

1979

A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Pieter Sanders

Recommended Citation

Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L L. 269 (1979)
<https://scholar.smu.edu/til/vol13/iss2/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

This is a review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention deals with recognition and enforcement, but it is primarily the enforcement of an arbitral award "made in the territory of a state other than the state where the recognition and enforcement is sought" that the Convention tries to improve and facilitate. I intend to deal with the Convention in its entirety with an emphasis on the enforcement of foreign arbitral awards because, presumably, practicing lawyers will be especially interested in the latter.

The ratification of the New York Convention of 1958 has been a considerable success for an international convention on private law. At present fifty-six states have ratified the Convention. The contracting states are in all parts of the world: developed and developing, East and West. They include almost all major trading nations. The socialist countries were rather quick to become parties. They ratified in the beginning of the 1960s. The European countries followed in the mid-sixties and the Anglo-American countries followed in the beginning of the 1970s. The United States acceded in 1970. It is also interesting that in 1975, Great Britain finally overcame its reluctance to joining the contracting states.

One area of the world, Latin America, is still underrepresented. Only a few Latin American states have ratified the Convention (Mexico, Ecuador, Cuba and Chile). Instead, Latin American states concluded their own Convention on International Commercial Arbitration in Panama in 1975. The Panama Convention copies in many respects the New York Convention. The United States may ratify the Panama Convention as well, although this may cause some problems. These matters are left to future commentators since dealing with the New York Convention is problem enough.

The problem with any legal instrument, no matter how carefully drafted, is that it will, in its application, show gaps or need interpretation.

When the International Council for Commercial Arbitration (ICCA) started publishing its Yearbook in 1976 and appointed me as general editor,

*Professor of Law, Erasmus University, Rotterdam.

I immediately reserved a part of the Yearbook (Part V) for national court decisions on the application of the New York Convention. It was obvious that the Convention might be subject to different interpretations in different parts of the world. The United Nations itself does not collect such material, and it has to be done. The first three published volumes of the Yearbook contain 72 national court decisions from fourteen different countries, many of them coming from the United States, a world arbitration center. The next Yearbook (Volume IV) will carry at least 28 decisions, bringing to 100 the number of court decisions reported.

The general tendency shown in these 100 decisions is that the courts are inclined to grant recognition and enforcement whenever possible. In general, the courts favor international commercial arbitration and it is seldom that recognition and enforcement under the New York Convention is refused.

The refusal to enforce an arbitral award goes right to the heart of the Convention. Article V sums up the grounds for refusal of recognition and enforcement. The diplomatic conference in 1958 tried to limit these grounds as far as possible. Only five grounds for refusal are found in paragraph 1 of Article V, and two other grounds in paragraph 2.

These last two contain the inevitable exception of public order: if the judge finds that recognition and enforcement of the foreign award would be contrary to the public policy of his country, he may refuse recognition and enforcement; the same is true when the subject matter of the dispute would not be capable of settlement by arbitration in his country, which is merely another way of saying that recognition and enforcement would be against public policy.

Although this ground for refusal is often invoked, it is seldom invoked successfully. To a large extent, this is due to the distinction made by the courts not only in the United States, but also in other countries, between the public order test in purely national affairs and the test as applied to arbitrations pursuant to truly international agreements.¹ In respect to the latter, the narrower criterion of violation of the international public order is applied. Therefore, although under the law of many countries arbitral awards must contain reasons for the decision and, if they do not, would be deemed to be against (domestic) public order, this does not lead to a refusal to enforce in these countries awards made in a foreign country where such a statement is not required.²

¹See Sanders, *Trends in the Field of International Commercial Arbitration*, 2 H^{AGUE} ACAD. INT'L L. 224 (1975).

²Judgment of Oct. 22, 1935, Court of Appeal, Florence, [1978] 3 Y.B. COM. ARB. 279-281 (International Council for Commercial Arbitration) concerning an English award made under the Rules of the Grain and Feed Trade Association (GAFTA); Judgment of Sept. 1, 1977, Court of Appeal, Florence, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration) concerning an award made under the Rules of the American Arbitration Association.

This distinction between domestic and international public order has also been applied in the famous case of *Fritz Scherk v. Alberto Culver Co.*³ In this case Alberto Culver, relying on *Wilko v. Swan*,⁴ contended that the dispute was not arbitrable, as it concerned the sale of securities. The United States Supreme Court, contrary to its previous decision in the purely domestic *Wilko* case, upheld the arbitration clause in this international securities transaction. Referring to the New York Convention, it stated that the goal of this Convention is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts. The Court continued by saying: "This country's adoption and ratification of the Convention, implemented by Chapter 2 of the United States Arbitration Act, provides strongly persuasive evidence of congressional policy consistent with the decision we reach today."⁵

Accordingly, one year later, the United States Court of Appeals for the Second Circuit in a case involving a Japanese firm, *Copal Ltd. v. Fotochrome, Inc.*, said: "The public policy limitation of the Convention is to be construed narrowly and to be applied only where the enforcement would violate the forum state's most basic notions of morality and justice."⁶

In fact, in 100 cases applying the New York Convention, enforcement has been refused for reasons of public policy only three times. The first time concerned the enforcement in the Federal Republic of Germany of an award rendered under the Rules of the American Arbitration Association in a dispute between an American and a German firm. The decision in *Oberlandesgericht Hamburg*⁷ observed that in a foreign arbitral award, not every infringement of the mandatory provisions of German law constitutes a violation of German public policy. The case was an extreme one, as it was established that the single arbitrator, who gave his decision on the basis of documents only, had not forwarded to the German party an important letter sent to him by the United States firm. Therefore, enforcement was refused.

