HARMONISING ROLE OF THE NEW YORK CONVENTION

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Statement of Originality

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Acknowledgements

Producing this thesis was an experience of a lifetime that made me reflect on my strengths and weaknesses once again. Equally importantly, it was an experience that emphasised that the most important thing in life is the family. This was underscored not only by my family’s huge support in the dark times but also by the loss of my dear mother-in-law, Kevser. So, the last four years mean a lot to me beyond the academic progress I have made. Now, I would like to reflect on the people who have supported me through this journey.

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ABSTRACT

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Bihter Kaytaz Eker

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") has provided a unique legal framework for the recognition and enforcement of foreign arbitral awards and arbitration agreements. Having been adopted by 159 States at the time of this thesis, the New York Convention represents the most significant convention in the field. Having been in force almost 60 years, it is time to assess its meaning for international arbitration. This thesis first examines the contribution of the New York Convention to the development of arbitration to date and second explores whether it has a contemporary role to play. Focusing on both its contribution through its original objective and its effect on the development of a favourable attitude towards international arbitration by courts and legislators, the study demonstrates that the New York Convention has had an impact beyond that which its drafters intended. Regarding its contemporary relevance, the thesis argues that persistent issues in the enforcement of arbitral awards proves that the New York Convention has no active relevance for contributing to facilitate enforcement of arbitral awards.
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INTRODUCTION

Scope of the Thesis and Research Questions

This thesis focuses on the harmonising effect of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “the New York Convention” or “the NYC”) in the field of arbitration. It will challenge the harmonising role of the NYC in the edifice of international arbitration. To be able to achieve this, the main research questions that will be addressed by this study are:

i. What was the scope of harmonisation intended by the drafters of the NYC;

ii. What is the harmonising effect of the NYC in reality;

iii. What is the contemporary relevance of the NYC for further harmonisation in the field of arbitration.

To be able to address the first main research question, the thesis will focus on the tools of harmonisation and their benefits in the period when the NYC was negotiated and agreed, and the improvements under the NYC at the time of its birth through an analysis of its main provisions, i.e. Articles I to VII. Thereafter, the thesis will review both the application and interpretation of the NYC by the courts of Member States and the national legislative changes in Contracting States, to reveal the harmonising effect of the NYC in practice and thereby to determine whether its role has evolved from its basic form. Finally, for the last research question, the thesis will engage with the recent calls for a new Convention and responses to such calls and discuss what tools of harmonisation should be used to update the regime of the NYC.

Background to the Thesis

After 60 years, it is time to take a step back and look at the bigger picture, i.e. the role of the NYC in the future development of the international commercial arbitration enforcement system. Here, it would be useful to briefly determine what ideas exist in relation to the issue.
It would be fair to say that there is consensus that it has been “the most effective instance of international legislation in the entire history of commercial law”.¹ Professor Graving has summarised its success very well:

The mortar in the edifice of international commercial arbitration remains the New York Convention. Designed as a universal charter for the partial unification of national law in an area of transnational activity, it has been described as an exemplar of successful private international law making [...]. It would be difficult to exaggerate the Convention’s critical importance to international arbitration [...]. Without this support in public international law, the international arbitral institutions would find their custom minimal, and their product of limited circulation, confined mostly to markets described by their respective national boundaries.²

This thesis argues that in addition to this well-known intended impact, the NYC also has influenced the development of international arbitration, by focusing on both judicial interpretations and national legislative changes. This study will demonstrate in detail that the NYC has had a revolutionary impact on courts, which now display a pro-enforcement bias in their application and interpretation of the NYC. Secondly, this study will argue that the Convention has had an inspirational and formative role in influencing Contracting States to change their national laws. From this point of view, this thesis argues that the initial reformist role of the NYC has evolved to serve a larger agenda that radically changed the field of arbitration.

On the other hand, the most relevant debates regarding the relevance of the NYC in the future development of the field are those that discuss the needs of international arbitration and the limitations of the NYC. In this regard, Judges Holtzmann and Schwebel propose as a vision for this century the creation of a new international court that would replace national courts as the authority responsible for determining the enforceability of arbitral awards.³ Judge Holtzmann’s argument is

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premised on the view that “[n]otwithstanding its widespread acceptance, the New York Convention falls short of achieving complete internationalization”, because of the fact that while laying down limited grounds for refusing enforcement, it “leaves the function of determining whether those grounds exist to the municipal court of the State where recognition and enforcement is sought”, making the role of municipal courts in the enforcing country decisive in determining the enforceability of foreign arbitral awards.⁴ He explains the practical effect of the involvement of municipal courts in the enforcement of foreign arbitral awards by noting that the winning party is at risk of being disadvantaged while the losing party, who might be familiar with the legal system and language if enforcement is sought in its country, could be favoured by the municipal court.⁵ He points out that this risk is significantly higher when the losing party is a State entity or when the outcome affects the national economic interest of the country of the losing party.⁶ He raises concerns that the mechanisms that parties may devise to absorb such risk, such as letters of credit, performance bonds or other forms of contractual guarantees, may make transactions more complex and costly.

