

CHAPTER 2

THE NEW YORK CONVENTION OF 1958: AN OVERVIEW*

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1. Introduction

The following briefly describes the two basic actions contemplated by the New York Convention.

The first action is the recognition and enforcement of foreign arbitral awards, ie, arbitral awards made in the territory of another State. This field of application is defined in Article I. The general obligation for the Contracting States to recognise such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Art. IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are limitatively listed in Article V(1). The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V(2). If the award is subject to an action for setting aside in the country in which, or under the law of which, it is made ('the country of origin'), the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement (Art. VI). Finally, if a party seeking enforcement prefers to base its request for enforcement on the court's domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more-favourable-right-provision of Article VII(1).

The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II(3) provides that a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration.

* This Overview is based on the most recent Commentary (XXVIII Y.B. Com. Arb. 562 et seq. (2003)) and the more than 1,300 court decisions reported and referenced in the *Yearbook*.

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In both actions the arbitration agreement must satisfy the requirements of Article II(1) and (2) which include in particular that the agreement be in writing.

2. Article I – Field of Application

2.1 Arbitral Award Made in Another (Contracting) State

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

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

2.2 Non-domestic Arbitral Award

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

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

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

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

Against the background of the foregoing, the 'non-domestic' arbitral award may cover three categories of awards:

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

As regards category (i), this was the genesis of the second definition as discussed at the New York Conference in 1958. The legislative history of the Convention reveals that the second definition was inserted into the Convention at the insistence of certain civil law countries. With this action they took the view that parties can agree to arbitrate in one country under the arbitration law of another country. Practice shows that such agreement is virtually never made by parties. The reason is presumably that such an agreement can lead to complications as to the court which is competent in matters relating to the arbitration, such as the appointment of the arbitrators and the setting aside of the award.

As regards category (ii), it originates from the implementing legislation in the United States as interpreted by the courts in that country. The leading case is a 1983 decision by the US Court of Appeals for the Second Circuit in *Bergesen v. Muller*.² In *Bergesen*, the Court enforced an award made in New York under New York law between a Norwegian and a Swiss party by relying on the second definition contained in Article I(1). The Court adopted the view that 'awards 'not considered as domestic' means awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, eg, pronounced in accordance with a foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction'. In support of this view, the Court relied on Section 202 of the US implementing legislation which gives a definition of awards that do not fall under the Convention: 'awards arising out of

² *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983), IX Y.B. Com. Arb. 487 (1984).

a such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship... has some other reasonable relation with one or more foreign States'.

As regards category (iii), it is argued that the second definition supports the Convention's applicability to the recognition and enforcement of arbitral awards that do not result from the ambit of the applicability of any national arbitration law. In case of enforcement of an 'a-national' award under the Convention, the place where the award was made is in principle irrelevant. It is controversial whether 'de-nationalized' arbitration and the resulting 'a-national' award are legal reality and if so, whether the New York Convention can be applied to them.

2.3 Parties' Nationality

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

However, within the framework of the question of non-domestic awards (Art. I(1), second sentence) and the reciprocity reservation (Art. I(3)), nationality may play a role in the sense that a court may be prepared to consider an award as non-domestic for the purposes of the Convention only if the parties (or at least one of them) come(s) from a Contracting State.

2.4 Enforcement of a Domestic Arbitral Award

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

A country may, however, unilaterally adopt the Convention's system for the enforcement of certain arbitral awards. An example is the UNCITRAL Model Law on International Commercial Arbitration of 1985 which contains in Articles 35 and 36 a system that is almost identical to

Articles IV–VI of the Convention for the enforcement of an arbitral award ‘irrespective of the country in which it was made’.

2.5 Setting Aside of an Arbitral Award

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

First, it is a generally accepted rule that the setting aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country of origin (ie, the country in which, or – rather theoretically – under the law of which, the award was made) and is to be adjudicated on the basis of the arbitration law of that country. This rule appears to underlie the ground for refusal of enforcement set forth in Article V(1)(e) of the Convention (‘The award ... has been set aside ... by a competent authority of the country in which, or under the law of which, that award was made’). The courts in the other Contracting States may only decide under the Convention whether or not to grant enforcement of the award within their jurisdiction.

