THE 1958 NEW YORK ARBITRATION CONVENTION REVISITED

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UNCITRAL's endeavours

It was in the year 1976 that the United Nations Commission on International Trade Law (Uncitral) received the first official suggestion for an amendment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded at New York on 10 June 1958 (the "New York Convention"). At that time, the Asian African Legal Consultative Committee (AALCC) considered that there was a lack of judicial uniformity in the interpretation and application of the New York Convention. It adopted a recommendation by which it invited Uncitral to consider a revision of the New York Convention in the form of a Protocol.1 The recommendation did not find a receptive audience. At the tenth session of Uncitral in May-June 1977, the predominant position was that, if it were decided at a later stage to implement the proposals of AALCC, the preparation of a Protocol to the Convention would not be an appropriate approach.2

There followed a long period of silence as to whether or not the Convention should be revisited by means of a Protocol or otherwise. In the meantime, the number of Contracting States increased from 35 in 1970 to 121 in 1999. Concomitantly, the number of court decisions increased. As you know, the *Yearbook Commercial Arbitration* reports court decisions on the New York Convention as of its inception in 1976. Including Volume XXIVa (1999), the total number of court decisions reported in the 24 Volumes of the Yearbook amounts to 829. When I wrote my book on a possible uniform judicial interpretation and application of the New York Convention in 1981, I covered some

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1 UN DOC/A/CN.9/127, briefly commented upon in a note by the Secretariat of UNCITRAL in UN DOC A/CN.9/127/Add. 1.

2 UN DOC A/32/17, Ann. II, para. 31.

140 decisions. The Consolidated Commentary of the Cases reported in Volumes XXII(1997) – XXIV(1999), which I am currently writing, alone covers 170 decisions.[3] The general trend in the court decisions is that the courts adopt a rather favourable attitude towards international arbitration in general and the New York Convention in particular. In less than 10% of the cases, enforcement of an award is refused under the Convention. It is said to be the most successful treaty in the field of international private law of the last century (and possibly millennium).

So, there was silence regarding the question of amendment for some 20 years, whilst the Convention flourished in practice.[4] In the field of international commercial arbitration, Uncitral devoted its time to the Uncitral Arbitration Rules (1976), the Model Law (1985) and the Notes on Organizing Arbitral Proceedings (1996). Each of these instruments has proven to be quite successful in practice.

Matters took a turn in 1998 when Uncitral organised a special commemorative New York Convention Day in New York in order to celebrate the fortieth anniversary of the Convention. The invitation to the speakers was with specific emphasis on identifying possible future work for Uncitral in the field of arbitration. That invitation did not fall on deaf ears. Each speaker had an even better plan for future work than the previous speaker.[5]

Uncitral convened its thirty-first session in New York immediately after the conference, and sure enough, with reference to the discussions at the conference, the Commission requested the Secretariat to prepare a note that would serve as a basis for the considerations of the

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[3] To be published as a separate Volume XXIVb of the *Yearbook Commercial Arbitration* in the course of the year 2000. In comparison with the previous Commentaries that appeared in the *Yearbook*, the Consolidated Commentary that will appear in Volume XXIVb is fully revised, incorporating all of the major court decisions involving the New York Convention reported in the *Yearbook* as of Volume I (1976).

[4] During that period, however, several commentators addressed various perceived shortcomings in the Convention. See, e.g., Swiss Arbitration Association, *The New York Convention of 1958. A Collection of Reports and Materials Delivered at the ASA Conference held in Zürich on 2 February 1996*, ASA Special Series No. 9 (August 1996), hereinafter referred to as "ASA Conference 1996"; see also Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 Arbitration International (1996), pp. 27-45.

[5] *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations publication, sales no. 99.V.2 (ISBN 92-1-133609-0), hereinafter referred to as "Enforcing Arbitration Awards."

Commission. Members of the Commission demonstrated themselves to be true arbitration conference road warriors, as they indicated that proposals made at other international conferences of arbitration practitioners might also be taken into account.[6] They were, furthermore, just recovering from the ICCA Paris Conference in May, which was entirely devoted to the New York Convention.[7]

A brilliant and amusing preview of what was to come was given by UNCITRAL's Secretary General, Gerold Herrmann, in the 1998 Freshfields Lecture some months later: *Does the World Need Additional Uniform Legislation on Arbitration?*[8]

In April 1999, the Secretariat issued a very informative Note, entitled: *Possible future work in the area of commercial international arbitration.*[9] It identified some 13 topics for consideration by the Commission. The Commission discussed the Note at its thirty-second session in May-June 1999.[10] The outcome of these discussions can be tabulated as follows:

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6 Report of UNCITRAL on the work of its thirty-first session (1998), *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17*, UN DOC. A/53/17, para. 235.