Judge Schwebel accepts the need for a new international court, indicating that there is no international court to which a private party can appeal the disposition of a national court towards a challenge to the recognition and enforcement of foreign arbitral awards.⁷ Having recognised two facts – first, in most cases no issues appear regarding the enforceability of awards due to the high rate of compliance with the award amongst parties, and secondly, many cases reported in the Yearbook Commercial Arbitration revealed that courts before which enforcement of an award is sought under the NYC rarely refuse to recognise and enforce arbitral awards – Judges Holtzmann and Schwebel claim that creating a court for resolving disputes over the enforceability of arbitral awards would (i) “promote uniform standards and predictability”, (ii) “avoid the delays that are often experienced in crowded municipal courts where it can take years to reach a final judgement” and (iii) “facilitate international trade and investments by reducing the risks and uncertainties that

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⁴ Holtzmann, H., Ibid, pp. 110,111.
⁵ Ibid, p.111.
⁶ Ibid.
⁷ Schwebel, S.M., Supra n.3.
business people fear when they must submit their affairs to the court of a foreign country". More importantly, they argue, such a court would solve the problem of interim measures under the existing regime of the NYC, as interim measures could be effectively and quickly obtained before it. If so, this argument is indeed significant in that it draws attention to the limited ability of the NYC to promote further harmonisation in the field of arbitration.

Another debate discussing the needs of international arbitration and the limitations of the NYC has developed around the discussion on the proposal by Professor van den Berg for a new New York Convention. In 2008, Professor van den Berg proposed a ‘new’ NYC in the form of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, reasoning that it was in need of modernisation on a number of grounds, including:

- the need to add provisions on some issues (e.g. definition of the scope of application with respect to agreements falling under the referral provisions of Article II(3); a waiver by a party of its right to resist on a ground for refusal of enforcement; a reference to the arbitration agreement under Article VII(1));
- the need to revise some of its provisions (e.g. the written form under Article II(2) as it is stricter than any national law; the refusal of enforcement on the ground of a setting aside on any ground in the country, as this could lead to a broadening of the grounds for refusal);
- the lack of clarity of some expressions (e.g. the phrase “the award not considered as domestic” under Article I(1); “duly authenticated original award” under Article IV(1); the word “may” in the English version of Article V; “terms of submission” and “scope of submission” to arbitration in Article V(1)(c); a “suspended award” in Article V(1)(e); the reference to “any interested party” in Article VII(I)(1));
- out-of-date provisions (e.g. reference to “permanent arbitral bodies” in Article I(2); reference to the law under which the award was made under Article V(1)(e)); and

8 Holtzmann, H., Supra n.3, pp.113,114.
9 Ibid, p.113.
the need to conform some provisions to the existing judicial interpretation (e.g. the public policy under Article V(2), which has been interpreted broadly to mean international public policy).¹⁰

Mainly two views have appeared in the literature: Few are in favour of drafting a new Convention. The majority of scholars have expressed opposition to this suggestion. For instance, Gaillard cites the “three NOs: there is no need, no hope and no danger”, recalling that Article VII of the NYC is there to allow development of arbitration law in a more liberal direction than its standards.¹¹ Similarly, Veeder indicates that problems in practice could be dealt with by interpreting the NYC in “good faith”.¹² It is explicit how these arguments serve the purpose of this study. Either view proves that the NYC has reached the limits of its ability to contribute to the further development of arbitration.

There are a number of issues calling for a remedy for predictability and certainty. One is the issue of enforcement of annulled arbitral awards as it presents interesting cases. Another matter is the issue of the procedure for actual enforcement inherent in the present regime of the NYC, which allows the enforcing country to enforce foreign arbitral awards by procedures not substantially more onerous than those applicable to domestic awards. Within this context, Professor Brekoulakis rightly concludes that “the New York Convention will, from now on, hold more of a historical rather than an active relevance to the enforcement of arbitral awards, and the further development of arbitration”.¹³ This study will review the findings of the 2008 Survey conducted by Queen Mary University of London, revealing how the business world has responded in practice and the impact of those reactions on the efficiency of arbitration, and highlighting the limitations of the NYC in this regard.

Overall, this thesis will move from an analysis of the achievements of the NYC and inefficiencies in the circulation of arbitral awards to a wider examination of the proposition that the NYC no longer has dynamic significance for shaping and developing international arbitration. Putting the role and significance of the NYC in the

¹³ Brekoulakis, S., Supra n.1 p. 440.
right context is necessary for directing attention and effort to the right sources for further development in the field.

**Methodology**

The method adopted to answer the aforementioned research questions was doctrinal research, as the arguments presented in this study would gradually develop through the process of data collection and analysis. Primary and secondary sources were used to collect data on the main focus of the study, which is the role of the NYC in the edifice of international arbitration.

To be more precise, the predecessors of the NYC (i.e. the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927), official records of discussions and negotiations during the process of creating the NYC and scholarly publications were reviewed in relation to the emergence of the NYC and its significance at its birth.

In searching for the achievements of the NYC and thereby for information about the evolution of its role over time, and in considering whether it will continue to have any further role in the future, attention was paid to court decisions and national legislative changes. With respect to the former, this study reviewed court decisions on the application of the NYC which have been reported in the International Council for Commercial Arbitration (ICCA) Yearbook of Commercial Arbitration over the last 40 years, from which a careful selection of cases has been provided. In relation to national legislative changes, the impact of the NYC on the UNCITRAL Model Law was reviewed with the aim of understanding its impact on national laws, i.e. whether or not national legislative changes occurred adopting the UNCITRAL Model Law. To assess its impact on legislative change in jurisdictions which have not adopted the Model Law, the focus was directed to arbitration laws in major arbitration centres such as France, Switzerland, England and Sweden. Secondary sources such as books, journal articles and online sources also were used to examine this issue.