The second instance concerned the stranding of the United States warship *Julius A. Furer* off the coast of Netherland. The question was whether by enacting the Public Vessels Act, Congress intended to waive the sovereign immunity of the United States in such a manner as to require the Government to submit to arbitration in London in accordance with the arbitration clause in the Lloyd's Open Form salvage agreement that had been signed by the captain of the warship. The United States District Court for the Southern District of New York answered this question in the negative.⁸

³*Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974), *rehearing denied*, 419 U.S. 885 (1974), [1976] 1 Y.B. COM. ARB. 203-204 (International Council for Commercial Arbitration).

⁴346 U.S. 427 (1953).

⁵417 U.S. 506, 521 n.15 (1974), *rehearing denied*, 419 U.S. 885 (1974).

⁶*Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975), [1976] 1 Y.B. COM. ARB. 202-203 (International Council for Commercial Arbitration).

⁷Judgment of April 3, 1975, Court of Appeal, Hamburg, [1977] 2 Y.B. COM. ARB. 241 (International Council for Commercial Arbitration).

⁸[1978] 3 Y.B. COM. ARB. 290 (International Council for Commercial Arbitration).

The third time was in a case that will be reported in the next volume of the Yearbook. The case concerned an exclusive distribution agreement between a Belgian firm and a German car manufacturer, AUDI-NSU. The Belgian Court of Appeal held, on the basis of a Belgian law of 1961, that the unilateral termination of such an agreement would not be arbitrable but could only be dealt with by the Belgian courts.⁹

Apart from this "public order" ground, enforcement of a foreign arbitral award can be refused under the New York Convention only on the five grounds enumerated in paragraph 1 of Article V. These five grounds for refusal deal with the following cases, which I sum up in a much abbreviated and not quite literal manner:

- (a) the arbitration agreement was invalid;
- (b) a party was unable to present his case;
- (c) the award does not comply with the terms of the submission;
- (d) the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties;
- (e) the award was not yet binding on the parties, or had been set aside in the country where it was made.

Reviewing the last twenty years, one may state that, although these grounds for refusal are often invoked by a losing party who wants to avoid enforcement, these defenses are seldom successful. Here again, the courts, including those in the United States, have repeatedly held that these grounds are to be construed narrowly.

The Convention presents some clear advantages when compared with the situation before it came into force. In the pre-Convention period one had to rely upon the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards, to which the United States did not adhere. Both the Protocol and the Geneva Convention have ceased to have effect between states that became bound by the New York Convention (article VII, paragraph 2).

When compared with the conditions that existed under the Geneva instruments, the situation nowadays has certainly improved. Under Article IV of the New York Convention, a party who seeks enforcement has only to supply to a court the original award (or a duly certified copy thereof). No further proof is demanded from him. It is up to the losing party to prove the existence of one of the grounds for refusal enumerated in Article V. The burden of proof has been reallocated.

Another advantage under the New York Convention is that it is no longer required that an award be *final*, the word used in the Geneva Convention of 1927. In practice, this use of *final* in the Geneva Convention meant that an *exequatur* (leave for enforcement) had to be obtained in the country where

⁹Judgment of May 12, 1977, Court of Appeal, Liege, Belgium, [1979] 4 Y.B. COM. ARB. (International Council for Commercial Arbitration). This case is now pending before the Belgian Supreme Court (Cour de Cassation).

the award was made before enforcement could be sought in the foreign country: the so-called "double *exequatur*." Today, this is not necessary. The New York Convention requires only that the award be *binding*, not *final*. (The importance of this change will be reviewed *infra* in the discussion of the grounds for award refusal in Section V(1)(e) of the New York Convention.)

The word *final* in the Geneva Convention of 1927 also implied that enforcement could be prevented, or at least postponed for many years, by simply commencing an action to have the award set aside in the country where the award was made. Under the New York Convention, it is no longer enough to commence an action. The Convention requires proof that the award has been set aside in the country where it was made before enforcement may be refused.¹⁰

Commencing an action to set aside an award in the country where the award was made may nevertheless have some influence on the enforcement of the award abroad. If an application to set aside an award has been made in the award's "home country," the enforcement judge may, if he considers it proper, postpone his decision on enforcement in order to protect the losing party. At the same time, the judge may order that suitable security be given by the party against whom enforcement is sought in order to protect the winning party. This provision in Article VI of the Convention may be regarded as another innovation. However, as far as one can observe, it has never been applied. Perhaps practicing lawyers are not fully aware of the possibilities offered by Article VI.¹¹

Overall, the New York Convention constitutes a considerable step forward. Still other advantages could be mentioned, like the recognition, in principle, of the arbitral tribunal.¹² In practice, parties do this by reference to the rules of known international arbitral institutions like the American Arbitration Association (AAA) or the International Chamber of Commerce (ICC), which regulate the arbitral proceedings in detail. All this, however, does not mean that the Convention cannot be improved. Some possible improvements may become apparent as court decisions on the application of the Convention are analyzed.

What problems are revealed by the court decisions on the application of the New York Convention? The "public order" test, Article V, paragraph 2., has been dealt with. The other problems which have arisen will be discussed in the following order: Article V, paragraph 1. (other than a); Article II, and Article V, paragraph 1, a.

¹⁰New York Convention of 1958, art. V, para. 1(e), [1970] 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997. For simplicity sake discussion of suspension of the award, discussed under e, has been omitted.

¹¹Only one French court has dealt with a request under Article IV in a case in which a set-aside action was pending before the Indian courts. The French court rejected the request because the party had not furnished sufficient evidence to make granting an adjournment appropriate. Judgment of May 15, 1970, President Tribunal de Grande Instance de Paris, [1976] 1 Y.B. COM. ARB. 184-85 (International Council for Commercial Arbitration).

¹²New York Convention of 1958, *supra* n. 10, art. V, para. 1(d).