7 The proceedings of the Paris Congress are published in A.J. van den Berg, ed., *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series no. 9 (Kluwer 1999).

8 15 Arbitration International (1999), pp. 211-236, hereinafter referred to as "Herrmann".

9 UN DOC A/CN.9/460 (6 April 1999), hereinafter referred to as "Note".

10 Report of UNCITRAL on the work of its thirty-second session (1999), *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17*, UN DOC. A/54/17, hereinafter referred to as "Discussion".

	Topic	Priority	Note un doc a/cn.9/460 paras.	Discussion un doc a/54/17 paras.
(a)	Conciliation	High	8-19	340-343
(b)	Requirement of written form	High	20-31	344-350
(c)	Arbitrability	Low	32-34	351-353
(d)	Sovereign immunity	Monitor ILC[11]	35-50	354-355
(e)	Consolidation of cases before arbitral tribunals	Low	51-61	356-357
(f)	Confidentiality of information in arbitral proceedings	Not high	62-71	358-359
(g)	Raising claims for the purpose of set-off	Low	72-79	360-361
(h)	Decisions by "truncated" arbitral tribunals	Low	80-91	362-363
(i)	Liability of arbitrators	Low	92-100	364-366
(j)	Power by the arbitral tribunal to award interest	Low	101-106	367-369
(k)	Cost of arbitral proceedings	Low	107-114	370
(l)	Enforceability of interim measures of protection	High	115-127	371-373
(m)	Possible enforceability of an award that has been set aside in the State of origin	High	128-144	374-376

[11] The matter of State immunity is under consideration by the International Law Commission (ILC). By its resolution 53/98 of 20 January 1999, the UN General Assembly has decided to establish a working group of the Sixth Committee to consider, at its fifty-fourth session, outstanding substantive issues related to the ILC's Draft Articles on Jurisdictional Immunities of States and their Property.

With respect to the assignments of priority, UNCITRAL insists that "low priority" does not mean that a topic will not be considered at all. In traditional UNese: "As to the other topics ... which were accorded lower priority, the Working Group [on Arbitration] was to decide on the time and manner of dealing with them."[12]

That applies also to several other topics that were not mentioned in the Secretariat's Note but were raised at various stages of the Commission's discussions at its thirty-first session in June 1998:[13]

- Filling of gaps in a contract by an arbitral tribunal;
- Adaptation of a contract by an arbitral tribunal to changed circumstances;
- Freedom of representation of parties before an arbitral tribunal;
- What a court may or may not do under article II (3) of the New York Convention (and the corresponding article 8(1) of the Model Law);
- Defences against the recognition or enforcement of a foreign court judgement based on an arbitration agreement, a pending arbitration or an arbitral award.[14]

The Commission expressly adopted the approach of "substance over form." Thus, the Commission plans first to discuss the substance of

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12 UN DOC A/CN.9/WG.II/WP.108 (14 January 2000), para. 9, hereinafter referred to as "Report", available on UNCITRAL's web site: *www.uncitral.org*. See also n. 15.

13 Discussion, n. 10, para. 339.

14 A review and possible revision of the European Convention on International Commercial Arbitration, Geneva, 1961 (the "1961 European Convention"), was also discussed, UN DOC A/54/17, paras. 377-379. The Economic Commission for Europe (ECE) Working Party on International Contract Practices in Industry (WP.5) had established an ad hoc informal working group (the WP.5 Arbitration Convention Working Group) for a review and possible revision of the 1961 European Convention. It invited UNCITRAL to work jointly with ECE. Whilst offering assistance "within existing resources," UNCITRAL's response was clear: "UNCITRAL appealed to ECE ... to concentrate on questions specific to its region or to the functioning of the 1961 European Convention ..., while exercising restraint as regards arbitration issues of general interest or concern, which were likely to be addressed by the UNCITRAL Working Group on Arbitration," *id.* para. 379. In my view, UNCITRAL is right when it states that it is "the core legal body within the United Nations system in the field of international trade law" and that "the subject matter of international commercial arbitration [is] a global issue best addressed by UNCITRAL," *id.* para. 378. One wonders, moreover, what use the 1961 European Convention can have today, considering that this Convention is a typical product of the former East-West division. Any useful provisions in the European Convention appear to have been overtaken by more modern provisions offered by UNCITRAL in its Arbitration Rules of 1976 and Model Law of 1985.

the topic, and depending on the outcome, will or will not recommend appropriate action. I will consider that formal aspect later.