**Synopsis of the Thesis**

This thesis is divided into two parts.

Part I consists of two chapters that aim to reveal the original purpose of the NYC. Chapter 1 examines the harmonising tools preceding the NYC with the aim of
providing an overview of the circumstances within which it emerged. Chapter 2 examines the objective of the NYC, detailing the improvements it offers over its predecessors, i.e. Geneva Treaties.

Part II consists of three chapters and examines the contributions made by the NYC to the development of arbitration and the limitations on its ability to further improve the efficiency of international arbitration. Through an analysis based mostly on a review of court decisions from different jurisdictions, Chapter 3 addresses the achievements of the original objective, focusing on the harmonisation of arbitration concepts in terms of both the recognition and enforcement of foreign arbitral awards and the standards for enforceability of arbitration agreements. The analysis under this chapter will demonstrate not only the uniform application of the rules of the NYC by the courts in cases where their national laws are less favourable, but also the effort of the courts to develop harmonised concepts on various issues with regard to critical aspects of the NYC. Chapter 4 explores whether the NYC has had a harmonising effect beyond its envisaged scope of application. Towards this end, national enactments are examined with the purpose out of determining whether it has been modelled both for matters for which it contains no rule, thereby requiring it to be supplemented by national law, and also for matters in relation to which it refers to national law explicitly. Chapter 5 will focus on recent debates and calls for a new convention and some issues affecting the efficiency of arbitration and the circulation of arbitral awards, to challenge the role of the NYC for further contribution to the circulation of arbitral awards and the efficiency of international arbitration in the settlement of private law disputes.

Finally, in the Conclusion, the main findings of the study are summarised and some suggestions are offered on what tools of harmonisation should be used to fix the regime of the NYC.
PART I: THE INTENDED EFFECT OF THE NEW YORK CONVENTION
AT THE TIME OF ITS BIRTH

INTRODUCTION

The concept of harmonisation refers to a process aiming at approximating different legal systems through sets of rules tailored to the needs of international trade. Such process is necessary to overcome uncertainties and differences of national laws that are not responsive to the needs of international trade, particularly in an environment where international relations are frequent. In the context of arbitration, the increase in international commerce and intense recourse to arbitration after the 2nd World War rendered a further work for harmonisation in the field of arbitration a necessity, which resulted in the NYC in 1958. This Part aims at revealing the scope of harmonisation intended by the drafters of the NYC at the time of its birth, with the purpose of the address of the first research question. To be able to achieve this, tools of harmonisation at the time of the drafting the NYC and reactions to their shortcomings will be addressed first. Then, Chapter 2 will focus on the improvements aimed with the regime of the NYC over the regime existing at that time.

CHAPTER 1: HARMONISATION TOOLS PRECEDING THE NYC

To be able to understand reforms aimed by the NYC at the time of its birth, it may be useful to overview the harmonising tools which regulated the issue of recognition and enforcement of arbitration agreements and arbitral awards before the NYC came into force. Then, this Chapter will start with a brief overview of circumstances leading up to harmonising tools preceding the NYC, namely the Geneva Protocol on Arbitration Clauses (herein after ‘the Geneva Protocol’)¹⁴ and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (herein after ‘the Geneva Convention’)¹⁵, and continue with innovations envisaged through main provisions of these tools and their shortcomings. Finally, this chapter will overview reactions to the shortcomings of

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the Geneva Treaties, to be able to understand in what atmosphere the NYC was drafted.

1.1 Circumstances Setting the Stage for the Geneva Protocol and the Geneva Convention

The rise of State sovereignty in the 18th century led to changes in relation to arbitration, which existed without control by the judicial mechanisms and national laws of sovereign states by then. States’ increasing desire to control activities occurring in their jurisdiction resulted in some domestic legislations for arbitration, which were not responsive to the needs of the business world. They were mostly “antiquated” and differed from each other, and judicial authorities perceived arbitration as a “rival” to their authority. Neither legislations nor courts were willing to “recognise that the commercial world was agreeing to arbitration as part of their business decisions”. Such anachronistic stance that falls short of expectations was clear from the difficulties in relation to the status of arbitration agreements and the recognition of arbitral awards.

To start with the obstacles in the context of the status of arbitration agreement, national laws mostly either perceived the arbitration agreement itself as a threat or recognised arbitration agreement in a way not reflecting trade practice. Within the context of the former, the Italian Code of Civil Procedure, which provided under Article 69 that “[t]he jurisdiction [of courts] cannot be prorogued by the parties,

