UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Dispute Settlement

International Commercial Arbitration

5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention

NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of some forty modules.

This Module has been established on the basis of a first draft prepared by Mr. Petar Šarčević at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed in this paper are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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UNCTAD/EDM/Misc.232/Add.37

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WHAT YOU WILL LEARN

This Module surveys the basic features of the recognition and enforcement of foreign arbitral awards under the New York Convention of 1958 (hereinafter: NYC). The recognition and enforcement proceedings constitute the final stage of any arbitration whenever the arbitral award is not executed voluntarily.

Since the arbitrators are private persons, national courts are necessarily involved in the recognition and enforcement of arbitral awards. In 1958, the attempt by the ECOSOC to adopt uniform rules on the recognition and enforcement of foreign arbitral awards resulted in the most important international instrument in the field – the New York Convention. Since then, the Convention has had a significant impact on arbitration practice, as well as on the court practice in connexion with arbitration. This is best witnessed by the fact that, to date, 133 countries have become party to the Convention. Thus it can be said that the NYC successfully fulfills its purpose of facilitating the recognition and enforcement of foreign awards.

While a court seized with a request for the recognition and/or enforcement of a foreign arbitral award may not examine the award on its merits, it may refuse to recognize or enforce the award on the basis of some grounds provided by the NYC. The grounds for refusal are intended to protect the vital interests of the enforcing State or to provide internationally recognized procedural standards for the protection of the parties. Of these grounds, it appears that the formal validity of the arbitration agreement no longer meets the needs of modern business transactions, thus calling for possible amendment.

The harmonization achieved in the field of recognition and enforcement of arbitral awards is due mainly to the worldwide acceptance of the NYC, which is growing annually. In 2002 alone, five more countries became Contracting States to the Convention.

1. INTRODUCTION

This Chapter deals with the recognition and enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[1] Despite considerable progress made by the Convention in harmonizing the enforcement of foreign awards, the enforcement process is sometimes considered the "weakest link in the entire chain of international dispute resolution".[2] Indeed, the enforcement proceedings are still dependent on national rules, which differ in many aspects in different parts of the world. Nonetheless, the New York Convention has considerably improved the situation. With 132 countries presently party to the Convention,[3] it has become one of the most successful multilateral conventions in the field of international commercial law and, of commercial dispute resolution in particular.

Brief history

When international commercial arbitration was first being established at the beginning of the twentieth century, it relied on domestic arbitration laws that differed considerably from each other, thus proving inadequate for the needs of international arbitration. The main problem was the non-enforceability of arbitral clauses referring future disputes to arbitration. After World War I, a multilateral convention - the Geneva Protocol on Arbitration Clauses of 1923[4] - was negotiated in the framework of the League of Nations, with the aim of unifying the position of the signatory States on this matter. To this end, Article 1 of the Geneva Protocol stipulated that arbitration agreements are valid "whether relating to existing or future differences".

This, however, was only the first step. After resolving the issue of the validity of arbitration agreements, it became necessary to provide certainty that arbitration awards would be enforced in foreign countries where assets of the award-debtor were located. Once again, a new convention was drawn up under the auspices of the League of Nations: the Geneva Convention on the Execution of Foreign Awards of 1927.[5] This Convention governed the enforcement of arbitral awards rendered on the basis of arbitration agreements falling under the Geneva Protocol. Although the Geneva Protocol of 1923 and the Geneva Convention of 1927 made significant progress in the area of unification, they failed to meet the needs of the international commercial community. Therefore, immediately after World War II, the International Chamber of Commerce (ICC) launched a project to draft a new international arbitration convention. The Draft Convention, which incorporated the ideas of the Geneva Treaties, was presented by the United Nations Economic and

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[1] *The text of the New York Convention is published in 330 United Nations Treaty Series, No. 4739 (1959), p. 38.*
[2] *BLESSING, Marc, "The New York Convention: The Major Problem Areas", in: The New York Convention of 1958, ASA Special Series No. 9 (1996), p. 20.*
[3] *This Chapter was completed in autumn 2002.*
[4] *Published in 27 League of Nations Treaty Series (1924), p. 158.*
[5] *Published in 92 League of Nations Treaty Series (1929-1930), p. 302.*

Social Council (ECOSOC) at the Conference held in New York from 20 May to 10 June 1958. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted on the last day of the Conference.

Voluntary execution of awards

Today, it is widely accepted that in most case arbitral awards are voluntarily executed by the parties. It has been reported, for example, that over 90 percent of ICC arbitral awards are executed by the parties on a voluntary basis. The reasons for this are manifold; most importantly, business people are unwilling to put their reputations at risk by refusing to comply with the decision of an arbitral tribunal that they have voluntarily agreed upon.

Some arbitration institutions, such as the ICC, request the parties to comply with the award without delay. In this sense, Article 28(6) of the ICC Rules of Arbitration[6] reads:

> *"Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their rights to any form of recourse insofar as such waiver can validly be made."*

This obligation has encouraged the parties to perform spontaneously, thus enhancing the enforceability of the award. This, however, does not mean that the award will be regarded in all countries as "a waiver of all recourses in respect of possible violation of due process, international public order or the competence of the Arbitral Tribunal".[7] On the other hand, some recent court decisions support the idea that such a waiver should be regarded as the parties' agreement to end the arbitration with the decision of the arbitral panel.

> *" the award is proper as a matter of U.S. law, and that the arbitration agreement between Egypt and CAS precluded an appeal in Egyptian courts… A decision by this Court to recognize the decision of the Egyptian Court would violate… U.S. public policy."*

Absence of voluntary execution

If the award-debtor fails to voluntarily comply with the award, in many countries it is possible to request the court to intervene after the award has become final. There are usually two procedural devices allowing national courts to act in the capacity of a control mechanism: the setting-aside and the enforcement procedure. Generally speaking, an award is set aside at the request of the award-debtor in a special procedure before the national court that would otherwise be competent if the case had been decided by an ordinary court. Since a national court can only set aside awards regarded as having the same

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[6] *In force as of 1 January 1998.*

[7] *DERAIN, Yves and SCHWARTZ, Eric A., A Guide to the New ICC Rules of Arbitration, The Hague/London/Boston (1998), p. 297. See, for example, Article 1073 of the Belgium Code Judiciaire of 19 May 1990, which reads as follows: "Unless the award is contrary to ordre public or the dispute was not capable of settlement by arbitration, an arbitral award has the authority of res judicata when it has been notified in accordance with paragraph 1 of Article 1702 and may no longer be contested before the arbitrators."*

nationality as the court itself, the setting-aside procedure is reserved for so-called domestic awards. While the award-debtor requests the setting aside of the award, the prevailing party may initiate enforcement proceedings in cases of non-compliance by the award-debtor. The grounds for vacating an award are basically the same in both the setting aside and the enforcement procedure, as can be seen, for example, in the UNCITRAL Model Law on International Commercial Arbitration.[8] In both procedures it is the award-debtor that invokes the grounds for challenging the award. The setting-aside procedure is not dealt with in this module.

Summary:

- **Still depending on national rules, the enforcement procedure of foreign arbitral awards may be considered the weakest link in the chain of international dispute resolution.**
- **Adoption of the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927 was instrumental for the development of international commercial arbitration.**
- **Developments in international business led to the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, currently the most successful multilateral convention in international commercial law.**
- **Leading arbitration institutions observe that the parties voluntarily execute most foreign arbitral awards.**

[8] *For the final text of the UNCITRAL Model Law, as adopted in 1985, see UNCITRAL document A/40/17.*

2. SCOPE OF APPLICATION: ARTICLE I

Recognition and enforcement of foreign arbitral awards

This module deals with the recognition and enforcement of foreign, i.e. non-domestic, arbitral awards under the NYC. "The question what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues posed by this treaty."[9] Article I(1) delimits the scope of application of the Convention as follows:

> *"This Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, 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."*

According to the cited provision, an arbitral award qualifies as foreign in two situations:

1) when the award is made in the territory of another State, or
2) when it is not considered a domestic award in the State where recognition and enforcement is sought.

The question whether an award is domestic or foreign is of particular importance because in many jurisdictions the enforcement proceedings are different for foreign and domestic awards. Due to the diversity of the approaches of national legal systems to the enforcement of arbitral awards, including the grounds for non-enforceability, it has occurred that enforcement has been refused in one State but granted in another.

Determining whether an award is foreign

As seen above, there are two criteria in the recognition and enforcement proceedings under the NYC for determining whether an award is foreign. In comparative national legislation, the place of the rendering of the award is usually decisive. In this regard, the new Swedish law[10] stipulates in Section 52:

> *"An award made abroad shall be deemed to be a foreign award. In conjunction with the application of this Act, an award shall be deemed to have been made in the country in which the place of arbitration is situated."*

However, the criteria for qualifying an award as domestic or foreign is not always clearly defined. In Greece, for example, "there is no unanimity on the question when an award can be considered foreign within the meaning of Article 903 CCP". In the past, the place of arbitration has generally been

[9] *VAN DEN BERG, Albert Jan, "Non-domestic arbitral awards under the 1958 New York Convention" in: Arbitration International, Vol. 3 (1986), p. 191*
[10] *Arbitration Act of 1999 (SFS 1999: 116).*

regarded as decisive; however, in recent Greek case law, an award is deemed foreign if the arbitrators have applied foreign procedural law. By the same token, an award is considered domestic if the arbitrators have applied Greek procedural law.[11]

In 1962 the Hungarian Ministry of Justice enacted a Law Decree[12] on the implementation of the New York Convention. In accordance with this Decree, awards rendered outside Hungary are deemed foreign. In addition, an arbitral award rendered within Hungarian territory will be deemed foreign if the seat of the tribunal is outside Hungary and the majority of arbitrators or the sole arbitrator is not a Hungarian national.[13]

Delocalized or transnational award

To avoid problems due to the diversity of national arbitration legislation, the idea of delocalizing the arbitral proceedings has been proposed.[14] Proceedings may be delocalized by "an express choice of the parties concerning the rules governing the arbitration proceedings, the arbitration agreement or the substance of the dispute respectively (e.g., *lex mercatoria*)" or by an express choice of the parties "to exclude the supervision or interference of the national courts over or with the arbitration".[15] Therefore, if no legal system claims certain arbitration proceeding to be domestic it "cannot be assigned to a particular legal system".[16]

The transnational character of the award of the most important arbitration centers is "nationally founded" and therefore "the judicial review of transnational arbitrations does not cause any specific problems".[17]

Which foreign awards fall under the NYC?

From the general rule in Article I(1) it follows that the New York Convention applies to all foreign awards irrespective of the country where they were made. Therefore, a foreign award will be recognized and enforced by a signatory party to the Convention regardless of whether the award was rendered inside or outside the territory of another Contracting State. This presupposes that the award satisfies all the requirements laid down in the Convention.

Article I(3): Reciprocity

Nevertheless, the drafters of the Convention made it possible to limit the broad scope of the general rule mentioned above by providing a reservation in Article

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[11] FOUSTOUCOS, Anghélos C. and KOUSSOULIS, Stelios, National Report – Greece, in: International Handbook on Commercial Arbitration, Kluwer Law International, The Hague/London/New York (2002), p. 40.

[12] Law Decree No. 12/1962 of 31 October 1962.

[13] VARADY, Tibor, "International Commercial Arbitration in Hungary" in: Review of Arbitration in Central and Eastern Europe, No. 1 (2000), p. 35

[14] The idea of delocalized or transnational arbitral awards has not been accepted in the UNCITRAL Model Law. See ŠARČEVIĆ, Petar, "The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law" in: ŠARČEVIĆ, Petar (ed.), Essays on International Commercial Arbitration, London/Dordrecht/Boston (1989), p. 181.

[15] HAAS, Ulrich, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, in: WEIGAND, Frank-Bernd (ed.),
Practitioner's Handbook konbInternationalbArbitration,C.H.Beck/Bruylant/Manz/Stämpli,München/Bruxelles/Wien/Bern (2002), p. 413.

[16] Ibid.

[17] SCHMITTHOFF, Clive M., "Finality of Arbitral Awards and Judicial Review", in: Contemporary Problems in International Arbitration, London (1987), p. 232.