The Secretary General acted swiftly. On 14 January 2000, he issued a report, entitled: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement.[15]

As the subject matter of my presentation concerns the question whether the New York Convention should be revisited, I will limit myself to topics that can be deemed relevant for the Convention. That raises three preliminary questions.

(1) Which topics are relevant for the New York Convention? The answer depends on what one wants to achieve. If the purpose is to expand the New York Convention to something like the 1961 European Convention, many topics would qualify. I do not think that that is the intent of the delegates at UNCITRAL. Nor would it be advisable to do so since there would be an unnecessary duplication of the provisions of the Model Law. If the delineation is the present framework of the New York Convention, that being the enforcement of the arbitration agreement and arbitral awards, the following of the above-mentioned topics would appear to be relevant:

(b) Requirement of written form;

(c) Arbitrability;

(l) Enforceability of interim measures of protection; and

(m) Possible enforceability of an award that has been set aside in the State of origin.

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15 See n. 12. The part of the Report dealing with the written form for arbitration agreements was promulgated somewhat later as UN DOC A/CN.9/WP.108/Add. 1 (26 January 1999).

(2) Is UNCITRAL's list complete? I submit that a number of other topics could be considered as well. I list below those which I believe to require review in some form or another:[16]

- Meaning and effect of a non-domestic award (article I(1), second sentence);

- Clarification of what constitutes an arbitral award under the Convention (awards on agreed terms; "Treaty awards"; a-national awards; award-like decisions in proceedings akin to arbitration, such as *arbitrato irrituale*);[17]

- Law applicable to arbitrability under article II (1) (unless it is subsumed in topic (c));

- Field of application of article II (3) concerning the enforcement of the arbitration agreement;

- Law applicable to agreements that may be "null and void, inoperative, or incapable of being performed" (article II (3));

- Compatibility of court-ordered interim measures with arbitration agreements falling under the Convention;

- Enforcement conditions and procedure as referred to in article III, the implementing legislations showing diverging solutions;

- Period of limitation for enforcement of a Convention award;

- Residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V;

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16 Due to my current work on a full revision of the Commentary for the *Yearbook* (see n. 3), this list is slightly more comprehensive than the matters identified in two of my earlier publications on the subject: *The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas*, in ASA Conference 1996, n. 4, pp. 25-45; *Striving for Uniform Interpretation*, in Enforcing Arbitration Awards, n. 5, pp. 41-44.

17 See Herrmann, n. 8, pp. 232-233.

- Meaning and effect of the suspension of an arbitral award in the country of origin (article V (1)(e)); and

- Meaning and effect of the more-favourable-right provision of article VII (1).

(3) Has the Commission set the priorities right? Here, I tread the dangerous grounds of the policy making of an international organisation. If I am nonetheless allowed to venture an opinion, I believe that the priorities are in order, except for three topics.

Topic (m), concerning "dead" awards, has, in my opinion, no priority. It is a French concept invented outside the Convention and followed by some authors only with varying degrees of acceptance.[18] It is true that one US district court has imitated, albeit confusingly, the French concept,[19] but two subsequent US decisions have almost set the record straight.[20] If there is any priority in the topic, it would be simply to dispel the confusion. It is interesting to note that although topic (m) had been accorded high priority, the Secretary General's Report in preparation of the forthcoming session of UNCITRAL's Working Group on Arbitration does not include a discussion thereon.

On the other hand, the topic listed by the Commission as belonging to the residual group concerning article II (3) ("What a court may or may not do under article II (3) of the New York Convention (and the corresponding article 8 (1) of the Model Law)") seems to me to have a fairly high priority. A survey of court decisions shows that the courts are diverging more and more on this question.

Another topic that in my view also should be accorded high priority is one that is not mentioned by the Commission at all but that appears to

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[18] See Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC International Court of Arbitration Bulletin (May 1998), pp. 14-31, and my réplique, *Enforcement of Annulled Awards?*, 9 ICC International Court of Arbitration Bulletin (November 1998), pp. 15-21.

[19] US District Court for the District of Columbia, 31 July 1996, *Chromalloy Aeroservices v. The Arab Republic of Egypt*, excerpted in *Yearbook Commercial Arbitration*, Vol. XXII (1997), pp. 1001-1012 (US no. 230).