Ground b of Article V, namely, that a party was unable to present its case, has often been invoked by the responding parties and their ingenious lawyers but, as far as one can see, never with success. To give two examples:

- In *Parsons & Whittemore (USA) v. Rakta (Egyptian)*,¹³ the Second Circuit rejected the defense, put forward by the American company, that the arbitrators had violated standards of due process by refusing to postpone a hearing because one of the witnesses could not be present due to a prior commitment to lecture at an American university.
- In another case, in which the Ethiopian Government was awarded its claim against an American company, the latter asserted successfully that the arbitrator, Professor Rene David, was not impartial, as some twenty years before he had drafted the new Civil Code for Ethiopia.¹⁴

Ground c, nonconformity of the award to the grounds for submission to arbitration, is well known in national arbitration laws as a ground for setting aside. However, it is seldom that arbitrators will deal with a difference not submitted to them or will take decisions "on matters beyond the scope of the submission to arbitration." Awarding interest which has not been claimed may constitute an example of the latter. This ground has so far been reported in only one case.¹⁵

Ground d sets forth, in principle, the freedom of the parties to compose the arbitral tribunal and to regulate the arbitral proceedings according to their wishes within the limits, of course, of the public order test we have already discussed. According to this ground, both the composition of the arbitral tribunal and the arbitral procedure are governed by the arbitration law of the place where the arbitration is held, but only insofar as the parties have failed to agree on these matters.¹⁶

This ground has recently been successfully invoked before the Court of Appeal in Florence.¹⁷ According to the arbitration clause in the charter party, the award should be made by three arbitrators, each party appointing one arbitrator and these two appointing a third. Arbitration took place in London; the award was made by the two arbitrators appointed by the parties. This was in accordance with the English Arbitration Act of 1950, which provides in Section 9(1) that an arbitral clause of the type just mentioned "shall have effect as if it provided for the appointment of an umpire,

¹³*Parsons & Whittemore Overseas Co. v. RAKTA*, 508 F.2d 969 (2d Cir. 1974), [1976] 1 Y.B. COM. ARB. 205 (International Council for Commercial Arbitration).

¹⁴*Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976), *extracted in* [1977] 2 Y.B. COM. ARB. 252 (International Council for Commercial Arbitration).

¹⁵Judgment of Feb. 12, 1976, Bundesgerichtshof, W. Ger., *extracted in* [1977] 2 Y.B. COM. ARB. 242-43 (International Council for Commercial Arbitration).

¹⁶Judgment of Jan. 31, 1969, Court of Appeal, Venice, *extracted in* [1978] 3 Y.B. COM. ARB. 277-79 (International Council for Commercial Arbitration), granted enforcement of an arbitral award made in London by a party-appointed arbitrator, acting as sole arbitrator where the other party failed to appoint its arbitrator. This was in accordance with the law of the place of arbitration. See English Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 7 at 444 (1950).

¹⁷Judgment of April 13, 1978, Court of Appeals, Florence, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

and not for the appointment of a third arbitrator." The Court held, however, that the English Arbitration Act (the law of the country where the arbitration took place) would only apply, according to the Convention, "failing agreement of the parties." In the present case the parties had agreed on an arbitral tribunal of three persons. Enforcement of the arbitral award was refused.

Ground e contains two grounds for refusal:

1. the award has not yet become binding;
2. the award has been set aside or suspended by the court of the country where the award was made.

The word *binding* in section V(e) of the New York Convention replaces the word *final* as used in the Geneva Convention of 1927. Many court decisions have stated that the New York Convention does not require a double *exequatur* (that is, leave for enforcement in the country where the award was made as well as in the country of enforcement). It suffices when the award is binding. This is the case when ordinary means of recourse are no longer available; the mere possibility of extraordinary means of recourse, such as an action for setting aside, does not prevent the award from becoming binding.¹⁸ A different interpretation of *binding* would render meaningless the limitation contained in ground *e* that the award "*has been set aside*." Moreover, what purpose would the special regulation in Article VI serve, when the commencement of an action for setting aside the award would prevent the award from becoming binding and lead to refusal of enforcement? Must the award, in order to become binding, be deposited with the court in case the arbitration law of the country where the award was made requires such deposit? A French court made this statement in respect to an award made in Hamburg under the Rules of the Association of Grain Merchants of the Hamburg Exchange.¹⁹ In arriving at this decision the French court applied German arbitration law, which indeed requires the deposit of the award before it can be recognized as such.²⁰ I doubt whether we have to fall back on the arbitration law of the country where the award was made for the interpretation of *binding* in the New York Convention. The Convention contains a reference to the arbitration law of the home country of the award only in connection with the next item of ground *e*, the setting aside. The interpretation of *binding*, given in the previous paragraph, seems more in line with the object of the Convention. Application of national arbitration law even in those countries which require an *exequatur*

¹⁸For the same interpretation, see Judgment of June 8, 1967, Landgericht, Bremen, W. Germ., *extracted in* [1977] 2 Y.B. COM. ARB. 234 (International Council for Commercial Arbitration): "binding" means that the award is not open to arbitral or judicial appeal, irrespective of the admissibility of an action for setting aside.

¹⁹Judgement of Oct. 9, 1970, Tribunal de Grande Instance, Strasbourg, *extracted in* [1977] 2 Y.B. COM. ARB. 244 (International Council for Commercial Arbitration).

²⁰ZIVILPROZESSORDNUNG art. 1039 (W. Ger. CCP). See also Glossner, *National Report on Arbitration Law and Practice in Federal Republic of Germany*, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

in order for domestic awards to become binding, would lead to the double *exequatur*, a situation the New York Convention expressly sought to avoid.

Setting aside²¹ can, according to the Convention, take place only in the country in which the award was made.²² Foreign courts can only refuse recognition and enforcement; they cannot set aside a foreign arbitral award. Many court decisions reported in the Yearbook confirmed this conclusion.

It may be noted here that the Convention thus accepts that a foreign award in its country of origin may have been set aside on other grounds than those mentioned under *a-d* (which lead to refusal of enforcement in the enforcement-country). Should awards in the country of origin be set aside on grounds other than those mentioned in the Convention, these grounds will be indirectly introduced as grounds for refusal in the country of enforcement. National arbitration laws are far from uniform in their formulation of grounds for set aside and do not necessarily limit these grounds to the four mentioned under Article V, paragraph *a-d*.