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Such judicial scepticism actually was rooted in a wide range of bias. First, there was a perception that “every activity which occurred within a jurisdiction should be within the purview of the state law and court”; secondly, “a realistic possibility and concern that an alternative mechanism would erode the authority of and respect for the national courts’ jurisdiction” appeared; finally, there was judicial jealousy towards this alternative method of dispute resolution, which settled disputes in a more effective manner. Lew, J.D.M., Supra n.16, p.183.
20 Van den Berg, A.J., Supra n.18.
except in the cases established by the law”, except in the cases established by the law”,21 exemplified the antagonism towards the nature of arbitration agreements.22 Thus, any agreement displacing the court jurisdiction with respect to matters of public policy was deemed as null and void.23 This rule was applied not only to agreements for arbitration in a foreign country that were between Italian parties and to be performed in Italy, but also to agreements for foreign arbitration that were between parties who were foreigners or in which one party was Italian if the agreement was to be performed in Italy or if the parties were domiciled in Italy.24 In respect to the latter, it is necessary to note that in trade practice, parties might either agree that future disputes between them would be determined through arbitration either by inserting an arbitral clause in a contract or by referring in the contract to standard conditions containing an arbitration clause or submit an existing dispute to arbitration by means of entering into agreement. And, only in a few States25 did the law recognise arbitration agreements in a manner reflecting the trade practice. National laws mostly allowed parties to agree arbitration only for existing disputes while excluding any future disputes from the scope because the natural courts could determine those as natural judge.26 For instance, in the US, where arbitration was not believed to provide fair results and was perceived as jeopardising “the livelihood of all those who relied on the court system” until the early 20th century, agreements to arbitrate future disputes were revocable, while agreements to submit existing disputes to arbitration were irrevocable under the legislations of many states.27 Also, in Latin American countries, future disputes could

21 Lorenzen, E.G., Supra n.17, p.747.
22 Ibid, p.747
24 Ibid, pp.747-748.
25 For instance, the German Code of Civil Procedure of 1877, which shifted the initial attitude of Germany that had been influenced by “growing jealousy of the ordinary courts with respect to arbitral procedure” and adversely affected the development of arbitration to such an extent that the practice of submitting disputes to arbitration had almost faded away, permitted agreements both to refer future disputes to arbitration and to submit existing disputes to arbitration. Similarly, in England, the approach under the Common Law Procedure Act 1885, which entitled courts to stay proceedings if the party commencing the court proceeding agreed to refer the dispute to arbitration, covering both existing and future disputes, was consolidated through the Arbitration Act of 1889, which made arbitration into a “systematic code of law”. See Ibid, pp.718, 721. See also, Noussia, K. (2010), Confidentiality in International Commercial Arbitration- A Comparative Analysis of the Position under English, US, German and French Law, Springer, pp.12, 13.
26 Van den Berg, A.J., Supra n.18.
not be submitted for arbitration. Similarly, under the French law of arbitration, the Code of Civil Procedure, arbitration agreement were required to specify the matters in dispute and the names of the arbitrators to be valid, thus excluding future disputes. 

The rationale for excluding future disputes from arbitration on the basis of a bias that every activity which occurred within a jurisdiction should be within the purview of the state law and court was confirmed by the Court of Cassation in France, indicating a widespread concern that to allow their submission could deprive the parties to future disputes of the guarantees that the courts afford.

Within the context of the difficulties on enforcement of arbitral awards, which emerged in parallel with that the mechanism to settle disputes in the guilds or merchant courts of fairs, which was based on moral force, fell short of securing the enforcement of arbitral awards as more and more nations declared sovereignty, the business community encountered the difficulty that every country handled enforcement differently, taking account of not only its own national law on the recognition of foreign awards, but also other political factors that might have been relevant. More precisely, some States did not include a provision for the enforcement of foreign arbitral awards while laws of States including provision in this context diverged on the conditions for the enforcement of the foreign awards. Furthermore, States mostly treated foreign arbitral awards in the same way as foreign judgements by counting arbitral awards as a dictum of the legal system of the country where arbitration took place, and therefore required reciprocity. On the other hand,

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32 Supra n.19, p.18.
although a number of States avoided the reciprocity requirement by emphasising the contractual nature of arbitration, they caused other difficulties by requiring an action to obtain an enforceable judgement on the award.\textsuperscript{35} In addition, there was a common perception in States where arbitration was allowed that judges were entitled to make the final determination on the dispute and could review the conclusions made by the arbitral tribunal.\textsuperscript{36} All these caused impracticalities and uncertainty for the business community.

Despite of the above-mentioned difficulties, which were mainly due to a sceptic, hostile and interventionist mindset, which regarded arbitration as “an exception rather than as a right”,\textsuperscript{37} international arbitration not only survived as a dispute resolution method but also gained importance by the early 20\textsuperscript{th} century. This was mainly due to the key features of arbitration, namely speed, low cost, the neutrality and expertise of the arbitrator, the “centrality of parties’ agreement to arbitration”, which bridges the gap between different law systems by enabling the parties to determine issues like the place of arbitration, the language of arbitration, the rules to be applied in the resolution of the dispute, the composition of tribunal, and the confidentiality of proceedings, particularly in comparison to litigation.\textsuperscript{38} The great distrust towards the former enemy’s court after the World War I confirmed that the sustainability of business highly depended on the replacement of state court adjudication with a reliable arbitration mechanism.\textsuperscript{39} This increased the thought that ever increasing need for legal force to ensure both the enforcement of arbitration clauses and the enforcement of arbitral awards should be satisfied through an international agreement, and triggered efforts to assure legal sanctions for international commercial arbitration in the early 20\textsuperscript{th} century.\textsuperscript{40}

\textsuperscript{36} Lew, J.D.M., \textit{Supra} n.16, p.184.
\textsuperscript{37} \textit{Ibid}, pp.183-184.
To be more specific, following initial calls for such measure, which were made at the International Congresses of Chambers of Commerce in Milan in 1904 and in Paris in 1914 and at the meeting of the International Federation of Cotton Industries in Boston in 1912,41 the International Chamber of Commerce (ICC)42, recommended to increase the efficacy of arbitration by encouraging an international convention which would remove one of fundamental hurdles at that time, namely “the unenforceability of arbitral clause, referring future disputes to arbitration”.43 These calls yielded results with the approval of the Geneva Protocol44 and the Geneva Convention45 after the League of Nations undertook all initiatives to deal with these matters.46

1.2 The Geneva Protocol and the Geneva Convention

Innovations envisaged through the Geneva Protocol and the Geneva Convention were basically to promote international validity and enforceability of arbitral clauses and to secure international enforceability of arbitral awards respectively.