[20] US Court of Appeals for the Second Circuit, 12 August 1999, *Baker Marine (Nig.) Ltd. v. (1) Chevron (Nig.) Ltd and (2) Chevron Corp., Inc*, excerpted in *Yearbook Commercial Arbitration*, Vol. XXIVa (1999), pp. 909-913; US District Court for the Southern District of New York, 22 October 1999, *Martin I. Spier v. Calzaturificio Tecnica S.p.A.*, 71 F. Supp. 2d 279.

give rise to increasingly diverse views in practice. It concerns the above-mentioned additional topic of the meaning and effect of the more-favourable-right provision of article VII (1). I submit that this topic is even more fundamental than all others since it goes to the heart of the Convention: to what extent can national law play a role in relation to the enforcement of foreign arbitral awards? And can it also play a role in relation to the enforcement of an arbitration agreement under article II (3), an aspect that is not mentioned in article VII (1)? Actually, I think that the Commission cannot usefully deliberate on the New York Convention until it has determined what the answer to this question should be. I will revert to article VII (1) below in the context of the written form required for the arbitration agreement.

This presentation does not allow me to go into this and other additional topics for consideration in connection with the New York Convention. Nor do space and time permit me to discuss the topics that have been accorded low priority by UNCITRAL. That leaves me the two topics that have been accorded high priority. As they will be discussed at the forthcoming thirty-second session of the Working Group on Arbitration in Vienna on 20-31 March 2000, it may be timely to venture some more detailed comments on them.

The requirement of written form of the arbitration agreement

We all know what article II (2) of the Convention defines as an arbitration agreement in writing: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." That definition can be analysed as providing two alternatives for the form of the arbitration agreement:

(1) a contract including an arbitration clause, or a separate arbitration agreement, the contract or agreement having been signed by both parties; or

(2) a contract including an arbitration clause, or a separate arbitration agreement, the contract or agreement being contained in an exchange of correspondence.

In those cases where both parties have not signed the contract, it is in particular the second alternative of an exchange that has caused headaches in practice. But as we will see presently, practice is faced with more questions.

We also know that the courts in the Contracting States generally regard article II (2) as an internationally uniform rule which prevails over any provision of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable. The maximum standard set by the uniform rule is unquestioned: a court may not impose requirements on the form of the arbitration agreement that are more stringent than article II (2). What is now open to debate is whether the uniform rule also sets a minimum standard: may a court accept a standard that implies less than is required by article II (2)?

At the time of this presentation, I have not yet had the benefit of reviewing the final version of the Report of UNCITRAL's Secretary General on the subject.[21] On the basis of my current review of the case law under the Convention, the following categories of problems can be identified in which the Convention's definition of an "agreement in writing" has given rise to questions:

(a) *Writing:* the contract including the arbitration clause is contained in a facsimile, e-mail, electronic data interchange (EDI) messaging, or, in general, electronic commerce;

(b) *Signature:* the same examples as under (a) apply;

(c) *Indirect acceptance:* the contract text as proposed by one party is not explicitly accepted by the other party, but the other party

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[21] See n. 15.

refers specifically in writing to that contract in subsequent correspondence, an invoice, letter of credit, etc., by mentioning its date and/or contract number;

(d) *Tacit acceptance:* the contract text as proposed by one party is not explicitly accepted by the other party, which however performs under that contract; this happens frequently in the case of purchase or sales confirmations sent by one party but not returned by the other, after the parties have orally or in writing agreed on the essentials of the transaction;

(e) *Custom of trade:* whilst the contract in question does not contain an arbitration clause, it is customary to resort to arbitration in the trade concerned;

(f) *Incorporation by reference:* the contract stipulates that another document, which includes an arbitration clause, forms part of that contract, standard conditions being a prime example; this category also includes a contract that contains standard conditions printed on the reverse side; another example is a bill of lading that refers to a charter party containing an arbitration clause;

(g) *Subsequent contract:* it happens from time to time that, contrary to the original contract, an arbitration clause is lacking in an addendum to the contract, an extension of the contract, a contract novation, or a settlement agreement relating to the contract; such a "further" contract may have been concluded orally or in writing; this category also includes the continuing trading relationship where, contrary to a series of contracts between the same parties that contain an arbitration clause, one or more contracts between these parties do not include such clause (this category is akin to category (e) above concerning custom); also included would be "call-off" contracts in electronic commerce (i.e., automated Internet supply chains may lead to orders being generated automatically);

(h) *Intermediary:* a contract containing an arbitration clause is concluded through a broker acting for one or both parties, or an agent acting for one of the parties;

(i) *Third party:* a third party may become party to a contract containing an arbitration clause on the grounds of assignment (of contract or claim thereunder), subrogation, legal succession due to transfer of assets, merger or take-over, or by being part of a group of companies, etc.; this category also includes third party beneficiary situations such as a subsequent holder of a bill of lading, or a contract made for the benefit of a third party.