I(3). States taking advantage of the "first reservation", as it is called, limit the application of the Convention to foreign awards made in the territory of another Contracting State, on the basis of reciprocity. More than 50 per cent of the Contracting States have made the reciprocity reservation in Article I(3), which reads as follows:

> *"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."*

The constantly growing number of Contracting States to the Convention has softened the effect of this reservation. Nonetheless, there are still cases where the reservation proves to be effective. For example, in *Texaco Panama Inc.* v. *Duke Petroleum Transport Corp.* (Liberia),[18] the United States District Court, Southern District of New York found that:

> *"The New York Convention of 1958 relied on by the respondent does not apply, since respondent is a Liberian corporation and Liberia is not a signatory party to that Convention."*

Application of the NYC to commercial matters (second reservation)

Under Article I(3) it is possible to place a second reservation that narrows the scope of the Convention even further by restricting its application to matters "considered as commercial under the national law of the State making such declaration".

This reservation has also been made use of by a large number of countries, especially those whose legal systems make a distinction between commercial and non-commercial transactions. However, the issue in question will be characterized by the national law of the State of enforcement. Since each Contracting State may determine which matters it regards as commercial, this leads to problems because the fact that a certain matter is characterized as commercial by a plaintiff's national law does not mean that it will also be regarded as commercial by the national law of the enforcing State.

In *Taieb Haddad and Hans Barett* v. *Société d'Invesstissement Kal,*[19] the Tunisian Cour de Cassation affirmed the denial of enforcement of an ICC arbitral award on the ground that Tunisia had made the commercial reservation under Article I(3) of the NYC and that architectural and urbanization works are not commercial under Tunisian law. The Court stated:

> *"Since [Kal] has proven that the arbitral clause is not valid according to Tunisian law, which governs the contract, for lack of compliances with Art. 258 CCP, because the contract is [not commercial] according to Art. I of the* →

[18] *Judgment of 3 September 1996, 95 Civ. 37/61 (LMM), excerpts published in YCA, Vol. 24 (1999), p. 1026.*

[19] *Judgment of 10 November 1993, excerpts published in YCA, Vol. 23 (1998), pp. 770-773.*

New York Convention, the enforcement court decided correctly, as it is allowed to do under Art. V of the said Convention, and did not violate Art. 32 of the Constitution nor the New York Convention."[20]

Which persons fall under the scope of the NYC?

In the first paragraph of Article I, the phrase "persons, whether physical or legal" specifies that the Convention applies to both natural persons and legal entities such as companies. The application goes even beyond this generally accepted scope to encompass "persons of public law ", i.e. States and State agencies. As to the question whether sovereign immunity may be invoked as a defence against the recognition of the arbitration agreement and the enforcement of the arbitral award, such a defence is "virtually always rejected" on the basis of the following theories: "restrictive immunity, the waiver of immunity, the distinction between *acta de iure gestionis* and *acta de iure imperii*, the reliance on *pacta sunt servanda* and the creation of an ordre public '*réellement international*'."[21] On the other hand, he submits that sovereign immunity is still considered absolute by a substantial number of national courts in cases where a party, which has obtained leave for enforcement, attempts to seek actual execution of the award against the State or State agency.

Article I(2) Permanent Arbitral Bodies

Finally, Article I(2) should be briefly mentioned, more for the sake of clarification than real importance. At the time the NYC was drafted, there was a strong division between countries with market and planned economies, which also had an effect on arbitration. The latter countries had "permanent arbitral bodies" to which the parties submitted their disputes. Pursuant to this paragraph, awards made by such bodies are also to be deemed arbitral awards in the sense of Article I of the Convention.

Summary:

- **The NYC applies to the recognition and enforcement of foreign arbitral awards; in the sense of Article I, an award is foreign that has been made in the territory of another State or, though made in the State where recognition or enforcement is sought, is not considered domestic by the law of that State.**
- **The following reservations are permitted under Article I:**
  1) **the Contracting States may limit the scope of the NYC to foreign awards made in the territory of another Contracting State, and**
  2) **the application of the NYC may be limited to matters considered commercial under the national law of the State making such declaration.**
- **The scope of the NYC encompasses physical and legal persons, as well as persons of public law.**

[20] Ibid., *p. 773.*
[21] *VAN DEN BERG, Albert Jan, "New York Convention of 1958 Consolidated Commentary Cases reported in Volumes XX (1995) – XXI (1996)", in: YCA, Vol. 21 (1996), pp. 394-520, paragraph 105, p. 406.*

3. ARBITRATION AGREEMENT: ARTICLE II (1) AND (2)

General remarks

The existence of a valid arbitration agreement is a prerequisite for any arbitration. This also applies to cases under the NYC. As provided in the first two paragraphs of 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."*

Scope of application

Based on the above, it is clear that the NYC sets broad limits as to the type of the arbitration agreement: it may be either in the form of a clause in the contract or a separate agreement, and it may concern an existing dispute or one that arises in the future. It further follows that the dispute may concern a contractual or non-contractual legal relationship as long as it is specifically defined. A problem that often arises, especially when the parties disagree, is whether the disputed issue actually falls under the phrasing used in the arbitration agreement. It is generally held that doubts as to the scope of the issues arbitrable under a specific arbitral clause should be answered in favour of arbitration.[22]

In *Chloe Z Fishing Co., Inc (US) and others (US) v. Odyssey Re (London) Limited*,[23] concerning a marine insurance coverage contract (P&I policies), the court had to determine *inter alia* the scope of the parties' agreement to submit disputes to arbitration. In doing so, it relied on four basic guidelines:"

> *... (1) the duty to submit a matter to arbitration arises from the contract itself*
>
> *(2) the question of whether the parties have agreed to arbitrate a dispute is a judicial one unless the parties clearly provide otherwise*
>
> *(3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issueand*
>
> *(4) arbitration of disputes is favoured by the courts."*[24]

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[22] *Such opinion has been confirmed in case law. See, for instance, U.S. Court of Appeals for the Second Circuit, 1 April 1987,* Genesco, Inc. v. T. Kakiuchi & Co., Ltd., YCA, *Vol. 13 (1988), pp. 567-588; U.S. Court of Appeals for the Ninth Circuit, 8 July 1987,* Management & Technical Consultants SA v. Parsons-Jurden International Corp., YCA, *Vol. 13 (1988), pp. 611-616; U.S. Supreme Court, 2 July 1985,* Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., YCA, *Vol. 11 (1986), pp. 555-566; U.S. Court of Appeals for the Second Circuit, 10 October 1984,* S.A. Mineraçao da Trinidade-Samitri v. Utah International, Inc. and others, YCA, *Vol. 11 (1986), pp. 572-576.*

[23] *Decision of 26 April 2000, No. 99-2521-IEG RBB,* YCA, *Vol. 26 (2001), pp. 910-938.*

[24] Ibid., *p. 929.*

Applying those principles to the arbitration clause at hand, the U.S. District Court, Southern District of California found that the wording "any difference or dispute between the Company and the Assured concerning any claim under the Policy of Insurance" warrants broad interpretation including all five matters of the present dispute – some of which qualified as contractual and others as tort causes of action.

Content of the arbitration agreement

The NYC prescribes no specific requirements for the content of the arbitration agreement. This implies that any phrase expressing the parties' common intention to submit a dispute arising from the defined legal relationship to arbitration would suffice. A case in point is the simple clause: "Arbitration: in city X."[25]

"In writing" requirement

Pursuant to Article II(2), there is only one formal requirement for the validity of the arbitral agreement: it must be in writing.[26] The rule is uniform and permits no reference to national laws in cases falling under the NYC.[27] Furthermore, the arbitral clause must be in a contract or agreement signed by the parties, or contained in an exchange of letters or telegrams. With respect to these alternatives, one should keep in mind that this provision reflects the level of technology when the NYC was adopted in 1958. Since then, technological advancement makes it necessary to interpret this provision in a less restrictive manner so as to include other means of telecommunication providing a record of the agreement.[28] As recent case law relating to the NYC shows, the trend is to tolerate arbitration agreements: 1) concluded by the exchange of telexes and facsimiles,[29] 2) based on sales or purchase confirmation[30] or by reference to general conditions, 3) contained in the bill of lading and charter party, 4) concluded through an agent, 5) in cases of renewal of agreement and other connected contracts, 6) concluded pursuant to trade usages and 7) entered into by e-mail or other means of electronic communication. Issues causing problems are addressed below.

[25] *VAN DEN BERG, "Court Decisions on the New York Convention" in:* The New York Convention of 1958*, ASA Special Series No. 9 (1996), p. 61.*

[26] *According to HAAS, the view prevails that "Article II(2) lays down both maximum and minimum requirements as to the form of arbitration agreements";* supra *at note 16, p. 438.*

[27] *Corte de primera instancia of Azpeitia, 27 December 1985,* Arnold Otto Meyer v. Kendu S. Coop.*,* YCA*, Vol. 13 (1988); Corte di cassazione, 19 November 1987, No. 8499,* Mara Confezioni SpA v. International Alltex Corporation*,* YCA*, Vol. 14 (1989), pp. 675-677.*

[28] *See HAAS,* supra *at note 16, p. 442. See also GAILLARD, Emmanuel and SAVAGE, John (eds.),* Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, The Hague (1999), p. 377; HOLTZMAN, Howard M. and NEUHAUS, Joseph E.,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law and Taxation Publishers, Deventer (1994), p. 286.*

[29] *Oberlandesgericht Hamburg, 30 July 1998,* Shipowner v. Time Charterer*,* YCA*, Vol. 25 (2000), pp. 714-716; Cour d'appel, Paris, 20 January 1987,* Bomar Oil N.V. v. Enterprise Tunisienne d'Activités Pétrolières- ETAP*,* YCA*, Vol. 13 (1988), pp. 466-470.*

[30] Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, cited* supra *at note 23.*

[31] *For instance, in U.S. District Court, Western District of Washington, 19 May 2000, No. 99-5642 (FDB),* Richard Bothell and others v. Hitachi Zosen and others*,* YCA*, Vol. 26 (2001), pp. 939-948, the court ruled that no valid arbitration agreement existed since it could not unequivocally establish the intention of the parties to that effect from the documents exchanged among them.*

[32] Bomar Oil N.V. v. Enterprise Tunisienne d'Activités Pétrolières – ETAP*, cited* supra *at note 30, Paragraph 19: "It appears therefrom that the said Convention admits the adoption of an arbitration agreement by reference only to the extent that the agreement to the parties does not involve any ambiguity."*

General conditions

A complex issue is whether and under what conditions an arbitration clause contained in the general conditions obliges the parties to arbitrate their dispute. Case law inclines to acknowledge the existence of an arbitration agreement if the parties referred to the standard conditions and their intention is evident.[31] In other words, the arbitration agreement is deemed to exist under Article II(3) NYC if "the proof of the parties' consent is sufficiently established".[32] Some court decisions consider the incorporation of the arbitration agreement valid by virtue of a general reference to standard conditions, and not specifically to the arbitral clause contained therein.[33] However, the view is sometimes held that such a reference requires the party proposing the inclusion of the standard conditions to draw the other party's attention to the conditions and to enable it to obtain knowledge of their content.[34]

An illustrative point is found in the previously cited case *Chloe Z Fishing Co., Inc (US) and others (US)* v. *Odyssey Re (London) Limited*.[35] The defendants in the said case regarded the "in writing" requirement as satisfied, given that the arbitral clause had been made part of the P&I policies by reference to the General Terms and Policy Conditions. Conversely, the plaintiffs argued that the conduct of the parties in negotiating and purchasing the P&I policies satisfies neither of the two requirements under the NYC. The court found the arbitration agreement existent and valid based on the relevant conduct of the parties, particularly because the parties had obviously bargained for alterations and deletions of certain clauses in the General Terms and Policy Conditions.

Additionally, the court held that the requirement of an "exchange of letters and telegrams" was fulfilled by virtue of the broker's slips, on the one hand, and defendant's certificates of insurance, on the other.

In the context of general conditions and enforcement of the arbitral clause contained therein, it may also occur that both parties have made reference to their own general conditions. Known as the "battle of forms", such a situation requires ascertaining which of the general conditions are effectively included in the contract. However, this issue should be regarded as a specific element of the more general problem of the "battle of forms" and resolved accordingly.

Connected contracts

In modern trade transactions the question arises whether a validly concluded arbitration agreement contained in one contract produces effects which bear on connected contracts.

