RESIDUAL DISCRETION AND VALIDITY OF THE ARBITRATION AGREEMENT IN THE ENFORCEMENT OF ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION OF 1958

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I. Introduction

The success of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (hereinafter 'the New York Convention' or 'the Convention') is undeniable. More than 100 States have become Parties to it, and more than 650 courts have interpreted and applied the Convention, virtually always granting enforcement of an arbitral award made in another (Contracting) State. Indeed, the New York Convention is probably the most successful treaty in the field of international commercial law.

However, success did not come easy. It took important trading States, such as the United States and the United Kingdom, a rather long time before deciding to adhere to the Convention (in 1970 and 1975, respectively). Actually, more than half of the Contracting States joined the Convention after 1980

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(amongst which Singapore, which joined in 1986). The hostility in South America toward international arbitration in general and the New York Convention in particular is only now disappearing.

And success did not come without effort. It is here that tribute must be paid to the judges in the Contracting States. To understand this, one has to go back to what was believed by certain commentators right after the Convention was signed in New York in 1958. While the Conference delegates hailed the Convention as establishing a uniform legal regime in international arbitration, these commentators pointed to the public policy defence in the Convention and ventured the view that the Convention would be largely ineffective because the courts would rely on public policy to refuse enforcement of foreign arbitral awards.

They proved to be wrong. The courts enthusiastically embraced the New York Convention and almost invariably rejected a public policy defence. In fact, the reported decisions show that if a party invokes the public policy defence, it is tantamount to showing a banner in court: 'I have no case.'

The judiciary did more. It is one thing to have a text that is believed to be uniform. It is quite another thing to see in practice the way in which the courts in the various Contracting States interpret and apply the Convention's provisions. For example, in the beginning, the Italian courts held views on article II(2)'s requirement of the written form of the arbitration agreement that were quite different from the views expressed by the courts in the United States. But then the courts in the various Contracting States looked at each other's decisions and attempted to align their interpretations, thus establishing a truly uniform judicial interpretation of the Convention's provisions.

It is submitted that the method of comparative judicial interpretation is one of the keys to the Convention's success in practice. For a long time, courts regrettably did not pay attention to this matter of interpretation in matters of private international law. It is different for the New York Convention where the court have exhibited an internationalist attitude. One hopes that the same attitude will also prevail in other fields of private international law.

That is not to say that we can sit back and relax. To maintain success, one has to overcome new problems that inevitably arise. The New York Convention does not form an exception to this fact of life. One problem is awareness of the Convention on the part of the new arrivals. It appears that judges and practising lawyers in States that have recently adhered to the Convention lack familiarity with its text and system. Another problem is divergence in the legislation that implements the Convention in the Contracting States. Yet another problem - if it may be called a problem - is the increasing ingenuity of lawyers representing defendants in enforcement actions. They test the Convention to the last comma and beyond. The result is that some enforcement actions take a long time - too long for those who favour international arbitration.

It is not the purpose of this article to explore these problems. Suffice it to refer to the many conferences that are organized in States that recently have adhered to the Convention in which the Convention is explained; and to mention the project of examining the implementing acts recently undertaken jointly by the United Nations Commission on International Trade Law (UNCITRAL) and the

International Bar Association (IBA).[1] Rather, I propose to deal with certain problems that have surfaced in recent cases decided by the courts in the Contracting States.

Some 15 years ago, I published a book on the interpretation and application of the Convention by the courts in the Contracting States.[2] I continued to monitor the court decisions of the Convention in the *Commentaries* in the Yearbook of Commercial Arbitration.[3] The problems analysed in these publications have been partially resolved today, but others remain and new ones have arisen. For the present article I have selected two recent problems that are, in my opinion, particularly compelling. First, it is questioned by certain courts, in particular those in Hong Kong, whether a court has residual discretion to grant enforcement in cases where a ground for refusal of enforcement is present (see Section II below). And second, there is the problem of the requirement of the written form of the arbitration agreement, as set forth in article II(2) of the Convention. This requirement is rather stringent, in particular if one compares it with modern arbitration legislation. The question therefore arises whether this requirement should be revisited, either in the form of an actualizing interpretation

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1 In my view, the implementing act of Singapore (Arbitration (Foreign Awards) Act 1986, No. 24 of 1986) constitutes a felicitous exception since it is an implementing act that may serve as an example for many other states. This is no wonder as Singapore took the good measure of being advised in its drafting by the then Secretary of UNCITRAL, Mr. Willem Vis, one of the most prominent international lawyers of our times who, unfortunately, died much too early in 1993.

2 Van den Berg *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1981) Kluwer (hereinafter *The New York Arbitration Convention*). A second edition of this book will appear in 1998.