A quick assessment of these categories is the following:

- Categories (a), (b) and (c) can be resolved by an appropriate interpretation of article II (2).
- Category (d) poses a real problem.
- Category (e) belongs to the category of "user problems," i.e., parties should be more careful in drafting their contracts.
- Category (f) can be resolved by an appropriate interpretation of article II (2).
- Category (g) equally belongs to the category of "user problems" and may also depend on the interpretation of the scope of the arbitration clause in the original contract.
- Categories (h) and (i) can scarcely be resolved in an international treaty such as the New York Convention and are typically to be dealt with on the basis of the applicable national law or other international instruments.

So, the true problem of the written form required by article II (2) for the arbitration agreement can be reduced to one category: category (d), the tacit acceptance. In this respect, a number of approaches can be envisaged.

First, article II (2) can be interpreted in the light of article 7 (2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985, providing:

> *"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 and defence in which the existence of an 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 approach is followed in particular by the Swiss Supreme Court, a court which, in my view, ranks high in the top five courts interpreting and applying the Convention, using its sacred expression *"interprétation évolutive et actualisante"* [updating interpretation].[22] However, while article 7(2) of the Model Law provides satisfactory answers in particular for the question of means of communication and arbitration clauses in standard conditions (see in particular categories (a) and (f) above), its text does not provide a solution to the question whether an arbitration clause contained in a contract that has tacitly been accepted by the other party can be considered to meet the written form requirement.

Second, article II (2) can be expansively interpreted to allow other written forms of arbitration agreements. This interpretation can be based on the words "shall include" in the English text of the Convention, meaning "shall include, but not be limited to." The same appears to be the language used in the equally authentic Russian text

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22 Tribunal Fédéral, 16 January 1995, *Compagnie de Navigation et Transports S.A. v. MSC - Mediterranean Shipping Company SA*, excerpted in *Yearbook Commercial Arbitration*, Vol. XXI (1996), pp. 690-698 (Switzerland no. 27).

("*vklyuchaet*"). Under this interpretation a tacit acceptance of a contract containing an arbitration clause can be allowed provided that the clause is contained in a written contract or other form of writing. It is to be noted, however, that other equally authentic texts of the Convention are less helpful in that they do not seem to contain words equivalent to "shall include". The French, Spanish and Chinese texts provide: "*On entend par ...*", "*La expresión 'acuerdo por escrito' denotará ...*" and "*wei*".[23]

Third, a court may use a possibly residual discretionary power to grant enforcement notwithstanding the presence of a ground for refusal of enforcement. However, such residual power would seem to be limited to circumstances such as waiver and estoppel. If such circumstances are not present, the third approach may not be available.

Fourth, at the level of enforcement of an arbitral award, the requirements of article II (2) may be held not to be applicable. This is the view of the Italian Supreme Court.[24] A problem with this approach is that article V (1)(a) specifically mentions "the agreement referred to in article II" (the same words appear in article IV (1) (b)). Furthermore, the fourth approach would seem to create an imbalance in the sense that it cannot be applied at the level of enforcement of the arbitration agreement under article II (3), which refers to "an agreement within the meaning of this article." That imbalance would not necessarily arise under the second and third approaches, which can be applied *mutatis mutandis* to the enforcement of the arbitration agreement under article II (3).

Fifth, a party can rely on article VII (1), according to which "[t]he provisions of the present Convention shall not... deprive any interested party of any right he may have to avail himself of an arbitral award in

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[23] The Russian and Chinese texts are taken from Howard Holtzmann and Joseph Neuhaus, *Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1990), p. 262 n. 25.