The consequence is that setting aside of an award in the country of origin has extra-territorial effect as it precludes enforcement in the other Contracting States by virtue of ground (e) of Article V(1) of the Convention.

In contrast, a refusal of enforcement is limited to the jurisdiction within which a court refuses enforcement and courts in other Contracting States are in principle not bound by such refusal.

Second, a country may adopt all or most of the grounds for refusal of enforcement set forth in Article V of the Convention as grounds for setting aside arbitral awards made within its jurisdiction. An example is the UNCITRAL Model Law on International Commercial Arbitration of 1985 which provides in Article 34 that a court of a country that has adopted the Model Law may set aside an arbitral award rendered under that law (as implemented) on grounds that are virtually identical to the grounds for refusal of enforcement listed in Article V of the Convention (except for ground (1)(e)).

2.6 'Persons, Whether Physical or Legal'

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

It is generally accepted that the expression also embraces persons of public law. The Convention is frequently applied to States and State agencies. In this field, the defence of sovereign immunity against recognition of the arbitration agreement and enforcement of the arbitral award is virtually always rejected on the basis of theories such as restrictive immunity, the waiver of immunity, the distinction between *acta de jure gestionis* and *acta de jure imperii*, the reliance on *pacta sunt servanda* and the creation of an *ordre public réellement international*.

The foregoing encompasses also the proceedings for obtaining leave for enforcement, for which reason the defence of sovereign immunity usually fails in enforcement cases under the Convention.

However, there remains a sharp (and some say illogical) distinction between immunity from jurisdiction and immunity from execution. Thus, notwithstanding the fact that many courts endorse the aforementioned theories, a substantial number of them still considers sovereign immunity to be absolute when, after having obtained the leave for enforcement, a party attempts to seek actual execution of the award against the State or State agency.

2.7 Permanent Arbitral Tribunal

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

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

2.8 Commercial Reservation

The second reservation of Article I(3) permits a State to reserve the applicability of the Convention '... only to differences arising out of legal

relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.’ This reservation was inserted because at the New York Conference of 1958 it was believed that, without this clause, it would be impossible for certain civil law countries, which distinguish between commercial and non-commercial transactions, to adhere to the Convention. As of today approximately one third of the Contracting States has used the commercial reservation.

In practice, the commercial reservation generally has not caused problems as the courts tend to interpret the coverage of ‘commercial’ broadly. There is also a tendency to rely on the broad description of what constitutes ‘commercial’ as is given in conjunction with the UNCITRAL Model Law on International Commercial Arbitration of 1985.

The words ‘whether contractual or not’ are intended to cover not only disputes arising out of contract but also tort (see ‘Article II(1) – Arbitration Agreement’ below).

3. Article II(1)–(2) – Arbitration Agreement

3.1 Introduction

Paragraph 1 of Article II sets forth the obligation for the Contracting States to recognise an arbitration agreement in writing. That obligation plays a role in the two actions contemplated by the Convention. In the case of enforcement of the arbitration agreement, Article II(3) obliges a court of a Contracting State to refer parties to arbitration ‘when seized of a matter in respect of which the parties have made an agreement within the meaning of this article’ (see ‘Article II(3) – Referral to Arbitration’ below). The second action is the enforcement of the arbitral award pursuant to Articles III–V. One of the grounds for refusal of enforcement is the invalidity of the arbitration agreement, which includes a mention of ‘the agreement referred to in article II’ (see ‘Lack of a Valid Arbitration Agreement (Article V(1)(a))’ below).

3.2 Article II(1) – Arbitration Agreement

According to paragraph 1 of Article II, the ‘agreement in writing’ encompasses an agreement ‘under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them’. This means that the Convention treats alike the submission agreement (*compromis*) by which an already existing dispute is referred to arbitration and the arbitration clause (*clause compromissoire*) by which a possible future dispute shall be submitted to arbitration.

This equal treatment is also reflected in other provisions of the Convention's text by using the general term 'arbitration agreement'. The equal treatment is nowadays accepted in most arbitration laws; this was different in 1958 as the arbitration clause was treated less favourably in a number of countries at that time.

What constitutes an 'agreement in writing' is defined in paragraph 2 of Article II. The text of this definition appears to be rather restrictive in the sense that it does no longer seem to correspond fully with the needs of international trade today. The problems caused by it may be overcome to a certain extent by an appropriate interpretation (see 'Article II(2) – Writing Requirement' below).