For instance, in cases where the contract is renewed but without an arbitral clause, will the parties be bound by the arbitral clause in the initial contract complying with the formal requirements of Article II(2) NYC? In practice, it often occurs that the initial contract in writing is renewed simply by an oral agreement by the parties. In legal scholarship the view is commonly held that the extension of the arbitration clause to the other connected contracts between

[33] *See, for example, U.S. District Court, Northern District of Oklahoma, 7 December 1995, No. 94-C-1084-BU,* Verlome Botlek B.V. v. Lee C. Moore Corporation*,* YCA*, Vol. 21 (1996), pp. 824-829.*
[34] *See HAAS,* supra *at note 16, p. 445.*
[35] *See* supra *at note 24.*

the same parties is made condition to the prior practices between them.[36]

The situation is similar when only the underlying contract contains the valid arbitration agreement but the other contracts are based on the same economic fundamentals and have the same purpose.[37]

Electronic means of communication

In recent decades the information society has left its impact on international transactions, thus making it necessary to consider new forms of the arbitration agreement. In particular, an increasing number of contracts are entered into by electronic means of communication, such as by e-mail or placing orders via the Internet.

Interpreting the NYC to include electronic forms is generally held to be consistent with the purpose of the Convention. However, this does not resolve the issue and should be regarded as a temporary solution. In fact, UNCITRAL has recently been considering alternative means of adapting the NYC to meet the needs of modern trade,[38] especially electronic commerce.[39] To date, however, there is still no consensus on the extent of those changes or on the type of instrument suitable to introduce them.

Multi-party arbitration

The issue of multi-party arbitration does not cause problems as long as it does not involve third parties who have not signed the initial arbitration agreement. Sometimes the third party has an interest to join the arbitration proceedings on the side of one of the parties, especially in cases where the third party is the guarantor of performance of the obligation of one of the parties to an arbitration agreement, or a person whose performance is a precondition for the performance of the obligation of one of the parties, usually a subcontractor. It may also occur that two already existing arbitral proceedings involve common issues of law and fact. Since the question whether they may be consolidated in a single proceeding is not resolved by the NYC rules, national law governs that matter.[40]

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[36] *GAILLARD and SAVAGE,* supra *at note 29, p. 305; HAAS,* supra *at note 16, p. 444.*

[37] *GAILLARD and SAVAGE,* supra *at note 29, pp. 301-302.*

[38] *See UNCITRAL note A/CN.9/WG.II/WP.118 concerning Preparation of uniform provisions on written form for arbitration agreements, accessible at the UNCITRAL web site: http://www.uncitral.org/en-index.htm.*

[39] Ibid.*, p. 11.*

[40] *One of the rare national laws containing specific provision devoted to the problem of consolidation of concurrent arbitration proceedings is the Netherlands Arbitration Act (Article 1046). Only paragraph 1 is cited here; published in* International Handbook on Commercial Arbitration*,* supra*, note 12, The Netherlands, Annex I, p. 7:*

"1. If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, any of the parties may, unless the parties have agreed otherwise, request the President of the District Court in Amsterdam to order a consolidation of the proceedings."

Summary:

- **A valid arbitration agreement is a prerequisite for arbitration.**
- **The "in writing" requirement under Article II NYC means that the contract must either be signed by the parties to a dispute or contained in an exchange of letters or telegrams.**
- **By broad interpretation of Article II NYC, arbitration agreements may be deemed valid if they have been entered into by the exchange of telexes and facsimiles, through sales or purchase confirmations or by virtue of a reference to general conditions, if contained in a bill of lading, if concluded through an agent or contained in connected contracts, if concluded pursuant to the trade usages or by means of electronic communication.**
- **Multi-party arbitration causes problems if one of the parties who joined or wanted to join was not a party to the arbitration agreement.**

4. REFERRAL BY COURT TO ARBITRATION: ARTICLE II(3)

General remarks

When a party to a court proceeding objects to the court's jurisdiction on the basis of the existence of an arbitration agreement dealing with the same cause of action, the court is obliged to refer the parties to arbitration. The conditions of the referral are set out in the third paragraph of 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 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."*

The following elements of the cited provision need further scrutiny: its scope of application, the mandatory nature of referral, the condition "at the request of one of the parties", "an agreement within the meaning of this article", the agreement is "null and void, inoperative or incapable of being performed".

"An agreement within the meaning of this article"

By referring to the definition of arbitration agreement set out in the first two paragraphs of Article II NYC, this expression raises the issues of the scope of the arbitration agreement and the arbitrability of the subject matter.

Since the wording of Article II(3) does not explicitly specify which arbitration agreements are covered, this is left to the court to decide. If interpreted in accordance with the scope of the NYC laid down in Article I, this provision would apply to arbitration agreements made in the territory of a State other than the one of the court seized. However there may be exceptions such as when a Contracting State has made a reservation according to Article I(3) declaring that it will apply the NYC only under the condition of reciprocity.

The parties in *National Oil Company of Iran (NIOC)* v. *Ashland Oil, Inc.*[41] had entered into a longterm contract for the supply of crude oil. As a result of the United States President's embargo on all purchases of oil from Iran in 1979, defendant made no payments. Plaintiff initiated arbitral proceedings in Teheran. When defendant refused to participate in the proceedings in Iran, plaintiff brought suit against the United States party, requesting the court to refer the case to arbitration in Teheran. The United States court denied the request on the ground that,

> *"[w]hen the United States adhered to the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970) (implemented by Chapter 2 of 9 U.S.C.), U.S. courts were granted the power to compel arbitration in signatory countries. See 9 U.S.C. § 206. But Iran is not one of the 65 nations that have adhered to the Convention [...] and thus no American court may order arbitration in Iran."*

As to the second problem, the wording "concerning a subject matter capable of settlement by arbitration" indicates that the matter of the dispute must be arbitrable. The arbitrability of a specific subject matter brought before the arbitration is to be judged according to the law of that country. However, case law has also affirmed that the arbitrability question must be addressed with a "healthy regard for the […] policy favouring arbitration".[42] This requirement coincides with one of the grounds for the refusal of the recognition and enforcement of arbitral awards (Article V(2)(a)).

Mandatory nature of the referral

The use of "shall" in Article II(3) NYC obliges the court to refer the parties to arbitration if all the conditions are fulfilled. The mandatory nature of the court's referral is deemed to have a uniform character and may not be altered by any national rules. The court's decision to stay the judicial proceedings in favor of the arbitration has an effect equivalent to referral.[43]

"At the request of one of the parties"

This condition makes it clear that the court is not *ex officio* obliged to refer the parties to arbitration; it does so only when one of the parties, usually the defendant, invokes the arbitration agreement. An important question in this context is the time limit for raising the jurisdictional objection. Since the NYC is silent on the issue, it is to be resolved according to the *lex fori*. As a rule, national laws require the objection to be submitted before the defendant presents its arguments on the merits of the case.[44]

The agreement is "null and void, inoperative or incapable of being performed"

This phrase is also not defined by the NYC, as a result of which the court seized applies its national law. Relevant case law is divided on this issue: while the courts of certain countries apply the law of the forum,[45] other countries favour application of the law chosen by the parties to govern the arbitration agreement or the law of the country of the seat of the arbitration.[46]

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[41] *U.S. Court of Appeals for the Fifth Circuit, 21 May 1987,* YCA*, Vol. 13 (1988), pp. 591-602.*

[42] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,* supra *at note 23.*

[43] *VAN DEN BERG, "Court Decisions on the New York Convention",* supra *at note 26, p. 67.*

[44] *In the relevant part of Section 4(2), the Swedish Arbitration Act of 1999 provides: "A party must invoke an arbitration agreement on the first occasion that a party pleads his case on the merits in the court. The invocation of an arbitration agreement raised on a later occasion shall have no effect unless the party had a legal excuse and invoked such as soon as the excuse ceased to exist." Published in* International Handbook on Commercial Arbitration*,* supra *note 11, Sweden, Annex I, p. 1.*

[45] *This is the position taken by courts in the United States. See, for instance, U.S. District Court, Virgin Islands, District of St. Thomas and St. John, 4 October 1982, affirmed by U.S. Court of Appeals, Third Circuit, 6 July 1983,* Rhône Méditerranée v. Achille Lauro*,* YCA*, Vol. 9 (1984), pp. 474-482.*

[46] *A case in point is Germany. See, for instance, Oberlandesgericht Karlsruhe, 13 March 1973, Landgericht Heidelberg, 23 October 1972,* YCA*, Vol. 2 (1977), pp. 239-240.*

In *Chloe Z Fishing Co., Inc and others* v. *Odyssey Re Limited* [47], the United States court was requested to compel the parties to arbitrate under Article II(3) NYC. When ruling on that motion, the court performed a two-step analysis: it established the existence of the arbitration agreement under the NYC, then referred the parties to arbitration. At both stages of the analysis it took account of "the federal policy favouring arbitration" and "the underlying principle of the Convention and its adoption." The court further rejected the plaintiff's argument that the arbitration clauses were unconscionable under California contract law, holding that international, and not domestic, standards on contract formation or matters of public policy should be decisive when determining the enforceability of the arbitration clauses.

A list of the internationally recognized defenses used as grounds for the refusal to enforce the arbitration agreement under the "null and void" exception is found in *Oriental Commercial and Shipping Co., Ltd.* v. *Rosseel NV*.[48] The list includes duress, mistake, fraud, waiver or violation of the fundamental policies of the forum nation.

Summary:

- **At the request of one of the parties, the court is obliged to refer the parties to arbitration under the conditions specified in Article II(3) NYC.**
- **In this context, the court rules on the existence and validity of the arbitration agreement in the sense of Article II NYC, unless it finds the said agreement to be "null and void and incapable of being performed".**

[47] *See* supra *at note 24.*
[48] *U.S. District Court, Southern District of New York, 4 March 1985,* YCA, *Vol. 12 (1987), pp. 532-536.*

5. ENFORCEMENT PROCEDURE: ARTICLE III

Article III general obligation

The enforcement procedure is dealt with in Articles III to VI of the New York Convention. Article III sets out the general obligation of each Contracting State to recognize and enforce an arbitral award in accordance with the conditions laid down in Article III, which reads as follows:

> *"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."*

Conditions for enforcement

It is necessary to distinguish between conditions for enforcement provided in the NYC itself and those stipulated by the procedural rules of the *lex fori*.

Conditions provided by the NYC

The conditions for enforcement provided by the Convention are found in Articles IV to VI. In general, Article IV requires the petitioner to submit an original or a copy of the arbitration agreement and the arbitral award and a translation thereof. Article V contains an exhaustive list of grounds that the respondent may invoke against the recognition and enforcement. Further, it contains public policy grounds that may be invoked by the competent authority of the country where the recognition and enforcement are sought. Article VI specifies situations in which the competent authority may adjourn the enforcement procedure or order the respondent to give suitable security.

Basic differences in national enforcement rules

The fact that a large number of countries throughout the world has adopted arbitration rules based on the UNCITRAL Model Law has contributed significantly to the harmonization of national arbitration rules. Nonetheless, the rules governing the enforcement proceedings still differ substantially. In common law countries, for example, the enforcement of an award requires that judgment be entered upon the award; in other words, the award must be transformed into a judgment. Consequently, the judgment – not the award – is enforceable. While the traditional course of dealing in civil law countries is to enforce the award itself, national procedural rules are not uniform. For instance, the award needs an exequatur in some countries; even then, it is not always granted by the same body. National laws not based on the UNICTRAL Model Law differ so greatly that it is difficult to expect harmonization in this field in the near future.

Examples in national law

National rules of the forum also regulate aspects of recognition and enforcement not governed by the Convention itself. For example, the *lex fori* may provide for discovery of evidence in order to prove the grounds for refusal of enforcement specified in Article V of the Convention. In addition, the *lex fori*

may stipulate the conditions under which a party may oppose the recognition and enforcement in situations where that party participated without objection in the arbitral proceedings, and it may enable the respondent to set-off a claim against the award being enforced or require the arbitration agreement to contain an "entry of judgment clause", without which the national courts would not have jurisdiction to enforce the award. Furthermore, national law may prescribe the granting of interest in cases where no interest was awarded or where the interest awarded was significantly lower than the prevailing market rate. Finally, national law may set a period of limitation for the initiation of the enforcement proceedings.[49]

Nonetheless, as seen in the following case, the application of national rules may be superseded by legal sources higher in the hierarchy, for example, by bilateral or multilateral conventions.