[24] Corte di Cassazione, 15 April 1980, *Official Receiver in the bankruptcy of Lanificio Walter Banci S.a.S. v. Bobbie Brooks Inc.*, excerpted in *Yearbook Commercial Arbitration*, Vol. VI (1981), pp. 233-236 (Italy no. 40). Yet, in a number of subsequent decisions the Italian Supreme Court did apply article II(2) in proceedings concerning the enforcement of arbitral awards (e.g., Corte di Cassazione, 21 February 1984, *S.a.S. Parolari Giovanni v. Antypas Bros. Ltd.*, excerpted in *Yearbook Commercial Arbitration*, Vol. X (1985), pp. 480-482 (Italy no. 80).

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" (the so-called "more-favourable-right provision," see above). It may be that the law or the treaties of the country where the award is sought to be relied upon impose conditions as to the form of the arbitration agreement that are less strict than article II(2) of the Convention (or refer to such an applicable law).

However, this fifth approach depends on the manner in which article VII (1) is interpreted. One interpretation is that it presupposes that the forum has domestic law (including possibly case law) or treaties concerning the enforcement of foreign or international arbitral awards. This interpretation is supported by the reference in article VII (1) to "any right... to avail himself of an arbitral award... allowed by the law or the treaties of the country where such award is sought to be relied upon." A problem with the first interpretation is that such law (or treaties) are not always available.[25]

Another interpretation is that the Convention sets the maximum standard for enforcement of foreign arbitral awards (and international arbitration agreements for that matter), but that article VII (1) allows a court to grant enforcement under less demanding conditions. A problem with this second interpretation is the standard under which the enforcement court is to determine the conditions that are less demanding than the Convention. It would also create a lack of uniformity in applying the Convention in the Contracting States.

All in all, the above approaches offer solutions but none of them is fully satisfactory.

Enforceability of interim measures under the Convention

The Report of UNCITRAL's Secretary General lists the following three categories of interim measures:[26]

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25 An example is article 1076 of the Netherlands Code of Civil Procedure, which contains a specific statutory regime for the enforcement of foreign arbitral awards outside the Convention. Such statutory provisions are rarely found in national legislation.

26 Report, n. 12, para. 63.

(a) *Measures aimed at facilitating the conduct of arbitral proceedings*, such as orders requiring a party to allow certain evidence to be taken (e.g., to allow access to premises to inspect particular goods, property or documents); orders for a party to preserve evidence (e.g. not to make certain alterations at a site); orders to the parties and other participants in arbitral proceedings to protect the privacy of the proceedings (e.g. to keep files in a certain place under lock or not to disclose the time and place of hearings);

(b) *Measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved*, such as orders to continue performing a contract during the arbitral proceedings (e.g., an order to a contractor to continue construction works despite its claim that it is entitled to suspend the works); orders to refrain from taking an action until the award is made; orders to safeguard goods (e.g., to take specific safety measures, to sell perishable goods or to appoint an administrator of assets); orders to take the appropriate action to avoid the loss of a right (e.g., to pay the fees needed to extend the validity of an intellectual property right); orders relating to the clean-up of a polluted site;

(c) *Measures to facilitate later enforcement of the award*, such as attachments of assets and similar acts that seek to preserve assets in the jurisdiction where enforcement of the award will be sought (attachments may concern, for example, physical property, bank accounts or payment claims); orders not to move assets or the subject-matter of the dispute out of a jurisdiction; orders for depositing in a joint account the amount in dispute or for depositing movable property in dispute with a third person; orders to a party or parties to provide security (e.g., a guarantee) for costs of arbitration or orders to provide security for all or part of the amount claimed from the party.

The Report states euphemistically that "[l]egislative solutions regarding the power of the arbitral tribunal to order interim measures of protection are not uniform." The overview given in the Report indeed indicates a wide disparity of legislative solutions.[27] It therefore appears that in any event in this respect UNCITRAL's Working Group on Arbitration can look forward to a heavy workload for finding harmonized solutions, which work, however, may well be rewarding.

The Report then makes a number of arguments in favour of enforceability of interim measures ordered by an arbitral tribunal. It states with respect to the New York Convention: "The prevailing view, confirmed also by case law in some States, is that the Convention does not apply to interim awards."[28] The Report does not give a source for this statement.

Actually, there does not appear to be a "prevailing view" on this question. Some are against, others are in favour (to which group I belong). The reference to case law "in some States" is, to my knowledge, limited to one Australian court decision, which is moreover not entirely persuasive. In an arbitration held under the rules of the AAA in Indianapolis, Indiana (United States), the arbitral tribunal had issued an "Interim Arbitration Order and Award" to the effect that the respondents were enjoined during the pendency of the arbitration from, inter alia, carrying out activities related to the agreement in dispute. The Supreme Court of Queensland refused to grant enforcement, holding that it was not an "arbitral award" within the meaning of the Convention.[29]

It is submitted that the Court of Queensland should rather have looked to what American arbitration law says on the subject. It appears that US courts show a tendency in favour of enforcing awards for interim relief. The leading case is *Sperry International Trade, Inc. v. Government of Israel*.[30] The case involved an award requiring Sperry and Is-

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27 Report, n. 12, paras. 69-72.