Article II(1) employs the expression 'differences'. For the purposes of an arbitration agreement it can be assumed that this is equivalent to 'disputes' (or, for that matter, 'controversies' or 'claims').

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

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

The foregoing questions concern the *scope* of the arbitration agreement, ie, whether a certain dispute can be said to be covered by the wording of the arbitration agreement. A different question is whether a certain dispute is *arbitrable* (although in practice the latter expression is also used – particularly by courts in the United States – for questions regarding the scope of the arbitration agreement). The arbitrability of a dispute concerns the question whether a dispute is capable of settlement by arbitration under the applicable law. Thus, a dispute may be within the scope of the arbitration agreement but nevertheless be non-arbitrable because under the applicable law it may not be decided by arbitrators but by a court only. Arbitrability in the latter sense is referred to in the final part of Article II(1) (requiring that an arbitration agreement concern 'a subject matter capable of settlement by arbitration') and in Article V(2)(a)

(see 'Article II(3) – Referral to Arbitration' under 'Arbitrability' and 'Article V(2) – Public Policy' under 'Arbitrability (Article V(2)(a))' below).

3.3 Article II(2) – Writing Requirement

As mentioned, Article II(1) requires the Contracting States to recognize an arbitration agreement in writing. Paragraph 2 of Article II defines the term 'agreement in writing' as 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. This definition can be divided into two alternatives:

First alternative: an arbitration clause in a contract or a separate arbitration agreement, the contract or the separate arbitration agreement being signed by the parties; and

Second alternative: an arbitration clause in a contract or a separate arbitration agreement contained in an exchange of letters or telegrams.

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

However, it is increasingly questioned whether the text of Article II(2) also constitutes an international minimum requirement for the formal validity of the arbitration agreement in view of the rather demanding conditions resulting from its text. In particular, the requirement of an exchange in writing is felt to be no longer in conformity with international trade practices where contracts are frequently formed by tacit acceptance. The number of courts which either construe Article II(2) expansively or even state that it is also allowed to rely on national law for determining compliance with the written form of the arbitration agreement, is increasing.

There are various approaches for adapting the requirements of Article II(2) to accommodate present day international trade practices. They are summarised in the Commentary contained in Volume XXVIII of the Yearbook Commercial Arbitration at pp. 584–87 (2003).

The first alternative of Article II(2) requires that the contract including the arbitration clause or the separate arbitration agreement bear the signatures of the parties. The second alternative was added to make allowances for the practices in international trade at the time (ie, in 1958). According to this alternative, it suffices that the contract including the arbitration clause or the separate arbitration agreement be contained in an exchange of letters or telegrams, without it being necessary that any of these documents be signed by the parties.

The courts in the Contracting States express different views as to when the exchange can be deemed accomplished. One view is that the document itself should be returned by the party to which it was sent to the party which dispatched it. Another view is that it suffices when a reference is made to the document in subsequent correspondence, such as a letter, facsimile, letter of credit, invoice, etc, emanating from the party to which the document was sent. The latter view would appear to be better suited for adapting the fairly strict requirements of Article II(2) to accommodate present day international trade practices. It would also correspond with the intent of the Convention's drafters who, by inserting the second alternative in the Convention's text, wanted to make allowance for international trade practices. In any event, the acceptance need not concern the arbitration clause specifically; it suffices that the contract containing the clause be accepted.

It is generally accepted that the expression in Article II(2) 'contained in an exchange of letters or telegrams' should be interpreted broadly as to comprise also other means of communication, especially telexes. This is expressly provided in Article I(2)(a) of the European Convention on International Commercial Arbitration of 1961, which is in part almost identical to Article II(2) of the New York Convention. The relevant proviso in the European Convention of 1961 states: 'contained in an exchange of letters, telegrams, or in a communication by teleprinter'. Other means of telecommunication, such as facsimile, can also be brought under the expression 'contained in an exchange of letters or telegrams', although no case law has yet been reported thereon. See also Article 7(2) of the UNCITRAL Model Law of 1985 which provides in relevant part: 'an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement'. With the advent of electronic commerce ('e-commerce'), the question is raised whether an arbitration agreement concluded by e-mail (or, for that matter, electronic contracting in general) meets the requirements of Article II(2) of the Convention. There is scant case law on that question. The prevailing view seems to be that an arbitration agreement concluded by e-mail can be brought under Article II(2) provided that there are signatures that are electronically reliable or the agreement is contained in an exchange of

e-mail (or other form of electronic contracting) that is sufficiently recorded or can be proven to have existed in writing by other means.