The Geneva Protocol, which was comprised of eight articles, primarily aimed to lead to “the transnational recognition of arbitration clauses”.47 It imposed an obligation on the courts of Contracting States to recognise arbitration clauses and arbitration agreements that were made between parties subject to jurisdictions of different Contracting States. To that effect, courts of Contracting States invoked in disregard of an arbitration agreement were obliged to refrain from determining the merits of a dispute covered by certain arbitration agreements and to refer the parties to arbitration, except in cases where the agreement or arbitration cannot proceed or becomes inoperative.48 According to this, an arbitration agreement would be recognised by any Contracting State, regardless of the character of subject matter (e.g. an existing or future dispute, a commercial or any other arbitrable issue) and

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41 Nussbaum, A., Supra n.38, p.220; Supra n.31, p.4.
42 The ICC was created in 1919 by a group of entrepreneurs who called themselves “the merchants of peace” and who believed that the private sector should govern international commerce without waiting for the governments to revive economic prosperity. ICC History-Merchants of Peace, available at http://www.iccwbo.org/about-icc/history/ (accessed on 19 July 2015).
44 Supra n.14.
45 Supra n.15.
46 Van den Berg, A.J., Supra n.18.
47 Supra n.39.
48 Supra n.14, Article 4.
regardless of whether the country where arbitration would take place was the one that the parties were subject to.\textsuperscript{49} In this way, the Geneva Protocol sought “to prevent any action from being brought in any Contracting State between nationals of different Contracting States on a contract containing an arbitration clause”,\textsuperscript{50} the validity of which was controversial by that time. Arbitration agreements relating to future disputes would not be discriminated against; rather, they would be equally recognised as agreements relating to existing disputes. Besides, the Geneva Protocol expressed enforcement of arbitral awards as an obligation for the first time.\textsuperscript{51} Article 3 of the Geneva Protocol obliged each Contracting State to enforce awards made within their own territory.

Because the Geneva Protocol stayed silent about the enforcement of arbitral awards in territories other than the Contracting State where the award was made, enforcement of an arbitral award made in another country remained chaotic, which required another treaty to deal with “international enforcement of foreign arbitral awards”.\textsuperscript{52} Thus, the Geneva Convention came up after the Geneva Protocol, which was the first step towards harmonising the approach to arbitration, to be a complementary text of the Geneva Protocol.\textsuperscript{53}

The Geneva Convention, which was “the first multilateral treaty referring to foreign arbitral awards”,\textsuperscript{54} compelled each Contracting State to recognise and enforce awards rendered in a foreign jurisdiction in pursuance of an arbitration agreement falling under the Geneva Protocol, subject to certain conditions,\textsuperscript{55} but without the judicial review of the merits of foreign arbitral awards in the enforcement proceedings.\textsuperscript{56} Moreover, it made an effort to guarantee the recognition and enforcement of arbitral awards to the greatest extent possible by stating that the provisions of the Geneva Convention “shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed

\textsuperscript{49} Ibid, Article 1.
\textsuperscript{50} Lorenzen, E.G., \textit{Supra} n.17, p.751.
\textsuperscript{52} Wolff, R., \textit{Ibid}, pp.10-11.
\textsuperscript{53} \textit{Supra} n.15.
\textsuperscript{54} Wolff, R., \textit{Supra} n.51, p.11.
\textsuperscript{55} \textit{Supra} n.15, Article, 1; Nussbaum, A., \textit{Supra} n.38, pp.221,222.
by the law or the treaties of the country where such award is sought to be relied upon”.  

With the rise of international trade through the initiatives taken by the Western world to revive the economy after the Second World War, the number of international commercial disputes naturally increased, and intense recourse to arbitration to settle disputes arising out of international transactions disclosed the shortcomings of the Geneva Treaties, in a world in which the international political landscape changed and the collapse of colonialism brought a lack of confidence in fairness and impartiality of hearings before a dispute settlement forum, particularly when one of the parties was from a former colony and the other was from an old colonial powers.  

The Geneva Treaties were not satisfying due to a number of reasons. Some shortcomings were observed for both of them. First, they were restricted in terms of their scope of application. To be more precise, Article 1 of the Geneva Protocol included a “diversity-of-citizenship clause”, thereby applying only to disputes between parties, each of whom was subject to the jurisdiction of different Contracting States. Thus, the Geneva Protocol did not cover agreements between nationals of one Contracting State for arbitration in another Contracting State. Nor did the Geneva Protocol cover arbitration agreements between parties who were subject to non-Contracting States. Also, the requirement “between parties subject respectively to the jurisdiction of different Contracting States” was ambiguous whether this was based on nationality, domicile or another criterion. Because the interpretation of the clause depended on one’s view of the main criterion for jurisdiction, the extent of the requirement remained controversial. Moreover, the Contracting States were allowed to limit the obligation to recognise and enforce arbitration agreements to those agreements which were defined as commercial under their national laws, with a notification to the Secretary-General of the League of Nations, and this was exploited