28 Report, n. 12, para. 83.

29 Supreme Court of Queensland, 29 October 1993, *Resort Condominiums International Inc. v. (1) Ray Bolwell and (2) Resort Condominiums (Australasia) Pty. Ltd*, excerpted in *Yearbook Commercial Arbitration*, Vol. XX (1995), pp. 628-650 (Australia no. 11).

30 689 F.2d 301 (2nd Cir. 1982).

rael to put the proceeds of a letter of credit into a joint escrow account. The District Court held that although the arbitrators had not yet finally resolved all issues submitted in the arbitration, they had reached a final decision with respect to the proceeds of the letter of credit. The Court concluded that this was a "clearly severable issue" and, hence, enforceable in court. On appeal, Israel abandoned its argument that the arbitral decision could not be enforced, but it appears that the Court of Appeals for the Second Circuit agreed with the District Court's reasoning. The rule appears to be that interim awards are enforceable so long as they relate to issues that are separable from the issues that remain to be decided.[31]

In a resourceful paper presented to the Institute for Transnational Arbitration (ita) workshop in Dallas in 1996, Joseph Neuhaus quotes four other examples of broad interpretations of the finality requirements of the US Federal Arbitration Act:

- *Island Creek Coal Sales Co. v. City of Gainsville, Florida*: confirming "Interim Order" that a party continue to accept deliveries under a coal purchase contract pending arbitration award because that disposed of "one self contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings";[32]

- *Yasunda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Casualty Co.*: order that re-insurer post letter of credit as security, as provided in the contract when the reinsured requests it, upheld in the light of "the potential importance of temporary equitable awards in making the arbitration proceedings meaningful";[33]

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31 See Robert von Mehren, *The Enforcement of Arbitral Awards under the Conventions and United States Law*, 9 Yale Journal of World Public Order (1983), pp. 343-368 at 362-363.

32 792 F.2d 1046 (6th Cir. 1984).

33 37 F.3d 345 (7th Cir. 1994).

- *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*: same as to "Interim Final Order" ordering payments into an escrow account pending completion of the arbitration;[34]

- *Southern Seas Navigation Limited of Monrovia v. Petroleos Mexicanos of Mexico City*: "interim" award reducing lien on vessel pending resolution of underlying dispute confirmed, on ground that "[s]uch an award is not 'interim' in the sense of being an 'intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the 'interim' period pending a final decision on the merits."[35]

It is submitted that the pragmatic approach taken by the US courts under the Federal Arbitration Act is wholly sensible. They do not adhere to a narrow interpretation of what constitutes a dispute (in the Convention's language: a "difference", see articles I(1), I(3), II(1), and V(1)(c)) between the parties. This is also the manner in which the Convention should preferably be interpreted.

As regards the question whether an interim award can be considered "binding" under article V(1)(e) of the Convention, no major obstacles to the enforcement of a "temporary" award seem to exist. An award will be enforced in accordance with its terms. If one of the terms is that the order contained in the award is for a limited period of time, the enforcement will correspondingly cover that period of time. If the interim award is subsequently rescinded, suspended or varied by an arbitral tribunal, that will as a rule be laid down in a subsequent interim award which can also be enforced.

To be on the safe side, a solution is to provide in the arbitration agreement that an interim award is "binding" within the meaning of article V(1)(e) of the New York Convention.[36] This would perhaps be

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[34] 935 F.2d 1019 (9th Cir. 1991).

[35] 606 F. Supp. 692 (S.D.N.Y. 1985).

[36] A number of courts accept that parties may agree as of which moment an arbitral award is considered to be binding under the Convention. See, e.g., Cour d'Appel Rouen, 13 November 1984, *Société Europeénne d'Etudes et d'Enterprises (SEEE) by its liquidator Mme. Y. Cleja v. Socialist Federal Republic of Yugoslavia, International Bank for Reconstruction and Development (the World Bank) and the French State*, excerpted in *Yearbook Commercial Arbitration*, Vol. XI (1986), pp. 491-499 (France no. 8); and Bundesgerichtshof, 14

requiring too much from lawyers drafting an arbitration clause, which may eventually be seen as "overlawyering". The solution, however, is practically conceivable in the form of a provision in arbitration rules. An example is the World Intellectual Property Organization (WIPO), which is currently drafting rules for emergency arbitrations that envisage an interim award within a very short period of time. One of the proposed provisions is that the award for interim relief shall be deemed "binding" within the meaning of article V(1)(e) of the New York Convention.