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

- (a) the confirmation is signed by both parties (first alternative); or
- (b) a duplicate is returned, whether signed or not (second alternative); or, possibly,
- (c) the confirmation is subsequently accepted by means of another communication in writing from the party which received the confirmation to the party who dispatched it.

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

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

With respect to the question of incorporation by reference of the arbitration clause in the standard conditions into the body of the contract, The test appears to be that the other party is able to check the existence of an arbitration clause. Thus, two categories of standard conditions can be distinguished. First, standard conditions printed on the back of a contract. In that case, a general reference clause in the contract is as a rule held sufficient since the other party is considered to be able to check the back of a contract. Second, standard conditions in a separate document require a reference clause in which specific attention is called for the arbitration clause in the standard conditions (for example, 'This Contract is governed by the General Conditions of Sale, including the arbitration clause contained therein,...'). Here again, the other party is

made aware of the existence of an arbitration clause and, hence, can be considered to be able to check it. There is no need to repeat the arbitration clause *verbatim* in the reference clause. This is the so-called specific reference. If, however, the standard conditions have been communicated to the other party, a general reference is usually deemed sufficient. Another exception is the case where the parties have a continuing trading relationship in which the same standard conditions are being used. In that case too, a general reference is as a rule held sufficient. A third exception seems to be the case where the standard conditions are so well known in the international trade concerned that any party participating therein can be deemed to be fully aware of these conditions, although case law is not yet developed in this respect.

The foregoing can also be viewed against the background of Article 7(2) of the UNCITRAL Model Law of 1985 which provides in relevant part: 'The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract'.

4. Article II(3) – Referral to Arbitration

4.1 Field of Application

The enforcement of the arbitration agreement is provided for in Article II(3), which states that a 'court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of [Article II], shall, at the request of one of the parties, refer the parties to arbitration'.

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

For resolving the question which arbitration agreement can be enforced under the Convention, it would be consistent to interpret Article II(3) by analogy to Article I, which is mainly based on the place where the award is made. An analogy can also be made to the second definition of Article I(1): an award that is considered to be non-domestic. Accordingly, the courts apply almost unanimously Article II(3) of the Convention to an arbitration agreement providing for arbitration in another (Contracting) State. No unanimity exists with respect to the applicability of Article II(3) to an arbitration agreement providing for arbitration

within the forum State. An acceptable interpretation would be that these agreements are only those which have an international element. The reason for the limitation in this category of agreements is that the primary goal of the Convention is international commercial arbitration. The two main criteria are the nationality of the parties and the subject matter of the agreement. That seems also to be the interpretation for an arbitration agreement that does not provide for a place of arbitration.

4.2 Requirements

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

- (a) the arbitration agreement must fall under the Convention (see above);
- (b) there must be a dispute;
- (c) the dispute must have arisen in respect of a defined legal relationship and must come within the scope of the arbitration agreement (see above);
- (d) the arbitration agreement must be in writing in accordance with Article II(2) (see above);
- (e) the arbitration agreement should not be 'null and void, inoperative or incapable of being performed' (see below); and
- (f) the subject matter must be capable of settlement by arbitration (see below).

4.3 'At the Request of' a Party

The words 'at the request of one of the parties' in Article II(3) indicate that a court may not refer the parties to arbitration on its own motion, but that a party should invoke the arbitration agreement. If a party does not invoke the arbitration agreement, the court will retain jurisdiction to hear the case, unless it lacks jurisdiction for some other reason not related to an arbitration agreement.

4.4 Latest Moment for Making the Request

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

4.5 Referral Is Mandatory

Article II(3) states that 'the court ... *shall*, at the request of one of the parties, refer the parties to arbitration' (emphasis added). There is a general agreement amongst the courts that this language does not leave any discretion to a court for referring the parties to arbitration once the conditions mentioned above are fulfilled.