The Geneva Convention of 1961, repeating in Article IX, paragraph 1 grounds *a-d* in almost similar wording, wisely added in paragraph 2 of Article IX that, "in relations between Contracting States that are also parties to the New York Convention" the application of Article V(1) under *e* of the New York Convention is limited "solely to the cases of setting aside set out under paragraph 1 above." The Geneva Convention of 1961 thereby contains a limitation of the grounds for set asides in arbitrations that deal with "disputes arising from international trade" (Article 1, paragraph 1 of the Geneva Convention on the scope of that Convention).

This example might be followed when modification of the New York Convention is considered. The New York Convention could be modified to provide that the grounds for set asides in the country where awards are made should be limited to those mentioned as grounds for refusal under said paragraph *a-d* in disputes arising out of international trade. Such an amendment would involve a reconsideration of the scope of the New York Convention, which now applies to "arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards is sought" (Article 1, paragraph 1 of the New York Convention).

The grounds for refusal contained in Article V are exclusive. This question of exclusivity has been dealt with on several occasions in Italian court decisions on the application of the New York Convention. They all concerned the reexamination of a foreign arbitral award on its merits. Under Italian law such a reexamination of a foreign award is possible under certain

²¹I leave out the suspension; see *supra* note 10.

²²I also leave aside the exceptional case where setting-aside takes place in the country "under the law of which" the award was made. These words refer to an award made in country *A* under the arbitration law of country *B*. In the Federal Republic of Germany, for example, an award made in that country under French arbitration law, should the parties have so provided, would be regarded as a foreign award. See New York Convention of 1958, *supra* note 10, art. I, para. 1.

conditions, for example, when the foreign award is made in the absence of the defendant.²³

On all these occasions the Italian courts declined to refuse the enforcement on this ground and to go into the merits of the award. They observed that the Convention, as *lex specialis*, supersedes Italian law and that Article V does not include under the grounds for refusal a reexamination on the merits.²⁴ In addition, as one court rightly observed, it is not possible to institute reexamination proceedings on the merits in Italy, as the Convention, in ground *e*, refers the setting aside to the "competent authority in the country where the award was made."²⁵

The problems arising in connection with the *arbitration agreement* have been reserved for the end of this article. The Convention deals with the arbitration agreement at two places:

- *Article II.* According to this article each contracting state shall recognize an arbitration *agreement* which is "in writing." Further, the courts, in an action in a matter governed by an arbitration agreement between the parties, shall *refer the parties to arbitration* unless it finds that the agreement is null and void, inoperative, or incapable of being performed.
- *Article V.* This article enumerates the grounds on which recognition and enforcement of an arbitral *award* may be refused. The first ground for refusing to recognize or enforce the award includes (a) incapacity of the parties to the agreement referred to in Article II or (b) invalidity of the said agreement.

In the application of the New York Convention these provisions have given rise to many questions. In fact, a large number of all court decisions reported deal, either completely or in part, with questions regarding these provisions.

The two articles just summarized should be distinguished. Article II deals with the situation where, despite written arbitration agreement, a court action has been started. A court, when seized of an action involving a dispute which the parties agreed to arbitrate, must refer the parties to arbitration. Article V deals with the situation where arbitration has already taken place and an award has been made for which enforcement is sought.

²³See also CODICE DI PROCEDURA CIVILE C.P.C. art. 798 (iuncto art. 800) (Italy) on reexamination on the merits (*Riesame del meritor*).

²⁴Judgment of Oct. 22, 1976, Court of Appeals, Naples, [1978] 3 Y.B. COM. ARB. 279-281. (International Council for Commercial Arbitration); Judgment of Feb. 20, 1975, Court of Appeals, Naples, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration); Judgment of June 30, 1976, Tribunale Naples, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration); and in particular Judgment of Feb. 2, 1978, Corte di Cassazione, Italy, *extracted in* [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

²⁵Judgment of Oct. 22, 1976, Court of Appeals, Naples, [1978], 3 Y.B. COM. ARB. 279-281 (International Council for Commercial Arbitration). The case concerned an arbitral award made in London under the Rules of the Grain and Feed Trade Association (GAFTA).

In that situation the defendant may invoke as grounds for refusal the invalidity of the agreement.

Article II, dealing with the recognition of arbitration *agreements*, appears out of place in a Convention which, according to its title, deals with the recognition and enforcement of foreign arbitral *awards*. Originally, a separate protocol was envisaged to deal with arbitration agreements, just as the Geneva Protocol of 1923 on Arbitration Clauses was separate from the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards. It was on the last day of the diplomatic conference on the New York Convention that Article II was inserted.

Against this background it is not surprising that so many questions have arisen on the enforcement of agreements. Surely it would have been preferable if more time had been available to study the implications of inserting Article II in a convention on the enforcement of foreign arbitral awards. Perhaps the insertion was a mistake, and consideration should be given to whether or not separate regulation of the recognition of arbitration agreements in a protocol would be preferable. Such a protocol, in a modern form and adapted to the needs of our days, could replace Article II of the Convention.

Article II makes it clear that for the Convention to be applicable an arbitration agreement must be "*in writing*." An oral agreement to arbitrate, recognized under some national arbitration laws such as The Netherlands, does not suffice. The term "agreement in writing" is defined in paragraph 2; the agreement may also be "contained in an exchange of letters or telegrams." Although an exchange of telexes is not mentioned,²⁶ an arbitration agreement could be contained in them.²⁷

The formal requirement that an arbitration agreement be in writing supersedes, in my opinion, national arbitration laws to which Article V refers when it introduces in ground *a*, as the first ground for refusal of enforcement of a foreign award, that the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." Taking into account only this part of ground *a*, there would be no basis for refusing to enforce an award made in The Netherlands under an oral arbitration agreement (failing other choice of law by the parties). However, Article V establishes a link with Article II by stating "the parties to the agreement *referred to in Article II* were, under the law applicable to them; under some incapacity, or *the said agreement* is not valid under. . . ." The "italicized" words refer back to Article II.