3 See also Van den Berg 'Non-Domestic Awards under the 1958 New York Convention' (1986) 2 Arbitration International 191; 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 Arbitration International 2; 'Where is an Award "made"? Case comment House of Lords, 24 July 1991, Hiscox v. Outwaite', Storme/De Ly (eds) *The Place of Arbitration* (1992) Mys & Breesch, pp 14-22.

or even an amendment of the Convention itself (see Section III below). As we will see, both questions are interrelated to a certain extent: if the writing requirement is not met in a certain case, can a court nevertheless grant enforcement on the basis of its residual discretion?

Before examining these questions, it may be useful for those readers who have no knowledge about the Convention to explain the Convention briefly. The first action contemplated by the Convention is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards made in the territory of another State. This field of application is defined in article I.[4] The general obligation for Contracting States to recognize 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 (article 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 exhaustively 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 (article 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 on bilateral or other multilateral treaties in force

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[4] 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).

in the country where it seeks enforcement (if such basis is available), 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 Convention is the referral of disputes to arbitration by a court. 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 the matter to arbitration.

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

II. Residual Discretion in Granting Enforcement

One of the main features of the grounds for refusal of enforcement listed in article V of the Convention is that they are exhaustive. Enforcement may be refused 'only if' the party against which 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 has been recognized almost unanimously by the courts.

While a court *may not* refuse enforcement on the basis of a ground not listed in article V of the Convention, the reverse issue is whether a court *must* refuse enforcement if a ground for refusal of enforcement mentioned in article V is present, or whether the court still has a residual discretion to grant enforcement. If the latter question is answered in the affirmative, a further question is whether

the residual discretion can be exercised with respect to all grounds for refusal of enforcement or only some of them. These questions have been addressed, in particular, by the courts of Hong Kong in a line of cases.

In the decision *Qinhunangdao v Million Basic Company* of 5 January 1993, the High Court in Hong Kong stated summarily that it 'retains a residual discretion to grant leave to enforce the award in any case.' [5]

This view was elaborated by the High Court in a decision dated 15 January 1993, *Paklito v Klockner*, in which it observed that discretion could not come into play in relation to all grounds for refusal of enforcement (e.g., violation of public policy), but that the Court

> could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute. . . . It is not necessary for me in this judgment to decide whether this is the only circumstance where the discretion could be exercised or to lay down circumstances where it would be appropriate for the court to exercise its discretion after finding a serious due process violation. [6]

In a decision dated 13 July 1994, *China Nanhai Oil v Gee Tai Holdings*, the High Court repeated: '[i]t is clear that even though a ground has been proved, the court retains a residual discretion.' It then went on to elaborate its view in more detail in several pages of its decision.[7] The case concerned an arbitral award rendered under the auspices of the Shenzhen Sub-Commission of the

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5 (1994) 19 YCA 675 (Hong Kong no. 7 sub 1).

6 (1994) 19 YCA 664 (Hong Kong no. 6 sub 44-50).

7 (1995) 20 YCA 671 (Hong Kong no. 8 sub 1).

China International Economic and Trade Arbitration Commission (CIETAC). The Hong Kong Court found that this was the incorrect Sub-Commission and that the case should have been dealt with by CIETAC in Beijing. The issue then arose whether the respondent was estopped from invoking this jurisdictional point in the enforcement proceedings under the Convention. The Court reviewed in detail the case law regarding estoppel in relation to the writing requirement of article II of the Convention. It approved the solution according to which the question of estoppel is regarded as a fundamental principle of good faith, which principle overrides the formalities required by article II(2) of the Convention. According to the Court, the solution does not depend on rules of possibly diverse municipal laws, but rather on the Convention itself. The Court also considered that the principle of good faith may be deemed to be enshrined in the Convention's provisions and that the legal basis would be that article V(1), which provides that a court '*may*' refuse enforcement if the respondent proves one of the grounds for refusal of enforcement listed in that article.[8] The Court considered in particular that there is much force in the point

> that even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement.

The Hong Kong Court did in fact exercise its discretion in the *China Nanhai Oil* case where the arbitral tribunal had been irregularly constituted:

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[8] The Court referred to *The New York Arbitration Convention*, n. 2 *supra* at 182.

> I am quite satisfied that the defendants got what they agreed in their contract in the sense that they got an arbitration conducted by 3 Chinese arbitrators under CIETAC Rules. To exercise my discretion against enforcement on the facts of this case would be a travesty of justice.