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

4.6 'Null and Void, Inoperative, or Incapable of Being Performed'

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

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

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

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

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

As regards the exception 'null and void, inoperative or incapable of being performed' in Article II(3), most courts apply by analogy the conflict rules contained in Article V(1)(a): 'the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, ... the law of the country where the award was made...'. The alternative conflict rule, referring to the law of the country where the award was made, can be read as the law of the country where the award *will* be made in the context of the exception 'null and void, inoperative or incapable of being performed' in Article II(3).

4.7 Arbitrability

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

As mentioned above, the term 'arbitrability' is used by the courts in the United States as also referring to the question whether a dispute falls within the scope of the arbitration agreement.

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

Another question is which law a court has to apply to questions relating to arbitrability at the stage of enforcement of the arbitration agreement under Article II(3). The final part of Article II(1) does not refer to an applicable law. In contrast, Article V(2) refers to the law of the forum. An analogous interpretation would lead to an application of the law of the forum with respect to arbitrability at the stage of referral to arbitration under Article II(3) as well.

4.8 Provisional Measures by National Courts

The Convention contains no express provisions on the matter of conservatory, provisional or interim measures issued by a court in aid of arbitration. Hence, their availability and procedure depend on the

law of the court before which the measure is sought. National courts can indeed assist international arbitration in an effective manner in this respect.

No court in the reported cases has doubted that an attachment in connection with the enforcement of an arbitral *award*, or post-award attachment, in order to secure payment under the award, is compatible with the Convention. The reported cases also leave no doubt as to the possibility of a pre-award attachment. However, doubts have arisen only in the United States in a fairly large number of cases as to the compatibility of pre-award attachment with the Convention.

5. Article III – Procedure for Enforcement

Article III opens the provisions relating to the enforcement of arbitral awards falling under the Convention (Arts. III–VI). It contains the general obligation for the Contracting States to recognize Convention awards as binding and to enforce them in accordance with their rules of procedure ‘under the conditions laid down in the following articles’. Thus, a clear distinction is made between the conditions for enforcement in respect of which the Convention alone is controlling and the procedure for enforcement in respect of which the procedural law of the forum governs. With regard to the latter, generally speaking three possibilities exist in the Contracting States for regulating the procedure for enforcement of a Convention award: (1) enforcement procedure according to specific provisions laid down in a special Act, (2) enforcement procedure as for a foreign award in general, and (3) enforcement procedure as for a domestic award.

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

Finally, the second sentence of Article III, in which it is stated that there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of Convention awards than on the recognition and enforcement of domestic awards, is self-explanatory and has not led to problems in practice.

6. Article IV – Conditions To Be Fulfilled by the Petitioner

Article IV is set up to facilitate enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement of a Convention award. That party has only to supply the 'duly authenticated original award or a duly certified copy thereof' and the 'original arbitration agreement... or a duly certified copy thereof' (paragraph 1). The authentication of a document is the formality by which the signature thereon is attested to be genuine. The certification of a copy is the formality by which the copy is attested to be a true copy of the original.

In fulfilling these conditions, the party seeking enforcement produces *prima facie* evidence entitling it to obtain enforcement of the award. It is then up to the other party to prove that enforcement should not be granted on the basis of the grounds enumerated exhaustively in the subsequent Article V(1). It should be emphasised that the conditions mentioned in Article IV are the only conditions with which the party seeking enforcement of a Convention award has to comply.

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

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

Although the language of Article IV(2) suggests that the submission of a translation of the arbitration agreement and arbitral award is mandatory ('shall produce'), it is held that a translation is not required when the judge knows the foreign language sufficiently well 'to have taken full cognizance of the contents of these documents'.

7. Article V – Grounds for Refusal of Enforcement in General

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

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

The three main features of the grounds for refusal of enforcement of an award under Article V are the following.

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

The second feature of the grounds for refusal of enforcement, which follows from the first feature, is that the court before which the enforcement of a Convention award is sought, may not review the merits of the award because a mistake in fact or law by the arbitral tribunal is not included in the list of grounds for refusal enumerated in Article V. This feature too is generally accepted by the courts. The principle that a court may not subject an arbitral award to a review on the merits is not unfettered, in the sense that the court may examine the award for the purposes of verifying the grounds for refusal of enforcement, eg excess by the arbitral tribunal of its authority.

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

Finally, it is arguable that in a case where a ground for refusal of enforcement is present, the enforcement court nevertheless has a residual discretionary power to grant enforcement in those cases in which the violation is *de minimis*.