In my opinion, the arbitration agreement must comply with the require-

²⁶The Geneva Convention of 1961 expressly provided so by adding "or contained in communication by teleprinter."

²⁷Judgment of Nov. 17, 1971, Supreme Court of Austria, [1976] 1 Y.B. COM. ARB. 183 (International Council for Commercial Arbitration).

ment of being "in writing" as defined in paragraph 2 of Article II. If it does not, the courts not only should refuse to refer parties to arbitration as mentioned in Article II, paragraph 3, but should also refuse enforcement of an arbitral award not based on an agreement "in writing" (Article V, paragraph 1, ground *a*).

One must doubt the correctness of the decision of the Rotterdam court where parties were referred to arbitration although the sales contract with an arbitration clause had not been returned by the Israeli buyer to the Dutch seller.²⁸ The Dutch court was apparently guided by the fact that under Dutch law the arbitration agreement was certainly valid, as the buyer did not react against the sales contract and only protested against the arbitration clause two months after delivery of the goods in Haifa. Dutch law does not have an "in writing" requirement; it recognizes oral agreements to arbitrate.

A rather strict interpretation of "in writing" was given by the Italian Supreme Court in the most recent of its numerous decisions (*see note 16 supra*) on Article II of the Convention.²⁹ In this case, one Italian firm sold Russian corn to another Italian firm. The sales contract was only signed by the seller. When the buyer commenced court proceedings in Italy for the seller's failure to perform the contract, the buyer furnished the contract he had not signed. The contract referred to the general conditions of contract number 80 of the London Corn Trade Association that provides for arbitration in London. The seller then requested a stay of the court proceedings and a referral of the case to arbitration in London where both parties had already appointed an arbitrator. According to the seller, production of the sales contract by the buyer equaled a signing of the contract by the buyer. Although this argument, combined with the appointment of the London arbitrator, may seem convincing, the Supreme Court was of the opinion that the substantial requirement of "in writing" of Article II was not met. According to the Court, admission of the existence of an arbitration agreement does not satisfy the requirement that the agreement be "in writing." This decision has been the subject of criticism by Italian authors.

On the other hand, the Court of Appeal of Florence held that arbitration clauses in purchase orders signed by an American buyer and sent to an Italian seller who did not sign or return them constituted a valid agreement to arbitrate because subsequent invoices that referred specifically to the purchase orders were signed by the seller. The court observed that under Article II the intention of the parties need not be expressed in the same document, and the agreement may be contained in an exchange of letters or telegrams.³⁰

²⁸Judgment of June 26, 1970, Rotterdam, Netherlands, [1976] 1 Y.B. COM. ARB. 195 (International Council for Commercial Arbitration).

²⁹Judgment of Sept. 18, 1978, Corte de cassazione (Sez. Un.), Italy, [1979] 4 Y.B. COM. ARB. _____, n. 4167. *See* extract at III.

³⁰Judgment of Sept. 1, 1977, Court of Appeals, Florence, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration). *See* extract at 3a.

In international trade, contracts are often concluded by one party's sending to the other a sales confirmation. The Geneva Court had to deal with a case where a Dutch seller sent a Swiss buyer a sales confirmation containing an arbitration clause. The latter did not react further but kept the sales confirmation without protest. The Swiss Court, in which enforcement of the *ex parte* award was sought, decided that Article II, paragraph 2 had not been satisfied and refused enforcement.³¹

A similar decision was given by the Oberlandesgericht (Court of Appeal) Dusseldorf, in a case where the sale of potatoes was concluded orally and the sales confirmation that had an arbitration clause providing for arbitration under the Rules of the Netherlands Arbitration Institute was kept by the German buyer without objection.³² The court declared that a one-sided confirmation does not suffice and that this could not be cured by the appearance of the defendant before the arbitrators. Enforcement under the New York Convention therefore was not granted.

In my opinion, these decisions are correct in light of Article II. Article II contains an autonomous rule requiring at least an *exchange* of letters or telegrams. Even when, under national law, the arbitration agreement is validly concluded, the New York Convention cannot be applied when the conditions of "in writing" described in Article II, paragraph 2, are not met. Article II, paragraph 2 supersedes, as to the form of the arbitration agreement, the requirements of the law applicable to that agreement.

In this connection it seems useful to draw attention to Article VII of the Convention, where it is stated that the provisions of the Convention do not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." This "most favorable right clause" may be helpful in those cases where no enforcement can be granted under the Convention. Especially in cases where the arbitration agreement does not meet the requirement of "in writing" as prescribed by Article II, it may be advisable to seek enforcement under the national arbitration law or a more favorable treaty, instead of relying on the Convention.

Thus, the enforcement of an award rendered between an Austrian seller and a German buyer (Austria and the Federal Republic of Germany have both acceded to the New York Convention) was upheld by the Supreme Court of the Federal Republic of Germany (Bundesgerichtshof), applying national (German) arbitration law which does not require an arbitration agreement between parties to a commercial transaction who are merchants to be in writing.³³

³¹Judgment of June 6, 1967, Tribunal De Geneva, *summarized in* [1976] 1 Y.B. COM. ARB. 199 (International Council for Commercial Arbitration).

³²Judgment of Nov. 8, 1971, Oberlandesgericht, Dusseldorf, W. Ger., [1977] 2 Y.B. COM. ARB. 237-38 (International Council for Commercial Arbitration).

³³Judgment of May 25, 1970, Bundesgerichtshof, W. Ger., [1977] 2 Y.B. COM. ARB. 237 (International Council for Commercial Arbitration).

