1979) p. 486.

305. Landgericht of Hamburg, December 19, 1967 (F.R. Germ. no. 4).

exchange of letters or telegrams" – is an internationally uniform rule which supersedes any rule of municipal law regarding the form of the arbitration agreement in those cases where the agreement falls under the Convention (pp. 173-178).

The meaning of the uniform rule character of Article II(2) is that it constitutes both a maximum and a minimum requirement, thereby prevailing over both more and less demanding requirements of municipal law (pp. 178-180).

The uniform rule does not allow proof by other means of an arbitration agreement concluded in a form different from that envisaged by Article II(2) (pp. 180-182).

On the other hand, it is arguable that a party can be estopped from invoking non-compliance of an arbitration agreement with Article II(2) in certain cases (pp. 182-185).

International arbitrators are bound to apply the Convention, including its Article II(2), but the more-favourable-right-provision of Article VII(1) offers them the possibility to rely on another basis (pp. 185-190).

The term "arbitration agreement" as appearing in the English text of Article II(2) must be deemed to mean "submission agreement", which is the agreement by which an already existing dispute is submitted to arbitration (pp. 190-191).

Article II(2) must be interpreted liberally for the question when an arbitration agreement satisfies its requirements. The limit of the liberal interpretation is that it should not go beyond what can be interpreted on the basis of the text of Article II(2) (pp. 191-192).

In the case of "an arbitral clause in a contract or [a submission] agreement, signed by the parties" – the first alternative of Article II(2) – the signatures of the parties are indispensable. The signatures for the contract as a whole are sufficient; they need not relate specifically to the arbitral clause (pp. 192-193).

In the case of a contract including an arbitral clause or a submission agreement concluded by means of an exchange of letters or telegrams – the second alternative of Article II(2) – the signatures of the parties are not required (pp. 193-195).

The exchange of letters or telegrams implies that there must be a written proposal to arbitrate, that the proposal is accepted in writing and that the acceptance is communicated to the proposing party. An oral or tacit acceptance does not satisfy the exchange. An acceptance of a contract or confirmation including an arbitral clause as a whole is sufficient; the acceptance need not relate specifically to the arbitral clause (pp. 196-198).

It must be readily assumed that there exists an acceptance in writing: any communication in writing issued by the other party subsequent to the proposal to arbitrate from which it can be inferred that that party

considers himself bound thereby completes the exchange in writing (pp. 198-202).

As far as relevant, the above rules apply also to the submission agreement (pp. 202-204).

The conclusion of a contract including an arbitral clause or a submission agreement by means of an exchange of letters or telegrams can also be achieved by means of an exchange of telexes (pp. 204-205).

The written form requirement of Article II(2) for an arbitral clause in a sales or purchase confirmation is the same as for an arbitral clause in an ordinary contract. In particular, an arbitral clause in a confirmation which is tacitly accepted does not meet Article II(2) (pp. 205-207).

The two main questions for standard conditions under municipal law may be solved by an autonomous interpretation of Article II(2) as far as the arbitral clause contained therein is concerned. The first question of the adhesion contract character of standard conditions may be solved by taking into account that Article II(2) contains fairly demanding requirements for the form of the arbitral clause. The second question of incorporation by reference may be solved by relying on the purpose of Article II(2) that a party is aware that he is agreeing to arbitration and the test formulated thereunder that the reference can be checked by a party exercising reasonable care. Accordingly, a reference to the standard conditions in the body of the contract is needed in any case. If the standard conditions are set out on the reverse side of the contract, a general reference will suffice. If the standard conditions are contained in a separate document, the reference clause must draw specific attention to the arbitral clause. However, in the latter case a general reference will suffice if the standard conditions have been communicated to the other party. It is not necessary that the conditions are communicated to the other party for each transaction (pp. 208-211 and 215-222).

The specific approval in writing for an arbitral clause in contract forms and standard conditions as required by Articles 1341 and 1342 of the Italian Civil Code is superseded by Article II(2) (pp. 174-176, 199 and 211-215).

If an arbitration agreement is concluded through an agent on behalf of his principal, Article II(2) does not per se have the effect that the authorization to conclude the arbitration agreement must be in writing. This question depends only on the law applicable to the form of the authorization (pp. 222-226).

II–2.6 Is a Revision of Article II(2) Needed?

On several occasions in this Part it was mentioned that Article II(2) poses rather demanding requirements for the form of the arbitration

agreement. This applies especially to the exclusion of the tacit acceptance of a contract or confirmation including an arbitral clause. The interpretation that the tacit acceptance is excluded is almost unanimously affirmed by the courts. Yet, it may be asked whether this exclusion is still compatible with the current practices of international trade. Furthermore, there are a certain number of questions raised by Article II(2) which have not yet been settled by a uniform judicial interpretation. These questions concern, inter alia, the estoppel, when is there acceptance in writing, and the arbitral clause in standard conditions. Surveying the entire scene of the judicial interpretations in respect of Article II(2), this provision appears to be the most troublesome for the courts. Thus it is especially for Article II(2) that the question may be asked whether it ought to be revised by an additional Protocol or the like.

In finding the answer to this question it may be interesting to see what has happened with Article 17 of the European Communities Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments of September 27, 1968. [306] That Article requires a forum selection agreement – which has much in common with an arbitration agreement – to be concluded "in writing or by an oral agreement confirmed in writing". Article 17 has been amended by the Convention on the accession of Denmark, Ireland, and the United Kingdom and Northern Ireland to the Judgments Conventions of 1968, of October 9, 1978.[307]

The amended version reads, in the relevant part, as follows:

> "[A]n agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with the practices in that trade or commerce of which the parties are or ought to have been aware."

In his explanatory report to the Convention of 1978, Prof. Schlosser gives as the reason behind what he calls the "relaxation" of the formal provisions for international trade in the amended version of Article 17, that the interpretation by the Court of Justice of the European Com-

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306. The English text of the Judgments Convention is published in the *Official Journal of the European Communities*, No. L 304/36, of October 30, 1978, reproduced in G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980), Appendix I, Booklet C. According to Art. 1(4) the Convention does not apply to arbitration. On June 3, 1971, the Member States of the European Community signed a Protocol Concerning the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Civil and Commercial Judgments. The 1971 Protocol empowers the Court of Justice of the European Communities to give preliminary rulings concerning the interpretation of the Judgments Convention of 1968. The English text of the Protocol is also reproduced in Delaume.

307. *Official Journal of the European Communities*, No. L 304, of October 30, 1978, reproduced in Delaume, *supra* n. 306. The Convention of 1978 has not yet entered into force.

munities of Article 17 of the Convention of 1968 "does not cater adequately for the customs and requirements of the international trade".[308] Prof. Schlosser is, in particular, opposed to the interpretation of the Court of Justice that Article 17 of the Convention of 1968 requires that the other party to a contract with anyone employing standard conditions has to give written confirmation before a jurisdiction clause in those conditions can be effective.

The two most important decisions of the Court of Justice of the European Communities are cases nos. 24/76 and 25/76.

In case no. 24/76 the Court held [309]:

> "Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.
> In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care."

In case no. 25/76 the Court held [310]:

> "In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as to the form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.
> The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction."

Although it would be very interesting, it is beyond the scope of this study to make a detailed comparison between Article 17 of the Judgments Convention of 1968 and Article II(2) of the New York Convention of 1958 and the interpretations given in respect of both provisions. It may suffice to note that, as it may be inferred from the interpretations given by the Court of Justice in respect of the written form of the

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308. *Official Journal of the European Communities*, No. C 59/71, of March 5, 1979, reproduced in Delaume, *supra* n. 306.

309. Judgment of December 14, 1976, Colzani *v.* RÜWA, Case No. 24/76, *European Court Reports* [1976] p. 1831.

310. Judgment of December 14, 1976, Segoura *v.* Bonakdarian, Case No. 25/76, *European Court Reports* [1976] p. 1851.

jurisdiction clause as required by Article 17 of the Judgments Convention of 1968, the prevailing opinion on Article II(2) of the New York Convention is also that a tacit acceptance of a contract containing an arbitral clause is insufficient. The Court of Justice, however, makes an exception for the continuing trading relationship, a question which is still unsettled for Article II(2) of the New York Convention.

The intent of the drafters of the Convention of 1978 to make allowances for the needs of international trade is naturally to be praised. However, it may be questioned whether the amended version of Article 17 of the Judgments Convention does not throw the baby out with the bathwater. The amended version is drafted with such loose wording that it will require considerable interpretation to determine in which cases jurisdiction clauses comply with it and in which cases they do not. This is likely to create an undesirable degree of uncertainty and may lead to a flood of court cases. In particular, it may be difficult to prove the (established?) practices of a certain international trade of which there exist so many.

This brings us to the heart of the problem; it would be extremely difficult to arrive at a satisfying revised text of Article II(2). Two courses would appear to be open: either an attempt is made to provide for all the different situations in which an arbitration agreement may appear, or a new text is drafted along the same lines as the amended version of Article 17 of the Judgments Convention. As it is impossible to provide for all situations in which an arbitration agreement may appear in practice, the first course has the inherent danger that the new text will be interpreted more restrictively for those situations not provided for. The second course would have the disadvantage that due to the vague wording it may lead to more differing interpretations than actually exist for the present text of Article II(2).

Even assuming that an improved text of Article II(2) could be realized, the problems caused by Article II(2) can be considered as not being of such a magnitude as to warrant a revision. The main problem is the exclusion of the tacit acceptance. This aspect may, however, be mitigated by assuming readily that an acceptance in writing exists.[311] The other problems of Article II(2) concern questions which are, for the time being, either not yet settled by judicial interpretations or are subject to diverging judicial interpretations. Nevertheless, the judicial experience gained during the first twenty years of the New York Convention is an invaluable asset for overcoming these problems and arriving at a uniform interpretation. It should not be forgotten that, unlike the Judgments Convention, the uniform interpretation of which is, at least on paper, safeguarded by the Court of Justice of the European

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311. See *supra* II–2.3.4 ("Acceptance in Writing of a Contract Containing an Arbitral Clause in the Case of an Exchange").

Communities, such supra-national judicial authority is not available for the New York Convention. This makes the process of arriving at a uniform interpretation an extra-arduous effort. A new text of Article II(2) would mean that more than twenty years of judicial experience – brought together in the cases reported in the *Yearbook Commercial Arbitration* – would be practically lost and the time-consuming process would have to start all over again. Moreover, a new Protocol may create uncertainty in that some States will become Party to it, whilst others may deem adherence unnecessary, as they consider the present text of Article II(2) sufficient. It is submitted that the problems caused by Article II(2) are not worth this price and that for this provision of the Convention also, the efforts could be better concentrated on the harmonization of interpretation.

Chapter III

Enforcement of the Arbitral Award

The last Chapter of this study concerning the unification of interpretation of the New York Convention deals with the second main action envisaged by the Convention, the enforcement of the arbitral award, which is regulated by Articles III-VI.

The Chapter is divided into five Parts. The first Part is concerned with Article III in relation to the procedure for the enforcement of the award (III–1). The second Part is devoted to Article IV which sets forth the conditions to be fulfilled by the party seeking enforcement of a Convention award (III–2). The general aspects of the grounds for refusal of enforcement of the award, as laid down in Article V, are examined in the third Part (III–3). The grounds for which enforcement may be refused if they are proven by the party against whom the enforcement is sought, as enumerated in Article V(1), are the subject matter of the fourth and largest Part of this Chapter (III–4). They include the question of setting aside the award in the country of origin as regulated by Article V(1) (e) and Article VI (III–4.5.3). Finally, the last Part of this Chapter is concerned with the grounds for which, according to Article V(2), a court on its own motion may refuse enforcement of the award for reasons of public policy (III–5).

PART III–1 PROCEDURE FOR ENFORCEMENT (ART. III)

Article III of the Convention provides:

"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."

We may be relatively brief in discussing this Article of the Convention as it has not created major problems of interpretation for the courts.

III–1.1 Legislative History

The history of Article III traces back to the Geneva Convention of 1927 which provided in Article I(1) that "... an arbitral award ... shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon ...".[1] A very similar provision was provided in the ECOSOC Draft Convention of 1955.[2] In their comments on the Draft Convention some governments and non-governmental organizations expressed a desire to supplement the provision. They wished either (a) to include in it uniform procedural rules that would be applicable to the enforcement of foreign arbitral awards, or (b) to provide that arbitral awards to which the Convention applied should be enforced by a "summary enforcement procedure", or (c) to stipulate that arbitral awards to which the Convention applied should be enforced by the same procedure as that which applied to domestic arbitral awards.

In commenting on these proposals, the Secretary-General of ECOSOC observed that each of these proposals would give rise to difficulties[3]: (a) it could not be considered practical to attempt to spell out the ap-

1. See H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 47.

2. ECOSOC Draft Convention, Art. II (UN DOC E/2704 and Corr. 1). The same provision was contained in the ICC Draft Convention of 1953, Art. II (UN DOC E/C./373/Add. 1).

3. Note by the Secretary-General on the Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards of March 6, 1958, UN DOC E/CONF.26/2 paras. 7-8.

plicable enforcement procedures in full detail in the text of the Convention itself; (b) a reference to "summary enforcement procedures" might not be given an identical meaning in countries with different procedural law systems; and (c) the procedures applicable to the enforcement procedures of domestic awards might contain elements which, if applied to foreign awards, would make the enforcement too cumbersome or time consuming. The Secretary-General suggested that these difficulties could be overcome by providing that arbitral awards should be enforced in accordance with a simplified and expeditious procedure which, in any event, should not be more onerous than that applied to domestic awards.

During the New York Conference of 1958 the suggestion of the Secretary-General of ECOSOC was taken up by the delegate of the United Kingdom who submitted a proposal to amend the provision. His proposal read that the rules of procedure should not be "more complicated than those used for the enforcement of any other award . . ." and that "in no case shall the scale of fees and charges demandable be . . . greater than those demandable in respect of the enforcement of any other award."[4] The United Kingdom delegate gave as explanation for his proposal that an arbitral award which met the conditions of the Convention should be enforceable without unnecessary inconvenience or excessive fees; otherwise the purpose of the Convention would be defeated.[5]

On the other hand, the delegate from Belgium submitted a proposal as mentioned under (c) above: the rules of procedure for the enforcement of a Convention award should be identical to those governing the enforcement of a domestic award.[6] This proposal of "national treatment" of the award was supported, inter alia, by the delegate from the United States.

Both proposals led to a Babel-like confusion at the Conference, which consumed considerable time, and served to demonstrate that there is practically no branch of law which is so different in the various legal systems as the law of procedure, it being mainly a product of national history. The confusion was aggravated by an oral proposal from certain Latin American countries to lay down different rules for the exequatur (leave for enforcement) procedure and for the enforcement procedure.[7] This proposal was objected to by other delegates who declared that in their countries the procedures were not distinguished or were combined in one procedure.

What finally did become clear was that the majority of delegates did no want national treatment for Convention awards (i.e., proposal (c)).

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4. UN DOC E/CONF.26/L.11. A similar proposal was submitted by the Israeli delegate (E/CONF.26/L.21).
5. UN DOC E/CONF.26/SR.10.
6. *Id.*
7. UN DOC E/CONF.26/SR.11.

They argued that in their countries the rules of procedure governing the enforcement of domestic awards were quite different from those governing the enforcement of foreign awards. In addition, in some countries the enforcement of a domestic award did not need to go through the process of an approval by an official authority, whilst this was indispensable for the enforcement of a foreign award. Accordingly, the Belgian proposal was rejected.[8] Apparently weary of discussing this provision, the delegates then decided to relegate the drafting of an appropriate text to Working Party No. 1.

Working Party No. 1 came up with two texts, along with the acknowledgement that it was unable to agree on one single text.[9] The first text consisted of the original version of the ECOSOC Draft Convention, and the second one was an amended version of the proposal of the United Kingdom delegate. The Conference adopted both texts without discussion.[10]

The final result was, therefore, the same as was suggested much earlier by the Secretary-General of ECOSOC. The Conference implicitly rejected proposal (a) mentioned above as it was not discussed at the Conference. The delegates apparently considered the unification of the rules of procedure for the enforcement of foreign arbitral awards as a too far-reaching interference with the differing national laws on procedure. The same applies to proposal (b) above to provide for enforcement by a "summary enforcement procedure".

III–1.2 Rules of Procedure for Enforcement of Convention Award

This history of Article III of the Convention shows that the rules of procedure for the enforcement of a Convention award are left to the law of the country where the enforcement is sought. Generally speaking, there are three possibilities for regulating the procedure for enforcement of a Convention award:

(1) specific provisions;
(2) enforcement as for a foreign award in general;
(3) enforcement as a domestic award.

Ad (1) Specific provisions for the procedure of enforcing an award falling under the Convention can be found, inter alia, in Australia, Botswana, Denmark, Ghana, India, Sweden, the United Kingdom, and the United States.[11] The specific provisions are contained in the Acts implementing the New York Convention in these countries. In

8. *Id.* The Belgian proposal was rejected by 23 votes to 3, with 8 abstentions.
9. UN DOC E/CONF.26/L.42 and Corr. 1.
10. UN DOC E/CONF.26/SR.16.
11. See for the references of these implementing Acts, Annex C.

most of these countries such an Act is required in order to incorporate a treaty into the internal law.

Ad (2) Most countries Party to the Convention have provided that the procedure for the enforcement of a Convention award is the same as that for the enforcement of a foreign award in general. These countries may be divided into two groups. The first group has specific provisions for the enforcement of foreign awards. Examples of this group are F.R. Germany and Greece.[12] According to the second group, the procedure for the enforcement of a foreign award is the same as for the enforcement of a foreign judgment. Examples of the second group are Italy, Mexico and the Netherlands.[13]

Ad (3) Provisions for the enforcement of a Convention award pursuant to the same procedure as for a domestic award are found in only very few countries. This confirms the view of the majority of the delegates at the New York Conference of 1958 not to subsume the procedure for enforcement of Convention awards under that of domestic awards. One of the few countries where the assimilation apparently exists is Japan. This became clear in a decision of the Court of Appeal of Tokyo.[14]

In an enforcement procedure of an award made in London, the Japanese respondent had argued that the enforcement could not be granted as Japanese law did not contain provisions for the enforcement of foreign awards and, therefore, it could not be enforced "in accordance with the rules of procedure of the territory where the award is relied upon". The Court held that this did not prevent the enforcement of the award:

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12. **F.R. Germany**: Sect. 1044 of the Code of Civil Procedure. **Greece**: Art. 903 of the Code of Civil Procedure.

13. **Italy**: Art. 800 *jo* 796 of the Code of Civil Procedure. E. Minoli, "L'entrata in vigore della Convenzione di New York sul riconoscimento e l'esecuzione delle sentenze arbitrale straniere", 24 *Rivista di Diritto Processuale* (1969) p. 539 at p. 555, defended the view that the same procedure as applicable to the enforcement of domestic awards was to be used for Convention awards. This view has not been followed by the Italian courts and almost all other Italian commentators. Minoli's view was expressly rejected by the Corte di Appello of Naples, December 13, 1974, Frey et al. *v*. F. Cuccaro e Figli (Italy no. 11). See for extensive references on this question, G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.D. 18 n. 55. See also *infra* n. 15. **Mexico**: Arts. 604-608 Code of Civil Procedure for the Federal District (the provisions in the Codes of Civil Procedure of the 31 other Mexican Districts are similar). **Netherlands**: Art. 993 *jo* 985 Code of Civil Procedure (a foreign arbitral award can be enforced in the Netherlands only by virtue of a treaty). In **France** the procedure for the enforcement of foreign arbitral awards has been developed by caselaw. It is an highly complicated system, if it is even possible to speak of a "system". See R. David, *L'arbitrage commercial international*, Cours de droit privé comparé (Paris 1968-1970) pp. 586-589. See also Y. Derains. "National Report France", in *Yearbook* Vol. VI (1981) p. 1 at p. 22.

14. Court of Appeal of Tokyo (2nd Civil Section), March 14, 1963, Niroshi Nishi *v*. Compania di Navigazione e Commercia (Japan no. 1). The enforcement was judged under the Geneva Convention of 1927 as at the time of enforcement the United Kingdom had not yet acceded to the New York Convention. The principle provided in Art. 1(1) of the Geneva Convention is, however, the same as that laid down in Art. III of the New York Convention, see *supra* at n. 1.

"[It is] in conformity with the spirit of our law to attribute to foreign arbitral awards, under certain conditions, the same force as domestic awards. In this spirit this country has signed the Geneva Protocol and the Geneva Convention and afterwards the New York Convention. [It is] the obligation of this country as a signatory of these Conventions to give these awards the same treatment as domestic awards in so far as they comply with the conditions of the Conventions."

It is submitted that this decision of the Tokyo Court can be considered as implying a sound principle: if a country has no provisions at all for the procedure of enforcement of a Convention award or foreign awards in general, the same procedure as governing the enforcement of domestic awards may be adopted, provided that this procedure does not imply an alteration of the Convention's conditions.

The above bird's-eye view shows that the procedure for the enforcement of an award falling under the Convention differs considerably amongst the Contracting States. A unification on this point would seem desirable but is impracticable. Moreover, in practice, the disparity of the laws on procedure has not produced such results that a revision of the Convention would be needed on this point.

The only directive which Article III gives for the procedure for enforcement of a Convention award is stated in the second sentence which, as noted, was inserted at the instigation of the ECOSOC Secretary-General and the United Kingdom delegate. As far as it could be researched, the Contracting States have not imposed more onerous conditions or higher fees or charges for the recognition or enforcement of Convention awards than are imposed on the recognition or enforcement of arbitral awards rendered under their own law. It has not led to problems for the courts either.[15]

In the enforcement procedure of an award made in Switzerland before the United States District Court in Michigan, the respondent had objected that the costs of arbitration of SFR. 92,838.40 awarded by the arbitral tribunal was in contravention of Article III of the Convention.[16] The Court rightly rejected the defence. It pointed out that this defence was not among the affirmative defences of Article V of the Convention, observing that "the respondent completely misapprehends the significance of that provision". The Court held that Article III concerns only the costs of the enforcement proceedings. In declaring that the enforcing court cannot impose higher fees or more onerous conditions on the enforcement of a foreign award than

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15. In Italy a bill has been submitted to the Parliament providing for a special procedure for the enforcement of Convention awards as the enforcement through the procedure of Art. 800 of the Code of Civil Procedure (see *supra* n. 13) is considered to subject the parties to conditions which are in terms of fees and charges substantially more onerous than those provided for domestic awards. See G. Bernini, "National Report Italy", in *Yearbook* Vol. VI (1981) p. 24 at p. 59.

16. U.S. District Court, E.D. Michigan, S.D., March 15, 1977, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 16).

on a domestic award, Article III does not by any means concern the costs of the arbitral tribunal.

It should be emphasized that the rules of procedure of the forum for the enforcement of a Convention award as mentioned in Article III are not concerned with the *conditions* for enforcement. The rules of procedure within the meaning of Article III are confined to questions such as the form of the request and the competent authority. The conditions for enforcement, on the other hand, are those set out in the Convention and are exclusively governed by the latter. This is unequivocally stated in Article III in the phrase "under the conditions laid down in the following articles." It means that the procedural law governing the enforcement of Convention awards may not derogate from the principles embodied by Articles IV-VI. Thus the petitioner only needs to submit an original or copy of the arbitration agreement and arbitral award, and, possibly, a translation thereof (Art. IV). The enforcement may be refused only if the respondent can prove one of the grounds listed exhaustively in Article V(1) or on public policy grounds by virtue of Article V(2). This implies also that the respondent must be offered an opportunity to be heard either during the proceedings concerning the request for enforcement or in proceedings in opposition to the granting of the leave for enforcement, as the case may be, according to the procedural law of the forum. In addition, and this may even be an innovation for certain procedural laws, the decision on the enforcement may be adjourned if an action for setting aside the award is pending in the country where the award was made (Art. VI).[17]

The Court of First Instance of Naples held correctly that no argument can be derived from Article III of the Convention that Article 798 of the Italian Code of Civil Procedure, which allows a re-examination of the merits of a foreign decision in certain cases (see *infra* III–3.3.2), constitutes "rules of procedure of the territory where the award is relied upon".[18] The Court reasoned that Article III concerns such things as the form of the request for enforcement, the competent judge, etc., but not the substantive conditions of the action, which are provided by the Convention itself.

In this connection it may be observed that the use of the wording "shall not impose substantially more onerous *conditions*" in the second sentence of Article III is somewhat confusing. The word "conditions" as used in the second sentence must be deemed to relate to the conditions of the procedure, in other words, the rules of procedure. It does not refer to the conditions under which the enforcement of a Conven-

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17. See for Art. VI, *infra* III–4.5.3.3.
18. Tribunale of Naples, June 30, 1976, Società La Naviera Grancebaco S.A. *v.* Italgrani (Italy no. 22).

tion award is to take place, in which sense the word is employed in the first sentence of Article III.[19]

Article III can also be considered as the basis for the application of the law of procedure of the forum to those aspects incidental to the enforcement which are *not regulated by the Convention*. Attachment in connection with the enforcement of the award is one such example; others are discovery of evidence, set-off of a claim against the award which is sought to be enforced, and bankruptcy of a party. The question of estoppel of the right to invoke a provision of the Convention could similarly be considered as pertaining to the law of the forum, although it is also arguable that this question is implicitly regulated by the Convention itself. Furthermore, the procedural law of the forum may impose time limits within which the enforcement of a Convention award must be requested.

The question of *attachment* and the Convention has created a problem in the United States only at the stage when an award is not yet made.[20]

The request for *discovery* was made in an enforcement procedure before a United States Court of Appeals.[21] Months after the rendition of the award, Baruch Foster sought disqualification of the French presiding arbitrator, Prof. René David, alleging that he had a connection with the Ethiopian Government as he had drafted the Ethiopian Civil Code between 1954 and 1958. Baruch Foster requested discovery, serving Ethiopia with a notice to produce documents from the period 1954 to 1974. Ethiopia submitted affidavits in opposition according to which Prof. David had not acted in any capacity for the Ethiopian Government after 1958 and attesting to his worldwide reputation and integrity. The Court denied the request for discovery on the grounds that Baruch Foster was estopped from contesting and had failed to "come forward with anything tending to show that the claim was asserted in good faith and for any reason other than delay."

The application of the law of the forum to the question of *set-off* has led to differing results in practice. The Court of First Instance of Hamburg had to decide on a set-off made by the respondent on the basis of commissions for representations made by him on behalf of the petitioner. The Arbitral Tribunal of the Romanian Chamber of Commerce had refused to consider the set-off because it had been made without the production of the necessary evidence and had not been presented in the form of a counterclaim as required under its Arbitration Rules. The Court held that the "rules of procedure" mentioned in Article III of the Convention include the decision concerning a set-off, and that under German law, an undisputed set-off may be brought forward in an enforcement procedure. The Court of Appeal of Ham-

19. See A. Bülow, "Das UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche", 20 *Konkurs-, Treuhand- und Schiedsgerichtswesen* (1959) p. 1 at p. 8 n. 59.

20. See *supra* II–1.2.5 ("Pre-award Attachment Not Precluded").

21. U.S. Court of Appeals (5th Cir.), July 19, 1976, Imperial Ethiopian Government *v.* Baruch Foster Corp. (U.S. no. 10).

burg in this case added to the decision of the lower court that a set-off can always be dealt with in the enforcement proceedings, whether the arbitrators had, rightly or wrongly, not dealt with it.[22] On the other hand, a United States District Court held that "counterclaims are inappropriate in a confirmation proceeding" (the counterclaim was based on an anti-trust cause of action).[23] However, another District Court reached an opposite conclusion in a case which involved the request for enforcement by the petitioner of one award and three counterclaims of the respondent based on three other awards.[24] The arbitrators had rejected a counterclaim of the respondent in the arbitration resulting in the first award without prejudice to renew it in separate arbitral proceedings. The Court observed:

> ". . . Once having acquired subject matter jurisdiction of the original complaint, the Court in its discretion could exercise under Rule 13 of the Federal Rules of Civil Procedure, ancillary jurisdiction over the subject matter of the counterclaims .... The interests of justice require that the Court exercise its power over the counterclaims, and strike a net balance, notwithstanding the fact that the arbitral tribunal, because of its own procedures, was unable to do so. It would be inequitable to permit this plaintiff to recover a judgment here against the defendant on the concededly valid arbitral award in its favor, and at the same time to withhold enforcement of the three counterclaims here, requiring Samincorp to seek their enforcement separately in a foreign tribunal or wherever Jugometal can be found. The Convention does not prevent this Court from entertaining set-offs or counterclaims in a proper case where authorized by Rule 13 .... "

The *bankruptcy* of a party has rarely been dealt with in enforcement proceedings of a Convention award. In one case a United States District Court observed that neither the Convention nor the United States implementing Act indicates what should be done in the event of bankruptcy of one of the parties.[25]

The question of *estoppel* has been examined in the context of the question whether a party can be estopped from invoking non-compliance with the written form of the arbitration agreement as required by Article II(2).[26] The other court decisions in which the question of estoppel has been dealt with are considered later.[27]

Stipulations concerning the *time limits* within which the enforcement of a Convention award must be requested, are found, for example, in Section 207 of the United States Arbitration Act (i.e., the implementing legislation of the Convention in the United States) which provides that enforcement of an arbitral award falling under the Convention must be requested within three years after the award is made. It may be noted that for awards rendered in domestic federal cases the time limit is, according to Section 9 of the Act, one year. Another example is the U.S.S.R. where the time limit is three years from the moment when the award acquires legal force.[28]

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22. Landgericht of Hamburg, March 27, 1974, affirmed by Oberlandesgericht of Hamburg, March 27, 1975 (F.R. Germ. no. 10).
23. U.S. District Court, E.D. Michigan, S.D., March 15, 1977, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 16).
24. U.S. District Court of New York, S.D., April 21, 1978, Jugometal *v.* Samincorp Inc. (U.S. no. 22).
25. U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v.* Fotochrome Inc. (U.S. no. 3); see also *infra* at n. 34 and III–5.1 at n. 354.
26. See *supra* II–2.2.3(*c*).
27. See *infra* at n. 88-92.
28. See S. Lebedev, "National Report U.S.S.R.", in *Yearbook* Vol. I (1976) p. 91 at p. 103.

III–1.3 Entry of Judgment Clause (United States)

A specific question in respect of the rules governing the procedure of Convention awards has arisen in the United States for the so-called "entry of judgment clause". Pursuant to Section 9 of Chapter 1 of the United States Arbitration Act – which is concerned with domestic arbitration in federal cases – the 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 the entry of judgment clause is not contained in the arbitration agreement, a federal court has no jurisdiction to enforce an award under Chapter 1 of the United States Arbitration Act.

Chapter 2 of the United States Arbitration Act – which is the enabling legislation for the Convention in the United States – does not provide expressly that the entry of judgment clause is also required for enforcement actions of awards falling under the Convention. On the other hand, Section 208 of Chapter 2, headed "Chapter 1 – Residual Application", provides that "Chapter 1 applies to actions and proceedings brought under this Chapter [2] to the extent that Chapter [1] is not in conflict with this Chapter or the Convention as ratified by the United States."

One District Court circumvented the question whether the entry of judgment clause requirement of Section 9 of Chapter 1 is superseded by the Convention by holding that the requirement can already be deemed to be fulfilled if consent can be implied from the wording of the contract ("award to be final") and the conduct of the parties (e.g., by invoking federal jurisdiction in the same arbitration at an earlier occasion).[29]

Mr. Holtzmann is of the opinion that the requirement of Section 9 is inapplicable to enforcement actions falling under the Convention mainly because Chapter 2 is silent on this point.[30] The following observation of Mr. Aksen may also be added[31] :

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29. U.S. District Court, E.D. Michigan, S.D., August 9, 1976, Audi NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 11). The Court referred to the U.S. Court of Appeals (2nd Cir.) decision in Varley *v.* Tarrytown Association, 477 *Federal Reporter Second Series* p. 208 (1973) in which the entry of judgment clause requirement was reaffirmed but in which it was also suggested that something less than the wording of Sect. 9 might have sufficed. This suggestion was elaborated in a subsequent decision in which it was held that the wording of the agreement ("award to be final") and the conduct of the parties "manifest the requisite 'consent' to entry of judgment", U.S. Court of Appeals (2nd Cir.), May 24, 1974, National Metal Converters Inc. *v.* I/S Stavborg (U.S. no. 2) (the Convention was not applied in this case because the award was made in New York).

30. H. Holtzmann, "National Report United States", in *Yearbook* Vol. II (1977) p. 116 at p. 120.

31. G. Aksen, "Application of the New York Convention by the United States Courts", in *Yearbook* Vol. IV (1979) p. 341 at p. 357.

> "If this requirement was to apply to an international Convention arbitration, the results would be difficult to explain to a foreign party. An international business entity enters into an arbitration agreement with the confidence that the U.S. is a member of good standing of the countries acceding to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, if the U.S. district courts are unavailable for implementing this treaty because the contract doesn't contain the 'magic language' specifying that 'judgment of the court shall be entered upon the award' required by Chapter 1 of the U.S. Arbitration Act, an anomalous and detrimental result might follow."

According to the letter of the text of Article III, the requirement of the entry of judgment clause would not conflict with the Convention. It is not a "more onerous condition" than is "imposed on the recognition and enforcement of domestic awards" as stated in Article III, since the entry of judgment clause is also required for domestic arbitrations in federal cases. However, these are conditions which a Contracting State *may* impose. If a Contracting State wishes to give Convention awards as favourable treatment as possible, it may do away with requirements applicable to domestic cases which are deemed too cumbersome for enforcement in the international context. As the implementing legislation exhibits a particularly favourable attitude towards the Convention, the silence of Chapter 2 may well be interpreted as the legislator's intent that the requirement of Section 9 not be applicable to actions falling under the Convention.[32]

III–1.4 Recognition of Awards

To conclude this Part concerning Article III, a brief observation may be made in respect of the opening line of this Article. It reads "Each Contracting State shall *recognize* arbitral awards as binding . . ." The Convention refers to the recognition of an arbitral award not only in Article III, but mentions it expressly throughout the Convention (Art. I(1) and (3), Art. IV(1), and Art. V(1) and (2)). The exception is Article VI, according to the text of which only the decision on the *enforcement* of an award can be adjourned if an application for the suspension or setting aside of the award is pending in the country of origin. In the other Articles recognition and enforcement of the award are treated on the same footing. The opening line of Article III provides for the basic obligation of a Contracting State as far as the recognition of the award is concerned: it must recognize an award falling under the Convention

32. The legislative history of the implementing Act of the United States does not contain, as far as it could be researched, an indication on the question of the applicability of the entry of judgment clause as required by Sect. 9 (House Report No. 91-1181; Senate Report No. 91-702; Congressional Record, Vol. 116 (1970), February 17, July 6, and July 16).

as "binding". What the word "binding" means will be examined in detail in relation to Article V(1) (e) of the Convention in III-4.5.2.

In most cases a party will request the enforcement of an award. In fact, none of the court decisions reported under the Convention so far involved the recognition of an award. The inclusion of recognition in the Convention is, rather, a *clause de style*: it is traditional to provide for it in international conventions relating to foreign judgments and awards. It also figured, for example, in the Geneva Convention of 1927, without, as far as it is known, having ever been applied in practice.

The recognition of a foreign award under the Convention may occur in a court action between the same parties on the same subject matter as decided in the foreign award. The defendant may, on the basis of the award, then object to the jurisdiction of the court to entertain the action. It means that the defendant requests the recognition of the award by invoking its effect of *res judicata (l'autorité de chose jugée)* and relying on the principle of *ne bis in idem* in a court action brought against him concerning a subject matter already decided in a foreign arbitration. In such a case it is not necessary first to institute enforcement proceedings. However, the same conditions as for the enforcement of an award as laid down in Articles IV-VI are applicable. The procedural aspects of the recognition, such as at which moment the award should be invoked for recognition, are governed by the procedural law of the forum.

The above case of a court action between the same parties on the same subject matter as decided in the award will certainly call for recognition under the Convention provided, of course, that the award comes within the purview of the Convention. Recognition of an award under the Convention would be less certain in the case where the award is invoked as a set-off or counterclaim. The admissibility of the request for recognition in this case will depend on the law of the forum, which may require, for example, that the subject matter of the award be related to the original cause of the court action. Even more uncertain is the question whether, in a court action between the same parties on a related subject matter, the court can be requested to recognize as binding the facts or even the points of law as found by the arbitrator in the award. In certain countries a court seems indeed to be bound by the findings of the arbitrators under certain circumstances, whilst in others a court seems not to be under such obligation.[33]

It may be mentioned that a United States Court of Appeals considered that the filing of a Japanese award by the petitioner as proof of claim in the bankruptcy

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33. See P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 779.

proceedings against the respondent was "premature".[34] The Court directed that the petitioner had first to seek a judgment based on the award in the District Court which gave the respondent, in turn, the right to assert the non-enforceability of the award on one of the grounds specified in Article V of the Convention. One may wonder why the award could not be *recognized* under the Convention in the bankruptcy proceedings. This issue was not pressed by the petitioner. Presumably, the Referee in Bankruptcy was not the proper authority to deal with the recognition of a Convention award.

III–1.5 Uniform Interpretation (and Summary)

The rules of procedure for the enforcement of an arbitral award falling under the Convention are determined by the law of procedure of the country where the enforcement is sought (pp. 236-239).

The rules of procedure are not concerned with the conditions of enforcement which are exclusively governed by the Convention (pp. 239-240).

Article III can also be considered as the basis for the application of the law of procedure of the forum to those aspects incidental to the enforcement which are not regulated by the Convention (e.g., attachment, discovery of evidence, set-off, bankruptcy, time limit for request of enforcement, and, possibly, estoppel) (pp. 240-241).

The requirement in United States law for domestic arbitration in federal cases of the entry of judgment clause is not applicable to cases falling under the Convention (pp. 242-243).

34. U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v*. Fotochrome Inc. (U.S. no. 3).

PART III–2 CONDITIONS TO BE FULFILLED BY THE CLAIMANT (ART. IV)

III–2.1 In General

Article IV of the Convention provides:
"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.**"

Article IV is set up to facilitate the request for enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement. In comparison with the Geneva Convention of 1927 it constitutes a great improvement. Under Article 4(1) of the Geneva Convention, the party seeking enforcement had to supply, in addition to the original or copy of the award:

– proof that the award had become "final" in the country in which it was made (which amounted in practice to the necessity of acquiring a leave for enforcement in that country);

– "when necessary", proof that the award was an award falling under the Geneva Convention, that the award had been made in pursuance of a submission to arbitration which was valid under the law applicable thereto, and that "the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure."

The ECOSOC Draft Convention of 1955 Article V(1) contained requirements which were similar to those contained in Article 4(1) of the Geneva Convention, albeit somewhat more relaxed.

A revolution in the whole set up of the Draft Convention took place during the New York Conference of 1958 because of the proposal of the Dutch delegate to amend Articles III-V of the Draft Convention.[35] One of the main objects of the Dutch proposal was to transform most

35. UN DOC E/CONF.26/L.17.

of the conditions to be fulfilled by the party seeking enforcement into grounds for refusal of enforcement to be proven by the party against whom the enforcement is sought.

The New York Conference appeared to be apprehensive of the Dutch proposal which was described by the Italian delegate as "a very bold innovation". It led to a flood of further amendments and long debates at the Conference.[36] The matter was finally referred to Working Party No. 3 which came up with a refined version of the Dutch proposal.[37] The Working Party's version was adopted by the Conference with some further amendments and was later re-numbered as the present Articles IV-VI of the Convention.[38] The following Parts will go into the other aspects of the innovations caused by the Dutch proposal, including the elimination of the requirement of the leave for enforcement from the country of origin, the infamous Geneva Convention system of "double exequatur".

The final result of the drafting history of Article IV is that the party seeking enforcement of an award no longer has to prove compliance with various conditions, but has only to supply the duly authenticated original award or duly certified copy thereof and the original arbitration agreement or duly certified copy thereof; if both documents are made in a language other than that of the country where the enforcement is sought, the party has also to submit a translation. In fulfilling these conditions, the party seeking enforcement produces *prima facie* evidence entitling him to obtain enforcement of the award.[39] It is then up to the other party to prove that enforcement should not be granted on the grounds enumerated exhaustively in the following Article V(1). The transformation of most of the "positive" conditions into "negative" conditions was prompted by the desire to ease the conditions to be fulfilled by the party seeking enforcement as much as possible. Article IV is to be interpreted accordingly.

The above-mentioned Dutch proposal to amend Articles III-V of the ECOSOC Draft Convention even contained an express provision on the *prima facie* proof, reading:

> "The party seeking recognition or enforcement of the award shall be deemed to have proved *prima facie* the existence of the award and of the agreement to arbitrate on which it was based by the supply of the documents mentioned under para. 1."

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36. UN DOC E/CONF.26/SR.11-14.
37. UN DOC E/CONF.26/L.43.
38. UN DOC E/CONF.26/SR.17.
39. P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 313; Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 102.

This provision of the proposal was deleted as it was considered superfluous. It is, however, helpful in interpreting Article IV.

The Australian implementing Act[40] may also be mentioned in this context as it provides in Section 9(5):

> "A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates."

The conditions mentioned in Article IV are the *only conditions* with which the party seeking enforcement of a Convention award has to comply. This principle of Article IV has been affirmed by several courts.[41]

It may be noted that the Indian implementing Act[42], in addition, requires in Section 8(1)(c) that the party seeking enforcement shall produce "such evidence as may be necessary to prove that the award is a foreign award." This requirement, which originates from the Geneva Convention of 1927, is not one which is listed in Article IV of the New York Convention and must, therefore, be considered to be contrary to it.

It also *supersedes domestic law* in respect of conditions to be fulfilled by a party seeking enforcement of a foreign award. In this connection two remarkable Mexican decisions may be mentioned.[43] In both cases the party against whom the enforcement of the award, made in Paris and New York respectively, was sought, had asserted that the Mexican courts should have received the award by means of a letter rogatory from the court in the country in which the award was made as required by Article 302(1) of the Mexican Code of Civil Procedure for the Federal District. Both Mexican courts held that the letters rogatory were not required because the enforcement was governed by the New York Convention, the conditions of Article IV having been satisfied. Both decisions are remarkable because they counterbalance the frequently heard complaint that the Latin American world is hostile to international commercial arbitration.[44]

The question has come up whether the fulfillment by the claimant of the conditions mentioned in Article IV is *indispensable for the admissi-*

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40. See for references, Annex C.

41. E.g., Areios Pagos, decision no. 926 of 1973 (Greece no. 3); Corte di Appello of Rome, September 24, 1973, Intercommerce *v.* Menaguale (Italy no. 9); Tribunal Superior de Justicia [Court of Appeals] (5th Chamber) of Mexico, D.F., August 1, 1977, Malden Mills Inc. *v.* Hilaturas Lourdes S.A. (Mexico no. 2).

42. See for references, Annex C.

43. Tribunal Superior de Justicia, 18th Civil Court of First Instance of Mexico, D.F., February 24, 1977, Presse Office S.A. *v.* Centro Editorial Hoy S.A. (Mexico no. 1); Tribunal Superior de Justicia [Court of Appeals] (5th Chamber), *supra* n. 41.

44. See also Corte di Appello of Messina, May 19, 1976, Wieland K.G. *v.* Società Industriale Meridionale (Italy no. 34) in which it was held that Art. IV(2) supersedes Art. 123 of the Italian Code of Civil Procedure according to which the translation should be made by an official translator appointed by the judge during the judicial proceedings, see *infra* at n. 84.

bility of the application for enforcement. The text of Article IV states namely "... shall, at the time of the application, supply ...". This phrase has, however, not formed an impediment for several courts to allow a claimant to cure, subsequent to the application, the non-fulfillment of the conditions without dismissing the application. For instance, the Supreme Court of Austria considered, in a case where the claimant had only submitted the authenticated original award, that the lack of fulfillment of the condition to submit the arbitration agreement as prescribed by Article IV(1) (b) of the Convention did not justify a refusal of enforcement, but could be cured in the manner provided in the Austrian Code of Civil Procedure.[45] Similarly, a United States Court of Appeals rejected the motion of the respondent to dismiss the application for enforcement on the ground that the claimant had failed to submit the authenticated original or certified copy of the award since the claimant had cured this failure subsequent to the motion.[46] These decisions can be deemed to be in conformity with the purpose of Article IV to ease as much as possible the conditions to be fulfilled by the party seeking enforcement of the award. Accordingly, the phrase "at the time of the application" as used in Article IV should not be interpreted too strictly, and it should be allowed that a claimant can complete the conditions during the proceedings.[47]

One may even go further. It may be argued that under certain circumstances a court may be satisfied that the documents submitted to it represent true copies of the arbitration agreement and award although they are not certified. The same could apply to an original award which is not authenticated. This was, for instance, the opinion of the District Court in Michigan.[48] The respondent in that case had objected to the application for enforcement in that it did not comply with Article IV of the Convention since only copies rather than the originals or certified copies of the arbitration agreement and award had been submitted by the claimant. The Court found, however, that the purpose of Article IV had been met by the claimant and that "the respondent may not assert such technical deficiencies to defeat or delay confirmation of a valid award."

For compliance with Article IV it is, of course, necessary that the claimant supply at least the arbitration agreement and arbitral award.

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45. Oberster Gerichtshof, November 17, 1965 (Austria no. 1), referring to Sects. 84 and 85 of the Austrian Code of Civil Procedure and Sect. 78 of the Law on Execution.

46. U.S. Court of Appeals (5th Cir.), July 19, 1976, Imperial Ethiopian Government *v.* Baruch Foster Corp. (U.S. no. 10) at p. 336 n. 4.

47. Accord, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 806.

48. U.S. District Court, E.D. Michigan, S.D., March 15, 1977, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 16).

The above liberal interpretations of Article IV concern the manner in which the conditions should be complied with, i.e., that Article IV should not be applied too strictly as far as the time of submission of the documents and the authentication and certification are concerned. On the other hand, as far as the translation of both documents as mentioned in the second paragraph of Article IV is concerned, it is arguable that this requirement may be dispensed with altogether.[49]

Furthermore, if a *copy* of the arbitration agreement or award is submitted, it must reflect the original in its entirety. Thus, if the Arbitration Rules agreed to in the parties' agreement provide that the parties will receive only an extract of the award which is merely signed by the President of the Arbitration Committee of the arbitral institution and not by the arbitrators who made the award, such a copy of the award does not comply with Article IV.[50] It implies also that Article IV cannot be modified by an agreement of the parties.

An aspect of Article IV which has not been dealt with in the court decisions is the mention in sub-paragraph (*b*) of the "*agreement referred to in article II*". Does this phrase imply that the party seeking enforcement should prove that the arbitration agreement complies with the requirements of Article II, and especially of the second paragraph of that Article that the agreement be in writing? The history, text, and system of the Convention are against such interpretation. It was inserted by the Drafting Committee of the Conference whose task was limited to making a linguistically proper and consistent wording of the text of the Convention; it was not discussed during the Conference itself. Furthermore, the text of Article IV states that a claimant has to "*supply*" the documents in the form as mentioned in that Article; he does not need to prove their validity under the other provisions of the Convention. It is the party against whom the enforcement is sought who has to prove that the agreement does not comply with Article II: Article V(1) provides that enforcement may be refused if the respondent furnishes "*proof*", whilst ground *a* for refusal of enforcement listed in that Article mentions "agreement referred to in article II".[51]

III–2.2 Authentication and Certification under Article IV(1)

Article IV(1) requires that the party seeking enforcement of the award 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 requirement of authentication and certification of the documents to be submitted according to Article IV raises a certain number of questions which may be largely answered by the legislative history.

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49. See *infra* III–2.3.
50. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14).
51. See *infra* III–4.1.3.3 ("Applicability of Article II").

The *first question* is the distinction between an authenticated original of the award, on the one hand, and a certified copy of the award and the agreement, on the other. 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. The authentication therefore concerns the signature, whilst the certification concerns the document as a whole.

The Geneva Convention of 1927 required that the copy of the award be "duly authenticated". The wording "duly authenticated" for the copy of the award appeared also in the ECOSOC Draft Convention of 1955. However, Working Party No. 3 provided that the copy was to be "duly certified". The change in the wording is indeed appropriate as it is more usual to certify a copy for a true copy than to authenticate the signature on a copy.

The *second question* is the difference in the text of Article IV according to which the original award needs to be authenticated, whereas such authentication is not necessary for the original arbitration agreement. The Working Party No. 3 had proposed for what later became Article IV: "(*a*) The original arbitration award or a duly certified copy thereof; (*b*) The original arbitration agreement . . . or duly certified cop[y] thereof." At the New York Conference the Belgian delegate proposed to amend the Working Party's text by inserting the wording "duly authenticated" before the original award and agreement. He pointed out that the original documents required under sub-paragraphs (*a*) and (*b*) would not be of much value unless the signatures were duly authenticated. The Israeli delegate asked for a separate vote for sub-paragraphs (*a*) and (*b*). He had no objection to the authentication of the signature of the arbitrator, but he could see no need to authenticate the signatures of the parties on the agreement as they appeared before the court in the enforcement proceedings. To this observation the French delegate added that the provision of the original arbitration agreement should not be subjected to excessive requirements: in many cases arbitration was based merely on an arbitral clause agreed to in an exchange of correspondence between the parties. This led to the adoption of the Belgian proposal to amend sub-paragraph (*a*), but to the rejection of the proposal to amend sub-paragraph (*b*).[52]

It is to be mentioned that the discussion and voting on the Belgian proposal took place during the Conference at a time when Article II(2) concerning the written form of the arbitration agreement had not yet been submitted to the Conference's consideration. If that had been the case, an argument in addition to the French objection against the Belgian proposal to amend sub-paragraph (*b*) would have been that the au-

52. UN DOC E/CONF.26/SR.17.

thentication of the original arbitration agreement would have been at odds with Article II(2) as that Article does not require the signatures of the parties in the case of an arbitration agreement concluded by an exchange of documents.[53]

The *third question* is according to which law the original award should be authenticated or the copy of the agreement and award should be certified. This law is not mentioned in Article IV, having been deliberately omitted by the drafters of the Convention. The Geneva Convention of 1927 required in its Article 4(1)(1) that the award be authenticated "according to the requirements of the law of the country in which it was made." The ECOSOC Committee which prepared the Draft Convention of 1955 left out the specification of the law applicable to the authentication. In the Report accompanying the Draft Convention it explained the omission by stating that it was "preferable to allow a greater latitude with regard to that question to the tribunal of the country in which the recognition or enforcement was being requested."[54] The omission was accepted by the Conference without any discussion in depth.[55]

The omission is not to be interpreted in the sense that the question of authentication and certification is now left exclusively to the law of the country in which the enforcement of the award is sought (*lex fori*), as certain authors maintain.[56] This interpretation is too restrictive. Rather, the "greater latitude" allowed the court before which the enforcement is sought must be understood to mean that the court may apply, instead of the law of the country in which the award is made, as was the case under the Geneva Convention, also its own law.

Prof. Gaja shares the view of the authors referred to above that the *lex fori* applies to the authentication and certification, but specifies that under this law the authentication of the award in the country of origin may be considered sufficient.[57] The specification may be true for certain laws, but would still give a too limited effect to Article IV as it does not offer a claimant the option to comply with either law in all cases (see for the option hereafter).

The above interpretation that a court may apply either law may be further reinforced by the purpose of Article IV to ease as much as possible the conditions to be fulfilled by the party seeking enforcement. This would imply the rule that the court should apply that law which upholds the validity of the authentication or certification. To infer such a rule from Article IV of the Convention would not be anything ex-

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53. See *supra* II–2.3.2 ("Whether Signatures Are Necessary").
54. UN DOC E/2704 and Corr. 1, para. 55.
55. UN DOC E/CONF.26/SR.17. See, however, for a related discussion, *infra* at n. 59.
56. P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 806; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 430.
57. G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.C. 1.

traordinary as it is in fact an application of the increasingly accepted modern principle of conflict law, namely, the application of the law of validation (*lex validitatis*).[58]

The foregoing is also based on the consideration that the party seeking enforcement of the award should have the option for the authentication or certification of complying either with the requirements of the law of the country in which the award was made, or with those of the law of the country in which the enforcement is sought. In practice, it means, for example, that the authentication or certification can be requested either at a diplomatic or consular agent of the country in which the award was made located in the country in which the enforcement is sought, or at a diplomatic or consular agent of the country in which the award is sought to be enforced located in the country in which the award was made, or at any other authority which may be sufficient under either law.

An indication that a party has this option can again be found in the legislative history. After the adoption of the Belgian amendment to sub-paragraph (*a*) to insert "duly authenticated" before the original arbitral award, the delegate of Monaco had proposed to add "by the consulate of the country where the award is relied upon". This proposal was rejected by the Conference.[59] The rejection of this proposal apparently was inspired by the desire not to limit the possibility of authentication, and by implication the certification, to the authorities of one country.

However, as the interpretation that either law can be applied is not well established, practice has shown that the safest solution is to request the authentication or certification at the diplomatic or consular agent of the country in which the enforcement of the award is sought located in the country in which the award was made.

In order to avoid any confusion, it should be noted that the latter course usually corresponds with the law of the country in which the enforcement of the award is sought. It therefore appears that the practice has a preference for compliance with a law which is opposite to the law that was required by the Geneva Convention (i.e., the law of the country in which the award was made). It is not so surprising as courts have a natural tendency to prefer the application of their own law.

Judicial support for the above interpretation concerning the question of the law governing the authentication and certification according to Article IV(1) of the Convention can be found in a decision of the Austrian Supreme Court.[60] The Court observed:

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58. See generally, G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980) Sects. 4.14 and 4.15.

59. UN DOC E/CONF.26/SR.17.

60. Oberster Gerichtshof, June 11, 1969 (Austria no. 3); see also *infra* n. 65.

> "Pursuant to Article IV of the New York Convention, to which Bulgaria also has adhered, it is required for the enforcement of an award that together with the request for enforcement the claimant supply the authenticated original arbitral award or a copy thereof, the conformity of which with the original is duly certified, as well as the original arbitration agreement or a copy thereof, the conformity of which with the original is also duly certified. The Convention does not make clear whether the arbitral award and the arbitration agreement must comply with the requirements for authenticity or trueness obtaining in the country in which, or under the law of which, the arbitral award is made, or whether they also must comply with the requirements for legalisation of foreign documents in the country in which the award is relied upon. Consequently, according to the Convention the claimant is not obliged to go to the foreign mission of the country in which he wishes to request the enforcement. . . . In order to avoid difficulties it is, however, recommended to have the copies certified by the foreign mission of the country whose courts will be requested to recognize or enforce the arbitral award . . . but this is not obligatory."

Other courts have not referred to the law governing the authentication and certification under Article IV. However, as we shall see presently, the courts readily accept that an authentication or certification is sufficient for the purposes of Article IV(1).

It should be added that the implementing Acts of Ghana and India contain provisions regarding the present question which not only deviate from the above interpretation that either law may be applied, but also in certain respects from the text of Article IV of the Convention itself.[61]

For sub-paragraph (*a*) concerning the award, both implementing Acts contain a provision similar to Article 4(1)(1) of the Geneva Convention of 1927 which requires: "The original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made." For sub-para. (*b*) concerning the arbitration agreement, the Indian implementing Act contains a provision ("The original agreement for arbitration or a duly certified copy thereof") which is similar to the wording of Article IV(1) (b) of the New York Convention, but which, in view of what is provided for sub-paragraph (*a*), would mean that the certification should take place in the manner required by the law of the country in which it was made.

The Ghana implementing Act, oddly enough, confirms the above interpretation of sub-paragraph (*b*) that both laws can be applied. The provision of the Ghana Act reads:

> "The agreement pursuant to which the award was made or a copy thereof duly authenticated in the manner required by the law of the country in which it was made or in such other manner as may be sufficient according to the law of Ghana."

Leaving aside that the word "authenticated" should read "certified", one wonders why the same could not have been provided for sub-paragraph (*a*) in the Ghana Act. Presumably, the difference originates from the erroneous idea that an award is a kind of official document for which authentication would be different than for a

61. Ghana: Arbitration Act 1961, Act No. 38 of 1961, Sect. 38(1). India: Foreign Awards (Recognition and Enforcement) Act 1961, Act No. 45 of 1961, Sect. 8(1).

private document such as an arbitration agreement between the parties. This idea is erroneous because an arbitral award made by arbitrators who are private persons must also be considered as a private document until a leave for enforcement, attestation, confirmation, or the like has been apposed on it by a judicial authority.

Finally, we may quote Section 9(2) of the Australian implementing Act in which an attempt is made to "translate" the "greater latitude" as follows:

> "For the purposes of sub-section (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if –
> (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
> (b) it had been otherwise authenticated or certified to the satisfaction of the court."

This provision of the Australian Act gives the court the power to assess the authenticity and certification according to what the court deems correct and therefore implements Article IV(1) in all respects.

The *fourth question* is which authority is competent to authenticate or certify. The answer to this question depends in the first place on the law applied to the authentication and certification. As observed above, the courts have refrained from referring to a specific law in regard of this question, with the exception of the Austrian Supreme Court. They appear, however, to be quite liberal in accepting that an original award is authenticated or a copy of an award or agreement is certified. This may at least be inferred from the cases decided so far in none of which it has been held that the authentication or certification was insufficient.[62]

For the authentication of the original award it is generally sufficient to have this formality accomplished by a diplomatic or consular agent of the country in which the enforcement is sought located in the country where the award was made. For example, a Swiss court held that Article IV(1) (a) was complied with where the original award, made in Rotterdam, was authenticated by the Swiss consul in Rotterdam.[63] This usually corresponds with the application of the law of the country in which the enforcement of the award is sought. As explained above, the

62. An exception is Oberlandsgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14), see *supra* at n. 50.

63. Obergericht of Basle, June 3, 1971 (Switz. no. 5). In Tribunal de grande instance (Commercial Chamber) of Strasbourg, October 9, 1970, Animalfeeds International Corp. *v.* S.A. A. Becker et Cie (France no. 2) the claimant was uncertain whether one authentication would do; he became a true autograph collector: the arbitrators' signatures on the awards, which were made in Hamburg under the Arbitration Rules of the Association of Grain Merchants of the Hamburg Exchange, were authenticated by the Secretary of the Association, whose signature was authenticated by the Chamber of Commerce of Hamburg, whose signature was authenticated by the Senate of Hamburg, whose signature was finally authenticated by the French consul in Hamburg. It is obvious that this chain of signatures was a waste of ink and time. The claimant could have better gone directly to the French consul. Another example of such chain can be found in Oberster Gerichtshof, June 11, 1969 (Austria no. 3), see *infra* n. 65.

application of the law of the country in which the award was made can also be deemed a possibility implied in Article IV. The latter usually envisages the authentication by the competent authority of the country in which the award was made. That authority may be a judicial officer, a notary, etc., in that country, or a diplomatic or consular agent of that country located in the country in which the enforcement of the award is sought.[64]

The production of a certified copy of the award occurs frequently in practice. This is not so surprising since arbitral institutions or arbitrators often keep the original in their files and provide the parties with a copy. The authority competent for the certification of the copy is, in principle, the same as the one competent for the authentication.[65] Certain courts have also accepted a copy of the original award which was certified by the Secretary of the arbitral institution under whose auspices the arbitration had taken place.[66]

The production of a certified copy of the original arbitration agreement occurs less frequently in practice as a party normally has the original arbitration agreement in his possession. Contrary to the original award which needs to be authenticated, the original arbitration agreement can, pursuant to Article IV(1)(b), be produced without being authenticated. In principle, the same authorities competent for the certification of the copy of the award can be generally deemed competent for the certification of a copy of the arbitration agreement.

The *fifth question* is whether, in the case of a certified copy of the award, the original award should also be authenticated.[67] The text of

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64. This occurred, for example, partially in the case decided by the Tribunal de grande instance of Strasbourg, *supra* n. 63.

65. Tribunal Superior de Justicia, 18th Civil Court of First Instance of Mexico, D.F., February 24, 1977, Presse Office S.A. *v.* Centro Editorial Hoy S.A. (Mexico no. 1): the copy of the award, which was made in Paris, was certified by the Mexican consul in Paris. In Oberster Gerichtshof, June 11, 1969 (Austria no. 3) the copy of the award, which was made in Bulgaria, was certified by a Bulgarian notary. The notary's signature, however, led to the following chain: it was authenticated by an official of the Ministry of Justice of Bulgaria, whose signature was authenticated by the Ministry of Foreign Affairs of Bulgaria, whose signature was finally authenticated by the Austrian embassy in Bulgaria. Here again (see *supra* n. 63) one wonders why the claimant has not gone directly to the Austrian embassy in Bulgaria.

66. E.g., Corte di Appello of Milan, December 13, 1974, S.a.S. C.I.P.R.A. di Schmutz & Co. *v.* Pezzota Camillo (Italy no. 12): the copy of the award, which was made in Hamburg under the Arbitration Rules of the Hamburg Commodity Association, was certified by an official of that Association; Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18): the copy of the award, which was made in London under the Arbitration Rules of the London Metal Exchange, was certified by the Secretary of the Exchange.

67. This is the opinion of A. Bülow, "Das UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche", 20 *Konkurs-, Treuhand- und Schiedsgerichtswesen* (1959) p. 1 who observes at p. 9: "Der Schiedsspruch kann in Urschrift oder in ordnungsmässig beglaubigter Abschrift vorgelegt werden (Art. IV Abs. 1 Buchst. a). *In beide Fällen* muss jedoch die Urschrift des Schiedsspruchs legalisiert sein." (emphasis added) [The arbitral award may be submitted in the form of an original award or in the form of a duly certified copy (Art. IV(1) (a)). The original award must, however, be authenticated *in both cases*.]