Finally, in a decision dated 16 December 1994, *Nanjing Cereals v Luckmate Commodities*, the High Court in Hong Kong elaborated the legal basis on which, in its opinion, the discretionary power rests: Section 44 of the Arbitration Ordinance, which implements the New York Convention in Hong Kong. That section provides: '(1) Enforcement of a Convention award shall not be refused except in cases mentioned in this section. (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves . . . .' The Court observed, 'Thus, Section 44 can be seen to be discretionary: even if there are grounds to set aside [the order granting leave to enforce] the award, there remains discretion to refuse to do so.'[9] In the *Nanjing Cereals* case, the defendants relied on the fact that the calculation of damages in the award was preceded by the words 'through independent investigation' and argued that they had been unable to present their case as regards quantum to the Tribunal (article V(1)(b) of the Convention). The High Court found that

> this is a classic case where a court should exercise its discretion to refuse to set aside [the order granting leave to enforce] an award, due to the failure of the defendants to prosecute their own case properly by submitting their own evidence to the Tribunal.

As it appears from the Hong Kong decisions, the residual discretion to grant enforcement notwithstanding the presence of a ground for refusal may be

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[9] (1996) 21 YCA 542 (Hong Kong no. 9 sub 2).

particularly useful in cases where the respondent has participated without objection in the arbitral proceedings. Under many laws, it is considered that, under these circumstances - and in particular where it concerns the plea that an arbitral tribunal lacks jurisdiction - the respondent is estopped from objecting to non-compliance in enforcement or setting aside proceedings.[10] The Convention does not contain provisions concerning the question whether a party is estopped from asserting a ground for refusal of enforcement. This has not deterred courts from resorting to estoppel, waiver and similar legal notions in Convention cases. The above decisions of the High Court of Hong Kong make this clear. Courts in other countries have adopted a similar approach as the following review will show.

The U.S. District Court for the Southern District of New York held in *Shaheen v Sonatrach* that the American party, which had lost the ICC arbitration in Geneva, had waived various defences because it had failed to raise them before the arbitrators. These were the defence that it was not the contracting party but an agent only; the defence that the arbitration clause could not have

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[10] See, e.g., article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration, providing:

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Of even wider scope are the waiver provisions in the Netherlands Arbitration Act of 1986. Not only must the plea of a lack of a valid arbitration agreement be raised *in limine litis*, but also an irregularity in the constitution of the arbitral tribunal and the arbitral proceedings must be objected to forthwith on pain of being barred to rely on it in setting aside proceedings (articles 1052(2)-(3) and 1065(2)-(4)).

been invoked by the plaintiff; and the expiration of the time limit for making the award.[11] The Court observed in its concluding remarks:

> To deny recognition and enforcement to the arbitration award rendered on November 27, 1981, at this stage would be to violate the goal and purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards. Shaheen had an opportunity to raise its objections to the arbitration proceedings before the panel and did not do so.

The same District Court held in another case, *Exportkhleb v Maistros Corp.*, that a party had waived its objection to arbitrability of a counterclaim since it had never raised the issue before the arbitral tribunal, either as a defence against jurisdiction or on the merits of the case presented to the arbitrators.[12]

The District Court in New York also considered a case where a party initially had agreed to arbitration in New York but subsequently decided not to participate therein.[13] When a vessel belonging to this party was arrested in France, it nevertheless argued that the other party should not be permitted to litigate in court in light of the agreement to arbitrate in New York, and on this basis the arrest was lifted. When arbitration actually took place in New York, the same party again was unwilling to arbitrate. Contesting the award rendered against it, it argued before the District Court in New York that it was not a party to the arbitration clause. The District Court rejected the argument, pointing out that

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[11] 585 F. Supp. 57 (S.D.N.Y. 1983); aff'd 733 F.2d 260 (2nd Cir. 1984); (1985) 10 YCA 540 (US no. 10).

[12] 790 F. Supp. (S.D.N.Y. 1992); (1993) 18 YCA 550 (US no. 135).

[13] *Transrol Navegacao v Redirekommanditselskaber Merc Scandia* 782 F. Supp. 848 (S.D.N.Y. 1992); (1993) 18 YCA 499 (US no. 129).

> [t]he doctrine of 'preclusion of inconsistent positions' prevents litigants from playing 'fast and loose' with the courts. . . . Under certain circumstances, preclusion of inconsistent positions is a variation of equitable estoppel. . . . This version of the doctrine requires *privity, reliance,* and *prejudice* [emphasis by the Court]. '"[t]he party, seeking to invoke the estoppel, must have been an adverse party in the prior proceeding, must have acted in reliance upon his opponent's prior position and must now face injury if a court were to permit his opponent to change positions"'. . . . '[v]irtually all courts agree that equitable estoppel may be applied to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding.'

The same principle has been applied by a number of European courts, the objection of a respondent that the arbitrators had consulted an expert in the absence of the parties was rejected by the Swiss Tribunal Fédéral on account of failure to object before the arbitrators.[14] The Court noted that article V(1)(b) of the Convention covers, by its general wording, any restriction on the parties' right to be heard. The Court held that is was not necessary to decide this question because the respondent had failed to object when it was informed by the chairman of the arbitral tribunal, shortly after the consultation had taken place. The raising of the objection at the enforcement stage only, according to the Court, manifested bad faith and constituted an abuse of rights.