8. Article V(1) – Grounds for Refusal of Enforcement To Be Proven by the Respondent

8.1 Lack of a Valid Arbitration Agreement (Article V(1)(a))

No court has doubted that the words ‘the agreement referred to in article II’ in ground (a) of Article V(1) imply that the lack of the written form of the arbitration agreement as required by Article II(2) constitutes a ground for refusal of enforcement of an arbitral award, with the exception of the Italian Supreme Court.

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

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

8.2 Violation of Due Process (Article V(1)(b))

When considering ground (b) of Article V(1), a US Court of Appeals (Second Circuit) stated ‘[T]his provision essentially sanctions the application of the forum state’s standards of due process’.³ This statement phrases concisely the object of ground (b). It concerns the fundamental principle of procedure, that of a fair hearing and adversary proceedings, also referred to as *audi et alteram partem*.

The courts appear to accept a violation of due process in serious cases only, thereby applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly.

³ *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), 1 Y.B. Com. Arb. 205 (1976).

The narrow interpretation of Article V(1)(b) becomes particularly evident where the courts hold that a violation of domestic notions of due process does not necessarily constitute a violation of due process in a case where the award is foreign (see 'Article V(2) – Public Policy' under 'Distinction between Domestic and International Public Policy' below).

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

Ground (b) requires that the party against whom the award is invoked was properly notified of the appointment of the arbitrator and of the arbitral proceedings. The question when a notice can be considered as proper depends on the facts of the case. The test is whether the notice is adequate to inform the party of the appointment of the arbitrators and the arbitral proceedings. It is generally accepted that, arbitration being a private manner of settlement of disputes, the notice needs not be in a specific (official) form as is laid down in certain laws for domestic arbitration or court proceedings.

The shortness of time limits for the appointment of an arbitrator and the preparation of the defence, or of the notice period to appear at the hearing generally, is held by the courts not to be a violation of due process under Article V(1)(b).

The proper notice for the appointment of the arbitrator and the arbitration proceedings can be considered as specific categories of the general principle that a party must have been able to present its case. Again, the test is whether a party was in fact precluded from presenting its case in arbitration. The defence of the inability of presenting the case was rarely successful.

8.3 Excess of the Arbitral Tribunal's Authority (Article V(1)(c))

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

Although not questioned in the court decisions reported to date and being somewhat obscure and repetitive, the expression '[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of submission to arbitration' implies a two prong test (based on a combined reading of the equally authentic English and French texts of the Convention). First, it requires a determination of what constitutes the scope of the arbitration clause. Secondly, having determined the scope, it requires a determination of the matters that the parties have submitted to the resolution by the arbitral tribunal in question. The latter is also referred to as the tribunal's mandate (in ICC arbitration: Terms of Reference). In certain cases, the matters submitted by the parties to the arbitral tribunal's decision (ie, its mandate) may be narrower than the scope of the arbitration clause. The distinction is, at least theoretically, important as ground (c) of Article V(1) is in the final analysis to be determined on the basis of the tribunal's mandate. However, the tribunal's mandate may be broadened by the parties' submissions beyond the scope of the arbitration clause if during the arbitration both parties explicitly or tacitly agreed to such an extension. The foregoing is relevant for the arbitration clause (referring future disputes to arbitration). In the case of a submission agreement (referring existing disputes to arbitration) matters concerning scope and mandate usually coincide.

Importantly, the question whether an arbitral tribunal has exceeded its authority should not lead to a re-examination of the merits of the award. This principle has been consistently upheld by the courts.

Ground (c) (or any other ground for refusal of enforcement listed in Article V of the Convention) does not mention an arbitral award in which not all (counter) claims submitted to the arbitral tribunal have been disposed of (the so-called award *infra petita*). Considering that one of the main features of Article V is that it lists the grounds for refusal exhaustively, an award *infra petita* does not qualify for refusal of enforcement. It is to be pointed out that most modern arbitration laws provide for the possibility of obtaining an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award (see eg UNCITRAL Model Law on International Commercial Arbitration, Article 33(3)). The additional award can in turn be enforced under the Convention.