Article IV(1) (a) is ambiguous on this point: in the phrase "The duly authenticated original award or a duly certified copy thereof", the word "thereof" may refer to the original award alone or to the original award as authenticated. It is true that, strictly speaking, a certified copy does not say anything about the authenticity of the signature on the original award as it only establishes that the copy is a true copy of the original. The requirement to produce a copy of an authenticated original would, however, be a rather excessive formalism which is contrary to the spirit in which Article IV is drafted. Moreover, the legislative history as outlined above indicates that the wording "duly authenticated" was intended only for the case where the original is produced, especially since that wording was a later insertion into the text. The interpretation is also belied in practice as in no case where a certified copy of the award was produced did it appear that the original was authenticated.[68]

A *sixth question* concerns the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of October 5, 1961.[69] The Convention replaces the legalisation – which is the same as authentication – by diplomatic or consular agents of foreign documents by a certificate called an "apostille" (there is apparently no English equivalent for this word). The "apostille" is issued by the competent authority of the country from which the document emanates and is a relatively simple formality. An arbitral award, being a private document, does not fall under the Hague Convention which applies only to public documents. If, however, a leave for enforcement (exequatur or the like) has been granted on the award by the court of the country in which it is made, the original award can be considered to have become a public document on which the "apostille" may be apposed. The addition of the "apostille" on such an award can be deemed to meet the requirement of Article IV(1) (a) of the New York Convention.[70]

The declaration of enforceability of the award by the court in the country of

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68. It may be noted that an authentication of the signature of the person who has certified the copy of the award occurs in practice. An example of this practice, which would appear redundant, is Tribunale of Naples, June 30, 1976, Società La Naviera Grancebaco S.A. *v.* Italgrani (Italy no. 22): the copy of the award, which was made in London, was certified by an English notary, whose signature was certified by the Italian consul in London. This practice may also lead to overly formalistic chains of signatures, as witnessed by the Austrian case cited in *supra* n. 65.

69. The English and French texts of this Convention are published in Hague Conference on Private International Law ed., *Recueil des Conventions 1951-1977* (The Hague 1977) p. 56. The following States have adhered to the Convention (March 1, 1981): Austria, Bahamas, Belgium, Botswana, Cyprus, Fiji, France, F.R. Germany, Hungary, Israel, Italy, Japan, Lesotho, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius Island, Netherlands, Portugal, Seychelles, Spain, Surinam, Swaziland, Switzerland, Tonga, United Kingdom, United States and Yugoslavia. Art. 2 of the Convention defines legalisation as "... the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears."

70. In this sense Oberlandesgericht of Hamburg, May 21, 1969 (F.R. Germ. 6). This case was somewhat complicated by the fact that the claimant was able to submit a *grosse* of the French award only. The award was deposited with the registry of the Tribunal de grande instance of Paris whose President had subsequently granted the leave for enforcement (*ordonnance d'exequatur*) on the award. The Tribunal issues then an official document, called a *grosse*, on which →

origin raises another question, *viz.* whether the award can still be considered as an award for the purposes of the Convention or has become a judgment. This question whether the award merges into the judgment on the award will be examined later.[71]

III–2.3 Translation (Art. IV(2))

The second paragraph of Article 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 the award is relied upon. The translation must further be certified as correct by an official or sworn translator or by a diplomatic or consular agent. This provision raises two questions. Must a translation be produced in all cases where a foreign language is used? And, secondly, by whom must the translation be certified as correct, and must a certification be obtained in all cases?

In regard to the *first question*, a difference between the Geneva Convention and the New York Convention should again be mentioned. Whilst the Geneva Convention provides in Article 4(2) that a translation "*may be demanded*", the New York Convention provides in Article IV(2) that the party seeking recognition and enforcement "*shall produce*" a translation. The permissive language of the Geneva Convention could also be found in the ECOSOC Draft Convention of 1955 and the Dutch proposal to amend Articles III-V of the Draft Convention ("may be required"). However, in one of the proposals to amend the Dutch proposal, the permissive language was changed into the mandatory language of "shall produce".[72] The latter expression was taken over by Working Party No. 3 for no specified reason and adopted by the Conference without discussion.[73]

Perhaps the idea prompting the change to the mandatory language was that in practice a court would always require a translation of documents submitted to it into its own language. This idea may be considered as somewhat out of date as currently most international arbitral awards are made in English and judges generally have a good command of English. It would have been preferable if the permissive language of the Geneva Convention had remained. The costs of translating documents are substantial, especially where recent arbitral awards sometimes tend to be as lengthy as a doctorate thesis.

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the actual enforcement can be pursued. The Oberlandesgericht held that the *grosse*, on which an "apostille" was apposed in France, was sufficiently equivalent to a duly certified copy of the award within the meaning of Art. IV(1) of the New York Convention.

71. See *infra* III–4.5.2.3 ("Merger of Award into Judgment").

72. It was contained in a proposal of the delegate of F.R. Germany (UN DOC E/CONF.26/L.34).

73. UN DOC E/CONF.26/SR.17.

It may therefore be argued that a party seeking enforcement of an award made in a foreign language need not produce a translation when he applies for enforcement if the court may be deemed to know the language of the award. He may await the request of the court or the respondent for such translation. If the court deems the translation necessary or the other party, with a justified interest, so requests, the party seeking enforcement is indeed obliged to produce a translation.

The question of the production of a translation is comparable with the requirement of the first paragraph of Article IV to supply the authenticated original award or a certified copy thereof and the original arbitration agreement or a certified copy thereof. In III–2.2 we have seen that the failure to produce these documents may be cured during the proceedings and that in certain cases the authentication or certification may even be dispensed with. Similarly, under the second paragraph it must be deemed not to be an essential condition for the request for enforcement that a translation be produced at the time of the application, whilst the certification, about which more presently, may also be dispensed with. The difference is that under the first paragraph the documents should ultimately be produced, whilst under the second paragraph it is arguable that the translation needs to be produced only if it is requested. The latter interpretation of Article IV(2) is, however, neither supported nor denied in any of the court decisions reported so far, except in the following Dutch case.

The President of the Court of First Instance of The Hague assumed that the party seeking enforcement of an award made in the United States did not wish to base his request on the New York Convention since he had not supplied a Dutch translation of the award made in English.[74] Referring to the difference between the Geneva Convention and the New York Convention, the President reasoned that "the translation is prescribed *compulsorily* by the New York Convention" [emphasis by the President]. It is submitted that this opinion is too formalistic and does not give due account to the idea of flexibility underlying Article IV.

It may be mentioned that the law implementing the New York Convention in Denmark of 1972 provides in Section 2(2) that the enforcement authority "*may* demand a certified translation of the award and the arbitration agreement" [emphasis added].[75]

An aspect of the *second question* is: the authority of which country can be deemed competent to certify the translation? It is to be noted that, as is the case for the authentication and certification in the first

74. President of Rechtbank of The Hague, June 23, 1972, Weinstein International Corp. *v.* Nagtegaal N.V. (Neth. no. 5).

75. See for references concerning this Law, Annex C. It may be mentioned that the Court of Appeal of Athens, decision no. 2768 of 1972 (Greece no. 2), held that Art. IV does not require the award to be served upon the respondent translated into his own (Greek) language, as a prerequisite for the application for enforcement.

paragraph, the drafters specifically did not mention the nationality of the translator or diplomatic or consular agent who is to certify the translation as correct. The Geneva Convention of 1927 required that the translation be certified as correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is relied upon. The specification of the countries was omitted in the ECOSOC Draft Convention of 1955. The Committee of ECOSOC explained the omission by declaring that the specification in the Geneva Convention "was too cumbersome and could give rise to difficulties in practice."[76] The final text remained as proposed by ECOSOC without having been subject to discussion at the New York Conference.

Here again, the drafters of the Convention appear to have had the intent to provide for the greatest possible flexibility for compliance with the positive conditions of enforcement of a Convention award. The same principles as are applicable to the certification under the first paragraph of Article IV can therefore be deemed applicable to the certification of the translation as correct under the second paragraph. Accordingly, the certification may take place according to the law of the country in which the award is made or according to the law of the country in which the award is relied upon. Correspondingly, the party seeking enforcement has, as a rule, the option to have the translation certified by an official or sworn translator of the country in which the award is made or of the country in which the enforcement is sought, or by a diplomatic or consular agent of either country.[77]

If the translation is made by an official or sworn translator of either country, the certification as correct is of course not necessary as this would be superfluous.[78] Consequently, one may answer in the negative to the other aspect of the second question, i.e., whether the translation

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76. UN DOC E/2704 and Corr. 1, para. 56.

77. In this sense Oberster Gerichtshof, June 11, 1969 (Austria no. 3). The reasoning of the Court was the same as quoted *supra* at n. 60. The translation in this case was made by the Ministry of Foreign Affairs of Bulgaria, but at the end of the opinion it appeared that an Austrian sworn translator had certified the translation as correct. Accord, Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 103; Bülow, *supra* n. 67, at p. 9. But see, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 806, who is of the opinion that the certification of the translation as correct can be made only by a diplomatic or consular agent of the country in which the enforcement is sought, while he states that "The translator need not be recognized in the country in which the enforcement is sought". P. Pointet, *La Convention de New-York sur l'exécution des sentences arbitrales étrangères* (Zurich 1958) writes at p. 13 that the Swiss delegation to the New York Conference had declared that it interpreted Art. IV(2) in the sense that a translation made by a notary ranks the same as a translation made by an official or sworn translator, which interpretation had not been contested by the Conference.

78. See *infra* n. 80.

must be certified as correct in all cases. Nevertheless, in order to avoid difficulties it is advisable to obtain a certification.

Certain implementing Acts have attempted to fill in the omission in Article IV(2). The Acts of Ghana and India contain again a reminiscence of the Geneva Convention as they provide that a translation "in the English language" is to be produced which is "certified as correct by a diplomatic or consular agent of the country to which that party belongs . . .".[79] This would give a too limited effect to Article IV(2) of the New York Convention. Moreover, for the purposes of Article IV(2) it is not the law of the country to which the party belongs which should be taken into account; rather, it is the law of the country in which the award is made or the law of the country in which the enforcement is to be sought. To this there may be added that a diplomatic or consular agent of the country to which the claimant belongs may not be the appropriate authority to certify a translation as correct: if the original language and the translation of the award are not the language of the country to which the claimant belongs, it is difficult to see how a diplomatic or consular agent of that country could certify the translation as correct. However, the Acts of Ghana and India offer a possibility to circumvent these problems as they add: "or certified as correct in such other manner as may be sufficient according to the law of [Ghana] [India]."

The Australian implementing Act provides in Section 9(4) that the translation is to be "certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court." Especially the last part of this provision can be said to give full effect to the flexibility which the drafters intended to confer upon Article IV.

Except for the above-mentioned Dutch decision, the requirement of a translation of the arbitration agreement and arbitral award as provided by Article IV(2) has not led to difficulties in practice. In several decisions it is merely stated that Article IV(2) has been complied with as a translation by a sworn translator had been submitted, without indicating the applicable law or the country to which the translator belongs.[89]

In a Swiss decision it was held that Article IV(2) was met as the translation by a translator in the Netherlands of an award made in Rotterdam was certified by the Swiss consul in Rotterdam.[81] In another Swiss decision, again concerning an award made in the Netherlands, Article IV(2) was also deemed to be complied with as the award was translated by a sworn translator in Switzerland.[82] In a Mexican decision

79. Ghana: Arbitration Act 1961, Act No. 38 of 1961, Sect. 38(2). India: Foreign Awards (Recognition and Enforcement) Act 1961, Act No. 45 of 1961, Sect. 8(2).

80. E.g., Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18); Tribunal de grande instance (Commercial Chamber) of Strasbourg, October 9, 1970, Animalfeeds International Corp. *v.* S.A. A. Becker et Cie (France no. 2). It is to be noted that the certification of the translation as correct is not mentioned in either decision. This confirms the view that in the case of a translation by an official or sworn translator, no certification as correct is needed (see *supra* at n. 78).

81. Obergericht of Basle, June 3, 1971 (Switz. no. 5).

82. Cour de Justice (1st Section) of the Canton Geneva, September 17, 1976, Léopold Lazarus Ltd. *v.* Chrome Ressources S.A. (Switz. no. 6).

it was not revealed who made the translation of an award made in France in French, but the Court stated that the translation was certified as correct by an official translator appointed for this purpose by the Court.[83] Finally, an Italian decision may be mentioned in which it was held that Article IV(2) supersedes Article 123 of the Italian Code of Civil Procedure according to which the translation should be made by an official translator appointed by the judge during the judicial proceedings.[84] This decision affirms the principle stated in III–2.1 *supra* that Article IV of the Convention supersedes domestic law in respect of the conditions to be fulfilled by the party seeking enforcement of an award falling under the Convention.

The brief review of the court decisions in respect of Article IV(2) of the Convention indicates that 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 the award is relied upon, or 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 the country in which the award is sought to be relied upon has also been held sufficient. It has not yet occurred that a translation was certified by a diplomatic or consular agent of the country where the award was made located in the country in which the award is sought to be enforced, but this will undoubtedly suffice as well.

III–2.4 Uniform Interpretation (and Summary)

The purpose of Article IV being to ease as much as possible the conditions to be fulfilled by the party seeking enforcement of an award, this Article is to be interpreted in a liberal sense (pp. 246-247).

By complying with the conditions of Article IV to produce the authenticated original award or a certified copy thereof and the original arbitration agreement or a certified copy thereof, as well as, if these documents are made in a foreign language, their translation, a party seeking enforcement of an award produces *prima facie* evidence entitling him to obtain enforcement of the award (pp. 247-248).

The conditions mentioned in Article IV are the only conditions with which the party seeking enforcement has to comply (p. 248).

Article IV supersedes domestic law in respect of conditions to be fulfilled by a party seeking enforcement of a foreign award (p. 248).

The failure to submit the documents mentioned in Article IV(1) does

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83. Tribunal Superior de Justicia, 18th Civil Court of First Instance of Mexico, D.F., February 24, 1977, Presse Office S.A. *v.* Centro Editorial Hoy S.A. (Mexico no. 1).

84. Corte di Appello of Messina, May 19, 1976, Wieland K.G. *v.* Società Industriale Meridionale (Italy no. 34).

not cause the automatic dismissal of the request for enforcement, but may be cured during the proceedings (pp. 248-250).

The authentication of the original award or the certification of the copy of the award or arbitration agreement may be made in accordance with either the law of the country in which the enforcement of the award is sought or the law of the country in which the award is made (pp. 250-256).

In the case of the production of a certified copy of the award there is no need to have the original authenticated (pp. 256-257).

The production of a translation as required by Article IV(2) is not essential for the request for enforcement of the award, but may be done later in the proceedings. It may be argued that the translation is to be produced only if the court or the respondent so requests (pp. 258-259).

The certification of the translation as correct may take place according to the law of the country in which the award is made or according to the law of the country in which the award is relied upon (pp. 259-262).

PART III–3 GROUNDS FOR REFUSAL OF ENFORCEMENT IN GENERAL (ART. V)

III–3.1 Main Features of the Grounds for Refusal of Enforcement

The main features of the grounds for refusal of enforcement of an award under the New York Convention may be best highlighted by listing the improvements in comparison with the Geneva Convention of 1927. Under the Geneva Convention the party seeking enforcement had the burden of proving a considerable number of conditions. In addition, the court before which the enforcement was sought could refuse enforcement if it was "satisfied" that one of a certain number of other grounds impeding enforcement as mentioned in the Geneva Convention was present. Furthermore, the party against whom the enforcement was sought could object to the enforcement by asserting any other cause of invalidity of the award under the law governing the arbitration. The Dutch proposal to amend the ECOSOC Draft Convention of 1955, which followed the Geneva Convention to a large extent, considerably ameliorated this cumbersome scheme.

In the foregoing Part we saw that one of the objectives of the Dutch proposal was to transform most of the conditions to be fulfilled by the party seeking enforcement into grounds for refusal of enforcement. What has remained for the party seeking enforcement is merely the production of the arbitration agreement and award, the production of which constitutes *prima facie* evidence entitling him to the enforcement of the award (Art. IV).

As far as the grounds for refusal are concerned, the Dutch proposal led to a clearer organization and a more precise definition. The grounds for refusal of enforcement are concentrated in one single Article V. They are further divided into two parts. Firstly, listed in the first paragraph of Article V, are the grounds for refusal of enforcement which are to be proven by the respondent. Secondly, listed in the second paragraph of Article V, which only concerns the violation of public policy of the law of the forum, is the ground on which a court may refuse enforcement on its own motion.

The main feature that *the respondent has the burden of proof* to show the existence of the grounds for refusal enumerated in Article V(1), as noted, constitutes a considerable improvement in comparison with the Geneva Convention. This main feature has been unanimously affirmed by the courts. They frequently explicitly state that the respondent, having the burden of proving the existence of one of the grounds for refusal mentioned in Article V(1), has failed to supply evidence of their existence.[85]

Another improvement is that *the grounds mentioned in Article 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 Article V(1), or if the court finds that the enforcement of the award would violate its public policy (Art. V(2)). Thus the respondent can no longer assert any cause for invalidity of the award under the law governing the arbitration as could happen under the Geneva Convention. This main feature has also been unanimously affirmed by the courts.[86]

A further main feature of the grounds for refusal is that *no review of the merits* of the arbitral award is allowed. The feature that Article V does not allow a review of the merits of the arbitral award has also been affirmed by the courts. In view of several specific aspects of this feature, it will be dealt with separately in the following Section III–3.2. In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award *extra* or *ultra petita*, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the non-binding force of the award, the setting aside of the award in the country of origin, and the violation of public policy.

It is to be noted that the opening lines of both the first and the second paragraph of Article V employ a permissive rather than mandatory language: enforcement "*may be*" refused. For the first paragraph it means that even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a certain discretion to overrule the defence and to grant the enforcement of the award. Such overruling would be appropriate, for example, in the case where the respondent can be deemed to be estopped from invoking the ground for refusal. For the second paragraph it would mean that a court can decide that, although the award would violate the domestic public policy of the court's own law, the violation is not such as to prevent enforcement of the award in international relations. The lat-

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85. E.g., President of Tribunal de grande instance of Paris, May 15, 1970, Compagnie de Saint-Gobain – Pont à Mousson *v.* Fertilizer Corporation of India Ltd. (FCIL) (France no. 1): respondent had failed to prove his allegation that the award had not become binding in the country where it was made (i.e., India) (Art. V(1) (e)); the same was held by the President of Rechtbank of Amsterdam, December 14, 1977 (Neth. no. 4) in respect of an award made in Romania, and by the Court of Appeal of Patras, decision no. 469 of 1974 (Greece no. 4), in respect of an award made in New York; Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29): respondent had failed to prove his allegation that the arbitral procedure had not been conducted in conformity with the applicable Arbitration Rules of the American Arbitration Association (Art. V(1) (d)).

86. E.g., Areios Pagos, decision no. 926 of 1973 (Greece no. 3); U.S. District Court, E.D. Michigan, S.D., March 15, 1977, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 16); President of Rechtbank of The Hague, April 26, 1973 (Neth. no. 3); Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21).

ter distinction between domestic and international public policy will be examined later.[87]

The question of estoppel has been dealt with in the context of the question whether a party can be estopped from invoking non-compliance with the written form of the arbitration agreement as required by Article II(2) of the Convention.[88] In addition to the court decisions concerning this question of Article II(2), discussed before, to the court decisions in which the issue of estoppel has come up are, inter alia, the following: *Court of Appeal of Hamburg* – defendant was held to be estopped from invoking that the arbitration agreement was concluded under the pressure of a dominant economic or social position of the other party (Sect. 1025(2) of the German Code of Civil Procedure, which could, according to the Court, be applied pursuant to Art. V(2) (b) of the Convention) as the defendant had participated in the arbitration without raising any objection in this respect.[89] *United States Court of Appeals* – defendant was held to be estopped from contesting the impartiality of the presiding arbitrator (Prof. René David) as he brought up this ground only months after the award had been rendered.[90] *Court of Appeal of Cologne* – the Arbitration Rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade provide that the parties are not informed of the names of the arbitrators; the defendant was held not to be estopped from invoking Article V(1) (b) of the Convention on the ground that he had not requested the list of the panel of arbitrators in order to delete the names he did not want, as he would have been unable to examine whether the names deleted by him would effectively have been excluded.[91] *Greek Supreme Court* – lack of power of attorney in writing to conclude arbitration agreement on the principal's behalf could have been remedied if the principal had appeared before the arbitrators and had participated in the proceedings without making any reservation.[92]

The exceeding by an arbitrator of his powers (Art. V(1) (c)) as well as the composition of the arbitral tribunal or the conduct of the arbitral procedure not in conformity with the agreement of the parties (Art. V(1) (d)) may also be considered as provisions of the Convention which may involve estoppel. They have not, however, been subject to judicial decisions in which the issue of estoppel has been raised.

Another improvement of the New York Convention's scheme for enforcement of an award is *the elimination of the "double exequatur"*. Under the Geneva Convention the party seeking enforcement of an award had to prove that the award had become "final" in the country in which it was made. In practice this could be proven only by producing an exequatur (leave for enforcement or the like) issued in the country in which the award was made. As the party had also to acquire a leave for enforcement in the country in which he sought enforcement, this

87. See *infra* III–5.1 ("Public Policy in General").

88. See *supra* II–2.2.3(*c*).

89. Oberlandesgericht of Hamburg, October 14, 1964 (F.R. Germ. no. 5); see also *infra* at n. 165.

90. U.S. Court of Appeals (5th Cir.), July 19, 1976, Imperial Ethiopian Government *v.* Baruch Foster Corp. (U.S. no. 10); see also *supra* at n. 21.

91. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14).

92. Areios Pagos, January 14, 1977, Agrimpex S.A. *v.* J.F. Braun & Sons Inc. (Greece no. 5).

amounted to the system of "double exequatur". The thought prevailed at the New York Conference that the acquisition of a leave for enforcement in the country where the award was made was an unnecessary time-consuming hurdle, especially since no enforcement was sought in that country. Moreover, it could lead to delaying tactics on the part of the respondent who could forestall the award becoming final by instituting setting aside procedures in the country in which the award was made.

The elimination of the "double exequatur" is achieved in two ways. In the first place, the word "final" is replaced by the word "binding" in order to indicate that it does not include the exequatur in the country of origin (Art. V(1) (e)). In the second place, it is no longer the party seeking enforcement of the award who has to prove that the award has become binding in the country in which the award is made; rather, the party against whom the enforcement is sought has to prove that the award has not become binding. We will consider this feature of the Convention in more detail.[93]

A certain number of authors also stress what they consider as another improvement contained in Article V(1): *the contractual autonomy of the parties*. Pursuant to Article V(1) (a) the parties have the freedom to designate the law applicable to the arbitration agreement. Pursuant to Article V(1) (e) they have the same freedom for designating the law applicable to the award. And according to Article V(1) (d) they would even have the freedom to detach, by their agreement, the composition of the arbitral tribunal and the arbitral procedure from any national arbitration law. It may be doubted whether these provisions concerning the parties' contractual autonomy truly constitute an improvement.[94]

The overall scheme which inspired the above improvements is the facilitation of the enforcement of an award. The scheme reflects a "*pro-enforcement bias*" as certain United States courts have said[95], or resorting to Latin, constitutes a *praesumptio juris tantum* for the enforceability of an award, as one Italian court expressed it.[96]

This is also the manner in which Articles IV-VI have to be interpreted. As far as the grounds for refusal of enforcement of the award as enumerated in Article V are concerned, it means that they *have to be*

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93. See *infra* III–4.5.2 ("Award Not 'Binding' ").

94. See especially *supra* I–1.6.2 ("Does the A-national Award Fall under the Convention?"), *infra* III–4.1.3 ("Law Applicable to Arbitration Agreement"), and III–4.4.2 ("Role of the Law of the Country Where the Arbitration Took Place According to Article V(1) (d)").

95. E.g., U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7).

96. Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21).

construed narrowly.[97] More specifically, concerning the grounds of refusal of Article V(1) to be proven by the respondent, it means that their existence should be accepted in serious cases only; obstructions by respondents on trivial grounds should not be allowed. Concerning the ground for refusal of Article V(2) to be applied by the court on its own motion, it means that a court should accept a public policy violation in extreme cases only, thereby using the distinction between domestic and international public policy. As we will see in the following two Parts, the courts have generally interpreted Article V in this manner.

The courts have also interpreted and applied the Convention in accordance with the above listed main features regarding the grounds for refusal of enforcement. However, from the theoretical point of view, some courts still seem to have difficulties in applying the Convention's principle that it *supersedes domestic law concerning the enforcement of foreign awards*.[98] They first refer to a ground for refusal of enforcement under their own law regarding the enforcement of foreign awards, and then state that this ground is "confirmed" by a corresponding ground listed in Article V of the New York Convention. Although the outcome has always been the same as if these courts had not taken into account grounds other than those listed in Article V of the Convention, this manner of applying the Convention is rather incorrect. The grounds for refusal of enforcement mentioned in Article V, or, as the case may be, in the corresponding Article in the implementing Act, are exclusive if the enforcement is governed by the Convention, and do not leave any room for reference to the law of the forum on this point.

Another rather incorrect application of Article V of the Convention is that some courts do not expressly mention on which ground of this Article they rely, but only refer to the Convention in a general way. This application of Article V by implication is unfortunate as it does not always give precise information as to which ground for refusal of Article V of the Convention the court had in mind. Both the claimant and the respondent must be deemed entitled to this information.

Bearing in mind the above main features of the grounds for refusal of enforcement of a Convention award, the following two Parts will be devoted to an examination of the grounds for refusal to be proven by the party against whom the enforcement is sought as enumerated in Ar-

97. E.g., U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v.* Fotochrome Inc. (U.S. no. 3); U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7); U.S. District Court of New Jersey, May 12, 1976, Biotronik Mess- und Therapiegeräte G.m.b.H. & Co. *v.* Medford Medical Instrument Co. (U.S. no. 8).

98. The principle that Art. V supersedes the grounds for refusal of enforcement of foreign awards under domestic law was, for example, affirmed expressly by the Court of Appeal in the case decided by the German Supreme Court on February 12, 1976 (F.R. Germ. no. 12).

ticle V(1) (Part III–4), and the ground provided in Article V(2) for refusal of enforcement relating to public policy which may be applied on its own motion by the court before which the enforcement is sought (Part III–5). Before turning to this examination, one important feature of the grounds for refusal, that the enforcement court may not review the merits of the arbitral award, is to be dealt with in more detail.

III–3.2 No Review of the Merits of the Arbitral Award

It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration. Accordingly, it has, for example, been held that the objection that the arbitrator wrongly applied German law to the substance of the dispute is not a defence under the Convention.[99]

Italian courts have exhibited a pro-Convention attitude especially in regard to the Convention's principle that no review on the merits of the arbitral award is allowed. It contrasts sharply with the parochial approach of the majority of the courts in Italy in interpreting Article II(2) of the Convention concerning the written form of the arbitration agreement. Article 798 of the Italian Code of Civil Procedure provides that an Italian court may review the merits of a foreign decision under certain circumstances. This provision of Italian law enjoys great popularity amongst the Italian parties against whom the enforcement of a foreign award is sought as is witnessed by the considerable number of cases reported under the New York Convention. Invariably, however, the Italian courts have turned down the request for review of the merits of the award. The Italian lower courts have held with a remarkable unity that Article 798 of the Italian Code of Civil Procedure is superseded by the New York Convention which does not provide for a review of the merits of the arbitral award. The Italian Supreme Court has limited itself to

99. Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16).

holding that Article 798 does, in general, not apply to foreign arbitral awards.[100]

The request for a review of the merits of an award falling under the New York Convention has been rejected by the Italian courts, inter alia, in the following cases: the award was made in the absence of the Italian respondent (the most frequently invoked case)[101]; the award contains an error in facts and new evidence has been discovered after the rendition of the award[102]; the award was obtained by fraud[103]; the award does not clearly establish the legal succession of the claimant[104]; a court action between the same parties on the same subject matter is pending before the Italian courts[105]; the award does not contain reasons.[106]

Certain problems would seem to exist in *Romania*. It is reported that the Romanian courts will only enforce a foreign award "if the award is reckoned to be reasonable".[107] However, it is to be noted that these reports mention only that, in several cases, Romanian State enterprises, having lost an arbitration in London, would refuse to honour the award, alleging that the "awards are subject to serious criticism" whilst they invite the foreign party "to come to Bucharest to settle the claims informally". As far as it could be researched, no Romanian court has expressly held that it could review the merits of a foreign award, neither in a case falling under the New York Convention nor in cases falling outside the Convention. It may be added that, although parties from Socialist countries enjoy a good reputation for honouring awards rendered against them, it is not unusual that they attempt to use a final award as a basis for a subsequent settlement.

The principle of the New York Convention that the court may not review the merits of the arbitral award does not mean that it will not look into the award when it is necessary to ascertain whether a ground for refusal of enforcement mentioned in Article V is present. Thus, if the party against whom the award is invoked asserts that enforcement

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100. Corte di Cassazione (Sez. I), April 18, 1978, no. 1842, Eugenio Menaguale *v.* Intercommerce (Italy no. 25); February 2, 1978, no. 459, Catz International N.V. *v.* Vaccaro S.p.A. (Italy no. 30). In the latter case the New York Convention was not applied, although there is no doubt that this could have been done; the outcome, however, would have been the same if the Convention had been applied. See G. Mirabelli, "The Application of the New York Convention by the Italian Courts", in *Yearbook* Vol. IV (1979) p. 362 at p. 370.

101. Corte di Appello of Naples, December 13, 1974, Frey et al. *v.* Cuccaro e Figli (Italy no. 11); Corte di Appello of Venice, May 21, 1976, S.A. Pando Compania Naviera *v.* S.a.S. Filmo (Italy no. 16); Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21); Corte di Cassazione (Sez. I), February 2, 1978, no. 459, *supra* n. 100; Corte di Appello of Messina, May 19, 1976, Wieland K.G. *v.* Società Industriale Meridionale (Italy no. 34).

102. Tribunale of Naples, June 30, 1976, Società La Naviera Grancebaco S.A. *v.* Italgrani (Italy no. 22).

103. Corte di Appello of Florence, October 22, 1976, S.A. Tradax Export *v.* S.p.A. Carapelli (Italy no. 18); Corte di Appello of Naples (Salerno Section), February 13, 1978, G.A. Pap-K.G. Holzgrosshandlung *v.* Giovanni P. Pecoraro (Italy no. 36).

104. Corte di Cassazione (Sez. I), April 18, 1978, no. 1842, Eugenio Menaguale *v.* Intercommerce (Italy no. 25).

105. Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27).

106. Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29).

107. "Rumblings about Romania", *The Economist Financial Report* of March 1, 1979, p. 1.

should be refused in virtue of Article V(1) (c), because the award deals with a difference not contemplated by the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, the court has to investigate the award in order to evaluate the rightness of such an assertion.[108] Similarly, the court may have to go into the award in order to find out whether it violates public policy as provided in Article V(2).[109] In both cases, however, the court's scrutiny of the award is strictly limited to ascertaining whether the award contains things which may give rise to a refusal of enforcement on one of the grounds mentioned in Article V; it does not involve an evaluation by the court of the arbitrator's findings.

As mentioned before, the assertion that the arbitrator has misinterpreted facts or law is not a defence under the New York Convention. This must be deemed not to be different if it is alleged that the arbitrator has made more serious mistakes in the reasoning of the award, for instance, that the reasoning is in contradiction with the decision or the reasoning is itself contradictory.

An example of the latter type of allegation is the *Götaverken* v. *GNMTC* case. In opposition to the request for enforcement of this ICC award before the Supreme Court of Sweden, the Libyan respondent GNMTC had alleged that, whilst the arbitrators had declared in the reasoned part of the award that the Libyan party was justified in refusing to take delivery of the vessels constructed by the other party, the Swedish shipyard Götaverken, they had ordered GNMTC in the decisional part of the award to take delivery of the vessels.[110] The Swedish Supreme Court declined to go into this objection on the ground that the New York Convention does not allow a review of the merits of the award.[111]

The Swedish Supreme Court was definitely correct in not going into the objection as it would have exceeded the task of the enforcement court under the New York Convention. The only possibility for GNMTC to contest the award was to institute setting aside proceedings in France, the country in which the award was made. It has, in fact, done so, but has been unsuccessful so far for other reasons.[112]

On the other hand, the Dutch Supreme Court apparently sees public policy as a cause leading to the refusal of enforcement if the arbitrator has proceeded in his reasoning in a grossly negligent manner. This can

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108. See *infra* III–4.3.

109. See *infra* III–5.

110. Award of April 5, 1978, made in the cases nos. 2977, 2978 and 3303, published in *Yearbook* Vol. VI (1981) p. 133.

111. Supreme Court, August 13, 1979, GNMTC *v.* Götaverken (Sweden no. 1).

112. See *supra* I–1.6.2 ("Does the 'A-national' Award Fall under the Convention?").

be inferred from an additional observation in its decision in the second Dutch round of the *SEEE* v. *Yugoslavia* case.[113] The Court of Appeal of The Hague had refused the enforcement in this case on public policy grounds, reasoning that the arbitrators had misconstrued a settlement agreement of 1950 reached between France and Yugoslavia in the dispute.[114] The Dutch Supreme Court first affirmed the principle of the New York Convention under discussion by declaring that, in giving another interpretation of the agreement than the arbitrators had done, the Court of Appeal had exceeded its task as enforcement judge. The Supreme Court pointed out that the enforcement judge has to accept the facts as determined by the arbitrators; his task is limited to an investigation as to whether there exist grounds for refusal of enforcement as provided in the New York Convention. The Supreme Court, however, added:

> "This may be different if the enforcement judge finds that, in determining the facts on which the decision is based, the arbitrators have proceeded in such a negligent manner that already for this reason the enforcement of the award would be contrary to the public policy of the country in which the enforcement of the award is sought . . . ."

The Supreme Court found that this was not established by the Court of Appeal, nor had it been alleged by Yugoslavia.

It is submitted that any form of examination as to how the arbitrator has arrived at his decision is beyond the task of a court before which the enforcement of a Convention award is requested. The question whether an arbitrator has proceeded in his reasoning in a grossly negligent manner would involve a marginal control by the court over the merits of the award. It would therefore involve an evaluation by the court of the findings of the arbitrator. This form of control, marginal as it may be, is not only excluded under the Convention because the Convention does not allow a review of the merits of the award; it must also be deemed excluded because the enforcement court is not the appropriate authority for exercising such control. The division of judicial control over the award as provided by the Convention is such that if a party desires to challenge a badly reasoned award, he should go to the courts of the country in which the award is made and, there, request the setting aside of the award. The courts of that country are the appropriate authorities to decide on such a challenge. If the courts in the country of origin, indeed, set aside the award because the arbitrator has proceeded in a grossly negligent manner, then the courts of the other Contracting States may refuse enforcement of the award by virtue of the second part of Article

113. Hoge Raad, November 7, 1975 (Neth. no. 2D).
114. Hof of The Hague, October 25, 1974 (Neth. no. 2C).

V(1) (e) of the Convention. In addition, if the courts of the other Contracting States were allowed to exercise a control over the merits of the arbitral award, it would have the undesirable effect of an invitation to dissatisfied respondents to attempt to re-open the debates on the merits before the courts of wherever enforcement is requested. Consequently, even a marginal control over the merits of the award must be deemed to be excluded by the Convention, and therefore can not be brought under the public policy provision. In its additional observation, which was also unnecessary in this case, the Dutch Supreme Court must be deemed to have misconceived the limitations put on the enforcement judge under the Convention.[115]

In this connection it may be mentioned that the United States Court of Appeals for the Second Circuit doubted whether the defence that the award is made in "manifest disregard of the law" was a defence permitted by the Convention.[116]

Section 10 of Chapter 1 of the United States Arbitration Act, which applies to domestic arbitration in federal cases, has been held to include an implied defence to the enforcement where the award is in "manifest disregard of the law".[117] This defence does not concern an erroneous finding of facts or misinterpretation of the law by the arbitrator, but would be present where the arbitrators have shown to understand and have correctly stated the law, but have proceeded to disregard the same. It is also said that it presupposes something beyond or different from a mere error in law or a failure of the arbitrator to understand or to apply the law. This defence can rarely be made in practice, not only because it rarely occurs but also because awards in the United States usually do not contain reasons.[118] The Court of Appeals in the above case held that the case did not require to decide on the question as the respondent was in effect asking the court "to read this defense as a license to review the record of arbitral proceedings for errors of fact or law – a role which we emphatically decline to assume. . . ." For the reasons given above, it must be deemed that the defence of "manifest disregard of the law" is not one which can be made against the enforcement of an award falling under the Convention.[119]

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115. In the same critical sense, P. Sanders in his case comment in *Weekblad voor Privaatrecht, Notariaat en Registratie* no. 5394 (1977) p. 362 at p. 364.

116. U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7).

117. The U.S. Supreme Court observed in Wilko *v.* Swan, 346 *United States Supreme Court Reports* (1953) p. 427 at p. 436: "In unrestricted submissions ... the interpretation of the law by the arbitrators in contrast to manifest disregard [is] not subject, in the federal courts, to judicial review for error in interpretation."

118. See M. Domke, *The Law and Practice of Commercial Arbitration* (Mundelein 1968-1979) Sect. 25.05.

119. Accord, J. Junker, "The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards", 7 *California Western International Law Journal* (1977) p. 228 at p. 235-237.

III–3.3 Uniform Interpretation (and Summary)

The party against whom the enforcement of the award is sought has the burden of proving the existence of the grounds for refusal of enforcement listed in the first paragraph of Article V. The court before which the enforcement is sought may refuse enforcement on its own motion for reasons of public policy as provided in the second paragraph of Article V (p. 264).

The grounds for refusal listed in Article V are exhaustive; no other grounds than those mentioned in that Article may be taken into account for determining whether enforcement should be granted (p. 265).

In particular, they do not include a review of the merits of the arbitral award by the court before which the enforcement is sought. This applies even if the arbitrator has manifestly erred in facts or law (p. 265 and pp. 269-273).

The grounds for refusal of enforcement listed in both paragraphs of Article V have to be construed narrowly (pp. 267-268).

They supersede the grounds for refusal of domestic law regarding the enforcement of foreign awards if the enforcement is governed by the Convention (p. 268).

PART III–4 GROUNDS FOR REFUSAL OF ENFORCEMENT TO BE PROVEN BY THE RESPONDENT (ART. V(I))

III–4.1 Ground *a:* Invalidity of the Arbitration Agreement

Article V(1) (a) of the Convention provides:

"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;"

III–4.1.1 *Incapacity of a party*

The cause of invalidity of the arbitration agreement that "The parties . . . were, under the law applicable to them, under some incapacity" has a curious historical background. The Geneva Convention of 1927 did not contain this cause in so many words, but provided in Article 2(1) (b) that enforcement of an award should be refused if the court was satisfied:

> "That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; *or that, being under a legal incapacity, he was not properly represented;*" (emphasis added)

Thus in the Geneva Convention the incapacity of a party was expressly dealt with only in the context of an improper representation in the arbitral proceedings. Both the ECOSOC Draft Convention of 1955 and the Dutch proposal to amend the latter contained almost identical wording. Thereupon the Conference decided to delete the express reference to a respondent under a legal incapacity on the grounds that such cases would seldom arise in practice.[120] It therefore did not appear in the text of Articles III-V prepared by Working Party No. 3.

At the opening of the last session of the Conference the Dutch delegate said that he was not entirely happy with the wording of Article

120. This appears from a statement made by the Norwegian delegate made at the Conference: UN DOC E/CONF.26/SR.17.

V(1) (a). He reasoned that the Geneva Convention of 1927 was concerned with the improper representation of a party in the arbitral proceedings, which is exceptional. On the other hand, Article V(1) (a) relates to the invalidity of the arbitration agreement, in which case an incapacity is not so theoretical: for instance, a State or public body may not be allowed to arbitrate, or, when concluding the agreement, a corporation may not have been represented in an adequate manner. He considered it useful to make this clear in Article V(1) (a), along with the other causes of the invalidity of the agreement.

The Dutch delegate's motion to reconsider Article V(1) (a) was, however, voted down by the Conference. Nevertheless, in the last minutes of the same session the Dutch delegate put forward a proposal for a new text of Article V(1) (a), prepared by him in the meantime, which included the additional wording "The parties . . . were, under the law applicable to them, under some incapacity". Despite the protests of the Russian delegate that the proposed text of Article V(1) (a) in fact departed from the text previously adopted to a far greater degree than the Dutch delegate had explained, the Conference voted in favour of it.[121]

The result is a noticeable difference between the Geneva Convention and the New York Convention. The Geneva Convention spoke, in fact, merely about the improper representation of a party in the arbitral *proceedings*. The New York Convention speaks now about the incapacity of a party to conclude the arbitration *agreement*. It should be added, however, that the New York Convention has not done away with the case of improper representation of a party in the arbitral proceedings. Article V(1) (b) provides as ground for refusal of enforcement that a party "was not given proper notice of the appointment of the arbitrator or the arbitration proceedings". It appears from the legislative history that the word "proper" was included in ground *b* for the case of the improper representation.[122]

The drafters of the Convention left open the question how the law applicable to a party – also referred to as the "personal law" – is to be determined. The question must therefore be resolved by means of the conflict of laws rules of the law of the court before which the enforcement of the arbitral award is sought. These conflict rules are different in the various countries, ranging, in the case of a physical person, from the law governing the nationality of a party to domicile or habitual residence, and in the case of a legal person, from the place of incorporation to the place of business.

There are, however, States, like the United States, which do not have

121. UN DOC E/CONF.26/SR.24.
122. See *infra* III–4.2.3(*a*) at n. 196-197.

a specific personal law for the capacity to conclude an agreement, but determine this question according to the law of the place of conclusion of the agreement or the law governing the agreement.[123] It is questioned whether the phrase "under the law applicable to them" would supersede these conflict rules of the latter countries and would oblige them to conceive a personal law for the sole purpose of Article V(1) (a) of the Convention.[124] It is submitted that this is unnecessary. The phrase in Article V(1) (a) gives a half-way conflict rule since what is to be considered as the personal law is still to be determined by the conflict rules of the forum. In view of the fact that the phrase does not give a complete conflict rule and hence does not guarantee a uniform method for determining the applicable law, it may be deemed to be permitted, by analogy, to substitute for the incomplete conflict rule of Article V(1) (a) the complete conflict rules of the forum in those countries where the personal law rule is unknown.

It should, however, be emphasized that the specific mention of the applicable law in respect of the incapacity of a party to conclude an arbitration agreement underscores that the capacity of a party is not necessarily to be determined under the same law as the law applicable to the arbitration agreement. For the determination of the latter law, Article V(1) (a) contains uniform conflict rules.

Notwithstanding the concerns of the Dutch delegate for which he desired a distinct mention of the incapacity of the parties in Article V(1) (a), this cause has not been invoked before the courts so far. In anticipation of possible future cases, it would be tempting to go into the various cases in which the incapacity of a party could play a role. This would, however, carry too far in view of the limited scope of this study. On the other hand, because of the increasing importance of the question of the capacity of the State or a public body to conclude an arbitration agreement, this question cannot be left aside and will be dealt with in the following Sub-section.

III–4.1.2 *State or public body as party to the arbitration agreement*

With the advent of Socialist States and developing countries, the participation of States, State trading agencies, and other bodies of public law (hereafter briefly referred to as State) in the international commercial life has increased tremendously. The type of contracts concluded

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123. American Law Institute, *Restatement of the Law Second – Conflict of Laws 2d* (St. Paul, Minn., 1971) Sect. 198 *jo* Sects. 187-188.

124. See P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 355.

between a State and a foreign private party involve particular aspects which have been extensively dealt with in international case law, international arbitrations and literature.[125]

Where this type of contract contains an arbitral clause, which occurs quite frequently, the first question is whether the State has the capacity to agree to arbitration. This question depends in the first place on the law of the State concerned. It may also depend on the law of the forum before which the State is sued, and, as the case may be, the international conventions to which that State has adhered. An example of such convention is the Washington Convention of 1965 on the Settlement of Investment Disputes Between States and Nationals of Other States.[126] The national laws contain different solutions for this question. When concluding a contract with a State, a foreign private party is, in any case, well advised to consult the laws of the State concerned.[127]

The question of the capacity of a State to agree to arbitration can be considered to be encompassed by the broad wording of Article V(1) (a) that "The parties . . . were, under the law applicable to them, under some incapacity". There is no case reported so far in which a State has invoked the incapacity to agree to arbitration under its own law when the enforcement of an award was sought against it. On the other hand, it may be mentioned that in an action for the enforcement of an arbitration agreement, in which case the provisions of Article V(1) (a) must be deemed to be applicable as well[128], the respondent, the Tunisian Electricity and Gas Company, had asserted that it was prohibited from resorting to arbitration (i.e., in Geneva under the ICC Rules) under Tunisian law. Without express reference to Article V(1) (a) of the Convention, the Court of First Instance of Tunis rejected this defence on

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125. See for one of the most recent discussions of the subject, the awards made between Libya and TOPCO (preliminary award: November 27, 1975; award on the merits: January 19, 1977; published in 17 *International Legal Materials* (1978) p. 3, and extract in *Yearbook* Vol. IV (1979) p. 177), between Libya and BP (October 10, 1973; published in 53 *International Law Reports* (1979) p. 297, and extract in *Yearbook* Vol. V (1980) p. 143), and between Libya and LIAMCO (April 12, 1977; published in 20 *International Legal Materials* (1981) p. 1, and extract in *Yearbook* Vol. VI (1981) p. 89). These awards contain extensive references to international case law, other international awards and literature. They exemplify that there is still no *communis opinio* regarding the various aspects of contracts between States and foreign private parties and arbitration relating thereto: although the cases involved almost identical concession agreements and nationalization measures, the arbitrators in each arbitration (Prof. René-Jean Dupuy, Mr. Justice Gunnar Lagergren and Mr. Sobhi Mahmassani) reached quite opposite conclusions. See for the two former awards, my "Comparative Table TOPCO *v.* Libya and BP *v.* Libya", in *Yearbook* Vol. V (1980) p. 161. See for a number of very useful surveys, including many references, the Progress Reports prepared by Prof. M. Domke for the Committee on International Commercial Arbitration Between Government-Controlled Bodies and Foreign-Owned Businessfirms of the International Law Association (1966 through 1975).

126. See *supra* I–4.4.3*a*.

127. See for this question the National Reports under Chap. II.2 in the *Yearbooks.*

128. See *supra* II–1.1.3.

the grounds that this prohibition does not apply in the case of international commercial arbitration.[129] The Court referred in this connection to French case law according to which French entities of public law may not resort to arbitration in domestic relations, but are bound by an arbitral clause in international contracts.[130] This distinction between domestic and international cases for resolving the question of the capacity of a State to agree to arbitration is gaining more and more acceptance.

It may be added that, although the text of the New York Convention does not contain an express provision regarding the capacity of a State to enter into an arbitration agreement, the expression in Article I(1) *"differences between persons, whether physical or legal"* was inserted in the Convention on the understanding that an arbitration agreement and an arbitral award to which a State is a party are not excluded from the ambit of the Convention.[131] The expression appeared for the first time in the ECOSOC Draft Convention, and it was explained by the Committee of ECOSOC that:

> "The representative of Belgium had proposed that the article should expressly provide that public enterprises and public utilities should be deemed to be legal persons for the purposes of that article if their activities were governed by private law. The Committee was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice."[132]

There was no specific discussion of the question during the Conference, but several observations of the Conference delegates appear to confirm the above statement of the Committee of ECOSOC.[133] It is also the generally accepted interpretation that the New York Convention applies also to arbitration agreements and arbitral awards to which a State is a party, if it relates to a transaction concerning commercial activities in their widest sense.[134]

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129. Court of First Instance of Tunis, March 22, 1976, Société Tunisienne d'Electricité et de Gaz *v.* Société Entrepose (Tunisia no. 1).

130. See Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) nos. 161 et seq.

131. See also L. Cappelli-Perciballi, "The Application of the New York Convention to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity", 12 *The International Lawyer* (1978) p. 197.

132. UN DOC E/2704 and Corr. 1, para. 24.

133. See G. Haight, *Report on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Commission on International Commercial Arbitration of the International Chamber of Commerce, ICC Document no. 420/90 of September 19, 1958, p. 3.

134. P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 299; P. Contini, "International Commercial Arbitration – The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 8 *American Journal of Comparative Law* (1959) p. 283 at p. 294; Haight, *supra* n. 133 at p. 4; P. Schlosser, *supra* n. 124, no. 71, and *Entwicklungstendenzen in Recht und Praxis der inter-*

It may be observed that the European Convention of 1961[135] provides expressly in Article II(1):

> "In the cases referred to in Article I, paragraph 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."

Whereas the defence of the incapacity of a State to agree to arbitration under its law has not been made in an enforcement procedure of an award under the Convention, the related defence of *immunity from suit* (also called immunity from jurisdiction) has been asserted in several cases. In these cases the applicability of the Convention was not questioned on the ground that a State was involved as party to the agreement and award. This confirms implicitly that the Convention is to be considered to be applicable to this type of case as well.

The defence of immunity from suit has proven to be rather unsuccessful because of the increasingly accepted distinction between acts performed by a State *jure imperii*, and those performed *jure gestionis*. In the former case of acts *jure imperii*, the State enjoys an absolute immunity from suit, whereas in the latter case of acts *jure gestionis*, which includes the conclusion of a commercial transaction with a private party, the State cannot claim immunity from suit. This distinction is known as the doctrine of restricted immunity.[136]

An application of this doctrine can be found in the decision of the Dutch Supreme Court in the case of *SEEE* v. *Yugoslavia*.[137] The Supreme Court rejected the defence of Yugoslavia that the Dutch courts would have no jurisdiction over Yugoslavia because the latter, being a State, enjoyed immunity from jurisdiction. The Court reasoned that there is an international tendency to restrict cases in which a State can invoke immunity in a foreign court, this tendency being influenced by the fact that many States are entering into relations with private parties in areas governed by private law. In these cases the private party should have the same legal protection as if it dealt with another private party. Accordingly, in such a case, a State cannot invoke the immunity from jurisdiction.

The entering by a State into a contract including an arbitral clause with a foreign private party can also be considered as a waiver of immunity from jurisdiction in

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nationalen privaten Schiedsgerichtsbarkeit (Karlsruhe 1976) p. 55 et seq. The interpretation was expressly confirmed by Hof of The Hague, September 8, 1972, SEEE *v.* Yugoslavia (Neth. no. 2A).

135. See *supra* I–4.4.2.

136. See for the question of immunity from suit in general, G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980) Chapter XI, dealing, inter alia, with such questions as which persons are entitled to immunity, what are to be considered acts *jure gestionis* and *jure imperii*, when immunity can be deemed to be waived, and procedural and jurisdictional issues.

137. Hoge Raad, October 26, 1973, SEEE *v.* Yugoslavia (Neth. no. 2B). See for comment on the Court's view on the question of immunity, A. Stuyt, "Misconceptions About International (Commercial) Arbitration", *Netherlands Yearbook of International Law* (1974) p. 35 at p. 50 et seq.

court proceedings connected with the arbitration. An example of this is a decision of the United States District Court for the District of Columbia.[138]

The Court rejected the defence of sovereign immunity made by Nigeria in the enforcement procedure of an award rendered against it in Switzerland for breach of a contract for the delivery of cement by a French company. The Court held that under the United States Foreign Sovereign Immunities Act (FSIA) of 1976 the conclusion of an agreement to arbitrate constitutes an implicit waiver of immunity.[139]

The FSIA was also used as a basis by the same Court for rejecting the plea of sovereign immunity made by Libya in an enforcement action of an award rendered against it in Switzerland for breach of oil concession agreements concluded with a United States corporation.[140] However, the Court considered the nationalization by Libya an Act of State which was not arbitrable and refused enforcement in virtue of Article V(2)(a) of the New York Convention.[141]

It may also be mentioned here that another United States District Court refused to enforce an arbitration agreement between a Dutch salvage company and the United States concerning the salvage of a United States warship stranded off the coast of the Netherlands.[142] The Court held that by enacting the Public Vessels Act of 1920, which gives exclusive jurisdiction to United States courts over cases involving matters concerning public vessels of the United States, the United States Congress did not intend to provide for a waiver of immunity which, in the case of an arbitration agreement, would require the Government to go to arbitration in matters covered by the Act.

It may be added that the immunity from suit or jurisdiction should be distinguished from the immunity from *execution*. Although the doctrine of restricted immunity from suit is accepted by a significant number of countries, albeit with differing modalities, a considerable number of them do not accept the application of the doctrine of restricted immunity to the immunity from execution, which immunity they still hold to be absolute, primarily for reasons of avoiding delicate political situations.[143] This is, for example, confirmed by the Washington Conven-

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138. U.S. District Court of Columbia, September 25, 1978, Ipitrade International S.A. *v.* Federal Republic of Nigeria (U.S. no. 24).

139. 28 United States Code Sect. 1605(a) (1) provides that a foreign State is not immune if it has "waived its immunity either explicitly or by implication". The legislative history indicates that the case where a foreign State has agreed to arbitration in another country constitutes an implicit waiver. (House of Representatives Report no. 94-1487, 94th Congress, 2nd Session 18).

140. U.S. District Court for the District of Columbia, January 18, 1980, LIAMCO *v.* Libya (U.S. no. 33).

141. See for this questionable part of the Court's opinion, *infra* III–5.2 ("Non-arbitrable Subject Matter (Arts. V(2) (a) and II(1)") at n. 380. In Switzerland, LIAMCO did not do any better. The Swiss Supreme Court, June 19, 1980, Case no. P. 627/79/ha, Libya *v.* LIAMCO, published in 20 *International Legal Materials* (1981) p. 151, and extract in *Yearbook* Vol. VI (1981) p. 151, annulled a payment order for SFR. 135 million issued by the Zurich Debt Enforcement Office. The Supreme Court reasoned that foreign States can be sued before Swiss courts only if it concerns commercial activities and if these activities have a sufficient link with Swiss territory. The fact that Libya's assets were in Switzerland was not such a sufficient link. The Swiss decision has been severely criticized in the *Financial Times* of November 6, 1980.

142. U.S. District Court of New York, S.D., December 21, 1976, B.V. Bureau Wijsmuller *v.* United States of America (U.S. no. 15).

143. See for the question of immunity from execution in general, Delaume, *supra* n. 136, Ch. XII, and 10 *Netherlands Yearbook of International Law* (1979) pp. 3-289 (Special Issue).

tion of 1965[144] which provides, after Article 54 concerning the enforcement of an award rendered under the application of the Convention, in Article 55:

"Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

It is doubted whether the New York Convention would also apply to arbitral awards rendered between States or public bodies concerning a commercial matter. The legislative history of the Convention would seem to contain certain indications which would deny the Convention's applicability to this type of awards.[145]

III–4.1.3 *Law applicable to the arbitration agreement*

III–4.1.3.1 *Introduction*

We now come to the provision of the Convention which has been described by one enthusiastic French author as "la grande conquête" of the New York Convention [146], and which has been hailed by other authors as the supremacy of the principle of party autonomy over the territorial concept of arbitration. It concerns the Convention's uniform conflict of laws provisions in Article V(1) (a) that the parties are free to designate the law applicable to the arbitration agreement, and that only in the absence of such choice, the law of the country where the award is made applies to the arbitration agreement.

However, the great victory of the New York Convention as embodied in the primary conflict rule of Article V(1) (a) has proven to be only a victory for theory. The invalidity of the arbitration agreement under the law applicable to it pursuant to Article V(1) (a) has scarcely ever been invoked, and never successfully. Most cases in which Article V(1) (a) was invoked concerned the assertion that the agreement did not comply with the uniform rule of Article II(2) regarding the form of the arbitration agreement. Furthermore, it appears that few matters are left to be determined under the law applicable to the arbitration agreement. Finally, in those few cases in which the conflict rules of Article V(1) (a) have been applied, it has invariably been found that the agreement was governed by the law of the country in which the award was made.

III–4.1.3.2 *Legislative history*

It had long seemed that no uniform conflict rules for determining the law applicable to the arbitration agreement would be provided in the

144. See *supra* I–4.4.3*a*.

145. See Cappelli-Perciballi, *supra* n. 131, at p. 199.

146. J.-D. Bredin, "La Convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères", 87 *Journal du Droit International* (1960) p. 1003 at p. 1020.

Convention. The Geneva Convention of 1927 provided in Article I(2) (a) that the arbitration agreement should be valid "under the law applicable thereto", which left the determination of the law governing the arbitration agreement to the conflict rules of the country in which the award was invoked. The Draft Convention of the International Chamber of Commerce of 1953 required only that the arbitration agreement be evidenced in writing without any reference to a specific law. In the opinion of the ICC "it would seem useless to re-open the irritating discussion on whether the arbitration agreement should be valid 'under the law applicable thereto' . . .".[147] The ICC's provision was taken over by the ECOSOC in its Draft Convention of 1955 without any explanation. The Dutch proposal to amend the ECOSOC Draft Convention provided, however, that the parties should "have *validly* agreed in writing." The word "validly" provoked much discussion amongst the Conference delegates. One group, inspired by the ICC, which included France and F.R. Germany, did not want any reference to an applicable law. On the other side of the ledger was a group, championed by Israel, which insisted on the specification in the Convention how the law applicable to the arbitration agreement was to be determined. A third, middle of the road group, including notably Sweden, would have been satisfied with the proviso as it appeared in the Geneva Convention, "under the law applicable thereto".[148] Working Party No. 3, to which the Draft was referred, wisely took the middle course and provided in its text that enforcement could be refused if the respondent proved that the arbitration agreement was "not valid under the law applicable to it". That text was initially approved by the Conference without further discussion.[149]

Yet, the Conference changed its mind. At the penultimate session the U.S.S.R. delegate put forward the proposal to amend Article V(1) (a) to the effect that it read that the arbitration agreement "is not valid under the national law to which the parties have subjected their agreement or, failing any indication thereon, under the law of the country where the award was made". The majority of the Conference delegates now appeared to be apprehensive of a specification of the determination of the law applicable to the arbitration agreement and adopted the Russian proposal.[150]

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147. International Chamber of Commerce, *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention*, ICC Brochure no. 174 (Paris 1953) p. 10 (reproduced in UN DOC E/C.2/373); Art. III(a) of the Draft Convention.

148. See for the discussion at the New York Conference, UN DOC E/CONF.26/SR.12-14; see also *supra* II–2.2.1.

149. UN DOC E/CONF.26/L.43 (text of Working Party No. 3) and SR.17 (adoption of text by Conference).

150. UN DOC E/CONF.26/SR.23.

III–4.1.3.3 *Applicability of Article II*

Despite the efforts of the Conference delegates to provide in the Convention for liberal conflict rules for determining the law applicable to the arbitration agreement, it appears that it is not the law applicable to the arbitration agreement but Article II(2) that is most frequently invoked to oppose the request for enforcement of a Convention award on the ground of Article V(1) (a). By far, the greatest number of cases in which the respondent relied on Article V(1) (a) concerned, namely, an alleged formal invalidity under Article II(2) of the Convention. This is not so suprising since Article II(2) poses fairly demanding requirements for the form of the arbitration agreement. We need not review the cases in which Article II(2) has been dealt with by the courts in connection with the enforcement of an award as they have been subject to an extensive examination in Part II–2.

Except for the Italian Supreme Court, no court has doubted that Article II(2) is also applicable at the stage of the enforcement of the arbitral award.[151] The Italian Supreme Court, on the other hand, has held that Article II(2) is applicable at the stage of the enforcement of the arbitration agreement under Article II(3) only, but not at the stage of the enforcement of the arbitral award.[152]

The Supreme Court reasoned that Article V of the Convention "operates on a completely different level", being the enforcement of the arbitral award. As the enforcement of the arbitral award is explicitly regulated by Articles III-V of the Convention, Article II, in the opinion of the Court, does not come into play at that stage. Hence, the validity of the arbitration agreement, including its formal validity, is to be judged solely on the basis of the law determined according to the conflict rules contained in Article V(1) (a) of the Convention.

The case concerned the request for enforcement by the American corporation Bobbie Brooks of an award made in its favour in Cleveland, Ohio, under the Arbitration Rules of the American Arbitration Association against the Italian firm Walter Banci. The arbitral clauses in question were contained in three purchase orders signed by Bobbie Brooks and sent to the agent of Walter Banci in New York; the invoices made out by Walter Banci referred, in turn, specifically to the purchase orders and their numbers. The Court of Appeal of Florence upheld the formal

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151. Art. II(2) was, for example, considered in an action for the enforcement of the award by: Oberster Gerichtshof, November 17, 1971 (Austria no. 2); Landgericht of Bremen, December 16, 1965 (F.R. Germ. no. 2), June 8, 1967 (F.R. Germ. no. 3); Oberlandesgericht of Düsseldorf, November 8, 1971 (F.R. Germ. no. 8); Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12); Areios Pagos, January 14, 1977, Agrimpex S.A. *v.* J.F. Braun & Sons Inc. (Greece no. 5).

