Correspondence

Dear Editor:

The International Lawyer's custom to publish letters to the editor encourages me to send you some remarks on Professor Sanders's excellent review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (Peter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (13 INT'L LAW. 269))

It is interesting to note that few difficulties arose from the dreaded exception of *ordre public* in Art. V—this heralding a generally friendly attitude towards international arbitration—but most problems arose from the notion of "in writing" agreement in Arts. II, IV para. 1b. A closer look shows that these mostly arise from the confusing interpretation by the Italian courts, while the courts of other countries have found adequate, often too liberal solutions for the questions of references to another document or contracting through the intermediary of a broker, agent or proxy. The most stunting decision of the Italian *Corte di cassazione* is the Judgment of May 25, 1977 (3 YB Com. Arb. 279): the Court held that the question if the form "in writing" has been complied with is to be determined by the law applicable to the agreement, and, as this law had not been proven to the Court, by the *lex fori*—the requirements of which were not met—the claim for enforcement, therefore, was dismissed, although, in reality, the agreement had been valid under the applicable Dutch law!

It seems to me clear "as mud" that "in writing" must be construed autonomously, as has been done generally by the courts of the other Contracting Parties; otherwise, Art. II of the CFAA would be a step behind the Geneva Protocol. I agree with Prof. Sanders that a special protocol dealing with the form of the agreement to arbitrate, affording the cumbersome procedure of ratification—which Italy eventually might deny—will not be helpful in this special situation caused by the Italian jurisprudence. Its background seems to me to be psychological: the traditional Italian reluctance to foreign awards and foreign arbitrators, the Italian "arbitrophobia." In 1965, Italy made a reserve to Art. 19 of the European Convention on Establishment which guarantees the admission of foreigners who are nationals of a contracting party as arbitrators. Experience shows that it is difficult to do away with judicial resentment and prejudice by an international convention. Apart from the appeal emanating from comparative law, steps taken by the Italian legislator might be the shortest way to conformity of interpretation with the rest of the contracting parties. One might also think of soliciting an

advisory opinion of the International Court of Justice, although this is not a popular way of clarifying interpretation differences on international uniform law, and the only decision rendered in this matter by the International Court of Justice (Netherlands v. Sweden, ICJ Rep. 1958, 54, concerning the Hague Convention on Guardianship) was disappointing. But the successful experiment of the EEC countries to charge the European Court of Justice with the interpretation of the European Community law should encourage the use of international instances, predestined for the harmonization of mankind's common law. In the meantime, a lawyer can only discourage to contract agreements to arbitrate with Italian firms; at least for an EEC client it might be safer to rely on the European Convention on Competence and Enforcement.

The solution found in Art. II of the CFAA is not a perfect one, on the contrary: In some respects, Art. II is narrower than the Geneva Convention which prescribes the recognition and enforcement of an award under an agreement to arbitrate which is valid "under the applicable law" (Art. 1 para. 1, para. 2a). As some countries recognize oral agreements or agreements by silence to a confirmation letter (West Germany, for instance), awards might be unenforceable under the CFAA although enforceable under national law or bilateral treaties. Above all, a gap has been opened by the European Convention on International Commercial Arbitration. Its Art. 1 para. 2 extends recognition "in relation between States whose laws do not require that an arbitration agreement be made in writing" to "any agreement concluded in the form authorized by these laws." But, as the European Convention on International Commercial Arbitration does not extend the CFAA rules for enforcement to awards under such agreements, enforcement is only possible on the basis of the national law of the enforcement judge or bilateral treaties. Such was the case in the decision of the (West German) *Bundesgerichtshof* of May 25, 1970 (2 YB Com. Arb. 237), mentioned by Prof. Sanders, where enforcement was granted under German national law (but could not have been granted under the German-Austrian Enforcement Treaty of 1959). As bilateral treaties on recognition and enforcement between West and East European countries are exceptional, there is a gap to be closed.

De lege lata this might be done by continuing to apply the Geneva Protocol and Convention which allow enforcements of awards under agreements valid "under the applicable law," including the uniform law of the European Convention on International Commercial Arbitration. If Art. VII para. 2 of the CFAA proposes that the Geneva Protocol and Convention "shall cease to have effect between the Contracting States on their becoming bound and to the extent that they become bound by this Convention" this clause must not necessarily be construed in a temporal and territorial sense as most authors, including Prof. Sanders, do; it might also be interpreted as superseding the Geneva Convention *ratione materiae,* excluding the cases not covered by Art. II. I am aware that I am alone with this opinion. I can only cite Dr. Mezger as a possible ally, who holds that Art. 2 para. 2 and Art. 3 of the Geneva Protocol remain in force (1959 *Rabels Zeitschrift* 242 note 41).

De conventione ferenda, the vexating junction between Art. II and Art. IV para. 1b should be cut. There is no plausible reason to deny enforcement to an award based on an agreement which is declared valid by the uniform law set by an international convention—even by a country which has not acceeded to it—or held valid by both the national laws of the nationals of different countries, or valid by the common national law of residents of the same country. The necessity of such an extension of the scope of the CFAA is shown by some decisions, the liberal approach of which to Art. IV para. 1b may be doubted as to its conformity to the convention (e. g. Gerechtshof Rotterdam, June 26, 1970, 1 YB Com. Arb. 195; Landgericht Hamburg, Dec. 19, 1976, 2 YB Com. Arb. 235). In this connection, the bodies concerned with a reform of the CFAA should try to find a uniform rule for the determination of the law applicable to the arbitration agreement—an intricate and still unsolved problem which may emerge again when the recognition of agreements to arbitrate is extended.

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