Again, the provision of Article VII, paragraph 1, came to the rescue of the enforcement in the Federal Republic of Germany of an arbitral award made in Belgium under the Rules of the European Wholesale Potato Trade. This time a bilateral treaty between Belgium and the Federal Republic of Germany was applied and was held to be more favorable than the New York Convention, to which both countries were also parties.³⁴

The situation becomes more complicated when a contract with an arbitration clause has not been entered into by a direct exchange of letters between the parties, but through the *intermediary of a broker*. A German court was satisfied that the conditions of Article II, paragraph 2, were fulfilled when both parties had signed the sales confirmation sent to them by the broker, and had returned their signed confirmations to the broker, although the broker did not forward either confirmation to the other party.³⁵ Under German law the broker was considered to be authorized to receive the written declaration of the will of both parties.

The Supreme Court of Greece, in a case where an arbitration agreement was concluded by the New York agent of a Greek exporter, held that the agent should have been authorized in writing by the Greek exporter.³⁶ Since the arbitration agreement had to be in writing, the authority to conclude the arbitration agreement should also have been in writing. As there was no written authorization of the agency, the award rendered in New York against the Greek exporter was held to be unenforceable in Greece.

A similar conclusion was reached by Landgericht Hamburg. Only the German buyer had signed and returned the duplicate copy of a contract to an Italian broker; the Italian seller had not done so. Contrary to German law, Italian law requires that a power of attorney have the same form as that required for the contract. Italian law was held applicable to the validity of the power of attorney. As an additional basis for its decision, the court referred to Article II of the New York Convention. The requirement of "in writing," laid down in Article II, extends to the power of attorney; otherwise, "by means of a mere oral grant of power of attorney the form required by Article II could be circumvented."³⁷

The Italian Supreme Court, however, referred two Italian parties to arbitration in London, finding that the contract that had been concluded in Paris through the intermediary of a broker was subject to French law, and that in France, unlike in Italy, a power of attorney may be granted orally.³⁸

³⁴Judgment of March 9, 1978, Bundesgerichtshof, W. Ger., [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

³⁵Judgment of Dec. 19, 1976, LGE Hamburg, W. Ger., [1977] 2 Y.B. COM. ARB. 235 (International Council for Commercial Arbitration).

³⁶Judgment of Jan. 24, 1977, Supreme Court of Greece, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

³⁷Judgment of March 16, 1977, LGE Hamburg, W. Ger., [1978] 3 Y.B. COM. ARB. 274-75 (International Council for Commercial Arbitration).

³⁸Judgment of Jan. 25, 1977, Corte di cassazione, Italy, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

A similar decision was given earlier in a case where it was held that English law applied to a charter party concluded in London and that, under English law, the signing of a contract by agents is the equivalent of a signing by the parties.³⁹

Difficulties with the "in writing" requirement in Article II may also arise when the arbitration agreement is only contained in a contract by *reference to another document* such as General Conditions of Sale. In international trade practice this is customary, especially in the field of commodities. In Italy, particularly, such incorporation by reference poses problems that are discussed *infra*. In other countries, this way of agreeing to arbitrate has so far always been recognized, provided that the contract itself has been signed by the parties or has been concluded by an exchange of letters or telegrams, or by teleprinter. Accordingly the courts refer the parties to arbitration, or enforce the award made on the basis of such incorporation by reference.

In the Yearbook several examples can be found. A French court enforced ten awards, rendered between a United States corporation and a French company under the Rules of the Association of Grain Merchants of the Hamburg Exchange.⁴⁰ In a series of contracts concluded between the parties they had expressly referred to General Conditions that contained an arbitration clause. The Supreme Court of the Federal Republic of Germany held similarly on an award made between a Romanian and a German firm by the Arbitration Commission of the Chamber of Commerce of the Romanian People's Republic.⁴¹ Here, the parties had referred to the General Conditions of Sale and Delivery which contained an arbitration clause. The Court considered that the requirement of "in writing" of Article II of the New York Convention had been fulfilled on the grounds that the General Conditions were inserted in the contract signed by the parties or at least attached to it as an annex.

A stay of court proceedings was ordered by courts of the United States and the United Kingdom where the bill of lading sent to charter parties contained an arbitration clause. In the United States case, the bill of lading contained in bold face type the clause: "all conditions and exceptions of the charter party being considered embodied in this bill of lading."⁴² In the British case the reference was more explicit: "all terms, clauses and exceptions of the charter party dated . . . are hereby incorporated."⁴³

³⁹Judgment of April 8, 1975, Corte di cassazione, Italy, [1977] 2 Y.B. COM. ARB. 349 (International Council for Commercial Arbitration).

⁴⁰Judgment of Oct. 9, 1970, Tribunal de Strasbourg, France, [1977] 2 Y.B. COM. ARB. 244 (International Council for Commercial Arbitration).

⁴¹Judgment of Feb. 12, 1976, Bundesgerichtshof, W. Ger., [1977] 2 Y.B. COM. ARB. 242-43 (International Council for Commercial Arbitration); *see b* of the extract.

⁴²Coastal States Trading, Inc. v. Zenith Navigation S.A., 446 F. Supp. 330, 338 (S.D.N.Y. 1977), [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

⁴³The Rena K, [1978] 3 W.L.R. 431, 438, [1979] 4 Y.B. COM. ARB. (International Council for Commercial Arbitration).

Two contracts for the sale of Canadian wheat by a Canadian company to two Italian firms were in a standard form of contract. On the front side of the document it was stated that the sale was made "on the conditions and rules incorporated herein." On the bottom was written, "See conditions and rules on the other side," where the arbitration clause was to be found (Grain Arbitration Rules of the American Arbitration Association). The U.S. court observed that "Article II does not indicate which law is to govern enforceability of an arbitral agreement, but it appears that the drafters (of the Convention) intended to give effect to such an agreement unless it offends the law or public policy of the forum."⁴⁴ The request of the Italian buyers to stay the arbitration proceedings, based on particular provisions of Italian law, was therefore rejected.