This occurred in *Zhe-jiang* v. *Takeyari*[50] in respect of the Chinese national law on the time limit for initiating the enforcement proceedings. Pursuant to the arbitration clause, the arbitration was held at the China International Economic and Trade Arbitration Commission (CIETAC). After the award was rendered in Zhe-jiang's favor, it sought enforcement in Japan. The Japanese court held that the reciprocity requirement under the NYC and the Japan-China Trade agreement was fulfilled and the award was to be enforced under Japanese law. However, both Japan and China had made reservations under Article I(3) of the Convention, as a result of which the conditions for enforcement must be identical in Japan and China. In light of the Chinese provision in Article 219 CCP requiring that the application for enforcement be filed within six months from the last day of the performance period, the conditions for enforcement were not identical. Nonetheless, the Japanese court ignored the Chinese rule. Contending that Chinese national law was not applicable, it applied the New York Convention and the Japan-China Trade Agreement.

Substantially equal conditions

Provisions of the *lex fori* relating to the recognition and enforcement of arbitral awards falling under the scope of the Convention may not be substantially more onerous than those applying to the recognition or enforcement of domestic arbitral awards. The same is true in regard to fees or charges. Nevertheless, it is highly unlikely that there will be discrimination against foreign awards in this way.[51]

The conditions for enforcement referred to in the NYC are those stipulated exclusively by the Convention. Accordingly, the procedural rules of enforcement of the forum are not concerned with conditions for enforcement. This is the meaning of the phrase in Article III "under the conditions laid down in the following articles".

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[49] *VAN DEN BERG, "Court Decisions on the New York Convention",* supra *at note 26, pp. 75-77.*
[50] *Okayama District Court, Civil Section II, 14 July 1993, Case No. Hei 4 (Wa) 8,* Zhe-jiang Provincial Light Industrial Products Import & Export Corp. *v.* Takeyari K.K., YCA, *Vol. 22 (1997), pp. 744-747.*
[51] Dicey and Morris on the Conflict of Laws*, Sweet & Maxwell, London (2000), Rule 63, paras. 16-124.*

Summary:

- **Conditions for the recognition and enforcement of arbitral awards are provided by the NYC and by national law.**
- **Conditions provided by the NYC are contained in Articles IV to VI.**
- **National rules may relate, for example, to discovery of evidence, estoppel or waiver, set-off or counterclaim against the award, the entry of judgment clause, the period of limitation for the enforcement of an award under the Convention and interest incurred on the award.**
- **National law shall not stipulate conditions for the recognition and enforcement of foreign arbitral awards that are substantially more onerous than those applicable to the recognition and enforcement of domestic arbitral awards.**

6. REQUEST FOR RECOGNITION AND ENFORCEMENT: FORMAL REQUIREMENTS ARTICLE IV

Article IV sets out the requirements to be met by the requesting party to obtain the recognition and enforcement of a foreign arbitral award before the competent national court of its choice. These requirements are the only ones; hence, they supersede any additional or different requirements of the national law of the enforcing country. Article IV reads as follows:

> *"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."*

Submisson of documents

The party requesting recognition or enforcement must fulfill two formal requirements: he must supply the "duly authenticated original" or a "duly certified copy" of the arbitral award, and the original arbitration agreement or a "duly certified copy" thereof. In other words, the original award must be authenticated, i.e. the signature must be attested to be genuine; or if a copy of the award is submitted, it must be certified, i.e. the copy must be attested to be a true copy of the original. The same applies if a copy of the arbitration agreement is submitted.[52]

> "In this sense, the Italian Corte di Cassazione found in its judgment of 7 June 1995 in *Inter-Arab Investment Guarantee Corporation* (Kuwait) v. *Banque Arabe et Internationale d'Investissements* (France)[53] that, by filing a certified copy of the award, the party seeking recognition and enforcement of the award had duly fulfilled the obligations imposed by Article IV(1)(a) of the New York convention, using the second alternative stipulated by that Article."

Applicable law

A further question that may arise is according to which national law the award is to be authenticated or the copies certified. While the Convention is silent on this matter, the view prevails in legal scholarship that the court may apply either the *lex fori*, i.e. the law of the court of recognition and enforcement, or the law of the country where the award was made.[54] Going a step further, Van

[52] *VAN DEN BERG, Albert Jan,* The New York Arbitration Convention of 1958*, Deventer/Netherlands (1981), p. 251. For more details see HAAS,* supra *at note 16, pp. 476 et seq.*
[53] *See* ICCA Yearbook *(1997), pp. 643-668.*
[54] *Van den BERG,* supra *at note 53, p. 252.*

Den Berg advocates application of the *lex validatis,* the law upholding "the validity of the authentication or certification".[55]

There are a number of court decisions conforming with this *in favorem executionis* position. For example, the Rostock Oberlandsgericht (Court of Appeal)[56] dealt with a case where the claimant complied with the requirements of Article IV(1)(a) NYC by submitting a copy of the arbitral award duly certified by a Hamburg notary public, as well as a translation and apostil. However, he did not submit the original arbitration agreement or a duly certified copy thereof, as required by Article IV(1)(b) of the Convention. Taking the morefavorable right position, the Court found that the said requirement could be ignored.

Non-formalistic approach

This lenient approach to the formality requirements of Article IV(1)(a) is evident in another German case in which the arbitration agreement was based on a treaty.[57] Therefore, the court noted that Art. IV only concerned the arbitral award. Since the defendant did not allege that the copy of the award supplied by the claimant did not correspond with the original, the Court justified its decision as follows:

"It would be a hollow formality to require that claimant prove the undisputed existence and authenticity of the arbitral award, whose copy is supplied, by also supplying the documents in Art. IV(1)(a). A certified copy (of the award), though unaccompanied by the authenticated original arbital award, complies with the requirements in Art. IV(1)(a)."

This non-formalistic approach to the requirements of Article IV of the New York Convention has been aptly explained by the Geneva Cour de Justice (Court of Appeal):[58]

"The text of the Convention does not further describe the contents and nature of the formal obligations it creates, nor does it indicate how their violation is sanctioned. This Court deems that Art. IV must be interpreted in accordance with the spirit of the Convention as described above. The Contracting States wished to reduce the obligations for the party seeking recognition and enforcement of a foreign arbitral award as much as possible."

Deadline for submission

The first sentence of the first paragraph of Article IV contains the phrase "at the time of application", thus raising the question whether the failure to submit the original award and the arbitration agreement together with the application for enforcement can be cured by later submission. Whereas the Italian Corte

[55] Ibid.
[56] *Judgment of 28 October 1999, published in* YCA, *Vol. 25 (2000), pp. 717-720. The disputed award favoring the claimant was rendered by the Maritime Arbitration Commission in Moscow. The parties were not indicated.*
[57] *Bundesgerichtshof judgment of 17 August 2000,* YCA, *Vol. 26 (2001), p. 771.*
[58] *Cour de Justice of Geneva, decision of 15 April 1999,* YCA, *Vol. 26 (2001), pp. 863-868.*

di Cassazione (Supreme Court)[59] answered this question negatively, it also made it clear that such a formal "failure does not prevent the party from filing a new request for enforcement".[60]

Translation of the documents

If the documents submitted by the party seeking recognition or enforcement are in a language other than that of the court, they have to be translated into the official language of the country of the court where recognition or enforcement of the award is requested.

A sworn translator, who may be a citizen of either country, must certify that the translation of the submitted documents is correct. The same applies if the translation is certified by consular or diplomatic representatives of either country.

In this context the question arises whether the court should reject a request if the award is only partly translated and certified.

In its decision of 15 April 1999 mentioned above, the Cour de Justice of Geneva acknowledged that only the first and last pages of the French translation supplied by the appellee had been certified by a diplomatic agent of the Swiss Embassy in Beijing. Nonetheless, it denied appelant's objection as purely formal, agreeing with the Court of First Instance[61] that:

> *"the two pages at issue are the most important [in the award] as they identify the parties, contain the decisional part and state that the award is final"*

If the recognition and enforcement judge speaks the language in which the original documents have been written, the translation is not required. However, the judge should know the "foreign language well enough to have taken full cognizance of the content of these documents".[62]

Summary:

- **The requirements stipulated by Art. IV are the only ones the requesting party must satisfy to obtain recognition and enforcement.**
- **To fulfill the formal requirements, the party must supply:**
  1) **the duly authenticated original or a duly certified copy of the arbitral award, and**
  2) **the original arbitration agreement or a duly certified copy thereof.**

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[59] *Decision of 20 September 1995, No. 9980,* YCA, *Vol. 24a (1999), pp. 698-702.*
[60] *VAN DEN BERG cites a decision of the Austrian Supreme Court which "was less formalistic by allowing a petitioner to cure such defect in the application subsequent to the filing thereof." In "Court Decisions on the New York Convention",* supra *at note 26, p. 79 note 72.*
[61] *See* supra *at note 59.*
[62] *VAN DEN BERG, "Court Decisions on the New York Convention",* supra *at note 26, p. 80, see note 73 and the cited case. President Rectbank Amsterdam, 12 February 1984,* SPP (Middle East) Ltd. (Hong Kong) v. Arab Republic of Egypt, YCA, *(1976) p. 205.*

- **In regard to authentication or certification, the view prevails that the court may apply the *lex fori* or the law of the country where the award was made.**
- **The original award and the arbitration agreement must be submitted at the time the application for enforcement is filed.**
- **The said documents must be made in or translated into the language of the court conducting the recognition and enforcement proceedings.**

7. GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT WHICH MAY BE INVOKED BY THE PARTIES, ARTICLE V(1)

General remarks

The court ruling on the request for recognition and enforcement of an arbitral award under the New York Convention may refuse the request on the grounds enumerated in Article V. The list is exclusive and the court may not base its refusal on any other ground. In addition, the grounds for refusal are to be interpreted restrictively in accordance with the purpose of the NYC.[63]

The grounds prescribed in Article V may be divided into two categories: 1) those that may be invoked by the parties (Article V(1)), and 2) those that the court may invoke *ex officio* (Article V(2)). Whereas the first category is intended to protect the interests of the award-debtor, the second serves the vital interests of the forum country.[64]

Grounds that may be invoked by the parties

The grounds that may be invoked by the parties to refuse the recognition and enforcement of an arbitral award are listed in the first paragraph of Article V, which reads as follows:

> *"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*

The wording "*may be refused*" suggests that the judges may use their discretion when ruling on the request for recognition and enforcement. Similarly, the Spanish text uses the expression "*se podrá denegar*". However, the wording of the French text – "*seront refusées*" – implies that the court has no discretion but "shall refuse" the enforcement if any of the grounds invoked by a party is met. The differences in the wording of the various language versions could pose a threat to the uniform interpretation of the Convention on this matter.

Incapacity of the parties and formal invalidity

The first ground that the party opposing enforcement may invoke is the material or formal invalidity of the arbitration agreement.

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[63] *VAN DEN BERG,* The New York Arbitration Convention of 1958*,* supra *at note 53, p. 297.*
[64] *CRAIG, W. Laurence, PARK, William W., PAULSSON, Jan,* International Chamber of Commerce Arbitration*, Oceana Publications, Inc., Dobbs Ferry, NY, (3rd ed. 1998), p. 684.*

Since the issue of the capacity of the parties to conclude the arbitration agreement is not resolved under the Convention, it is to be decided according to the applicable law designated by the choice-of-law rules of the court conducting the enforcement procedure. A specific problem arises when one of the parties to the arbitration agreement is a State, a State trading agency or other body of public law and that party invokes sovereign immunity as a defense in order to avoid arbitration. As a rule, such a defence is unsuccessful. This is in keeping with the view that a State enjoys immunity from jurisdiction only in cases where it acted *iure imperii,* whereas immunity cannot be acknowledged in cases where the State entered into the legal relationship *iure gestionis*.[65]

The formal validity of the arbitration agreement may also be invoked as a ground to prevent the award from being enforced. According to the wording of the provision, the formal validity of the agreement is determined primarily according to the law chosen by the parties to govern the agreement. Subsidiarily, the law of the country where the award was made shall apply. Despite these choice-of-law rules, the most frequently invoked ground under Article II(2) is the invalidity of the arbitration agreement.