The Court of Appeal of Athens decided that a party cannot assert the lack of the written form of the arbitration agreement and the authorization to conclude the agreement in the enforcement proceedings if it has participated in the arbitration proceedings without reservation.[15]

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[14] *Chrome Resources SA v Léopold Lazarus Ltd. (1980)* 102 La Semaine Judiciaire 67; (1981) 37 Annuaire Suisse de Droit International 450; (1986) 11 YCA 538 (Switzerland no. 10).

[15] (1984) 51 Ephemeris Elenon Nomikon 461; (1989) 14 YCA 638 (Greece no. 10)

The German Federal Supreme Court has expressed the view that estoppel is limited to article V(1)(d) of the Convention, i.e., irregularities in the arbitral procedure that violate the law of the State where the arbitration took place.[16] Estoppel in this context means that objections against a foreign arbitral award may no longer be asserted in enforcement proceedings in Germany if they could and should have been raised abroad within a given period of time but were not raised.[17]

In a case concerning the enforcement of an award made in London, the Italian Supreme Court implicitly acknowledged the possibility of estoppel by noting that 'no objection concerning the appointment of the arbitrators and the constitution of the arbitral tribunal has been raised in the arbitral proceedings.'[18]

The Spanish Supreme Court has applied article V(1) of the European Convention of 1961, according to which the lack of jurisdiction of the arbitrator must be raised *in limine litis*. The Court observed: 'Thus, that would have been the moment to [raise such plea]; not now, when this is impossible. Hence, only the party which does not [raise this plea] in the legally valid form while it can, bears the consequences thereof.'[19]

Finally, returning briefly to the United States courts, the District Court for the District of Columbia has rejected the argument that the defendant waived the

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16 (1990) Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1990 510; (1996) 21 YCA 532 (Germany no. 43 sub 4).

17 See also Federal Supreme Court, (1984) Wertpapier-Mitteilungen no. 30 1014; (1984) 30 Recht der Internationalen Wirtschaft no. 8 644 (commentary by Mezger 647); (1985) 5 Praxis des Internationalen Privat- un Verfahrensrechts (IPRax) no. 3 158; (1984) Neue Juristische Wochenschrift no. 48 2763; (1985) 10 YCA 427 (Germany no. 27).

18 *Conceria G. de Maio & F. snc v EMAG AG* (1996) 21 YCA 602 (Italy no. 139 sub 9).

19 *Nobulk Cargo Services Ltd. v Compañía Española de Laminación SA* (1991) 7 Revista de la Corte Espanola de Arbitraje 167; (1996) 21 YCA 678 (Spain no. 28 sub 4).

defence of an invalid arbitration agreement because it had failed to file a motion to stay the arbitration before the arbitral proceedings took place: 'There is no procedure under statutory or decisional law that requires a party challenging arbitrability to seek an injunction before the arbitration commences, or suffer the penalty of a waiver.'[20] On the basis of the facts of the case, however, the Court found that the defendant had ratified the contract.

The foregoing overview of cases demonstrates two things. First, the courts are ready to use a discretionary power in cases falling under the Convention. Most of them do so without reference to municipal law. This approach, which is explicitly endorsed by the High Court in Hong Kong, is to be welcomed because it provides an internationally available power for the courts that is not dependent on whether the law of the forum allows a residual discretion.

Second, the cases show that the residual discretion is to be used with caution and in fact is limited mainly to two situations: (1) where the presence of a ground for refusal of enforcement is *de minimis* (e.g., a minor violation of the applicable arbitration rules); and in particular (2) where the respondent has failed to raise timely an objection in the arbitration. The second situation is treated under estoppel, waiver or similar legal notions. Thus, the failure to object may concern the lack of validity of the arbitration agreement (article V(1)(a)); the violation of due process (article V(1)(b)); the situation where the arbitral tribunal exceeds its authority (article V(1(c)); and the violation of the agreement of the parties on the constitution of the arbitral tribunal or the arbitral proceeding or, in

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[20] (1995) U.S. Dist. Lexis 14131; (1995) International Arbitration Report no. 10 C-1; (1996) 21 YCA 815 (US no. 205 sub 9).

the absence of such agreement, the law of the place of arbitration (article V(1)(d)).[21] It is less likely that the estoppel can be used in relation to the public policy defence of article V(2), in respect of which no case has been reported.

The residual power to grant enforcement may be in particular useful in relation to the absence of the written form of the arbitration agreement (article II(2)), in conjunction with the invalidity of the arbitration agreement as ground for refusal of enforcement set forth in article V(1)(a), which will be examined in the following section.