152. Corte di Cassazione (Sez. I), April 15, 1980, no. 2448, Lanificio Walter Banci S.a.S. *v.* Bobbie Brooks Inc. (Italy no. 40).

validity of the arbitral clauses principally under Article II(2) of the Convention and, subsidiarily – apparently for "security's sake", but nevertheless improperly – under United States law which it deemed applicable on the basis of the conflict rules of Article V(1) (a), the award having been made in the United States.[153] Although it affirmed the Court of Appeal's decision, the Supreme Court corrected the former's view by holding that Article II(2) is inapplicable at the stage of enforcement of the award.

On an earlier occasion the Italian Supreme Court seems to have implicitly decided in the same sense as it found in that case that the arbitration agreement in question did not need to be in writing under German law, which law it deemed applicable according to Article V(1) (a), the award having been made in F.R. Germany.[154] Nevertheless, the Supreme Court decision under discussion, in which the view was expressly expounded, must be considered an about-face by the Court, as in at least two other decisions concerning the enforcement of an award the Court did rely on Article II(2).[155]

It is submitted that the view of the Italian Supreme Court that Article II(2) is inapplicable at the stage of enforcement of the award is at odds with both the legislative history of the Convention and its internal consistency.

As far as the legislative history is concerned, it should be mentioned that at the last session of the New York Conference the Dutch delegate had said that he was not entirely happy with the text of Article V(1) (a). The discomfort of the Dutch delegate did not only concern the lack of mention of the incapacity of a party.[156] He was also worried that the text, as it stood, would not only include agreements in express terms, but also tacit agreements. He proposed therefore to add "the agreement referred to in Article II", which proposal was finally approved by the Conference.[157] It is true that the amendment is somewhat awkwardly worded as it does not state expressly as cause for refusal of enforcement that the arbitration agreement is invalid under Article II, but the legislative history makes it clear that this was the intent.

In the decision under discussion, the Italian Supreme Court omitted to mention the expression "the agreement referred to in Article II" of Article V(1) (a). In fact the Supreme Court "redrafted" Article V(1) (a) in a curious manner. The Court stated:

> "[A]ccording to paragraph 1 of the said Article V, the recognition and enforcement of an arbitral award may not be refused unless the party against whom the award is invoked has proven (*a*) *the incapacity of the parties under the law appli-*

153. Corte di Apello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29), discussed *supra* at n. II.231.

154. Corte di Cassazione (Sez. I), January 20, 1977, no. 272, S.p.A. Nosegno e Morando *v.* Bohne Friedrich und Co-Import-Export (Italy no. 23); cf. *supra* n. II.270.

155. Corte di Cassazione (Sez. Un.), November 8, 1976, no. 4082, Società Brisighello *v.* Chemapol (Italy no. 24); Corte di Cassazione (Sez. I), April 18, 1978, no. 1842, Eugenio Menaguale *v.* Intercommerce (Italy no. 25).

156. See *supra* III–4.1.1.

157. UN DOC E/CONF.26/SR.24.

> *cable to the written agreement*, or the invalidity of said agreement under the law to which the parties have subjected it or, in the absence thereof, under the law of the place where the award was made . . .". (emphasis added)

In comparison Article V(1) (a) may be quoted, the part in italics pointing out the main differences with the Italian Supreme Court's version:

> "*(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".

As far as the internal consistency of the Convention itself is concerned, it is to be observed that the Italian Supreme Court's view may lead to an anomalous situation. Whilst at the stage of enforcement of the arbitration agreement, enforcement would have to be refused because the agreement does not satisfy the written form of Article II(2), the same arbitration agreement could be held valid under the law applicable to it at the stage of enforcement of the award. The Italian Supreme Court justifies this distinction by arguing that Article V "operates on a completely different level". However, the Convention's provisions must be deemed to be interrelated as the underlying purpose is to attain as much uniformity as possible in the legal regime governing international commercial arbitration; in principle, the Convention's text must be considered to constitute a whole. It is only in the case where express provisions provide for a separation that a distinction amongst them is to be made. This is not the case for Article II and Article V. To the contrary, as just noted, Article V(1)(a) specifically mentions Article II. This is underscored by Article IV(1)(b) according to which the party seeking enforcement of the award has to supply to the court the arbitration "agreement referred to in Article II".[158]

Although the Supreme Court only advanced the argument that Article V operates on a completely different level, the Court apparently had in mind that at the stage of enforcement of the agreement one should be more strict in regard to its (formal) validity than at the stage of enforcement of the award. At the stage of enforcement of the agreement, the basic question is whether the competence of the courts is validly excluded in favour of arbitration. Once the arbitration is over, the question would be less important, and, hence, one would have to be less strict about the validity of the agreement. At the stage of enforcement of the award, the parties have participated in the arbitration or, in the case of a defaulting respondent, the latter has had the opportunity to contest the validity of the agreement before the courts; he should not be allowed to sit back and wait until the enforcement of the award is sought. Although this line of reasoning is understandable, it would deal a severe blow to the Convention's system. Moreover, preference

158. In the same sense P. Sanders, "Consolidated Commentary Vols. V and VI", in *Yearbook* Vol. VI (1981) p. 202 at p. 211.

should be given to achieving uniformity of the legal regime governing international arbitration at all stages of the arbitration.

Whatever may be, the interpretation that Article II(2) applies only at the stage of enforcement of the arbitration agreement is limited to Italy.[159] In other countries the courts consider it self-evident that Article II(2) is also applicable at the stage of enforcement of the award as evidenced by the decisions referred to above.[160] If at the stage of enforcement of the award, the agreement does not comply with Article II(2), enforcement has to be sought on a different basis by virtue of the more-favourable-right-provision of Article VII(1) of the Convention.

III–4.1.3.4 *Matters left to the law applicable to the arbitration agreement*

We just mentioned that the uniform rule of Article II(2) preempts the matter regarding the form of the arbitration agreement from the matters falling under the law applicable to the arbitration agreement, and that the question of the formal validity of the agreement under Article II(2) plays the most important role in practice. We may now examine the matters which could possibly be determined under the law governing the agreement. As we shall see, few remain.[161]

One of the matters of invalidity of the arbitration agreement under the law applicable to it could be the *lack of consent* (misrepresentation, duress, fraud, or undue influence). Leaving aside the question whether the conflict rules of Article V(1) (a) can be applied to the formation of the arbitration agreement, it is submitted that the defence of lack of consent for the arbitration agreement will hardly be successful if the arbitration agreement complies with Article II(2) of the Convention. As Article II(2) poses fairly demanding requirements for the form of the arbitration agreement, it can be argued that in most cases its compliance absorbs the questions regarding the lack of consent. For, if the contract including the arbitral clause is signed by both parties or is contained in an exchange of letters or telegrams, it will not be easy to maintain that it is concluded under misrepresentation, duress, fraud or

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159. One of the few authors who appears to be of the same opinion that Art. II(2) is inapplicable at the stage of enforcement of the award is Haight, *supra* n. 133, as he states at p. 17 that "Any form of agreement, express or tacit, would appear to be sufficient" and at p. 18 "The final texts of Article IV and V do not contain any express requirement that the agreement be in writing". The author omits to mention that both Arts. IV(1) (b) and V(1) (a) state "agreement referred to in article II".

160. See decisions mentioned in *supra* n. 151.

161. A similar conclusion is reached by P. Sanders, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231, who states at p. 247: "Under Art. V, the courts are, for the validity of the arbitration agreement, referred to the applicable law. In my opinion, few matters remain to be governed by the applicable law, since the *form* of the arbitration agreement is regulated in a uniform manner by Article II."

undue influence. The argument for the absorption of the questions regarding the lack of consent by the compliance with Article II(2) applies even more strongly if the doctrine of separability is applied, which is now the case in more and more countries.[162] It is therefore not surprising that in no case reported hitherto has the defence of lack of consent for the arbitration agreement been made.

A possible exception to the latter can be found in a decision of the Court of Appeal of Naples.[163] The Italian respondent had opposed to the request for enforcement of the award made in Vienna that the arbitration agreement was tainted by fraud as, when he signed the contract, the Austrian agent of the claimant had not mentioned the arbitral clause contained in it, and the clause was drafted in German which language he did not master. The Court of Appeal reasoned that the question was, in virtue of Article V(1) (a), to be determined under Austrian law, Austria being the country where the award was made. The Court rejected the defence as the Italian respondent had failed to furnish proof that under Austrian law the arbitration agreement was tainted by fraud under these circumstances.

A question connected with the lack of consent is the invalidity of the arbitration agreement when it is concluded under an *economically or socially dominant position* of a party. This cause of invalidity of the arbitration agreement is, for example, expressly provided in Section 1025(2) of the German Code of Civil Procedure.[164] Without such statutory provision this would also be a cause for invalidity under most of the other laws, usually under the application of the rule of undue influence or a similar rule. The economically or socially dominant position of a party in concluding the arbitration agreement is, however, applied by the courts in the various countries with a differing degree of strictness. In borderline cases it may then, indeed, be important to determine the applicable law.

Section 1025(2) of the German Code of Civil Procedure was invoked by a German respondent in one case which involved the request for the enforcement of an award made in Czechoslovakia. The Court of Appeal of Hamburg rejected this defence on two grounds. In the first place, the Court argued that Czechoslovak law, which it deemed applicable pursuant to Article V(1) (a) of the Convention, does not contain a provision similar to Section 1025(2) of the German Code of Civil Procedure. In the second place, the Court argued that Section 1025(2) could be applied in virtue of the public policy provision contained in Article V(2) (b) of the Convention, but that in this case the defence did not hold water as the respondent had participated in the arbitral proceedings without raising an objection to the alleged economically or socially dominant position of the other party in concluding the arbitration agreement.[165]

The *non-arbitrability of the subject matter* of the agreement under the law applicable to the agreement is not a matter of invalidity which

162. See for the separability doctrine, *supra* II–1.3.1.2.

163. Corte di Appello of Naples (Salerno Section), February 13, 1978, G.A. Pap – KG Holzgrosshandlung *v.* Giovanni G. Pecoraro (Italy no. 36).

164. See O. Glossner, "National Report F.R. Germany", in *Yearbook* Vol. IV (1979) p. 60 at p. 64.

165. Oberlandesgericht of Hamburg, October 14, 1964, affirmed by the Bundesgerichtshof, March 6, 1969 (F.R. Germ. no. 5).

has to be taken into account when the enforcement of the award is sought under the Convention.

According to Article V(2) (a) the court before which the enforcement of the award is sought may refuse the enforcement if it finds that the subject matter of the difference is not capable of settlement under its own law. The express reference to the law of the country where the enforcement is sought is already a strong indication that the law of the forum is the only controlling law for the question of arbitrability. When dealing with the enforcement of the arbitration agreement pursuant to Article II(3) of the Convention, it has similarly been argued that the court has to decide on the question of arbitrability under its own law only. The same considerations would apply *mutatis mutandis* at the stage of the enforcement of the award.[166]

Nevertheless, in an exceptional case, the arbitrability under the law governing the arbitration agreement may indirectly play a role for the enforcement of the award in a Convention country. It may have happened that in the country of origin, in which the Convention is not applicable, the award has been set aside because the dispute was deemed not to be arbitrable under the law governing the arbitration agreement (which will almost always be the same law as the law of the country of origin). In such a case the enforcement is to be refused in another Contracting State on the basis of Article V(1) (e) of the Convention. This has not occurred in practice so far.

Those matters contained in the arbitration agreement which pertain to *the composition of the arbitral tribunal and the arbitral procedure* are solely to be judged under the provisions of Article V(1) (d) and are, in principle, outside the reach of Article V(1) (a).

Article V(1) (d) provides that the enforcement of an award may be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, not in accordance with the law of the country where the arbitration took place.[167] Article V(1) (d) contains a specific regulation in that only in the absence of an agreement of the parties on the composition of the arbitral tribunal or the arbitral procedure are these matters to be judged under a domestic law, namely the law of the place of arbitration. In view of the specificity of this regulation of Article V(1) (d), the matters concerning the composition of the arbitral tribunal and the arbitral procedure as provided in the arbitration agreement cannot be judged under the more general provision of Article V(1) (a). If it were otherwise, an award which results from an arbitration held in accordance with the agreement of the parties, whilst not being capable of refusal of enforcement under Article V(1) (d), could still be refused enforcement "through the backdoor" of Article V(1)(a) in those cases where the agreement is affected by an invalidity under the applicable law due to the fact that the composition of the arbitral tribunal or the arbitral procedure agreed to therein cannot be validly agreed to under that law. An example may clarify this.

Let us assume that an arbitration agreement provides for arbitration by two arbitrators in the Netherlands and that Dutch law governs the arbitration agreement according to the conflict rules of Article V(1) (a). Under Dutch law an arbitration

166. See *supra* II–1.3.3 and *infra* III–5.2.
167. See *infra* III–4.4.

agreement providing for two arbitrators is invalid as the law mandatorily prescribes an uneven number of arbitrators. In the enforcement proceedings of the Dutch award in another Contracting State the respondent cannot object to the enforcement on the basis of Article V(1) (d) as the composition of the arbitral tribunal was in accordance with the agreement of the parties. The respondent must then be deemed not to be entitled to bypass Article V(1) (d) by relying on Article V(1) (a) arguing that the arbitration agreement is invalid under Dutch law.[168]

For the purposes of the Convention, the construction may also be conceived such that those matters concerning the composition of the arbitral tribunal and the arbitral procedure as provided in the arbitration agreement constitute a further agreement subject to a different regulation of the Convention (i.e., Art. V(1) (d)).

These observations would seem not to apply to time limits for initiating arbitration. Rather, time limits for initiating arbitration are to be determined under the law applicable to the arbitration agreement as determined by the conflict rules of Article V(1) (a) because they may concern the question whether the arbitration agreement has ceased to have effect.[169]

It may be added that if the arbitration agreement does not provide anything on the composition of the arbitral tribunal or the arbitral procedure, Article V(1) (d) still takes precedence over Article V(1) (a) in view of the former's specificity. For this case, Article V(1) (d) provides that failing an agreement of the parties on the composition of the arbitral tribunal or the arbitral procedure, their regularity has to be judged under the law of the country where the arbitration took place (which must be deemed the same law as the law of the country where the award is made).[170] As we shall see, in most cases it appears that the arbitration agreement is governed by the same law of the country where the award was made, and no problem will arise. In the theoretical case, however, that the parties have, according to the primary conflict rule of Article V(1) (a), subjected the arbitration agreement expressly to a law different from the law of the country where the award is made, a respondent cannot invoke Article V(1) (a) alleging that a certain aspect of the composition of the arbitral tribunal or the arbitral procedure was not valid under the law applicable to the arbitration agreement.

The above examination of matters which could possibly be considered as a cause for invalidity of the arbitration agreement under the law applicable to it pursuant to Article V(1) (a) leads to the conclusion that there are few left. In fact, it would seem that the only matter is the lack of consent, but even this matter is overshadowed by Article II(2) in most cases. In addition, it may be that in exceptional cases a law govern-

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168. The respondent can, however, request the setting aside of the award before the Dutch courts. If the Dutch courts indeed set aside the award, enforcement in another Contracting State may be refused on the ground mentioned in Art. V(1) (e) that the award "has been set aside ... by a competent authority of the country in which ... that award was made." See for the setting aside in general, *infra* III–4.5.3.

169. See Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12) which held that the interpretation of the arbitral clause "Any claim for arbitration formulated after 6 months from the date of arrival of the goods at the final station or port of destination is null" was to be decided on the basis of the law of Romania which was the country where the award was made in this case. For the applicability of Romanian law the Court referred to Art. V(1) (a) as the law chosen by the parties to govern the arbitration agreement. See *infra* at n. 237.

170. See *infra* at n. 182.

ing the arbitration agreement poses a specific requirement as to the contents of the agreement, but this has not come up in practice. It may be said that, in general, the invalidity of the arbitration agreement under the applicable law as ground for refusal of the award as provided in Article V(1) (a) has lost a great deal of its practical significance. This can at least be inferred from the few cases in which the invalidity of the arbitration agreement under the applicable law was invoked in virtue of Article V(1) (a): it has not been used successfully so far.

III–4.1.3.5 *Determination of the law applicable to the arbitration agreement*

For those few cases in which the determination of the law applicable to the arbitration agreement may be necessary in the context of the grounds for refusal of enforcement of a Convention award, Article V(1) (a) provides for two conflict rules. The first rule is the primary rule of party autonomy according to which the parties have the liberty to subject the arbitration agreement to a law of their choice (see *a* below). The second rule is the subsidiary rule of territoriality according to which the arbitration agreement is, failing a choice of law by the parties, governed by the law of the country where the award was made (see *b* below).

It has never been questioned that these conflict rules are to be interpreted as uniform rules which supersede the relevant conflict rules of the country in which the award is relied upon.

This is also the view of the Italian Supreme Court in the decision discussed above.[171] In that case, the Supreme Court observed that, in view of Article V(1) (a), the conflict rules of Article 26 of the Italian General Provisions of Law were "irrelevant". This aspect of the decision is certainly to be approved. It should be noted, however, that, confusingly enough, at the stage of enforcement of the arbitration *agreement* the Italian Supreme Court does rely on Article 26 of the General Provisions of Law, not only for determining the substantive validity of the arbitration agreement, but also for determining its formal validity.[172]

(a) *Law to which the parties have subjected the arbitration agreement*

It has not occurred that a court has found that the parties have subjected the arbitration agreement to a law which was different from the law of the country in which the award was made within the meaning of Article V(1) (a) of the Convention. This observation could suffice in

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171. Corte di Cassazione (Sez. I), April 15, 1980, no. 2448, Lanificio Walter Banci S.a.S. *v.* Bobbie Brooks Inc. (Italy no. 40). See *supra* at n. 152-154.

172. See *supra* II–2.2.2 ("Uniform Rule").

itself, but for completeness sake two questions posed by the primary conflict rule of party autonomy of Article V(1) (a) may be considered. Firstly, what interest may the parties have in subjecting the arbitration agreement to a given law? And secondly, which indications are sufficient for constituting a choice of law governing the arbitration agreement for the purposes of Article V(1) (a)?

As regards the *first question*, the observations made in the foregoing Paragraph would lead to the conclusion that the parties have little interest in choosing a given law to govern their arbitration agreement as few matters are left to that law. Theoretically, a possible interest may arise in the case the parties wish to have the arbitration governed by a law which is different from the law of the country in which the award is to be made. This faculty is offered by the Convention in two provisions: Article V(1) (e) provides as ground for refusal of enforcement that the award has been set aside "in the country in which, *or under the law of which*, that award was made". Article I(1) provides as second criterion for the field of application that the Convention also applies to arbitral awards not considered as domestic awards in the State where their enforcement is sought. As explained earlier, the second criterion of the Convention's field of application envisages those awards which are made in the country in which their enforcement is sought, but which are, on the basis of the agreement of the parties, subjected to the arbitration law of another country.[173] If the parties have made such an arrangement it would seem logical also to subject the arbitration agreement to the arbitration law to which the arbitration is subjected. It may be noted that the aforementioned Russian proposal to amend Article V(1) (a) was obviously inspired by the addition of the second criterion to the Convention's field of application. The same can be said of the above quoted part of Article V(1) (e) which also originates from a Russian amendment.[174]

However, as it also was explained earlier, the use of the faculty to designate an arbitration law which is different from the law of the country where the award is to be made is not to be recommended as it may lead to inextricable complications.[175] This may explain why in practice there has been no court decision concerning a case where the parties have, as far as it is known, subjected the arbitration agreement expressly to a law which is different from the law of the country where the award is to be made.

As regards the *second question* of which indications are sufficient for constituting a choice of law governing the arbitration agreement for the

173. See *supra* I–1.5 ("Awards Not Considered as Domestic").
174. UN DOC E/CONF.26/SR.23.
175. See *supra* I–1.5 ("Awards Not Considered as Domestic").

purposes of Article V(1) (a), the authors are divided on the question whether, besides the express choice (e.g., "this arbitration agreement is governed by the arbitration law of country X"), the choice can also be implied. The difference of opinion especially concerns the case where a contract including an arbitral clause contains a choice of law clause for the contract in general. Some authors argue that this choice of law clause also applies to the arbitral clause.[176] Others are of the opinion that the choice of law clause for the contract in general is not sufficient as choice of law for the arbitral clause.[177]

The problem stems from the wording of Article V(1) (a) that the subsidiary conflict rule applies "*failing any indication*" on the law to which the parties have subjected the arbitration agreement. It is submitted that, despite this somewhat ambiguous wording, the second opinion represents the better view. The main contract and the arbitral clause have different objects: the main contract concerns the relationship between the parties as to the substance; the arbitral clause is concerned with the procedure for settling disputes arising out of the main contract. If the parties provide a general choice of law clause, they intend to give a directive to the arbitrator as to which law he has to apply to the substance. The distinction between substance and procedure would then preclude that the directive given to the arbitrator would also be an "indication" of a choice of the law governing the arbitration. It would therefore seem that the latter can be achieved only by a distinct express agreement.

Assuming that, in spite of the foregoing observations, the primary conflict rule of Article V(1) (a) would allow an implied choice, the strongest indication of such choice must be deemed to be the provision in the arbitration agreement where the arbitration is to take place.[178] Thus if a contract contains a general choice of law clause and provides in the arbitral clause that arbitration is to be held in a country with a different law, the latter indication must be deemed to prevail over the former.

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176. E.g., H.-V. von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen* (Berlin 1973) p. 101. Cf., Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 34, who states that a tacit choice of law is sufficient. The latter opinion is also adhered to by F.-E. Klein, "La Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères", 57 *Revue Suisse de Jurisprudence* (1961) p. 229 at p. 247.

177. E.g., Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 125; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 212 and further references.

178. See Private International Law Committee, *Fifth Report on the Recognition and Enforcement of Foreign Arbitral Awards*, Command Report 1515 (London 1961) p. 30. Cf., the decision of the English House of Lords in James Miller and Partners Ltd. *v.* Whitworth Street Estates (Manchester) Ltd. [1970] 1 *All England Reports* 796 and in Compagnie d'Armement Maritime S.A. *v.* Compagnie Tunisienne de Navigation S.A. [1971] 3 *All England Reports* 71. See also A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 63 et seq.

It may be reiterated, that in the few cases in which it was held that the parties had subjected the arbitration agreement to a given law, it appeared that in all these cases this law was the law of the country in which the award was made.[179] This is the same result as would ensue from the application of the subsidiary conflict rule of Article V(1) (a) prescribing the law of the country in which the award was made. As a matter of practice, the primary conflict rule of Article V(1) (a) of party autonomy has therefore remained a theoretical nicety as far as can be gathered from the decided cases.

(b) *Law of the country where the award was made*

As noted before, in the cases in which the validity of the arbitration agreement was judged under the applicable law pursuant to Article V(1) (a), it has been invariably held that the law of the country where the award was made applied to the arbitration agreement. The courts deemed this law applicable either because they found that the parties had subjected the agreement to this law (i.e., the primary conflict rule, see above), or because they found that the parties had not chosen a given law, which leads to the application of the subsidiary conflict rule of Article V(1)(a).[180]

The result is that in the enforcement proceedings of an award under the Convention the same law can be applied to the arbitration agreement, the arbitral procedure (unless the parties have made their own arrangement), and the arbitral award. This unity of the law governing the arbitration makes both the practical applicability of the Convention and the legal framework governing international commercial arbitration much simpler.

Although the determination of the country where the award was made for the purposes of the application of the subsidiary conflict rule of Article V(1) (a) has not led to difficulties in practice, we may make some observations in regard of this question. These observations apply equally to the conflict rule of Article V(1) (e) ("the country in which . . . that award was made") and to the field of application of the Con-

179. E.g., Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12), *supra* n. 169; President of Rechtbank of The Hague, April 26, 1973 (Neth. no. 3): the arbitral clause in this case providing for arbitration in F.R. Germany declared that the arbitrators had to apply German procedural and substantive law.

180. Examples of the application of the subsidiary conflict rule of Art. V(1) (a) are: Oberlandesgericht of Hamburg, October 14, 1964 (F.R. Germ. no. 5), *supra* at n. 165; Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29), and Corte di Cassazione (Sez. I), April 15, 1980, no. 2448, in this case (Italy no. 40), discussed *supra* at n. 152-154; Corte di Appello of Naples (Salerno Section), February 13, 1978, G.A. Pap – KG Holzgrosshandlung *v.* Giovanni G. Pecoraro (Italy no. 36), discussed *supra* at n. 163.

vention as provided in Article I(1) and (3) (an arbitral award made in the territory of another (Contracting) State).[181]

The award must be deemed to be made in the country which is indicated in the award as place where the award was rendered. In practice, arbitrators will mention as place of rendition of the award the place of arbitration as agreed to by the parties, or, as the case may be, as designated by the arbitral institution to which the parties have referred, or, if they have been authorized to do so, as designated by the arbitrators themselves. It rarely occurs that a different place is mentioned in the award (e.g., the place of actual signing). If the arbitrators would do so, difficult problems for the application of the New York Convention might arise. It may be added, perhaps redundantly, that, for example, an arbitrator residing in India need not travel to Stockholm, the place of arbitration, for signing the award, but can do so in India, provided that it is indicated in the award that it is rendered in Stockholm.

Another matter of practice which is incidental to the place of making of the award is that it may happen that the arbitral proceedings have effectively been held in different countries, or that they are conducted on the basis of documents exchanged between the parties and the arbitrators residing in different countries. These circumstances also are immaterial for the country in which the award is made. Here again, the only decisive element is the indication in the award of where it is rendered.

In connection with the latter observation it should be mentioned that, despite the differences in the text between Article V(1) (d) concerning the arbitral procedure which states "the law of the country where the arbitration took place", on the one hand, and Article V(1) (a) and (e) concerning the arbitration agreement and the arbitral award which refer to the law of the country where the award was made, on the other, both phrases must be deemed to point to the same law as the arbitration must be deemed to have taken place where the award, as stated in it, has been made.[182]

III–4.1.4 *Uniform interpretation (and summary)*

The incapacity of a party referred to in Article V(1) (a) as a cause for which enforcement of the award may be refused concerns the incapacity of a party to conclude an arbitration agreement. The improper representation of a party in the arbitral proceedings is a ground for refusal of enforcement which is to be considered to be included in Article

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181. See *infra* III–4.5.3 and *supra* I–1.1 respectively.
182. See Schlosser, *supra* n. 177, no. 238; von Hülsen, *supra* n. 176, p. 34 n. 16.

V(1) (b). The law applicable to the question of the capacity of a party to conclude the arbitration agreement is to be determined on the basis of the conflict rules of the country in which the award is invoked (pp. 275-277).

The Convention does not exclude that a State or public body be a party to an arbitration agreement or arbitral award with a private party relating to a transaction of private law which pertains to an act *jure gestionis* (pp. 277-282).

The uniform rule of Article II(2) regarding the form of the arbitration agreement applies also to Article V(1) (a) in that the non-compliance with this provision may constitute a ground for refusal of enforcement of the award (pp. 284-287).

There are few matters left which can be held to be a cause of invalidity under the law applicable to the arbitration agreement under Article V(1) (a). Excluded are in particular: matters regarding the form of the agreement, which are governed by the uniform rule of Article II(2), being the most frequently invoked ground in practice; the non-arbitrability of the subject matter, which is by virtue of Article V(2) (a) to be judged solely under the law of the forum; and the matters concerning the composition of the arbitral tribunal and the arbitral procedure, which are to be judged under the provisions of Article V(1) (d). The matters which are left for the purposes of Article V(1) (a) are the lack of consent and, in exceptional cases, specific requirements of the applicable law as to the contents of the arbitration agreement (pp. 287-291).

The conflict rules for determining the law governing the arbitration agreement as provided in Article V(1) (a) are uniform conflict rules which supersede the relevant conflict rules of the forum (p. 291).

The primary conflict rule of the law to which the parties have subjected the arbitration agreement can be applied only if the choice of law made by the parties is express (pp. 291-294).

The subsidiary conflict rule of the law of the country where the award is made applies in all other cases. The country where the award is made is the country of rendition as mentioned in the arbitral award (pp. 294-295).

III–4.2 Ground *b*: Violation of Due Process

Article V(1) (b) of the Convention provides:

"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 recognition and enforcement is sought, proof that:

(. . . .)

(b) **The party against whom the award is invoked was not given**

proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;"

III–4.2.1 *Introduction*

On considering this ground for which enforcement of the award may be refused, a United States Court of Appeals said pointedly: "this provision essentially sanctions the application of the forum State's standards of due process."[183] This statement states concisely what Article V(1) (b) is all about, albeit that a distinction is to be made between due process in domestic cases and international ones. It concerns the fundamental principle of procedure, that of fair hearing and adversary proceedings, also referred to as *audi et alteram partem*.

The wording of Article V(1) (b) encompasses more than the corresponding provision in the Geneva Convention of 1927 which read in Article 2(1) (b): "That the party against whom is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case . . .". However, although the Geneva Convention's provision related textually to the proper notice aspect, it was generally interpreted as covering all cases involving a serious violation of due process.[184] The text of the New York Convention has the advantage of making this unequivocally clear.

Reviewing the court decisions on the New York Convention, the defence of a violation of due process enjoys a high popularity rating amongst the defences allowed by the Convention. Nevertheless, the defence has rarely been successful. Despite the broad wording of Article V(1) (b), the courts appear to accept a violation of due process in very serious cases only, thereby applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly. The narrow interpretation of Article 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. We will see various examples of this below.

Although the judicial interpretations and applications of the due process requirement under the Convention have been largely satisfactory and have not led to noteworthy difficulties, Article V(1) (b) has posed a number of questions which may be examined briefly in III–4.2.2. The cases in which the due process requirement has been applied will be reviewed in III–4.2.3.

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183. U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7).

184. See H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 69.

III–4.2.2 *Questions regarding Article V(1)(b)*

The *first question* is under which law the standards of due process are to be judged. It has been argued that Article V(1) (b) constitutes a truly international rule, not linked to any national law.[185] This opinion is based on a relationship between Article V(1) (b) and Article V(1) (d). Article V(1) (d) provides that if the parties have agreed on the composition of the arbitral tribunal and the arbitral procedure, the law governing these matters is not to be taken into account. As Article V(1) (b) can be considered as a corrective on such arrangement of the parties (see the third question hereafter), the latter provision is also regarded as a rule which would be outside the reach of domestic law. This opinion is prompted by the desire to discard the law of the forum which may contain parochial requirements for an orderly procedure. However, the authors who adhere to this opinion add that the judge before whom the enforcement of the award is sought will "find his inspiration" in the notions of due process under his own law.

The courts proceed the other way around: whilst no court has held that Article V(1) (b) constitutes an international rule, many have affirmed that the standards of due process are basically to be judged under their own law.[186] However, as noted, they hold either expressly or implicitly that what may be a violation of due process under their own law is not necessarily a violation of due process under the Convention. This judicial attitude belies the fears of parochialism of the authors.

The authors take as point of departure the internationality, the courts start from domestic law, but both arrive at the same result. The question is therefore rather academic and may be regarded as a matter of taste. In addition, the question whether a violation of due process is present is, in most cases, largely a question of fact.

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185. Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 526; G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.C. 4.

186. E.g., Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11), see *infra* at n. 195 and 215; July 27, 1978 (F.R. Germ. no. 18), see *infra* at n. 213 and 221; Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21), see *infra* at n. 204 and 218; Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27), see *infra* at n. 205 and 214; U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7), see *infra* at n. 220; U.S. District Court of New Jersey, May 12, 1976, Biotronik Mess- und Therapiegeräte G.m.b.H. & Co. *v.* Medford Medical Instrument Company (U.S. no. 8), see *infra* at n. 211; Obergericht of Basle, June 3, 1971 (Switz. no. 5), see *infra* at n. 203 and 219. The opinion that the question of due process is to be determined under the law of the forum is also shared by a certain number of authors, e.g., K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 419; L. Quigley, "Convention on Foreign Arbitral Awards", 58 *American Bar Association Journal* (1972) p. 821 at p. 825.

The *second question* is the relationship between Article V(1) (b) and Article V(2) (b). According to Article V(2) (b) a court may refuse enforcement on its own motion if "The recognition or enforcement of the award would be contrary to the public policy of that country." As due process is generally conceived as pertaining to public policy, the question is raised whether the specific provision of Article V(1) (b) concerning due process would have the effect of excluding due process from Article V(2) (b), which concerns public policy in general.[187] This question is important because if due process were only covered by Article V(1) (b), a court would not be allowed to refuse enforcement of the award on its own motion if it finds that an award is tainted by a serious violation of due process; it could refuse enforcement only if the respondent asserts it. In practice it will make little difference as a respondent will be eager to point out that a violation of due process has occurred; in none of the reported cases has a court refused enforcement on its own motion on account of a violation of due process. It may make a difference in the case where the respondent declines to appear before the court in the enforcement proceedings, but that happens rarely at this stage.

There is only one court which has addressed the question. The Court of Appeal of Basle had to consider whether a refusal of an extension of time to a respondent to appoint his arbitrator violated Swiss public policy as was alleged by the respondent.[188] The Court referred first to Article V(2) (b) and observed that under Swiss law, public policy concerns not only defects in respect of the substance of the award but also irregularities in the procedure.[189] The Court referred then to Article V(1) (b), but observed that it did not need to answer the question "whether this provision covers the Swiss public order in respect of the extent of the protection for due process, because, in the opinion of the Court, the refusal to grant an extension of time violates neither this provision nor the Swiss public order". The question raised by the Court is understandable as the Court seemed to have wondered whether the Convention would have been different from the view prevailing in

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187. This is, inter alia, the opinion of Fouchard, *supra* n. 185, no. 528; B. Oppetit in his comment on the decision of the President of the Tribunal de grande instance of Paris of May 15, 1970, and the Cour d'appel of Paris of May 10, 1971, Compagnie de Saint-Gobain – Pont à Mousson *v.* The Fertilizer Corporation of India (FCIL) (France no. 1), see *infra* at n. 192 and 217, in *Revue de l'arbitrage* (1971) p. 97 at p. 105; Private International Law Committee, *Fifth Report on the Recognition and Enforcement of Foreign Arbitral Awards*, Command Report 1515 (London 1961) which states at p. 30 that "It is now made clear that this objection must be raised by the opponent."; J. Junker, "The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards", 7 *California Western International Law Journal* (1977) p. 288 at p. 231. Gaja, *supra* n. 185, is not entirely clear on this question at I.C. 5.

188. Obergericht of Basle, June 3, 1971 (Switz. no. 5), see *infra* at n. 203 and 219.

189. The Court referred to a decision of the Swiss Federal Supreme Court, published in *Entscheidungen des schweizerischen Bundesgerichts* 93 I 57.

Switzerland and in most other countries that due process forms part of public policy.

It is submitted that the Convention is not different from this generally accepted view.[190] Article V(1) (b) has been inserted in the Convention because of the specific importance attached to the fundamental requirement of a fair hearing. It is also a traditional requirement to be found in many treaties concerning the recognition and enforcement of foreign judgments. The same view also prevailed under the Geneva Convention of 1927.[191] The fact that the requirement of due process is listed amongst the grounds for refusal in the first paragraph of Article V which are to be proven by the respondent, does not alter this. It merely signifies that if he alleges a violation of due process, it is he, and not the claimant, who should establish the violation by furnishing proof. It does not exclude that if a court finds a violation of due process which is not invoked by a respondent, it may refuse enforcement on its own motion in virtue of Article V(2) (b).

Accordingly, Article 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 Article V(2) (b); violation of due process may fall thus either under Article V(1) (b) or Article V(2) (b). Article V(2) (b) is therefore not limited to questions regarding the substance of the award involving public policy aspects, but also covers procedural irregularities.

The interpretation that a violation of due process also falls under Article V(2) (b) is implicitly confirmed by several courts. In deciding whether an award was affected by certain procedural irregularities, they relied on Article V(2) (b) rather than Article V(1) (b). In doing so they followed the invocation of Article V(2) (b) by the respondent. A respondent is, of course, not precluded from invoking the public policy provisions of the second paragraph of Article V as well, although for the violation of due process ground *b* of the first paragraph would be more likely. Apparently, respondents think – erroneously – that the invocation of public policy of the forum is more impressive. An example of such a court decision is the Court of Appeal of Paris which decided on the refusal of the arbitrator to allow the cross-examination of a witness under Article V(2) (b) as invoked by the French respondent.[192] Another example is a United States District Court which decided on

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190. Accord, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 736; Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 75.

191. See Greminger, *supra* n. 184, p. 69.

192. Cour d'appel of Paris (1st Chamber), May 10, 1971, Compagnie de Saint-Gobain – Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (France no. 1), see *infra* at n. 222.

the non-disclosure by the claimant before the arbitrators of one of the agreements involved in this case on the basis of Article V(2) (b) which was relied upon by the American respondent.[193]

The *third question* is the relationship between Article V(1) (b) and Article V(1) (d). As mentioned under the first question, Article V(1) (d) provides that if the parties have made an agreement on the composition of the arbitral tribunal and the arbitral procedure, the law governing these matters is not to be taken into account. This provision must, however, be deemed to be limited by the fundamental requirements of due process. Thus, where the Arbitration Rules referred to in the agreement of the parties provide that the names of the arbitrators are not made known to the parties, such an arrangement is undoubtedly against the fundamental requirements of due process, and enforcement of an award resulting from such a case may be refused under Article V(1) (b) (or Art. V(2) (b), see the preceding question).[194] Thus, although the argument has not been advanced, in anticipation of possible future cases, it does not hold water to refer in this case to the freedom granted by Article V(1) (d) as Article V(1) (d) must be deemed to be subject to the due process provision of Article V(1) (b). For the same reason, the claimant cannot respond with the objection that under Article V(1) (b) he also was affected by the same contractual provision involving a violation of due process as this does not negate the fact that the violation of due process was present. Moreover, according to Article V(1) (b) it is only the respondent who is permitted to invoke the violation of due process.

The *fourth and last question* is whether a serious violation of due process may lead to a refusal of enforcement of the award if the arbitral decision would not have been different in case the irregularity in the procedure had not occurred. This question was considered by a Court of Appeal in a case in which the arbitrator had not forwarded a letter, submitted to him by the claimant, to the respondent, who was, consequently, unable to express his views on this letter.[195] The Court of Appeal considered that a violation of due process cannot be cured as soon as it cannot be excluded that the arbitral decision would have led to a more favourable decision for the respondent, which the Court found to be the case. This would mean that if it were beyond doubt that the

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193. U.S. District Court of New Jersey, May 12, 1976, Biotronik Mess- und Therapiegeräte G.m.b.H. & Co. *v.* Medford Medical Instrument Company (U.S. no. 8), see *infra* at n. 211.

194. See Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14), see *infra* at n. 207.

195. Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11), see *infra* at n. 215.

arbitral decision would have been the same, a serious violation might not lead to a refusal of enforcement of the award.

The point of view of the Court of Appeal of Hamburg is a pragmatic one. If it is clear that the arbitral decision could not have been different, had the irregularity in the procedure not occurred, it would seem to make no sense to refuse enforcement. A legal justification for this point of view can be found in the opening line of paragraph 1 of Article V: "Recognition and enforcement of the award *may* be refused . . .". It is to be approved that the Court of Appeal was very cautious to this effect by exercising a marginally negative control. It considered that a serious violation of due process could have led to a different arbitral decision as soon as this could not be excluded. Thus only if it is beyond any doubt that the decision could have been the same, would a court be allowed to override the serious violation. A court before which enforcement of a Convention award is sought may, in my opinion, not go further as this would amount to an extensive examination as to how an arbitrator would have decided if the violation had not occurred. The latter would yield to a review of the merits of the arbitral award which is excluded under the Convention.

III–4.2.3 *Court decisions concerning due process*

The violation of the standards of due process may concern the improper notice of the proceedings and the denial of an opportunity to be heard as well as other irregularities in the arbitral procedure. All these questions concerning due process can be deemed to be covered by the wording of Article V(1) (b) that enforcement may be refused if the respondent was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case.

The review of court decisions below will follow the order of the wording of Article V(1) (b) concerning proper notice and the ability to present the case. It may be recalled that questions regarding due process can equally be based on the public policy provision of Article V(2) (b) (see the second question mentioned in the foregoing Subsection). The decisions relating to due process in which that provision of the Convention is relied upon will therefore be discussed as well.

The question of impartiality of the arbitrator may also be regarded as forming part of due process. Thus an arbitrator who is not impartial may prevent a party from presenting his case within the meaning of Article V(1)(b). However, as in practice the question of impartiality of the arbitrator is usually based on the public policy of Article V(2) (b), the court decisions relating to this question are dealt with in Sub-section III–5.3.2.

(a) *No proper notice*

The word "proper" was inserted in the text of Article V(1) (b) upon a proposal of the Norwegian delegate. He had made the proposal because the Conference had decided to delete from this provision the proviso contained in the Geneva Convention of 1927 that the respondent, being under a legal incapacity, was not properly represented, on the grounds that such cases seldom arose in practice.[196] The insertion of the word "proper" is therefore intended for the contingency of an improper representation in the arbitral proceedings, which contingency has, however, not occurred in any of the reported court decisions.[197]

Apart from this interpretation based on the legislative history of Article V(1) (b), the word "proper" can also be interpreted in the sense that the notice of the appointment of the arbitrator and the arbitral proceedings must be *adequate*. The question when a notice can be considered as adequate is largely a question of fact. In any case, arbitration being a private manner of settlement of disputes, the notice need not be in a specific (official) form.

In this connection two Mexican decisions may be recalled in which the Mexican respondents had asserted that the service by mail, pursuant to the Arbitration Rules of the International Chamber of Commerce and the American Arbitration Association, respectively, violated Mexican law under which it is a rule of public policy that first notice of summons should be served personally upon a respondent.[198] With express reference to Article V(1) (b) of the Convention both courts rejected the objection in both cases on the ground of the same reasoning. They reasoned that by inserting the arbitral clause in the contract, the parties tacitly waived the formalities established by Mexican procedural legislation, especially those required by Article 605 No. IV of the Code of Civil Procedure in respect of summons *in personam*.[199]

Three aspects of these Mexican decisions are interesting. The first aspect is that the Courts have held that the notice is not subject to a specific official form but that compliance with the method of notifying as agreed to by the parties suffices under the Convention. The second aspect is that the Courts regard the question of due process as provided by Article V(1) (b) as belonging to public policy (see the foregoing Sub-section under the second question). And the third aspect, which has

196. UN DOC E/CONF.26/SR.17.

197. It may be recalled that under the New York Convention questions regarding the capacity to conclude an arbitration agreement are covered by Art. V(1) (a), see *supra* III–4.1.1.

198. Tribunal Superior de Justicia, 18th Civil Court of First Instance of Mexico, D.F., February 24, 1977, Presse Office S.A. *v.* Centro Editorial Hoy S.A. (Mexico no. 1); Tribunal Superior de Justicia [Court of Appeals] (5th Chamber) of Mexico, D.F., August 1, 1977, Malden Mills Inc. *v.* Hilaturas Lourdes S.A. (Mexico no. 2).

199. Art. 605 No. IV of the Code of Civil Procedure for the Federal District provides:

"Foreign judgments can be recognized in the Mexican Republic only if the following conditions are fulfilled:

....

IV. The defendant must have been personally summoned to appear before the court."

already been discussed in another context[200], is that the decisions imply the application of the distinction between domestic and international public policy, which is remarkable for courts in Latin America.

Another case in which the impropriety of the notice of the arbitration proceedings was questioned was decided by the Court of First Instance of Zweibrücken.[201] The German respondent had asserted that the letter of the claimant to the Secretary of the arbitration association concerned, in which the claimant had requested arbitration and which had been forwarded to the respondent, was not a sufficient notice. The objection appeared to be frivolous as the Court found that the letter contained a sufficient description of the matter in dispute and the relief sought so that with this letter the respondent could have known that arbitration would be initiated. Moreover, the respondent had been requested three times by the Secretary to appoint his arbitrator which he had omitted to do.

Similarly, the Court of Appeal of Florence rejected the assertion of the Italian respondent that he had not been informed in conformity with Section 39 of the Arbitration Rules of the American Arbitration Association because from the facts of the case it appeared that the respondent had refused explicitly to participate in the arbitration and, moreover, the AAA had continued to keep him informed of the progress of the arbitration.[202]

The shortness of *time limits* within which a respondent has to appoint his arbitrator as provided by the Arbitration Rules referred to in the agreement of the parties has been attacked several times without success.

Rather short time limits are provided, in particular, by Arbitration Rules of commodity associations in order to speed up the arbitration and to have the goods in question available as evidence.

The Court of Appeal of Basle, considering that commodity arbitration requires quick decisions, held that the time limit of seven days for the appointment of the arbitrator and the seven days extension of time by the Secretary of the association concerned, was not a ground for refusal of enforcement under Article V(1) (b) of the Convention.[203]

This Swiss case is also interesting because the Arbitration Rules of the association in question provide that if the respondent has not appointed his arbitrator within the period of time, the claimant may request the Secretary to appoint the second and third arbitrator. The Secretary had, however, appointed the second and third arbitrator without a formal request by the claimant to this effect. The Court of Appeal held that this could not be considered as such a serious procedural irregularity that there existed a violation of due process.

Several Italian courts have also decided on time limits. The Court of Appeal of Naples held that the request to appoint an arbitrator within seven days is not a violation of due process.[204] The same was held by the Italian Supreme Court in

200. See *supra* at n. 43 concerning the question of letters rogatory.

201. Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16).

202. Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29). In the same sense: U.S. District Court, E.D. of Michigan, S.D., March 15, 1977, Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 16).

203. Obergericht of Basle, June 3, 1971 (Switz. no. 5), see also *infra* at n. 219.

204. Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21).

respect of an appointment to be made within 12 days, and by the Court of Appeal of Milan in respect of an appointment to be made within 15 days.[205]

The Court of First Instance of Munich held that the failure of the arbitrators to make the preliminary inquiry as to their competence in regard to whether the time limits for initiating arbitration as provided in the Arbitration Rules in question had been met constituted a "serious procedural violation" for which enforcement was to be refused on the basis of the public policy provision of Article V(2) (b).[206] In my opinion, this question should not have been dealt with under the public policy provision of Article V(2) (b), but rather under Article V(1) (a) – i.e., invalidity of the arbitration agreement.

The requirement of the proper notice of the appointment of the arbitrator implies that *the parties are informed of the name of the arbitrator*. The non-disclosure of the names of the arbitrators has led to one of the exceptional cases in which enforcement of an award was refused on the basis of Article V(1) (b).

The case, decided by the Court of Appeal of Cologne[207], involved an arbitration according to the Arbitration Rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade. The Arbitration Rules provide that, with the exception of the President of the arbitral tribunal, the names of the arbitrators are not made known to the parties. The parties receive a copy of the award which is signed by the President only. The reason underlying this provision is that the persons on the list of arbitrators of the Copenhagen Committee all come from a small circle of grain merchants who regularly do business with each other. If the name of the arbitrator is known to a party also coming from the grain trade, that party may be tempted to influence him. The Rules provide that the parties have the right to request the list of arbitrators and to delete the names of the persons whom they do not wish to have as arbitrator. In the case at hand, the German respondent had not made such request. This failure of the respondent could not cure the irregularity as was observed by the Court of Appeal:

> "The parties have not disputed the fact that – with the exception of the President of the arbitral tribunal – the respondent never had knowledge of the names of the persons who have decided the arbitration between the parties. The respondent is not estopped from invoking Article V(1) (b) of the New York Convention . . . because he could have requested by virtue of Rule 4(6) of the Arbitration Rules the list of all arbitrators from amongst whom the arbitrators for the arbitration in question were chosen. Apart from the fact that Article V(1) (b) implies that the affected party is informed of the appointment of the arbitrator, failing a disclosure of the arbitrators who conducted the arbitral procedure, the respondent is unable to examine whether the members of the Committee challenged by him were effectively excluded from the arbitration or whether prejudiced arbitrators participated who were not mentioned on the list transmitted to him."

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205. Corte di Cassazione (Sez. I), January 20, 1977, no. 272, S.p.A. Nosegno e Morando *v.* Bohne Friedrich und Co-Import-Export (Italy no. 23); Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27). In the latter case the time limit of 48 hours to invoke the inferior quality of the corn was also held not to be in violation of Italian public policy.

206. Landgericht of Munich, June 20, 1978 (F.R. Germ. no. 19); cf. *infra* at n. 237.

207. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14).

The refusal to enforce the award in this case was, in my opinion, justified. Despite the understandable concern of the Copenhagen Arbitration Committee to avoid the influence by a party of an arbitrator, the right to challenge an arbitrator is such a fundamental right of fair trial that it should not be allowed to contract it out.[208]

(b) *"Unable to present his case"*

Originally, the text of Article V(1) (b) read "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings *in sufficient time to enable him to present his case* . . .". At the penultimate session of the New York Conference the underscored wording was amended at the instigation of the Dutch delegate to read "*. . . or was unable to present his case*".[209] This broader wording was proposed by him in view of the possibility that, although notice had been given in sufficient time, the respondent might, for example, have been unable to appear before the arbitrator because a visa had been refused or for other causes of force majeure, or, when appearing before the arbitrator, he might not have had a sufficient opportunity to defend his case.[210] The broadening of the wording has as consequence that the present text covers any serious irregularity in the arbitral proceedings. It also lays down the principle of equal opportunity to be heard.

The equal opportunity to be heard means that a party must have been effectively offered the opportunity to be heard. But if, after having been duly notified, a respondent *refuses to participate or remains inactive* in the arbitration, he must be deemed to have deliberately forfeited the opportunity. Default in arbitration after having been duly notified has invariably been held not to bar enforcement of a Convention award. The counterpart of due process is an active participation in the arbitration.

This is well illustrated by a case decided by the United States District Court in New Jersey.[211] The American respondent, who, although having been invited to the arbitration under the Arbitration Rules of the International Chamber of Commerce in Switzerland, did not take part in the arbitration, asserted that he was "unable to present his case" as under one of the agreements involved in the dispute his rights and liabilities (i.e., commissions for sales of pacemakers) had not matured and

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208. This is also the opinion of U. Kornblum in his comment on this case in 91 *Zeitschrift für Zivilprozess* (1978) p. 323; P. Sanders, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231 at p. 248.

209. UN DOC E/CONF.26/SR.23.

210. P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 315.

211. U.S. District Court of New Jersey, May 12, 1976, Biotronik Mess- und Therapiegeräte G.m.b.H. & Co. *v.* Medford Medical Instrument Company (U.S. no. 8).

could not be calculated until that agreement had expired. He also alleged fraud in obtaining the award as the agreement had not been disclosed by the claimant to the arbitrators. The Court rejected both allegations. The Court reasoned that the respondent misconceived the thrust of Article V(1) (b) which is that "The primary elements of due process are notice of the proceedings and the opportunity to be heard." As he had received notice of the arbitral proceedings, he should and he could have made the allegation before the arbitral tribunal. As regards the allegation of fraud, the Court held that as the respondent was unable to establish this under Section 10(a) of the United States Arbitration Act, the public policy defence of Article V(2) (b) was *a fortiori* inapplicable.[212]

Another case in which it was held that an active participation of the respondent is required is a decision of the Court of Appeal of Hamburg.[213] The German respondent had asserted that he had not had an opportunity to present his case as certain documents of the English claimant had been transmitted to him by mail the evening before the oral hearing in London, for which reason he had not unpacked the documents. The Court rejected the assertion arguing that the fact that the documents had reached him only the evening before the hearing does not violate the requirements of due process as the counterpart of due process is an active participation in the arbitral proceedings; by not unpacking the documents, the respondent had willfully not taken notice of them.

A further example is a decision of the Court of Appeal of Milan which considered that the refusal of the arbitrator to examine the quality of the corn in question was justified, and did not constitute a violation of public policy as provided by Article V(2) (b), as the respondent had not allowed the taking of samples in a procedure with a contra-expertise.[214]

The equal opportunity to be heard does not mean that in each and every case an *oral hearing* must take place. The question whether an oral hearing is to take place or whether the proceedings can be conducted on the basis of documents only depends on the arbitration agreement of the parties and, as the case may be, the Arbitration Rules referred to, as well as, if to be observed in the enforcement procedure (see Art. V(1) (d)), the law governing the arbitration. The question of an oral hearing has not led to a court decision under the Convention.

The principle of due process implies that *the arbitrator must inform a party of the arguments and evidence of the other party and allow the former to express an opinion thereon*. The non-observance of this principle has actually resulted in another exceptional case in which enforcement of an award was refused for a violation of due process.

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212. See for examples of other cases in which the default of a party after due notice was held not to be a bar to enforcement of a Convention award, Landgericht of Zweibrücken, January 11, 1978 (F.R. Germ. no. 16), see *supra* at n. 201; Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29), see *supra* at n. 202.

213. Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18).

214. Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27).

The case involving an award made under the Arbitration Rules of the American Arbitration Association in New York was decided by the Court of Appeal of Hamburg.[215] The New York Convention was held not to be applicable in this case on the account of non-retroactive applicability, but the decision would undoubtedly have been the same if the Convention had been applied.[216] The arbitrator, who conducted the arbitration on the basis of documents only, had not forwarded to the German respondent a letter submitted by the American claimant; the German respondent had therefore no opportunity to obtain knowledge of this letter and to express an opinion thereon. After having observed that in the case of a foreign award not every infringement of mandatory provisions of German law constitutes a violation of public policy, but that a violation is to be accepted in extreme cases only, the Court held that the above facts amounted to such an extreme case. In this connection the Court referred to Section 31(2) of the AAA Arbitration Rules according to which all parties shall be afforded opportunity to examine documents.

On the other hand, the President of the Court of First Instance of Paris rejected the objection of the French respondent that he had been unable to present his case because, after having rejected the basis of the claim as relied upon by the claimant, the arbitrator had substituted on his own initiative another basis for awarding the claim without having heard the respondent thereon. The President reasoned that, although he had rejected the claimant's argumentation, the arbitrator "did not change the legal context of the parties' debate." This view was affirmed by the Court of Appeal of Paris in this case.[217] The President and Court of Appeal were, in my opinion, right in so deciding, because what the respondent was attempting to do, in fact, was to introduce a review of the merits through the due process provision of Article V(1) (b).

As it is the case for the appointment of an arbitrator, it has been held that *short time limits for the preparation of defence* are generally not a violation of due process.

An example is the Court of Appeal of Naples which held that a time limit of 14 days to present evidence in support of the defence is sufficient time for the preparation of the defence.[218]

A related example is the already-mentioned decision of the Court of Appeal of Basle.[219] The responding Swiss company had asserted that it was unable to prepare its defence as its director had to go into obligatory Swiss military service, which objection, made for the purposes of a postponement of the arbitral proceedings, was rejected by the Secretary of the association concerned. The Court of Appeal rejected the assertion as the notice of the arbitration and the setting of time limits by the Secretary had occurred before the entry into military service; the director had, therefore, the possibility to prepare the defence, and, in particular, to the

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215. Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11), see also *supra* at n. 195.

216. See *supra* I–3 ("Retroactivity") at n. 192.

217. President of the Tribunal de grande instance of Paris, May 15, 1970; Cour d'appel of Paris, May 10, 1971, Compagnie de Saint-Gobain – Pont à Mousson *v*. The Fertilizer Corporation of India Ltd. (FCIL) (France no. 1).

218. Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v*. Francesco Ferraro (Italy no. 21).

219. Obergericht of Basle, June 3, 1971 (Switz. no. 5), see *supra* at n. 203.

extent that he could no longer act himself, to take appropriate measures. Moreover, the Court argued, a legal person can be expected to provide that during the absence of one of its directors it remains capable of acting.

Finally, the courts are generally averse to the allegation that the arbitrator has refused to postpone the arbitration hearing because a *witness* of the respondent was unable to appear at a given time or has refused to hear a witness, considering the hearing unnecessary.

An example is a case decided by a United States Court of Appeals.[220] The American respondent contended a violation of due process on the ground that the arbitrators had refused to delay the arbitral proceedings in order to accommodate the speaking schedule of one of his witnesses, the United States chargé d'affaires in Egypt, who had to lecture at a United States university. The Court of Appeals rejected the contention. After having observed that Article V(1) (b) "essentially sanctions the application of the forum State's standards of due process", the Court reasoned that the respondent's due process rights were in no way infringed by the arbitrators because: (1) the inability to produce a witness is inherent to arbitration, (2) the lecture commitment is hardly the type of obstacle to his presence which would require the arbitrators to postpone the hearing as a matter of fundamental fairness to the respondent, and (3) the arbitrators had before them an affidavit from the witness in question.

Another example is a case decided by the Court of Appeal of Hamburg in which it was held that the refusal by the arbitrators to postpone a hearing because a witness "was on business trip" was not a violation of due process. The arbitrator had replied to the request of the respondent for a postponement of the hearing that an affidavit from the witness would also do, which suggestion was not followed by the respondent.[221]

A further example is the already-mentioned Court of Appeal of Paris.[222] Before the Court of Appeal the respondent had invoked a violation of French public policy within the meaning of Article V(2) (b), alleging that the arbitrator had refused to hear again witnesses in respect of documents produced by him, the respondent. The Court of Appeal considered that this did not amount to a violation of French public policy as the arbitrator could rightly assume that the previous declarations of the witnesses were not in contradiction with the newly produced documents.

A last case which may be mentioned in this context is a decision of the Court of Appeal of Geneva concerning an award made in the Netherlands.[223] The respondent had asserted that the conduct of the arbitrators constituted a violation of public policy as provided in Article V(2) (b) because they had consulted an expert (in the chrome trade) in the absence of the parties and without giving them an opportunity to express an opinion on the conclusions of the expert. The Court found that no violation of Swiss public policy had occurred because it appeared that the

220. U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7).

221. Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18).

222. Cour d'appel of Paris, May 10, 1971, Compagnie Saint-Gobain – Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (France no. 1).

223. Cour de Justice (1st Section) of the Canton Geneva, September 17, 1976, Léopold Lazarus Ltd. *v.* Chrome Ressources S.A. (Switz. no. 6).

arbitrators had merely consulted an expert for ascertaining the prices of chrome according to its differing compositions, a question which did not relate to a point controverted by the parties, but which had come up during the deliberations in respect of the commercial practice in this field. The Court considered also that it is an undisputed doctrine in the Netherlands that an arbitrator is not limited to relying on the experience which he already possesses, but may also make inquires in order to elucidate a certain problem.

The review of cases decided under Article V(1) (b) and Article V(2) (b) concerning due process demonstrates that the courts accept the defence of a violation of due process in very serious cases only. However, this must not give the impression that this judicial attitude would give a free rein to reckless conduct and administration of arbitrations by arbitrators and arbitral institutions. Rather, it has appeared that the arbitrators and the arbitral institutions generally have paid due attention to the principles of fair trial, but that the defence of a violation of due process was made by respondents in many cases for what is described as "mere chicanery".[224] These obstructive defences fortunately have not misled the courts. In conclusion, one may say that in interpreting and applying Article V(1) (b) and Article V(2) (b) in respect of the requirements of due process, in particular, the courts have in general underlined the Convention's pro-enforcement bias.

III–4.2.4 *Uniform interpretation (and summary)*

Article V(1) (b) according to which enforcement of an award may be refused if a respondent proves that he has not been given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case, concerns the fundamental standards of due process (p. 297).

What is regarded as a violation of due process in domestic cases need not necessarily be a violation of due process in cases falling under the Convention, the latter being limited to serious irregularities (p. 298).

The violation of due process may also be based on the public policy provision of Article V(2) (b). Article V(1) (b) does not have the effect of preempting this question from Article V(2) (b) (pp. 299-301).

Article V(1) (b) is a corrective on the provision contained in Article V(1) (d) that, in the case of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, the law governing the arbitration is not to be taken into account (p. 301).

A serious violation of due process may not lead to a refusal of en-

224. P. Sanders, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231 at p. 248.

forcement if it is beyond any doubt that the arbitral decision could not have been different, had the irregularity not occurred (pp. 301-302).

The word "proper" before "notice" in Article V(1) (b) includes also the improper representation of a party in the arbitral proceedings (p. 303).

The notice of the appointment of the arbitrator and of the arbitral proceedings must be adequate, but need not be in a specific form (pp. 303-304).

The shortness of time limits for the appointment of an arbitrator by a party is generally not a ground for refusal of enforcement (pp. 304-305).

The parties must be informed of the name of the arbitrator(s) (pp. 305-306).

The wording ". . . or was unable to present his case" covers any serious irregularity in the arbitral proceedings (p. 306).

A party who has refused to participate, or remains inactive, in the arbitration, after having been duly notified, generally cannot invoke Article V(1) (b) or Article V(2) (b) (pp. 306-307).

The arbitrator must inform a party of the arguments and evidence of the other party and allow the former to express an opinion thereon (pp. 307-308).

Short time limits for the preparation of defence are generally not a violation of due process (pp. 308-309).

III–4.3 Ground *c*: Excess by Arbitrator of His Authority

Article V(1) (c) of the Convention provides:

"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:

(. . . .)

(*c*) The 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 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;"

III–4.3.1 *In general*

Ground *c* can be divided in half. The first half is concerned with the award which contains decisions in excess of the arbitrator's authority. The second half deals with the possibility of a partial enforcement of

an award which contains both decisions within the arbitrator's authority and decisions outside that authority.

Contrary to the preceding ground *b* concerning due process, ground *c* has seldom been relied upon by a party against whom enforcement of a Convention award was sought; in fact, it is the least invoked ground of all the grounds for refusal of enforcement provided in Article V. Moreover, in the few cases in which the defence on the basis of ground *c* was made, it has always been dismissed. It may be added that the second half of Article V(1) (c) concerning the partial enforcement has never been applied.