In *Société Van Hopplynus* v. *Société Coherent Inc.*,[66] which concerned a distributorship contract between the Belgium plaintiff and the United States defendant, one of the issues raised was the law applicable to the validity of the arbitral clause under Article V(1)(a) NYC. The defendant objected to the validity of the arbitral clause relying on the Belgian Law on Exclusive Distributorship of 27 July 1961. In the relevant part of the judgment, the Belgium court held that

> *"[i]t suffices, however, to note that the common intention of the parties was to submit the contract between them to the law of the State of California […]. The New York Convention recognizes the principle of contractual autonomy (Art. V(1)(a)) and in fact gives the parties the freedom to agree on the applicable law. In the present case, the arbitral clause is valid according to California law. Art. II of the New York Convention requires, therefore, that the court recognize the validity of the arbitral clause."*

Violation of due process

The wording of the provision on due process provides that, if the party against whom the award is invoked, (a) was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or (b) was otherwise unable to present his case, the court may refuse the enforcement of the award. In other words, this provision concerns the fundamental principle of procedural law to enable both parties to present their case. Different stands are taken in legal scholarship and the case law on this issue. While scholars maintain that this ground should be interpreted as a uniform convention rule, the courts believe it should be construed with reference to domestic notions (*lex fori* of the place of enforcement) of due process violations.[67]

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[65] *VAN DEN BERG,* The New York Arbitration Convention of 1958*,* supra *at note 53, p. 280.*
[66] *Tribunal de Commerce of Brusseles, 5 October 1994,* YCA*, Vol. 22 (1997), pp. 637-642.*
[67] *HAAS,* supra *at note 16, pp. 494-495. See also the cited references and cases. VAN DEN BERG,* The New York Arbitration Convention of 1958*,* supra *at note 53, p. 298.*

The notion of "*proper notice*" implies that the notice of the appointment of the arbitrator and of the arbitral proceedings must be adequate and appropriate. This does not mean that it must be in a particular form,[68] nor does it designate the time limit in which the respondent should name the arbitrator(s).[69] In the rare cases where the exequatur has been refused under Article V(1)(b), the parties had not been informed of the names of the arbitrators.[70]

The wording "*unable to present his case*" implies a concept restricted to serious violations of the arbitral procedural rules. It includes the arbitrators' duty to inform the other party of whatever arguments and evidence had been submitted by the opposing party, thus giving the former a chance to reply.[71] There have been several cases in which the parties invoked the brevity of the time limit for the preparation of defence as a violation of due process under Article V(1)(b). However, those attempts were unsuccessful.[72] Similarly, the Italian Supreme Court decided that due process had not been infringed, although it remarked that too short a "time limit to appear before the arbitrators […] is ground for refusal of enforcement of the foreign arbitral award in the New York Convention".[73] Furthermore, a party which purposely does not participate in the proceedings before the arbitrators and remains inactive may not rely on Article V(1)(b). This also includes awards rendered in default.

The United States District Court, Southern District of New York, deciding *Overseas Cosmos, Inc.* v. *Vessel Corp.*,[74] concerning the failure to pay a deposit under the contract for the sale of the vessel, ruled that the award rendered by the arbitration tribunal seated in London did not fall under the exception of Article V(1)(b). Among other things, the plaintiff alleged that the award should not be enforced because it had been rendered in default. Furthermore the plaintiff alleged that it lacked notice of arbitration. However, based on the facts of the case, the court concluded:

> *"Respondent's alleged lack of participation in the arbitration proceeding, even if true, could only be interpreted as intentional. The proper course, however, could have been for respondent to object to the proceeding entirely […], which it clearly did not do, rather than simply refuse to participate. […] Accordingly, […] the court finds that respondent was given 'ample notice of the arbitration and an adequate opportunity to present its defences' and objections"*

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[68] *See Tribunal Superior de Justicia, Eighteenth Civil Court of First Instance for the Federal District of Mexico, 24 February 1977,* Presse Office S.A. v. Centro Editorial Hoi S.A.*,* YCA*, Vol. 4 (1979), pp. 301-302; Tribunal Superior de Justicia, Court of Appeals (Fifth Chamber) for the Federal District of Mexico, 1 August 1977,* Malden Mills Inc. v. Hilaturas Lourdes S.A.*,* YCA*, Vol. 4 (1979), pp. 302-304; Landgericht of Zweibrücken, 11 January 1978,* YCA*, Vol. 4 (1979), pp. 262-264.*

[69] *Corte di Appello di Napoli, 20 February 1975,* Carters (Merchants) Ltd. v. Francesco Ferraro*,* YCA*, Vol. 4 (1979), pp. 275-279.*

[70] *Oberlandesgericht of Cologne, 10 June 1976,* YCA*, Vol. 4 (1979), pp. 258-260.*

[71] *Oberlandesgericht of Hamburg, 3 April 1975,* YCA*, Vol. 2 (1977), pp. 241.*

[72] *See case cited* supra *at note 69; Obergericht of Basle, 3 June 1971,* YCA*, Vol. 4 (1979), pp. 309-311.*

[73] *Corte di Cassazione, 11 July 1992, No. 8469,* Vicerè Livio v. Prodexport*,* YCA*, Vol. 22 (1997), pp.*

Relationship between paragraphs 1(b) and (2)(b) of Article V

While paragraph 1(b) deals with due process, paragraph 2(b) of Article V stipulates the ground for refusal of enforcement if the arbitral award is contrary to the public policy of the country where enforcement is sought. It is commonly recognized that due process constitutes part of public policy. In this context the question arises whether the specific provision of Article V(1)(b) excludes the due process grounds from the general provision of Article V(2)(b).[75] The importance of this question is obvious in light of the fact that the former ground may be considered by the court only if raised by the parties themselves, whereas the court takes account of the latter *ex officio*. Given the essential position of the due process requirement, it may be concluded that the special provision of Article V(1)(b) was inserted as a manifestation of its importance. Therefore, Article V(2)(b) should be interpreted as including the specific ground referred to in Article V(1)(b).[76]

Excess of authority by the arbitrator (Art. V(1)(c))

Excess of authority by the arbitrator as a ground for refusal of recognition and enforcement does not involve cases where an arbitrator lacked competence entirely. Such situations fall under Article V(1)(a). Similarly, Article V(1)(c) does not apply to cases of lack of competence on the ground of invalidity of the arbitration agreement, which is a separate ground for denying enforcement under paragraph 1(a) of Article V.[77] In the light of their similarity, both grounds have frequently been treated as one in recent arbitration legislation.[78] It is generally held that excess authority by the arbitrator is to be interpreted restrictively.

This expression covers situations where an arbitrator has decided matters covered neither by the arbitration agreement nor by the terms of reference.[79] In other words, the arbitrator has decided claims not considered by the parties or outside the arbitration agreement.[80] For example, paragraph 1(c) applies to situations when an arbitrator decided the dispute *ex aequo et bono* without proper authorization or where the award is rendered outside the time limit set by the parties.

Partial enforcement

Article V(1)(c) permits enforcement of the part of the award dealing with questions submitted to arbitration, provided the relevant part of the award can be separated from the parts that do not comply with the terms of the arbitration agreement.[81]

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[75] *This has also been noted as a problem by other legal scholars. See, for example, VAN DEN BERG, "Court Decisions on New York Conventions",* supra *at note 26, p. 299.*

[76] Ibid*., p. 300.*

[77] *PATOCCHI, Paolo Michele and JERMINI, Cesare, "Commentary on Articles 192 and 194" in:* International Arbitration in Switzerland, Introduction and Commentary on Articles 176-194 of the Swiss Private International Law Statute*, Helbing & Lichtenhahn/Kluwer Law International (2000), pp. 660 and 661.*

[78] *GAILLARD and SAVAGE,* supra *at note 29, p. 988.*

[79] *Terms of reference are usually drawn up jointly by the arbitrators and parties at the beginning of the arbitral proceedings to define the disputed matters, WAGNER, Gerhard, "D. Germany" in: WEIGAND, Frank-Bernd (ed.),* Practitioner's Handbook on International Arbitration*,* supra *at note 16, p. 815.*

[80] *PATOCHI and JERMINI,* supra *at note 78, pp. 660-663.*

[81] *GAILLARD and SAVAGE,* supra *at note 29, p. 988.*

In *De Agostini and others* v. *Milloil and others,*[82] the court did not find the existence of a ground for refusal under Article V(1)(c) NYC; however, it held that a decision rendered in equity instead of according to the law would exceed the arbitral clause or agreement in that case. When the defendants sought enforcement of the ICC award in Italy, the plaintiffs objected, alleging *inter alia* that the arbitrators had acted in excess of their authority by rendering the award in equity, whereas the arbitral clause provided for arbitration according to the law. The court found that the arbitrators' decision to award damages to the defendant on its counterclaim was not a decision in equity. Namely, equity in deciding must be distinguished from equity in awarding damages, which is a decision according to the law.

Violation of composition of the arbitral tribunal/ arbitration proceedings

Under paragraph 1(d) of Article V the respondent may oppose recognition and enforcement on the ground that the composition of the arbitral tribunal or the arbitration proceedings did not comply with the parties' agreement or, where there is no agreement, that it did not comply with the law of the country where the arbitration took place.[83]

Agreement by the parties vs. national rules

An agreement by the parties regarding the composition of the arbitral tribunal or the arbitral proceedings supersedes the national rules of the country where the arbitration took place, except for the fundamental requirements of due process. Generally, the law of the country where the arbitration took place comes into play in the absence of an agreement.[84]

In *Tongyuan* v. *Uni-Clan,*[85] the parties concluded a contract to sell, install and satisfactorily test two sachet-filling machines. Since one of the machines was defective, the award ordered Uni-Clan to take the machine back and reimburse the price together with interest. After enforcement was granted, Uni-Clan took action to set aside the enforcement order, arguing that the arbitration was held in Beijing and not in Shenzhen or Shanghai, as stipulated in the arbitral clause. The High Court of Justice, Queen's Bench Division Commercial Court, in its decision of 19 January 2001 rejected the claim, finding that the change in the venue of the proceedings was not crucial for the validity of the arbitral award, especially because the seller had failed to participate in the proceedings. Since Uni-Clan had shown no interest in participating in the proceedings, the fact that the arbitration was conducted in Beijing had no effect on the fairness of the proceedings, or on the applicable law.

Article V(1)(e)

The recognition and enforcement of the award may also be refused if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

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[82] *Corte di Appello di Milano, 24 March 1998,* Virgilio De Agostini (Italy) and Loris and Enrico Germani (Italy) v. Milloil SpA (Italy), Pia and Gabriella Germani (Italy) and Andrea De Agostini (Italy)*, YCA, Vol. 25 (2000), pp. 739-750.*

[83] *VAN DEN BERG,* The New York Arbitration Convention of 1958*,* supra *at note 53, p. 322.*

[84] Ibid*., pp. 324-325; see also PATOCHI and JERMINI,* supra *at note 78, pp. 664-665; GAILLARD and SAVAGE,* supra *at note 29, pp. 990-991.*

[85] Tongyuan (USA) and International Trading Group (China) v. Uni-Clan Limited*, YCA, Vol. 26 (2001), pp. 886-893.*

Award is not yet binding

Contrary to the situation prior to the New York Convention, "an award need not be declared enforceable under the law of the place of arbitration in order to be binding within the meaning of Article V(1)(e)".[86] It is generally accepted that the law applicable to the award applies when determining whether the award has became binding on the parties. There are, however, relevant court decisions and views in legal scholarship that advocate resolving this matter in an autonomous manner independent of the applicable law.[87] As a rule, it can be said that, as long as an award can be challenged before courts with ordinary jurisdiction or before an arbitral appellate body, such an award has not yet become binding on the parties. In all cases, the burden is on the party resisting enforcement to prove that the award has not yet become binding.

However, in cases where the parties have agreed that the arbitral award shall be final and binding, the question has been raised whether national rules of the country where the award was rendered or the will of the parties shall be decisive.