The text of the New York Convention requires that partial recognition and enforcement can be granted only if 'matters submitted to arbitration can be *separated* from those not so submitted' (emphasis added). The Convention's drafters had decisions on matters such as interest and costs in mind. Moreover, these matters had to be of a very incidental nature

and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement. Case law confirms that test. The courts review the award in order find out whether it contains distinct findings that can be severed. The cases in which partial enforcement was granted indeed concerned incidental matters.

8.4 Irregularity in the Composition of the Arbitral Tribunal or Arbitral Procedure (Article V(1)(d))

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

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

Ground (d) has led to very few refusals on enforcement in practice.

8.5 The Award 'Has Not Yet Become Binding' (Article V(1)(e))

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

The courts, however, differ with respect to the question whether the binding force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Indeed, a number of courts investigate the applicable law in order to find out whether the award has become binding under that law. Other courts interpret the word 'binding', without reference to an applicable law, as meaning that the award is no longer open to a genuine appeal on the merits to a second arbitral instance or to a court.

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

8.6 The Award 'Has Been Set Aside' (Article V(1)(e))

Ground (e) further provides that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been set aside (annulled, vacated) by a court of the country in which, or under the law of which, the award was made ('the country of origin'). According to Article VI of the Convention, a court may adjourn its

decision on enforcement if the respondent has applied for a setting aside of the award in the country of origin and the application is pending in that country.

The reference to 'under the law of which' is a rather theoretical case (see 'Article I – Field of Application' under 'Non-domestic Arbitral Award' above). The expression 'competent authority' is normally a court having jurisdiction to entertain an action for setting aside in the country of origin (see 'Article I – Field of Application' under 'Setting Aside of an Arbitral Award' above).

It rarely occurs that an action for setting aside the award in the country of origin is successful.

It is questioned whether the circumstance that an arbitral award has been set aside in the country of origin, should lead to a refusal of enforcement. The French view is that a setting aside in the country of origin should be ignored altogether. The French courts arrive at this result by relying on their domestic law concerning the enforcement of foreign (international) awards in virtue of the more-favourable-right-provision of Article VII(1) of the Convention. French domestic law on enforcement of foreign (international) awards does not include as ground for refusal of enforcement that the award has been set aside in another country. Another view is that enforcement of a Convention award should be refused on the basis of Article V(1)(e) only if the setting aside in the country of origin occurred on grounds equivalent to the grounds for refusal of enforcement listed in grounds (a)–(d) of the Convention. This system prevails under Article IX of the European Convention on International Commercial Arbitration of 1961. As far as the New York Convention is concerned, the legal basis for that concept is said to be the residual discretion to grant enforcement even though a ground for refusal has been established and/or the more-favourable-right-provision of Article VII(1). It is not entirely clear whether and if so to what extent the courts in the United States adhere to that concept. In any event, the vast majority of the courts in the other Contracting States do not enforce arbitral awards that have been set aside in the country of origin, either under the Convention or otherwise.

8.7 The Award 'Has Been Suspended' (Article V(1)(e))

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

respondent has applied for a suspension of the award in the country of origin and the application is pending in that country.

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

The courts have held that a suspension of the award by operation of law in the country of origin (eg because of the initiation of an action for setting aside the award) is not sufficient for refusal of enforcement under ground (e). In order for the suspension to be a ground for refusal of enforcement of the award, the respondent must prove that the suspension of the award has been effectively ordered by a court in the country of origin.

9. Article V(2) – Public Policy

9.1 Distinction Between Domestic and International Public Policy

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

In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts. They apply it to both the question of arbitrability (ground (a) of Article V(2)) and other cases of public policy (ground (b) of Article V(2)). The application of the distinction between domestic and international public policy in cases falling under the Convention also can be seen as a consequence of the general rule of interpretation to construe narrowly the grounds for refusal of enforcement in Article V of the Convention. Or, as the US Court of Appeals for the Second Circuit observed in *Parsons & Whittemore v. RAKTA*,⁴ arbitral awards should be denied enforcement only when the asserted public policy 'would violate the forum State's most basic notions of morality and justice'.

⁴ *Supra* note 3.

9.2 Arbitrability (Article V(2)(a))

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

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

9.3 Other Cases of Public Policy (Article V(2)(b))

Article V(2)(b) allows a court to refuse enforcement of an award on its own motion if the enforcement of the award would be contrary to the public policy of the country where the enforcement is sought. There are a number of diverse cases in which the question of public policy was raised. Cases that are regularly (but almost always unsuccessfully) invoked in practice are the following.