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57 Supra n.15, Article 5.
58 Supra n.31, p.8; Lew, J.D.M., Supra n.16, pp.183-184.
60 Nussbaum, A., Supra n.38, p.234.
61 Lorenzen, E.G., Supra n.17, p.750.
62 Contini, P., Supra n.27, p.289.
63 Nussbaum, A., Supra n.38, p.235.
64 Supra n.14, Article 1.
by a number of Contracting States.\textsuperscript{65} As the Geneva Convention was applicable to arbitral awards in pursuance of arbitration agreements covered by the Geneva Protocol, deficiencies with respect to the applicability of the Geneva Protocol indirectly limited the applicability of the Geneva Convention.\textsuperscript{66} Accordingly, the Geneva Convention was not applicable either to arbitral awards which were related to arbitration agreements between parties subject to the same jurisdiction of one Contracting State for an arbitration in another Contracting State or to arbitral awards rendered regarding a dispute in which at least one of the parties was subject to a non-Contracting State.\textsuperscript{67} Again, the rule that the exclusion of non-commercial matters from the application was at the discretion of each country under the Geneva Protocol had a restrictive effect on the applicability of the Geneva Convention.\textsuperscript{68} Additionally, the awards rendered in a non-Contracting State remained outside the protection of the Geneva Convention, due to a reciprocity requirement. This was heavily criticised on the ground that such a requirement might have had justification for the recognition and enforcement of foreign judgements, but it was indefensible in the context of the recognition and enforcement of arbitral awards, which rest upon the parties’ agreement.\textsuperscript{69} Apart from the scope of application, the Geneva Protocol did not address the question of which law governed the validity of the arbitration clause or arbitration agreement.\textsuperscript{70} Considering the variety of approaches taken by national laws regarding the formal validity of arbitration agreements, there was a degree of uncertainty under the Geneva Protocol in this regard.\textsuperscript{71} Also, there was an ongoing risk of parallel proceedings before an arbitral tribunal and a court if a court concluded that an arbitration clause or arbitration agreement was invalid by applying a different law than the one applied by the arbitral tribunal.\textsuperscript{72} For instance, the law applicable in Belgium for establishing the validity of an arbitration clause or arbitration agreement required it to comply with the mandatory rules of the law of the parties and the law of the place of arbitration and international public order of the forum, and the fact that Belgian courts applied the local law for determining the validity of arbitration clauses and

\textsuperscript{65} Lorenzen, E.G., \textit{Supra} n.17, p.750.  
\textsuperscript{66} Nussbaum, A., \textit{Supra} n.38, p.230.  
\textsuperscript{67} \textit{Ibid}, p.230.  
\textsuperscript{68} \textit{Ibid}.  
\textsuperscript{69} Contini, P., \textit{Supra} n.27, p.289.  
\textsuperscript{70} \textit{Supra} n.39, pp.40, 41; Van den Berg, A.J., \textit{Supra} n.18, p.172.  
\textsuperscript{71} Van den Berg, A.J., \textit{Supra} n.18, p.172.  
\textsuperscript{72} \textit{Supra} n.39, p.39.
agreements with their understanding of the international public order broadly increased the risk of parallel proceedings in Belgian courts and arbitral tribunals abroad.\textsuperscript{73} The Geneva Convention did not assist in this context, either, since it required the party claiming enforcement of an arbitral award, when necessary, in addition to documents supporting such request, to supply evidence to prove that the validity of the arbitration clause or arbitration agreement must be established “under the law applicable thereto”.\textsuperscript{74} Then, the validity of the arbitration clause or arbitration agreement continued to be governed by the law applicable under the conflict of law rules of forum.\textsuperscript{75} Finally, another common difficulty was in relation to the rule governing the arbitral procedure. The Geneva Protocol left the arbitral procedure, including the constitution of arbitral tribunal, to be governed by the will of the parties and the law of the country where arbitration took place,\textsuperscript{76} and the Geneva Convention required the party seeking enforcement, when necessary, in addition to documents supporting the request for enforcing an arbitral award, to supply evidence to prove that arbitral award was made by the arbitral tribunal constituted in the manner agreed by the parties and in compliance with the law governing the procedure.\textsuperscript{77}

In addition to these common shortcomings, the Geneva Convention came in criticism for other reasons specific to the recognition and enforcement of foreign arbitral awards. The troublesome points in this context may be broadly divided in three categories: the procedure for recognition and enforcement of foreign arbitral awards, the requirements to be observed when applying for recognition and enforcement of foreign arbitral awards and the grounds on which the recognition and enforcement of awards shall be refused.\textsuperscript{78}

To start with the procedure for recognition and enforcement of foreign arbitral awards, the Geneva Convention unconditionally left the procedure for recognition and enforcement of foreign arbitral awards to the rules of the procedure of the country where enforcement of arbitral award was sought, by providing that “an arbitral award […] shall be recognised as binding and shall be enforced in accordance with the rules of

\textsuperscript{73} Ibid, p.41.
\textsuperscript{74} Supra n.15, Articles 1(2)(a) and 4(1)(3).
\textsuperscript{75} Supra n.39, p.41; Nussbaum, A., Supra n.38, p.235.
\textsuperscript{76} Supra n.14, Article 2.
\textsuperscript{77} Supra n.15, Articles 1(2)(c) and 4(1)(3).
\textsuperscript{78} Ibid, Articles 2,3 and 4.
the procedure of the territory where the award is relied upon”. Applying the *lex fori* to the procedure for the recognition and enforcement of foreign awards without setting any limits was inconvenient, as there might be delays or impracticalities “because of unduly complicated enforcement procedure”.80