Will of the parties

In a case concerning the enforcement of a Jordanian award,[88] the Brussels Cour d'Appel (Court of Appeal) rejected all grounds for appeal and affirmed the lower court's decision that Jordanian law did not apply to this issue. As to the question how to determine at which point an award becomes binding, the Cour d'Appel found that, on the basis of Article V(1),[89]

> *"it clearly appears that the Convention considers the will of the parties to be fundamental to the arbitration proceedings".*

Maintaining that the award must be binding in accordance with the agreement of the parties, the court concluded:

> *"The agreement of the parties provides that the award of the arbitral tribunal shall be final and binding, and thus immediately enforceable upon being rendered. It does not provide for an appeal. According to the agreement of the parties, the award has become binding upon being rendered. In fact, the arbitral award states that it 'is effective' as of the date hereof."*[90]

Setting aside or suspension of the award

Alternative grounds for refusal of recognition and enforcement of the award under Article V(1)(e) are the setting aside or suspension of the award by the court of the country in which the award was rendered or under the law of which the award was made. Again, the burden is on the party resisting enforcement to prove that the award has been set aside or suspended. As regards suspension, the party resisting enforcement "must prove that the suspension of the award has been effectively ordered by a court in the country of origin…. The automatic suspension of the award by operation of law in the

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[86] *PATOCHI and JERMINI,* supra *at note 78, p. 666.*
[87] *VAN DEN BERG, "Court Decisions on the New York Convention",* supra *at note 26, p. 87.*
[88] *Decision of 24 January 1997,* YCA, *Vol. 22 (1997), pp. 643-668.*
[89] Ibid. *p. 659.*
[90] Ibid. *pp. 659-660.*

country[91] of origin … is not sufficient".[92]

Summary:

- **The list of grounds for refusal of the recognition and enforcement of an arbitral award under the NYC is exclusive and they should be interpreted restrictively.**
- **There are two categories of grounds for refusal: grounds which may be invoked by the parties (Article V(1)), and those which the court may invoke *ex officio* (Article V(2)).**
- **The grounds for refusal under Article V(1) include:**
  - **(a) incapacity of the parties and formal invalidity of the arbitration agreement,**
  - **(b) violation of due process,**
  - **(c) excess of authority by the arbitrator,**
  - **(d) infringement of the composition of the arbitral tribunal or of the arbitration proceedings and**
  - **(e) the award has not yet become binding or has been set aside or suspended.**

[91] *Supreme Court of Sweden, 13 August 1979, No. SO 1462, Svea Court of Appeal (Fifth Department) in Stockholm, 13 December 1978,* AB Gotaverken v. Genegal National Maritime Transport Company (GMTC), YCA, *Vol. 4 (1981), pp. 237-242.*

[92] *VAN DEN BERG,* The New York Arbitration Convention of 1958, supra *at note 53, p. 352*

8. GROUNDS FOR *EX OFFICIO* REFUSAL OF THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS: ARTICLE V(2)

Grounds for* ex officio *refusal

The grounds that the court may invoke *ex officio* for the refusal to recognize and enforce an arbitral award are laid down in the second paragraph of Article V, which reads:

> *"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."*

Under Article II(1) NYC, every arbitration presupposes the existence of a valid arbitration agreement. One of the conditions for validity stipulated in the same provision is the arbitrability of the subject matter. The concept of arbitrability is also found in Article V(2)(a) however, as a ground for refusal to enforce the award: the award need not be recognized and enforced if "[t]he subject matter… is not capable of settlement by arbitration" under the law of the country where recognition and enforcement is sought. For their part, national legal systems have reserved a number of issues for adjudication by the judiciary, thus making them non-arbitrable. Classic examples include antitrust, the validity of intellectual rights (patents, trademarks, etc.), family law and the protection of weaker parties, all of which differ from country to country.[93]

Distinction between domestic and international disputes

As a means of limiting court control of the arbitrability of a dispute, more and more countries are making a distinction between the arbitrability of domestic and of international disputes. According to Gaillard and Savage, such a distinction enables "a dispute to be found non-arbitrable under a country's domestic law, without necessarily preventing the recognition in that country of a foreign award dealing with the same subject matter".[94] By using this approach, United States federal courts have recognized the arbitrability in international arbitrations of disputes concerning securities and antitrust law, although at the time these subjects were considered non-arbitrable under national law.

For example, in *Scherk* v. *Alberto-Culver Co.*,[95] the parties had signed a contract containing an arbitral clause providing that any controversy or claim arising

[93] Ibid., *p. 369.*
[94] *GAILLARD and SAVAGE,* supra *at note 29, p. 995.*
[95] *417 U.S. 506 (U.S. Supreme Court 1974); also published in BORN, G.B.,* International Commercial Arbitration, Commentary and Materials*, Kluwer Law International/Transnational Publishers (2001), pp. 258-264.*

out of the agreement would be referred to arbitration before the ICC in Paris. The applicable law was agreed to be the law of Illinois, United States of America. When Alberto-Culver Co. (U.S.) commenced an action before a federal court in Illinois, Scherk filed a motion to stay the action pending arbitration in Paris according to the arbitral clause. The case turned on the issue of arbitration : under the United States Securities Exchange Act of 1934, agreements to arbitrate liabilities had been held to be void and inoperative. Contrary to its practice in domestic arbitrations, the court nevertheless recognized the validity of the agreement of the parties to arbitrate and concluded that the award would be enforced by the federal courts in accordance with the provisions of the Arbitration Act. In its reasons, the United States Supreme Court stated:

> *"The invalidation of such an agreement… would not only allow the respondent to repudiate its solemn promise but would, as well, 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."*[96]

Interpretation of public policy

With regard to the public policy ground for refusal, the question arises whether the notion of public policy is to be interpreted in the same way in both domestic and international cases. As seen in the *Alberto-Culver* case, the courts may make a distinction between these two situations. Although paragraph 2(b) is not explicit on this point, the view prevails that the reference in that provision to public policy is "in fact a reference to the international public policy of the host jurisdiction".[97] As a rule, the courts construe this ground for refusal narrowly.

This was confirmed by the United States District Court for the District of Pennsylvania in its decision in *CBS and others* v. *WAK Orient Power & Light Ltd.*[98] With regard to the public policy exception invoked by WAK, the court found:

> *"[T]he public policy exception is very narrow…. The courts have held that the exception is only applicable when 'enforcement would violate the forum state's most basic notions of morality and justice'."*

Similarly, the Swiss Supreme Court rejected the request invoking the public policy exception in its decision of 9 January 1995.[99] According to the court, the public policy defence has to be narrowly construed, especially in enforcement proceedings so as to be understood as opposing:

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[96] *BORN,* supra *at note 96, p. 261.*
[97] *GAILLARD and SAVAGE,* supra *at note 29, p. 996.*
[98] *Decision of 12 April 2001, No. 99-2996; published in* YCA*, Vol. 26 (2001), p. 1120.*
[99] *Published in* YCA*, Vol. 22 (1997), p. 997.*

> *"the enforcement of foreign arbitral awards which hurt the Swiss legal feeling in an intolerable manner and violate the fundamental principles of the Swiss legal system"*

As seen in the above cases, international public policy is basically national as "it can be sanctioned only by national judges".[100] There is, however, a different approach that is truly international, hence the name "*ordre public réellement international.*"

This view, which is in the minority, is found in *Allsop Automatic Inc.* v. *Techoski snc*,[101] where the Corte di Appello (Court of Appeal) of Milan defined the notion of international public policy as follows:

> *"We must say where the consistency [with public policy] is to be examined, reference must be made to the socalled international public policy, being a 'body of universal principles shared by nationals of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions'."*

The rules of such a policy can be said to 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'."[102]

In comparative case law on the NYC, several matters are deemed to constitute a violation of public policy: lack of impartiality of the arbitrators, lack of reasons in the award, irregularities in the arbitral procedure etc. One of the fundamental requirements of every commercial arbitration, the independence of the arbitrators, presupposes that there are no connexions between the parties and the arbitrators that could result in a personal interest on the part of an arbitrator; any conflict of interests amounts to impartiality, making it impossible for the arbitrator to act independently.

In its decision of 24 March 1998 in *Excelsior Film TV, srl* v. *UGC-PH*,[103] the French Cour de Cassation (Supreme Court) denied Excelsior's appeal and affirmed the lower court's decision to refuse enforcement of the arbitral award rendered in Rome on grounds of public policy for lack of impartiality of one of the arbitrators. Appointed by the same party in parallel arbitrations taking place in France and Rome, the said arbitrator was found to have conveyed erroneous information to the Roman arbitral panel, thus influencing the tribunal's decision on jurisdiction. Addressing the issue of impartiality, the Supreme Court affirmed the lower court's conclusion:

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[100] *VAN DEN BERG,* The New York Arbitration Convention of 1958*,* supra *at note 53, p. 360; cf. GAILLARD and SAVAGE,* supra *at note 29, p. 996.*
[101] *Judgment of 4 December 1992, published in* YCA*, Vol. 22 (1997), pp. 725-727.*
[102] *Van den BERG,* The New York Arbitration Convention of 1958*,* supra *at note 53, p. 361.*
[103] *Published in* YCA*, Vol. 24 (1999), p. 644.*

"The court drew the conclusion that this disloyality of an arbitrator, who was connected to one of the parties – as revealed in the award, so that it cannot be inferred from UGCPH's failure to challenge this arbitator that it waived its right to rely on this irregularity – created an imbalance between the parties, amounting to a violation of due process, so that the award rendered in Italy under such conditions violates French public policy in the sense of both Articles mentioned above" [Art. V(2)(b) NYC and Art. 1502(5) of the new French CCP]."

The public policy exception may also be invoked in cases where the award contains no reasons.[104] However, the failure to provide reasons usually does not amount to a violation of public policy. On the other hand, if the award contains reasons, but there are serious contradictions in the reasoning, this may be considered an infringement of public policy.[105] Ruling on the matter, the French Cour de cassation held that the failure to give reasons is not "in itself contrary to the French understanding of international public policy".[106] Only if the applicable procedural law or arbitration rules require that reasons be given, would failure to comply with such requirement "justify the award being set aside or refused enforcement, on the grounds that the arbitrators failed to comply with their brief".[107]

Summary:

- **The recognition and enforcement of an arbitral award may be refused *ex officio.***
- **The grounds for such refusal are:**
  - **a) non-arbitrability of the subject matter, and**
  - **b) violation of the public policy of the law of the country where recognition and enforcement is sought.**
- **The non-arbitrability of an award is determined according to the law of the country where recognition and enforcement is sought.**
- **Matters deemed to constitute a violation of public policy include, *inter alia*, impartiality of the arbitrators, lack of reasons in the award, and irregularities in the arbitral procedure.**

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[104] *The Belgium Judicial Code (Art. 1701(6)), the Dutch Code of Civil Procedure (Art. 1057(4)(e)) and the German ZPO (Art. 1054(2)) require arbitrators to provide reasons in their decisions.*
[105] *HAAS,* supra *at note 16, p. 523.*
[106] *Cass, 1e civ., 22 Nov. 1966,* Gerstlé *v.* Merry Hull*, JCP, Ed.G., Pt. II, No. 15,318/1968. Cited in GAILLARD and SAVAGE,* supra *at note 29, p. 959.*
[107] Ibid.

9. DISCRETION TO ADJOURN THE DECISION ON ENFORCEMENT: ARTICLE VI

General remarks

In order to gain a better understanding of setting aside and suspension in the meaning of Article V(1)(e), it is necessary to take Article VI of the Convention into account , which reads:

> *"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."*.

Adjournment of the decision on enforcement

Article VI NYC provides for the adjournment of the decision on enforcement of the award in cases where an application for the setting aside or suspension of the award has been made. Whether the court should adjourn the decision on enforcement is a question of fact and of law. The Convention uses the term "if it considers it proper", thus suggesting that the competent authority may use its discretion when deciding whether to adjourn the decision on enforcement. The same applies when ruling on a request to order the other party to provide suitable security. The usual test seems to be whether the enforcement court considers it likely that, on the basis of the arguments presented, the award will be set aside or suspended in the country of origin.

In a case before the Swedish Supreme Court,[108] the respondent-appellee (GMTC) requested adjournment of the decision on enforcement pending the decision in the setting aside procedure it had initiated in France. Rejecting the request, the court found:

> *"Having regard to the general purpose of the New York Convention and the legislation of 1971 based thereon to expedite the enforcement of foreign 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 of the procedure initiated by GMTC in France."*[109]

Summary:

- **Under Article VI the national court may use its discretion when deciding whether to adjourn the decision on enforcement in cases where a party has sought setting aside or suspension of the award.**

[108] AB Gotaverken v. Genegal National Maritime Transport Company (GMTC), supra *at note 92.*
[109] Ibid., *p. 242.*

10. APPLICATION OF NATIONAL LAW OR OTHER TREATY: ARTICLE VII

Article VII of the NYC reads as follows:

> *"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."*

More favourable right provision

Paragraph 1 permits a party to base its request for the enforcement of an arbitral award or an arbitral agreement either on national law or on bilateral/multilateral treaties. By providing a solution for awards that cannot be enforced under the NYC, this provision attempts to promote the enforceability of as many awards as possible. On the other hand, non-uniform application of the NYC in matters of enforcement leads to uncertainty as to which awards are enforceable. In practice, national law or other international treaties are rarely applied instead of the NYC because the NYC conditions are usually the most favourable.