This brings us to the Italian situation. Here a special difficulty arises, as Italian law not only prescribes, as does Article II of the Convention, that the arbitration agreement shall be "in writing" (Article 807 and 808 CCP), but also requires a special approval in writing (Articles 1341 and 1342 CC) of the arbitral clause when it is in general conditions or in contracts of adhesion. The question then arises whether or not such special approval is also required when the Convention applies. In my opinion, it is not. Article II of the Convention contains a uniform rule that excludes the application of contrary regulations under national law (as previously discussed).

In Italy this view has been expressed by the Court of Appeal of Naples, which stated that Article II establishes a uniform rule for all contracting states and prevails over rules of domestic law.⁴⁵ The validity of an arbitration agreement should be examined solely on the basis of the Convention.

A similar result can be found in a decision of the Court of Appeal of Tunis, which held that Article II contains a uniform rule applicable to all the states adhering to the Convention.⁴⁶ The defense of the Italian party, who invoked Article 1341, was rejected. The validity of the arbitration agreement should be judged solely on the basis of the Convention.

Looking into the decisions of the Italian Supreme Court, we get a more shaded, if not confusing, picture. In 1976, the Supreme Court interpreted Article II as requiring the specific approval called for by Articles 1341-1342 CC, as it saw itself obliged to apply Italian law to an agreement.⁴⁷ According to the Court, Article II requires a specific agreement to arbitrate,

⁴⁴*In re Ferrara S.p.A.*, 441 F. Supp. 778 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), [1979] 4 Y.B. COM. ARB. (International Council for Commercial Arbitration).

⁴⁵Judgment of Feb. 20, 1975, Court of Appeals, Naples, Italy, [1979] 4 Y.B. COM. ARB. (International Council for Commercial Arbitration).

⁴⁶Judgment of March 30, 1973, Court of Appeals, Tunis, Tunisia, [1976] Y.B. COM. ARB. (International Council for Commercial Arbitration).

⁴⁷Judgment of May 25, 1976, Corte di cassazione (Sez. Un.), Italy, [1978] 3 Y.B. COM. ARB. 279 (International Council for Commercial Arbitration); *see also* Judgment of March 30, 1977, Tribunale di Milano, Italy, [1978] 3 Y.B. COM. ARB. 282 (International Council for Commercial Arbitration).

"signed by the parties or contained in an exchange of letters or telegrams." The Court did not find such specific agreement in the arbitration clause printed on the standard form contract which was signed by both parties. The clause referred any dispute arising out of the contract to arbitration under the Rules of the European Union of Wholesale Trade in Potatoes.

The decision of the Supreme Court seems quite an obstacle to sound arbitration practice. The decision goes even further than two earlier decisions of the Supreme Court in which a simple reference to general conditions containing an arbitration clause was held not to constitute the written arbitration agreement required by Article II of the Convention.⁴⁸ In the decision just mentioned, the arbitration clause was contained in the contract form signed by the parties. The two other decisions dealt with cases in which the arbitration clause could only be found in a document incorporated by reference.

Whether a 1976 decision which has been criticized by Italian scholars will stand is doubtful. However, a simple reference to another document in which an arbitration clause can be found has repeatedly been regarded as insufficient by the Supreme Court. The Court of Appeal of Florence referred to these decisions recently in observing that they concerned cases where a general reference was made to a separate document in which an arbitration clause was embedded.⁴⁹ In the case before the court, the arbitration clause was in the purchase orders to which invoices accepted by the defendant referred explicitly. The Court concluded that this included acceptance of the arbitration clause under Article II, which is applicable by virtue of Article V, paragraph 1.

The situation differs when the arbitration clause has been the subject of discussion between the parties, or when the contract, referring to other documents in which the clause is contained, has been the subject of specific negotiations between the parties. Thus an arbitral clause contained in a charter party and referring expressly to Centrocon arbitration was held by the Court of Naples to comply with Article II, paragraph 2, because it was not a general reference provision but one that had been modified in negotiations (claims to be made within nine months instead of three months).⁵⁰ The parties had shown their full awareness of the arbitration clause and had specifically adopted it.

The Supreme Court, in a decision in 1977 (registered 1978), observed that the rationale of the specific approval required by Article 1341 (Civil Code)

⁴⁸Judgment of Dec. 13, 1971, Corte di cassazione (Sez. Un.) (Italy) [1976] 1 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration); Judgment of April 22, 1976, Corte di cassazione (Sez. Un.), Italy, [1977] 2 Y.B. COM. ARB. 344 (International Council for Commercial Arbitration).

⁴⁹Judgment of Sept. 1, 1977, Court of Appeals, Florence, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration); see extract under 3f; see also Judgment of Sept. 1, 1977, Court of Appeals, Florence, [1979] 4 Y.B. COM. ARB. (International Council for Commercial Arbitration).

⁵⁰Judgment of June 30, 1978, Tribunale di Napoli, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration), at 4 of extract.

is to ensure that in the case of an adhesion contract a party is fully aware of onerous clauses.⁵¹ Where the contract results from specific negotiations between the parties, there is no adhesion to a contract imposed by one of the parties. Accordingly, an award by the Chamber of Commerce in Sofia was enforced.

Again, in a recent and not yet officially published decision concerning a license agreement between a Liechtenstein and an Italian company, the Supreme Court held the arbitration agreement to be valid under the Convention.⁵² The Court was of the opinion that, even assuming that the contract was concluded in Italy and not in Switzerland and Article 1341 (Civil Code) (a provision unknown under Swiss law) applied, this did not alter the situation. Article 1341 requires only that there be specific approval of an arbitration clause contained in General Conditions that have been fixed in advance by one of the parties to regulate uniformly an unlimited series of contractual relationships. However, specific approval is not required if the contract is a result of negotiations between two experienced parties looking towards the specific contract they have concluded. Therefore, Article 1341 did not apply even though the contents of the agreement may have been determined in advance by one of the parties. The Court referred in this respect to the nature of the agreement, the negotiations which had taken place, and the correspondence between the parties.

The assumption in the previous decision that Italian law would be applicable brings us to a last aspect of the Italian interpretation of Article II.