III. Requirement of the Written Form of the Arbitration Agreement

Article II(1) of the Convention requires that the arbitration agreement be in writing. Article II(2) defines what is to be understood by this requirement:

> 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.

This definition offers two alternatives for the written form of the arbitration agreement. The first alternative of article II(2) requires that the contract including the arbitration clause, or the separate arbitration agreement, be signed by the parties. To allow for the practices in international trade, the second alternative was added.

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[21] The German Supreme Court, n. 16 *supra*, is the only court that has expressed a narrow view, limiting estoppel to article V(1)(d) of the Convention.

This alternative provides that it is sufficient that the contract including the arbitration clause, or the separate arbitration agreement, be contained in an exchange of letters or telegrams, with no requirement that any of these documents be signed by the parties.

For a long time the prevailing view was that the definition of what constitutes a written arbitration agreement in article II(2) of the Convention is to be deemed an internationally uniform rule, which prevails over any provisions of municipal law regarding the form of the arbitration agreement in those cases in which the Convention is applicable. As the Swiss Tribunal Fédéral expressed it in the *Tradax Export S.A. v Amoco Iran Oil Company* case:

> It results from the text of the Convention itself - and the prevailing opinion concedes - that Art. II contains rules of uniform applicability which, in cases where the Convention is applicable, replace national law.[22]

The same Court stated one year later in *Tracomin SA v Sudan Oil Seeds Co.*:

> This provision prevails over national laws and constitutes a uniform law governing the form of the arbitration clause and the submission agreement . . . . The recognition of the arbitration agreement cannot involve requirements which are less or more demanding than the form described by Article II(2) of the Convention.[23]

However, it is questioned more and more whether the 'uniform rule' character of article II(2) can be maintained. An increasing number of courts have either

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[22] (1984) 110 Arrêts du Tribunal Fédéral II 54 (commentary by Klein); (1985) XLI Annuaire Suisse de Droit International 426 (commentary by Vischer); (1986) 11 YCA 532 (Switzerland no. 8).

[23] (1985) 111 Arrêts du Tribunal Fédéral I b 253; (1987) 12 YCA 511 (Switzerland no. 14 sub. 2).

construed article II(2) liberally, or even stated that it is also permissible to rely on national law for determining compliance with the requirement that the arbitration agreement be in written form. This uneasiness of the courts is created by certain problems that have arisen in practice.

What is not a problem in practice may be mentioned first.

Signatures. If a contract containing the arbitration clause is signed, or if the separate arbitration agreement is signed by the parties, the first alternative of article II(2) is satisfied. In the case of the second alternative, the signatures of the parties are not required, provided that the arbitration agreement has been the subject of an exchange in writing between the parties. *Telex and Facsimile.* It is generally accepted that the expression in article II(2), 'contained in an exchange of letters or telegrams', should be interpreted broadly to include other means of communication, particularly telexes (to which facsimile nowadays could be added). 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.'

Agent/Broker, etc. Article II(2) does not pose any particular difficulties for an arbitration agreement -- usually an arbitration clause in a contract -- which is concluded through an agent between his principal and a third party. Such an arbitration agreement must comply with article II(2), exactly like an arbitration agreement concluded between parties without an intermediate agent. The question is whether the authorization granted by the principal to the agent to conclude the arbitration agreement on his behalf also should be in writing. In

several countries it is required by law that the authorization take the same form as the act for which it is intended. This is, for instance, the case for articles 216 and 217 of the Greek Civil Code and article 1392 of the Italian Civil Code. These provisions mean that if the authorization relates to the conclusion of an arbitration agreement that falls under the Convention, the authorization must also be in written form. The question is unresolved whether the written form required by article II(2) also applies to the authorization even if the law applicable to the form of the authorization does not contain a requirement similar to that in Greek and Italian law.

To a certain extent, an arbitration clause in *standard conditions* does pose a problem, although it may be overcome by an appropriate interpretation. The question of an arbitration clause in standard conditions and the written form requirement of article II(2) is important because standard conditions are frequently used in practice; but the issue is also rather complex. It is not only to be considered in different settings (clause in the body of a printed contract form; clause amongst the printed conditions on the back of a contract; clause in a separate, usually printed, document to which the contract refers, etc.), but also bears consideration in connection with two main questions. The first question relates to adhesion contracts (protection of weaker parties). The second concerns incorporation by reference (i.e., when the 'reference clause' in the contract, referring to the external standard conditions, is sufficient). An autonomous interpretation of Article II(2), as far as the arbitration clause contained in standard conditions is concerned, may solve the two main questions in relation to standard conditions under municipal law. The first question concerning the adhesion contract character of standard conditions may be solved by taking into account

that article II(2) contains fairly demanding requirements for the form of the arbitration clause. The second question of incorporation by reference may be solved by relying on the purpose of article II(2), which is that a party is aware that it is agreeing to arbitration, and by adopting a test for determining whether that purpose is fulfilled, i.e., that the reference can be checked by a party exercising reasonable care. Accordingly, a reference to standard conditions in the body of the contract is needed in any case. If the standard conditions are set out on the reverse side of the contract, a general reference to the conditions will suffice. If the standard conditions are contained in a separate document, the reference clause must draw specific attention to the arbitration clause. However, in the latter case a general reference will suffice if the standard conditions have been communicated to the other party. Finally, it is not necessary that the conditions are communicated to the other party for each transaction.