National Law

Application of the NYC does not replace national rules governing the enforcement of foreign arbitral awards; however, national rules may apply when the conditions relating to recognition and enforcement contained therein are more favourable. For example, the grounds for disputing enforcement laid down in Article 1076(1)(A) of the Netherlands Arbitration Act 1986 are practically the same as those in Article V NYC. However, the Netherlands Act limits the possibility to invoke three of those grounds if they were not raised during the arbitral proceedings.[110] While the party requesting enforcement may use either Article 1076 of the Netherlands Act or the NYC (or any other applicable treaty) as a basis for enforcement, it is not possible to combine favourable elements from the two.[111]

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[110] *Paragraphs 2-4 of Article 1076 of the Netherlands Arbitration Act provide that the grounds for refusal cited in paragraph 1(A)(a-c), i.e., the invalidity of the arbitration agreement, irregularity in the constitution of the tribunal and the arbitral tribunal's non-compliance with the mandate, may not be invoked if the party disputing enforcement did not plead that the arbitral tribunal lacks jurisdiction on that ground during the arbitral proceedings. For example, Article 1976(2) reads as follows: "The ground mentioned in paragraph (1)(A)(a) above shall not constitute a ground for refusal of recognition or enforcement if the party who invokes this ground has made an appearance in the arbitral proceedings and, before submitting a defence, has not raised the plea that the arbitral tribunal lacks jurisdiction on the ground that a valid arbitration agreement is lacking."*

[111] *See LAZIC, Vesna and MEIJER, Gerard, "F. Netherlands" in: WEIGAND, Frank-Bernd (ed.),* Practitioner's Handbook on International Arbitration, supra *at note 16, p. 945.*

Enforcement of an award vacated in the place where it was rendered.

The question whether a national court may enforce an international arbitral award that has been vacated in the place of its rendering was raised in *Chromalloy Gas Turbine Corporation v. Arab Republic of Egypt.*[112] Such an international arbitral award is neither binding nor existent in the country where it was rendered and thus cannot be enforced unless the court of another State refuses to recognize the foreign vacation or annulment. In *Chromalloy,* the American and Egyptian parties concluded a contract in which the former agreed to provide parts, maintenance and repair for helicopters belonging to the Egyptian Air force.

When Egypt subsequently terminated the contract, the American company commenced arbitral proceedings on the basis of the arbitral clause in the contract. The American company requested enforcement of the award in the United States ; however, Egypt sought nullification of the award in Egypt and requested the United States court to adjourn the enforcement proceedings. Although the award had been suspended and annulled in Egypt, the United States court found it to be valid under United States law and granted enforcement.

Exequatur was also granted in a separate case[113] in France when the French Court of Appeal found that the parties had implicitly accepted the more-favourable-right provision in Article VII NYC, thus allowing the application of French law:

> *"Art. 33 of the Treaty on Legal Cooperation signed by France and Egypt on 15 March 1982 provides 'arbitral awards rendered in one of the two States shall be recognized and enforced according to the provisions of the [1958 New York Convention]'. Contrary to the argument of the Arab Republic of Egypt, it results from this general and unqualified reference to the Convention provisions adopted in New York in 1958 that the contracting parties also implicitly accepted the exception in Art. VII by which the provisions of the New York Convention do not deprive an 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."*

Despite its annulment in Egypt, the award – qualified by the court as "international" – remained in existence and its enforcement in France did not constitute a "violation of international public policy".

In *Ministry of Public Works v. Société Bec Frères*,[114] the French and Tunisian companies formed a group of companies and successfully bid on a tender offered by the Tunisian Ministry of Public Works for the construction of two

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[112] Chromalloy Gas Turbine Corporation *v.* The Arab Republic of Egypt*. 939 F.Supp 907 (D.D.C. 1996).*

[113] *Cour d'Appel, Paris,* The Arab Republic of Egypt *v.* Chromalloy Aeroservices, Inc. *(U.S.), decision of 14 January 1997; published in* YCA*, Vol. 22 (1997), pp. 692-693.*

[114] *Cour d'Appel, Paris, decision of 24 February 1994,* Ministry of Public Works *v.* Société Bec Frères*,* YCA*, Vol. 22 (1997), pp. 682-690.*

road segments. The contracts contained an arbitral clause granting jurisdiction to both Tunisian and French courts in respect of any dispute. Upon termination of the contract by the Tunisian Ministry, the Tunis Court of First Instance declared the arbitration agreement null and void. Nonetheless, the arbitral tribunal continued the proceedings and rendered the award. The request for enforcement was granted in France on the basis of the more-favourable-right provision of the NYC. According to the French court, a court may not refuse to grant exequatur when its national law permits it; moreover, it is obliged *ex officio* to ascertain whether this is the case.

International treaties and the compatibility provision

Matters concerning the relationship between the NYC and other bilateral or multilateral treaties may be resolved by relying on three sets of provisions: the NYC, conflicts rules relating to treaties, and other treaties. Application of the NYC does not affect the validity of provisions of other international treaties relating to the recognition and enforcement of arbitral awards. When applying relevant conflicts rules, a distinction can be made between two traditional principles: a later law takes precedence over an earlier law, a specialized law over a general law (*lex posterior derogat legi priori; lex specialis derogat legi generali)* and the rule of maximum efficacity (*la règle d'efficacité maximale)*. The latter, more modern principle favours the international treaty that upholds the enforcement of the award in question, regardless whether that treaty is older or more general.

Criticism of giving priority to Article VII over Article V

The above-mentioned approach of French courts has been criticized by some authors. For example, Sir Roy Goode maintains that following the example of the French courts would reduce Article V NYC to a dead letter. No court would have any regard for the decision of foreign courts setting aside an award, and all courts would take refuge in their own arbitration law. Concluding that such an approach is not in accordance with the principle of international cooperation in dispute resolution, Goode believes that a strong case can be made for amending Article VII NYC to "apply only to treaties entered into by the enforcing state".[115]

Aiming to promote the enforceability of as many awards as possible, the more favourable right provision in Article VII(1) is increasingly gaining importance in the relationship between the NYC and national law. The trend of national legal systems to liberalize their arbitration laws has also resulted in lower "requirements for the recognition and enforcement of foreign arbitral awards as compared with the standard laid down in the NYC"(Haas).

Abrogation in paragraph 2

The NYC was intended to replace both the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and the Geneva Protocol on Arbitration Clauses of 1923. Therefore, these treaties can no longer be applied by the Contracting States to the NYC.[116]

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[115] *GOODE, Roy, "The Role of the* Lex Loci Arbitri *in International Commercial Arbitration",* Arbitration International*, Vol. 17 (2000), pp. 19-40.*

[116] *Van den BERG, "Court Decisions on the New York Convention",* supra *at note 26, pp. 113- 114.*

Summary:

- **The party requesting recognition and enforcement may base its request on national law or an international treaty other than the NYC.**
- **The more favourable right provision of Article VII(1) NYC provides that, in the relationship between the NYC and national law, the rules more favourable to enforcement have priority.**

11. TEST YOUR UNDERSTANDING

You should be able to answer the following questions after having read the text on the recognition and enforcement procedure under the NYC:

1. What is the significance of the NYC in international trade?
2. Which arbitral awards fall under the scope of application of the NYC?
3. Explain the problems that could arise in connexion with the nationality of an award.
4. Which reservations are allowed in connexion with the scope of application of the NYC?
5. How is the arbitration agreement defined in the NYC?
6. How can the "in writing" requirement be interpreted to meet the standards of modern technology currently used in international trade?
7. What position is taken by the courts in cases where the arbitral clause is contained in standard conditions: Does a mere general reference to the conditions suffice in order for the arbitral clause to be deemed part of the contract or is a specific reference to the clause necessary?
8. How are the following terms in Article II(3) NYC to be interpreted: "null and void, inoperative or incapable of being performed"?
9. What law governs the recognition and enforcement procedure of foreign arbitral awards and what specific obligations must Contracting States to the NYC fulfill in this regard?
10. What formal requirements must a party satisfy when applying for the recognition and enforcement of an award?
11. What are the two categories of grounds for the refusal of recognition and enforcement under Article V NYC? Is a party allowed to rely on any ground other than those expressly mentioned therein?
12. Explain the basic features of the grounds set out in Article V(1)(b) and Article V(2)(b) and their relationship.
13. What stand is taken in the case law on the interpretation of the notion of public policy in international disputes? Give concrete examples of public policy violations.
14. What criteria do the courts apply when deciding whether to adjourn a decision on enforcement under Article VI NYC?
15. Explain the relationship between the NYC and other multilateral and bilateral agreements or domestic law regarding the recognition and enforcement of arbitral awards. What is the rationale behind the solution provided by the NYC?

12. HYPOTHETICAL CASES

12.1 *Alpha SL* v. *Genius SA*

On 15 April 1996, the parties Alpha SL, as buyer, and Genius SA, as seller, both of the State of Vayaland, entered into a sales contract through the broker Société BTD, incorporated under the law of Coinland. On 24 April 1996 the broker sent the order confirmation to Alpha. Subsequently, Genius sent two copies of the sales contract to Alpha, one of which was to be signed by Alpha and returned, which Alpha never did. Both documents – the order confirmation and the sales contract – contained a reference to General Conditions that, *inter alia,* provided for arbitration. The arbitral clause read as follows:

> *"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce in Speencity, Coinland by one or more arbitrators appointed in accordance with the said Rules."*

After a dispute arose between the parties, Genius initiated arbitral proceedings before the ICC International Court of Arbitration, which rendered the award in its favour on 1 May 1998. When Alpha failed to comply with the award, Genius sought enforcement before the competent court in Vayaland.

Two international instruments are relevant to this issue: a Treaty between Vayaland and Coinland on the Recognition and Enforcement of Arbitral Awards of 1976 and the NYC. The said bilateral Treaty prescribes stricter conditions for the formal validity of an arbitral agreement. It also contains a provision providing that the Treaty shall not prevent the application of other conventions that have been or will be signed by the parties on the same matters.

State possible arguments and specify which NYC provisions would support the following contentions of the parties:

1. Genius' assertion that the NYC is applicable to the recognition and enforcement of the arbitral award at issue.
2. Genius' argument that, although the order confirmation was not signed by Alpha, the arbitral agreement satisfies the condition of Article II NYC.
3. Alpha's argument that its silence and inactivity did not amount to its consent to arbitration under the NYC and that the formal requirements for a valid arbitration agreement are not met.

12.2 *Banque d'Investissements* v. *Gulf Investment Corporation*

Oiland, Gasland and Fuelland are States that are parties to the NYC and are located in the Gulf region. Gulf Investment Corp., an international organization with its seat in Oiland, was established by a multilateral Convention for the purpose of providing insurance coverage for investors who are nationals of the States belonging to the Gulf region.

On 12 August 1988, Banque d'Investissements (Fuelland) concluded a loan contract with Infrastructure Board (Gasland). Banque d'Investissements signed the guarantee contract with Gulf Investment Corp. on 11 November 1988, whereby the latter agreed to compensate the former for part of any loses it might sustain under the above-mentioned loan contract. The General Conditions containing the arbitral clause were annexed to the guarantee contract.

When Infrastructure Board failed to perform the loan contract, Banque d'Investissements sued Gulf Investment Corp. for compensation. Since Banque d'Investissements had lost its nationality and no longer met the requirements for the guarantee provided by Gulf Investment Corp., the latter refused to compensate Banque d'Investissements under the guarantee contract. Arbitration proceedings were initiated in Gasland and after winning the case, Banque d'Investissements sought enforcement of the award in Vayaland where Gulf Investment Corp. had considerable assets. Subsequent to commencement of the enforcement procedure, Gulf Investment Corp. applied to have the arbitral award set aside by the court in Gasland.

Taking account of the above facts, propose the arguments likely to be presented by both parties and anticipate the court's decisions when deliberating the following issues:

1. Gasland law requires every arbitral award to be confirmed by the national court. Since Gulf Investment Corp. is aware of this, may it successfully rely on the argument that the certified copy of the original award does not comply with the requirements under Article IV(1)(a) NYC since only the original confirmed by Gasland courts would be authentic?
2. On the one hand, Gasland law does not consider an award to be "binding" unless it has been confirmed by the national court. On the other hand, the General Conditions annexed to the guarantee contract expressly provided that "the award shall be binding immediately after it has been rendered". Which provisions should the Vayaland court apply when deciding on enforcement under the NYC, having in mind the purpose and spirit underlying the NYC? Which provision of the NYC regulates this issue?
3. Would Gulf Investment Corp.'s objection that, hiding behind unusually long and complex reasoning, the Arbitral Tribunal had rendered the decision as *amiable compositeurs*, though not authorized to do so, be a

justifiable ground to refuse enforcement under Article V(1)(c) or V(1)(d) NYC?