At the outset it should be pointed out that the excess of authority by the arbitrator as provided by Article V(1) (c) does not concern the case where the arbitrator had no competence at all because of the lack of a valid arbitration agreement. For that case of incompetence, Article V(1) (a) concerning the validity of the arbitration agreement has to be invoked. Article V(1) (c), on the other hand, concerns the case where the arbitration agreement may be valid as such, but the arbitrator has given decisions which are not contemplated by or not falling within the scope of the arbitration agreement and the questions submitted to him by the parties.

The Convention does not imply that the arbitrator may give a final decision on his competence (the question of so-called *Kompetenz-Kompetenz*). Under almost all arbitration laws the arbitrator has no power to give such final decision; as arbitration excludes the competence of the courts, which is considered as a far-reaching effect, the courts retain the last word in this matter. Many laws, however, allow the arbitrator to give a provisional ruling on his competence in order not to delay the arbitration and to alleviate dilatory tactics by obstructive respondents. This principle that the court has the last word on the arbitrator's competence is not different for the New York Convention. If it were otherwise, the Convention would have contained express provisions to that effect in order to make clear that it deviates from the prevailing principle of the national arbitration laws. Thus, regardless of the arbitrator's opinion that the arbitration agreement is valid, if the agreement is proven to be invalid, enforcement may be refused under Article V(1) (a). Similarly, regardless of the arbitrator's ruling that certain matters fall within the scope of the arbitration agreement or concern questions submitted to him, if it is proven that he has exceeded his authority, enforcement may be refused under Article V(1) (c).

Another question is under which law the competence of the arbitrator is to be determined. As far as the invalidity of the arbitration agreement is concerned, this question is to be judged under the law applicable to it as determined according to the conflict rules of Article V(1) (a). As far as the excess of authority due to a transgression of the scope of the arbitration agreement and the questions submitted to him is concerned, the question of applicable law will normally not arise, as the excess of authority is largely a question of fact. In exceptional cases, which have not arisen in practice so far in connection with the enforcement of an arbitral award, it may be necessary to ascertain this law. An example is the question whether the arbitration agreement extends to a bill of exchange.[225] In the absence of an express provision to this effect in the Convention, two laws would be equally quali-

fied for this question: the law applicable to the arbitration agreement and the law applicable to the arbitral award. As in practice both laws are in most cases the same[226], the question is rather academic. It may be mentioned that the Swedish implementing Act opts for the law applicable to the award as it provides in Section 7(1) (3), which is intended to give effect to Article V(1) (c) of the Convention[227]:

> "that the arbitrators have gone beyond the matters submitted to them and that by reason thereof the arbitral award is ineffective in the State where it was given or under whose law it was given".

As far as *the interpretation of Article V(1) (c)* is concerned, like the other grounds for refusal of enforcement of Article V, Article V(1) (c) is to be construed narrowly. In any case, the question whether an arbitrator has exceeded his authority should not lead to a re-examination of the merits of the award.

This interpretation was clearly stated by a United States Court of Appeals in one of the few decisions involving the defence of Article V(1) (c).[228] The considerations of the Court are well worth quoting:

> "[Article V(1) (c)] basically allow[s] a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration. This defense to enforcement of a foreign award, like the others already discussed, should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a strict reading.[229]
>
> In making this defense . . . Overseas must therefore overcome a powerful presumption that the arbitral body acted within its powers. Overseas principally directs its challenge at the U.S. $ 185,000 awarded for loss of production. Its jurisdictional claim focuses on the provision of the contract reciting that '(n)either party shall have any liability for loss of production.' The tribunal cannot properly be charged, however, with simply ignoring this alleged limitation on the subject matter over which its decision-making powers extended. Rather, the arbitration court interpreted the provision not to preclude jurisdiction on this

225. Comp. with Court of Appeal, April 2-8, 1976, and House of Lords, February 16, 1977, Kammgarn Spinnerei G.m.b.H. *v.* Nova Jersey Knit Ltd. (U.K. nos. 1 and 2) in which this question was considered under the law applicable to the arbitration agreement in an action for the enforcement of the arbitration agreement under Art. II(3) of the Convention, see *supra* II–1.3.2 ("Difference in Respect of a Defined Legal Relationship").

226. See *supra* III–4.1.3.5 ("Determination of the Law Applicable to the Arbitration Agreement").

227. See for references, Annex C.

228. U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7). In the same sense: U.S. District Court of Michigan, S.D., Audi-NSU Auto Union A.G. *v.* Overseas Motors Inc. (U.S. no. 16).

229. The Court referred to the U.S. Supreme Court decision in United Steelworkers of America *v.* Enterprise Wheel & Car Corp., 363 *United States Supreme Court Reports* 593 (1960). The provision referred to by the Court is Sect. 10(d) of the U.S. Federal Arbitration Act, reading:

> "Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

matter . . . [T]he court may be satisfied that the arbitrator premised the award on a construction of the contract and that it is 'not apparent' . . . that the scope of the submission to arbitration has been exceeded.[230]
The appellant's attack on the U.S. $ 60,000 awarded for start-up expenses . . . cannot withstand the most cursory scrutiny. In characterizing the U.S. $ 60,000 as 'consequential damages' (and thus proscribed by the arbitration agreement), Overseas is again attempting to secure a reconstruction in this court of the contract – an activity wholly inconsistent with the deference due to arbitral decisions on law and fact . . ."
Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The appellant's attempt to invoke this defense, however, calls upon the court to ignore this limitation on its decision-making powers and usurp the arbitrator's role . . .".

III–4.3.2 *"Submission to arbitration"*

Although not yet questioned in the courts so far, the expression "submission to arbitration" as appearing in the English text of Article V(1)(c) may be open to certain difficulties in its interpretation. The same can be said of the French wording of the expression.

In the case of an arbitral clause the allegation of a respondent that the arbitrator has overstepped his authority may be of two kinds. The first type of allegation is that the arbitrator has dealt with a dispute which does not fall within the scope of the arbitral clause. The second type of allegation is that the arbitrator has given decisions on matters which are beyond or outside the questions submitted to him by the parties, which may be called the arbitrator's mandate. The latter type of allegation usually concerns the allegation that the arbitrator has awarded more than, or differently from, what was claimed. The difference between both types of allegations is that the first is based on the arbitral clause itself whereas the second is based on the mandate given by the parties to the arbitrator. The relevance of this distinction is that the mandate may comprise less than the arbitral clause. This has as consequence that in the case of the arbitral clause it depends on the type of allegation made whether the arbitral clause or the mandate must be taken as the measuring standard for determining the question whether the arbitrator has exceeded his authority.

In the case of the submission agreement, on the other hand, there is no need to distinguish between the agreement and the mandate since the mandate is defined in the agreement itself.

As regards the expression "submission to arbitration" in Article

230. The Court referred to the U.S. Supreme Court decision, *supra* n. 229.

V(1) (c), a difference between the English and French texts of Article V(1) (c) – which are according to Article XVI of the Convention equally authentic – is to be mentioned. The English text reads "a difference not contemplated by or not falling within the terms of the submission to arbitration". The French text, on the other hand, reads "un différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire".[231] A wording similar to the French text can be found in the equally authentic Spanish text and the non-authentic German translation.[232] The literal translation of the French text is "a difference not contemplated by the submission agreement or not falling within the terms of the arbitral clause". The same difference between the English and French texts existed under Article 2(1) (c) of the Geneva Convention of 1927, which provision is similar to the first half of Article V(1) (c).[233]

In the case of the arbitral clause, the expressions "submission to arbitration" and "clause compromissoire" must be deemed to have two meanings. The first meaning, which is the one referred to by the French text, is that it refers to the arbitral clause itself. This meaning suits the first type of allegation mentioned above (i.e., that the dispute does not fall within the scope of the arbitral clause). The second meaning is that it also refers to the delineation of the arbitrator's authority as made by the questions submitted to him (i.e., the arbitrator's mandate). The latter meaning suits the second type of allegation mentioned above. The English text of the Convention supports the second meaning: whilst, for example, Article V(1) (a) refers to the arbitration agreement in general, Article V(1) (c) mentions specifically the "submission to arbitration". If the submission agreement and the arbitral clause were only intended to be provided for, Article V(1) (c) could simply have mentioned "arbitration agreement".

Accordingly, the first meaning of the expressions "submission to arbitration" and "clause compromissoire", is to be derived from the French text, whilst the second meaning is to be derived from the English text.

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231. The French text of Art. V(1) (c) cannot be interpreted as meaning that in the case of an arbitral clause a submission agreement must be concluded once the dispute has arisen. As explained in *supra* II–1.2.2, the New York Convention treats both types of arbitration agreements alike. See for this far-fetched interpretation of Art. V(1) (c), P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 265; G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) I.C. 2.

232. The Spanish text reads: "una diferencia no prevista en el compromiso o no comprendida en las disposiciones de la cláusula compromisoria". The German translation reads "eine Streitigkeit ..., die in der Schiedsabrede nicht erwähnt ist oder nicht unter die Bestimmungen der Schiedsklausel fällt".

233. Like it is the case for the difference between the English and French text of the first half of Art. V(1) (c) of the New York Convention, no explanation for the difference between the English and French text of Art. 2(1) (c) of the Geneva Convention can be found in literature.

Consequently, as far as their interpretation is concerned, both texts are to be read together. Thus, depending on the type of allegation made, if the English text is relied upon, it may be necessary to interpret it by relying also on the French text (i.e., in the case of the arbitral clause), and conversely, again depending on the type of allegation made, if the French text is relied upon, it may be necessary to interpret that text by relying on the English text (i.e., in the case of the mandate).

In the case of the submission agreement, the French text explicitly refers to this type of agreement ("compromis"). Accordingly, in this case the expression "submission to arbitration" as appearing in the English text is to be interpreted in the sense of "submission agreement" on the basis of the clearer French text.

III–4.3.3 *Court decisions regarding Article V(1)(c)*

(a) The allegation that the arbitrator has awarded something which was not claimed was dealt with by the Svea Court of Appeal in Stockholm in the matter of *Götaverken* v. *GNMTC*.[234]

The dispute concerned the refusal of GNMTC from Libya to take delivery of three oil tankers which it had ordered from the Swedish shipyard Götaverken. The arbitrators decided that GNMTC should take delivery of the vessels against a price reduction for certain minor defects. Before the Court of Appeal, GNMTC opposed to the request for enforcement of the award, inter alia, on the ground that the arbitrators had exceeded their authority since they had never been asked to determine whether there should be a price reduction. The Court of Appeal held that the arbitrators' mission was to determine whether GNMTC was obliged to take delivery of the vessels and to pay the last instalment of the purchase price. It meant, according to the Court, that they had the power to determine that GNMTC should take delivery and should pay the last instalment with a reduction for non-substantial defects in the vessels. The reduction was not an unsolicited award of damages to GNMTC, but rather a price adjustment connected with the general determination that GNMTC owed the last instalment.

It may be interesting to add that GNMTC had also asserted that the arbitrators had exceeded their authority by declaring in the decisional part of the award: "By the execution of this decision, both parties will be deemed to have fulfilled all their obligations under the three contracts." GNMTC alleged that this was not a question submitted to the arbitrators. The Court of Appeal refrained from deciding on this assertion by holding that this declaration of the arbitrators was of a general nature and not subject to enforcement.

(b) Provisions in the contract of the parties may sometimes also contain a directive which may have to be taken into account by the arbitrator. The defence that the arbitrator has transgressed his authority by in-

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234. Svea Court of Appeal (5th Dep't), December 13, 1978, affirmed by the Swedish Supreme Court, August 13, 1979 (Sweden no. 1).

terpreting such contractual provision, which allegedly he would not have been allowed to do, is approached with great caution by the courts. Such defence usually appears to be a disguised attempt to have the merits of the award re-examined by the court which it is not permitted to do under the Convention.

An example of this defence was already given in the above quoted decision of the United States Court of Appeals.[235] In that case the respondent had alleged that the arbitrator had awarded U.S. $ 185,000 for loss of production in excess of his authority as the contract provided that "[n]either party shall have any liability for loss of production." The Court of Appeal rejected the defence arguing that this clause was a matter of construction of the contract for the arbitrator and that it was not apparent that the scope of the submission to arbitration had been exceeded.

Another example can be found in a decision of the Court of Appeal of Paris in the matter of *Saint-Gobain* (France) v. *FCIL* (India).[236] Saint-Gobain, against whom the enforcement of the award was sought by FCIL, had asserted that the arbitrator had exceeded his authority because according to the award Saint-Gobain had to pay FCIL the indemnity it received from the insurers on the account of materials damaged during transport, whilst the contract of the parties provided that such indemnity was to be transferred by FCIL to Saint-Gobain. The Court held that this concerned a simple slip of the pen in the award as the words "respondent" and "claimant" had erroneously been changed. As this was recognized by FCIL, which declared to be prepared to reimburse Saint-Gobain the amount in question, the Court considered the question as moot.

(c) The question of the transgression by the arbitrators of time limits for initiating arbitration was dealt with by the German Federal Supreme Court under Article V(1) (c).[237] It may be questioned whether this is correct.

The case concerned the addition to the arbitral clause: "Any claim for arbitration formulated after 6 months from the date of arrival of the goods at the final station or port of destination is null." Although the arbitration had been initiated after 6 months from the date of arrival of the goods, the arbitral tribunal in Bucharest had declared itself competent. The transgression of the time limit was sufficient reason for the German Court of Appeal in this case to refuse enforcement of the award on the basis of Article V(1) (c). This decision was reversed by the German Federal Supreme Court. It reasoned that the addition to the arbitral clause was ambiguous as it did not *expressis verbis* exclude the competence of the arbitral tribunal after the six months period. According to the Court, it could mean, inter alia, an absolute bar to the competence of the arbitral tribunal, or one which could still be decided upon by it. Nor was it clear whether the time limit was to be observed by the arbitral tribunal on its own motion, or only at the request of a party. With reference to the conflict rules of Article V(1) (a), the Court held that these questions

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235. U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7), see *supra* at n. 228.

236. Cour d'appel of Paris (1st Chamber), May 10, 1971 (France no. 1).

237. Bundesgerichtshof, February 12, 1976 (F.R. Germ. no. 12), see also *supra* n. 169.

should have been examined by the Court of Appeal under Romanian law and referred the case back to the latter.

Like the Court of Appeal in this case, the German Supreme Court referred also to Article V(1) (c). It may be questioned whether the reliance on ground *c* is appropriate for the question whether the arbitrators have transgressed the time limits for initiating arbitration. Rather, time limits for initiating arbitration affect the validity of the arbitration agreement. As explained in III–4.3.1 *supra*, Article V(1) (c) is not concerned with the incompetence of the arbitrators due to an invalid arbitration agreement, as this question falls under the ground for refusal of enforcement set out in Article V(1) (a). The Supreme Court should therefore have referred to Article V(1) (a) not only for the purpose of determining the law for resolving the question of time limits for initiating arbitration, but also for deciding on this question regarding the arbitrator's competence in its entirety.

III–4.3.4 *Partial enforcement*

The second half of Article V(1) (c) provides:

> "..., if the decisions on the 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;"

The proviso concerning the partial enforcement of an award which is in part *ultra* or *extra petita* was intended to "replace" Article 2(2) of the Geneva Convention of 1927.[238] There is, however, a difference between the provisions. Article 2(2) of the Geneva Convention of 1927 namely provides:

> "If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide."

This provision concerns an award which is *infra petita*, i.e., an award which does not dispose of all questions submitted to the arbitrator's decision. In contrast, the proviso in the New York Convention concerns, according to its text, the award which is *ultra* or *extra petita*, i.e., an award containing decisions which are partially or entirely outside the questions submitted to the arbitrator's decision. In fact, the text of the New York Convention does not regulate the case of an incomplete award at all. We will come back on this question in the following Sub-section.

Leaving aside the difference between an incomplete award and an award made in excess of the arbitrator's authority, the proviso in the

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238. See Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 77.

New York Convention is more flexible than Article 2(2) of the Geneva Convention in that it does not limit the partial enforcement to a postponement of the decision on the enforcement or an enforcement subject to a guarantee. It offers the possibility to grant an unfettered enforcement of that part of the award which contains decisions on matters which were submitted to the arbitrator's decision.

Whereas the first half of Article V(1) (c) was not subject to discussions at the New York Conference, the second half occasioned debates on certain aspects. The delegate from Israel thought it unduly long and complex. The Belgian delegate feared that a court, having to sever, would inevitably have to look into the merits. The delegate from India, on the other hand, stated according to the Summary Records[239] :

> "[I]n a commercial arbitration, the extraneous matter introduced by the arbitrator into the award might be of a very incidental nature. If the enforcing court was not authorized to sever that matter from the remainder of the award and was obliged to refuse enforcement altogether merely because a small detail fell outside the scope of the arbitral agreement, the applicant might suffer unjustified hardship. He consequently thought that the proviso could be retained."

This statement was seconded by statements of delegates of a number of other States. The Italian and Dutch delegates in particular cited as examples the unauthorized decisions on interests and costs. These statements convinced the Conference to vote down the Belgian proposal to delete the proviso.[240]

The partial enforcement as provided by Article V(1) (c) has not been subject to judicial application. It may be mentioned that the proviso gives the court the discretion to grant the partial enforcement ("*may* be recognized and enforced"). The above-mentioned Conference discussions may provide some guidelines as to how this discretion could be exercised: partial enforcement may be granted if the matter in excess of the arbitrator's authority is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement.

The possibility of partial enforcement is unknown in a certain number of countries. In these countries the proviso of Article V(1) (c) will introduce a novelty. In those countries where the partial enforcement is made subject to certain conditions, such as a guarantee, the relevant provisions of their laws are superseded by this uniform rule of the Convention.

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239. UN DOC E/CONF.26/SR.17.
240. *Id.*

III–4.3.5 *Award* infra *petita*

As noted before the award *infra petita*, i.e., the award which does not dispose of all questions submitted to the arbitrator's decision, was regulated by Article 2(2) of the Geneva Convention of 1927. The latter provided that in the case of an incomplete award the court could either postpone the decision on the enforcement or grant enforcement subject to such guarantee as the court would decide. The "replacement" of Article 2(2) of the Geneva Convention resulted in a different proviso in Article V(1) (c) which concerns the partial enforcement of an award *ultra* or *extra* petita. Hence, the case of an incomplete award is no longer listed as a ground for refusal of enforcement under the New York Convention.

The case of an incomplete award has hitherto not been brought up before the courts. In anticipation of possible future cases, may it be argued that an award, in the decisional part of which matters submitted to the decision of the arbitrator are omitted, may be refused enforcement under the Convention?

It is submitted that this argument cannot be maintained. The main reason is that the grounds for refusal of enforcement of Article V of the Convention are limitative and have to be construed strictly.[241] As the incomplete award is not included in the text of Article V, it can, on principle, not be considered as a ground for refusal. The primary purpose of the drafters of the Convention was to limit as much as possible the grounds for refusal of enforcement. Thus, although there is no express mention in the Summary Records of the New York Conference that the incomplete award was to be excluded from the new Convention, the "replacement" of Article 2(2) of the Geneva Convention, in which the incomplete award does not re-appear, may be construed as a consequence of the desired limitation. In addition, there would not seem to exist an objection to the enforcement of an arbitrator's decision which he was competent to take. This is fundamentally different from the case where the arbitrator made a decision in excess of his authority.

It may be added that Article V(1) (d) regarding the ground for refusal of enforcement due to an irregularity in the arbitral procedure is, in my opinion, inappropriate for the case of an incomplete award as it would confer upon the word "procedure" a too extensive meaning. Similarly, for this case it is not appropriate to rely on Article V(1) (e) according to which enforcement may be refused if the award has not become binding on the parties; the concept of "binding" should be limited to those cases where the award is still open to ordinary means of

241. See *supra* III–3.1 ("The Main Features of the Grounds for Refusal of Enforcement") at n. 86.

recourse, such as an appeal on the merits to a second arbitral instance or a court.

Consequently, an incomplete award can, in principle, be enforced under the Convention. It may, however, be that in the country of origin of the award, an award *infra petita* is a ground for setting it aside.[242] In such a case, if a respondent wishes to foreclose the possibility of enforcement of an incomplete award in the other Contracting States under the Convention, he should attempt to obtain its setting aside in the country of origin. In the other Contracting States he can then invoke the second part of ground *e* of Article V(1) that the award has been set aside in the country in which, or under the law of which, the award was made.

It may be added that certain Arbitration Rules provide for the possibility of an additional award in order to avoid the possibility of a setting aside or, if such a possibility does not exist under the applicable arbitration law, to avoid the introduction of a new arbitration to obtain a decision on an omitted point.[243] Such an additional award is of course enforceable under the Convention as any other ordinary award.

III–4.3.6 *Uniform interpretation (and summary)*

The ground for refusal as provided in Article V(1) (c) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, concerns those cases where the arbitrator has given decisions in excess of his authority due to a transgression of the scope of the arbitration agreement and the questions submitted to him by the parties. It does not concern the lack of competence of the arbitrator due to an invalid arbitration agreement as this matter is regulated by Article V(1) (a) (pp. 312-313).

Like the other grounds for refusal of an award contained in Article V

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242. This is the case in several countries; see the National Reports in the *Yearbooks* under Chap. VI.3. The European Convention Providing a Uniform Law on Arbitration, done at Strasbourg January 20, 1966, *European Treaty Series* no. 56, provides as ground for setting aside in Art. 25(2) (e):

"if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made".

243. For example, Art. 37 of the UNCITRAL Arbitration Rules 1976 provides:

"1. Within thirty days after receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims represented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after receipt of the request."

See P. Sanders, "Commentary on UNCITRAL Arbitration Rules", in *Yearbook* Vol. II (1977) p. 172 at p. 214.

of the Convention, Article V(1) (c) has to be construed narrowly. In any case it should not be allowed to result in a re-examination of the merits of the award (pp. 313-314).

The expression "submission to arbitration" in Article V(1) (c) includes both the arbitration agreement, comprising the submission agreement and the arbitral clause, and the mandate given by the parties to the arbitrator which concerns the questions actually submitted to him by the parties (pp. 314-316).

The court has the discretion to grant partial enforcement of an award which is in part *ultra* or *extra petita*. A guideline for the exercise of the discretion may be that partial enforcement may be granted if the matter in excess of the arbitrator's authority is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement. In cases of enforcement falling under the Convention the possibility offered by the second half of Article V(1) (c) constitutes an innovation for those laws which do not contain this possibility, and supersedes those laws which provide for a different regulation of the partial enforcement (pp. 318-319).

An incomplete award (an award *infra petita*) does not constitute a cause for refusal of enforcement under Article V(1) (c), nor under any other ground of Article V (pp. 320-321).

III–4.4 Ground *d*: Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure

Article V(1) (d) of the Convention provides:

"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:

(. . . .)

(*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;"

III–4.4.1 *In general*

Ground *d* lays down the rule that enforcement of an award may 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.

Ground *d* can be deemed to be the result of the desire of the drafters of the Convention to reduce the role of the law of the country where the arbitration took place in the enforcement proceedings in other Contracting States. Under the Geneva Convention of 1927, enforcement of the award could be refused if the composition of the arbitral tribunal and the arbitral procedure was not in accordance with the agreement of the parties *and* the law of the country where the arbitration took place. Thus, even if there was an agreement of the parties on these matters, the law of the country where the arbitration took place was to be taken into account in an enforcement procedure under the Geneva Convention of 1927. This could lead to a refusal of enforcement of an award if, notwithstanding the agreement of the parties, the composition of the arbitral tribunal or the arbitral procedure had deviated, in however small and insignificant manner, from the law of the country where the arbitration took place. The drafters of the Convention thought it therefore preferable to leave out as ground for refusal of enforcement of the award the irregularity of the composition of the arbitral tribunal and the arbitral procedure under the law of the country in which the arbitration took place in those cases where the parties had agreed on these matters.

It may be recalled that despite the difference in text between Article V(1) (d) which states "the law of the country where the arbitration took place" on the one hand, and Article V(1) (a) and (e) concerning the arbitration agreement and the arbitral award which refer to the law of the country where the award was made on the other hand, both must be deemed to point to the same law, as the arbitration must be deemed to have taken place where the award, as stated by it, has been made.[244]

Although Article V(1) (d) was subject to extensive debates at the New York Conference[245] and has been commented upon in depth in literature, few courts have dealt with this provision of the Convention. The reason is that in the case of an agreement of the parties on the composition of the arbitral tribunal, it rarely occurs that the tribunal is not constituted in accordance with their agreement. As far as the agreement on the arbitral procedure is concerned, which agreement is usually embodied in Arbitration Rules of a specific arbitral institution, such an agreement generally affords wide discretionary powers to arbitrators as to the conduct of the arbitral procedure. It therefore rarely happens that the arbitral procedure has not been conducted in accordance with the agreement of the parties.

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244. See *supra* III–4.1.3.5(*b*) ("Law of the Country Where the Award Was Made").
245. See for the history of Art. V(1) (d) *supra* I–1.6.2 ("Does the 'A-national' Award Fall under the Convention?").

An example of one of the rare cases in which enforcement of the award was refused by virtue of Article V(1) (d) because the composition of the arbitral tribunal and the arbitral procedure had not been carried out in accordance with the agreement of the parties is a case decided by the Court of Appeal of Basle.[246] The contract between a Swiss seller and a German buyer concerning the sale of nuts contained an arbitral clause according to which arbitration was to be held under the Conditions of the Commodity Association of the Hamburg Exchange. When a dispute arose between the parties in respect of the quality of the nuts delivered by the Swiss seller, the German buyer wanted to settle the dispute in two phases: the first to ascertain the quality of the nuts and the second to assess the damages. This was unacceptable to the Swiss seller who wished to have the differences settled in one arbitration. When the German buyer pursued the arbitration in two phases, the Swiss seller declined to participate. The enforcement of the award, which was in favour of the German buyer, was refused by the Court of First Instance of Basle. The Court of Appeal of Basle affirmed this decision. With express reference to Article V(1) (d) of the Convention, the Court of Appeal reasoned that neither the composition of the arbitral tribunal nor the arbitral procedure was in accordance with the agreement of the parties because the applicable Arbitration Rules of the Hamburg Commodity Association (Sect. 20 of the *Platzusancen*) do not provide for an arbitration in two phases, although it might recently have become customary to do so in Hamburg. The Court added that inasmuch as the Swiss seller may have had knowledge of this recent development, he still could have assumed in good faith that the Arbitration Rules as printed were still in force.

If the parties have made an agreement on the composition of the arbitral tribunal and the arbitral procedure, according to Article V(1) (d), the alleged irregularity of these matters has to be determined under the agreement alone. The generally accepted interpretation is, however, that notwithstanding the supremacy of the parties' agreement under Article V(1) (d), the composition of the arbitral tribunal and the arbitral procedure are still subject to the fundamental requirements of due process. Thus, if the agreement of the parties provides that one party only may nominate the arbitrator(s) or does not grant the respondent the opportunity to present his case, and this has actually happened, enforcement of the award may be refused in virtue of Article V(1) (b) or Article V(2) (b).[247]

Failing an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, or on certain aspects thereof, ac-

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246. Appellationsgericht of the Canton Baselstadt, September 6, 1968 (Switz. no. 4).

247. P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 317; P. Schlosser, *Das Recht der privaten internationalen Schiedsgerichtsbarkeit* (Tübingen 1975) no. 421. See also for the relationship between Art. V(1) (b) and Art. V(1) (d), *supra* III–4.2.2 under the third question. An example of Art. V(1) (b) overriding the agreement of the parties on the composition of the arbitral tribunal can be found in Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14) in which it was held that the provision in the Arbitration Rules of the Copenhagen Arbitration Committee for Grain and Feed Stuff Trade providing that the names of the arbitrators are not made known to the parties is in violation of the fundamental requirements of due process. Art. V(1) (d), however, was not explicity mentioned in this case. See *supra* at n. 207.

cording to Article V(1) (d) the alleged irregularity of these matters has to be determined under the law of the country where the arbitration took place. It goes without saying that also in this case the fundamental requirements of due process must have been observed. The reason why, here again, there are few cases reported is undoubtedly that parties take care that the arbitral tribunal is constituted in conformity with the law of the place of arbitration. As far as the arbitral procedure is concerned, the arbitration laws too, as a rule, offer freedom to the arbitrators in conducting their arbitration.

Although the distinction made by Article V(1) (d) between the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure on the one hand and the law of the country where the arbitration took place on the other may seem to be clear, the role which the latter law may play according to this provision of the Convention may be looked at more closely (III–4.4.2 below). However, the question whether Article V(1) (d) would also apply to the exceptional case of the so-called "de-nationalized" agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure is not considered in this Section as it has already been examined in connection with the question whether the so-called "a-national" award falls under the Convention.[248] The following is based on the ordinary case that *in the country of origin* the agreement of the parties on these matters is governed by the arbitration law of that country.

III–4.4.2 *Role of the law of the country where the arbitration took place according to Article V(1) (d)*

The role of the law of the country where the arbitration took place for the composition of the arbitral tribunal and the arbitral procedure under Article V(1) (d) can be divided into a subsidiary and a complementary role. The role is subsidiary if the parties have provided nothing in respect of these matters: in that case only is the law of the place of arbitration to be taken into account. The role is complementary for those aspects not provided for by the parties in their agreement: in these cases the law of the place of arbitration can fill the lacunae in the agreement of the parties.

An example of the complementary role of the law of the country in which the arbitration took place can be found in a case decided by the Court of Appeal of Venice.[249] The arbitral clause in the charter party in question read:

248. See *supra* I–1.6 (" 'A-national' Award") and in particular I–1.6.2 ("Does the 'A-national' Award Fall under the Convention?").

249. Corte di Appello of Venice, May 21, 1976, S.A. Pando Compania Naviera *v.* S.a.S. Filmo (Italy no. 16).

> "If any controversy may arise between the owners and the charterers, such a dispute must be referred to three persons in London, one to be appointed by each party, and the third by the two thus appointed . . .".

The arbitral clause did not provide for the event that the respondent would not appoint his arbitrator which indeed happened after the dispute arose between the parties. When the Italian charterer refused to appoint his arbitrator, the Panamanian owner acted in conformity with English arbitration law: he appointed his arbitrator as sole arbitrator. The Court of Appeal of Venice granted the enforcement of the award which was in favour of the Panamanian owner. It rejected the defence of the Italian charterer made under Article V(1) (d), reasoning that the appointment was valid under English law.[250]

It should be emphasized that the subsidiary and complementary role of the law of the country where the arbitration took place in the case of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure is confined to enforcement proceedings under the Convention, i.e., when the enforcement of an arbitral award made in a (Contracting) State (the country of origin) is sought in another Contracting State. As in the country of origin the Convention is not applicable, the principle of Article V(1) (d) does not apply in that country.[251] In fact, in the country of origin the role of the arbitration law will usually be a primary one as in the majority of cases the arbitration, including the composition of the arbitral tribunal and the arbitral procedure, are governed by the law of that country. Consequently, in the country of origin the violation of a mandatory provision of the arbitration law in respect of the composition of the arbitral tribunal or the arbitral procedure may well lead to a setting aside of the award. However, the action for a setting aside in the country of origin appears to be a *rara avis*, and rarely successful.[252]

This results in the seemingly curious situation that in most cases the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure is, in the country where the arbitration took place, subject to the law of that country, whilst, by virtue of Article V(1) (d) of the Convention that law is not to be taken into account in enforcement proceedings in another Contracting State, even if the mandatory provisions of that law have been violated. As noted, the idea behind this system is to reduce the role of the law of the country where the arbitra-

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250. According to Sect. 7(b) of the English Arbitration Act of 1950, if there is a reference to two arbitrators and the respondent does not appoint an arbitrator, the claimant may appoint his arbitrator as sole arbitrator. This provision, which is still good law, is held to apply also to the case where there is a reference to three arbitrators, one to be appointed by the claimant, one to be appointed by the respondent, and the third by the two chosen, and the respondent does not appoint his arbitrator: in that case too, the claimant may appoint his arbitrator as sole arbitrator. See A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 132 et seq.

251. See *supra* I–1.4 ("Convention Not Applicable in Country of Origin").

252. See *infra* III–4.5.3.

tion took place in enforcement proceedings under the Convention. However, as a setting aside action in the country of origin seldom occurs, the idea behind Article V(1) (d) can be deemed to be realized to a certain extent in the country of origin as well, even though that provision is inapplicable in that country.

It might be argued that in most cases the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure includes an implied or express agreement on the law governing these matters, i.e., the law of the country where the arbitration took place. However, such implied or express agreement on the law governing the composition of the arbitral tribunal and the arbitral procedure must be deemed not to form part of the agreement as referred to in Article V(1) (d): this provision draws a clear distinction between the agreement on the composition of the arbitral tribunal and the arbitral procedure as such on the one hand, and the law of the country where the arbitration took place on the other. If it were otherwise, the very purpose of Article V(1) (d), *viz.* the primary role of the agreement of the parties on these matters vis-à-vis the law of the country where the arbitration took place, would be defeated. It would mean that in most cases, despite the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, the alleged irregularity of these matters would still have to be judged under the law of the country where the arbitration took place in enforcement proceedings under the Convention. This would amount to the same system as existed under the Geneva Convention of 1927 – a system which the drafters of the New York Convention specifically wished to abandon.

Consequently, it is not a defence under Article V(1) (d) that, although the composition of the arbitral tribunal or the arbitral procedure was in accordance with the agreement of the parties, it was not in accordance with the mandatory provisions of the law governing these matters. Conversely, it will be a good defence that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties although it was in accordance with the law governing these matters. Such deviations between the agreement of the parties concerning the composition of the arbitral tribunal and the arbitral procedure on the one hand and the law governing these matters on the other are rather unusual in practice.

An example of an exceptional case where the composition of the arbitral tribunal was not in accordance with the agreement of the parties, although it was in accordance with the law of the country where the arbitration took place, is a decision of the Court of Appeal of Florence.[253] The case involved a charter party (EXXONVOY

253. Corte di Appello of Florence, April 13, 1978, Rederi Aktiebolaget Sally *v.* S.r.l. Termarea (Italy no. 32).

1969) between a Finnish charterer and an Italian shipowner, which provided in clause 24 that:

"Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London, whichever place is specified in Part I of this Charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any of two of the three on any point or points shall be final . . .".

The arbitral clause further contained details as to how the three arbitrators had to be appointed, including provisions for the case that the second was not appointed by the respondent and the case that the two arbitrators could not reach agreement on the third arbitrator. In the latter case the third arbitrator was to be appointed by the "Judge of any court of maritime jurisdiction in the city abovementioned". The place specified in Part I was London.

Following a dispute concerning demurrage, each party appointed an arbitrator.[254] The two arbitrators, however, did not appoint a third arbitrator. In the award, made in favour of the Finnish charterer, the arbitrators explained this as follows:

"Clause 24 of the said charter party required arbitration before a board of three persons, the third arbitrator to be appointed by the two chosen by the parties. The Arbitration Act 1950, Section 9(1) states that any such provision shall take effect as if provided for the appointment of an Umpire. As the two arbitrators were minded to agree, an Umpire was not required and if so appointed would not have entered into the Reference."

Section 9(1) of the Arbitration Act of 1950, which has been changed by the Arbitration Act of 1979[255], provided:

"Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have the effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties."

Section 9(1) was considered mandatory in England. It was held that where there is an apparent reference to three arbitrators, the third of them is to be treated as though he were an umpire, and the provision that "the decision of any two of the three on any point or points shall be final" must be overriden by Section 9(1).[256] The umpire is an arbitrator who decides the dispute in lieu of the two arbitrators if the latter cannot reach a decision; before that event he does not take part in the arbitration.

The Court of Appeal of Florence, before which the enforcement of the award was sought by the Finnish charterer against the Italian shipowner, refused to grant the enforcement on account of Article V(1) (d) of the Convention, considering that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The Court overruled the applicability of Section 9(1) of the English Arbitration Act of 1950 arguing that according to Article V(1) (d) the agreement of the parties prevails over the law of the country where the arbitration took place.

The decision of the Court of Appeal makes it clear that even in the case of an express agreement of the parties on the law governing the composition of the arbi-

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254. As the respondent appointed his arbitrator, the case is different from the one mentioned in *supra* n. 250.

255. See *infra* n. 257.

256. A. Walton, *Russell on the Law of Arbitration*, 18th ed. (London 1970) p. 98.

tral tribunal – the arbitral clause read: "... pursuant to the laws relating to arbitration there in force ..." – that law is not to be taken into account under Article V(1) (d) in the case of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure.

One may argue that it is not entirely satisfying that the agreement in question was not construed under English arbitration law. In that case the validity of the composition of the arbitral tribunal would certainly have been upheld. But if that would have been done, the purpose of Article V(1) (d) to restrict the role of the law of the country where the arbitration took place would be defeated because, as noted, in most cases that law is implicitly or expressly agreed upon. It would mean that in most cases the law of the place of arbitration, including all its particularities and its public policy, has to be taken into account under Article V(1) (d). On the other hand, it may also be pointed out that the Finnish and Italian party probably had not expected that their agreement on three arbitrators would mean an agreement on two arbitrators and an umpire under English arbitration law. Moreover, this unusual case of a deviation of the agreement of the parties from the law of the country where the arbitration takes place will no longer occur in England as the arbitration law has changed in the meantime.[257]

The moral is that parties should be very careful in drafting the arbitral clause. At the time of concluding the charter party, the arbitral clause in EXXONVOY 1969 was not a well drafted clause: depending on the place of arbitration specified in Part I, the arbitral tribunal would have consisted of two arbitrators and eventually an umpire in the case London was specified, and of a tribunal of three ordinary arbitrators in case New York was specified, in which jurisdiction the former particularity of English arbitration law does not exist.

The decision of the Court of Appeal of Florence shows, however, that the desire of the drafters of the Convention to degrade the law of the country where the arbitration took place may create a Scylla and Charybdis situation in the exceptional case that the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure deviates from the mandatory provisions of the law of the country where the arbitration is to take place. The Scylla is that if the two arbitrators, as they did, followed English arbitration law in disregard of the letter of the agreement of the parties, the award was valid in England, but the enforcement was to be refused under Article V(1) (d) of the Convention in Italy. The Charybdis is that if the arbitrators had followed

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257. Sect. 9(1) has been changed by Sect. 6(2) of the Arbitration Act of 1979 as follows:

"Unless the contrary intention is expressed in the arbitration agreement, in any case where there is a reference to three arbitrators, the award of any two of the arbitrators shall be binding."

This change was prompted by the Commercial Court Committee which observed in its *Report on Arbitration* of July 1978 (Command Report 7284) in para. 59 at p. 15 that Sect. 9(1) is

"unpopular with those sections of the commercial community which favour three-arbitrator agreements. They point out, not unreasonably, that if they wanted an umpire, they would have so provided in their agreement. Instead they wanted a third arbitrator who would be seized of their dispute *ab initio.* Parliament, for reasons which are wholly unexplained, has frustrated their intentions. This complaint is unanswerable and should be remedied by amending the Section."

the agreement of the parties and appointed a third arbitrator in disregard of mandatory English arbitration law, the award would have been enforceable under the Convention in Italy. However, in the latter case the Italian party could have instituted setting aside procedures before the High Court in London. If the Court in London had set aside the award for the reason that the composition of the arbitral tribunal was in violation of mandatory English arbitration law, the enforcement of the award could have been resisted in Italy on the ground contained in Article V(1) (e) of the Convention that the award "has been set aside . . . by a competent authority of the country in which . . . that award was made". This "side-effect" of Article V(1) (d) is unfortunate but apparently inevitable.

Dr. Gentinetta agrees that the composition of the arbitral tribunal and the arbitral procedure in accordance with the agreement of the parties but in violation of the law of the country where the arbitration took place is not a ground for refusal of enforcement of the award under Article V(1) (d).[258] However, the author is of the opinion that if contrary to the agreement of the parties on these matters the law of the country where the arbitration took place has been observed, it is not a ground for refusal of enforcement of the award under Article V(1) (d) that in this case the agreement of the parties has not been followed. The author argues that Article V(1) (d) cannot have the meaning that a situation whereby Article V(1) (e) could be invoked would arise (i.e., a setting aside in the country of origin). He fails, however, to explain why the latter would not apply also to the first case. Moreover, it should be pointed out that Article V(1) (e) is limited to cases where the award "*has been* set aside" in the country of origin. In addition, in the first case the agreement of the parties would rank first, whilst in the second case the law of the country where the arbitration took place would have a primary role. This is difficult to maintain in view of the unambiguous wording of Article V(1) (d).

III–4.4.3 *Uniform interpretation (and summary)*

Article V(1) (d) according to which enforcement of an award may 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 failing such agreement, was not in accordance with the law of the country where the arbitration took place, means that if the parties have made an agreement on these matters, the alleged irregularity in their respect is to be judged under that agreement alone. The law of the country where the arbitration took place may be taken into account only if the agreement on these matters is lacking or to the extent that matters are not covered by the agreement (pp. 322-324).

Although in the case of an agreement of the parties on the composi-

258. J. Gentinetta, *Die Lex Fori internationaler Handelsschiedsgerichte* (Bern 1973) p. 302.

tion of the arbitral tribunal and the arbitral procedure the agreement is supreme, these matters must comply with the requirements of due process, and a violation thereof may lead to a refusal of enforcement under Article V(1) (b) or Article V(2) (b) (p. 324).

In the case of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, the implied or express agreement on the law governing these matters is to be observed in the country of origin in which the Convention is not applicable, but is not to be taken into account for the purpose of Article V(1) (d) in another Contracting State in enforcement proceedings under the Convention (pp. 325-327).

The supremacy of the agreement of the parties regarding the composition of the arbitral tribunal and the arbitral procedure over the law of the country where the arbitration took place in the enforcement proceedings under the Convention, means also that if the mandatory provisions of that law have been violated, this exceptional case is no ground for refusal of enforcement of the award under Article V(1) (d) nor any other provision of the Convention. This is, however, without prejudice to the possibility of setting aside the award in the country of origin, and, as observed above, to a refusal of enforcement on the basis of Article V(1) (b) or Article V(2) (b).

Conversely, a ground for refusal of the award under Article V(1) (d) is the again exceptional case that, whilst the mandatory provisions of the law of the country where the arbitration took place have been observed, the agreement has been disregarded (pp. 327-330).

III–4.5 Ground *e*: Award Not Binding or Set Aside

Article V(1) (e) of the Convention provides:

"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:

(. . . .)

(*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."

III–4.5.1 *Introduction*

Ground *e* of Article V(1) contains in fact two grounds for refusal. They will be examined consecutively in this Section: the award which has not become binding (III–4.5.2), and the award which has been set aside or suspended (III–4.5.3).

According to the first part of Article V(1) (e), enforcement of the award may be refused if the respondent can prove that the award has not yet become binding on the parties. The term "binding" is acknowledged to be one of the major improvements of the Convention in comparison with its predecessor, the Geneva Convention of 1927 which required the award to be "final". The term was probably the most discussed proviso of the Convention at the New York Conference of 1958. As its meaning is difficult to grasp without the legislative history, this will be reviewed at some length in III–4.5.2.1. The term has given rise to diverging judicial interpretations, but, and this is very significant, has hitherto not led to a refusal of enforcement, notwithstanding the many cases in which it was applied. How the term "binding" could be interpreted in a uniform manner, and especially whether to this end an autonomous interpretation is possible, will be examined in III–4.5.2.2.

As we shall see, the term "binding" implies that a leave for enforcement (exequatur or the like) issued by the court in the country of origin is not needed. However, if such leave has been issued, another question may arise: if the leave for enforcement can be equated to a judgment, the question is whether the award still continues to exist as an award and can be enforced as such under the Convention, or has been absorbed by the judgment, in which case the Convention would not be the basis for enforcement. As this question of merger is related to the interpretation of the term "binding", it will be dealt with at the end of the Subsection concerning this term (III–4.5.2.3).

According to the second part of Article V(1) (e), enforcement of the award may be refused if the respondent can prove that the award has been set aside or suspended by the court in the country of origin. This ground for refusal that the award has been set aside, which seldom occurs and is almost never successful, will be examined in III–4.5.3.1. Thereafter we will deal briefly with the rare case of a suspension of the award (III–4.5.3.2). This will be followed by an examination of the corollary provision contained in Article VI. According to the latter provision, if an application for the setting aside or suspension of the award is made in the country of origin, the court before which enforcement of the award is sought under the Convention may, "if it considers it proper", adjourn the decision on enforcement and may, at the request of the claimant, order the respondent to put up suitable security (III–4.5.3.3). Finally, the question will be addressed whether the setting aside of the award in the country of origin should be retained as a ground for refusal of enforcement under the Convention (III–4.5.3.4).

III–4.5.2 *Award not "binding"*

III–4.5.2.1 *Legislative history*[259]

Pursuant to Article 1(2) (d) of the Geneva Convention of 1927, to obtain enforcement of the award it was necessary:

> "That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;"

The word "final" in this provision was generally interpreted as meaning that means of recourse involving a short time limit were no longer open against the award in the country where that award was made.[260] However, since according to Article 4(2) of the Geneva Convention the party seeking enforcement of the award had the burden of proving that the award had become final in the country in which it was made, in practice it meant that he could prove this only by submitting a leave for enforcement (exequatur or the like) issued by the court of the latter country. As an exequatur was also required in the country where the enforcement was sought, this amounted to the system of the so-called "double exequatur". Furthermore, in virtue of the last part of Article 1(2) (d) of the Geneva Convention, the party against whom the enforcement of the award was sought could easily obstruct the finality of the award, and hence its enforcement, by instituting proceedings for contesting the validity of the award in the country where it was made.

Considering that the Geneva Convention's requirement of a "final" award was both burdensome and inadequate, the International Chamber of Commerce left it out in its Draft Convention of 1953. It reasoned that "it has appeared advisable to consider the problem from a more practical angle and to envisage only the case of awards effectively set aside."[261] In addition, the latter condition did not have to be proven by the party seeking enforcement, but had to be established by the other party or the court on its own motion.

The ECOSOC Committee, however, proposed in Article III(b) *jo* Article V(b) of its Draft Convention of 1955 that to obtain enforcement the party seeking enforcement had to prove:

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259. See also for the legislative history of the term "binding", Th. Firth, "The Finality of a Foreign Arbitral Award", 25 *Arbitration Journal* (1970) p. 1 at p. 10.

260. See H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* (Winterthur 1957) p. 57.

261. International Chamber of Commerce, *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention*, ICC Brochure no. 174 (Paris 1953) p. 11 (reproduced in UN DOC E/C.2/373).

> "That, in the country where the award was made, the award has become *final* and *operative* and, in particular, that its enforcement has not been suspended." (emphasis added)

The ECOSOC Committee explained in its Report accompanying the Draft Convention that it decided to re-introduce this requirement "in order properly to safeguard the rights of the losing party."[262]

In their comments on the ECOSOC Draft Convention, many Governments objected to the above-quoted provision regarding the finality of the award. They argued that it would be normally impossible for a claimant to submit the negative proof that no recourse has been taken against the award or that its enforcement has not been suspended in the country in which it was made. Furthermore, they objected that the word "operative" in combination with the word "final" was likely to be interpreted by enforcement courts as requiring a prior leave for enforcement in the country where the award was made. This would amount to a duplication of enforcement actions, one in the country in which the award was made, and another in the country where the enforcement was sought (i.e., the so-called "double exequatur"), which existed in practice under the Geneva Convention of 1927.[263]

Taking account of these objections, the Dutch proposal to amend the ECOSOC Draft Convention provided that enforcement of the award could be refused if the party against whom the enforcement was sought could prove that[264] :

> "the award has been annulled in the country in which it was made or has not become final in the sense that it is still open to ordinary means of recourse."

The Dutch delegate explained that the effect of the amendment was to eliminate the "double exequatur", which resulted from the word "operative" in the ECOSOC Draft Convention. However, as the Dutch delegate explained, the respondent was not completely stripped of his protection since the award would not be final if it was still open to ordinary means of recourse.[265]

At this juncture it should be observed that the distinction between ordinary and extraordinary means of recourse, as introduced by the Dutch delegate to distinguish between non-final and final awards, is typical for several Civil Law countries, but is unknown in many Common Law countries. Although varying from country to country in the Civil Law world, it can generally be said that ordinary means of recourse connote a gen-

262. UN DOC E/2704 and Corr. 1, para. 32.
263. UN DOC E/CONF.26/2 para. 15.
264. UN DOC E/CONF.26/L.17.
265. UN DOC E/CONF.26/SR.11.

uine appeal on the merits, whilst extraordinary means of recourse are reserved for certain irregularities, especially the procedural ones, tainting a final decision.[266]

The Dutch proposal led to a deluge of other amendments regarding the provision in question and was debated extensively at the Conference.[267] Certain delegates, including those from Belgium, the United States, and certain Latin American countries, were squarely opposed to the elimination of the leave for enforcement issued by the court of the country in which the award was made. The majority of delegates could, in principle, agree with the elimination, but several had difficulties with the expression "ordinary means of recourse", which could have different meanings in the various countries. They wished to replace it by means of recourse involving a – short – time limit. The Swiss delegate went so far as to propose that the provision should only read that "The award has been annulled or its execution suspended in the country in which it was made".[268]

The drafting of the provision was referred to Working Party No. 3, which brought forth the following text[269] :

> "or the award, recognition and enforcement of which is sought, has not yet become *binding* on the parties, or has been set aside in the country in which it was made." (emphasis added)

The Working Party could not agree whether this provision should be a ground for refusal to be proven by the party against whom the enforcement is sought, or was to be examined by the enforcement court on its own motion. The Conference voted in favour of the former.[270]

What is interesting is that the Working Party had replaced the word "final" with the word "binding". According to the Summary Records, the Chairman of the Working Party explained this as follows[271] :

> "[T]he text of paragraph 1(e) of Article [V] was drafted with the aim of making the Convention acceptable to those States which considered an arbitral award to be enforceable only if it fulfilled certain formal requirements which alone made the award binding on the parties. The Working Party agreed that the award should not be enforced if under the applicable arbitral rules it was still subject to an appeal which had a suspensive effect, but at the same time felt it would be unrealistic to delay the enforcement of an award until all the time limits pro-

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266. See *infra* at n. 296-309.

267. The various amendments are compared in UN DOC E/CONF.26/L.33/Rev.1. The Summary Records concerning the discussions in regard of these amendments can be found in UN DOC E/CONF.26/SR.11-14.

268. UN DOC E/CONF.26/L.30.

269. UN DOC E/CONF.26/L.43.

270. UN DOC E/CONF.26/SR.17.

271. *Id.*

vided for by the statutes of limitations had expired or until all possible means of recourse, including those which normally did not have a suspensive effect, have been exhausted and the award had become 'final'. The Working Party also agreed to avoid the use of the words 'operative' or 'capable of enforcement' which many delegations considered unacceptable because they could be interpreted as requiring the award to satisfy all conditions for its enforcement in the country where it was made."

However one may view the correctness of the statement in its entirety[272], it signifies in any case that the term "binding" was inserted as a compromise between those favouring the mere provision that the award has been effectively set aside in the country of origin and those favouring the requirement of a leave for enforcement issued by the court of that country.

The above-quoted statement of the Chairman of Working Party No. 3 indicates in particular that the term "binding" was used in order to make clear that no leave for enforcement from the court of the country in which the award was made was needed. This was also confirmed by the Conference which rejected a Brazilian proposal to insert in the text the requirement that the award has been "ratified" in the country of origin.[273]

Apart from the just mentioned certainty which exists regarding the meaning of the term "binding", the legislative intent is not entirely clear. The text proposed by Working Party No. 3 did not contain the mention of "in the sense that it is still open to ordinary means of recourse" as could be found in the Dutch proposal. The Italian delegate, who was a member of Working Party No. 3, explained: "[I]n the Working Party the term 'binding' had been taken to mean that the award would not be open to ordinary means of recourse."[274]

The Turkish delegate proposed to re-introduce the phrase. The Israeli delegate, whilst agreeing with the interpretation of the term "binding" as given by the Italian delegate, opposed the Turkish proposal arguing that the Working Party had wisely refrained from using the phrase as it would have been difficult to reconcile this expression with the law of Common Law countries in which the distinction between ordinary and extraordinary means of recourse is unknown. The Turkish proposal was thereupon defeated. On the other hand, the delegate from Guatemala disagreed with the interpretation given by the Italian delegate. In his view, an award would not become binding until all means of recourse, both ordinary and extraordinary, had been exhausted.[275]

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272. See especially, *infra* n. 305. Furthermore, the first sentence does not indicate cleary whether the binding force of the award is to be determined under the law governing the award. See for an autonomous interpretation of the term "binding", *infra* III–4.5.2.2.

273. UN DOC E/CONF.26/L.37/Rev.1., rejected at SR.17.

274. UN DOC E/CONF.26/SR.17.

275. *Id.*

Although several delegates urged to find a better word for the term "binding" as it would probably be subject to diverging interpretations, the Conference left the term untouched. The fear that the term "binding" would be subject to diverging interpretations has turned out to be justified in practice, as we will see in the following Paragraph.

For completeness' sake it may be added that as a provision corollary to the ground for refusal that the award has been set aside in the country of origin, the Working Party proposed also that if an application for setting aside had been made in the country of origin, the enforcement court can adjourn the decision on enforcement. With some minor amendments, this provision became Article VI.[276]

After several other amendments, the text of ground *e* as adopted by the Conference at the stage when it was being discussed extensively, was that enforcement may be rejected if the party against whom the enforcement it sought could prove that:

> "the award, recognition and enforcement of which is sought, has not yet become binding on the parties, or has been set aside or suspended by the competent authority."

At the penultimate session of the New York Conference this text was amended to its present text at the proposal of the delegate from the U.S.S.R.[277]

III–4.5.2.2 *Meaning of the term "binding"*

The intent of the drafters to eliminate the so-called "*double exequatur*" by using the term "binding" in Article V(1) (e) has been almost unanimously affirmed by the courts.

For example, a French court rejected the objection by the French respondent to the request for enforcement of an award made in F.R. Germany that no leave for enforcement had been issued by a German court, holding that, as the Convention has done away with the system of the "double exequatur", it does not require a leave for enforcement from the country in which the award is made.[278] Similarly, the Italian Supreme Court overruled the objection of the Italian respondent to the enforcement of an award made in the United States that a United States court should have entered judgment upon the award.[279] For the same reason, a Mexican court brushed aside the defence of the Mexican respondent that the award, which was made in France, should have been declared enforceable in France by means of an exequatur.[280]

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276. See *infra* III–4.5.3.3.

277. UN DOC E/CONF.26/SR.23.

278. Tribunal de grande instance (Commercial Chamber) of Strasbourg, October 9, 1970, Animalfeeds International Corp. *v.* S.A. A. Becker et Cie (France no. 2).

279. Corte di Cassazione (Sez. I), April 15, 1980, no. 2448, Lanificio Walter Banci S.a.S. *v.* Bobbie Brooks Inc. (Italy no. 40), affirming Corte di Appello of Florence, October 8, 1977 (Italy no. 29).

280. Tribunal Superior de Justicia, 18th Civil Court of First Instance for Mexico D.F., February 24, 1977, Presse Office S.A. *v.* Centro Editorial Hoy S.A. (Mexico no. 1). In the same sense: Landgericht of Hamburg, January 18, 1979 (F.R. Germ. no. 22). The Court of First Instance of Piraeus, decision no. 1193/1968 (Greece no. 1) held that according to Greek law →

Furthermore, the courts have unanimously held that *the party against whom the enforcement is sought has to prove* that the award has not become binding. It still happens in some cases that a respondent merely asserts that the award has not become binding. In these cases the courts have invariably held that the respondent should furnish proof to this effect.[281]

The above interpretation of the term "binding" is also almost unanimously affirmed by the authors.[282] To this extent there exists a uniformity of interpretation.

The uniformity of the interpretation begins to waver, however, when it comes to the question *at which moment* an award can be considered to have become binding under Article V(1) (e). Although in no case has it been held hitherto that the award in question was to be considered as not having become binding, the various reasonings are diverse. If this situation continues, it may occur that an award will not be considered as binding by one court, whilst the same award would have been considered as binding by another court.

In finding the answer to the question at which moment the award

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the leave for enforcement issued by a court in the country of origin is a prerequisite for the enforcement of foreign awards in Greece. The Court granted the enforcement, as the award, which was made in F.R. Germany, had been declared enforceable by a German court. The requirement was laid down in Art. 858 of the former Greek Code of Civil Procedure. The new Greek Code of Civil Procedure of 1968 has done away with this requirement, see A. Foustoucos, "National Report Greece", in *Yearbook* Vol. V (1980) p. 57 at p. 82. It should be observed, however, that according to the prevailing interpretation of the term "binding" of Art. V(1) (e), this question in any case does not depend on the law of the country in which the enforcement is sought, but is governed by the Convention alone. In practice, Greek courts and lawyers still appear not to be conversant with the New York Convention as the party seeking enforcement of a foreign award is still requested to submit a sworn affidavit from a legal expert of the country in which the award was made, certifying that the award is valid, binding, final and enforceable under the law of that country.

281. E.g., President of the Tribunal de grande instance of Paris, May 15, 1970, Compagnie de Saint-Gobain-Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (France no.1); Corte di Appello of Naples, February 20, 1975 Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21); President of Rechtbank of Amsterdam, December 14, 1977 (Neth. no. 4).

282. J. Robert, "La Convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères", *Revue de l'arbitrage* (1958) p. 70 at p. 79; F.-E. Klein, "La Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères", 57 *Revue Suisse de Jurisprudence* (1961) p. 229 at p. 248; Private International Law Committee, *Fifth Report on the Recognition and Enforcement of Foreign Arbitral Awards*, Command Report 1515 (London 1961) p. 31; Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 94; Firth, *supra* n. 259, at p. 61; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 423; P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 319, "Commentary", in *Yearbook* Vol. I (1976) p. 207 at pp. 215-216, "Commentary", in *Yearbook* Vol. II (1977) p. 254 at p. 262, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231 at p. 249, and "Consolidated Commentary Vols. V and VI", in *Yearbook* Vol. VI (1981) p. 202 at p. 213.

can be considered binding, the prevailing judicial interpretation seems to be that this question is to be determined under the law applicable to the award. The law applicable to the award is according to Article V(1) (e), the law of the country in which, or under the law of which, that award was made (the country of origin). Several courts appear to search under the applicable law for the moment at which the award can be considered to be inchoate for enforcement in the country of origin. Others attempt to find an equivalent of the term "binding" under the arbitration law of the country of origin.

Before the Court of Appeal of Naples the Italian respondent had resisted the request for enforcement of an award made in London, alleging that the award should have been declared enforceable in England.[283] The Court rejected the defence, reasoning that the legal effect of the award was not to be determined under Italian law, according to which an award becomes binding only upon an enforcement order of the *Pretore*, but should be assessed under English law according to which the leave for enforcement is not necessary in order to confer binding force upon the award.[284]

Another example is the Court of First Instance of Strasbourg before which the French respondent had asserted that the enforcement of an award made in F.R. Germany could not be granted because a leave for enforcement had not been issued by a German court.[285] Whilst observing that the Convention has abolished the "double exequatur", the Court reasoned that the award had become binding when it had been deposited with the German court. The latter is indeed a prerequisite for the binding force (*Verbindlichkeit*) of an award under German law.[286]

The binding force of an award under German law was also considered by the Court of Appeal of Basle.[287] The Court referred to the Report of the Swiss Federal Council (*Conseil fédéral*) accompanying the implementation of the Convention in Switzerland, in which it is stated that "an award is binding within the meaning of Article V(1) (e) when the award complies with the conditions required for being enforceable or for being capable for being declared enforceable in the country in which it was made".[288] The Court held that the award was binding on the ground

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283. Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21).

284. The Court referred to Sect. 16 of the English Arbitration Act of 1950, which Section has not been changed by the Arbitration Act of 1979, providing:

"Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively."

285. Tribunal de grande instance (Commercial Chamber) of Strasbourg, October 9, 1970, Animalfeeds International Corp. *v.* S.A. A. Becker et Cie (France no. 2).

286. Under German law an award becomes *verbindlich* (the German equivalent of binding) only after the three conditions of Sect. 1039 of the German Code of Civil Procedure, *viz.* signing, delivery and deposit with the competent court, have been fulfilled. See O. Glossner, "National Report F.R. Germany", in *Yearbook* Vol. IV (1979) p. 60 at p. 75.

287. Appellationsgericht of the Canton Baselstadt, September 6, 1968 (Switz. no. 4). This part of the decision is not summarized in the extract appearing in *Yearbook* Vol. I (1976) p. 200.

288. "Message du Conseil fédéral à l'Assemblée fédérale concernant l'approbation de la Convention pour la reconnaissance et l'exécution des sentences arbitrales étrangères (dite Convention de New York)", *Feuille fédérale de la Confédération Suisse* (1964) II p. 625 at p. 637.

that a declaration of enforceability of the award had been issued by the Court of First Instance of Hamburg.[289]

This decision might create the impression that in order to be binding under Article V(1) (e), an award made in F.R. Germany must have been declared enforceable by a German court. However, the Swiss *Conseil fédéral* merely meant to say that "binding" should be understood as "ready for enforcement" and not as "enforced". If the Court had followed this interpretation, it would have probably have reached the same conclusion as the above-mentioned Court of First Instance of Strasbourg which considered the award to be binding under German law once it had been deposited with the German court. Nevertheless, both courts have in common that they considered the question at which moment an award becomes binding within the meaning of Article V(1) (e) under the law applicable to the award.