What is a problem is the requirement of an *exchange of communications* (the second alternative) for fulfilling the required written form. 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 whom it was sent to the party who dispatched it. Another view is that it suffices when a reference is made to the document in a subsequent letter, telex, telegram, invoice, letter of credit, etc., emanating from the party to whom the document was sent.

In any case, the Swiss Tribunal Fédéral, in *Tracomin SA v Sudan Oil Seeds Co.*,[24] underscored that an exchange of messages is necessary for the second alternative of Article II(2):

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[24] See n. 23 *supra*.

> [N]ot only must there be a written proposal to arbitrate but also a written acceptance from the other party which acceptance must be communicated to the party who made the proposal to arbitrate.

After a dispute had arisen, *Sudan Oil Seeds* proposed FOSFA arbitration in London in a letter and telexes to *Tracomin*. In a letter referring to one of these telexes, *Tracomin* appointed its arbitrator. The Tribunal Fédéral held that this exchange of messages amounted to a submission agreement that met the requirements of article II(2) of the Convention. It therefore did not need to deal with *Tracomin*'s argument that the arbitration clause in the contract did not comply with article II(2).

The English Courts appear to be more relaxed. In a case before the Court of Appeal in London, the question came up whether an assent in writing for the arbitration clause is necessary.[25] The lower court had refused a stay of the court proceedings, holding that, although the clause was in writing, it was necessary for there to be a binding arbitration agreement that the defendant (i.e., the party invoking the arbitration clause) show some writing that the other party (i.e., the claimant in the court proceedings) had assented to it. The Court of Appeal reversed, holding that if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient.

It appears that the Court of Appeal's opinion departs from what is required by the text of the Convention, which excludes an oral or tacit acceptance of an arbitration agreement, at least in the manner in which that requirement is

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[25] *Zambia Steel & Building Supplies Ltd. v James Clark & Eaton Ltd.* [1986] 2 Lloyd's Law Reports 226; (1989) 14 YCA 715 (UK no. 24 sub 2-26).

interpreted in the majority of court decisions. The Court was apparently inspired by section 32 of the English Arbitration Act 1950, under which an oral or tacit acceptance is sufficient.

A typical example of a case that does not satisfy article II(2) of the Convention is *Marc Rich v Italimpianti* (also known as the *Atlantic Emperor*), decided by the Italian Supreme Court.[26] In that case, the parties had concluded a contract concerning the purchase of Iranian crude through an exchange of telexes. After conclusion of the transaction by telex, Marc Rich sent a further telex that included an arbitration clause. *Italimpianti* did not reply to this telex. The Italian Supreme Court held that the arbitration clause did not satisfy the Convention.

The problem of an exchange of communications is particularly compelling in the case of a sales or purchase confirmation. 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) only 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,

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[26] (1991) Il Corriere giuridico no. 6 637 (commentary by Focarelli 638); (1991) 7 Arbitration International no. 3; (1992) 17 YCA 554 (Italy no. 116 sub 6-8).

(c) the confirmation is subsequently accepted by means of another communication in writing from the party who received the confirmation to the party who dispatched it.

In particular, a tacit acceptance of the confirmation is not sufficient for purposes of article II(2). And this, it is submitted, is no longer in accord with international trade practices.

Probably the most appalling case in this field is the decision by the Corte di Cassazione in *Butera v Pagnan.*[27] Butera had sent an unsigned confirmation of the transaction to Pagnan, who signed and returned it. When a dispute arose, Pagnan as well as Butera appointed an arbitrator in London in conformity with the arbitral clause in the confirmation. Thereafter, Butera apparently preferred another course and started an action on the merits against Pagnan before the Italian courts. In support of this action Butera filed the confirmation, which was signed only by Pagnan. The Italian Supreme Court rejected the objection of Pagnan against the competence of the Italian courts on the basis of the arbitral clause in the confirmation. The Court reasoned that the confirmation should have been signed by both parties in order to be formally valid under article II(2) of the Convention. The fact that Butera had appointed his arbitrator and that he, himself, had filed the confirmation, could not cure the lack of compliance with article II(2), in the Court's opinion. This decision of the Italian Supreme Court is, to say the least, unsatisfactory. Butera had proposed the arbitration, which proposal had been accepted by Pagnan, and he had appointed his arbitrator. He