The Italian Supreme Court has repeatedly held that Article 1341 does not apply to contracts concluded abroad. These decisions refer to Article 26 of the General Provisions of Law, according to which the form of an agreement is governed by the law of the place where the agreement is concluded. So the Supreme Court has decided that under English law the signing of a contract by agents equals signing by the parties as required by Article II;⁵³ that where Czechoslovakian law, which does not contain provisions similar to Articles 1341 and 1342 was applicable, an arbitration agreement was valid;⁵⁴ and that, where French law was applicable, a power of attorney need not, as under Italian law, be in writing.⁵⁵ For contracts concluded abroad, Article 1341 should not interfere with the interpretation of Article II of the Convention. Only the requirement that the arbitration agreement be in writing, contained in Italian law as well as in Article II, remains.

⁵¹Judgment of Jan 23, 1977, Corte di cassazione, Italy, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration), *see* extract under 2.

⁵²Judgment of May 12, 1977, Corte di cassazione (Sez. Un.), Italy, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration); *see* extract under 4a.

⁵³Judgment of April 8, 1975, Corte di cassazione (Sez. Un.), Italy, [1977] 2 Y.B. COM. ARB. 292 (International Council for Commercial Arbitration).

⁵⁴Judgment of Nov. 8, 1976, Corte di cassazione (Sez. Un.), Italy, [1979] 4 Y.B. COM. ARB. 292 (International Council for Commercial Arbitration).

⁵⁵Judgment of Jan 25, 1977, Corte di cassazione (Sez. Un.), Italy, [1979] 4 Y.B. COM. ARB. _____ (International Council for Commercial Arbitration).

To summarize, the Italian situation concerning the interpretation of Article II, paragraph 2 of the Convention is unclear and rather confusing. Volume IV (1979) of the Yearbook will contain an article by Judge Mirabelli, President of a section of the Italian Supreme Court, which may clarify the situation.⁵⁶ Although learned Italian authorities all favor an interpretation of Article II without reference to municipal law, this has not been generally accepted by the Italian courts. Their decisions—at least the majority of them—show to what extent domestic law may influence the application of the New York Convention.

In my opinion an autonomous interpretation of Article II, paragraph 2, should be followed. The formal requirements for the validity of an arbitration agreement, laid down in paragraph 2, should supersede national law. Under the New York Convention, therefore, the parties should not be referred to arbitration if the form of the arbitration agreement required by national law is satisfied with less than these requirements.⁵⁷ The same principle however, has been applied when the national law, as in Italy, requires a greater standard than that set out in the New York Convention. The court should not refuse to refer the parties to arbitration because of noncompliance with some formal requirements of national law once the formal requirements of Article II, paragraph 2 have been met.

A similar rational should apply when enforcement of an arbitral award is sought. In determining the law to be applied to the arbitration agreement, Article V, paragraph 1a refers to the law chosen by the parties or, failing any such choice in the agreement, to the law of the country where the award was made. As far as the *formal requirements* of an arbitration agreement are concerned, however, national law should be superseded by Article II, paragraph 2. As explained above, Article V incorporates Article II, and does not require special approval for an arbitration agreement.

The problems which have arisen in connection with the interpretation of Article II stem, in my opinion, from the last-day insertion of Article II on the recognition of the arbitration *agreement* in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the true core of which is to be found in Article V. Further study of this and other problems raised by Article II could well lead to the conclusion that the subject matter of Article II could better be dealt with in a separate instrument, similar to the Geneva Protocol.

For the moment, a more harmonized interpretation of Article II seems the best approach. Outside Italy the same problem of reconciling Article II with domestic law has so far not arisen. And even in Italy some courts have accepted the notion that Article II establishes a uniform rule superseding rules of domestic law.⁵⁸ If this interpretation were to be generally accepted

⁵⁶See also Recchia, *Questions actuelles de l'arbitrage commercial international en Italie*, REVUE DE L'ARBITRAGE 1-24 (1978).

⁵⁷An example of such a law would be one permitting an oral agreement to arbitrate.

⁵⁸See cases cited nn.45 and 46, *supra*.

by Italy, it would lead to a greatly improved situation. Other problems presented by Article II could, in my opinion, also be solved to a great extent through harmonized interpretation.

This harmonized interpretation, based on the analysis of the decisions made by the courts of different contracting states, may be preferable to the creation of an additional protocol to the Convention. This creation would not only be a cumbersome procedure, but might lead to new problems and confusion, as not all the states which adhered to the Convention might adhere to a new protocol replacing Article II and the reference to it in Article V, paragraph 1a. My recommendation is to pursue the harmonization method, in which the Yearbook, by giving worldwide information on court decisions applying the New York Convention, may be helpful.

In conclusion, let me note that this was an abbreviated survey of twenty years of applying the New York Convention, a survey which, one hopes, will not have been misleading. The one hundred court decisions collected from different parts of the world and reported, in extract form, in the first four volumes of the *Yearbook on Commercial Arbitration* reflect the enormous creativity of our brothers in the law in trying, on behalf of their clients, to escape the recognition of an arbitration agreement or the enforcement of a foreign arbitral award. Such attempts did little but gain time for the clients. In general, the courts interpreted the Convention in a constructive way and only seldom did the ingenious attempts of parties who lost their case or tried to avoid arbitration lead to successful results. Thus, in general, the courts have shown a favorable attitude to international commercial arbitration.

Of course, the Convention may still be improved. The United Nations Commission on International Trade Law (UNCITRAL) has taken up this subject as an item of its new working program. ICC has done the same. Recently, the International Council for Commercial Arbitration (ICCA) has constituted a group of experts to study possible improvements in close connection with UNCITRAL and ICC. In the meantime the world goes on, and so, more than ever before, does international commercial arbitration. It is astonishing how the number of international arbitrations has been increasing during the last few years.

All this fully justified the decision of the American Bar Association, on the occasion of its one-hundredth anniversary, to deal with the subject of international commercial arbitration.