Another example is a decision of the President of the Court of First Instance of Paris.[290] The French respondent had objected to the request for enforcement of an award made in India that it had not become binding as provided by Article V(1) (e) because it had not been confirmed by the High Court in New Delhi. The President observed that an award must be considered as "binding" within the meaning of the Convention "even if it is open to means of recourse". The Judge, however, rejected the objection for the reason that according to Article V(1) (e) the respondent "must prove that an award has not become binding *in the country in which it was made*" (emphasis added), which the respondent had failed to do.

Furthermore, whilst declaring that the Convention has eliminated the "double exequatur", the Italian Supreme Court held that the Court of Appeal had correctly ascertained that the award in question, made in the United States, had become binding under the relevant law of the United States.[291]

Finally, mention should be made of the Swedish Foreign Arbitration Agreements and Awards Act of 1971 (as amended in 1976), which Act implements the Convention in Sweden. This Act is the only implementing legislation which expressly provides that the binding force of the award is to be ascertained under the applicable law: Section 7(1) (5) of the Act, implementing Article V(1) (e) of the Convention, reads:

> "that the arbitration award has not yet become enforceable or otherwise binding on the parties in the State where it was given or under whose law it was given or that it has been set aside or suspended by a competent authority in the said State."[292]

In the *Götaverken* v. *GNMTC* decision, the Swedish Supreme Court, however, assigned a very limited role to the law of the country of origin for determining the question when an award is binding.[293] We will come back to this aspect presently.[294] It suffices to mention here that the Supreme Court observed that the phrase "enforceable or otherwise", which does not appear in Article V(1) (e) of the Conven-

289. The Court referred to Sect. 1042 of the German Code of Civil Procedure according to which the actual enforcement (*Zwangsvollstreckung*) of the award can only take place after the court has declared the award enforceable (*vollstreckbar*). Comp. *supra* n. 286.

290. President of the Tribunal de grande instance of Paris, May 15, 1970, Compagnie de Saint-Gobain-Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (France no. 1).

291. Corte di Cassazione (Sez. I), April 15, 1980, no. 2448, Lanificio Walter Banci S.a.S. *v.* Bobbie Brooks Inc. (Italy no. 40), affirming Corte di Appello of Florence, October 8, 1977 (Italy no. 29).

292. The translation is taken from Stockholm Chamber of Commerce, ed., *Arbitration in Sweden* (Stockholm 1977) Appendix 3.

293. Supreme Court, August 13, 1979 (Sweden no. 1).

294. See *infra* at n. 302-304.

tion, was added at the initiative of the Swedish Law Council, but that according to the legislative history of the Act, no material deviation from the Convention was intended. Apparently, the Swedish Law Council added "enforceable or otherwise binding" with the purpose of making it clear that the term "binding" means in any case "ready for enforcement".

From the above cases it appears that the courts generally consider that the award becomes binding within the meaning of Article V(1) (e) at the moment when the award becomes inchoate for enforcement under the law governing the award or at the moment when the award fulfills the conditions of a term under the applicable law equivalent to the term "binding". It will be clear that this moment may vary from law to law. This disparity is aggravated by the fact that certain laws distinguish between a judicial approval of the award and its subsequent enforcement, whilst others do not know the former or, at least, do not distinguish between them.

Most of the authors are also of the opinion that the moment at which an award becomes binding within the meaning of Article V(1) (e) is to be determined under the law governing the award. However, they also differ at which moment this should be assumed under that law.[295]

Considering that the determination of the moment when the award becomes binding under the applicable law may lead to differing results, it may be questioned whether this law should be relied upon for the purpose of applying the term "binding" of Article V(1) (e).

The courts and authors mentioned above implicitly do give an *autonomous interpretation* to the term "binding" of Article V(1) (e) as far as the elimination of the "double exequatur" is concerned. If the binding force of the award is to be determined in all respects under the applicable law, it may happen that a law, such as Italian law[296], considers an award binding only when the court has granted a leave for enforcement on the award. If the latter aspect of the applicable law were to be taken into account for the purposes of Article V(1) (e), it would amount to the system of "double exequatur", which was precisely intended to be avoided by the use of the term "binding".[297]

The use of the specific term "binding" in the Convention indicates that it is to be conceived independent of the law governing the award in so far as the elimination of the "double exequatur" is concerned. If this

295. See for an overview of the differing opinions of the authors, G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) at n. 74.

296. Cf. Corte di Appello of Naples, February 20, 1975 (Italy no. 21), *supra* at n. 283.

297. Some authors draw as logical conclusion from their interpretation that the term "binding" is to be determined under the law applicable to the award, that if the applicable law requires a leave for enforcement for the validity of the award, such leave is necessary in order to meet the term "binding" of Article V(1) (e). See, for example, P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 655.

is accepted, could the autonomous interpretation then not be extended to *all* questions regarding the binding force of an award, and, in particular, the question of at which moment the award becomes binding, for the purposes of Article V(1) (e)? The text of Article V(1) (e) conspicuously does not link the term "binding" with the law applicable to the award, as it does, on the other hand, in the second part of this provision in respect of the setting aside and suspension of the award.

Furthermore, an autonomous interpretation for the question at which moment an award becomes "binding" within the meaning of Article V(1) (e) may also be possible on the basis of a combined reading of the legislative history, as outlined in the preceding Paragraph, and Articles V(1) (e) and VI.

At the New York Conference of 1958, the distinction between ordinary and extraordinary means of recourse was proposed for the term binding: the ordinary means of recourse were used for denoting a genuine appeal on the merits of the arbitral award to a second arbitral instance or to a court. Extraordinary means of recourse were reserved for other irregularities, and especially the procedural ones, tainting a final decision. The latter means of recourse were meant to correspond to setting aside or equivalent proceedings. The distinction was proposed in order to make clear that if the award was still open to the possibility of another decision, it was not to be considered "binding", whereas if it was open to the possibility of other means of recourse, this would not prevent the award from becoming binding. The expression "has not become binding in the sense that the award is still open to ordinary means of recourse" was finally not inserted. This must be deemed, however, not to be due to a rejection of the distinction as such. Rather, the expression was rejected because, in various countries, the distinction between ordinary and extraordinary means of recourse did not exist, or existed with different meanings.

The essence of the distinction may be deemed to have been retained. This can also be inferred from the text of Article V(1) (e) as the concept behind extraordinary means of recourse is covered by the second part of Article V(1) (e) and Article VI which refer to the setting aside of the award. The idea behind the ordinary means of recourse, i.e., the appeal on the merits to a second arbitral instance or to a court, can then be deemed to be covered by the first part of Article V(1) (e), *viz*., the term "binding".

This distinction has the advantage that it dispenses with the sometimes difficult inquiries under the law governing the award, such as, at which moment it is ready for enforcement under that law, or what may be the equivalent of the term "binding" under that law. It is true that the law governing the award is still to be consulted in order to find out whether it is still open to a genuine appeal on the merits to a court (which is exceptional). However, technically speaking, this is not an inquiry to

find out whether the award has become binding under the applicable law, but an inquiry only for the purpose of the term "binding" of Article V(1) (e).

The autonomous interpretation of the term "binding" of Article V(1) (e) has not yet been formulated by many authors.[298] The number of courts which have hitherto expressly adhered to this interpretation is also limited.[299]

An example is the Court of First Instance of Naples.[300] The Court rejected the request of the Italian respondent for a re-examination of the merits of the award.[301] In support of this rejection, the Court argued that the exclusion by virtue of the Convention of the possibility of a re-examination of the merits of a foreign award does not lead to an anomalous situation. The Court pointed to the safeguards contained in the Convention against awards tainted by serious defects, referring to the possibility of the award having been set aside in the country of origin, as provided in the second part of Article V(1) (e), and to the possibility of adjournment of the decision on enforcement in case the application for setting aside is made in the country of origin, as provided in Article VI. The subsequent observation of the Court is well worth being quoted:

> "It is obvious, however, that by using the general expression 'setting aside or suspension' of the arbitral award, the Convention intends to refer to extraordinary means of recourse against the award as provided for, under different denomination, in the various States. On the other hand, the ordinary means of recourse are covered by the concept of the binding or final character of the award. Consequently, and also in view of the foregoing, the silence of the Convention in respect of the re-examination on the merits in the State where the enforcement is sought, is not accidental, but appears to be significant as an intentional exclusion of this practice."

The decision of the Swedish Supreme Court in the *Götaverken* v. *GNMTC* case may also be mentioned.[302] As noted before, the "version" of Article V(1) (e) of the Convention in the Swedish implementing Act is Section 7(1) (5), reading in the relevant part that the award "has not yet become enforceable or otherwise binding on the

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298. P. Sanders, "A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 13 *The International Lawyer* (1979) p. 269 at p. 275. By implication: Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 742; G. Aksen, "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 3 *Southwestern University Law Review* (1971) p. 1 at p. 11. See also B. Oppetit in his case comment in *Revue de l'arbitrage* (1971) p. 97.

299. Compare with the decision of the Court of Justice of the European Communities, Judgment of November 22, 1977, Industrial Diamond Supplies *v.* Luigi Riva, Case no. 43/77, *European Court Reports* [1977] p. 2175, in which it was held that the expression "ordinary appeal" within the meaning of Arts. 30 and 38 of the Judgments Convention of 1968 (*supra* n. II. 306) "must be defined solely within the framework of the system of the Convention itself and not according to the law either of the State in which the judgment was given or of the State in which recognition or enforcement of that judgment is sought."

300. Tribunale of Naples, June 30, 1976, Società La Naviera Grancebaco S.A. *v.* Italgrani (Italy no. 22). A similar reasoning, albeit not so outright, can be found in Corte di Appello of Milan (Sez. I), May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27).

301. See *supra* III–3.2 ("No Review of the Merits of the Arbitral Award").

302. Supreme Court, August 13, 1979 (Sweden no. 1).

parties *in the State where it was given or under whose law it was given* . . ." (emphasis added).[303] Notwithstanding this provision referring expressly to the law applicable to the award, the Swedish Supreme Court gave an interpretation which may be considered as very close to an autonomous interpretation. The Court observed:

> "The legislative history states unequivocally that the possibility of an action for setting aside the award shall not mean that the award is not to be considered as not being binding. This meaning has even been admitted by GNMTC. A case in which a foreign award is not binding is when its merits are open to appeal to a higher jurisdiction. The choice of the word binding was provided for the party relying on the award. The intent was, inter alia, to avoid the necessity of a double exequatur or the need for the party relying on the award to prove that the award is enforceable according to the authorities of the country in which it was rendered.
>
> According to the arbitral clause in the contracts (Art. 13) the parties agreed to abide by the award as being finally binding and enforceable in regard of the matters submitted to the arbitrators. Furthermore, the ICC Arbitration Rules, according to which the arbitration has been conducted, provide in Article 24 that the arbitral award shall be final.
>
> Having regard to the above observations, the present arbitral award must be considered to have become enforceable and binding on the parties in France within the meaning of Section 7(1) (5) of the Foreign Arbitration Agreements and Awards Act as from the moment on which, and by virtue of the very fact that, the award was rendered. The fact that GNMTC has subsequently challenged the award in France by means of '*opposition*' has no effect in this respect."

GNMTC had asserted that the award was not binding within the meaning of Article V(1) (e) because the '*opposition*' it had instituted against the award before the French courts, which is a kind of setting aside procedure, automatically suspends the enforceability of the award under French arbitration law. If the Court had followed the prevailing judicial interpretation, which is also laid down in Section 7(1) (5) of the Swedish Act, that the binding force is to be determined under the applicable law, it would have been obliged to hold in this case that the award had no binding force under French law.[304] But this would have been at odds with the second part of Article V(1) (e) that the award must *have been declared* suspended by the court in the country of origin, and Article VI, according to which in the case of the application for a setting aside or suspension in the country of origin the enforcement court may adjourn its decision on the enforcement. The Supreme Court therefore first made an implicit autonomous interpretation of the term "binding", adding discretely "enforceable and binding on the parties in France", but conspicuously avoiding "under French law". It was thereupon able to infer from the second part of Articles V(1) (e) and VI that the automatic suspension of the enforceability of the award under French law had no bearing on its binding force within the meaning of the first part of Article V(1) (e).

In fact, the provisions relating to the suspension of the award are another argument in favour of an autonomous interpretation of the term "binding" of Article V(1) (e). It would be halting between two opinions to consider the binding force of

303. See for the words "enforceable or otherwise", *supra* at n. 292-293.

304. At the time that this case was decided, the application for the *opposition à ordonnance d'exequatur* had a suspensive effect on the enforcement of the award unless provisional enforcement was granted, see J. Robert, *Arbitrage civil et commercial* (Paris 1967) nos. 254 and 260. Under the new French arbitration law (Decree no. 80-354 of May 14, 1980, *Journal Officiel de la République Française* of May 18, 1980, p. 1238, in force as of October 1, 1980) the exequatur is no longer subject to *opposition* (Art. 48(1)).

the award under the applicable law, but to rely on the Convention's provisions alone for the question of a subsequent suspension.[305]

The result of the autonomous interpretation is that in most cases an award can be deemed "binding" within the meaning of Article V(1) (e), and hence can be enforced under the Convention, once it is rendered. It may be mentioned that in practice the provision in the parties' agreement for the possibility of an appeal on the merits to a second arbitral instance is limited to the Arbitration Rules of certain commodity associations.[306] The statutory possibility of an appeal on the merits to a court is highly exceptional. It exists on paper, for example, in France and the Netherlands, but virtually never occurs in practice.[307]

It may be added that the possibility of an appeal on the merits to a court must be a *genuine appeal in full*. Thus, where an arbitration law, such as Article 36 of the Swiss Concordat, provides as ground for setting aside that the award "constitutes a clear violation of law or equity", this is not to be considered as an appeal on the merits for the purposes of the term "binding" of Article V(1) (e). Similarly, the appeal to the English High Court on a question of law arising out of the award as introduced by the English Arbitration Act of 1979[308] would not seem to be a genuine appeal in full.

Under the former "Special Case" procedure, according to which any question of law or fact arising out of the award could be referred to the High Court, it has never been a question that the possibility of an application for a "Special Case" would prevent an English award from becoming binding under Article V(1) (e) of the Convention. The "Special Case" procedure was apparently not conceived as a genuine appeal in full. This view may be prompted by the specific nature of English arbitration, being closely intermingled and identified with the judicial process. The English

305. See for suspension of the award, *infra* III–4.5.3.2. It may be added that from the observations in the text it follows that the statement of the Chairman of Working Party no. 3 at the New York Conference of 1958 ("... the award should not be enforced if under the applicable arbitral rules it was still subject to an appeal which had a *suspensive effect* ..." (emphasis added), see *supra* at n. 271) must be deemed inconsistent with the Convention's provisions relating to suspension as they were finally adopted by the New York Conference.

306. E.g., the Arbitration Rules of the Grain and Feed Trade Association (GAFTA) in London provide for an appeal to a Board of Appeal Arbitrators within 30 days (Rule 10).

307. The new French arbitration law, see *supra* n. 304, has retained the possibility of appeal on the merits to the court, unless the parties have renounced this means of recourse in their arbitration agreement (Art. 42). As it was the case under the former arbitration law, this appeal is likely to be excluded in virtually all cases in practice. Art. 646(1) of the Dutch Code of Civil Procedure provides that no appeal from an arbitral award to the court shall be allowed, unless such possibility has been reserved in the arbitration agreement. The latter almost never happens in practice. It may be added that the possibility of appeal on the merits exists also in various Latin American countries, see my article, "L'arbitrage commercial en Amérique latine", *Revue de l'arbitrage* (1979) p. 123 at p. 187.

308. See C. Schmitthoff, "The United Kingdom Arbitration Act 1979", in *Yearbook* Vol. V (1980) p. 231; R. Gibson-Jarvie and G. Hawker, *A Guide to Commercial Arbitration under the 1979 Act* (London 1980).

Arbitration Act of 1979 has restricted the judicial review of the arbitration decision, *inter alia*, to questions of law only. Thus, what would seem to be the generally prevailing view in respect of the "Special Case" procedure, would seem to apply with even stronger force to the possibility of appeal under the 1979 Act.

The above autonomous interpretation of the term "binding" would not unduly curtail the rights of the losing party to contest the validity of the award in the country of origin, the safeguarding of which right caused concern amongst the delegates at the New York Conference. If the merits of the award can still be appealed to a second arbitral instance or to a court, the losing party can successfully invoke Article V(1) (e) on the basis that the award has not become binding. If such means of recourse is not available, the losing party cannot invoke the first part of Article V(1) (e), but may contest the validity of the award in the country of origin by instituting a setting aside or equivalent procedure. Article VI of the Convention has provided a safety catch against premature enforcement abroad: in this case the enforcing court may, "if it considers it proper", adjourn the decision on enforcement. The discretion conferred upon the enforcement court by Article VI may be exercised depending upon whether the losing party has instituted the setting aside procedure in the country of origin in good faith or for dilatory reasons only.[309]

It may be added that the autonomous interpretation of the term "binding" could not result in the seemingly anomalous situation that the award is enforced under the Convention in another Contracting State, whilst it would not be valid in the country of origin because it would not satisfy certain prerequisites. This would, for example, be the case in Italy if the award has not been deposited with the *Pretore* within five days after its rendition. In this case, the respondent could request the Italian courts to set aside the award or to declare that the award has no legal effect. Such decision of the country of origin would constitute a bar to enforcement according to the second part of Article V(1)(e).

III–4.5.2.3 *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 furthermore 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 is to be enforced as a foreign award under the Convention or as a foreign judgment on another basis. In other words, does the merger of the award into the judgment in the country of origin have an extraterritorial effect?

309. See *infra* III–4.5.3.2 ("Adjournment of Decision on Enforcement").

This question was raised before the Court of Appeal of Hamburg in respect of an award made in London, on which award the High Court in London had given a judgment in terms of the award pursuant to Section 26 of the English Arbitration Act.[310] The German respondent contended that the *award* could not be enforced under the Convention because it had been merged into the judgment of the English High Court. The Court of Appeal discarded the defence. It reasoned that, although it can be assumed that under English law the award merges into the judgment[311], in view of Article V(1) (e) of the Convention which requires the award to be "binding", and which Convention has the purpose of facilitating enforcement of foreign awards, *in Germany* the award must be considered as not having been absorbed by the English judgment. The Court concluded that the effects of the merger are limited to English jurisdiction only. It added that English courts do not apply the merger doctrine to foreign awards declared enforceable by judgment in the country of origin either.[312]

The view of the Court of Appeal of Hamburg is to be approved as it must indeed be assumed that the merger of the award into the judgment in the country of origin does not have extra-territorial effect. The leave for enforcement means that a court authorizes the enforcement of the arbitral award within its jurisdiction. The fact that the leave for enforcement has the effect of absorbing the award in the country of origin is a technical aspect for the purposes of enforcement within that country. The award can therefore be deemed to remain a cause of action for enforcement in other countries.[313]

It may be mentioned that a United States Court of Appeals was uncertain as to whether extra-territorial effect should be given to the merger in the country of origin. The Dutch political entity, Curaçao, had obtained an award against Solitron Devices, a United States corporation, on which award the Court in Curaçao had issued an exequatur (leave for enforcement). The District Court in New York granted

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310. Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18). Sect. 26 of the English Arbitration Act of 1950, which Section has not been changed by the Arbitration Act of 1979, reads:

> "An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

311. In this sense, A. Walton, *Russell on the Law of Arbitration*, 19th ed. (London 1979) p. 399 and p. 419.

312. In this sense also, Walton, *supra* n. 311, p. 399 and p. 412.

313. See also M. Domke, *The Law and Practice of Commercial Arbitration* (Mundelein 1968-1979) Sect. 39.03; E. Minoli; "L'esecuzione delle sentenze arbitrali stranieri in Italia", 12 *Rassegna dell'Arbitrato* (1972) p. 66 at 77; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 782; G. Delaume, *Transnational Contracts. Applicable Law and Settlement of Disputes* (Dobbs Ferry 1978-1980) Sect. 13.15. J. Robert, *Arbitrage civil et commercial* (Paris 1967) no. 459, is of the opinion that the merger has an extraterritorial effect.

the enforcement – apparently for security's sake – on the basis of both the New York Convention and the New York Foreign Country Money Judgments Statute.[314] The Court of Appeals enforced the award as a foreign judgment under the New York Statute only, considering that by doing so, it

> "need not deal with the question . . . whether the action on the arbitration award was merged in the Curaçaoan judgment . . . . By first addressing ourselves to the question whether or not the Curaçaoan judgment confirming or enforcing the award is enforceable *qua* judgment, we avoid the question . . . that the award might not be enforceable *qua* award . . .".[315]

As far as the New York Convention is concerned, it may be recalled that the Geneva Convention of 1927 required, in practice, a leave for enforcement issued by the court in the country of origin. Under that Convention it has not been questioned that the effect of the leave for enforcement of absorbing the award in the country of origin would operate in other States where the enforcement of the award was sought under the Convention. If that had been the case, it would have resulted in the absurd situation that by requiring, in practice, the leave for enforcement of the court in the country of origin, the Convention would have rendered itself inapplicable.

The term "binding" of Article V(1) (e) of the New York Convention was principally inserted to eliminate the burdensome requirement of a leave for enforcement from a court in the country of origin. But this change of wording does not mean that *a contrario* if such leave has been granted in the country of origin, the award is no longer "binding" within the meaning of Article V(1) (e) of the New York Convention. The term "binding" has been merely inserted for the purpose of facilitating enforcement. Thus, where enforcement was possible under the Geneva Convention, it should certainly be possible under the New York Convention.

We see here a parallel with the question at which moment the award

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314. U.S. District Court of New York, S.D., February 14, 1973, Island Territory of Curaçao *v.* Solitron Devices Inc. (U.S. no. 1). The New York Statute is embodied by the New York Civil Practice Law and Rules (NYCPLR) Sect. 5301-5309.

315. U.S. Court of Appeals (2nd Cir.), December 26, 1973 (U.S. no. 1). It may be noted that the New York State courts disregard the merger of the award into the foreign judgment, see Domke, *supra* n. 313, Sect. 39.03. The Court of Appeals dealt also with the question whether the New York Convention, being implemented by a federal Statute, would have preempted the New York Statute (i.e., NYCPLR Sect. 5301-5309) which the Court denied. See for the latter question D. Swisher, "Comment. International Commercial Arbitration under the United Nations Convention and the Amended Federal Arbitration Statute", 47 *Washington Law Review* (1972) p. 441 at p. 447. The question whether an award made in Japan was to be treated as a foreign judgment because Art. 800 of the Japanese Code of Civil Procedure provides that "An award shall have the same effect as a judgment which is final and conclusive", and the relationship between the New York Convention and NYCPLR Sect. 5301-5309, was considered by U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v.* Fotochrome Inc. (U.S. no. 3). The Court treated the Japanese award as an award in this case. See Note in 8 *Law and Policy in International Business* (1976) p. 732 at p. 756.

becomes "binding" within the meaning of Article V(1) (e), as was examined in the preceding Paragraph. The differing formalities to be fulfilled, according to various laws, for an award to become binding – e.g., the deposit of an award – are usually imposed in view of the enforcement of the award within the jurisdiction concerned. As has been shown pursuant to the autonomous interpretation of the term "binding" of Article V(1) (e), these prerequisites, or any other, of the law applicable to the award need not be taken into account. Similarly, the question what happens with the award under the law of the country of origin if a leave for enforcement is granted thereon in that country, is limited to that country. In fact, the limitation of the question of the merger to the country of origin can be viewed as another aspect of the autonomous status of the "binding" award as referred to in Article V(1) (e).[316]

On the other hand, it would go too far to reason that because of the elimination by the term "binding" of the requirement of a leave for enforcement from a court in the country of origin, the leave for enforcement cannot constitute, as a foreign judgment, a basis for enforcement outside the Convention in other Contracting States. The more-favourable-right-provision of Article VII(1) can be deemed to apply by analogy to this case.[317] According to that provision the Convention allows to base the request for enforcement on a bilateral or another multilateral convention or domestic law concerning enforcement of foreign arbitral awards. This may be deemed to apply also to the leave for enforcement issued by the court in the country of origin in those cases where the leave can be equated to a foreign judgment, and the enforcement as foreign judgment would be more favourable.[318]

III–4.5.3 *Award set aside or suspended*

III–4.5.3.1 *Award set aside*

The ground for refusal of enforcement in the second part of Article V(1) (e) that the award 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 has scarcely been invoked, and was hardly successful.

Article V(1) (e) – and Article VI with which we will deal presently –

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316. There are several cases in which the award had received a leave for enforcement in the country of origin, but in which the *award* was enforced under the Convention without discussion on this point. See, for example, Oberlandesgericht of Hamburg, May 21, 1969 (F.R. Germ. no. 6): enforcement of award made in France which was granted leave for enforcement by the President of the Tribunal de grande instance of Paris.

317. See *supra* I–4.2 ("More-favourable-right-provision").

318. See for the option to choose between the enforcement as foreign award and the enforcement as foreign judgment, Ph. Fouchard, *L'arbitrage commercial international* (Paris 1965) no. 753 and references given.

of the Convention unequivocally lay down the principle that *the court in the country in which, or under the law of which, the award was made has the exclusive competence to decide on the action for setting aside the award.* This principle, which has been unanimously affirmed by the courts, has already been dealt with in the first Chapter of this study concerning the Convention's field of application.[319]

It may be added that the exclusive competence according to Article V(1) (e) of the court in the country of origin to decide on the setting aside was one of the reasons for several Italian courts to hold that the Convention excludes a re-examination of the merits of the award by the courts of other Contracting States before which the enforcement of the award is sought.[320]

The "competent authority" as mentioned in Article V(1) (e) for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase *"or under the law of which"* the award was made refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.

The phrase was inserted at the penultimate session of the New York Conference at the instigation of the U.S.S.R. delegate.[321] The question of an award governed by another arbitration law, including the question of the setting aside of such an award, in particular according to the German implementing law, has already been discussed in *supra* I–1.5 ("Awards Not Considered as Domestic").

It may be observed that the phrase "of the country in which, or under the law of which" is somewhat out of tune with Article V(1) (a) which accords the primary role to the law as chosen by the parties, and the subsidiary role to the law of the country where the award was made. Although Article V(1) (e) reverses this order, this has no legal consequence.

The ground for refusal in the second part of Article V(1) (e) *applies only if the award has been effectively set aside in the country of origin.* The case where a party has merely made an application for setting aside in that country, calls only for the possibility of an adjournment of the decision on the enforcement as provided by Article VI of the Convention (see following Paragraph).

A particular question, which has not occurred in practice, is what happens *if after the granting of enforcement of the award in another Con-*

319. See *supra* I–1.4.2 ("Setting aside").

320. E.g., Corte di Appello of Florence, October 22, 1976, S.A. Tradax Export *v.* S.p.A. Carapelli (Italy no. 18); Tribunale of Naples, June 30, 1976, Società La Naviera Grancebaco S.A. *v.* Italgrani (Italy no. 22); Corte di Appello (Sez. I) of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27). See *supra* III–3.2 ("No Review of the Merits of the Arbitral Award").

tracting State, the award is set aside in the country of origin. This is not likely to occur. It is true, as explained in the preceding Paragraph, that in most cases the award is "binding" within the meaning of Article V(1) (e) as soon as it is rendered, and can be directly enforced under the Convention in other countries after that moment. However, if there are doubts about the validity of the award under the applicable law which are likely to lead to a setting aside, a losing party will certainly institute an action for setting aside the award in the country of origin. In this case the court may according to Article VI adjourn its decision on the enforcement.

Whatever may be, if a subsequent setting aside occurs, it would seem to be reasonable to cancel the order by which the enforcement is granted. The question would seem to have to be solved by virtue of Article III of the Convention under the law of procedure of the country where the enforcement was granted.[322]

III–4.5.3.2 *Award suspended*

The second part of Article V(1) (e) mentions also as ground for refusal of enforcement that the award has been "suspended" by the court in the country of origin. According to Article VI, a court may adjourn its decision on enforcement if the respondent has applied for the 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.

The term "suspension" did not figure in the Geneva Convention of 1927. It appeared for the first time in the ECOSOC Draft Convention of 1955 which provided in Article III(b) that to obtain enforcement it was necessary that the claimant should prove "that, in the country where the award was made, the award has become final and operative and, *in particular, that its enforcement has not been suspended*" (emphasis added). In the Dutch proposal to amend the ECOSOC Draft Convention the suspension of enforcement was eliminated. The Dutch delegate explained the elimination by stating that it would lead to delaying tactics on the part of the respondent.[323] In the text prepared by Working Party No. 3 suspension was re-introduced but without specifying "suspension of *enforcement*": it was proposed that if an award has been suspended in the country where it was given, the enforcement court was obliged to adjourn the decision on the enforcement, but if only an application for suspension of the award was made in the country of origin, the enforcement

321. UN DOC E/CONF.26/SR.23.

322. See P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 663.

323. UN DOC E/CONF.26/L.17 and SR.11.

court had the discretion whether to adjourn the decision on enforcement.[324] At the Conference, the Israeli delegate argued that the suspension of the award in the country of origin should entail the refusal of enforcement, not merely the adjournment of the decision on enforcement. The Conference adopted the proposal of the Israeli delegate to insert the words "or suspended" after the words "set aside" and to delete the Working Party's proposal to oblige the court to adjourn the decision on enforcement if the court in the country of origin has suspended the award.[325] On the other hand, the Conference retained the provision that if only an application for suspension of the award has been made in the country of origin, the enforcement court has the discretion whether to adjourn the decision on enforcement (Art. VI).

Whatever may be, in order for the suspension of the award to be a ground for refusal of enforcement of the award, the respondent must prove that *the suspension of the award has been effectively ordered by a court in the country of origin*. This rule is clearly laid down by the text of Articles V(1) (e) as it states "*has been* . . . suspended by a competent authority . . .". The automatic suspension of the award by operation of law in the country of origin therefore is not sufficient.[326]

This rule was affirmed by the Swedish Supreme Court in the *Götaverken* v. *GNMTC* case discussed above.[327] The Court observed in particular:

> "As noted, GNMTC has also argued that under French law the challenge of the award automatically bars and suspends the enforceability of the award pending the decision of the competent court on the validity of the award. In GNMTC's view, this would constitute a suspension for enforcement as is mentioned in Section 7(1) (5) of the said Act. According to the letter of the law as well as its drafting history . . ., this provision refers in this respect to a situation where, after specific consideration of the matter, the foreign authority orders the setting aside of a binding and enforceable award or the suspension of its enforcement. GNMTC has not even asserted that such a decision has been made in the procedure for challenging the award or otherwise."

It may be added that the arbitration laws of many countries, amongst which France, provide that the institution of setting aside proceedings automatically suspends the enforcement of the award in that country. If such automatic suspension were sufficient for "has been suspended" as provided in Article V(1) (e), it would defeat the system of the Convention. It would mean that by a mere application for setting aside the award in the country of origin – often prompted by the wish to delay enforcement –, enforcement would have to be refused under the Convention in other Contracting States. This obviously runs counter to the reason behind the term "binding" in Article V(1) (e) and the adjournment provisions in Article VI (327A).

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324. UN DOC E/CONF.26/L.43.

325. UN DOC E/CONF.26/SR.17.

326. See for criticism of the statement of the Chairman of Working Party no. 3 at the New York Conference of 1958 about the suspensive effect of appeal, *supra* n. 305.

327. Supreme Court, August 13, 1979 (Sweden no. 1), discussed *supra* at n. 302-304.

327A. Accord, P. Sanders, "Consolidated Commentary Vols. V and VI", in *Yearbook* VI (1981) p. 202 at p. 213.

III–4.5.3.3 *Adjournment of the decision on enforcement (Art. VI)*

Article VI of the Convention provides:

"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."

Under the Geneva Convention of 1927, the mere application for the setting aside of the award in the country of origin was usually interpreted as being sufficient to refuse enforcement of the award in the other Contracting States. This made it too easy to delay the enforcement of an award. Although in most cases the setting aside of an award is requested in order to have its enforcement postponed, the problem was how to safeguard the right of a bona fide losing party to contest the validity of an award in the country of origin. The drafters of the Convention provided a sensible solution for this problem. On the one hand, they provided in Article V(1) (e) that enforcement may be refused if the award has been effectively set aside or suspended in the country of origin. On the other, they provided in Article VI that if the setting aside or suspension of the award is requested in the country of origin, the court may adjourn, "if it considers it proper", the decision on the enforcement – to which must be added: until the court in the country of origin has decided on the setting aside or suspension – and, may also, on the application of the claimant, order the respondent to put up suitable security.

The question whether a court should adjourn its decision on the enforcement in the case of an application for setting aside or suspension of the award in the country of origin and whether to order the respondent to give security in this case, is discretionary. This can be inferred from the words "if it considers it proper" and "may". In conformity with the division made between the second part of Article V(1) (e) and Article VI, it is likely that the court before which the enforcement is sought will adjourn its decision on enforcement if it is *prima facie* convinced that the request for the setting aside or suspension of the award in the country of origin is not made on account of dilatory tactics, but is based on rather reasonable grounds.[328] In my opinion, it implies that the respondent has the burden of giving some summary proof that the

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328. See P. Sanders, "Consolidated Commentary Vols. III and IV", in *Yearbook* Vol. IV (1979) p. 231 at p. 252, and "Consolidated Commentary Vols. V and VI", in *Yearbook* Vol. VI (1981) p. 202 at p. 215.

award is tainted by a defect which is likely to cause its setting aside in the country of origin.

The adjournment of the decision on enforcement pursuant to Article VI has hitherto been requested in two cases only. In both cases the adjournment was refused by the court.

The first case is the already mentioned decision of the President of the Court of First Instance of Paris.[329] The French responding company Saint-Gobain had requested the adjournment of the decision on the enforcement of the award, which was sought by the Indian company FCIL, pending the action for a declaration of no legal effect of the award which it had applied for before the Indian courts.[330] The President rejected the request, reasoning that Saint-Gobain had not furnished sufficient terms to make the granting of an adjournment an appropriate measure.

The second case, already mentioned several times, is the Swedish Supreme Court decision in the *Götaverken* v. *GNMTC* case.[331] GNMTC had requested the adjournment of the decision on enforcement as it had instituted setting aside procedures in France as well as new arbitration proceedings. After having observed that Article VI of the Convention gives the enforcement court a discretionary power whether to grant an adjournment, the Court rejected the request as follows:

> "Having regard to the general purpose of the New York Convention and the legislation of 1971 based thereon to expedite the enforcement of foreign arbitral awards . . . , it cannot be said that there exist circumstances which would justify an adjournment of the decision on enforcement in this case on the ground for the procedures initiated by GNMTC in France."

It may be mentioned that Mr. Justice Brentsson of the Swedish Supreme Court dissented on this point from the majority of the Judges. He pointed out, inter alia, that

> "The grounds invoked by GNMTC against the award are, in part, of such a nature that, although the award could not be considered invalid under Swedish law, the possibility that a French court might come to an opposite conclusion cannot be disregarded. The hearings on the merits of the challenge are said to be scheduled for October 16, 1979.
>
> In view of the above and the substantial amounts involved in this case, I find preponderant reasons in favour of an adjournment of the decision on the enforcement of the award . . . ."

This reasoning sounds, in my opinion, more convincing than that of the majority of the Judges, especially since the arbitral award in this case was rather questionable. Nevertheless, the decision of the majority not to adjourn the decision on enforcement turned out to be fortunate as the French Court decided that the award in question was not an award governed by French arbitration law. If the Swedish Supreme Court had adjourned and then had to face the latter decision, it would have been in a difficult position.[332]

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329. President of the Tribunal de grande instance of Paris, May 15, 1970, Compagnie de Saint-Gobain – Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (France no. 1).

330. High Court of Delhi, August 28, 1970, Compagnie de Saint-Gobain – Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL) (India no. 2).

331. Supreme Court, August 13, 1979 (Sweden no. 1), discussed *supra* at n. 302-304.

332. See *supra* at n. I.88-90.

III–4.5.3.4 *Is the setting aside of the award in the country of origin a necessary ground for refusal of enforcement?*

It may be questioned whether the ground that the award has been set aside in the country of origin should be retained as a ground for refusal of enforcement under the Convention. This question might be considered if it were decided to amend the Convention in the form of an additional Protocol or the like. The possible effect of this ground for refusal is that, as the award can be set aside in the country of origin on *all* grounds contained in the arbitration law of that country, including the public policy of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin. This might undermine the limitative character of the grounds for refusal listed in Article V, and possibly also the uniform rule of the written form of the arbitration agreement of Article II(2), and thus decrease the degree of uniformity existing under the Convention. Could it not be sufficient to provide that enforcement may be refused on the grounds listed in the Convention only, without the ground that the award has been set aside in the country of origin?

In practice, the ground for refusal of enforcement that the award has been set aside has not produced the above-mentioned effect so far since there is a paucity of cases decided under the Convention in which the setting aside in the country of origin has been invoked. Of course, this paucity may be due to the fact that once an award is set aside in the country of origin, it is unusual that a claimant pursues enforcement in another Contracting State in view of the second part of Article V(1) (e). However, it is more likely that the action for setting aside in the country of origin is initiated in exceptional cases only.

Apart from these considerations as to practice, an elimination of the ground for refusal that the award has been set aside in the country of origin would, in my opinion, be undesirable. A losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.

It is to be mentioned that the drafters of the European Convention of 1961[333] have attempted to cope with the above problem of setting aside in the country of origin by providing the following intermediary

333. See *supra* I–4.4.2.

solution. According to Article IX(2) of the European Convention, in relations between States that are also Party to the New York Convention, the ground for refusal of enforcement of Article V(1) (e) of the New York Convention that the award has been set aside in the country of origin is limited to those cases where the award is set aside in the country of origin on the grounds mentioned in Article IX(1) of the European Convention. The grounds mentioned in Article IX(1) are substantially similar to grounds *a* – *d* of Article V(1) of the New York Convention.[334]

The advantage of the solution of the European Convention is that it excludes the possible incorporation of particularities for setting aside contained in the arbitration law of the country of origin into the grounds for refusal of enforcement under the Convention. In particular, the setting aside in the country of origin for reasons of public policy of that country is not a ground for refusal of enforcement within this system. However, this system may lead to the unsatisfying situation that, if the enforcement of the award is sought in the country of origin, enforcement would have to be refused in those cases where the award has been set aside in that country, whilst, if enforcement of the same award is sought in another Contracting State, enforcement would not have to be refused in those cases where the award has been set aside in the country of origin on grounds not listed in the Convention. This is so because the limitation on the grounds for refusal of enforcement in other Contracting States is not extended to a limitation on the grounds for setting aside in the country of origin itself. In the country of origin therefore enforcement is to be refused in *all* cases in which the award is set aside in that country.

If the European Convention of 1961 had provided that the award could be set aside in the country of origin on the grounds listed in the Convention only, this would have caused a fundamental change of the arbitration laws of the Contracting States. It would have meant that for those awards falling under the European Convention the grounds for setting aside mentioned in the arbitration laws would be replaced by, or at least limited to, those listed in the European Convention.

The latter system of congruence of the grounds for setting aside in the country of origin and the grounds for refusal of enforcement in other Contracting States is certainly attractive. However, if this system were envisaged for inclusion in an additional Protocol or the like, it would constitute a far-reaching change of the New York Convention as

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334. According to the prevailing interpretation, in relations between States which are also Party to the New York Convention, the first part of ground (*e*) of Article V(1) that the award has not yet become binding, applies as well. See P. Pointet, "The Geneva Convention on International Commercial Arbitration", in P. Sanders, ed., *International Commercial Arbitration* Vol. III (The Hague 1965) p. 263 at p. 291.

it would mean that the latter is to be made applicable in the country of origin, which is presently not the case. Such a change, which may create many complex problems, is, in my view, unnecessary for the time being, since, as noted, the possibility offered by the New York Convention to have an award set aside in the country of origin on all grounds contained in its arbitration law, is in practice not a problem of such magnitude as it theoretically appears to be. This is underscored by the experience with the European Convention whose Article IX(2) has, as far as it is known, not been applied.

III–4.5.4 *Uniform interpretation (and summary)*

The first part of Article V(1) (e) according to which enforcement of an award may be refused if the respondent proves that the award has not yet become "binding" on the parties, means that a leave for enforcement (exequatur or the like) of the court in the country in which, or under the law of which, the award was made, is not required in order to be "binding" within the meaning of this provision of the Convention (p. 337).

Apart from this interpretation, the question at which moment an award can be considered as to have become binding within the meaning of Article V(1) (e) is, according to the interpretation of most courts, to be resolved under the law of the country of origin. However, it is arguable that, like the elimination by the term "binding" of the so-called "double-exequatur", this question too is to be resolved independently of the otherwise applicable law. According to this autonomous interpretation, the award can be considered to have become "binding" for the purposes of Article V(1) (e) at the moment on which it is no longer open to a genuine appeal on the merits to a second arbitral instance or court in those cases where such means of recourse are available (pp. 338-346).

In case a leave for enforcement is granted on the award by the court in the country of origin and the leave for enforcement, having the same status as a judgment, has the consequence of absorbing the award, such a merger has no extra-territorial effect in other Contracting States. In the latter States enforcement can be sought as an award under the Convention. Conversely, the term "binding" of Article V(1) (e) does not preclude that the leave for enforcement in this case may also serve as basis for enforcement as a foreign judgment if the latter basis is more favourable for the party seeking enforcement than enforcement under the Convention (pp. 346-349).

The second part of Article V(1) (e), according to which enforcement of an award may be refused if the respondent proves that the award has been set aside or suspended by the court of the country in which, or under the law of which, the award was made, as well as Article VI (see

below), imply that these actions belong to the exclusive competence of the courts of that country (pp. 349-350).

In order to be a ground for refusal of enforcement falling under the second part of Article V(1) (e), the award must have been effectively set aside by the court in the country of origin. The mere application for setting aside is covered by the adjournment provision of Article VI (p. 350).

The suspension of the award as mentioned in Articles V(1) (e) and VI refers presumably to a suspension of the enforceability or enforcement of the award by the court in the country of origin. In order to be a ground for refusal of enforcement as mentioned in Article V(1) (e), the suspension of the award must have been effectively ordered by a court in the country of origin; the automatic suspension of the award by the operation of law in the country of origin can be disregarded in an enforcement action under the Convention (pp. 351-352).

The power of the court granted by Article VI to adjourn the decision on enforcement in case the respondent has applied for a setting aside or suspension of the award in the country of origin, is discretionary. The discretionary power is to be exercised between the limits of the safeguarding of the right of a bona fide losing party to contest the validity of the award in the country of origin and of protecting a claimant against dilatory tactics of an obstructive respondent (pp. 353-354).

The case of an award having been set aside in the country of origin should be retained as ground for refusal of enforcement of an award in the Convention, even if the Convention were to be made applicable in the country of origin (which is presently not the case) (pp. 355-357).

PART III–5 PUBLIC POLICY AS GROUND FOR REFUSAL OF ENFORCEMENT *EX OFFICIO* (ART V(2))

Article V(2) of the Convention provides:

"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."

III–5.1 In General

In the foregoing Part III–4 we dealt with the grounds for refusal of enforcement of an award mentioned in Article V(1) which have to be proven by the party against whom the enforcement is sought. In this Part we will deal with the ground of public policy as provided in Article V(2) on which ground a court may refuse enforcement on its own motion (*ex officio*). At the outset three preliminary points should be made.

The first preliminary point is that it is said that the Civil Law term "*ordre public*" is generally given a wider application than the Common Law term "public policy".[335] However, as both terms are frequently used interchangeably, the term "public policy" will be used with the understanding that it has the same meaning as the term "*ordre public*".

The second preliminary point is that the Convention refers to the question of the non-arbitrable subject matter (hereafter also referred to as arbitrability) in connection with both the action for the enforcement of the arbitration agreement – Article II(3) *jo* Article II(1) (". . . an [arbitration] agreement . . . concerning a subject matter capable of settlement by arbitration") – and the action for the enforcement of the arbitral award – Article V(2) (a) (quoted above). As at both stages the question of arbitrability is the same, it is examined in this Part within the framework of the enforcement of the arbitral award. In order not to confuse this Part unduly, the question of arbitrability in the context of the enforcement of the arbitration agreement will not be mentioned specifically.[336]

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335. See J. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry 1978) para. 401 n. 1.

336. See also *supra* II–1 ("Referral by Court to Arbitration"), and, in particular, II–1.3.3 ("Subject Matter Not Capable of Settlement by Arbitration").

The third preliminary point concerns the distinction between grounds (*a*) and (*b*) of Article V(2). It is generally accepted that arbitrability forms part of the general concept of public policy and that therefore Article V(2) (a) can be deemed superfluous.[337] The fact that the Convention mentions it separately has historical reasons which will be explained later. Although arbitrability can be deemed to be included in the general concept of public policy, the distinction as made by the Convention will be followed in this Part for clarity's sake: Part III–5.2 will be devoted to the question of the non-arbitrable subject matter and Part III–5.3 will be concerned with the other questions regarding public policy.

In general, public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards and foreign judgments, as well as for the refusal to apply a foreign law. A public policy provision can be found in almost every international convention or treaty relating to these matters. Its function is basically to be the guardian of the "fundamental moral convictions or policies of the forum".[338] The reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various States.

It is impossible within the limited scope of this study to make even an attempt to review the numerous doctrines of public policy (or its equivalent) and arbitration.[339] It may suffice to draw the attention to the important *distinction between domestic and international public policy*. This distinction is gaining increasing acceptance in matters of arbitration as well. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases.[340] The distinction is justified by the differing purposes of domestic and international relations.

It should be pointed out that even if public policy is acknowledged to be "international", its basis is national as it can be sanctioned only by a national judge. To

337. E.g., P. Sanders, "The New York Convention", in *International Commercial Arbitration* Vol. II (The Hague 1960) p. 293 at p. 323; F.-E. Klein, "La Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères", 57 *Revue Suisse de Jurisprudence* (1961) p. 229 at p. 249; Th. Bertheau, *Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* (Winterthur 1965) p. 60; K.-H. Schwab, *Schiedsgerichtsbarkeit*, 3d ed. (Munich 1979) p. 427.

338. Lew, *supra* n. 335, para. 403.

339. See P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (Tübingen 1975) nos. 274-297 and 733-754.

340. See P. Sanders, "Trends in the Field of International Commercial Arbitration", *Recueil des Cours*, 1975 – Vol. II, p. 297 at pp. 220-227 and 285-287.

this end French doctrine identifies the two categories of public policy, "internal" and "external" ("*ordre public interne*" and "*ordre public externe*" or "*ordre public à usage international*"). Since the term "international public policy" is commonly used, this term will be maintained hereafter.

It should further be pointed out that in certain countries, such as F.R. Germany, the distinction is deemed unnecessary as far as arbitration is concerned, because in domestic relations the notion of public policy as such is regarded as nonexistent.[341] However, upon further analysis, in these countries also there can be deemed to exist an equivalent of domestic public policy in the sense that statutory provisions exist which cannot be contracted out by the parties or which cannot be disregarded by the arbitrators. Hence the distinction can be used for the purpose of Article V(2) of the Convention for these countries as well.

It may be added that certain French and Swiss authors maintain that there also exists a third category of public policy, the so-called "truly international public policy" ("*ordre public réellement international*").[342] The rules of this public policy would comprise fundamental rules of natural law, the principles of universal justice, *jus cogens* in public international law and the general principles of morality accepted by what is referred to as "civilized nations".[343] The precise contents of this category of public policy, however, are rather unclear. Moreover, these rules can be deemed to be covered to a large extent by "international public policy" (i.e., external public policy). As very few courts have made the distinction between "international public policy" and "truly international public policy" in general, and none under the Convention in particular, this distinction will be left aside.[344]

Considering the legislative history of Article V(2) (b), the Convention can be said to refer to "international public policy" as distinct from "domestic public policy". The Geneva Convention of 1927 provided in pertinent part "contrary to the public policy or the principles of law of the country" in which the enforcement of the award was sought. The ECOSOC Draft Convention of 1955 provided "clearly incompatible with public policy or with fundamental principles". Considering that "the provision should not be given a broad scope of interpretation"[345], Working Party No. 3 proposed to limit it to "public policy" alone. This limitation was accepted by the Conference, which, moreover, rejected a

341. See Schwab, *supra* n. 337, p. 226 and 428.

342. See especially, B. Goldman, "Les conflits des lois dans l'arbitrage international de droit privé", *Recueil des Cours*, 1963 – Vol. II, p. 352 at p. 432.

343. Lew, *supra* n. 335, para. 407.

344. The Swiss Supreme Court rejected in a recent decision the notion of "ordre public international" in the sense of a "truly international public policy". The Court observed inter alia:

> "It concerns rather a formula proposed by certain authors, who do not, however, give it a precise and unambiguous meaning. It cannot be ascertained how this 'ordre public international' would limit the application of the foreign law more, or in another manner, than Swiss public order does."

Tribunal Fédéral, May 5, 1976, Société des Grands Travaux de Marseille (SGTM) *v.* People's Republic of Bangladesh and the Bangladesh Industrial Development Corporation (BIDC), *Arrêts du Tribunal Fédéral* 102 Ia 574, summarized in *Yearbook* Vol. V (1980) p. 217.

345. Statement of the Chairman of Working Party no. 3, UN DOC E/CONF.26/SR.17.

Brazilian proposal to re-introduce "fundamental principles of law".[346]

Although directly after the adoption of the Convention there existed some doubts whether the distinction between domestic and international public policy would also apply to the question of arbitrability as mentioned in Article V(2) (a) of the Convention, at present this is no longer doubted by the majority of the courts and authors.[347]

In a great number of court decisions reported under the Convention, the distinction between domestic and international public policy is made either expressly or implicitly. In the United States the leading case is the Supreme Court decision in *Fritz Scherk* v. *Alberto-Culver Co.*[348] 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.

By a contract made in 1969 the German citizen Fritz Scherk had transferred to the Deleware corporation Alberto-Culver the ownership of its enterprises along with all rights held by these enterprises to trademarks in cosmetic goods. The contract provided for arbitration pursuant to the Arbitration Rules of the International Chamber of Commerce. Contending fraudulent representations made by Scherk concerning the unencumbered ownership of the trademarks, Alberto-Culver commenced an action for damages and other relief before the United States District Court of Illinois in 1970. Scherk filed a motion to stay the action pending arbitration in Paris. Alberto-Culver, in turn, opposed this motion and sought an injunction restraining the arbitration proceedings. The District Court denied Scherk's motion, and granted Alberto-Culver's motion. In granting the latter motion the District Court relied entirely on the Supreme Court's 1953 decision in *Wilko* v. *Swan*[349], in which it was held that an agreement to arbitrate could not preclude a buyer of securities from seeking judicial remedy for an alleged fraud in the transaction under the Securities Act. The Court of Appeals for the Seventh Circuit affirmed.

The United States Supreme Court reversed. After having pointed to the difference between the domestic character of the transaction in the Wilko-case and the international aspects of the case at hand, the Supreme Court stated that an international contract involves considerations and policies significantly different from those found controlling in Wilko. In Wilko there was no doubt that the contract was governed by United States law and federal securities laws in particular. In contrast, in the present case it was uncertain whether the federal securities laws would apply

346. UN DOC E/CONF.26/SR.17. Accord, inter alia, J.-D. Bredin, "The New York Convention of June 10th 1958 for the Recognition and Enforcement of Foreign Arbitral Awards", 87 *Journal du Droit International* (1960) p. 1003 at p. 1027; Lew, *supra* n. 335, para. 410.

347. Sanders, *supra* n. 337, at p. 323 regretted the distinction between grounds (a) and (b) of Art. V "as now the distinction, which in my opinion could be made between national and foreign arbitrations ... cannot be made as far as the subject matter is concerned". The author appears to have reconsidered this opinion in his Hague Lectures of 1975, *supra* n. 340, in which he states at p. 225 when discussing the distinction between domestic and international public policy that "ground (a) can be interpreted in the same way as ground (b)".

348. June 17, 1974 (U.S. no. 4).

349. 346 *United States Supreme Court Reporter* 427 (1953).

to this international transaction. In this context, the absence of an arbitration agreement would create considerable uncertainty. The Court observed:

> "Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.
> . . . A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemingly and mutually destructive jockeying by the parties to secure tactical litigation advantages."

The Supreme Court referred then to its decision in *The Bremen* v. *Zapata Off-Shore* which also involved an international contract.[350] In that case the Supreme Court had rejected the doctrine that a forum-selection clause in a contract will not be respected in a suit brought in the United States unless the selected State would provide a more convenient forum than the State in which suit is brought. The Supreme Court had held that a "forum clause should control absent a strong showing that it should be set aside". In that case also, the Court had observed that the elimination of uncertainties in respect of the courts of which country would have jurisdiction over a suit by agreeing in advance on a forum acceptable to both parties, is an indispensable element in international trade. Observing that an arbitration agreement "is, in effect, a specialized kind of forum-selection clause", the Supreme Court repeated in the Scherk case that the repudiation of such an agreement would also reflect a

> "parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

In a footnote[351] the Supreme Court stated that its conclusion was confirmed by the adherence of the United States to the New York Convention, the principle purpose of which is

> "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

In *Parsons & Whittemore Overseas Inc.* v. *RAKTA*, the United States Court of Appeals for the Second Circuit observed:

> ". . . the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice."[352]

The case concerned a contract from 1962 between the United States corporation Overseas and the Egyptian corporation RAKTA for the construction of a paperboard mill in Egypt, financed by the United States Agency for International Development (AID). The construction was near completion when the six-day Arab-Israeli

350. 407 *United States Supreme Court Reports* 1 (1972).
351. *Supra* n. 348, at p. 521 n. 15.
352. December 23, 1974 (U.S. no. 7).

war was about to break out. Egypt expelled all Americans except those who would apply and qualify for a special visa. AID informed Overseas that it was withdrawing financial backing. Thereupon, Overseas abandoned the project and notified RAKTA that it regarded itself as excused by force majeure. RAKTA disagreed and obtained an award largely in its favour. In the award Overseas' force majeure defence was considered as valid only during the period from May 28 to June 30, 1967. Furthermore, Overseas was considered to have made no more than a perfunctory effort to secure special visas. Finally, AID's notification was held as not justifying Overseas' unilateral decision to abandon the project.

In the enforcement action Overseas argued before the United States Court of Appeals that the various actions by United States officials, most particularly AID's withdrawal of financial support, required Overseas "as a loyal American citizen" to abandon the project. Enforcement of an award predicated on the feasibility of Overseas' returning to work in defiance of these expressions of national policy would therefore contravene United States public policy.

After having made the above-quoted observation concerning the public policy defence of the Convention in general, the Court of Appeals rejected Overseas' arguments as follows:

> "In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy'. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.
>
> To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defense."[353]

The interpretation that the public policy limitation of the Convention is to be construed narrowly and to be applied only where the enforcement would violate the forum State's most basic notions of morality and justice, was adopted by the same Court of Appeals in a subsequent case in which it held that the order of a United States bankruptcy judge staying all proceedings, including arbitration, did not have extra-territorial effect on the arbitration taking place in Tokyo.[354]

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353. The Court referred the U.S. Supreme Court decision in Fritz Scherk *v.* Alberto-Culver Co. (U.S. no. 4), *supra* n. 348.

354. U.S. Court of Appeals (2nd Cir.), May 29, 1975, Copal Co. Ltd. *v.* Fotochrome Inc. (U.S. no. 3). See also U.S. District Court of New Jersey, May 12, 1976, Biotronik Mess- und Therapiegeräte G.m.b.H. & Co. *v.* Medford Medical Instrument Company (U.S. no. 8): allegation of the respondent of fraud on the part of the claimant as being contrary to public policy within the meaning of Art. V(2) (b) rejected, see *supra* at n. 211; U.S. District Court of New York, S.D., June 28, 1976, Antco Shipping Co. Ltd. *v.* Sidermar S.p.A. (U.S. no. 9): exclusion of Israel in charter party was held not to be against public policy of the United States. The U.S. District Court of Georgia, N.D., January 18, 1980, Laminoirs-Trefilieries-Cableries de Lens S.A. *v.* Southwire Company (U.S. no. 32) referred also to the U.S. Court of Appeals in the Parsons case, *supra* n. 352, that enforcement of foreign arbitral awards may be denied on the basis of Art. V(2) (b) of the Convention only "where enforcement would violate the forum country's most basic notions of morality and justice". The District Court refused, however, to enforce that part of an award made under the Arbitration Rules of the International Chamber

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In F.R. Germany the courts have repeatedly held that in the case of a foreign award not every infringement of mandatory (*zwingend*) provisions of German law constitutes a violation of public policy; they accept a violation of public policy in "extreme cases only".[355]

Similarly, the Swiss courts affirm that a violation of Swiss public policy will only be deemed to be present where the innate feeling of justice is hurt in an intolerable manner, where fundamental provisions of Swiss legal order have been disregarded, or where the Swiss legal thinking compels prevalence over the applicable or applied law. Whether this is the case can be decided only on the basis of the facts of the specific case, whereby, when foreign decisions are to be enforced, the scope of public policy is narrower than in the case of a direct application of Swiss law.[356]

The Court of Appeal of the Canton Geneva quoted approvingly from the Swiss Federal Supreme Court, which, in an earlier decision under the Geneva Convention of 1927, had observed[357]:

> "The extent of the exception of Swiss public order is more restrictive in respect of the recognition and enforcement of foreign awards than in respect of the application of foreign law by Swiss courts. Accordingly, as far as the procedure is concerned, this limitation means that an irregularity in the procedure does not necessarily entail the refusal of enforcement of the foreign arbitral award, even if such an irregularity would imply the setting aside of an award made in Switzerland. There must be a violation of fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice .... This exception of public order should not be twisted in order to avoid application of international conventions which are signed by Switzerland and which form part of Swiss law. This would ultimately lead to the exclusion of application of Swiss law. In the final analysis, it should not lead to a violation of a Convention, the purpose of which is precisely to recognize the existence of different legal systems and to coordinate them."

The Mexican courts have also distinguished between domestic and international public policy. They held that although the Mexican statutory provisions regarding the summoning of a party *in personam* per-

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of Commerce in which the arbitrators had applied a French law which increased the rate of interest by 5% after two months from the date of the award, as it considered this an impermissable penalty under United States law. This decision appears to be somewhat out of tune with the other decisions mentioned above.

355. E.g., Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11), discussed *supra* at n. 215.

356. Tribunal Fédéral, May 3, 1967, Billerbeck & Co. *v.* Bergbau-Handel G.m.b.H. (Switz. no. 3), see *infra* n. 403, referred to by Obergericht of Basle, June 3, 1971 (Switz. no. 5).

357. Cour de Justice (1st Section) of the Canton Geneva, September 17, 1976, Léopold Lazarus Ltd. *v.* Chrome Ressources S.A. (Switz. no. 6), quoting the Swiss Federal Supreme Court's decision of December 12, 1975, Provenda S.A. *v.* Alimenta S.A., *Arrêts du Tribunal Fédéral Suisse* 101 1a 521, in which it was held that an English award without reasons does not violate Swiss public policy.

tain to Mexican public policy, these provisions do not apply in the case of an international arbitration.[358]

Other examples of the distinction between domestic and international public policy are the even number of arbitrators and the lack of reasons in the award.[359]

It is true that in the above cases not all courts make the distinction in express terms between domestic and international public policy. However, it is clearly apparent from these and other cases decided under the Convention that the courts are prepared to refuse enforcement of an arbitration agreement or arbitral award in very serious cases only. To this extent it is justified to use the helpful distinction between domestic and international public policy also in those cases where the courts do not resort expressly to the distinction.

The foregoing observation brings us to the main point to be made in respect of judicial interpretation and application of the Convention's public policy provisions: contrary to what was feared by some directly after the adoption of the Convention that the Convention's public policy provisions could be used by the courts to take away a great deal of its effectiveness, the courts have refused enforcement in very exceptional cases only. Although they have had this basis in the Convention to do otherwise, the courts have generally given a narrow interpretation and application to the Convention's public policy provisions. It is in the judicial interpretation and application of the Convention's public policy provisions that the courts have exhibited a particularly favourable attitude towards the Convention.

In fact, although the public policy provisions are frequently invoked, out of some 140 decisions, enforcement of an arbitration agreement and an arbitral award was refused in five decisions only on account of public policy. These cases are the following.

The first case is a decision of the Court of Appeal of Hamburg in which the Court refused enforcement of the award, made in New York under the Arbitration Rules of the American Arbitration Association, because the arbitrators were considered to have violated fundamental requirements of due process by not forwarding to the respondent a letter submitted by the claimant to the arbitrators.[360]

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358. Tribunal Superior de Justicia, 18th Civil Court of First Instance of Mexico, D.F., February 24, 1977, Presse Office S.A. *v.* Centro Editorial Hoy S.A. (Mexico no. 1); Tribunal Superior de Justicia [Court of Appeals] (5th Chamber) of Mexico, S.F., August 1, 1977, Malden Mills Inc. *v.* Hilaturas Lourdes S.A. (Mexico no. 2). Both decisions are discussed *supra* at n. 198-199.

359. See *infra* III–5.3.2 ("Lack of Impartiality of the Arbitrator") at n. 410 and III–5.3.3 ("Lack of Reasons in Award").