4. Gulf Investment Corp. sought adjournment of the decision on enforcement under Article VI NYC, claiming that the enforcement court should await the outcome of the setting aside procedure in Gasland. Is the court in Vayaland obliged to wait for the decision in the setting aside proceedings? Explain the possible considerations of the court when deciding this issue.

13. FURTHER READING

13.1 Books

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13.2 Articles

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- **Goldstein, M. J.**, "Interpreting the New York Convention: When Should an Interlocutory Arbitral 'Order' be treated as an 'Award'?", *Bulletin Swiss Arbitration Association,* No. 4 (2000), pp. 830-837.
- **Goode Roy**, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration", *Arbitration International*, Vol. 17 (2000), pp. 19-40.
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- **Kuner, C. B.**, "The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention", *Journal of International Arbitration*, No. 4 (1990), pp. 71-92.
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- The Geneva Protocol on Arbitration Clauses of 1923, 27 *League of Nations Treaty Series* (1924), p. 158.
- The Geneva Convention on the Execution of Foreign Awards of 1927, 92 *League of Nations Treaty Series* (1929-1930), p. 302.
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13.4 Case Law

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14. ANNEX

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

State	*Signature*	*Ratification, Accession [(a)], Succession [(d)]*	*Entry into force*
Albania	-	27 June 2001 [a]	25 September 2001
Algeria [1,2]	-	7 February 1989 [a]	8 May 1989
Antigua and Barbuda [1,2]	-	2 February 1989 [a]	3 May 1989
Argentina [1,2,7]	26 August 1958	14 March 1989	12 June 1989
Armenia [1,2]	-	29 December 1997 [a]	29 March 1998
Australia	-	26 March 1975 [a]	24 June 1975
Austria	-	2 May 1961 [a]	31 July 1961
Azerbaijan	-	29 February 2000 [a]	29 May 2000
Bahrain [1,2]		6 April 1988 [a]	5 July 1988
Bangladesh	-	6 May 1992 [a]	4 August 1992
Barbados [1,2]	-	16 March 1993 [a]	14 June 1993
Belarus [3]	29 December 1958	15 November 1960	13 February 1961
Belgium [1]	10 June 1958	18 August 1975	16 November 1975
Benin	-	16 May 1974 [a]	14 August 1974
Bolivia	-	28 April 1995 [a]	27 July 1995
Bosnia and Herzegovina [e,1,2,6]	-	1 September 1993 [d]	6 March 1992
Botswana [1,2]	-	20 December 1971 [a]	19 March 1972
Brazil	-	7 June 2002 [a]	5 September 2002
Brunei Darussalam [1]	-	25 July 1996 [a]	23 October 1996
Bulgaria [1,3]	17 December 1958	10 October 1961	8 January 1962
Burkina Faso	-	23 March 1987 [a]	21 June 1987

Cambodia	-	5 January 1960 [a]	4 April 1960
Cameroon	-	19 February 1988 [a]	19 May 1988
Canada [4]	-	12 May 1986 [a]	10 August 1986
Central African Republic [1,2]	-	15 October 1962 [a]	13 January 1963
Chile	-	4 September 1975 [a]	3 December 1975
China [1,2]	-	22 January 1987 [a]	22 April 1987
Colombia	-	25 September 1979 [a]	24 December 1979
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d'Ivoire	-	1 February 1991 [a]	2 May 1991
Croatia [e,1,2,6]	-	26 July 1993 [d]	8 October 1991
Cuba [1,2,3]	-	30 December 1974 [a]	30 March 1975
Cyprus [1,2]	-	29 December 1980 [a]	29 March 1981
Czech Republic [a,e]	-	30 September 1993 [d]	1 January 1993
Denmark [1,2]	-	22 December 1972 [a]	22 March 1973
Djibouti [e]	-	14 June 1983 [d]	27 June 1977
Dominica	-	28 October 1988 [a]	26 January 1989
Dominican Republic	-	11 April 2002 [a]	10 July 2002
Ecuador [1,2]	17 December 1958	3 January 1962	3 April 1962
Egypt	-	9 March 1959 [a]	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia	-	30 August 1993 [a]	28 November 1993
Finland	29 December 1958	19 January 1962	19 April 1962
France [1]	25 November 1958	26 June 1959	24 September 1959
Georgia	-	2 June 1994 [a]	31 August 1994
Germany [b,1,10]	10 June 1958	30 June 1961	28 September 1961
Ghana	-	9 April 1968 [a]	8 July 1968
Greece [1,2]	-	16 July 1962 [a]	14 October 1962
Guatemala [1,2]	-	21 March 1984 [a]	19 June 1984
Guinea	-	23 January 1991 [a]	23 April 1991

Haiti	-	5 December 1983 [a]	4 March 1984
Holy See [1,2]	-	14 May 1975 [a]	12 August 1975
Honduras	-	3 October 2000 [a]	1 January 2001
Hungary [1,2]	-	5 March 1962 [a]	3 June 1962
Iceland	-	24 January 2002 [a]	24 April 2002
India [1,2]	10 June 1958	13 July 1960	11 October 1960
Indonesia [1,2]	-	7 October 1981 [a]	5 January 1982
Iran (Islamic Rep. of) [1,2]	-	15 October 2001 [a]	13 January 2002
Ireland, Republic of [1]	-	12 May 1981 [a]	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959
Italy	-	31 January 1969 [a]	1 May 1969
Jamaica [1,2]	-	10 July 2002 [a]	8 October 2002
Japan [1]	-	20 June 1961 [a]	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan	-	20 November 1995 [a]	18 February 1996
Kenya [1]	-	10 February 1989 [a]	11 May 1989
Kuwait [1]	-	28 April 1978 [a]	27 July 1978
Kyrgyzstan	-	18 December 1996 [a]	18 March 1997
Lao People's Democratic Republic	-	17 June 1998 [a]	15 September 1998
Latvia	-	14 April 1992 [a]	13 July 1992
Lebanon [1]	-	11 August 1998 [a]	9 November 1998
Lesotho	-	13 June 1989 [a]	11 September 1989
Lithuania [3]	-	14 March 1995 [a]	12 June 1995
Luxembourg [1]	11 November 1958	9 September 1983	8 December 1983
Madagascar [1,2]	-	16 July 1962 [a]	14 October 1962
Malaysia [1,2]	-	5 November 1985 [a]	3 February 1986
Mali	-	8 September 1994 [a]	7 December 1994
Malta [1,11]	-	22 June 2000 [a]	20 September 2000

Mauritania	-	30 January 1997 [a]	30 April 1997
Mauritius [1]	-	19 June 1996 [a]	17 September 1996
Mexico	-	14 April 1971 [a]	13 July 1971
Monaco [1,2]	31 December 1958	2 June 1982	31 August 1982
Mongolia [1,2]	-	24 October 1994 [a]	22 January 1995
Morocco [1]	-	12 February 1959 [a]	7 June 1959
Mozambique [1]	-	11 June 1998 [a]	9 September 1998
Nepal [1,2]	-	4 March 1998 [a]	2 June 1998
Netherlands [1]	10 June 1958	24 April 1964	23 July 1964
New Zealand [1]	-	6 January 1983 [a]	6 April 1983
Niger	-	14 October 1964 [a]	12 January 1965
Nigeria [1,2]	-	17 March 1970 [a]	15 June 1970
Norway [1,5]	-	14 March 1961 [a]	12 June 1961
Oman	-	25 February 1999 [a]	26 May 1999
Pakistan	30 December 1958	- -	
Panama	-	10 October 1984 [a]	8 January 1985
Paraguay	-	8 October 1997 [a]	6 January 1998
Peru	-	7 July 1988 [a]	5 October 1988
Philippines [1,2]	10 June 1958	6 July 1967	4 October 1967
Poland [1,2]	10 June 1958	3 October 1961	1 January 1962
Portugal [c,1]	-	18 October 1994 [a]	16 January 1995
Qatar		30 December 2002 [a]	30 March 2003
Republic of Korea [1,2]	-	8 February 1973 [a]	9 May 1973
Republic of Moldova [1,6]	-	18 September 1998 [a]	17 December 1998
Romania [1,2,3]	-	13 September 1961 [a]	12 December 1961
Russian Federation [d,3]	29 December 1958	24 August 1960	22 November 1960
Saint Vincent and the Grenadines [1,2]	-	12 September 2000 [a]	11 December 2000
San Marino	-	17 May 1979 [a]	15 August 1979
Saudi Arabia [1]	-	19 April 1994 [a]	18 July 1994
Senegal	-	17 October 1994 [a]	15 January 1995
Singapore [1]	-	21 August 1986 [a]	19 November 1986

Slovakia [a,e]	-	28 May 1993 [d]	1 January 1993
Slovenia [e,1,2,6]	-	6 July 1992 [d]	25 June 1991
South Africa	-	3 May 1976 [a]	1 August 1976
Spain	-	12 May 1977 [a]	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland [8]	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic	-	9 March 1959 [a]	7 June 1959
Thailand	-	21 December 1959 [a]	20 March 1960
The former Yugoslav Republic of Macedonia [e,1,2,6]	-	10 March 1994 [d]	17 September 1991
Trinidad and Tobago [1,2]	-	14 February 1966 [a]	15 May 1966
Tunisia [1,2]	-	17 July 1967 [a]	15 October 1967
Turkey [1,2]	-	2 July 1992 [a]	30 September 1992
Uganda [1]	-	12 February 1992 [a]	12 May 1992
Ukraine [3]	29 December 1958	10 October 1960	8 January 1961
United Kingdom of Great Britain and Northern Ireland [1]	-	24 September 1975 [a]	23 December 1975
United Republic of Tanzania [1]	-	13 October 1964 [a]	12 January 1965
United States of America [1,2]	-	30 September 1970 [a]	29 December 1970
Uruguay	-	30 March 1983 [a]	28 June 1983
Uzbekistan	-	7 February 1996 [a]	7 May 1996
Venezuela [1,2]	-	8 February 1995 [a]	9 May 1995
Viet Nam [1,2,3,9]	-	12 September 1995 [a]	11 December 1995
Yugoslavia [f,1,2,6]	-	12 March 2001 [d]	27 April 1992
Zambia	-	14 March 2002 [a]	12 June 2002
Zimbabwe	-	29 September 1994 [a]	28 December 1994

***SOURCE**:*
Official site of the UNCITRAL: http://www.uncitral.org/en-index.htm (on 30 June 2003).

Notes:

Number of parties: 133

[a] *The Convention was signed by the former Czechoslovakia on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959. On 28 May 1993, Slovakia and, on 30 September 1993, the Czech Republic deposited instruments of succession.*

[b] *The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations [1,2] and [3].*

[c] *On 12 November 1999, Portugal presented a declaration of territorial application of the Convention in respect of Macau. The notification took effect for Macau on 10 February 2000, in accordance with Article X(2).*

[d] *As from 24 December 1991, the Russian Federation continues the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.*

[e] *The date of effect of the succession is as follows: for Bosnia and Herzegovina, 6 March 1992; for Croatia, 8 October 1991; for the Czech Republic, 1 January 1993; for Djibouti, 27 June 1977; for Slovakia, 1 January 1993; for Slovenia, 25 June 1991; and for The former Yugoslav Republic of Macedonia, 17 September 1991.*

[f] *The former Yugoslavia had acceded to the Convention on 26 February 1982. On 12 March 2001, the Secretary-General received from the Government of Yugoslavia a notification of succession, confirming the declaration dated 28 June 1982 by the Socialist Federal Republic of Yugoslavia. (see footnotes [1,2] and [6] below)*

Declarations and reservations
(Excludes territorial declarations and certain other reservations and declarations of a political nature)

[1] *State will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State.*

[2] *State 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.*

[3] *With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.*

[4] *Canada declared 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 laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.*

[5] *State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.*

[6] *State will apply the Convention only to arbitral awards adopted after the Convention entered into force.*

[7] *Argentina declared that the present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.*

[8] *On 23 April 1993, Switzerland notified the Secretary-General of its decision to withdraw the reciprocity declaration it had made upon ratification.*

[9] *Viet Nam declared that interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the law of Viet Nam.*

[10] *On 31 August 1998, Germany withdrew the reservation made upon ratification mentioned in footnote 1.*

[11] *The Convention applies in regard to Malta only in respect of arbitration agreements concluded after the date of Malta's accession to the Convention.*