Within the context of the conditions to obtain enforcement and refusal grounds, the Geneva Convention mostly relied on national laws. Such framework was believed as essential for an international legislative framework to be recognised by Member States for the recognition and enforcement of foreign arbitral awards;81 however, this exposed the enforcement of arbitral awards to local differences in national provisions and practices.82

To start with the conditions that the party claiming enforcement of an award must meet, which (i) were “arduous” for the party seeking enforcement and (ii) exposed the applicant to the parochial policies established by States by means of treaties and domestic laws,83 one of the formal requirements was that the party seeking enforcement had to supply the original award, or a copy thereof duly authenticated according to the requirements of the law of the country where it was made. This left the authentication of the copy to the law of the country where the award was made. Another condition was that the party seeking enforcement had to supply documentary or other evidence to prove that the award had become final, in the sense defined by the Geneva Convention, in the country where it was made.84 Accordingly, an award would not be considered final as long as it was open to opposition, appeal or *pourvoi en cassation*, or it was proved that any proceedings for challenging the validity of the award were pending.85 In this regard, proving the finality of arbitral awards in the country where the award was made was to be satisfied by the party seeking their enforcement,86 which presented a clear difficulty and uncertainty for the party seeking enforcement under the Geneva Convention on a number of reasons.87 Firstly, it was cumbersome because this meant that a notice of the award must be given in the

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80 Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Note by the Secretary-General, 6 March 1958, UN DOC E/CONF. 26/2, p.4.
81 Wolff, R., *Supra* n.51, p.12.
83 Wolff, R., *Supra* n.51, pp.12, 209.
84 *Supra* n.15, Articles 4(1)(2) and 1(d).
87 Contini, P., *Supra* n.27, p.289.
country where the award was rendered, to initiate the legal period in which recourse was available before its enforcement could be sought abroad.\textsuperscript{88} In some jurisdictions, there was no time limit for initiating this procedure.\textsuperscript{89} Secondly, the forms of procedure, namely “appeal or pourvoi en cassation”, were specified only in European countries, and this caused uncertainty as to the effect of other means of recourse, not only in those countries but also in other countries whose laws established other means of recourse.\textsuperscript{90} Thirdly, the mere application to contest the validity of an award in the country where it was rendered was sufficient to refuse enforcement of the award in other Contracting States, which made it far too easy to delay enforcement proceedings.\textsuperscript{91} In addition to these difficulties, the requirement to prove that the award had become final in the country where it had been made constituted a double exequatur, since most national laws did not provide for a certificate of “finality” other than declaring that the award was enforceable in that country.\textsuperscript{92} Thus, the obligatory force of an arbitral award outside of its country of origin was subject to a declaration by the country of origin of the executory force of the award under its own law.\textsuperscript{93} And, since the national laws of some countries required courts to assume jurisdiction if a defendant either had presence or some assets in that country, the prevailing party was at risk of not being able to obtain the enforcement in the country of origin because of the lack of jurisdiction of the courts in that country,\textsuperscript{94} which would obstruct an application for enforcement in other countries. Clearly, this condition was a real obstacle to the desired expeditious method for enforcing foreign arbitral awards.\textsuperscript{95}

It was apparent that the Geneva Convention relied on national laws with respect to the refusal grounds, from that it compelled national courts to refuse recognition and enforcement of foreign arbitral awards not only if the award did not


\textsuperscript{89} Ibid.

\textsuperscript{90} Ibid.

\textsuperscript{91} Van den Berg, A.J., Supra n.18, p.353.


\textsuperscript{93} Paulsson, J., Supra n.34, p.9.

\textsuperscript{94} Supra n.92, p.146.

\textsuperscript{95} Mustill, M., Supra n.1, p.49.
meet the above-mentioned conditions\textsuperscript{96} but also if following grounds were present: (i) the subject matter of the award was not capable of settlement by arbitration under the law of the country where the award was sought to be relied upon; (ii) the recognition and enforcement of the award was contrary to the public policy or the principles of law in the country where it was to be relied upon; (iii) the award had been annulled in the country where it was made.\textsuperscript{97} Among these grounds, the public policy ground with a reference to “principles of law” particularly prompted complaints by some commercial bodies, since it was sometimes used as a justification for virtually retrying the dispute and therefore frustrated the purpose of arbitration agreement.\textsuperscript{98} Additionally, the Geneva Convention allowed the parties against whom the award was made to resist recognition and enforcement of arbitral awards if there was a further ground under the law governing the arbitration procedure, entitling the party against whom the award had been made to contest the validity of the award in a court of law.\textsuperscript{99} The possibility of contesting the validity of the award on grounds other than those enumerated in the Geneva Convention not only facilitated obstruction of the enforcement of the award by the recalcitrant party,\textsuperscript{100} but also permitted the party contesting the recognition and enforcement of arbitral award to relying on national idiosyncrasies and procedures which did not mirror predominant trends.\textsuperscript{101}

Aside from the above-mentioned hurdles respecting the conditions for enforcement and grounds for refusal, the Geneva Convention did not answer the question of whether the enforcing court had to examine the conditions to be observed when applying for recognition and enforcement of foreign arbitral awards and refusal grounds \textit{ex officio} or by request of one of the parties.\textsuperscript{102} Lack of guidance in this respect left this question to the court of the country where recognition and enforcement was being sought.