9.4 Due Process

Due process, which pertains to public policy, implies as a fundamental principle, that the parties have an equal opportunity to be heard. This principle demands that each party must have been effectively offered such opportunity. But if, after having been duly notified, a party refuses to participate or remains inactive in the arbitration, it must be deemed to have deliberately forfeited the opportunity. Default in arbitration, after having been duly notified, has been invariably held not to bar enforcement of a Convention award. In other words, the counterpart of due process is an active participation in the arbitration. See also Article V(1)(b) above.

9.5 Procedure

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

9.6 Impartiality

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

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

9.7 Reasons

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

10. Article VI – Adjournment of the Decision on Enforcement

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

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

The courts have generally considered that the case for adjournment is stronger where the setting aside action is likely to succeed ('not frivolous') and where the period of time within which the decision on setting aside is to be expected is short, in which case the posting of security may then be less necessary.

Article VI offers a balanced solution between the application for setting aside made with a dilatory intent only and the right of a bona fide party to contest the validity of the award in the country of origin.

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

11. Article VII(1) – More-Favourable-Right-Provision; Compatibility Provision

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

The rationale underlying the mfr-provision is that the New York Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon. It may be added that a few countries have a separate statutory regime for the enforcement of foreign arbitral awards. In a number of other countries such a regime is developed by case law.

While the text does not make it clear, the Convention's legislative history shows that the drafters' intent was to prevent from picking and choosing between the Convention and another basis for enforcement of a foreign award (the 'all-or-nothing proposition'). Under this interpretation, it is, for instance, not allowed to base the request for enforcement on the Convention, to the exception of the written form of the arbitration agreement as required by Article II(2) which would be based on some domestic law.

The expression 'the law' refers to a statutory or case law regime for the enforcement of foreign arbitral awards outside a treaty. It also follows from the juxtaposition of 'the law' with 'the treaties' which cannot have any other meaning than treaties concerning the recognition and enforcement of foreign arbitral awards.

Some, however, interpret Article VII(1) expansively in the sense that the right of a party to avail itself of an arbitral award in the manner and to the extent allowed by its law is extended to the right that a party may have in respect of a domestic award. The result is, for example, that the written form is no longer assessed under Article II(2) of the Convention but rather the (arbitration) law of the forum.

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

Another question is whether a court may also on its own motion apply the more-favourable-right-provision of Article VII(1). The French Cour de Cassation answered this question in the affirmative in *Pabalk v. Norsolor*.⁵ The Swiss Federal Tribunal answered it in the negative in *Tracomin v. Sudan Oil*.⁶

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

12. Article VII(2) – Geneva Treaties

The New York Convention provides expressly in the second paragraph of Article VII that its predecessors, the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, shall cease to have effect between the States which have become Party to the New York Convention. Several courts have affirmed this rule. As, with very few exceptions, all States which had adhered to the Geneva treaties have by now become a Party to the New York Convention, Article VII(2) has progressively lost relevance.

⁵ Cass. 1e civ., 9 October 1984, *Pabalk Ticaret Sirketi v. Norsolor*, 1985(3) *Rev. arb.* 431, XI Y.B. Com. Arb. 484, ¶¶ 9–20 at 489 (1986); see also CA Paris, 24 February 1994, *Ministère tunisien de l'Équipement v. Bec Frères*, 1995(2) *Rev. arb.* 275, XXII Y.B. Com. Arb. 682, ¶ 4 at 685 (1997).

⁶ Swiss Fed. Trib., 5 November 1985, *Tracomin S.A. v. Sudan Oil Seeds Co.*, ATF 111 Ib 253, XII Y.B. Com. Arb. 511 (1987).

13. Article XIV – General Reciprocity Clause⁷

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

The general reciprocity clause is not a reciprocity clause as commonly used in international law meaning that in relations between two States each State gives the subjects of the other State certain privileges on the condition that its own subjects enjoy similar privileges in the other State, because the party's nationality is excluded as a condition for the Convention's applicability (see 'Article I – Field of Application' under 'Parties' Nationality' above).

⁷ The other articles of the Convention are typical treaty provisions of a technical nature. They are not reproduced as they have not been subject to judicial interpretation in the court decisions reported to date.