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[27] (1979) 15 Rivista di Diritto Internazionale Privato e Processuale 525; (1979) 4 YCA 296 (Italy no. 33).

should not then be allowed to act capriciously and subsequently start court proceedings in the belief that this would be more advantageous to him. This case is also a good example of the unreasonable results to which the labelling of the written form requirement of Article II(2) as *ad validitatem*, as the Italian Supreme Court did in this case, may lead.[28]

There are various solutions to the problem of the requirement of an exchange of communications. A first solution is to apply the doctrine of residual discretion discussed in section II above. This doctrine is indeed helpful if the party opposing enforcement of the award on the ground of lack of compliance of the arbitration agreement with article II(2) (through the ground for refusal set forth in article V(1)(a)) has participated in the arbitration without objecting to the formal validity of the arbitration agreement. However, if the party did raise the objection or has not appeared in the arbitration, the doctrine cannot be relied upon. Moreover, a party which participated in the arbitration, but failed to object, may assert that the Convention applies only to the enforcement of the arbitral award and the referral to arbitration - but does not apply *during* an international arbitration - and that, hence, the requirement of article II(2) of the Convention was inapplicable at that stage. There is indeed a question whether international arbitrators should apply the Convention. I believe that the answer is in the affirmative,[29] but this is not universally recognized.

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[28] It may be noted that the Italian Supreme Court was less formalistic in a subsequent case, in which it held that it was irrelevant that the contract containing the arbitration clause was signed only by one party since the other party had filed the document in court and had based upon it the objection to the lack of jurisdiction of the court, 'thereby unequivocally showing its intention to rely on the clause.' (*Antonio Imparato v August Töpfer & Co. GmbH and Pisani & Rickertsohn* (1991) 14 YCA 588 (Italy no. 106 sub 3-4).

[29] Van den Berg, 'Should an international arbitrator apply the New York Arbitration Convention of 1958?', Van den Berg/Schultsz (eds) *The Art of Arbitration* (1982) Kluwer pp 39-49.

A second solution is to interpret article II(2) of the Convention in accordance with article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration. It provides:

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim or defence in which the existence of the agreement is alleged by one party and not denied by another. 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.

This is the solution that appears to have been adopted in, inter alia, Switzerland. Thus, in a decision rendered in 1995, the Swiss Tribunal Fédéral, while not abandoning the view that article II(2) of the Convention sets forth a minimum and maximum rule, started to move towards a more progressive interpretation of this provision.[30] It referred approvingly to the opinion of commentators according to whom article II(2) of the Convention must be interpreted in the light of article 7(2) of the UNCITRAL Model Law,[31] and even stated in so many words: '[article II(2)] must be interpreted in the light of the [UNCITRAL MODEL LAW].' A similar approach is advocated by the High Court in Hong Kong, which has stated that article II(2)

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30 *Compagnie de Navigation et Transports SA v Mediterranean Shipping Company SA* (1995) 121 Arrêts du Tribunal Fédéral 38; English translation in (1996) 21 YCA 690 (Switzerland no. 690).

31 The Court referred, inter alia, to Bucher *Le nouvel arbitrage international en Suisse* (1989) Helbing & Lichtenhahn, p 49 n. 123; Lalive/Poudret/Reymond *Le droit de l'arbitrage interne et international en Suisse* (2nd edn, 1989) Payot; Schlosser *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (1989) Mohr (Paul Siebeck), p 267 *et seq.*.

of the Convention 'is not exclusive and is not a bar to the application of article 7(2) [of the UNCITRAL Model Law].'[32]

This interpretation solves questions regarding an arbitration agreement in standard conditions (see p. 19 above). It does not, however, solve the problem of tacit acceptance.

In his Goff Lecture given in Hong Kong in November 1995, Mr. Justice Neil Kaplan (as he then was) expressed regret that the United Nations had missed the boat two times.[33] The first was at the New York Conference in June 1958, where Professor Pieter Sanders had proposed to add to what has become article II(2) ('Confirmation by one of the parties (which is kept) without contestation by the other party') which proposal was voted down 10 to 8 with 5 abstentions after terse discussion.[34] The second was at the Vienna Conference of 1985, where the UNCITRAL Model Law was discussed and adopted. At that conference the view prevailed that the Model Law should follow the New York Convention and not depart from it.[35] Hence, article 7(2) merely reflects the current interpretation of article II(2) of the Convention but is not intended to add anything to it. Mr. Kaplan observes:

> after nearly five years of applying the Model Law in Hong Kong in my former judicial capacity, I found that the problems arising from the applica-

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32 *Jiangxi Provincial Metal and Minerals Import and Export Corp. v Sulanser Company Ltd.* (1995) 10 International Arbitration Report no. 6 B-1; (1996) 21 YCA 546 (Hong Kong no. 10).