The foregoing boils down to the proposition that interim measures can be enforced under the New York Convention if they are taken in the form of an (interim) arbitral award and such an award is permitted under the law applicable to the arbitration (usually the arbitration law of the place of arbitration).

When considering the question of enforceability of interim measures in the form of an interim award, I do not address the question whether it is preferable that these measures be taken by an arbitral tribunal rather than a court. UNCITRAL's Commission takes that for granted: "[I]t was generally agreed that this question was of utmost practical importance [and] in many legal systems was not dealt with in a satisfactory way."[37] That may be so in many countries. However, it should not be forgotten that, in many cases, it may take more time to obtain interim measures from an international arbitral tribunal than from a national court. Would the solution rather not be to establish an international instrument (treaty or model law) for the taking of interim measures instead of encumbering the New York Convention with this question?

In connection with the latter question, the Secretary General's Report suggests that the Working Group may also wish to give consideration to the desirability and feasibility of preparing a harmonised text on the scope of interim measures that an arbitral tribunal may issue and pro-

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April 1988, *SpA Ghezzi v. Jacob Boss Söhne*, excerpted in *Yearbook Commercial Arbitration*, Vol. XV (1990), pp. 450-455 (Germany no. 33).

[37] Report, n. 12, para. 81.

cedural rules for their issuance.[38] It further suggests that if it is considered that work should be undertaken in this direction, "some inspiration may be drawn" from the Principles on Provisional and Protective Measures in International Litigation, adopted in 1996 by the Committee on International Civil and Commercial Litigation of the International Law Association (ila).[39] One cannot but agree with these suggestions.

Should the New York Convention be revisited, and if so, in what form?

I mentioned before that UNCITRAL has taken the approach of "substance over form" in addressing the topics it has identified as possible issues in international commercial arbitration. I believe this to be the most effective approach. Only after it has been determined that a topic is a real problem in practice, and the topic has been fully analysed, can it be seen what the appropriate harmonised solutions are.

As regards the possible form for adopting harmonised solutions, UNCITRAL has indicated various measures.[40] They fall in two basic categories:

- legislative text (such as model legislative provisions or a treaty); or

- non-legislative text (such as a model contractual rule or practice guide).

With respect to the New York Convention, it seems that the model-law technique has proven to be very successful (see UNCITRAL's Model Law on International Commercial Arbitration of 1985). A model law could be envisaged for legislation implementing the Convention, which at present appears to show a number of significant dif-

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38 Report, n. 12, paras. 102-108.

39 The International Law Association, Report of the Sixty-seventh Conference, held at Helsinki, 12–17 August 1996, published by the International Law Association (1996), pp. 202-204. The text of the Principles (22 in total) is reproduced in the Report, n. 12, para. 108.

40 Report, n. 12, para. 8.

ferences in the various Contracting States. At the New York Convention Day in 1998, I made a suggestion to that effect.[41]

A practice guide would also be a good technique. The guide can be of help to judges and counsel in the Contracting States in explaining the Convention. Additionally, it can set forth preferred uniform interpretations of the Convention's provisions.

Yet, UNCITRAL's Commission stressed that "even if an international treaty were to be considered, it was not intended to be a modification of the [1958 New York Convention]. It was thought that, even if ultimately no new uniform text would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission, possibly with suggestions for uniform interpretation, would be a useful contribution to the practice of international commercial arbitration."[42]

I am therefore eagerly awaiting the outcome of the discussions of UNCITRAL's Working Group on Arbitration. Until recently, I was of the opinion that the Convention is not in a need of an amendment.[43] I still maintain this view as a working hypothesis based on my study of the more than 800 court decisions rendered under the Convention, which show that the courts generally interpret and apply the Convention in a favourable manner. One has, however, to keep an open mind and it may be that some adjustments are desirable in one form or another.

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41 A.J. van den Berg, *Striving for Uniform Interpretation*, in Enforcing Arbitration Awards, n. 5, pp. 41-44.

42 Report, n. 12, para. 8.

43 See n. 16.