360. Oberlandesgericht of Hamburg, April 3, 1975 (F.R. Germ. no. 11), discussed *supra* at n. 215.

The second case is a decision of the Court of Appeal of Cologne in which enforcement of the award, made under the Arbitration Rules of Copenhagen Arbitration Committee for Grain and Feed Stuff Trade, was refused because the names of the arbitrators were not made known to the parties.[361]

The third case is a decision of the United States District Court of New York in which it was held that in virtue of the United States Public Vessels Act, disputes concerning the salvage of a United States warship cannot be submitted to arbitration (i.e., in London).[362]

The fourth case is a decision of the Belgian Supreme Court which held that on the basis of a Belgian Law of 1961 the unilateral termination of an exclusive distributorship agreement under which a Belgian firm was the concessionaire could not be dealt with by arbitration in Zurich as provided in the agreement, but exclusively by the Belgian courts.[363]

A fifth case is a decision of the United States District Court for the District of Columbia which held that the nationalization by Libya constituted an Act of State which was not arbitrable for which reason enforcement was to be refused in virtue of Article V(2) (a) of the Convention.[364]

It is questioned whether the courts, and especially those in the United States, have gone too far in limiting public policy to considerations of "the forum State's most basic notions of morality and justice".[365] It is alleged that the United States courts have given public policy so narrow a construction that it now must be characterized as having no meaningful definition, leaving it pragmatically useless if not altogether nonexistent. This would apply, for instance, to the decision that an award even in direct conflict with United States law or policy is held not to be a violation of public policy.[366] In other words, United States courts would blindly pay lip service to international commercial arbitration. It is concluded that this attitude could have adverse effects on international commercial arbitration as parties would no longer wish to use this mechanism of dispute settlement fearing the deprivation of the public policy defence as a "catch-all" to protect "the integrity of arbitration".[367]

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361. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14), discussed *supra* at n. 207.

362. U.S. District Court of New York, S.D., December 21, 1976, B.V. Bureau Wijsmuller *v.* United States of America (U.S. no. 15), discussed *infra* at n. 386.

363. Cour de Cassation (1st Chamber), June 28, 1979, Audi-NSU Auto Union A.G. *v.* Adelin Petit & Cie (Belgium no. 2), discussed *infra* at n. 379.

364. U.S. District Court of Columbia, January 18, 1980, LIAMCO *v.* Libya (U.S. no. 33), see *infra* at n. 380.
A possible sixth case is the U.S. District Court of Georgia, N.D., January 18, 1980, Laminoirs-Trefilieries-Cableries de Lens S.A. *v.* Southwire Company (U.S. no. 32), see *supra* n. 354.

365. J. Junker, "The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards", 7 *California Western International Law Journal* (1977) p. 228 at p. 245.

366. See U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7), discussed *supra* at n. 352-353.

367. Junker, *supra* n. 365, at p. 246 n. 103 voices here the opinion of counsel for Overseas which lost the case.

This criticism is, in my opinion, not justified. The interpretation of public policy is like the movement of a pendulum. It has moved from an earlier parochialism to the present attitude in favour of international commercial arbitration. It may reach a point where international commercial arbitration may be favoured too much by an overly narrow interpretation of public policy, and this may produce a counter reaction. But the pendulum has by no means reached that point. At present the judicial attitude in favour of international commercial arbitration is just emerging in various countries. For example, in the United States the movement in favour of international commercial arbitration started only in the early 70's. This movement should be encouraged, to which end the distinction between domestic and international public policy is a useful criterion. It is true that the limitation put on public policy should not be applied blindly. The word "international" is not magic. This possible danger should, however, not lead to a rejection of the limitation altogether.

It may be added that, analyzing the decisions of the United States courts in which the limitation on public policy was alleged to have been applied blindly, the criticism does, in my opinion, not hold water: the respondents tried to obstruct enforcement either by rather parochial defences or by simply breaching their own promise to go to arbitration.

III–5.2 Non-arbitrable Subject Matter (Arts. V(2) (a) and II(1))

As indicated, Article V(2) (a) according to which a court may refuse enforcement on its own motion of an award if the difference is not capable of settlement by arbitration under its law, may be considered superfluous as the question of the non-arbitrable subject matter is deemed to form part of the general concept of public policy. The reason why Article V(2) (a) nevertheless figures as a separate ground for refusal of enforcement is historical. It was a distinct ground in the Geneva Convention of 1927[368], the ICC Draft Convention of 1953[369], and the ECOSOC Draft Convention of 1955.[370] Despite an isolated objection of the French delegate that its retention could induce a court "to give international application to rules which were of exclusively domestic validity" and that public policy alone would be sufficient[371], the Conference kept the question of non-arbitrable subject matters as a separate ground without discussion.

The concern expressed by the French delegate has turned out to be

368. Geneva Convention of 1927, Art. I(2) (b).
369. ICC Draft Convention of 1953, Art. IV(a).
370. ECOSOC Draft Convention of 1955, Art. IV(b).
371. UN DOC E/CONF.26/SR.11.

unwarranted since, as demonstrated in the preceding Section, for the question of arbitrability also, the courts generally use the distinction between domestic and international public policy. The mention of the non-arbitrable subject matter as a separate ground for refusal of enforcement therefore has not had undesirable consequences in practice.

It is a question, however, *under which law* the arbitrability of the subject matter is to be determined in enforcement actions falling under the Convention. Concerning the enforcement of the arbitral award, Article V(2) (a) refers explicitly to the law of the country where the enforcement of the award is sought. This appears also to be the unanimous interpretation of the courts in all cases in which the question of arbitrability was considered under the Convention. Some authors, however, have argued that the question of arbitrability may also have to be determined under some other law. This opinion should be rejected not only because of the unanimous judicial interpretation to the contrary, but also because, as Prof. Gaja rightly points out, this opinion would render it difficult to understand why the case of the non-arbitrable subject matter should have been considered so important that the enforcement court can ascertain it on its own motion.[372]

The arbitrability under the law governing the award may nevertheless play a role in an enforcement procedure under the Convention if the award has been set aside on this ground in the country of origin. Enforcement may then be refused on the basis of the second part of Article V(1) (e) of the Convention.

With respect to the action for enforcement of the arbitration agreement pursuant to Article II(3), Article II(1) merely requires that the arbitration agreement concern "a subject matter capable of settlement by arbitration". It has been argued earlier that at this stage the enforcement court also has to rely on its own law only for the question of arbitrability of the subject matter.[373]

The non-arbitrability of a subject matter reflects a special national interest in judicial, rather than arbitrable, resolution of dispute.[374] Classic examples of non-arbitrable subject matters are anti-trust, the validity of intellectual property rights (patents, trademarks, etc.), family law and the protection of certain weaker parties. The various subject matters differ, however, from country to country.[375] In spite of this divergence, it is remarkable that the question of a non-arbitrable subject mat-

372. G. Gaja, "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) at n. 82 in which also the references to the authors are given.

373. See *supra* II–1.3.3 ("Subject Matter not Capable of Settlement by Arbitration").

374. As defined by U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Générale de l'Industrie du Papier (RAKTA) (U.S. no. 7).

375. See National Reports under Chap. II.3 ("Domain of Arbitration") in the *Yearbooks*. See also, P. Sanders, "Trends in the Field of International Commercial Arbitration", *Recueil des Cours*, 1975 – Vol. II, p. 207 at p. 220.

ter has been raised in a relatively small number of cases under the Convention.

Several courts, especially Italy, merely affirmed that the dispute in question was "clearly arbitrable" under their law.[376]

The question of arbitrability of *securities transactions* in the United States has been considered in discussing the famous United States Supreme Court decision in *Fritz Scherk* v. *Alberto-Culver Co.* in which the distinction was made between arbitrability in domestic and in international cases.[377]

The question of arbitrability of *trademarks* involved Scherk again, this time in Italy. The Liechtenstein based Scherk Enterprise A.G. had entered into a licensing agreement with the Italian company, having the colourful French name Société des Grandes Marques (SGM). By this agreement Scherk granted SGM the use of several of its internationally registered trademarks in Italy. The agreement provided for arbitration in Zurich and for the applicability of Swiss law. Alleging that SGM was using the trademarks in Italy without paying royalties to Scherk, the latter claimed before the arbitrators the cancellation of the licensing agreement before its expiry date. SGM, in turn, requested the Italian courts to declare Scherk's trademarks null and void and itself to be the exclusive owner of them. Scherk opposed to the jurisdiction of the Italian courts on the basis of the arbitral clause. The Italian Supreme Court held that the arbitration could proceed insofar as it was concerned with the action based on the contractual rights in regard to the trademarks (i.e., the licensing agreement), but that the request of SGM that the trademarks be declared null and SGM be entitled to the exclusive rights in Italy arising out of them was a distinct action which was to be determined in independent judicial proceedings in Italy. With respect to the latter the Court observed that these judicial proceedings required the Public Prosecutor's intervention and could not be subjected to arbitration.[378]

The question of arbitrability of the termination of an *exclusive distributorship agreement* was considered by the Belgiun Supreme Court and actually led to an exceptional refusal of enforcement of an award under the Convention on the ground of a non-arbitrable subject matter.[379] The case involved the Belgian law of July 27, 1961, concerning the Unilateral Termination of Concessions for Exclusive Distributorships of an Indefinite Time. This Law is an example of non-arbitrability of the subject matter in view of the protection of a party which is considered to be in a weaker position (i.e., the exclusive distributor in Belgium). The Belgian Law of 1961 gives an exclusive distributor within Belgian territory the right to compensation upon termination in certain cases. If the parties cannot agree, a Belgian court can be requested to determine the amount of compensation.

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376. E.g., Corte di Appello of Naples, February 20, 1975, Carters (Merchants) Ltd. *v.* Francesco Ferraro (Italy no. 21) concerning claim for damages because of non-fulfilment of a contract for maritime transport; Corte di Appello of Milan, May 3, 1977, Renault Jacquinet *v.* Sicea (Italy no. 27) concerning a dispute over the edible quality of corn; Corte di Apello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29) concerning the quantity and quality of textiles delivered by the Italian seller.

377. June 17, 1974 (U.S. no. 4) discussed *supra* at n. 348-351.

378. Corte di Cassazione (Sez. Un.), May 12, 1977, no. 3989, Scherk Enterprises A.G. *v.* Société des Grandes Marques (Italy no. 28).

379. Cour de Cassation (1st Chamber), June 28, 1979, Audi-NSU Auto Union A.G. *v.* S.A. Adelin Petit & Cie. (Belgium no. 2), affirming Cour d'appel of Liège, May 12, 1977 (Belgium no. 1).

The German car manufacturer Audi informed Petit that he would cease to be its exclusive distributor in Belgium. As Petit was not willing to accept such termination without a substantial compensation, Audi started arbitration in Zurich on the basis of the arbitral clause in the exclusive distributorship agreement, which agreement also provided that it was to be governed by German law. Petit appeared before the arbitrators in Zurich solely with the purpose of contesting their competence to deal with the dispute. The arbitrators declared themselves to be competent, which decision was confirmed by the Superior Court of Zurich. The arbitrators made an award on the merits, holding that the agreement was terminated and that Petit did not have any right to compensation because of the termination.

Petit started proceedings in Belgium seeking a declaration from the courts that they had exclusive jurisdiction to deal with the dispute and that they refuse recognition and enforcement of the award made in Zurich. The Commercial Court of Liège, the Court of Appeal of the same city and the Belgian Supreme Court all agreed with Petit, holding that the Belgian courts had exclusive jurisdiction to deal with the dispute, and refused to recognize and enforce the award. In justifying its decision the Supreme Court referred, inter alia, to Article V(2)(a) of the New York Convention. The Supreme Court observed:

> "Considering that the Law of July 27, 1961, concerning the Unilateral Termination of Concessions for Exclusive Distributorships of an Indefinite Time, as modified by the Law of April 13, 1971, declares in Article 4 that upon termination of a concession of sale which concerns wholly or partially the Belgian territory, the aggrieved concessionnaire in all cases can cite the grantor of the concession in Belgium, whether before the court of his own domicile, or before the court of the domicile or seat of the grantor of the concession, and that in the case that the dispute is brought before a Belgian court, the latter shall apply exclusively Belgian law;
>
> Considering that, by virtue of Art. 6 of the same Law, the provisions of this Law are applicable notwithstanding any agreement to the contrary which is concluded before the end of the contract under which the concession is granted;"
>
> Considering that those mandatory (*imperatives*) provisions are intended to ensure that in all cases the concessionnaire has the right to invoke the protection of Belgian law; except where he has renounced this right by an agreement concluded after the end of the contract under which the concession is granted;"

It may be added that the choice of German law was overruled by the Supreme Court as being an abuse of the right to choose a law (*fraude à la loi*).

Finally, mention should be made of an unfortunate decision of the United States District Court for the District of Columbia in the case *LIAMCO* v. *Libya*.[380] Following a nationalization by Libya of LIAMCO's assets in that country in 1973, LIAMCO commenced an arbitration in accordance with the arbitral clause contained in the concession agreements. The award, made in Geneva, was in favour of LIAMCO, condemning Libya to pay approximately US$ 80 million.[381]

The District Court refused to enforce the award on the ground of Article V(2) (a) of the Convention, reasoning that Libya's nationalization, being an Act of State, is a subject matter not capable of settlement by arbitration. The Court considered in particular:

380. U.S. District Court for the District of Columbia, January 18, 1980 (U.S. no. 33).

381. Award of April 12, 1977, extract in *Yearbook* Vol. VI (1981) p. 89. See for the other two awards concerning Libya's nationalization (BP *v.* Libya and TOPCO *v.* Libya), *supra* n. 125.

> "The 'subject matter of the difference' in this case is Libya's nationalization of LIAMCO's assets and the rate at which LIAMCO should be compensated for the assets taken under that nationalization. Should that rate be determined according to the terms of the original concessions (by arbitration), or should it rather be determined according to the provisions of the nationalization laws themselves (by Libyan committee)?
> Had this question been brought before this Court initially, the Court could not have ordered the parties to submit to arbitration because in so doing it would have been compelled to rule on the validity of the Libyan nationalization law. That law by its terms abrogated the concessions entirely and vested exclusively determination of any compensation in a special committee provided for in the same law. The practice that counsels this judicial abstention from passing on the effectiveness of the acts of foreign sovereigns is termed the act of state doctrine."

The Act of State doctrine, as formulated by the United States Supreme Court in 1897, is that every sovereign State is bound to respect the independence of every other sovereign State, and that the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.[382] The courts in the United States have invariably held that the nationalization by a foreign State is an Act of State. The exception to the Act of State doctrine is the so-called Hickenlooper Amendment to the Foreign Assistance Act of 1964 according to which the doctrine does not apply in the case of a confiscation or taking in violation of the principles of international law. According to the Court, the exception did not apply because LIAMCO would have failed to prove that the Amendment's requirements had been met.

It is submitted that the Court confuses the right of a State to nationalize and the method of settlement of disputes as agreed upon by that State and a foreign private party. Today it is generally recognized that a State has the right to nationalize within its own territory. On the other hand, a State should not have the right to unilaterally revoke its commitment to arbitrate, even if it is in the form of a statutory enactment.

The concession agreements contained an arbitration agreement which was carefully drafted by the parties in 1955 and amended by them in 1966, and was valid beyond any doubt. If a State were permitted to unilaterally revoke its commitment to arbitrate, such an agreement would be worthless. It would seriously frustrate the settlement of disputes in the ever delicate field of relations between States and foreign private parties. It could also have adverse effects on the economic development of the States concerned, as it would discourage foreign private parties from making investments.

The Court would certainly have had a legal justification to make the distinction between the nationalization as such and the agreed method of settlement of disputes: the United States Supreme Court has held that the arbitral clause is an agreement independent of the agreement in which it is contained.[383] Under this separability doctrine the Court could have considered both questions independently, which the Court omitted to do when it observed that the nationalization law "by its terms abrogated the concessions *entirely*" (emphasis added).

Furthermore, the Court could have referred to its own – correct – reasoning that it had jurisdiction over Libya. In respect of this question the Court had held on

382. Underhill *v.* Hernandez, 168 *United States Supreme Court Reports* 250 (1897).

383. Prima Paint *v.* Flood & Conklin Mfg. Co., 388 *United States Supreme Court Reports* 395 (1967). See for the separability doctrine, *supra* II–1.3.1.2.

the basis of the United States Foreign Sovereign Immunities Act of 1976 that where Libya has agreed to arbitrate in another country, this constituted an implicit waiver of sovereign immunity.[384] If the agreement to arbitrate constitutes a waiver of immunity, the logical conclusion would have been to hold that the agreement to arbitrate should also be honoured.

Seen in this light, the Act of State doctrine would not apply to that part of the nationalization law which is concerned with the settlement of disputes. The foregoing also answers the question whether the subject matter was capable of settlement by arbitration. Here again, the Act of State doctrine would, in principle, not apply as arbitration was the agreed method of settlement of dispute. Of course, a court in the United States would not be obliged to recognize and enforce an award in which an arbitrator has held that the nationalization law was invalid, as the Act of State doctrine expresses a policy of the United States to refrain from ruling on the validity of a nationalization by a foreign State. But this was not done by the arbitrator in this case; he had recognized the sovereign right of Libya to nationalize. The arbitrator had also applied the principles of international law and found that a premature termination of the concession agreements creates the obligation of indemnification. In fact, this was not different from a combined application of the Act of State doctrine and the Hickenlooper Amendment.

During the pleadings before the Court of Appeals for the District of Columbia, Libya and LIAMCO reached a settlement on March 20, 1981. The *amici curiae* of LIAMCO, among which the American Arbitration Association and the Chamber of Commerce of the United States, lodged thereupon a motion requesting an order vacating the decision of the District Court, which motion was, without reasons, granted by the Court of Appeals on May 6, 1981.

The field of non-arbitrable matters may also be delineated by the fact that the State in question has used the second reservation of Article I(3) according to which when adhering to the Convention, a State may "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." (emphasis added)[385]

In this connection the decision of District Court in New York in *Wijsmuller* v. *United States* may be recalled.[386] Wijsmuller and the Captain of a United States warship, stranded off the Dutch coast in 1974, had signed a Lloyd's Open Form salvage agreement (LOF). This agreement provided for the submission of the salvor's claim for salvage compensation to arbitration in London in accordance with English Law. The District Court rejected the motion of Wijsmuller to arbitrate in London, holding that the Public Vessels Act permitted recovery against the United States only by suit in the appropriate United States District Court. In its reasoning, the District Court first considered the question whether by enacting the Public Vessels Act, United States Congress intended to waive sovereign immunity in such a manner as to require the United States to submit to arbitration in London. The Court reached the conclusion that this was not the case.[387] The Court further rejected the contention

384. See *supra* at n. 140.
385. See *supra* I–1.8 ("Second Reservation ('Commercial Reservation')").
386. U.S. District Court of New York, S.D., December 21, 1976 (U.S. no. 15).
387. See *supra* III–4.1.2 ("State or Public Body as Party to the Arbitration Agreement").

of Wijsmuller that the adherence of the United States to the New York Convention had changed the foregoing principles, and the further contention that the adherence reflected a policy in favour of international commercial arbitration. In this connection the Court referred, inter alia, to the commercial reservation laid down in Article I(3) of the Convention, stating that relations arising out of activities of warships have never been regarded as "commercial". This case shows also the special national interest in judicial, rather than arbitrable, resolution, as mentioned before.

It should be added that the non-arbitrability of a subject matter of the arbitration is not to be accepted if it is only of an incidental nature in the resolution of dispute. Rather, the non-arbitrability should concern certain *categories* of claims. For example, a United States Court held that the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute non-arbitrable, but that the non-arbitrability should concern a certain category of claims which is non-arbitrable because of the special national interest vested in their resolution.[388]

Similar observations can be found in a decision of the United States District Court in Michigan, again involving the German car manufacturer Audi.[389] Following a dispute with its United States distributor Overseas Motors, Audi sought arbitration in Zurich on the basis of the arbitral clause in the agreement. Overseas started an action against Audi for alleged anti-trust conspiracy before the District Court. The District Court denied Overseas' motion for a stay of the arbitration in Zurich and decided that the anti-trust action instituted by Overseas was without merit.[390] In the meantime, the arbitrators in Zurich rendered an award in favour of Audi. In the subsequent enforcement action before the District Court, Overseas again contended that the subject matter of the arbitration was not capable of settlement by arbitration as it related to anti-trust issues. The Court rejected Overseas' argument once again. It reasoned that

> "Certainly some of the factual findings were common to both the contractual dispute and the anti-trust claim. But that does not make the former "not capable of settlement by arbitration."

The District Court quoted in this connection from the earlier decision in which the allegation of anti-trust conspiracy was rejected:

> ". . . in the absence of allegations that the contract itself was intrinsically violative of the antitrust laws such actions are not preempted by this Court's exclusive authority over them."

Mention may also be made of the Court of Appeals of Florence before which the Italian respondent objected to the request for enforcement of an award made in London that it was contrary to public policy as the arbitrators had no power to de-

388. U.S. Court of Appeals (2nd Cir.), December 23, 1974, Parsons & Whittemore Overseas Co. Inc. *v.* Société Génerale de l'Industrie du Papier (RAKTA) (U.S. no. 7) discussed *supra* at n. 352.

389. U.S. District Court of Michigan, S.D., March 15, 1977, Audi-NSU Auto Union A.G. *v.* Overseas Motor Inc. (U.S. no. 16).

390. 375 *Federal Supplement* 499 (1974).

cide over the alleged illegal behaviour of the Panamanian claimant.[391] The Court of Appeal rejected the objection. It reasoned that the fact that the claimant might have been engaged in illegal behaviour was arbitrable. Whilst such question may be subject to a penal law action, it may also be submitted to arbitrators in the form of an action *ex delicto* for liability under civil law which action may result in an award of monetary damages.

In view of the diversity in the Contracting States in regard to the subject matters which are non-arbitrable, it has been suggested that a list of non-arbitrable subject matters should be drawn up for each State. It has, furthermore, been suggested that the possibility should be considered of establishing a generally acceptable list which could eventually be annexed to a possible new Convention.[392] These suggestions, made some time ago, have not been responded to. Indeed, it does not seem advisable to draw up such a list.

Leaving aside the question whether it is desirable that the New York Convention be revised by an additional Protocol or the like, it will prove to be difficult to establish a list of non-arbitrable matters for each Contracting State. In many States it is unclear which matters are non-arbitrable; and in those cases where they can be identified, it is difficult to lay down all the necessary kinds of subtle distinctions for each case. Moreover, it will not be easy to reduce to writing all cases in which the distinction between domestic and international public policy could be made. There is also a danger that States will be tempted to reverse the order by stating which matters are allowed to be arbitrated upon, and to consider as arbitrable only the matters expressly mentioned in the list. This would vitiate instead of improving the existing situation.[393] These observations would lead to the conclusion that the adoption of a generally acceptable list is both difficult to attain and undesirable because of the possibly adverse effect. Moreover, for the time being the establishment of such a list would not have high priority considering the few cases in which the non-arbitrability of the subject matter has led to a refusal of enforcement under the Convention.

391. Corte di Appello of Florence, October 22, 1976, S.A. Tradax Export *v.* S.p.A. Carapelli (Italy no. 18).

392. This suggestion was made by I. Nestor in his Report of 1972 to UNCITRAL, "Problems concerning the Application and Interpretation of Existing Multilateral Conventions on International Commercial Arbitration and Related Matters", *UNCITRAL Yearbook*, Vol. III (1972) p. 193 at p. 244 (UN DOC A/CN.9/64 para. 172)..

393. In this sense, A. Chavanne, "Arbitrage et transfert de brevets, savoir-faire, marques de fabrique et de commerce et autre droits de nature à promouvoir la coopération internationale", in *Schiedsgerichtsbarkeit und gewerblicher Rechtsschutz*, Interim Meeting of the International Council for Commercial Arbitration, Vienna, September 29 – October 1, 1976, Schriftenreihe der Bundeswirtschaftskammer no. 30 (Vienna 1976) p. 9 at p. 17.

III–5.3 Other Grounds of Public Policy (Art. V(2) (b))

III–5.3.1 *Introduction*

Within the system of the Convention, Article V(2) (b), according to which a court may refuse enforcement on its own motion if the enforcement would be contrary to its public policy, would appear to be a provision of residual application for those cases not covered by the other provisions of the Convention. This would especially apply to the due process provision contained in Article V(1) (b) which can be considered to form part of public policy. In reality, however, the public policy provision of Article V(2) (b) co-exists with the other provisions. Thus where according to Article V(1) (b) the respondent must prove a violation of due process, a court may also refuse enforcement of the award on its own motion if it finds that such ground for refusal is present. The latter may, for instance, occur if the respondent declines to participate in the enforcement proceedings.

The seemingly residual character of Article V(2) (b) has as consequence that in this study various aspects of it, such as the violation of due process which is covered by the Sub-section concerning Article V(1) (b)[394], and the question of non-arbitrable subject matters according to Article V(2) (a) which was considered in the preceding Section, have already been dealt with in the context of the other provisions of the Convention. They will therefore not be repeated in this Section.

It may be recalled that the fact that the parties have the same nationality cannot be considered as pertaining to public policy under the Convention. This question was considered in I–1.2 *supra*. However, it may also be recalled that the case where two parties have arbitrated in another country in a purely domestic matter in order to circumvent mandatory provisions of the law of their country (e.g., tax regulations), may be regarded as a violation of public policy. This case is not different from the case where parties of a different nationality have arbitrated abroad and the award violates mandatory tax laws of the country where enforcement is sought. Such a case has not occurred in practice under the Convention.

As noted, public policy concerns in essence the fundamental moral convictions and policies of the forum. These matters vary from country to country. Moreover, what constitutes a violation of public policy is largely a question of fact and is to be decided on an ad hoc basis. Although Article V(2) (b) has been frequently invoked, two cases may be

394. See *supra* III–4.2 ("Ground *b*: Violation of Due Process"), especially under the second question at n. 187-193.

singled out: the lack of impartiality of arbitrators (III–5.3.2) and the lack of reasons in the award (III–5.3.3).[395]

III–5.3.2 *Lack of impartiality of the arbitrator*

The lack of impartiality of an arbitrator can also be asserted within the system of the Convention under Article V(1) (b) concerning the requirements of due process. As the assertion of lack of impartiality is almost always made on the basis of an alleged violation of Article V(2) (b) this question is dealt with in this Section.

The impartiality of the arbitrator is a fundamental requirement of every arbitration. Impartiality of the arbitrator means basically that he has no personal interest in the case and is independent vis-à-vis the parties.[396] The assertion of a lack of impartiality must, however, be made in good faith. Two cases decided by courts in the United States may illustrate this.

A first example can be found in a decision of the Court of Appeals for the Fifth Circuit.[397] The respondent, the United States corporation Baruch Foster, had opposed to an award rendered between it and the Ethiopian Government that the arbitrator, the French professor René David, was disqualified to act as arbitrator since between 1954 and 1958 he had drafted the Ethiopian Civil Code. Ethiopia had submitted affidavits in opposition in which it appeared that after 1958 Prof. David had not acted in any capacity for the Ethiopian Government and in which the integrity and worldwide reputation of Prof. David was attested. The Court of Appeals rejected the contention of Baruch Foster by referring to Prof. David's integrity and reputation and by adding that Baruch Foster had failed "to come forward with anything tending to show that the claim was asserted in good faith and for any reason other than delay".

A second example can be found in a decision of the District Court in New York.[398] In this case the respondent had asserted that enforcement of the award should be refused because one of the arbitrators was the president of a firm that served as general agents for a shipowning corporation which had pursued a claim against it in prior arbitration and court proceedings. The Court found that the arbitrator's relationship with the respondent was "far too tenuous . . . to require the disqualification of an experienced and respected maritime arbitrator, particularly where [the respondent] offers no challenge to [the arbitrator's] personal integrity".

Whilst clearly affirming this principle in the cases decided under the Convention, the courts generally distinguish between the case where

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395. The other cases involving Art. V(2) (b) dealt with in the context of various other provisions of the Convention can be found in the Index on Articles of the Convention under Article V(2) (b).

396. See generally, P. Schlosser, *Das Recht der international privaten Schiedsgerichtsbarkeit* (Tübingen 1975) no. 458 et seq.

397. U.S. Court of Appeals (5th Cir.), Imperial Ethiopian Government *v.* Baruch Foster Corp. (U.S. no. 10).

398. U.S. District Court of New York, S.D., Transmarine Seaways Corp. of Monrovia *v.* Marc Rich & Co. A.G. (U.S. no. 30).

there are circumstances which might have created the lack of impartiality on the part of the arbitrator, and the case where the arbitrator has effectively not acted in an impartial manner. As a rule it is in the latter case only where the courts are prepared to refuse enforcement of the award. It is needless to add that the former case should be avoided as much as possible by arbitrators, arbitral institutions, and parties.

Of course, a prerequisite is that the name of the arbitrator is made known to the parties. If that is not done, a party is deprived of the possibility to investigate whether the arbitrator lacks impartiality and to challenge him.[399]

The question of a personal interest in the case may come up especially in arbitration administered by *trade associations*. In certain trade associations arbitrators are chosen from a small circle of member merchants who regularly do business with each other. Another problem for such arbitrations is the case where a non-member is involved in arbitration administered by the association.

In opposition to a request for enforcement of an award rendered by an arbitral tribunal of the Netherlands Hide and Leather Exchanges Association, the Swiss respondent contended before the Court of Appeal of Basle that the arbitral tribunal could not be considered independent because all arbitrators came from the circle of merchants in raw materials, whilst no person representing the leather manufacturing industry (to which the Swiss respondent belonged) had been nominated.[400] Rejecting the objection, the Court observed that the Swiss Supreme Court has been very reluctant to accept the composition of an arbitral tribunal in international commercial arbitration as a violation of public order (see below). The fact that an arbitrator belongs to a certain economic group, according to the Court, did not justify considering him *beforehand* as not being independent. The Court stated that the crucial question is whether in a *specific case* an arbitrator has been dependent on one of the parties. The latter had not appeared to be the case for the arbitral tribunal in question.

The impartiality of arbitral tribunals of the Courts of Arbitration attached to the Chambers of Commerce in *Eastern European countries* is questioned from time to time. The main complaint is that in many CMEA countries arbitrators can be chosen solely from a list which is drawn up in advance by the Chamber of Commerce of the Socialist country concerned and which is composed of nationals of that country only.[401] A further complaint is that the Chamber of Commerce, which

399. Cf. Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. no. 14) discussed *supra* at n. 162.

400. Obergericht of Basle, June 3, 1971 (Switz. no. 5).

401. See National Reports under Chap. III.1 ("Qualifications Required for Being an Arbitrator") and under Chap. III.3 ("Appointment of Arbitrators") in *Yearbook* Vol. I (1976). See also D. Pfaff, *Die Aussenhandelsschiedsgerichtsbarkeit der socialistischen Länder im Handel mit der Bundesrepublik Deutschland* (Heidelberg 1973).

draws up the list, could be controlled by the State and that the Socialist arbitrators owe allegiance to the State, for which reasons they cannot be considered independent.

As far as the former complaint is concerned, this situation continues to exist at present in several CMEA countries in spite of the objections from countries outside the CMEA world and the promises by the CMEA countries to change this unsatisfactory situation. After the adoption of the European Convention of 1961, to which all CMEA countries have adhered, and which provides in Article III that "foreign nationals may be designated as arbitrators", one would have expected some change.

As far as the latter complaint is concerned, all authors from Eastern Europe stress the independent status of the Chambers of Commerce and their arbitral institutions in respect of the State under the relevant laws, and that their Rules prescribe expressly that the arbitrators must be absolutely impartial.[402]

The courts, however, have invariably rejected the allegation that the constitution and composition of arbitral tribunals in CMEA countries would constitute in itself a violation of public policy. They point out, in this case also, that what matters is that in a given case the arbitrators have not acted in an impartial manner. In deciding so, Swiss courts, in particular, resort to the distinction between domestic and international public policy.[403] The courts give as an additional justification that the particular manner of constituting and composing an arbitral tribunal in Eastern European countries is well known and that the foreign party submits himself to it with full knowledge thereof.[404]

Some courts refer in relation to the arbitral tribunals in Eastern European countries to Article I(2) of the Convention according to which "The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also

402. See references given in *supra* n. 401.

403. Tribunal Fédéral, May 3, 1967, Billerbeck & Cie. *v.* Bergbau-Handel G.m.b.H. (Switz. no. 3) concerning an award rendered by the Court of Arbitration attached to Chamber of Foreign Trade of the German Democratic Republic. The Court referred to its earlier decision Ligna *v.* Baumgartner, *Arrêts du Tribunal Fédéral Suisse* 84 I 39 (1958) in which the same was held in respect of an award rendered by the Court of Arbitration attached to the Chamber of Commerce of Czechoslovakia.

404. E.g., Oberster Gerichtshof, June 11, 1969 (Austria no. 3) concerning an award rendered by the Court of Arbitration attached to the Bulgarian Chamber of Commerce and Industry; Oberlandesgericht of Hamburg, October 14, 1964, affirmed by the Bundesgerichtshof, March 6, 1969 (F.R. Germ. no. 5) concerning an award rendered by the Court of Arbitration attached to the Chamber of Commerce of Czechoslovakia; Corte di Appello of Rome, September 24, 1973, Intercommerce *v.* Menaguale (Italy no. 9), affirmed by Corte di Cassazione (Sez. I), April 18, 1978, no. 1842 (Italy no. 25), concerning an award rendered by the Court of Arbitration attached to the Bulgarian Chamber of Commerce and Industry; President of Rechtbank of Amsterdam, December 14, 1977 (Neth. no. 4) concerning an award rendered by the Arbitration Commission attached to the Chamber of Commerce and Industry of Romania. In none of these cases the enforcement of the award was refused.

those made by permanent arbitral bodies to which the parties have submitted".[405] Originally, the U.S.S.R. had proposed to insert a provision to this effect in the ECOSOC Draft Convention of 1955, but the Committee deemed such a provision, in my opinion rightly, unnecessary.[406] At the beginning of the New York Conference of 1958, the Czechoslovak delegate took up the U.S.S.R. proposal, arguing that he did not agree that it was unnecessary and that it would tend to strengthen the Convention and help in avoiding certain difficulties which had been encountered in the past and might arise again in the future.[407] An entire session was devoted to this proposal.[408] The crucial question was whether the proposal would include permanent arbitral tribunals to which parties were obliged to submit their disputes (so-called compulsory arbitration). The Czechoslovak delegate emphasized that his proposal envisaged voluntary arbitration only. The Conference decided then to add "to which the parties have voluntarily submitted". Upon instigation of the Drafting Committee, the word "voluntarily" was subsequently deleted as it was considered redundant.[409]

The arbitral tribunal composed of an *even number* of arbitrators has not been held to be a violation of public policy under the Convention. In many countries an uneven number of arbitrators is prescribed mandatorily, inter alia, in order to guarantee the impartiality of the arbitrator(s). In these countries it is considered that if the arbitrators are even in number, they will almost always be appointed by the parties and be inclined to defend the point of view of the party who nominated him. This inclination is less likely if there are three arbitrators, one of which is not appointed by one party alone. Nevertheless, relying expressly or implicitly on the distinction between domestic and international public policy, the courts of these countries generally enforce an award made by two arbitrators in a country where the composition of such arbitral tribunal is valid, such as England.[410]

III–5.3.3 *Lack of reasons in award*

On the question of reasons in the award we may be relatively brief as it has not led to diverging judicial applications under the Convention.

As is the case for an uneven number of arbitrators, the arbitration laws of many countries prescribe mandatorily that the award must contain the reasons on which the arbitral decision is based. In these coun-

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405. E.g., Tribunal Fédéral, May 3, 1967, Billerbeck & Cie. *v.* Bergbau-Handel G.m.b.H. (Switz. no. 3); Corte di Appello of Rome, September 24, 1973, Intercommerce *v.* Menaguale (Italy no. 9), affirmed by the Corte di Cassazione (Sez. I), April 18, 1978, no. 1842 (Italy no. 25).

406. UN DOC E/2704 and Corr. 1, para. 25.

407. UN DOC E/CONF.26/L.10 and Rev. 1.

408. UN DOC E/CONF.26/SR.8.

409. UN DOC E/CONF.26/SR.23. Art. I(2) is considered superfluous, inter alia, by P. Sanders, "Commentary", *Yearbook* Vol. I (1976) p. 207.

410. By implication: Corte di Appello of Venice, May 21, 1976, S.A. Pando Compania Naviera *v.* S.a.S. Filmo (Italy no. 16), discussed *supra* at n. 249.

tries it is considered fundamental that the parties are informed *how* justice has been done to their case. On the other hand, in several Common Law countries it is customary not to give reasons in the award.[411]

Here again, whilst making the distinction between domestic and international public policy, the courts of the countries under whose law the giving of reasons is mandatory generally enforce awards without reasons made in countries where such awards are valid.[412]

In this connection Article VIII of the European Convention of 1961[413] may be quoted:

> "The parties shall be presumed to have agreed that reasons shall be given for the award unless they
> (a) either expressly declare that reasons shall not be given; or
> (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given."

It may be argued that the reasons in an award are also unnecessary as no re-examination of the merits of an arbitral award is allowed under the Convention.[414] However, the requirement of the giving of reasons should not be seen in this light. The countries in which the giving of reasons in the award is mandatory, impose this requirement as part of the right of the parties to know how the arbitrator has reached his decision. The antiquated re-examination of the merits of an arbitral award, on the other hand, has as purpose to supervise the application of the law by the arbitrator.

It may be added that, in my opinion, it goes too far, as one Italian Court of Appeal did, to state that a violation of public policy must be appreciated on the basis of the decisional part alone, and not on the basis of the reasoning.[415] If reasons are given, there is the slight chance that

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411. See my article "Etude comparative du droit de l'arbitrage commercial dans les pays de Common Law", 19 *Rassegna dell'Arbitrato* (1979) p. 11 at p. 37. The English practice not to give reasons for the award has undergone a change because of the English Arbitration Act of 1979 (Sect. 1(5)-(6)), see C. Schmitthoff, "The United Kingdom Arbitration Act 1979", in *Yearbook* Vol. V (1980) p. 231 at p. 237.

412. E.g., Oberlandesgericht of Hamburg, July 27, 1978 (F.R. Germ. no. 18) concerning an award made in England; Corte di Appello of Florence, October 22, 1976, S.A. Tradax Export *v.* S.p.A. Carapelli (Italy no. 18) again concerning an award made in England; Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29), affirmed by Corte di Cassazione (Sez. I), April 15, 1980, no. 2448 (Italy no. 40) concerning an award made in the United States.

413. See *supra* I–4.4.2.

414. See *supra* III–3.2 ("No Review of the Merits of the Arbitral Award").

415. Corte di Appello of Florence, October 8, 1977, Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S. (Italy no. 29); the Court found that no violation of public policy had occurred. The Corte di Cassazione (Sez. I), April 15, 1980, no. 2448 (Italy no. 40) did not express an opinion on this aspect of the case.

they may contain something which is fundamentally in violation of public policy (e.g., approval by the arbitrator of bribes by a party), which is not apparent in the decisional part of the award. In this case, such reasoning in the award should be vindicated.

III–5.4 Uniform Interpretation (and Summary)

Public policy may be distinguished as domestic and international public policy. This distinction is based on the proposition that what pertains to public policy in domestic cases is not necessarily to be regarded as pertaining to public policy in international cases. Accordingly, the field of public policy in international cases may be narrower than in domestic cases. Pursuant to the notion of international public policy, a violation of public policy is to be deemed present in very serious cases only. Article V(2) (a) and (b) can be said to refer to international public policy as has been expressly or implicitly affirmed by a substantial number of courts (pp. 359-368).

Article V(2) (a) according to which a court may refuse enforcement of an award on its own motion (*ex officio*) if the subject matter is not capable of settlement by arbitration under its law, is superfluous as it forms part of the general concept of public policy as provided in Article V(2) (b). The separate mention of the non-arbitrable subject matter in Article V(2) (a) has, however, not produced averse effects in practice (p. 359 and pp. 368-369).

The question of the non-arbitrable subject matter of Article V(2) (a) is to be determined under the law of the forum only (p. 369). The non-arbitrability of a subject matter must concern the claim as dealt with in the arbitration in its entirety; it is not to be accepted if it is only of an incidental nature (pp. 374-375).

Article V(2) (b) according to which a court may refuse enforcement of an award on its own motion if the enforcement would be contrary to its public policy is not of a residual nature, but coexists with the other provisions of the Convention, in particular Article V(1) (b) concerning due process (p. 376).

The lack of impartiality of an arbitrator is, in principle, not to be evaluated on the basis of the circumstances which may have created the lack of impartiality, but on the basis of the examination whether the arbitrator has effectively not acted in an impartial manner (pp. 377-380).

The even number of arbitrators is not a ground for refusing enforcement of the award on account of public policy if an arbitral tribunal composed of an even number of arbitrators is valid in the country in which, or under the law of which, the award was made (p. 380).
The same applies to the award without reasons (pp. 380-382).

Summary and Conclusion

1. Introduction

This study has been concerned with the interpretations given by the courts in the Contracting States in respect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958. In essence, the Convention covers two fundamental aspects of international commercial arbitration: the enforcement of the arbitration agreement and the enforcement of the arbitral award.[1] The main object has been to examine whether a uniform interpretation for the various provisions of the Convention could be achieved.

The examination has drawn its inspiration from the lessons of the past that, whilst international conventions are established to regulate a certain subject matter in a uniform manner, they are interpreted and applied differently by the courts in the States Party to them. Nearing its 25th anniversary, during which period the Convention has found adherence by 56 States, it appears that the New York Convention does not constitute an exception to this phenomenon as may be seen from some 140 cases from 18 Contracting States.

These court decisions are reported in the *Yearbook Commercial Arbitration* Volumes I(1976) – VI(1981), and have formed the basic material of this study. They have been analyzed and compared in respect of the relevant provisions of the Convention. On the basis of this comparative caselaw method, it has been attempted to formulate an interpretation which may be workable in current practice and acceptable for the courts in the Contracting States, having regard to their differing legal systems and concepts of law.

The study has been divided into the three main subject areas where (the Convention is open to interpretation: the field of application (Chapter I, Arts. I and VII), the enforcement of the arbitration agreement (Chapter II, Art. II), and the enforcement of the arbitral award (Chapter III, Arts. III-VI). Each Chapter is sub-divided into two or more Parts, corresponding to the sub-divisions of the relevant provisions of the Convention.

1. The Convention refers also to the recognition of arbitration agreements and arbitral awards. For simplicity's sake, the recognition, which scarcely plays a role in practice, is left aside. See n. II.1 and III–1.4.

At the end of each Part, the uniform interpretations, developed in that Part, are summarized; it is unnecessary to reiterate them in this Conclusion. It may suffice to repeat certain significant interpretations within the framework of a survey of the Convention's provisions.

2. Arbitral Awards Falling under the Convention

The Convention provides in Article I(1) that it applies to the enforcement of *foreign* arbitral awards, i.e., arbitral awards made in the territory of another State. This may be limited to awards made in other Contracting States if the first reservation of Article I(3) is used.[2]

The criterion of territoriality is, in fact, the sole criterion for the Convention's field of application in regard to the award. In particular, it does not condition its scope upon either the nationality of the parties or the internationality of the subject matter involved.[3] The use of one clear criterion has probably been the reason why the courts have generally not had difficulties with the Convention's definition of its field of application for the arbitral award as such.

On the other hand, according to Article I(1), the Convention can also be applied to awards which are *not considered as domestic* awards. This additional possibility for the Convention's field of application envisages those awards which are, on the basis of an agreement of the parties, governed by an arbitration law of a country which is different from the country in which the award is to be made. It would carry too far to repeat the inextricable complications to which the application of the second criterion may lead.[4] Presumably, because of these complications, an agreement by which the award is to be governed by an arbitration law which is different from the arbitration law of the country in which the award is to be made, virtually never occurs in practice. Correspondingly, the second criterion has not been applied by the courts hitherto; and, it is submitted, this rather theoretical invention, with which the Convention could have dispensed, should remain a dead letter.

There exists a difference of opinion amongst the courts whether two other types of decisions can be enforced under the Convention. The first type is the so-called "a-national" award which will be considered hereafter (see no. 10).

The second type of decisions are decisions rendered in procedures akin to arbitration. These procedures are governed not by a law on arbitration, but by contract law. Examples are the Italian *arbitrato irrituale* (as opposed to the Italian arbitration proper, called *arbitrato rituale*

2. See I–1.1.
3. See I–1.2 and 3.
4. See I–1.5.

governed by the law on arbitration contained in the Italian Code of Civil Procedure) and the Dutch *bindend advies* (as opposed to arbitration proper, called *arbitrage* governed by the law on arbitration contained in the Dutch Code of Civil Procedure). For this type of decisions, it is my view that their enforcement cannot take place on the basis of the Convention, as the Convention must be deemed to apply only to arbitration proper.[5]

3. Arbitration Agreements Falling Under the Convention

The Convention does not define which arbitration agreements can be enforced under its Article II(3). This lack of a definition, due to the last minute insertion of Article II concerning the arbitration agreement into the Convention, has troubled the courts to some extent. A possible uniform interpretation may be as follows: if the award is to be made in a State other than the State in which the agreement is invoked, the Convention applies to the enforcement of the agreement regardless of nationality or subject matter. If the award is to be made within the State in which the agreement is invoked, the Convention applies to the enforcement of the agreement as soon as one of the parties is foreign or the subject matter involves international commerce. The second rule of interpretation applies also if, at the time of enforcement of the agreement, it is not yet known where the award is to be made.[6]

4. Retroactive Applicability of the Convention

The Convention is also silent on the question whether it applies retroactively, which has caused quite diverse judicial interpretations. However, with the progress of time this is becoming a moot point. The character of the Convention is mainly procedural; thus a possible uniform interpretation may be that the Convention applies to the enforcement of any arbitration agreement and arbitral award whenever made.[7]

5. Non-exclusive Applicability of the Convention

Another aspect of the Convention's applicability is that the Convention is not exclusively applicable once an agreement or award falls under it. According to Article VII(1) the enforcement of an arbitral award may also be based on other mulitlateral or bilateral treaties, or domestic law concerning the enforcement of foreign arbitral awards, if such basis is more favourable than the Convention.

5. See I–1.7.
6. See I–2.
7. See I–3.

Although the text of Article VII(1) does not refer to the enforcement of the arbitration agreement, the provision can be deemed to apply to this action as well.[8]

As far as domestic law is concerned, this basis is usually less favourable than the Convention and, therefore, finds little application in practice.[9] On the other hand, enforcement on the basis of another multilateral or bilateral treaty may sometimes be more favourable. In regard to the relationship between the other mulitlateral and bilateral treaties and the Convention, conflicts can generally be resolved by virtue of the conflict of treaties principle of maximum efficacy, rather than the principles of *lex posterior* or *lex specialis.*[10]

The more-favourable-right-provision of Article VII(1) appears to be somewhat neglected in practice. Although it was inserted in the Convention to provide for enforcement in the largest possible number of cases, it may have the negative effect of hampering the achievement of uniformity in the legal regime governing the enforcement of arbitration agreements and arbitral awards within the context of international commercial arbitration.

6. Enforcement of the Arbitration Agreement

The Convention's provisions relating to the enforcement of the arbitration agreement have hitherto not posed major problems of interpretation for the courts, with the exception of Article II(2) relating to the written form of the arbitration agreement. According to Article II(3), the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, shall, at the request of one of the parties, refer them to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Article II(3) gives *no discretionary power* whether or not to comply with a request for a stay of court proceedings brought in violation of an arbitration agreement. The rule that the stay is mandatory has been almost unanimously affirmed by the courts.[11]

The condition for the enforcement of the agreement that the arbitration agreement should not be "*null and void, inoperative or incapable of being performed*" has not been frequently applied by the courts. Although the wording is seemingly all-embracing, and could potentially lead to diverging interpretations, in anticipation of future cases it is submitted that it is to be construed narrowly.[12]

8. See I–4.2.
9. See I–4.3.
10. See I–4.4.
11. See II–1.2.3.
12. See II–1.3.4.

The phrase in Article II(3) "*an agreement within the meaning of this article*" incorporates as conditions for enforcement of the agreement that

(a) there be a difference in respect of a defined legal relationship whether contractual or not (Art. II(1)),

(b) that the subject matter be capable of settlement by arbitration (the question of arbitrability, Art. II(1)), and

(c) that the agreement be in writing (Art. II(2)).

Conditions (b) and (c) will be discussed under nos. 9 *in fine* and 7 respectively. As far as condition (a) is concerned, no noticeable difficulties of interpretation have arisen for the courts.[13]

A particularly worrying development in the United States is that certain courts have held that the Convention precludes the availability of an *attachment* before an award is rendered. This view, which is not followed by the courts in the other Contracting States, in my opinion, is not warranted under the Convention.[14]

7. Arbitration Agreement "In Writing"

The provision of the Convention which has provoked the most diverse judicial interpretations is the requirement of the written form of the arbitration agreement as defined by Article II(2) of the Convention. This provision states that "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." The confusion mainly stems from the Italian courts, although several courts in other Contracting States have likewise expressed differing views.[14]

With the exception of the Italian Supreme Court, the courts have underwritten the principle that Article II(2) supersedes the requirements of municipal law regarding the form of the arbitration agreement in those cases where the agreement falls under the Convention. In other words, it can be regarded as an internationally uniform rule for the formal validity of the arbitration agreement.

This means that if an arbitration agreement does not meet the formal requirements of Article II(2), enforcement cannot be based on the Convention. In such a case enforcement may be possible, by virtue of the more-favourable-right-provision of Article VII(1), on the basis of domestic law or another multilateral or bilateral treaty (see no. 5 above).

The uniform rule character of Article II(2) has as consequence that neither more nor less than is provided by Article II(2) may be demanded for the form of the arbitration agreement. Similarly, if an

13. See II–1.3.2.
14. See II–1.2.5.

arbitration agreement does not comply with Article II(2), the uniform rule character precludes the possibility of proof of the existence of the agreement by other means. Both aspects have not encountered difficulties on the judicial level.

On the other hand, the courts differ on the question whether a party can be deemed to be estopped from invoking non-compliance of the agreement with Article II(2) in those cases where that party has acted specifically as if he considers himself bound by the arbitration agreement. In my opinion, the estoppel is to be accepted in this case because of the fundamental principle of good faith.[15]

Another consequence of the uniform rule character may be that international arbitrators have to apply Article II(2) of the Convention as well. In my opinion, an international arbitrator must indeed do so, subject to the possibility to rely on another basis in virtue of the more-favourable-right-provision of Article VII(1) of the Convention.[16]

The question as to when the requirements of Article II(2) can be deemed to be met has been given different answers by the courts. This does not apply so much to the first alternative of Article II(2), an arbitral clause contained in a contract or an arbitration agreement which is signed by the parties. In this case the signatures of the parties are indispensable. However, in the case of an arbitral clause contained in a contract, the signatures for the contract as a whole are sufficient; contrary to what the Italian Supreme Court in certain cases has held, the signatures need not specifically concern the arbitral clause.[17]

Uncertainty exists especially in regard to the second alternative ot Article II(2), the contract including the arbitral clause or the arbitration agreement contained in an exchange of documents. The second alternative was added by the drafters of the Convention to make allowances for the more modern means of concluding contracts in international trade.

The interpretation advanced in this study is that the second alternative of Article II(2) does not require the signatures of the parties. On the other hand, the requirement of an exchange means that a written proposal to arbitrate is made by one party to the other who must return his acceptance to the former in writing.

Regarding the question when the acceptance in writing can be deemed to have been complied with, it is submitted that the existence of such acceptance is to be readily assumed. This interpretation may attenuate the fairly demanding requirements of Article II(2) which, in spite of the efforts of the drafters of the Convention, does not fully correspond to current practices in international trade.[18]

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15. See II–2.2.2 and 3.
16. See II–2.2.4.
17. See II–2.3.2.
18. See II–2.3.3 and 4.

The question of an arbitral clause in standard conditions has not yet had extensive judicial review, notwithstanding the fact that most international transactions are concluded on this basis. To this end, it has been attempted to develop interpretations independent from municipal law.[19]

8. Enforcement of the Arbitral Award

The second aspect of international commercial arbitration as regulated by the Convention, is the enforcement of the award made in another State. The initial provision of the Convention relating to this action is *Article III*, which essentially concerns the procedure for the enforcement. This provision has generally not provoked differing interpretations.[20]

The same can be said of *Article IV* which lays down the conditions to be fulfilled by the party seeking enforcement of an award, *viz.*, that he has only to supply the authenticated arbitral award or certified copy thereof and the arbitration agreement or a certified copy thereof.[21]

9. Grounds for Refusal of Enforcement of the Arbitral Award

The main features of the grounds for refusal of enforcement of the award as embodied by Article V, are likewise interpreted by the courts in a more or less uniform manner. Accordingly, in general the courts have affirmed that the grounds listed in paragraph 1 of Article V have to be proven by the party against whom the enforcement is sought; that the grounds listed in Article V are limitative, excluding, in particular, the review of the merits of the award by the enforcement court; and that they have to be construed narrowly.[22]

On the other hand, the courts have given differing interpretations in respect of some of the grounds for refusal of enforcement enumerated in *the first paragraph of Article V.*

With regard to ground *a* concerning the invalidity of the arbitration agreement, the Italian Supreme Court has held that it does not include the requirements for the form of the agreement as contained in the uniform provisions of Article II(2), but that the formal validity is to be judged under the applicable law. In my opinion, other courts have been correct in not sharing the view that Article II(2) applies only in the action for the enforcement of the arbitration agreement, and, according-

19. See II–2.4.3.
20. See III–1.
21. See III–2.
22. See III–3.

ly, have applied Article II(2) in the action for the enforcement of the arbitral award as well.[23]

Although ground *b* has frequently been invoked by respondents, the courts have rarely held that the requirements of due process have been violated. There exists an almost uniform interpretation – corresponding to the "pro-enforcement bias" of the Convention – that a violation of due process is to be accepted in serious cases only.[24]

Ground *c* concerning the award made by the arbitrator in excess of his authority (*extra* or *ultra petita*) has scarcely been applied in practice. This ground does not seem to pose problems of interpretation, except for the question of an award which does not dispose of all questions submitted to the arbitrator's decision (*infra petita*), a case not envisaged by the text of ground *c*.[25]

According to ground *d*, enforcement may be refused if the composition of the arbitral tribunal 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. The meaning of this ground for refusal of enforcement is not readily understood. In this study the interpretation is advanced that ground *d* implies that a court may not verify the regularity of the composition of the arbitral tribunal or the arbitral procedure under the law applicable to the arbitration in those cases where the parties have made an agreement on these matters, subject, however, to the overriding fundamental principles of due process.[26] On the other hand, ground *d* cannot, in my opinion, be taken as basis for the so-called "de-nationalized" arbitration and its companion "a-national" award (see no. 10 hereafter).

Ground *e* contains, in fact, two grounds for refusal of enforcement. The first ground is that the award has not yet become binding on the parties. Whilst the courts generally agree that this term does not imply that a leave for enforcement (exequatur or the like) need be obtained in the country in which the award is made, they differ in particular as to at which moment the award is to be considered as having become binding. Most of them make inquiries to this effect under the law governing the award. In my opinion, an interpretation independent from municipal law can be made. Pursuant to this autonomous interpretation, an award becomes binding once its merits can no longer be reviewed by a court or a second arbitral instance.[27]

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23. See III–4.1.3.3.
24. See III–4.2.
25. See III–4.3.
26. See III–4.4.
27. See III–4.5.2.

The second ground for refusal of enforcement provided by ground *e* is that the award has been set aside or suspended in the country of origin. This ground has not given rise to many court decisions.[28] Yet, the possible effect of this ground for refusal of enforcement may be that the grounds for refusal of the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin, as in that country the award can be set aside on all grounds contained in its arbitration law.[29] In this connection it may be added that *Article VI* gives a court the discretion to adjourn its decision on enforcement if an action for setting aside or suspension has been initiated in the country of origin. This provision has rarely been applied by the courts, but seems to be unambiguous.[30]

The grounds mentioned in the *second paragraph of Article V,* for which a court may refuse enforcement on its own motion, concern the question whether the subject matter is capable of settlement by arbitration (i.e., the question of arbitrability (ground *a*, see also Art. II(1)), and public policy (ground *b*). Although ground *a* concerning arbitrability is listed as a separate ground, it must be deemed superfluous since the question of arbitrability is generally conceived as forming part of public policy.[31]

Notwithstanding the fact that these provisions, in particular, could enable courts to take away a great deal of the Convention's effectiveness, the courts have construed these provisions narrowly, as well. To this end, the use of the distinction between the notions of domestic public policy and the narrower international public policy is increasingly gaining acceptance. It can be said that, particularly in respect of Article V(2), the courts have generally exhibited a favourable attitude towards the Convention.[32]

10. Applicable Law

The Convention contains several conflict of laws provisions for determining the applicable law. According to Article V(1)(a) the arbitration agreement is governed by the law to which the parties have subjected the agreement, or, failing any indication thereon, the law of the country where the award was made. As mentioned before, Article V(1)(d) provides that, only in the absence of an agreement of the parties in respect of the composition of the arbitral tribunal or the arbitral procedure, is the law of the country where the arbitration took place to be applied. And, according to Article V(1)(e), the arbitral award is govern-

28. See III–4.5.3.1 and 2.
29. See III–4.5.3.4.
30. See III–4.5.3.3.
31. See III–5.2.
32. See III–5.1 and 3.

ed by the law of the country in which, or under the law of which, the award was made.[33]

These provisions have been dealt with extensively in the literature from the point of view of party autonomy. In particular, they would allow the parties to provide for the applicability of an arbitration law which is different from the law of the place of arbitration (i.e., the country where the award is, or is to be, made). This faculty corresponds with the afore-mentioned second criterion of the Convention's field of application (see no. 2 above). Although this faculty theoretically can be used pursuant to the Convention, in practice it has appeared that the arbitration agreement and the arbitral award have almost always been found to be governed by the law of the country where the award is, or is to be, made.

It has been argued that Article V(1)(d) would even allow a complete party autonomy in the sense that the parties are permitted to "de-nationalize" the arbitration from the applicability of any national arbitration. In my view, the Convention does not provide a legal basis for the "de-nationalized" arbitration since the Convention's provisions, notably Article V(1)(a) and (e), presuppose that arbitration is governed by a national arbitration law. Consequently, the so-called "a-national" award resulting from such arbitration cannot be enforced under the Convention.[34]

Whatever may be, a general practice has been developed on the issue of the applicable arbitration law, *viz.*, that the arbitration agreement, arbitral procedure and arbitral award are normally governed by one and the same law, which is the law of the country where the award is, or is to be, made. Of course, the national arbitration law does not apply to those elements for which the Convention provides uniform rules (e.g., Art. II(2) concerning the written form of the arbitration agreement).

It is true that this general practice may not be ideal in view of the sometimes fortuitous character of the place of arbitration and the sometimes parochial particularities of national arbitration laws. Nevertheless, for the time being, the clear rule of the applicability of the law of the place of arbitration is, failing a better solution, to be preferred over the other possibilities which may involve complex legal problems and create an undesirable degree of uncertainty. It means, in fact, that one should be aware of choosing a country which is favourable to arbitration.

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33. See III–4.1.3.4 and 5, III–4.4.2 and III–4.5.3.
34. See I–1.6.

11. Is a Revision of the Convention Needed?

The survey of the Convention's provisions and judicial interpretations, as given under nos. 2-10 above, is, of course, of a very general nature and does not mention the many detailed points examined in this study, which are subject to differing interpretations or which are susceptible to different interpretations. Yet, it may be said that the court decisions on the Convention reported so far show that, as a rule, the courts interpret and apply the Convention in a manner which is well-disposed towards international commercial arbitration.

The differences in judicial interpretations are not such that they seriously hamper the Convention's effectiveness. This is remarkable if one considers the system and text of the Convention itself. The Convention's system is not readily accessible to one who reads it for the first time: it starts with a definition of its field of application in respect of the arbitral award. It then mentions in Article II the arbitration agreement, including a rather "hidden" provision in the third paragraph – not announced in the title of the Convention – concerning the enforcement of the arbitration agreement, without specifying the field of application in this respect. It contains subsequent provisions concerning the procedure and conditions for the enforcement of the arbitral award (Arts. III-VI). And finally, it contains a more-favourable-right-provision (Art. VII(1)) which, by implication, must be deemed also to apply to the enforcement of the arbitration agreement. Furthermore, several provisions are rather ambiguous or not readily understandable (e.g., Art. I(1), second criterion, Art. II(2) and Art. V(1)(d)).

This brings us to the final question: does the Convention need to be revised with the purpose of clarifying its text by means of an additional Protocol or the like? As observed in the Introduction, the opinion has been expressed, in particular by the Asian-African Legal Consultative Committee (AALCC), that such a revision may be desirable.

Having regard to the examination in this study of the approximately 140 reported court decisions from 18 Contracting States in which the Convention has been interpreted and applied so far, the difficulties are, in my opinion, not of such a magnitude that a revision is needed for the time being. The only provision which might qualify for a revision would be Article II(2) relating to the written form of the arbitration agreement because, as mentioned, to a certain extent it is no longer in accordance with the practices of current international commerce. But for this provision also, it has been concluded that the process of establishing an additional Protocol or the like is not worth the price of a new text.[35]

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35. See II–2.6.