33 Kaplan 'Is the need for writing as expressed in the New York Convention and the Model Law out of step with commercial practice?' (1996) 12 Arbitration International no. 1 27.

34 E/CONF.26/L.54 and SR.22. See also *The New York Arbitration Convention*, n. 2 *supra*, at 196.

35 See Holtzmann and Neuhaus *Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989) Kluwer p 261.

> tion of article 7(2) of the Model Law were the most difficult and frustrating which came before me.

Indeed, there have been several cases in Hong Kong where the court has had to consider the scope of article 7(2) of the Model Law.[36] It is to be noted that *Smal v Goldroyce*[37] is the only case of which Mr. Kaplan is aware where the writing requirement was clearly not complied with. In some cases the court was able to find that there was sufficient material before it to give rise to an arguable case of compliance with article 7(2) and then leave the jurisdictional issue to the arbitrators under the regime set out in article 16 of the Model Law.

A more daring solution is to interpret article II(2) of the Convention as not setting forth a minimum and maximum rule. As explained above, the uniform rule character has as a consequence that article II(2) is a maximum and minimum rule. It means that a court may not impose more stringent requirements on the form of the arbitration agreement. Neither may a court go below the minimum - if a purported arbitration agreement does not meet the requirement of article II(2), the Convention cannot be applied. However, the minimalist view may be questioned: the English and Russian texts of article II(2) use the non-exhaustive expression 'include' and *'vklyuchaet'* (however, the French, Spanish and Chinese texts are less helpful: '*On entend par . . .*' and '*La expresion "acuerdo por escrito" denotara . . .*' and '*wei*').[38] Whilst not relying on this difference in the equally authentic texts of the Convention, the German Bundesgerichtshof [Federal

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[36] See UNCITRAL, Case Law On UNCITRAL Texts (Clout), published yearly in YCA as of 1994.

[37] [1994] 2 HKC 526.

[38] See Holtzmann and Neuhaus, n. 35 *supra*, at 262 n. 25.

Supreme Court] took the position that the Convention 'allows reliance upon an arbitration agreement concluded informally according to municipal law.'[39]

Finally, the ultimate solution is to amend the Convention in the form of an additional Protocol. One hears this suggestion from time to time. However, the price to be paid is considerable. First, it is not certain whether a definition of an agreement in writing can be drafted that satisfies a majority of States. Second, even if a satisfactory definition can be found, it may take considerable time before the Protocol is adopted by the more than 100 present Contracting States, and even more time before a uniform judicial interpretation has been established. In the meantime, much disparity will reign that is detrimental to international commercial arbitration. I submit that the problem is not worth paying this price. In practice, it is mainly limited to sales confirmations that are sent after the fact and in which estoppel does not play a role. In my view, a modernized interpretation of article II(2) of the Convention, together with the use of a residual discretion in enforcement (i.e., estoppel), is the most appropriate solution under the circumstances.

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[39] (1993) Deutsche Zeitschrift für Wirtschaft no. 11 465 (commentary by Berger 466); English translation in (1995) 20 YCA 666 (Germany no. 42). This approach is to be distinguished from reliance on the more-favourable-right-provision of article VII(1) of the Convention. That provision allows a party to base its request for enforcement of an arbitral award on the domestic law concerning enforcement of foreign awards (or bilateral or multilateral treaties), instead of the New York Convention. If a party relies on the domestic law concerning the enforcement of foreign arbitral awards, the Convention can no longer serve as basis for the enforcement. Thus, 'cherry picking' between favourable provisions in the Convention and domestic law is not allowed. See Van den Berg, n. 2 *supra* at 85-86.

IV Conclusion

The success of the Convention depends upon the willingness of courts to continue to develop innovative solutions to the practical problems that arise. To a certain extent, this has been accomplished already with respect to the issue of residual discretion to enforce awards. It makes little practical sense to refuse enforcement where the error asserted is *de minimis*, or where the objecting party could have raised the matter before the arbitrators but did not. The courts - in particular the High Court in Hong Kong - has acted wisely in addressing this problem through the use of residual discretion.

A related issue concerns the rather stringent requirement in article II(2) of the Convention concerning the written form of the arbitration agreement, which has led to uncertainty in practice. Residual discretion may be useful in a significant number of cases in avoiding non-enforcement, as would a progressive interpretation of article II(2) by the courts.

The Convention has been incredibly successful in promoting and facilitating international commercial arbitration. If the courts continue to address problems under the Convention creatively, and to take note of the efforts of courts in sister jurisdictions, the future success of the Convention seems assured.