The process of adoption and implementation of an additional Protocol is time-consuming and may lead to complex situations. Assuming that a better text than the present one can be established, it will take time before the Protocol will be adopted by all States which are presently Party to the Convention. In the interval uncertainty may exist. This situation may even continue if States do not deem it necesary to adhere to the new Protocol. In addition, however better the new text may be, even the new Protocol will require time before a more or less uniform judicial interpretation can be achieved.[36]

12. Model Uniform Law on International Commercial Arbitration

The question whether the Convention needs to be revised is to be distinguished from the question of a uniform law on arbitration. The Convention's field of application is limited to the enforcement of arbitration agreements within its purview and of foreign arbitral awards. It does not give an all-embracing regulation of international commercial arbitration. For example, it does not apply to the action for the setting aside of awards, international as they may be, which action is left to the arbitration law of the country of origin.[37] In view of the differences in national arbitration laws, it may be desirable to establish a uniform law on arbitration, at least as far as international commercial arbitration is concerned. The efforts to establish a uniform law by means of an international convention, however, have proven to be difficult. The disappointing experience of the European Uniform Law of 1966 is an example of this.[38] A more realistic approach would seem to be to prepare a model uniform law which can serve as basis for adapting national arbitration laws. Within this perspective, the United Nations Commission on International Trade Law (UNCITRAL), at its twelfth session in June 1979, has taken the decision to prepare such a model law which, I hope, will materialize within the not too distant future.[39]

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36. The conclusion that the Convention, despite some deficiencies, has satisfactorily met the general purpose for which it was adopted and that it would therefore be inadvasible to amend its provisions or prepare a Protocol, at least for the time being, is also reached by the Secretary-General of UNCITRAL in his report *Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UN DOC A/CN.9/168 (April 1979).

37. See I–1.4.2.

38. The Uniform Law is attached to the European Convention on Arbitration, done at Strasbourg on January 20, 1966, *European Treaty Series* No. 56. The Convention has been signed only by Austria and Belgium. Belgium has also deposited the instrument of ratification on February 22, 1973, and has implemented the Uniform Law by a Law of July 4, 1972, *Moniteur belge* of August 8, 1972.

39. "Report of the United Nations Commission on International Trade Law on the Work of Its Twelfth Session", *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17,* UN DOC A/34/17, para. 81 (1979). See also the note by the Secretariat of →

13. Unification of Judicial Interpretation

The conclusion being that, at present, the New York Convention does not need a revision for clarifying its text by means of an additional Protocol or the like, but that the preparation of a model uniform law for international commercial arbitration is desirable, efforts should be continued to harmonize the judicial interpretations of the Convention with the object of arriving at a uniform interpretation. This requires that the judicial interpretations should continue to be monitored on a worldwide basis.

The reporting of court decisions on the Convention in the *Yearbook Commercial Arbitration* as of its first Volume in 1976, as well as the reporting and surveys in various other places, are invaluable aids to this aim. The effectiveness of the Convention for international commercial arbitration can continue and improve only if the judicial interpretations converge.

I hope that the analyses and comparisons of the judicial interpretations during the almost 25 years of the Convention's existence, as well as the suggestions for uniform interpretations in this study, may be a modest contribution to this end.

UNCITRAL entitled "Progress Report on the Preparation of a Model Law on Arbitral Procedure", UN DOC A/CN.9/190 (1980).

Annexes

ANNEX A

TEXT OF THE CONVENTION

The text of the Convention is published in 330 *United Nations Treaty Series*, p. 38, no. 4739 (1959).

Because of technical difficulties in reproduction, the equally authentic Chinese and Russian texts of the Convention as mentioned in Article XVI(1) have not been included.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958

Article I

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.

Article II

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

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.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this

article, shall *, at the request of one of the parties, refer the parties to arbitration, unless if finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

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.

Article IV

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 releid 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.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*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 falling 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

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* The word "shall" has been left out in the text of Article II(3) of the Convention as published in 330 *United Nations Treaty Series* (1959) p. 38 at p. 39. The omission must be considered as a printing error as the Final Act of the New York Conference of 1958 includes the word "shall" (UN DOC E/CONF. 26/8/Rev. 1 and E/CONF.26/9/Rev. 1, p. 9).

(*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.

2. 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.

Article VI

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.

Article VII

1. 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.

2. 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.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit of such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention

.gainst other Contracting States except to the extent that it is itself bound to apply he Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contem-›lated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;
(*b*) Accessions in accordance with article IX;
(*c*) Declarations and notifications under articles I, X and XI;
(*d*) The date upon which this Convention enters into force in accordance with .rticle XII;
(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish exts shall be equally authentic, shall be deposited in the archives of the United Na-ions.

2. The Secretary-General of the United Nations shall transmit a certified copy of his Convention to the States contemplated in article VIII.

:onvention pour la reconnaissance et l'exécution des sentences arbitrales étran-;ères, New York, le 10 juin 1958

Article I

1. La présente Convention s'applique à la reconnaissance et à l'exécution des sen-ences arbitrales rendues sur le territoire d'un Etat autre que celui où la reconnais-ance et l'exécution des sentences sont demandées, et issues de différends entre per-onnes physiques ou morales. Elle s'applique également aux sentences arbitrales qui ıe sont pas considérées comme sentences nationales dans l'Etat où leur reconnais-ance et leur exécution sont demandées.

2. On entend par "sentences arbitrales" non seulement les sentences rendues par .es arbitres nommés pour des cas déterminés, mais également celles qui sont ren-.ues par des organes d'arbitrage permanents auxquels les parties se sont soumises.

3. Au moment de signer ou de ratifier la présente Convention, d'y adhérer ou de aire la notification d'extension prévue à l'article X, tout Etat pourra, sur la base de ı réciprocité, déclarer qu'il appliquera la Convention à la reconnaissance et à l'exé-:ution des seules sentences rendues sur le territoire d'un autre Etat contractant. Il ›ourra également déclarer qu'il appliquera la Convention uniquement aux diffé-ends issus de rapports de droit, contractuels ou non contractuels, qui sont consi-lérés comme commerciaux par sa loi nationale.

Article II

1. Chacun des Etats contractants reconnaît la convention écrite par laquelle les ›arties s'obligent à soumettre à un arbitrage tous les différends ou certains des :ifférends qui se sont élevés ou pourraient s'élever entre elles au sujet d'un rapport .e droit déterminé, contractuel ou non contractuel, portant sur une question sus-eptible d'être réglée par voie d'arbitrage.

2. On entend par "convention écrite" une clause compromissoire insérée dans un ontrat, ou un compromis, signés par les parties ou contenus dans un échange de ›ttres ou de télégrammes.

3. Le tribunal d'un Etat contractant, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu une convention au sens du présent article, renverra les parties à l'arbitrage, à la demande de l'une d'elles, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée.

Article III

Chacun des Etats contractants reconnaîtra l'autorité d'une sentence arbitrale et accordera l'exécution de cette sentence conformément aux règles de procédure suivies dans le territoire où la sentence est invoquée, aux conditions établies dans les articles suivants. Il ne sera pas imposé, pour la reconnaissance ou l'exécution des sentences arbitrales auxquelles s'applique la présente Convention, de conditions sensiblement plus rigoureuses, ni de frais de justice sensiblement plus élevés, que ceux qui sont imposés pour la reconnaissance ou l'exécution des sentences arbitrales nationales.

Article IV

1. Pour obtenir la reconnaissance et l'exécution visées à l'article précédent, la partie qui demande la reconnaissance et l'exécution doit fournir, en même temps que la demande:

(*a*) L'original dûment authentifié de la sentence ou une copie de cet original réunissant les conditions requises pour son authenticité;

(*b*) L'original de la convention visée à l'article II, ou une copie réunissant les conditions requises pour son authenticité.

2. Si ladite sentence ou ladite convention n'est pas rédigée dans une langue officielle du pays où la sentence est invoquée, la partie qui demande la reconnaissance et l'exécution de la sentence aura à produire une traduction de ces pièces dans cette langue. La traduction devra être certifiée par un traducteur officiel ou un traducteur juré ou par un agent diplomatique ou consulaire.

Article V

1. La reconnaissance et l'exécution de la sentence ne seront refusées, sur requête de la partie contre laquelle elle est invoquée, que si cette partie fournit à l'autorité compétente du pays où la reconnaissance et l'exécution sont demandées, la preuve:

(*a*) Que les parties à la convention visée à l'article II étaient, en vertu de la loi à elles applicable, frappées d'une incapacité, ou que ladite convention n'est pas valable en vertu de la loi à laquelle les parties l'ont subordonnée ou, à défaut d'une indication à cet égard, en vertu de la loi du pays où la sentence a été rendue; ou

(*b*) Que la partie contre laquelle la sentence est invoquée n'a pas été dûment informée de la désignation de l'arbitre ou de la procédure d'arbitrage, ou qu'il lui a été impossible, pour une autre raison, de faire valoir ses moyens; ou

(*c*) Que la sentence porte sur un différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire, ou qu'elle contient des décisions qui dépassent les termes du compromis ou de la clause compromissoire; toutefois, si les dispositions de la sentence qui ont trait à des questions soumises à l'arbitrage peuvent être dissociées de celles qui ont trait à des questions non soumises à l'arbitrage, les premières pourront être reconnues et exécutées; ou

(*d*) Que la constitution du tribunal arbitral ou la procédure d'arbitrage n'a pas été conforme à la convention des parties, ou, à défaut de convention, qu'elle n'a pas été conforme à la loi du pays où l'arbitrage a eu lieu; ou

(*e*) Que la sentence n'est pas encore devenue obligatoire pour les parties ou a été annulée ou suspendue par une autorité compétente du pays dans lequel, ou d'après la loi duquel, la sentence a été rendue.

2. La reconnaissance et l'exécution d'une sentence arbitrale pourront aussi être refusées si l'autorité compétente du pays où la reconnaissance et l'exécution sont requises constate:

(*a*) Que, d'après la loi de ce pays, l'objet du différend n'est pas susceptible d'être réglé par voie d'arbitrage; ou

(*b*) Que la reconnsaissance ou l'exécution de la sentence serait contraire à l'ordre public de ce pays.

Article VI

Si l'annulation ou la suspension de la sentence est demandée à l'autorité compétente visée à l'article V, paragraphe 1, *e*, l'autorité devant qui la sentence est invoquée peut, si elle l'estime approprié, surseoir à statuer sur l'exécution de la sentence; elle peut aussi, à la requête de la partie qui demande l'exécution de la sentence, ordonner à l'autre partie de fournir des sûretés convenables.

Article VII

1. Les dispositions de la présente Convention ne portent pas atteinte à la validité des accords multilatéraux ou bilatéraux conclus par les Etats contractants en matière de reconnaissance et d'exécution de sentences arbitrales et ne privent aucune partie intéressée du droit qu'elle pourrait avoir de se prévaloir d'une sentence arbitrale de la manière et dans la mesure admises par la législation ou les traités du pays où la sentence est invoquée.

2. Le Protocole de Genève de 1923 relatif aux clauses d'arbitrage et la Convention de Genève de 1927 pour l'exécution des sentences arbitrales étrangères cesseront de produire leurs effets entre les Etats contractants du jour, et dans la mesure, où ceux-ci deviendront liés par la présente Convention.

Article VIII

1. La présente Convention est ouverte jusqu'au 31 décembre 1958 à la signature de tout Etat Membre des Nations Unies, ainsi que de tout autre Etat qui est, ou deviendra par la suite, membre d'une ou plusieurs institutions spécialisés des Nations Unies ou partie au Statut de la Cour internationale de Justice, ou qui aura été invité par l'Assemblée générale des Nations Unies.

2. La présente Convention doit être ratifiée et les instruments de ratification déposés auprès du Secrétaire général de l'Organisation des Nations Unies.

Article IX

1. Tous les Etats visés à l'article VIII peuvent adhérer à la présente Convention.

2. L'adhésion se fera par dépôt d'un instrument d'adhésion auprès du Secrétaire général de l'Organisation des Nations Unies.

Article X

1. Tout Etat pourra, au moment de la signature, de la ratification ou de l'adhésion, déclarer que la présente Convention s'étendra à l'ensemble des territoires qu'il représente sur le plan international, ou à l'un ou plusieurs d'entre eux. Cette déclaration produira ses effets au moment de l'entrée en vigueur de la Convention pour ledit Etat.

2. Par la suite, toute extension de cette nature se fera par notification adressée au Secrétaire général de l'Organisation des Nations Unies et produira ses effets à partir du quatre-vingt-dixième jour qui suivra la date à laquelle le Secrétaire général

de l'Organisation des Nations Unies aura reçu la notification, ou à la date d'entrée en vigueur de la Convention pour ledit Etat si cette dernière date est postérieure.

3. En ce qui concerne les territoires auxquels la présente Convention ne s'applique pas à la date de la signature, de la ratification ou de l'adhésion, chaque Etat intéressé examinera la possibilité de prendre les mesures voulues pour étendre la Convention à ces territoires, sous réserve le cas échéant, lorsque des motifs constitutionnels l'exigeront, de l'assentiment des gouvernements de ces territoires.

Article XI

Les dispositions ci-après s'appliqueront aux Etats fédératifs ou non unitaires:

(*a*) En ce qui concerne les articles de la présente Convention qui relèvent de la compétence législative du pouvoir fédéral, les obligations du gouvernement fédéral seront les mêmes que celles des Etats contractants qui ne sont pas des Etats fédératifs;

(*b*) En ce qui concerne les articles de la présente Convention qui relèvent de la compétence législative de chacun des Etats ou provinces constituants, qui ne sont pas, en vertu du système constitutionnel de la fédération, tenus de prendre des mesures législatives, le gouvernement fédéral portera le plus tôt possible, et avec son avis favorable, lesdits articles à la connaissance des autorités compétentes des Etats ou provinces constituants;

(*c*) Un Etat fédératif Partie à la présente Convention communiquera, à la demande de tout autre Etat contractant qui lui aura été transmise par l'intermédiaire du Secrétaire général de l'Organisation des Nations Unies, un exposé de la législation et des pratiques en vigueur dans la fédération et ses unités constituantes, en ce qui concerne telle ou telle disposition de la Convention, indiquant la mesure dans laquelle effet a été donné, par une action législative ou autre, à ladite disposition.

Article XII

1. La présente Convention entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt du troisième instrument de ratification ou d'adhésion.

2. Pour chacun des Etats qui ratifieront la Convention ou y adhéreront après le dépôt du troisième instrument de ratification ou d'adhésion, elle entrera en vigueur le quatre-vingt-dixième jour qui suivra la date du dépôt par cet Etat de son instrument de ratification ou d'adhésion.

Article XIII

1. Tout Etat contractant pourra dénoncer la présente Convention par notification écrite adressée au Secrétaire général de l'Organisation des Nations Unies. La dénonciation prendra effect un an après la date où le Secrétaire général de l'Organisation des Nations Unies aura reçu la notification.

2. Tout Etat qui aura fait une déclaration ou une notification conformément à l'article X pourra notifier ultérieurement au Secrétaire général de l'Organisation des Nations Unies que la Convention cessera de s'appliquer au territoire en question un an après la date à laquelle le Secrétaire général aura reçu cette notification.

3. La présente Convention demeurera applicable aux sentences arbitrales au sujet desquelles une procédure de reconnaissance ou d'exécution aura été entamée avant l'entrée en vigueur de la dénonciation.

Article XIV

Un Etat contractant ne peut se réclamer des dispositions de la présente Convention contre d'autres Etats contractants que dans la mesure où il est lui-même tenu d'appliquer cette convention.

Article XV

La Secrétaire général de l'Organisation des Nations Unies notifiera à tous les Etats visés à l'article VIII:

(*a*) Les signatures et ratifications visées à l'article VIII;

(*b*) Les adhésions visées à l'article IX;

(*c*) Les déclarations et notifications visées aux articles premier, X et XI;

(*d*) La date où la présente Convention entrera en vigueur, en application de l'article XII;

(*e*) Les dénonciations et notifications visées à l'article XIII.

Article XVI

1. La présente Convention, dont les textes anglais, chinois, espagnol, français et russe font également foi, sera déposée dans les archives de l'Organisation des Nations Unies.

2. Le Secrétaire général de l'Organisation des Nations Unies remettra une copie certifiée conforme de la présente Convention aux Etats visés à l'article VIII.

Convención sobre el reconocimiento y ejecución de las sentencias arbitrales extranjeras, Nueva York, el 10 de junio de 1958

Artículo I

1. La presente Convención se aplicará al reconocimiento y la ejecución de las sentencias arbitrales dictadas en el territorio de un Estado distinto de aquel en que se pide el reconocimiento y la ejecución de dichas sentencias, y que tengan su origen en diferencias entre personas naturales o jurídicas. Se aplicará también a las sentencias arbitrales que no sean consideradas como sentencias nacionales en el Estado en el que se pide su reconocimiento y ejecución.

2. La expresión "sentencia arbitral" no sólo comprenderá las sentencias dictadas por los árbitros nombrados para casos determinados, sino también las sentencias dictadas por los órganos arbitrales permanentes a los que las partes se hayan sometido.

3. En el momento de firmar o de ratificar la presente Convención, de adherirse a ella o de hacer la notificación de su extensión prevista en el artículo X, todo Estado podrá, a base de reciprocidad, declarar que aplicará la presente Convención al reconocimiento y a la ejecución de las sentencias arbitrales dictadas en el territorio de otro Estado Contratante únicamente. Podrá también declarar que sólo aplicará la Convención a los litigios surgidos de relaciones jurídicas, sean o no contractuales, consideradas comerciales por su derecho interno.

Artículo II

1. Cada uno de los Estados Contratantes reconocerá el acuerdo por escrito conforme al cual las partes se obliguen a someter a arbitraje todas las diferencias o ciertas diferencias que hayan surgido o puedan surgir entre ellas respecto a una determinada relación jurídica, contractual o no contractual, concerniente a un asunto que pueda ser resuelto por arbitraje.

2. La expresión "acuerdo por escrito" denotará una cláusula compromisoria incluída en un contrato o un compromiso, firmados por las partes o contenidos en un canje de cartas o telegramas.

3. El tribunal de uno de los Estados Contratantes al que se someta un litigio respecto del cual las partes hayan concluído un acuerdo en el sentido del presente

artículo, remitirá a las partes al arbitraje, a instancia de una de ellas, a menos que compruebe que dicho acuerdo es nulo, ineficaz o inaplicable.

Artículo III

Cada uno de los Estados Contratantes reconocerá la autoridad de la sentencia arbitral y concederá su ejecución de conformidad con las normas de procedimiento vigentes en el territorio donde la sentencia sea invocada, con arreglo a las condiciones que se establecen en los artículos siguientes. Para el reconocimiento o la ejecución de las sentencias arbitrales a que se aplica la presente Convención, no se impondrán condiciones apreciablemente más rigurosas, ni honorarios o costas más elevados, que los aplicables al reconocimiento o a la ejecución de las sentencias arbitrales nacionales.

Artículo IV

1. Para obtener el reconocimiento y la ejecución previstos en el artículo anterior, la parte que pida el reconocimiento y la ejecución deberá presentar, junto con la demanda:

(*a*) El original debidamente autenticado de la sentencia o una copia de ese original que reúna las condiciones requeridas para su autenticidad;

(*b*) El original del acuerdo a que se refiere el artículo II, o una copia que reúna las condiciones requeridas para su autenticidad.

2. Si esa sentencia o ese acuerdo no estuvieran en un idioma oficial del país en que se invoca la sentencia, la parte que pida el reconocimiento y la ejecución de esta última deberá presentar una traducción a ese idioma de dichos documentos. La traducción deberá ser certificada por un traductor oficial o un traductor jurado, o por un agente diplomático o consular.

Artículo V

1. Sólo se podrá denegar el reconocimiento y la ejecución de la sentencia, a instancia de la parte contra la cual es invocada, si esta parte prueba ante la autoridad competente del país en que se pide el reconocimiento y la ejecución:

(*a*) Que las partes en el acuerdo a que se refiere el artículo II estaban sujetas a alguna incapacidad en virtud de la ley que le es aplicable o que dicho acuerdo no es válido en virtud de la ley a que las partes lo han sometido, o si nada se hubiera indicado a este respecto, en virtud de la ley del país en que se haya dictado la sentencia; o

(*b*) Que la parte contra la cual se invoca la sentencia arbitral no ha sido debidamente notificada de la designación del árbitro o del procedimiento de arbitraje o no ha podido, por cualquier otra razón, hacer valer sus medios de defensa; o

(*c*) Que la sentencia se refiere a una diferencia no prevista en el compromiso o no comprendida en las disposiciones de la cláusula compromisoria, o contiene decisiones que exceden de los términos del compromiso o de la cláusula compromisoria; no obstante, si las disposiciones de la sentencia que se refieren a las cuestiones sometidas al arbitraje pueden separarse de las que no han sido sometidas al arbitraje, se podrá dar reconocimiento y ejecución a las primeras; o

(*d*) Que la constitución del tribunal arbitral o el procedimiento arbitral no se han ajustado al acuerdo celebrado entre las partes o, en defecto de tal acuerdo, que la constitución del tribunal arbitral o el procedimiento arbitral no se han ajustado a la ley del país donde se ha efectuado el arbitraje; o

(*e*) Que la sentencia no es aún obligatoria para las partes o ha sido anulada o suspendida por una autoridad competente del país en que, o conforme a cuya ley, ha sido dictada esa sentencia.

2. También se podrá denegar el reconocimiento y la ejecución de una sentencia arbitral si la autoridad competente del país en que se pide el reconocimiento y la ejecución, comprueba:

(*a*) Que, según la ley de ese país, el objeto de la diferencia no es susceptible de solución por vía de arbitraje; o

(*b*) Que el reconocimiento o la ejecución de la sentencia serían contrarios al orden público de ese país.

Artículo VI

Si se ha pedido a la autoridad competente prevista en el artículo V, párrafo 1(*e*), la anulación o la suspensión de la sentencia, la autoridad ante la cual se invoca dicha sentencia podrá, si lo considera procedente, aplazar la decisión sobre la ejecución de la sentencia y, a instancia de la parte que pida la ejecución, podrá también ordenar a la otra parte que dé garantías apropiadas.

Artículo VII

1. Las disposiciones de la presente Convención no afectarán la validez de los acuerdos multilaterales o bilaterales relativos al reconocimiento y la ejecución de las sentencias arbitrales concertados por los Estados Contratantes ni privarán a ninguna de las partes interesadas de cualquier derecho que pudiera tener a hacer valer una sentencia arbitral en la forma y medida admitidas por la legislación o los tratados del país donde dicha sentencia se invoque.

2. El Protocolo de Ginebra de 1923 relativo a las cláusulas de arbitraje y la Convención de Ginebra de 1927 sobre la ejecución de las Sentencias Arbitrales Extranjeras dejarán de surtir efectos entre los Estados Contratantes a partir del momento y en la medida en que la presente Convención tenga fuerza obligatoria para ellos.

Artículo VIII

1. La presente Convención estará abierta hasta el 31 de diciembre de 1958 a la firma de todo Miembro de las Naciones Unidas, así como de cualquier otro Estado que sea o llegue a ser miembro de cualquier organismo especializado de las Naciones Unidas, o sea o llegue a ser parte en el Estatuto de la Corte Internacional de Justicia, o de todo otro Estado que haya sido invitado por la Asamblea General de las Naciones Unidas.

2. La presente Convención deberá ser ratificada y los instrumentos de ratificación se depositarán en poder del Secretario General de las Naciones Unidas.

Artículo IX

1. Podrán adherirse a la presente Convención todos los Estados a que se refiere el artículo VIII.

2. La adhesión se efectuará mediante el depósito de un instrumento de adhesión en poder del Secretario General de las Naciones Unidas.

Artículo X

1. Todo Estado podrá declarar, en el momento de la firma, de la ratificación o de la adhesión, que la presente Convención se hará extensiva a todos los territorios cuyas relaciones internacionales tenga a su cargo, o a uno o varios de ellos. Tal declaración surtirá efecto a partir del momento en que la Convención entre en vigor para dicho Estado.

2. Posteriormente, esa extensión se hará en cualquier momento por notificación dirigida al Secretario General de las Naciones Unidas y surtirá efecto a partir del nonagésimo día siguiente a la fecha en que el Secretario General de las Naciones

Unidas haya recibido tal notificación o en la fecha de entrada en vigor de la Convención para tal Estado, si esta última fecha fuere posterior.

3. Con respecto a los territorios a los que no se haya hecho extensiva la presente Convención en el momento de la firma, de la ratifación o de la adhesión, cada Estado interesado examinará la posibilidad de adoptar las medidas necesarias para hacer extensiva la aplicación de la presente Convención a tales territorios, a reserva del consentimiento de sus gobiernos cuando sea necesario por razones constitucionales.

Artículo XI

Con respecto a los Estados federales o no unitarios, se aplicarán las disposiciones siguientes:

(*a*) En lo concerniente a los artículos de esta Convención cuya aplicación dependa de la competencia legislativa del poder federal, las obligaciones del gobierno federal serán, en esta medida, las mismas que las de los Estados Contratantes que no son Estados federales;

(*b*) En lo concerniente a los artículos de esta Convención cuya aplicación dependa de la competencia legislativa de cada uno de los Estados o provincias constituyentes que, en virtud del régimen constitucional de la federación, no estén obligados a adoptar medidas legislativas, el gobierno federal, a la mayor brevedad posible y con su recomendación favorable, pondrá dichos artículos en conocimiento de las autoridades competentes de los Estados o provincias constituyentes;

(*c*) Todo Estado federal que sea Parte en la presente Convención proporcionará, a solicitud de cualquier otro Estado Contratante que le haya sido transmitida por conducto del Secretario General de las Naciones Unidas, una exposición de la legislación y de las prácticas vigentes en la federación y en sus entidades constituyentes con respecto a determinada disposición de la Convención, indicando la medida en que por acción legislativa o de otra índole, se haya dado efecto a tal disposición.

Artículo XII

1. La presente Convención entrará en vigor el nonagésimo día siguiente a la fecha del depósito del tercer instrumento de ratificación o de adhesión.

2. Respecto a cada Estado que ratifique la presente Convención o se adhiera a ella después del depósito del tercer instrumento de ratificación o de adhesión, la presente Convención entrará en vigor el nonagésimo día siguiente a la fecha del depósito por tal Estado de su instrumento de ratificación o de adhesión.

Artículo XIII

1. Todo Estado Contratante podrá denunciar la presente Convención mediante notificación escrita dirigida al Secretario General de las Naciones Unidas, La denuncia surtirá efecto un año después de la fecha en que el Secretario General haya recibido la notificación.

2. Todo Estado que haya hecho una declaración o enviado una notificación conforme a lo previsto en el artículo X, podrá declarar en cualquier momento posterior, mediante notificación dirigida al Secretario General de las Naciones Unidas, que la Convención dejará de aplicarse al territorio de que se trate un año después de la fecha en que el Secretario General haya recibido tal notificación.

3. La presente Convención seguirá siendo aplicable a las sentencias arbitrales respecto de las cuales se haya promovido un procedimiento para el reconocimineto o la ejecución antes de que entre en vigor la denuncia.

Artículo XIV

Ningún Estado Contratante podrá invocar las disposiciones de la presente Con-ención respecto de otros Estados Contratantes más que en la medida en que él nismo esté obligado a aplicar esta Convención.

Artículo XV

El Secretario General de las Naciones Unidas notificará a todos los Estados a que e refiere el artículo VIII:

(*a*) Las firmas y ratificaciones previstas en el artículo VIII;

(*b*) Las adhesiones previstas en el artículo IX;

(*c*) Las declaraciones y notificaciones relativas a los artículos I, X y XI;

(*d*) La fecha de entrada en vigor de la presente Convención, en conformidad on el artículo XII;

(*e*) Las denuncias y notificaciones previstas en el artículo XIII.

Artículo XVI

1. La presente Convención, cuyos textos chino, español, francés, inglés y ruso erán igualmente auténticos, será depositada en los archivos de las Naciones Unidas.

2. El Secretario General de las Naciones Unidas transmitirá una copia certificada le la presente Convención a los Estados a que se refiere el artículo VIII.

ANNEX B

LIST OF CONTRACTING STATES
(as of February 1, 1981)

The reservations refer to the reservations mentioned in Article I(3) of the Convention. According to the *1st* reservation, a State may declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State (see in particular I–1.1). According to the *2nd* reservation, a State may 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 (see in particular I–1.8). The texts of the declarations and reservations of the Contracting States are reproduced below.

State	Ratification Accession (*a*)	Reservation
Australia	Mar. 26, 1975*a*	–
Austria	May 2, 1961*a*	1
Belgium	Aug. 18, 1975	1
Benin	May 16, 1974*a*	–
Botswana	Dec. 20, 1971*a*	1-2
Bulgaria	Oct. 10, 1961	1
Byelorussian SSR	Nov. 15, 1960	1
Central African Empire	Oct. 15, 1962*a*	1-2
Chile	Sep. 4, 1975*a*	–
Colombia	Sep. 25, 1979*a*	–
Cuba	Dec. 30, 1974*a*	1-2
Czechoslovakia	July 10, 1959	1
Democratic Kampuchea	Jan. 5, 1960*a*	–
Denmark	Dec. 22, 1972*a*	1-2
Ecuador	Jan. 3, 1962	1-2
Egypt	Mar. 9, 1959*a*	–
Finland	Jan. 19, 1962	–
France	June 26, 1959	1-2
German DR	Feb. 20, 1975*a*	1-2
Germany, FR of	June, 30 1961	1
Ghana	Apr. 9, 1968*a*	–
Greece	July 16, 1962*a*	1-2
Holy See	May 14, 1975*a*	1-2
Hungary	Mar. 5 1962*a*	1-2
India	July 13, 1960	1-2
Israel	Jan. 5, 1959	–
Italy	Jan 31, 1969*a*	–
Japan	June 20, 1961*a*	1
Jordan	Nov. 15, 1979	–
Kuwait	Apr. 28, 1978*a*	1
Madagascar	July 16, 1962*a*	1-2
Mexico	Apr. 14, 1971*a*	–
Morocco	Feb. 12, 1959*a*	1
Netherlands	Apr. 24, 1964	1
Niger	Oct. 14, 1964*a*	–
Nigeria	Mar. 17, 1970*a*	1-2
Norway	Mar. 14, 1961*a*	1
Philippines	July 6, 1967	1-2
Poland	Oct. 3, 1961	1-2
Rep. of Korea	Feb. 8, 1973*a*	1-2
Romania	Sep. 13, 1961*a*	1-2
San Marino	May 17, 1979*a*	–
South Africa	May 3, 1976*a*	–
Spain	May 12, 1977*a*	–
Sri Lanka	Apr. 9, 1962	–
Sweden	Jan. 28, 1972	–
Switzerland	June 1, 1965	1
Syrian Arab Rep.	Mar. 9, 1959*a*	–
Thailand	Dec. 21, 1959*a*	–
Trinidad and Tobago	Feb. 14, 1966*a*	1-2
Tunisia	July 17, 1966*a*	1-2
Ukrainian SSR	Oct. 10, 1960	1
USSR	Aug. 24, 1960	1
United Kingdom	Sep. 24, 1975*a*	1
United Rep. of Tanzania	Oct. 13, 1964*a*	1
United States of America	Sep. 30, 1970*a*	1-2

Extensions

Australia (Mar. 26, 1975):	Australian Antartic Territory, Christmas Island, Cocos (Keeling) Islands, Norfolk Island.
Denmark (Feb. 10, 1976):	Faroe Islands, Greenland.
France (June 26, 1959):	Afars and the Issas, Comoro Islands, French Polynesia, New Caledonia, St. Pierre et Miquelon, Wallis and Futuna Islands.
Germany, FR of (June 30, 1961):	West Berlin.[1]
Netherlands (Apr. 24, 1964):	Netherlands Antilles, Surinam.[2]
United Kingdom:	Bermuda (Feb. 12, 1980), Gibraltar (Sep. 24, 1975), Hong Kong (Apr. 21, 1977), Isle of Man (May 23, 1979), Cayman Islands and Belize (Feb. 24, 1981, 1st reservation).
United States of America (Nov. 3, 1970):	American Samoa, Canton Island, Enderberry Island, Guam, Puerto Rico, Virgin Islands, Wake Island.

Declarations and Reservations of the Contracting States

The declarations and reservations reproduced below, including particularities of punctuation, are taken from the United Nations publication "*Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions. List of Signatures, Ratifications, Accessions etc.*", UN DOC ST/LEG/SER.D/12 p. 573 et seq.

The statements concerning the extensions have not been included in the texts reproduced below (see above).

The declarations and reservations made by the States which have signed the Convention only have not been reproduced. They can be found in the United Nations publication mentioned above.[3]

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1. The Governments of Albania, Bulgaria, the Byelorussian SSR, Cuba, Czechoslovakia, Poland, Romania, the Ukrainian SSR and the USSR have informed the Secretary-General of the United Nations that they consider the statement of F.R. Germany that the Convention will also apply to the *Land* Berlin as having no legal force on the ground that West Berlin is not, and never has been a State territory of F.R. Germany and that, consequently, the Government of F.R. Germany is in no way competent to assume any obligations in respect of West Berlin or to extend to it the application of international agreements, including the Convention in question.

The Governments of F.R. Germany, France, the United Kingdom and the United States have informed the Secretary-General that, in the Declaration on Berlin of May 5, 1955, which accords with instruments that previously entered into force, the Allied Kommandatura as the supreme authority in Berlin had authorized the Berlin authorities to assure the representation abroad of the interests of Berlin and its inhabitants under suitable arrangements, and that the arrangements made in accordance with the said authorization permitted F.R. Germany to extend to Berlin the international agreements which F.R. Germany concludes, provided that the final decision in every case of such an extension was left to the Allied Kommandatura and that internal Berlin action was required to make any such agreement applicable as domestic law in Berlin. For these reasons they consider the objections referred to in the preceding paragraph as unfounded.

2. Surinam became independent on Nov. 25, 1975. By a letter of Nov. 29, 1975, of the then Prime Minister to the Secretary-General of the United Nations, Surinam has declared that it will remain bound by the treaties and conventions which the Netherlands had extended to it.

3. The States which have signed the Convention only are: Argentina (Aug. 26, 1958), Costa

Austria

The Republic of Austria will apply the Convention, in accordance with the first sentence of article I(3) thereof, only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State.

Belgium

Upon ratification: In accordance with article 1, paragraph 3, the Government of the Kingdom of Belgium declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of a Contracting State.

Botswana

"The Republic of Botswana will apply the Convention only to differences arising out of legal relationship, whether contractual or not, which are considered commercial under Botswana law.

"The Republic of Botswana will apply the Convention to the Recognition and Enforcement of Awards made in the territory of another Contracting State."

Bulgaria

"Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment."

Byelorussian Soviet Socialist Republic

The Byelorussian Soviet Socialist Republic will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.

Central African Empire

Referring to the possibility offered by paragraph 3 of article I of the Convention, the Central African Republic declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

Cuba

The Republic of Cuba will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another Contracting State. With respect to arbitral awards made by other non-contracting States, it will apply the Convention only in so far as those States grant reciprocal treatment as established by mutual agreement between the parties. Moreover, it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Cuban legislation.

Czechoslovakia

"Czechoslovakia will apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State. With regard to awards

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Rica (June 10, 1958), El Salvador (June 10, 1958), Luxembourg (Nov. 11, 1958), Monaco (Dec. 31, 1958), and Pakistan (Dec. 31, 1958).

made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment."

Denmark

In accordance with the terms of article I, paragraph 3, [the Convention] shall have effect only as regards the recognition and enforcement of arbitral awards made by another Contracting State and [it] shall be valid only with respect to commercial relationships.

Ecuador

Ecuador, on a basis of reciprocity, will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting State only if such awards have been made with respect to differences arising out of legal relationships which are regarded as commercial under Ecuadorian law.

France

Referring to the possibility offered by paragraph 3 of Article I of the Convention, France declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

German Democratic Republic

In respect of article I: The German Democratic Republic will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another Contracting State. To arbitral awards made in the territories of non-contracting States, the Convention will be applied only to such extent as those States grant reciprocity. Furthermore, the German Democratic Republic will apply the Convention only to differences arising out of contractual or non-contractual legal relationships which are considered as commercial under the national law of the German Democratic Republic.

In respect of articles VIII and IX: The German Democratic Republic considers that the provisions of articles VIII and IX of the Convention are inconsistent with the principle that all States pursuing their policies in accordance with the purposes and principles of the Charter of the United Nations shall have the right to become parties to conventions affecting the interests of all States.

In respect of article X: The position of the German Democratic Republic on article X of the Convention, as far as the application of the Convention to colonial and other dependent territories is concerned, is governed by the provisions of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (Res. 1514 (XV) of 14 December 1960) proclaiming the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.

Germany, Federal Republic of

"With respect to paragraph 1 of article I, and in accordance with paragraph 3 of article I of the Convention, the Federal Republic of Germany will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State."

Greece

[Although the Greek implementing Act (Legislative Decree no. 4220 of 1961) contains in its Article 2(1) both reservations of Article I(3) of the Convention,

Greece had not communicated any reservation to the Secretary-General of the United Nations when it acceded to the Convention on July 16, 1962. Greece has rectified the omission by communicating both reservations to the Secretary-General on April 18, 1980-*AJB.*]

Holy See

The State of Vatican City will apply the said Convention on the basis of reciprocity, on the one hand, to the recognition and enforcement of awards made only in the territory of another Contracting State, and on the other hand, only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Vatican law.

Hungary

"... the Hungarian People's Republic shall apply the Convention to the recognition and enforcement of such awards only as have been made in the territory of one of the other Contracting States and are dealing with differences arising in respect of a legal relationship considered by the Hungarian law as a commercial relationship."

India

"In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India."

Japan

"... It will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."

Jordan

[The Government of Jordan] shall not be bound by any awards which are made by Israel or to which an Israeli is a party.

Kuwait

The State of Kuwait will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

It is understood that the accession of the State of Kuwait to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on the 10th of June 1958, does not mean in any way recognition of Israel or entering with it into relations governed by the Convention thereto acceded by the State of Kuwait.

Madagascar

The Malagasy Republic declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State; it further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.

Morocco

The Government of His Majesty the King of Morocco will only apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

Netherlands

Referring to paragraph 3 of article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Kingdom declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

Nigeria

"In accordance with paragraph 3 of article I of the Convention, the Federal Military Government of the Federal Republic of Nigeria declares that it will apply the Convention on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of a State party to this Convention and to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of the Federal Republic of Nigeria."

Norway

"1. We will apply the Convention only to the recognition and enforcement of awards made in the territory of one of the Contracting States."

"2. We will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in Norway, or a right in or to such property."

Philippines

"The Philippines delegation signs *ad referendum* this Convention with the reservation that it does so on the basis of reciprocity and declares that the Philippines will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State pursuant to Article I, paragraph 3 of the Convention."

(*Declaration made on ratification*) ". . . the Philippines, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and 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."

Poland

"With reservations as mentioned in article I, para. 3."

Republic of Korea

"By virtue of paragraph 3 of article I of the present Convention, the Government of the Republic of Korea declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law."

Romania

The Romanian People's Republic will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its legislation.

The Romanian People's Republic will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State. As regards awards made in the territory of certain non-contracting States, the Romanian People's Republic will apply the Convention only on the basis of reciprocity established by joint agreement between the parties.

Switzerland

Referring to the possibility offered by paragraph 3 of article I, Switzerland will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

Trinidad and Tobago

"In accordance with article I of the Convention, the Government of Trinidad and Tobago declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. The Government of Trinidad and Tobago further declares that it will apply the Convention only to differences arising out of legal relationships, whether contracted or not, which are considered as commercial under the Law of Trinidad and Tobago."

Tunisia

With the reservations provided for in article I, paragraph 3, of the Convention, that is to say, the Tunisian State will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Tunisian law.

Ukrainian Soviet Socialist Republic

The Ukrainian Soviet Socialist Republic will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.

Union of Soviet Socialist Republics

The Union of Soviet Socialist Republics will apply the provisions of this Convention in respect to arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.

United Kingdom

[Although the United Kingdom implementing Act (Arbitration Act 1975) contains in its Article 7(1) the first reservation of Article I(3) of the Convention, the United Kingdom had not communicated the making of the reservation to the Secretary-General of the United Nations when it acceded to the Convention on September 24, 1975. The United Kingdom has rectified the omission by communicating the first reservation to the Secretary-General on May 5, 1980-*AJB.*]

United Republic of Tanzania

"The Government of the United Republic of Tanganyika and Zanzibar will apply the Convention, in accordance with the first sentence of article I(3) thereof, only to the recognition and enforcement of awards made in the territory of another Contracting State."

United States of America

"The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

"The United States of America 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 United States."

ANNEX C

LIST OF IMPLEMENTING ACTS

Listed below are references of those implementing Acts which contain specific provisions in furtherance of the New York Convention.

Numbers without indication refer to pages. Number with a "n." refer to footnote on page indicated. Italics indicate place where provision is examined in particular.

"Gaja" means that the implementing Act is reproduced in G. Gaja, *New York Convention* (Dobbs Ferry 1978-1980).

Australia

Arbitration (Foreign Awards and Agreements) Act 1974, No. 136 of 1974, assented to December 9, 1974, reproduced in Gaja, IV.13.1.

In general	: 236.	Sect. 9(2)	: 255.
Sect. 2(1)-(2)	: 73.	Sect. 9(4)	: 261.
Sect. 7(1)	: *66-67.*	Sect. 9(5)	: 248.
Sect. 7(2)	: 123; 130 n. 17.	Sect. 14	: 73.

Botswana

The Recognition and Enforcement of Foreign Arbitral Awards Act 1971, No. 49 of 1971, assented to December 22, 1971, reproduced in Gaja, IV.12.1.

In general	: 236.	Sect. 3(1)	: 73; 75.

Denmark

Executive Order No. 117 of March 7, 1973, Regarding Recognition and Execution of Foreign Arbitral Awards and Regarding International Commercial Arbitration, translated in English in 43 *Nordisk Tidsskrift for International Ret* (1973) p. 179, and translated in French in *Revue de l'arbitrage* (1977) p. 358.

In general	: 236.	Sect. 2(2)	: 259.

Germany, F.R.

Law of March 15, 1961, Regarding the Convention of June 10, 1958, Concerning the Recognition and Enforcement of Foreign Arbitral Awards, *Bundesgesetzblatt* II, p. 121 of March 22, 1961, reproduced Gaja, IV.3.1.

Sect. 2	: *27-28.*

Ghana

The Arbitration Act 1961, No. 38 of 1961, assented to on March 16, 1961, reproduced in Gaja, IV.5.1.

In general	: 236.	Sect. 38(2)	: 261.
Sect. 36(1)	: 73; 75.	Sect. 40	: 139 n. 55.
Sect. 38(1)	: 254.		

India

The Foreign Awards (Recognition and Enforcement) Act 1961, No. 45 of 1961 of November 30, 1961, reproduced in Gaja, IV.6.1.

In general	: 20; 236.	Sect. 8(1)	: 254.
Sect. 2	: 53; 73; 75; 77.	Sect. 8(1)(c)	: 248.
Sect. 3	: 53-54; 77; 129 n. 17; 132-133; 139 n. 55; 147; 166.	Sect. 8(2)	: 261.

The Foreign Awards (Recognition and Enforcement) Amendment Act 1973, No. 57 of 1973 (of November 26, 1973), reproduced in Gaja, IV.6.5.

Sect. 1-2	: 77; 133.

Sweden

Act of 1929 Concerning Foreign Arbitration Agreements and Awards, No. 147 of 1929, as amended in 1971 and 1976, translated in English in Stockholm Chamber of Commerce, ed., *Arbitration in Sweden* (Stockholm 1977) Appendix 3.

In general	: 236.	Sect. 7(1)(3)	: 313.
Sect. 1	: 61-62.	Sect. 7(1)(5)	: 340-341; 343-344; 352.
Sect. 1(2)	: 70.		

United Kingdom

The Arbitration Act 1975, 1975 c. 8, reproduced in Gaja, IV.15.1, and in A. Walton, *Russell on the Law of Arbitration,* 19th ed. (London 1979) p. 548.

In general	: 59; 62; 149; 164; 236.	Sect. 1(2)-(4)	: *63-64;* 65; 66; 69.
Sect. 1(1)	: 130 n. 17; 136-137; 139 n. 55; 140; 147.		

United States

An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, July 31, 1970, Public Law 91-368 (84 Stat. 692), amending Title 9 of the United States Code, by adding a Chapter 2 (also referred to as Chapter 2 of the Federal Arbitration Act), reproduced in Gaja, IV.11.1, and in *Yearbook* Vol. V(1979) p. 360.

In general	: 236; 243 n. 32.	Sect. 206	: 62-63; 67; *130.*
Sect. 202	: *17*; 18; 52; 59-60; 67-68	Sect. 207	: 241.
Sect. 203	: 52 n. 120.	Sect. 208	: 130 n. 18; 242.
Sect. 205	: 141-142.		

ANNEX D

TABLE OF COURT DECISIONS ON THE CONVENTION

(*a*) The table of references for the court decisions on the Convention as given below is divided per country. In order to facilitate research, the numbering of decisions per country corresponds with the numbering of the extracts of the decisions as appearing in the *Yearbook Commercial Arbitration*.

(*b*) The numbering corresponds also with the *abbreviated references in the footnotes* of this study. For example, the detailed references of the abbreviation "(Austria no. 1)" in a footnote can be found in this table under Austria no. 1.

(*c*) "Gaja" means that a copy of the *original text* of the decision in full can be found at the indicated number in Part V of G. Gaja, *New York Convention* (Dobbs Ferry 1978-1980). For example, "Gaja V.26" in Austria no. 1 indicates that the copy of the original text of this decision can be found at number 26 of Part V of Gaja's publication.

A full set of the original texts of all court decisions on the Convention is with the International Commercial Arbitration Library of the T.M.C. Asser Institute for International Law in The Hague.

(*d*) "*Yearbook*" means that an *extract* of the decision can be found at the indicated Volume and page of the *Yearbook Commercial Arbitration*. For example, "*Yearbook* I (1976) p. 182" in Austria no. 1 indicates that the extract of this decision is published in *Yearbook Commercial Arbitration* Vol. I(1976) p. 182.

(*e*) The *case comments*, if any, are included in the references. Some publications, however, contain a review of several decisions on the Convention rendered in one country. Such reviews of decisions per country are mentioned at the beginning of each country beneath the words "*Reviews of several decisions*".

There exist a few publications in which the judicial interpretation and application of the Convention are reviewed in a general manner, not limited to one country. It may suffice to mention here:

GAJA, G., "Introduction", in *New York Convention* (Dobbs Ferry 1978-1980) Part I.

SANDERS, P., "Commentary", *Yearbook* Vol. I(1976) p. 207 and Vol. II(1977) p. 254; "Consolidated Commentary Vols. III and IV", *Yearbook* Vol. IV(1979) p. 231; "Consolidated Commentary Vols. V and VI", *Yearbook* Vol. VI(1981) p. 202.

SANDERS, P., "A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 13 *The International Lawyer* (1979) p. 269; a French version of this article entitled "Vingt années de la Convention de New York de 1958" is published in 5 *Droit et pratique du commerce international* (1979) p. 359.

It may be added that a bibliography on publications concerning the Convention can be found under "Bibliography" hereafter.

(*f*) The *footnotes* in this study in which a given court decision is referred to are indicated after the words "Discussed at n.:". The Roman numerals I, II and III refer to the Chapter in which the footnote is to be found. For example, "Discussed at n.: I.202" under Austria no. 1 means that the decision is referred to in footnote 202 of Chapter I and discussed in the text accompanying this footnote.

AUSTRALIA

no. 1 SUPREME COURT OF NEW SOUTH WALES (EQUITY DEVISION), September 5, 1979,
Flakt Australia Ltd. *v.* Wilkens & Davis Construction Co. Ltd.,
25 *Australian Law Reports* (1979) p. 605; *Yearbook* VI(1981) p. 218.
Discussed at n.: II.40; II.55.

AUSTRIA
Oberster Gerichtshof = Supreme Court

no. 1 OBERSTER GERICHTSHOF, November 17, 1965,
9 *Zeitschrift für Rechtsvergleichung* (1968), p. 123 with comment by Zacherl; Gaja V.26; *Yearbook* I(1976) p. 182.
Discussed at n.: I.3; I.202; I.306; III.45.

no. 2 OBERSTER GERICHTSHOF, November 17, 1971,
96 *Juristische Blätter* (1974) p. 629; Gaja V.29; *Yearbook* I(1976) p. 183.
Discussed at n.: I.150; I.166; II.12; II.153; II.234; II.237; III.151.

no. 3 OBERSTER GERICHTSHOF, June 11, 1969,
42 *Entscheidungen des österreichischen Obersten Gerichtshofes* (1969) p. 269; Gaja V.28; *Yearbook* II(1977) p. 232.
Discussed at n.: III.63; III.65; III.77; III.404.

BELGIUM
Cour de Cassation = *Supreme Court*
Cour d'appel = *Court of Appeal*

no. 1 COUR D'APPEL OF LIÈGE, May 12, 1977,
Audi-NSU Auto Union A.G. *v.* S.A. Adelin Petit & Cie,
Journal des Tribunaux (1977) p. 710 with comment by Keutgen and Huys; Gaja V.75; *Yearbook* IV(1979) p. 254. See also Ledoux, *Journal des Tribunaux* (1976) p. 305.
Discussed at n.: I.298; III.379.

no. 2 COUR DE CASSATION (1ST CHAMBER), June 28, 1979,
Audi-NSU Auto Union A.G. *v.* S.A. Adelin Petit & Cie,
Pasicrisie Belge (1979) I, p. 1260; Gaja V.76; *Yearbook* V(1980) p. 257.
Discussed at n.: I.287; III.363; III.379.

FRANCE
Tribunal de grande instance = *Court of First Instance*
Cour d'appel = *Court of Appeal*

no. 1 PRESIDENT OF TRIBUNAL DE GRANDE INSTANCE OF PARIS, May 15, 1970,
COUR D'APPEL OF PARIS (1ST CHAMBER), May 10, 1971,
Compagnie de Saint-Gobain-Pont à Mousson *v.* The Fertilizer Corporation of India Ltd. (FCIL),
Journal du Droit International (1971) p. 313 with comment by Kahn;

Revue de l'arbitrage (1971) p. 108 with comment by Oppetit (at p. 97); Gaja V.11-12; *Yearbook* I(1976) p. 184.
Discussed at n.: I.29; III.85; III.187; III.192; III.217; III.222; III.236; III.281; III.290; III.329.

no. 2 TRIBUNAL DE GRANDE INSTANCE (COMMERCIAL CHAMBER) OF STRASBOURG, October 9, 1970,
Animalfeeds International Corporation *v.* S.A. A. Becker & Cie,
Revue de l'arbitrage (1970) p. 166; Gaja V. 10; *Yearbook* II(1977) p. 244.
Discussed at n.: II.281; III.63; III.80; III.278; III.285.

no. 3 COUR D'APPEL (1ST CHAMBER) OF PARIS, February 21, 1980,
General National Maritime Transport Company (GNMTC) *v.* AB Götaverken,
Revue de l'arbitrage (1980) p. 524 with comment by Jeantet; *Journal du Droit International* (1980) p. 661 with comment by Fouchard; *Revue critique de droit international privé* (1980) p. 763 with comment by Mezger; *Yearbook* VI(1981) p. 221.
Discussed at n.: I.33; I.44; I.50; I.54; I.70; I.79; I.88.

GERMANY, FEDERAL REPUBLIC OF*

Bundesgerichtshof	=	*Federal Supreme Court*
Oberlandesgericht (OLG)	=	*Court of Appeal*
Landgericht (LG)	=	*Court of First Instance*

no. 1 OBERLANDESGERICHT OF HAMBURG, April 15, 1964,
Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (1964-1965) p. 786, no. 275; *Yearbook* II(1977) p. 233.
Discussed at n.: I.4.

no. 2 LANDGERICHT OF BREMEN, December 16, 1965,
Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (1964-1965) p. 808, no. 284; *Yearbook* II(1977) p. 233.
Discussed at n.: I.298; III.151.

no. 3 LANDGERICHT OF BREMEN, June 8, 1967,
Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (1966-1967) p. 860, no. 283; Gaja V.46; *Yearbook* II(1977) p. 234.
Discussed at n.: II.234; III.151.

no. 4 LANDGERICHT OF HAMBURG, December 19, 1967,
Arbitrale Rechtspraak (1968) p. 138, no. 565; Gaja V.47; *Yearbook* II(1977) p. 235.
Discussed at n.: II.211; II.305.

no. 5 BUNDESGERICHTSHOF, March 6, 1969,
OBERLANDESGERICHT OF HAMBURG, October 14, 1964,
BGH: *Wertpapier-Mitteilungen* (1969) p. 671; *Der Betrieb* (1969) p. 922; *Monatschrift für deutsches Recht* (1969) p. 567; 31 *Konkurs-, Treuhand und Schiedsgerichtswesen* (1970) p. 30; *Die deutsche Rechtsprechung auf*

* It is in F.R. Germany a general policy not to publish the names of the parties.

dem Gebiete des internationalen Privatrechts (1968-1969) p. 656, no. 256; Gaja V.48;
OLG: *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1964-1965) p. 739, no. 277; Gaja V.45;
BGH and OLG: *Yearbook* II(1977) p. 235.
Discussed at n.: III.89; III.165; III.180; III.404.

no. 6 OBERLANDESGERICHT OF HAMBURG, May 21, 1969,
Wertpapier-Mitteilungen (1969) p. 875; *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1968-1969) p. 662, no. 257; Gaja V.49; *Yearbook* II(1977) p. 236.
Discussed at n.: II.304; III.70; III.316.

no. 7 BUNDESGERICHTSHOF, May 25, 1970,
Wertpapier-Mitteilungen (1970) p. 1050; *Aussenwirtschaftsdienst des Betriebs-Beraters* (1970) p. 417; 50 *Revue critique de droit international privé* (1971) p. 88 with comment by Mezger (at p. 37); *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1970) p. 456, no. 133; Gaja V.8; *Yearbook* II(1977) p. 237.
Discussed at n.: I.246; II.250.

no. 8 OBERLANDESGERICHT OF DÜSSELDORF, November 8, 1971,
Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (1971) p. 491, no. 161; *Aussenwirtschaftsdienst des Betriebs-Beraters* (1972) p. 478; *Der Betrieb* (1972) p. 1060; Gaja V.50; *Yearbook* II(1977) p. 237; comment by Habscheid, *Konkurs-, Treuhand und Schiedsgerichtswesen* (1973) p. 236.
Discussed at n.: I.224; I.240; I.302; II.172; II.181; II.247; III.151.

no. 9 OBERLANDESGERICHT OF KARLSRUHE, March 13, 1973,
LANDGERICHT OF HEIDELBERG, October 23, 1972,
OLG: *Aussenwirtschaftsdienst des Betriebs-Beraters* (1973) p. 403; *Die Justiz* (1973) p. 389; *Der Betrieb* (1974) p. 184; Gaja V.52;
OLG and LG: *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1973) p. 365, no. 129; Gaja V.51; *Yearbook* II(1977) p. 239.
Discussed at n.: I.171; II.10; II.105.

no. 10 OBERLANDESGERICHT OF HAMBURG, March 27, 1975,
LANDGERICHT OF HAMBURG, March 27, 1974,
OLG: 21 *Recht der internationalen Wirtschaft* (1975) p. 645; Gaja V.60;
LG: 21 *Recht der internationalen Wirtschaft* (1975) p. 223; Gaja V.19;
OLG and LG: *Yearbook* II(1977) p. 240.
Discussed at n.: III.22.

no. 11 OBERLANDESGERICHT OF HAMBURG, April 3, 1975,
21 *Recht der internationalen Wirtschaft* (1975) p. 432 with comment by Gründisch (at p. 577); Gaja V.36; *Yearbook* II(1977) p. 241; see also Schlosser, "Verfahrensintegrität und Anerkennung von Schiedssprüchen im deutsch-amerikanischen Verhältnis", *Neue Juristische Wochenschrift* (1978) p. 455.
Discussed at n.: I.192; I.294; III.186; III.195; III.215; III.355; III.360.

no. 12 BUNDESGERICHTSHOF, February 12, 1976,
22 *Recht der internationalen Wirtschaft* (1976) p. 449; *Wertpapier-Mitteilungen* (1976) p. 435; *Monatschrift für deutsches Recht* (1976) p. 649; Gaja V.34; *Yearbook* II(1977) p. 242.
Discussed at n.: I.3; I.48; I.214; I.223; I.248; II.114; II.154; II.289; III.98; III.151; III.169; III.179; III.237.

no. 13 LANDGERICHT OF HAMBURG, March 16, 1977,
24 *Recht der internationalen Wirtschaft* (1978) p. 124 with comment by Klinke (at p. 642); Gaja V.61; *Yearbook* III(1978) p. 274.
Discussed at n.: I.30; I.147; II.294.

no. 14 OBERLANDESGERICHT OF COLOGNE, June 10, 1976,
91 *Zeitschrift für Zivilprozess* (1978) p. 318 with comment by Kornblum; *Yearbook* IV(1979) p. 258.
Discussed at n.: I.32; I.211; I.214; I.217; I.244; III.50; III.62; III.91; III.194; III.207; III.247; III.361; III.399.

no. 15 LANDGERICHT OF HAMBURG, April 20, 1977,
Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (1978); *Yearbook* IV(1979) p. 261.
Discussed at n.: I.133.

no. 16 LANDGERICHT OF ZWEIBRÜCKEN, January 11, 1978,
unpublished; *Yearbook* IV(1979) p. 262.
Discussed at n.: II.208; II.211; II.246; II.278; III.99; III.201; III.212.

no. 17 BUNDESGERICHTSHOF, March 9, 1978,
Wertpapier-Mitteilungen (1978) p. 573; Gaja V.77; *Yearbook* IV(1979) p. 264.
Discussed at n.: I.283.

no. 18 HANSEATISCHES OBERLANDESGERICHT OF HAMBURG, July 27, 1978,
unpublished; *Yearbook* IV(1979) p. 266.
Discussed at n.: I.3; I.187; I.193; I.204; II.185; III.66; III.80; III.186; III.213; III.221; III.310; III.412.

no. 19 LANDGERICHT OF MUNICH, June 20, 1978,
unpublished; *Yearbook* V(1980) p. 260.
Discussed at n.: I.48; I.291; II.248; III.206.

no. 20 OBERLANDESGERICHT OF HAMBURG, September 22, 1978,
25 *Recht der internationalen Wirtschaft* (1979) p. 482 with comment by Mezger; Gaja V.78; *Yearbook* V(1980) p. 262.
Discussed at n.: I.31; I.152; I.245; II.297; II.304.

no. 21 LANDGERICHT OF HAMBURG, April 24, 1979,
25 *Recht der internationalen Wirtschaft* (1979) p. 493; *Yearbook* V(1980) p. 264.
Discussed at n.: I.3; I.307.

no. 22 LANDGERICHT OF HAMBURG, January 18, 1979,
Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privat-

rechts (1979); *Yearbook* VI(1981) p. 225.
Discussed at n.: I.103; III.280.

GHANA

no. 1 HIGH COURT OF GHANA, September 29, 1965,
Strojexport *v.* Edward Nasser and Company (Motors) Ltd.,
African Law Reports (1965) p. 493; Gaja V.1; *Yearbook* III(1978) p. 276.
Discussed at n.: I.184.

GREECE

Areios Pagos = Supreme Court

no. 1 COURT OF FIRST INSTANCE OF PIRAEUS, decision no. 1193 of 1968,
20 *Archeion Nomologias* [Archives of Jurisprudence] (1969) p. 229; *Yearbook* I(1976) p. 186.
Discussed at n.: I.3; III.280.

no. 2 COURT OF APPEAL OF ATHENS, decision no. 2768 of 1972,
24 *Epitheorissis Emporikou Dikaiou* [Commercial Law Review] (1973) p. 42; *Yearbook* I(1976) p. 186.
Discussed at n.: III.75.

no. 3 AREIOS PAGOS, decision no. 926 of 1973,
22 *Nomikon Vima* [Law Tribune] (1974) p. 486; 41 *Emphimeris Ellinon Nomikon* [Journal of Greek Lawyers] (1974) p. 374; *Yearbook* I(1976) p. 187.
Discussed at n.: III.41; III.86.

no. 4 COURT OF APPEAL OF PATRAS, decision no. 469 of 1974,
6 *Dike* (1975) p. 241 with comment by Lekkas and Beis; *Yearbook* I(1976) p. 187.
Discussed at n.: III.85.

no. 5 AREIOS PAGOS, decision no. 88 of January 14, 1977,
Agrimpex S.A. *v.* J.F. Braun & Sons Inc.,
25 *Nomikon Vima* [Law Tribune] (1977) p. 1126; *Yearbook* IV(1979) p. 269.
Discussed at n.: II.300; III.92; III.151.

INDIA

no. 1 SUPREME COURT OF INDIA, January 1971,
V/O Tractoroexport *v.* Tarapore and Co.,
All India Reporter (1971) S.C. p. 3; 66 *American Journal of International Law* (1972) p. 637; Gaja V.3; *Yearbook* I(1976) p. 188. See for comment U. Baxi, "Goodbye to Unification? The Indian Supreme Court and the United Nations Arbitration Convention", 15 *Journal of the Indian Law Institute* (1973) p. 353.
Discussed at n.: I.199; II.28; II.117.

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Indian Organic Chemicals Ltd. *v.* Chemtex Fibres Inc.,
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ITALY*

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Corte di Cassazione = *Supreme Court*
Corte di Appello = *Court of Appeal*
Tribunale = *Court of First Instance*

* The Italian practice of publishing court decisions is to give the date on which the decision is filed with the Cancelleria of the court, and not the date on which the decision is made.

no. 1 CORTE DI CASSAZIONE, April 30, 1969, no. 1403,
Officina Fratelli Musso *v.* S.r.l. Sevplant,
6 *Rivista di Diritto Internazionale Privato e Processuale* (1970) p. 332; *Foro Italiano* (1969) I. p. 2223; *Giustizia Civile* (1969) I. p. 1678; 8 *Diritto negli Scambi Internazionali* (1969) p. 563 with comment by Ubertazzi; Gaja V.4; *Yearbook* I(1976) p. 189.
Discussed at n.: I.194.

no. 2 CORTE DI CASSAZIONE (SEZ. UN), February 27, 1970, no. 470,
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6 *Rivista di Diritto Internazionale Privato e Processuale* (1970) p. 393; *Foro Italiano* (1970) I. p. 1051 with comment by Barone; *Giurisprudenza Italiana* (1970) I.1, p. 118 with comment by Franchi; 9 *Diritto negli Scambi Internazionali* (1970) p. 153 with comment by Cutrera; Gaja V.5; *Yearbook* I(1976) p. 189.
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S.p.A. Agnesi *v.* Ditta Augusto Miserocchi,
6 *Rivista di Diritto Internazionale Privato e Processuale* (1970) p. 877; 9 *Diritto negli Scambi Internazionali* (1970) p. 556; Gaja V.6; *Yearbook* I(1976) p. 190.
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G.A.P.A.P. K.G. *v.* Veronese,
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no. 5 CORTE DI CASSAZIONE (SEZ. UN.), December 13, 1971, no. 3620,
Ditta Augusto Miserocchi *v.* S.p.A. Paolo Agnesi,
8 *Rivista di Diritto Internazionale Privato e Processuale* (1972) p. 563; 95 *Foro Italiano* (1972) I.1, p. 615 with comment by Barone; 11 *Diritto negli Scambi Internazionali* (1972) p. 112; Gaja V.13; *Yearbook* I(1976) p. 190; see for comment also Morviducci, "La forma della clausola compromissoria secondo la Convenzione di New York del 1958", 56 *Rivista di Diritto Internazionale* (1973) p. 732.
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no. 6 TRIBUNALE OF MILAN, December 11, 1972,
Pezzota Camillo *v.* S.a.S. C.I.P.R.A. di Schmutz & Co.,
11 *Diritto negli Scambi Internazionali* (1972) p. 484; Gaja V.14; *Yearbook* I(1976) p. 191.
Discussed at n.: I.21.

no. 7 CORTE DI APPELLO OF TURIN, March 30, 1973,
Barthl Mayer O.H.G. *v.* Pannelli F.G.B.,
10 *Rivista di Diritto Internazionale Privato e Processuale* (1974) p. 126; 13

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Discussed at n.: II.160.

no. 8 CORTE DI APPELLO OF BARI, May 30, 1973,
Figli di Antonio Casulli *v.* Tradax England Ltd.,
10 *Rivista di Diritto Internazionale Privato e Processuale* (1974) p. 285; 13 *Diritto negli Scambi Internazionali* (1974) p. 453; Gaja V.16; *Yearbook* I(1976) p. 192.
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no. 9 CORTE DI APPELLO OF ROME, September 24, 1973,
Intercommerce *v.* Eugenio Menaguale,
12 *Diritto negli Scambi Internazionali* (1973) p. 443; Gaja V.32; *Yearbook* I(1976) p. 192.
Discussed at n.: III.41; III.404; III.405.

no. 10 CORTE DI CASSAZIONE (SEZ. UN.), November 10, 1973, no. 2969,
Cantiere Navale Leopoldo Rodriguez *v.* Supramar A.G.,
10 *Rivista di Diritto Internazionale Privato e Processuale* (1974) p. 585; 127 *Giurisprudenza Italiana* (1975) I. p. 330 with comment by Franchi; Gaja V.17; *Yearbook* I(1976) p. 192.
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no. 11 CORTE DI APPELLO OF NAPLES, December 13, 1974,
Frey, Milota, Seitelberger and Vesely *v.* F. Cuccaro e Figli,
11 *Rivista di Diritto Internazionale Privato e Processuale* (1975) p. 552; Gaja V.22; *Yearbook* I(1976) p. 193.
Discussed at n.: II.161; II.220; III.13; III.101.

no. 12 CORTE DI APPELLO OF MILAN, December 13, 1974,
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Discussed at n.: I.22; I.305; III.66.

no. 13 CORTE DI CASSAZIONE (SEZ. UN.), April 8, 1975, no. 1269,
Agenzia Marittima Constantino Tomasos Ltd. *v.* Sorveglianza S.I.P.A.,
12 *Rivista di Diritto Internazionale Privato e Processuale* (1976) p. 133; Gaja V.23; *Yearbook* II(1977) p. 247.
Discussed at n.: I.133; I.196; II.155; II.272; II.299.

no. 14 TRIBUNALE OF MILAN, March 22, 1976,
Sopac Italiana S.p.A. *v.* Bukama G.m.b.H. and F.I.M.M.,
12 *Rivista di Diritto Internazionale Privato e Processuale* (1976) p. 574; Gaja V.40; *Yearbook* II(1977) p. 248.
Discussed at n.: II.129.

no. 15 CORTE DI CASSAZIONE (SEZ. UN.), April 22, 1976, no. 1439,
Junakovic *v.* Seagull Shipping Company, and Oceanus Mutual Underwriting Association *v.* Seagull Shipping, and Junakovic,
99 *Foro Italiano* (1976) I. p. 1495; 13 *Rivista di Diritto Internazionale Privato e Processuale* (1977) p. 852; Gaja V.33; *Yearbook* II(1977) p. 249.
Discussed at n.: II.283.

no. 16 CORTE DI APPELLO OF VENICE, May 21, 1976,
S.A. Pando Compania Naviera *v.* S.a.S. FILMO,
12 *Rivista di Diritto Internazionale Privato e Processuale* (1976) p. 851; Gaja V.38; *Yearbook* III(1978) p. 277.
Discussed at n.: I.240; III.101; III.249; III.410.

no. 17 CORTE DI CASSAZIONE (SEZ. UN.), May 25, 1976, no. 1877,
Begro B.V. *v.* Voccia and Antonio Lamberti,
13 *Rivista di Diritto Internazionale Privato e Processuale* (1977) p. 88; 71 *Foro Padano* (1976) I. col. 57; 24 *Recht der internationalen Wirtschaft* (1978) p. 619; Gaja V.39; *Yearbook* III(1978) p. 278; see for comment: Luzzatto, "La Corte di Cassazione e la 'forma' della clausola compromissoria per arbitrato estero: forza di una tradizione ed equivoci di una massima", 14 *Rassegna dell'Arbitrato* (1976) p. 157; Schneider, 24 *Recht der internationalen Wirtschaft* (1978) p. 619; Gaja, "La legge olandese è ignota a questa Suprema Corte", 13 *Rivista di Diritto Internazionale Privato e Processuale* (1977) p. 401; Franchi, "Sull'integrazione della convenzione arbitrale mediante richiamo extratestuale", *Giurisprudenza Italiana* (1977) I.1, p. 1551.
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S.A. Tradax Export *v.* S.p.A. Carapelli,
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Discussed at n.: I.2; I.104; I.240; I.249; III.103; III.320; III.391; III.412.

no. 19 TRIBUNALE OF MILAN, November 11, 1976,
S.p.A. S.I.A.G.A. *v.* Solna Offset A.G. Printing Equipment and *v.* S.p.A. Stabilimento Poligrafico C. Colombi,
13 *Rivista di Diritto Internazionale Privato e Processuale* (1977) p. 110; Gaja V.53; *Yearbook* III(1978) p. 281.
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Montaggi Tubolari Montubi S.p.A. *v.* Spie Batignolles et al.,
14 *Rivista di Diritto Internazionale Privato e Processuale* (1978) p. 360; Gaja V.71; *Yearbook* III(1978) p. 281.
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Carters (Merchants) Ltd. *v.* Francesco Ferraro,
13 *Rivista di Diritto Internazionale Privato e Processuale* (1977) p. 839; 18 *Rassegna dell'Arbitrato* (1978) p. 143; Gaja V.58; *Yearbook* IV(1979) p. 275.
Discussed at n.: II.161; II.279; III.86; III.96; III.101; III.186; III.204; III.218; III.281; III.283; III.296; III.376.

no. 22 TRIBUNALE OF NAPLES, June 30, 1976,
La Naviera Grancebaco S.A. *v.* Italgrani,
13 *Rivista di Diritto Internazionale Privato e Processuale* (1977) p. 861; Gaja V.59; *Yearbook* IV(1979) p. 277.
Discussed at n.: I.304; III.18; III.68; III.102; III.300; III.320.

no. 23 CORTE DI CASSAZIONE (SEZ. I), January 20, 1977, no. 272,
S.p.A. Nosegno e Morando *v.* Bohne Friedrich und Co.,

14 *Rivista di Diritto Internazionale Privato e Processuale* (1978) p. 341; 17 *Rassegna dell'Arbitrato* (1977) p. 87; Gaja V.70; *Yearbook* IV(1979) p. 279.
Discussed at n.: II.270; III.154; III.205.

no. 24 CORTE DI CASSAZIONE (SEZ. UN.), November 8, 1976, no. 4082,
Società Brisighello *v.* Società Chemapol, and Casa di Spedizioni Internazionali Zoni *v.* Festari,
Foro Italiano (1977) I. col. 2756; 14 *Rivista di Diritto Internazionale Privato e Processuale* (1978) p. 93; 17 *Rassegna dell'Arbitrato* (1977) p. 30; Gaja V.68; *Yearbook* IV(1979) p. 280.
Discussed at n.: I.197; II.156; III.155.

no. 25 CORTE DI CASSAZIONE (SEZ. I), April 18, 1978, no. 1842,
Eugenio Menaguale *v.* Intercommerce,
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Discussed at n.: II.264; II.273; III.100; III.104; III.155; III.404; III.405.

no. 26 CORTE DI CASSAZIONE (SEZ. UN.), January 25, 1977, no. 361,
Total Soc. It. p.a. *v.* Achille Lauro,
17 *Rassegna dell'Arbitrato* (1977) p. 94; 14 *Rivista di Diritto Internazionale Privato e Processuale* (1978) p. 118; Gaja V.69; *Yearbook* IV(1979) p. 284.
Discussed at n.: I.140; I.190; I.204; II.155; II.299.

no. 27 CORTE DI APPELLO OF MILAN (SEZ. UN.), May 3, 1977,
Renault Jacquinet *v.* Sicea,
32 *Foro Padano* (1977) col. 129; 18 *Rassegna dell'Arbitrato* (1978) p. 149; *Yearbook* IV(1979) p. 284.
Discussed at n.: II.155; II.260; II.284; III.105; III.186; III.205; III.214; III.300; III.320; III.376.

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Scherk Enterprises A.G. *v.* Société des Grandes Marques,
unpublished; 17 *Rassegna dell'Arbitrato* (1977) p. 196; *Yearbook* IV(1979) p. 286.
Discussed at n.: I.190; II.58; II.96; II.260; II.264; III.378.

no. 29 CORTE DI APPELLO OF FLORENCE, October 8, 1977,
Bobbie Brooks Inc. *v.* Lanificio Walter Banci S.a.S.,
18 *Rassegna dell'Arbitrato* (1978) p. 161; *Yearbook* IV(1979) p. 289.
Discussed at n.: II.231; II.276; III.85; III.106; III.153; III.180; III.202; III.212; III.279; III.291; III.376; III.412; III.415.

no. 30 CORTE DI CASSAZIONE (SEZ. I), February 2, 1978, no. 459,
Catz International N.V. *v.* S.p.A. Vaccaro,
18 *Rassegna dell'Arbitrato* (1978) p. 136; 80 *Giurisprudenza Italiana* (1978) I. col. 1008; *Yearbook* IV(1979) p. 292.
Discussed at n.: III.100.

no. 31 TRIBUNALE OF BIELLA, February 7, 1978,
Filatura Abate Giuseppe e Figli S.a.S. *v.* S.A. Paul Azais et Cie,

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no. 32 CORTE DI APPELLO OF FLORENCE, April 13, 1978,
Rederi Aktiebolaget Sally *v.* S.r.l. Termarea,
unpublished: Gaja V.92; *Yearbook* IV(1979) p. 294.
Discussed at n.: III.253.

no. 33 CORTE DI CASSAZIONE (SEZ. UN.), September 18, 1978, no. 4167,
Gaetano Butera *v.* Pietro e Romano Pagnan,
Foro Italiano (1978)I. p. 2422; 4 *Diritto Marittimo* (1978) p. 671; *Yearbook* IV(1979) p. 296.
Discussed at n.: I.101; II.182; II.216; II.285.

no. 34 CORTE DI APPELLO OF MESSINA, May 19, 1976,
S.a.S. Wieland K.G. *v.* Società Industriale Meridionale,
14 *Rivista di Diritto Internazionale Privato e Processuale* (1978) p. 77; Gaja V.67; *Yearbook* V(1980) p. 266.
Discussed at n.: III.44; III.84; III.101.

no. 35 CORTE DI CASSAZIONE (SEZ. UN.), May 18, 1978, no. 2392,
Società Atlas General Timbers S.p.A. *v.* Agenzia Concordia Line S.p.A.,
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Discussed at n.: I.241; II.155; II.204; II.299.

no. 36 CORTE DI APPELLO OF NAPLES (SALERNO SECTION), February 13, 1978,
G.A. Pap – K.G. Holzgrosshandlung *v.* Giovanni G. Pecoraro,
15 *Rivista di Diritto Internazionale Privato e Processuale* (1979) p. 91; *Yearbook* VI(1981) p. 228.
Discussed at n.: II.103; III.163; III.180.

no. 37 CORTE DI CASSAZIONE (SEZ. UN.), April 27, 1979, no. 2429,
Compania Generale Construzioni CODEGA S.p.A. *v.* Piersanti,
Foro Italiano (1980) I. col. 190; 15 *Rivista di Diritto Internazionale Privato e Processuale* (1979) p. 565; *Yearbook* VI(1981) p. 229.
Discussed at n.: II.96.

no. 38 CORTE DI CASSAZIONE (SEZ. UN.), September 11, 1979, no. 4746,
Lloyd Continental *v.* S.p.A. Navigazione Alga,
16 *Rivista di Diritto Internazionale Privato e Processuale* (1980) p. 425; 19 *Rassegna dell'Arbitrato* (1979) p. 307; *Yearbook* VI(1981) p. 230.
Discussed at n.: II.159; II.266; II.269.

no. 39 CORTE DI CASSAZIONE (SEZ. UN.), November 19, 1978, no. 6017,
Metallgesellschaft A.G. *v.* Motosi Aldo and S.p.A. I.P.I.M. Ingegneria Promozione Industriale Mineraria,
Giurisprudenza Italiana (1980) I. p. 562; 19 *Rassegna dell'Arbitrato* (1979) p. 312; *Yearbook* VI(1981) p. 232.
Discussed at n.: II.216.

no. 40 CORTE DI CASSAZIONE (SEZ. I), April 15, 1980, no. 2448,
Official Receiver in the Bankruptcy of Lanificio Walter Banci S.a.S. *v.* Bob-

bie Brooks Inc.,
Foro Italiano (1980) I. col. 2164 with comment by Barone; *Giurisprudenza Italiana* (1980) I. p. 1259 with comment by Franchi; *Yearbook* VI(1981) p. 233.
Discussed at n.: II.162; II.231; II.276; III.152; III.171; III.180; III.279; III.291; III.412; III.415.

JAPAN

no. 1 COURT OF APPEAL OF TOKYO (2ND CIVIL SECTION), March 14, 1963,
Niroshi Nishi *v.* Casaregi Compania di navigazione e commercio,
Revue de l'arbitrage (1964) p. 102; *Yearbook* I(1976) p. 194.
Discussed at n.: III.14.

MEXICO

no. 1 TRIBUNAL SUPERIOR DE JUSTICIA, 18TH CIVIL COURT OF FIRST INSTANCE FOR THE FEDERAL DISTRICT OF MEXICO, February 24, 1977,
Presse Office S.A. *v.* Centro Editorial Hoy S.A.,
unpublished; *Newsletter Inter-American Arbitration* (1977) 4th quarter; *Yearbook* IV(1979) p. 301.
Discussed at n.: III.43; III.65; III.83; III.198; III.280; III.358.

no. 2 TRIBUNAL SUPERIOR DE JUSTICIA [COURT OF APPEALS] (5TH CHAMBER) FOR THE FEDERAL DISTRICT OF MEXICO, August 1, 1977,
Malden Mills Inc. *v.* Hilaturas Lourdes S.A.,
unpublished; *Newsletter Inter-American Arbitration* (1977) 4th quarter; *Yearbook* IV(1979) p. 302.
Discussed at n.: III.41; III.198; III.358.

NETHERLANDS

Hoge Raad = *Supreme Court*
Hof = *Court of Appeal*
Rechtbank = *Court of First Instance*

no.1 RECHTBANK OF ROTTERDAM, June 26, 1970,
Israel Chemicals & Phosphates Ltd. *v.* N.V. Algemene Oliehandel,
Nederlandse Jurisprudentie (1971) p. 1372, no. 470; *Uniform Law Cases* (UNIDROIT) (1970) p. 313; Gaja V.9; *Yearbook* I(1976) p. 195; see for comment Sanders, *Weekblad voor Privaatrecht, Notariaat en Registratie* no. 5307 (1975) p. 354.
Discussed at n.: I.157; II.202; II.211; II.222; II.244.

no. 2A HOF OF THE HAGUE, September 8, 1972,
Société Européenne d'Etudes et d'Entreprises *v.* Federal Republic of Yugoslavia,
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Yearbook of International Law (1973) p. 390; *Yearbook* I(1976) p. 196. See for comments also Stuyt, "Misconceptions About International (Commercial) Arbitration", *Netherlands Yearbook of International Law* (1974) p. 35; Sanders, *Weekblad voor Privaatrecht, Notariaat en Registratie* no. 5394 (1977) p. 362.
Discussed at n.: I.83; I.181; III.134.

no. 2B HOGE RAAD, October 26, 1973,
Société Européenne d'Etudes et d'Entreprises *v.* Federal Republic of Yugoslavia,
Nederlandse Jurisprudentie (1974) no. 361 with comment by Zonderland and Panhuys; *Revue de l'arbitrage* (1974) p. 318 with comment by Batiffol; *Netherlands Yearbook of International Law* (1974) p. 290; Gaja V.18; *Yearbook* I(1976) p. 196. See for comment also Stuyt and Sanders, *supra* Neth. no. 2A.
Discussed at n.: I.84; I.181; I.188; III.137.

no. 2C HOF OF THE HAGUE, October 25, 1974,
Société Européenne d'Etudes et d'Entreprises *v.* Federal Republic of Yugoslavia,
Revue de l'arbitrage (1974) p. 322 with comment by Batiffol; *Yearbook* I(1976) p. 196. See for comment also Stuyt and Sanders, *supra* Neth. no. 2A.
Discussed at n: I.85; III.114.

no. 2D HOGE RAAD, November 7, 1975,
Société Européenne d'Etudes et d'Entreprises *v.* Federal Republic of Yugoslavia,
Nederlandse Jurisprudentie (1975) no. 274 with comment by Zonderland; Gaja V.35; *Yearbook* I(1976) p. 196. See for comment also Sanders, *supra* Neth. no. 2A.
Discussed at n.: I.87; I.189; III.113.

no. 3 PRESIDENT OF RECHTBANK OF THE HAGUE, April 26, 1973,
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Discussed at n.: II.186; III.86; III.179.

no. 4 PRESIDENT OF RECHTBANK OF AMSTERDAM, December 14, 1977,
unpublished; *Yearbook* IV(1979) p. 307.
Discussed at n.: III.85; III.281; III.404.

no. 5 HOF OF THE HAGUE, April 19, 1973,
PRESIDENT OF RECHTBANK OF THE HAGUE, June 23, 1972,
Weinstein International Corporation *v.* Nagtegaal N.V.,
unpublished; *Yearbook* V(1980) p. 269.
Discussed at n.: I.309; III.74.

SWEDEN

no. 1 SUPREME COURT, August 13, 1979,
SVEA COURT OF APPEAL (5TH DEPARTMENT) IN STOCKHOLM, December 13, 1978,

AB Götaverken *v.* General Maritime Transport Company (GNMTC), unpublished (Case no. 0 1243/78); an English translation of the decision of the Supreme Court and the summary of the decision of the Court of Appeal can be found in Paulsson, "Arbitration and the Swedish Courts", paper submitted to the Seminar "*Arbitration and State Courts*", organized by the Institute of International Business Law and Practice of the International Chamber of Commerce, Paris, April 21-23, 1980; a French translation is published in *Revue de l'arbitrage* (1980) p. 555; *Yearbook* VI(1981) p. 237.
Discussed at n.: I.55; I.90; III.111; III.234; III.293; III.302; III.327; III.331.

SWITZERLAND

Tribunal Fédéral = *Bundesgericht* = *Federal Supreme Court*
Cour de Justice = *Appellationsgericht* = *Obergericht* = *Court of Appeal*
Tribunal = *Court of First Instance*

no. 1 TRIBUNAL OF THE CANTON GENEVA (6TH CHAMBER), June 8, 1967,
J.A. van Walsum N.V. *v.* Chevalines S.A.,
64 *Schweizerische Juristen-Zeitung* (1968) p. 56 with comment by Schwartz (at p. 49); Gaja V.2; *Yearbook* I(1976) p. 199.
Discussed at n.: II.152; II.200; II.212; II.226; II.239.

no. 2 COUR DE JUSTICE OF THE CANTON GENEVA, May 12, 1967,
Commoditex S.A. *v.* Alexandria Commercial Co.,
Semaine Judiciaire (1968) no. 37; *Yearbook* II(1976) p. 199.
Discussed at n.: I.183.

no. 3 TRIBUNAL FÉDÉRAL (BUNDESGERICHT), May 3, 1967,
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Samenvatting en Conclusie *

(Dutch Summary and Conclusion)

1. Inleiding

Deze studie betreft de interpretatie door de rechters van het Verdrag inzake de Erkenning en Tenuitvoerlegging van Buitenlandse Scheidsrechterlijke Uitspraken, New York, 10 juni 1958. Dit Verdrag regelt in essentie twee fundamentele aspecten van internationale handelsarbitrage: de nakoming van de arbitrage-overeenkomst, en de tenuitvoerlegging van het arbitrale vonnis.[1] Het voornaamste doel van deze studie is het onderzoek naar de mogelijkheid van een uniforme rechterlijke interpretatie van het Verdrag.

Het onderzoek is gebaseerd op het gegeven dat, hoewel internationale verdragen zijn gesloten om een bepaalde materie op een uniforme wijze te regelen, zij niettemin verschillend worden geïnterpreteerd en toegepast door de rechters in de Verdragsstaten. Nu het Verdrag zijn 25ste verjaardag nadert, gedurende welke periode 56 Staten zijn toegetreden, blijkt, dat het Verdrag geen uitzondering op dit verschijnsel vormt.

De rechterlijke uitspraken zijn gerapporteerd in het *Yearbook Commercial Arbitration* Vol. I(1976) – VI(1981); deze uitspraken vormen het basismateriaal voor deze studie. De uitspraken zijn geanalyseerd en onderling vergeleken in samenhang met de relevante bepalingen van het Verdrag. Op basis van deze methode van vergelijkende rechtspraak is getracht een interpretatie te formuleren die in de praktijk hanteerbaar is en aanvaardbaar voor de rechters in de Verdragsstaten, daarbij rekening houdend met hun verschillende wettelijke systemen en rechtsopvattingen.

De studie is verdeeld in drie hoofdstukken: het toepassingsgebied (Hoofdstuk I, Artt. I en VII), de nakoming van de arbitrage-overeenkomst (Hoofdstuk II, Art. II), en de tenuitvoerlegging van het arbitrale vonnis (Hoofdstuk III, Artt. III-VI). Ieder hoofdstuk is onderverdeeld in twee of meer delen, overeenkomstig de onderverdeling van de relevante bepalingen van het Verdrag.

Aan het einde van ieder deel zijn de uniforme interpretaties, ontwikkeld in dat deel, samengevat. Een aantal van deze interpretaties wordt

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* Krachtens Artikel 14 van het Promotiereglement van de Erasmus Universiteit Rotterdam dient aan een niet in het Nederlands gesteld proefschrift een in het Nederlands gestelde samenvatting te worden toegevoegd. De hier volgende samenvatting is een aangepaste vertaling van de *Summary and Conclusion*, te vinden op pp. 383-395.

1. Het Verdrag vermeldt ook de erkenning van arbitrage-overeenkomsten en arbitrale vonnissen. De erkenning, die in de praktijk nauwelijks een rol speelt, wordt hier eenvoudigheidshalve niet behandeld. Zie n. II.1 en III–1.4.

hierna herhaald in het kader van een algemeen overzicht van de Verdragsbepalingen.

2. Arbitrale vonnissen waarop het Verdrag van toepassing is

Het Verdrag bepaalt in Artikel I lid 1 dat het van toepassing is op de tenuitvoerlegging van *buitenlandse* arbitrale vonnissen, dat wil zeggen, arbitrale vonnissen gewezen op het grondgebied van een andere Staat dan die waar de tenuitvoerlegging wordt verzocht. De toepasselijkheid van het Verdrag kan beperkt worden tot vonnissen gewezen in een andere Verdragsstaat, indien van het eerste voorbehoud genoemd in het derde lid van Artikel I is gebruik gemaakt.[2]

Het criterium van de territorialiteit is het enige criterium voor het toepassingsgebied van het Verdrag, voorzover dit het arbitrale vonnis betreft. Met name wordt de reikwijdte van het Verdrag niet aan de nationaliteit van partijen of aan de internationaliteit van het onderwerp waar het arbitrale vonnis betrekking op heeft, gebonden.[3] Het gebruik van een ondubbelzinnig criterium voor het toepassingsgebied van het Verdrag is er waarschijnlijk de oorzaak van geweest dat de rechters in het algemeen geen moeilijkheden hebben gehad met de vraag welke arbitrale vonnissen onder het Verdrag vallen.

Naast dit criterium bevat het Verdrag nog een tweede criterium: volgens Artikel I lid 1, tweede zin, kan het Verdrag ook worden toegepast op arbitrale vonnissen die niet beschouwd worden als nationale arbitrale vonnissen. Deze bijkomende mogelijkheid voor het toepassingsgebied van het Verdrag betreft die vonnissen, die op grond van een overeenkomst tussen partijen beheerst worden door het arbitragerecht van een staat, die niet de staat is waarin het vonnis zal worden gewezen. Een dergelijke overeenkomst van partijen leidt echter tot aanzienlijke complicaties.[4] Waarschijnlijk komt een zodanige overeenkomst om deze reden in de praktijk nauwelijks voor. Het tweede criterium heeft dan ook tot nu toe geen toepassing gevonden in de gerapporteerde rechterlijke beslissingen. De uniforme toepassing van het Verdrag is er naar mijn mening bij gebaat dat deze nogal theoretische uitvinding een dode letter blijft.

De rechters verschillen van mening omtrent de vraag of twee andere soorten beslissingen onder het Verdrag tenuitvoer kunnen worden gelegd. Het eerste soort betreft het zogenaamde "a-nationale" arbitrale vonnis, dat hierna onder no. 10 zal worden behandeld.

Onder het tweede soort vallen beslissingen die worden gegeven in

2. Zie I–1.1.
3. Zie I–1.2 en 3.
4. Zie I–1.5.

aan arbitrage verwante procedures. Deze procedures worden niet beheerst door een arbitragewet, maar door contractenrecht. Voorbeelden zijn het Italiaanse *arbitrato irrituale* (in tegenstelling tot de Italiaanse eigenlijke arbitrage, genaamd *arbitrato rituale*, die wordt beheerst door de arbitragewet zoals vervat in het Italiaanse Wetboek van Rechtsvordering) en het Nederlandse bindend advies (in tegenstelling tot de eigenlijke arbitrage, die wordt beheerst door de arbitragewet zoals vervat in het Nederlandse Wetboek van Rechtsvordering). In deze studie wordt de opvatting verdedigd dat dit soort beslissingen niet op grond van het Verdrag kan worden tenuitvoer gelegd, omdat het Verdrag geacht moet worden alleen betrekking te hebben op de eigenlijke arbitrage.[5]

3. Arbitrage-overeenkomsten waarop het Verdrag van toepassing is

Artikel II lid 3 van het Verdrag regelt de nakoming van arbitrage-overeenkomsten. Het Verdrag geeft echter niet aan welke arbitrage-overeenkomsten onder deze bepaling vallen. Het ontbreken van deze definitie, hetgeen is toe te schrijven aan het op het laatste moment aan het Verdrag toevoegen van bepalingen met betrekking tot de arbitrage-overeenkomst (Art. II), heeft de rechters tot op zekere hoogte voor problemen gesteld. Een mogelijke uniforme interpretatie zou de volgende kunnen zijn. Indien de arbitrage plaatsvindt of zal plaatsvinden in een andere staat dan die waarin een beroep wordt gedaan op de overeenkomst, is het Verdrag van toepassing, ongeacht de nationaliteit van partijen of de internationaliteit van het onderwerp. Indien de arbitrage plaatsvindt of plaats zal vinden in de staat waarin op de overeenkomst een beroep wordt gedaan, dan is het Verdrag van toepassing op de nakoming van de overeenkomst zodra een van de partijen een buitenlander is, of het geschil betrekking heeft op internationale handel. De laatstgenoemde interpretatie-regel kan ook worden toegepast indien op het moment van het verzoek tot nakoming van de overeenkomst tot arbitrage nog niet bekend is waar de arbitrage zal plaatsvinden.[6]

4. Retro-activiteit

Het Verdrag zwijgt ook over de vraag of het met terugwerkende kracht van toepassing is. Deze lacune heeft aanleiding gegeven tot nogal uiteenlopende rechterlijke interpretaties. Met het voortschrijden van de tijd verliest dit vraagstuk echter zijn belang. Gezien het hoofdzakelijk procedurele karakter van het Verdrag, kan een mogelijke uniforme interpretatie zijn dat het Verdrag van toepassing is op de nakoming van iedere

5. Zie I–1.7.
6. Zie I–2.

arbitrage-overeenkomst en tenuitvoerlegging van ieder arbitraal vonnis, wanneer dan ook tot stand gekomen.[7]

5. Toepasselijkheid van het Verdrag niet exclusief

Artikel VII lid 1 van het Verdrag voorziet in de mogelijkheid om de tenuitvoerlegging van een arbitraal vonnis te baseren op andere multilaterale of bilaterale verdragen, of op het nationale recht inzake de tenuitvoerlegging van buitenlandse arbitrale vonnissen, indien een dergelijke tenuitvoerlegging gunstiger is dan die onder het Verdrag. Het Verdrag is derhalve niet bij uitsluiting toepasselijk indien een arbitraal vonnis onder zijn bereik valt. Hoewel de tekst van Artikel VII lid 1 niet uitdrukkelijk verwijst naar de nakoming van de arbitrage-overeenkomst (Art. II lid 3), kan de bepaling geacht worden ook op deze actie van toepassing te zijn.[8]

Het nationale recht is in de meeste gevallen minder gunstig dan het Verdrag. Het is daarom ook niet verwonderlijk dat het nationale recht in de praktijk weinig wordt toegepast voor de nakoming van arbitrage-overeenkomsten of arbitrale vonnissen die binnen het bereik van het Verdrag vallen.[9]

Aan de andere kant kan de nakoming of de tenuitvoerlegging op basis van een ander multilateraal of bilateraal verdrag gunstiger zijn. Conflicten tussen het Verdrag en de andere multilaterale en bilaterale verdragen kunnen in de regel worden opgelost door toepassing van de verdragsrechtelijke conflictregel van maximale doelmatigheid (*règle d'efficacité maximale*), welke regel de voorkeur verdient boven de regels van *lex posterior* of *lex specialis*.[10]

De meest-begunstigingsregel van Artikel VII lid 1 lijkt in de praktijk enigszins verwaarloosd. Hoewel deze regel in het Verdrag is opgenomen teneinde tenuitvoerlegging in het grootst mogelijke aantal gevallen te bevorderen, kan zij niettemin een negatief effect hebben: zij kan het bereiken van een eenvormig regime, dat de nakoming van de arbitrage-overeenkomsten en arbitrale vonnissen beheerst in de context van internationale handelsarbitrage, in de weg staan.

6. Nakoming van de arbitrage-overeenkomst

Met uitzondering van Artikel II lid 2 betreffende de schriftelijke vorm van de arbitrage-overeenkomst, hebben de bepalingen van het Verdrag met betrekking tot de nakoming van de arbitrage-overeenkomst tot nu toe weinig interpretatie-problemen voor de rechters met zich meege-

7. Zie I–3.
8. Zie I–4.2.
9. Zie I–4.3.
10. Zie I–4.4.

bracht. Volgens in Artikel II lid 3 moet de rechter van een Verdragsstaat bij wie een geschil aanhangig wordt gemaakt over een onderwerp ten aanzien waarvan partijen een arbitrage-overeenkomst zijn aangegaan, partijen op verzoek van een hunner naar arbitrage verwijzen, tenzij hij constateert dat de overeenkomst vervallen is, niet van kracht is of niet kan worden toegepast.

Artikel II lid 3 verschaft geen discretionaire bevoegdheid om al dan niet een rechterlijke onbevoegdheid c.q. niet-ontvankelijkheid uit te spreken ten aanzien van procedures die aanhangig zijn gemaakt in strijd met een arbitrage-overeenkomst. De regel dat een rechter zich onbevoegd c.q. de vordering niet ontvankelijk moet verklaren indien een partij daarom verzoekt, is bijna unaniem bevestigd door de rechters in de Verdragsstaten.[11]

De voorwaarden voor de nakoming van de arbitrage-overeenkomst dat deze overeenkomst niet vervallen is, krachteloos is of niet kan worden toegepast, hebben tot weinig rechterlijke uitspraken aanleiding gegeven. Niettegenstaande de ruime formulering, die vatbaar zou kunnen zijn voor uiteenlopende interpretaties, dient naar mijn mening een enge interpretatie te worden gehanteerd.[12]

De zin in Artikel II lid 3 "een overeenkomst als bedoeld in dit artikel" behelst als voorwaarden voor het nakomen van de overeenkomst dat:

(a) er een geschil moet zijn naar aanleiding van een bepaalde al dan niet contractuele rechtsbetrekking (Art. II lid 1),

(b) dat het geschil vatbaar moet zijn voor afdoening door arbitrage (Art. II lid 1), en

(c) dat de overeenkomst schriftelijk moet zijn aangegaan (Art. II lid 2).

De voorwaarden (b) en (c) zullen hierna onder respectievelijk nos. 9 *in fine* en 7 worden besproken. Voor wat betreft voorwaarde (a) kan worden opgemerkt dat zich geen noemenswaardige interpretatie-moeilijkheden hebben voorgedaan.[13]

Een zorgwekkende ontwikkeling in de Verenigde Staten is dat een aantal rechters geoordeeld heeft dat het Verdrag de mogelijkheid uitsluit beslag te leggen voordat een arbitraal vonnis is gewezen. Deze opvatting, die niet wordt gedeeld door de rechters in andere Verdragsstaten, kan naar mijn mening niet op het Verdrag worden gebaseerd.[14]

11. Zie II–1.2.3.
12. Zie II–1.3.4.
13. Zie II–1.3.2.
14. Zie II–1.2.5.

7. De schriftelijke vorm van de arbitrage-overeenkomst

De Verdragsbepaling die aanleiding heeft gegeven tot het grootste aantal uiteenlopende rechterlijke interpretaties is het vereiste van de schriftelijke vorm van de arbitrage-overeenkomst zoals gedefinieerd in Artikel II lid 2. Deze bepaling houdt in dat "Onder 'schriftelijke overeenkomst' wordt verstaan een compromissoir beding in een overeenkomst of een acte van compromis, ondertekend door partijen of vervat in gewisselde brieven of telegrammen." De grootste verwarring heerst in Italië, hoewel verscheidene rechters in andere Verdragsstaten ook tot uiteenlopende interpretaties zijn gekomen.

Behalve door het Italiaanse hoogste gerechtshof, is het algemeen aanvaard dat Artikel II lid 2 prevaleert boven de vereisten van nationaal recht inzake de vorm van de arbitrage-overeenkomst, in die gevallen waarin de overeenkomst onder het toepassingsbereik van het Verdrag valt. Met andere woorden, Artikel II lid 2 kan worden opgevat als een regel van uniform recht voor de formele geldigheid van de arbitrage-overeenkomst.

Dit betekent dat de nakoming niet kan worden gebaseerd op het Verdrag indien de arbitrage-overeenkomst niet voldoet aan de formele vereisten van Artikel II lid 2. In een dergelijk geval kan echter onder toepassing van de meest-begunstigingsregel van Artikel VII lid 1 de nakoming mogelijk zijn op basis van nationaal recht of een ander multilateraal of bilateraal verdrag (zie no. 5 hierboven).

Het feit dat Artikel II lid 2 het karakter heeft van een regel van uniform recht, heeft tot gevolg dat noch meer, noch minder dan is bepaald in Artikel II lid 2 geëist kan worden voor de vorm van de arbitrage-overeenkomst. Het heeft ook tot gevolg dat het bestaan van de overeenkomst niet door andere middelen bewezen kan worden, indien de vorm van een arbitrage-overeenkomst niet in overeenstemming is met Artikel II lid 2. Beide aspecten hebben geen aanleiding gegeven tot moeilijkheden voor de rechterlijke instanties.

Aan de andere kant verschillen de rechters van mening over de vraag of een partij geacht kan worden het recht te hebben verwerkt zich te beroepen op het niet voldoen aan Artikel II lid 2 in die gevallen waarin deze partij met betrekking tot de arbitrage-overeenkomst heeft gehandeld als ware hij erdoor gebonden. Het is verdedigbaar in dit geval rechtsverwerking aan te nemen op grond van het beginsel van goede trouw.[15]

In deze studie wordt voorts de opvatting verdedigd dat internationale arbiters Artikel II lid 2 dienen toe te passen, met dien verstande dat ook zij gebruik kunnen maken van de meest-begunstigingsregel van Artikel VII lid 1.[16]

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15. Zie II–2.2.2 en 3.
16. Zie II–2.2.4.

De vraag in welke gevallen aan het vereiste van Artikel II lid 2 geacht moet worden te zijn voldaan, wordt door de rechters verschillend beantwoord. Dit geldt niet zozeer voor het eerste alternatief van Artikel II lid 2, te weten een arbitrale clausule, vervat in een overeenkomst of een acte van compromis die door partijen is getekend. In dit geval zijn de handtekeningen van beide partijen onontbeerlijk. Hierbij dient te worden opgemerkt dat in het geval waarin een arbitrale clausule is vervat in een contract, de handtekeningen voor het contract als geheel voldoende zijn; in tegenstelling tot wat in het bijzonder door het Italiaanse hoogste gerechtshof in een aantal gevallen is geoordeeld, is het niet nodig dat de handtekeningen op de arbitrale clausule zelf betrekking hebben.[17]

Er bestaat met name onzekerheid omtrent het tweede alternatief van Artikel II lid 2, het contract met de arbitrale clausule of de acte van compromis, vervat in gewisselde documenten. Het tweede alternatief is door de ontwerpers van het Verdrag toegevoegd met het doel ruimte te verschaffen voor de modernere middelen tot het sluiten van overeenkomsten in de internationale handel.

Het tweede alternatief van Artikel II lid 2 houdt naar mijn mening niet in, dat de handtekeningen van partijen zijn vereist. Het tweede alternatief betekent echter wel dat de ene partij een schriftelijk aanbod om te arbitreren aan de andere partij doet, en dat de andere partij dit aanbod schriftelijk accepteert en deze acceptatie aan de eerstgenoemde partij retourneert. Met betrekking tot de vraag in welke gevallen de schriftelijke aanvaarding geacht kan worden te hebben plaatsgevonden, kan worden gesteld dat allerlei soorten schriftelijke acceptaties voldoende zouden kunnen worden geacht (bijvoorbeeld verwijzing in factuur naar contractnummers). Deze interpretatie zou de tamelijk strenge eisen van Artikel II lid 2 kunnen verzachten, welke bepaling, ondanks de inspanningen van de ontwerpers van het Verdrag, niet meer volledig in overeenstemming is met de huidige internationale handelspraktijk.[18]

Het probleem van de arbitrale clausule in standaardvoorwaarden is nog weinig bij de rechters aan de orde geweest in samenhang met Artikel II lid 2 van het Verdrag, ondanks het feit dat de meeste internationale transacties op deze basis worden afgesloten. Vooruitlopend op mogelijke rechterlijke interpretaties, is getracht interpretaties te ontwikkelen die niet afhankelijk zijn van nationaal recht.[19]

8. **Tenuitvoerlegging van het arbitrale vonnis**

Het tweede aspect van de internationale handelsarbitrage dat in het Verdrag wordt geregeld, is de tenuitvoerlegging, in de ene staat, van

17. Zie II–2.3.2.
18. Zie II–2.3.3 en 4.
19. Zie II–2.4.3.

arbitrale vonnissen gewezen in een andere staat. De eerste bepaling van het Verdrag met betrekking tot deze actie is Artikel III, dat voornamelijk de procedure voor tenuitvoerlegging betreft. Dit artikel heeft in het algemeen geen problemen opgeleverd.[20]

Hetzelfde kan gezegd worden van Artikel IV, dat de voorwaarden geeft waaraan door een partij die de tenuitvoerlegging van een arbitraal vonnis verzoekt moeten worden voldaan. Deze voorwaarden zijn in het Verdrag tot een minimum beperkt: er dient slechts een gelegaliseerd origineel van de arbitrale uitspraak overgelegd te worden, en het origineel van de arbitrage-overeenkomst, of gewaarmerkte afschriften van deze documenten.[21]

9. Gronden voor weigering van tenuitvoerlegging van het arbitrale vonnis

De hoofdkenmerken van de gronden voor de weigering van de tenuitvoerlegging, zoals vervat in Artikel V, zijn door de rechterlijke instanties min of meer uniform geïnterpreteerd en toegepast. Zo hebben de rechters in het algemeen bevestigd dat de gronden zoals opgesomd in lid 1 van Artikel V, bewezen dienen te worden door de partij tegen wie de tenuitvoerlegging wordt verzocht; dat deze gronden limitatief zijn, waarbij in het bijzonder een nieuw onderzoek door de rechter naar de zaak zelf is uitgesloten; en dat de gronden eng dienen te worden geïnterpreteerd.[22]

Daartegenover staat dat de rechters uiteenlopende interpretaties hebben gegeven ten aanzien van een aantal gronden voor weigering van tenuitvoerlegging, vervat in lid 1 van Artikel V.

Met betrekking tot grond *a*, die de ongeldigheid van de arbitrage-overeenkomst betreft, heeft het Italiaanse hoogste gerechtshof geoordeeld dat deze niet het vereiste van geschrift van Artikel II lid 2 omvat. De opvatting dat Artikel II lid 2 alleen van toepassing is bij de vordering tot nakoming van de arbitrage-overeenkomst (Art. II lid 3), wordt naar mijn mening terecht niet gedeeld door de rechters in de andere Verdragsstaten.[23]

Hoewel partijen tegen wie tenuitvoerlegging werd verzocht vaak een beroep gedaan hebben op grond *b*, betreffende de schending van regels van een behoorlijke procesgang, hebben de rechters zelden geoordeeld dat een dergelijke schending aanwezig was. Er bestaat een nagenoeg uniforme interpretatie dat schending van de regels van een behoorlijke

20. Zie III–1.
21. Zie III–2.
22. Zie III–3.
23. Zie III–4.1.3.3.

procesgang slechts dient te worden aangenomen in zeer ernstige gevallen.[24]

Grond *c*, met betrekking tot het arbitrale vonnis dat buiten de grenzen van het compromis is gewezen, heeft weinig toepassing in de praktijk gevonden. Deze grond lijkt geen interpretatie-problemen op te leveren. Het arbitrale vonnis waarin niet op alle punten door arbiters wordt beslist zou evenwel een uitzondering kunnen zijn. Dit geval valt mijns inziens niet onder de bepaling van grond *c*.[25]

Volgens grond *d* kan tenuitvoerlegging worden geweigerd indien de samenstelling van het scheidsgerecht of de scheidsrechterlijke procedure niet in overeenstemming was met de overeenkomst van partijen, of, bij gebrek aan een overeenkomst daaromtrent, niet in overeenstemming was met het recht van het land waar de arbitrage heeft plaatsgevonden. De betekenis van deze grond voor de weigering van de tenuitvoerlegging is niet direct duidelijk. In deze studie wordt de opvatting verdedigd dat het een rechter van een land waar de tenuitvoerlegging van een buitenlands arbitraal vonnis wordt verzocht, niet is toegestaan de geldigheid van de samenstelling van het scheidsgerecht of de arbitrale procedure te toetsen aan de wet van het land waar de arbitrage heeft plaatsgevonden, in die gevallen waarin partijen een overeenkomst hieromtrent hebben gemaakt. Een dergelijke overeenkomst blijft echter wel onderworpen aan de fundamentele regels van een behoorlijke procesorde.[26] Grond *d* kan naar mijn mening niet worden beschouwd als basis voor de zogenaamde "gedenationaliseerde" arbitrage en het "a-nationale" arbitrale vonnis (zie no. 10 hierna).

Grond *e* bevat in feite twee gronden voor weigering van tenuitvoerlegging. De eerste grond is, dat het vonnis nog niet bindend is geworden voor partijen. Terwijl de rechters het er in het algemeen over eens zijn dat deze bepaling niet inhoudt dat een verlof tot tenuitvoerlegging (exequator en dergelijke) verkregen moeten worden in het land waar het vonnis is gewezen, verschillen zij van mening met name met betrekking tot het moment waarop het vonnis als bindend beschouwd kan worden. Het merendeel van de rechters onderzoekt deze vraag op basis van het recht dat van toepassing is op het arbitrale vonnis. Naar mijn oordeel kan evenwel een interpretatie onafhankelijk van nationaal recht worden gegeven. Volgens deze autonome interpretatie kan een arbitraal vonnis bindend worden beschouwd op het moment dat er geen gewone rechtsmiddelen meer tegen openstaan, hetgeen in de meeste gevallen betekent dat er geen hoger beroep meer openstaat bij een tweede arbitrale instantie of (uitzonderlijk) bij een rechter.[27]

24. Zie III–4.2.
25. Zie III–4.3.
26. Zie III–4.4.
27. Zie III–4.5.2.

De tweede grond voor weigering van tenuitvoerlegging zoals neergelegd in grond *e* is, dat het vonnis is vernietigd of dat tenuitvoerlegging, of de mogelijkheid daartoe, is opgeschort in het land van oorsprong. Deze grond is weinig in de praktijk toegepast.[28] Een mogelijk effect van de tweede grond van grond *e* kan zijn, dat het limitatieve karakter van de gronden voor weigering van tenuitvoerlegging zoals opgesomd in het eerste lid van Artikel V wordt ondermijnd, doordat het de mogelijkheid biedt tot introductie van alle mogelijke gronden waarop het vonnis volgens het arbitragerecht van het land van oorsprong kan worden vernietigd. Indien namelijk in het land van oorsprong het arbitrale vonnis is vernietigd op een van de gronden die niet vermeld staan in het eerste lid van Artikel V van het Verdrag, dan dient niettemin tenuitvoerlegging te worden geweigerd in een andere Verdragsstaat op basis van de tweede grond van grond *e*.[29]

In dit verband kan worden toegevoegd dat Artikel VI aan de rechter de bevoegdheid toekent de beslissing over de tenuitvoerlegging van het vonnis op te schorten indien een vordering tot vernietiging van het vonnis of tot schorsing van tenuitvoerlegging, of van de mogelijkheid daartoe, is aanhangig gemaakt in het land van oorsprong. Deze bepaling is nauwelijks toegepast door de rechters, doch lijkt niet voor meer dan één uitleg vatbaar.[30]

De gronden vermeld in het tweede lid van Artikel V, op grond waarvan een rechter ambtshalve tenuitvoerlegging kan weigeren, hebben betrekking op de vraag of het geschil vatbaar is voor arbitrage (grond *a*, zie ook Art. II lid 1), en op de openbare orde (grond *b*). Hoewel grond *a* betreffende de vatbaarheid voor arbitrage als zodanig apart vermeld staat, kan deze vermelding als overbodig worden beschouwd, omdat naar algemene opvatting openbare orde reeds omvat de vraag of een geschil vatbaar is voor arbitrage.

De rechters hebben ook deze bepalingen eng geïnterpreteerd, niettegenstaande het feit dat met name de openbare orde een potentieel ondermijnende factor kan zijn voor het doelmatig functioneren van een internationaal verdrag. In dit verband wordt in toenemende mate het onderscheid tussen de nationale openbare orde en de engere internationale openbare orde gehanteerd. Gesteld kan worden dat, in het bijzonder met betrekking tot Artikel V lid 2, de rechters zich in het algemeen gunstig gezind hebben getoond ten opzichte van het Verdrag.[32]

28. Zie III–4.5.3.1 en 2.
29. Zie III–4.5.3.4.
30. Zie III–4.5.3.3.
31. Zie III–5.2.
32. Zie III–5.1 en 3.

10. Toepasselijk recht

Het Verdrag bevat eveneens enige bepalingen van internationaal privaatrecht, teneinde het toepasselijk recht vast te stellen voor die gevallen waarin het Verdrag niet in uniforme bepalingen voorziet. Volgens Artikel V lid 1 sub *a* wordt de arbitrage-overeenkomst beheerst door het recht waaraan de partijen de overeenkomst hebben onderworpen, of, indien elke aanwijzing hieromtrent ontbreekt, door het recht van het land waar het vonnis is gewezen. Zoals reeds vermeld, bepaalt Artikel V lid 1 sub *d* dat slechts indien een overeenkomst van partijen omtrent de samenstelling van het scheidsgerecht of de arbitrale procedure ontbreekt, het recht van het land waar de arbitrage heeft plaatsgevonden dient te worden toegepast. Volgens Artikel V lid 1 sub *e*, wordt het arbitrale vonnis beheerst door het recht van het land waar, of krachtens het recht waarvan, het vonnis is gewezen.[33]

Aan deze bepalingen is in de literatuur uitvoerig aandacht besteed vanuit het gezichtspunt van partij-autonomie. In het bijzonder zouden zij het voor partijen mogelijk maken een arbitragerecht van toepassing te verklaren dat verschilt van het arbitragerecht van de plaats van arbitrage (dat wil zeggen het land waar het vonnis wordt, of zal worden, gewezen). Deze mogelijkheid komt overeen met het hiervoor genoemde tweede criterium van het toepassingsgebied van het Verdrag (zie no. 2). Hoewel volgens het Verdrag van deze mogelijkheid in theorie gebruik kan worden gemaakt, is in de praktijk gebleken dat de arbitrage-overeenkomst en het arbitrale vonnis praktisch altijd beheerst worden door het arbitragerecht van het land waar het vonnis is, of zal worden, gewezen.

Er wordt wel gesteld dat Artikel V lid 1 sub *d* zelfs een totale partij-autonomie zou toestaan, in die zin dat het de partijen vrij staat de arbitrage te "denationaliseren", dat wil zeggen te onttrekken aan de toepasselijkheid van welk nationaal arbitragerecht dan ook. Naar mijn mening voorziet het Verdrag niet in een juridische basis voor een "gedenationaliseerde" arbitrage, aangezien de Verdragsbepalingen veronderstellen, met name Artikel V lid 1 sub *a* en *e*, dat arbitrage beheerst wordt door een nationaal arbitragerecht. Dit heeft tot gevolg dat het zogenaamde "a-nationale" vonnis, dat het resultaat is van een "gedenationaliseerde" arbitrage, niet kan worden tenuitvoergelegd op basis van het Verdrag.[34]

Wat daarvan ook moge zijn, de praktijk blijkt een voorkeur te hebben voor de regel dat zowel de arbitrage-overeenkomst als de arbitrale procedure, en het arbitrale vonnis, beheerst worden door één en hetzelfde arbitragerecht, te weten het recht van het land waar het vonnis is, of zal worden, gewezen. Het moet worden toegegeven dat deze praktijkregel

33. Zie III–4.1.3.4 en 5, III–4.4.2 en III–4.5.3.
34. Zie I–1.6.

niet altijd ideaal is, gezien het soms toevallige karakter van de plaats van arbitrage en de plaatsgebonden eigenaardigheden van sommige arbitragewetten. Niettemin is vooralsnog de duidelijke regel van de toepasselijkheid van het arbitragerecht van het land waar de arbitrage plaatsvindt, bij gebrek aan een betere oplossing, te preferen boven de andere mogelijkheden die ingewikkelde juridische problemen met zich kunnen meebrengen en een ongewenste mate van onzekerheid kunnen veroorzaken. De praktijkregel komt er in feite op neer dat men er zich bewust van dient te zijn een "arbitrage-vriendelijk" land te kiezen.

11. Is een herziening van het Verdrag noodzakelijk?

Het overzicht van de Verdragsbepalingen en de gerechtelijke interpretaties, zoals gegeven onder nos. 2 tot en met 10 hierboven, is natuurlijk zeer algemeen en maakt geen melding van de vele detailpunten die in deze studie zijn onderzocht, en die het onderwerp van verschillende interpretaties zijn of die verschillend geïnterpreteerd kunnen worden. Toch kan gesteld worden dat de uitspraken aangaande het Verdrag die tot nu toe gerapporteerd zijn, aantonen dat de rechters in de regel het Verdrag interpreteren en toepassen op een wijze die gunstig genoemd kan worden ten opzichte van de internationale handelsarbitrage.

De verschillen in de rechterlijke interpretaties zijn niet zodanig, dat zij een doelmatig functioneren van het Verdrag in ernstige mate belemmeren. Dit is opmerkelijk, indien men het systeem en de tekst van het Verdrag zelf in ogenschouw neemt. Het systeem van het Verdrag is niet gemakkelijk te doorgronden voor diegene die het Verdrag voor het eerst leest. Het begint met een definitie van het toepassingsgebied met betrekking tot het arbitrale vonnis. Het noemt vervolgens de arbitrage-overeenkomst in Artikel II. Dit Artikel bevat een "verborgen" bepaling – niet aangekondigd in de titel van het Verdrag – met betrekking tot de nakoming van de arbitrage-overeenkomst, zonder evenwel het toepassingsgebied in dit opzicht te omschrijven. Het bevat vervolgens bepalingen met betrekking tot de procedure en de voorwaarden voor tenuitvoerlegging van het arbitrale vonnis (Artt. III–VI). Daarna leest men een meestbegunstigingsregel (Art. VII lid 1), die impliciet geacht moet worden ook van toepassing te zijn op nakoming van de arbitrage-overeenkomst. Bovendien zijn verschillende bepalingen dubbelzinnig of niet gemakkelijk te begrijpen (bijvoorbeeld Art. I lid 1, tweede criterium, Art. II lid 2 en Art. V lid 1 sub *d*).

Dit brengt ons tot de vraag of het Verdrag moet worden herzien, teneinde zijn tekst te verduidelijken door een additioneel Protocol of een soortgelijk instrument. Sommigen, waaronder de Asian-African Legal Consultative Committee (AALCC), hebben de mening geuit dat een herziening inderdaad wenselijk zou zijn. Indien men de ongeveer 140 gerapporteerde rechterlijke beslissingen uit 18 Verdragsstaten beschouwt, dan zijn

naar mijn mening de interpretatie-problemen niet dermate groot dat herziening op dit moment noodzakelijk lijkt. De enige bepaling die voor herziening in aanmerking zou kunnen komen, is Artikel II lid 2 met betrekking tot de schriftelijke vorm van de arbitrage-overeenkomst. Doch ook wat betreft deze bepaling kan worden gesteld dat de procedure voor het tot stand komen van een additioneel Protocol of soortgelijk instrument een te hoge prijs voor een betere tekst zou zijn.[35]

De procedure voor het tot stand komen van een additioneel Protocol is langdurig, en kan leiden tot ingewikkelde situaties. Zelfs indien men ervan uitgaat dat een betere tekst van het Verdrag dan de bestaande kan worden vastgesteld, dan zal het toch nog enige tijd duren voordat een dergelijk Protocol zal zijn aangenomen door alle staten die op dit moment aangesloten zijn bij het Verdrag van New York. In de tussenliggende periode kan onzekerheid bestaan. Deze situatie zou zelfs kunnen voortduren indien een aantal staten het niet noodzakelijk zou achten zich bij een nieuw Protocol aan te sluiten. Bovendien zou het geruime tijd kunnen vergen voordat de bepalingen van een nieuw Protocol, hoeveel beter de nieuwe tekst ook zou mogen zijn, op een min of meer uniforme wijze door de rechters worden geïnterpreteerd en toegepast.[36]

12. Model uniforme wet inzake internationale handelsarbitrage

De vraag of het Verdrag herzien moet worden, dient te worden onderscheiden van de vraag of een uniforme arbitragewet wenselijk is. Het toepassingsgebied van het Verdrag is beperkt tot de nakoming van arbitrage-overeenkomsten die geacht kunnen worden onder het Verdrag te vallen en tot de tenuitvoerlegging buitenlandse arbitrale vonnissen. Het geeft geen allesomvattende regeling voor internationale handelsarbitrage. Het is bijvoorbeeld niet van toepassing op de vordering tot vernietiging van arbitrale vonnissen, hoe internationaal deze ook mogen zijn, welke vordering is overgelaten aan het arbitragerecht van het land van oorsprong.[37] Met het oog op de verschillen in de nationale arbitragewetten kan het daarom wenselijk zijn een uniform arbitragewet tot stand te brengen, tenminste voor wat betreft de internationale handelsarbitrage. De pogingen om een uniforme wet door een internationaal verdrag tot stand te brengen, zijn tot nu toe teleurstellend geweest. Een voorbeeld

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35. Zie II–2.6.

36. De conclusie dat, ondanks enige tekortkomingen, het Verdrag op een bevredigende wijze beantwoordt aan het doel waarvoor het in het leven is geroepen en dat, in elk geval vooralsnog, het niet zou zijn aan te bevelen de bepalingen te veranderen of een additioneel Protocol tot stand te brengen, wordt eveneens getrokken door de Secretaris-Generaal van de United Nations Commission on International Trade Law (UNCITRAL) in zijn rapport *Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UN DOC A/CN.9/168 (april 1979).

37. Zie I–1.4.2.

hiervan is de Europese Eenvormige Wet van 1966.[38] Een meer realistische benadering lijkt het voorbereiden van een model eenvormige wet die kan dienen als basis voor het aanpassen van nationale arbitragewetten. Met dit oogmerk heeft de United Nations Commission on International Trade Law (UNCITRAL) op haar twaalfde zitting in juni 1979 het besluit genomen een dergelijke modelwet voor te bereiden, die, naar ik hoop, in de nabije toekomst haar beslag zal krijgen.[39]

13. Eenmaking van rechterlijke interpretaties

De conclusie is, dat vooralsnog het Verdrag van New York geen herziening behoeft teneinde de tekst te verduidelijken door een additioneel Protocol of soortgelijk instrument, terwijl de totstandkoming van een model eenvormige wet voor internationale handelsarbitrage wenselijk zou zijn. De pogingen om de rechterlijke interpretaties van het Verdrag van New York te harmoniseren ten einde tot een uniforme interpretatie te komen zouden moeten worden voortgezet. Dit vereist dat de rechterlijke interpretaties bij voortduring op een wereldwijde basis worden gevolgd. Het rapporteren van de rechterlijke uitspraken inzake het Verdrag in het *Yearbook Commercial Arbitration*, vanaf het eerste deel in 1976, evenals de verschillende andere rapportages en overzichten, zijn hiervoor bronnen van groot belang.

Het Verdrag is tot nu toe in de praktijk redelijk hanteerbaar gebleken. De huidige betekenis van het Verdrag voor de internationale handelsarbitrage kan echter in de toekomst alleen dan toenemen indien de rechterlijke interpretaties naar elkaar toegroeien. Het analyseren en vergelijken van de door de rechters gedurende de bijna vijfentwintig jaar van het bestaan van het Verdrag gegeven interpretaties, evenals de voorstellen tot mogelijke uniforme interpretaties, mogen, naar ik hoop, een —bescheiden — bijdrage tot dit doel leveren.

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38. De Eenvormige Wet is als annex toegevoegd aan het Europese Verdrag inzake Arbitrage, Straatsburg, 20 januari 1966, *European Treaty Series* no. 56. Het Verdrag is slechts ondertekend door België en Oostenrijk. België heeft het Verdrag geratificeerd op 22 februari 1973; de Eenvormige Wet was reeds ingevoerd bij een wet van 4 juli 1972, gepubliceerd in *Belgisch Staatsblad* van 8 augustus 1972.

39. "Report of the United Nations Commission on International Trade Law on the Work of its Twelfth Session", *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17,* UN DOC A/34/17, para. 81 (1979). Zie ook het memorandum van het Secretariaat van UNCITRAL "Progress Report on the Preparation of a Model Law on Arbitral Procedure", UN DOC A/CN.9/190 (1980).