\textsuperscript{96} Supra n.15, Article 1.
\textsuperscript{97} Ibid, Articles 1(2)(b) and (e) and 2(a).
\textsuperscript{98} Comments by Governments on the draft Convention on Recognition and Enforcement of Foreign Arbitral Awards, UN DOC E/2822/Add.4, twenty-first session, item 8, 3 April 1956, p.7.
\textsuperscript{99} Supra n.15, Article 3.
\textsuperscript{100} Contini, P., \textit{Supra} n.27, p.289.
\textsuperscript{101} Supra n.31, p.8; Wolff, R., Supra n.51, p.12.
\textsuperscript{102} Wolff, R., \textit{Ibid} n.51, p.243.
1.3 Reactions to the Shortcomings of the Geneva Treaties

The difficulties with the Geneva Treaties required “a new beginning”, which set in motion the ICC.\(^{103}\) Having been honoured with “the highest level consultative status” within the newly-established United Nations,\(^{104}\) the ICC requested the United Nations to undertake the function of the League of Nations in respect to arbitration and establish an efficient system that would immediately guarantee the recognition of arbitration agreements and awards with which the party did not comply voluntarily.\(^{105}\)

In 1953, the ICC proposed the Preliminary Draft Convention on Enforcement of International Arbitral Awards, which defended the idea of a “truly international arbitral award”\(^{106}\) and enabled the enforcement of arbitral award based on the will of the parties spontaneously,\(^{107}\) in the hope that it would be followed by “an international conference with a view to obtaining the adoption of a new international system of enforcement of arbitral awards”.\(^{108}\)

To be more specific, the ICC Draft wisely identified its scope of application that it would apply to “commercial disputes between persons subject to the jurisdiction of different States or involving legal relationships arising on the territories of different States”,\(^{109}\) thus attracted the attention to the international nature of the dispute rather than the question of where the awards was made. This means that it offered same regime for recognition and enforcement of arbitral awards in international character, regardless of whether the award was made in the territory of one of the Contracting State and concerned a dispute between persons who were subject respectively to the jurisdiction of different Contracting States, or whether the award was made abroad or in the country where the enforcement was sought.

In the context of the conditions to obtain enforcement and refusal grounds, compared to the Geneva Treaties, the ICC Draft considerably detached international arbitration from national laws and reduced the influence of national idiosyncrasies on


\(^{104}\) Since 1946 when such status was given, the ICC has had an important role as representative of private sector in activities with the UN and its specialized agencies. ICC History-Merchants of Peace, Supra n.42.

\(^{105}\) Supra n.103.

\(^{106}\) Wolff, R., Supra n.51, p.12.

\(^{107}\) Contini, P., Supra n.27, p.290; Supra n.31, pp.8-9.

\(^{108}\) Supra n.88.

\(^{109}\) Ibid.
the enforceability of arbitral awards. To start with the conditions, it removed the troublesome requirement under the Geneva Convention of the finality of the award at the seat of arbitration, thereby avoiding the aforementioned difficulties stemming from that requirement.\textsuperscript{110} Furthermore, the ICC Draft revised the requirement of the Geneva Convention that the party claiming enforcement must supply, when necessary, documentary or other evidence to prove that the arbitration agreement was valid under the applicable law and that the award was made by the arbitral tribunal provided for in the submission for arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.\textsuperscript{111} Within the context of the former, by requiring only evidence that there existed between the parties named on the award a written agreement stipulating settlement of their disputes by means of arbitration,\textsuperscript{112} it laid down a uniform rule which excluded the question concerning the specific form of the arbitration agreement which might be required by the law of the country of arbitration.\textsuperscript{113} This was justified on the ground that if it was the basic principle that arbitration was always voluntary and should be based on the agreement of the parties, it was pointless to open the discussion on whether the arbitration agreement was valid “under the law applicable thereto”.\textsuperscript{114} In the context of the latter, the ICC Draft brought this condition into compliance with its idea of a truly international arbitral award by requiring that:

[T]he composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place.\textsuperscript{115}

It allowed the arbitral procedure to originate from two sources, one contractual and the other legislative. In this respect, the conformity of the arbitration proceedings with the law in the seat of arbitration was secondary in cases where the arbitral procedure was determined by the parties, rather than placing it as an additional requirement to be met by the parties to the agreement, as required under the Geneva Treaties.\textsuperscript{116} This

\textsuperscript{110} Ibid, Article V(a).
\textsuperscript{111} Supra n.14, Articles 2 and 3; Supra n.15, Articles 4(1)(3) and 1(2)(a) and (c).
\textsuperscript{112} Supra n.88, Articles V(b) and III(a).
\textsuperscript{113} Ibid.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid, Articles V(b) and III(b).
\textsuperscript{116} Ibid.
provided an insight into the conjunction “and” which united these two methods of determination under Article 2 of the Geneva Protocol and Article 1(c) of the Geneva Convention, thereby aiming to remedy the suspicion aroused within some legal systems that the interference of the law of the country was entirely secondary to the agreement between the parties.\textsuperscript{117} Hence, the ICC Draft eased the formal requirements laid on the party seeking enforcement of the award, by means of consolidating its full recognition of the conception of international awards, prioritising the autonomy of the will as the source of law.\textsuperscript{118}

As for refusal grounds, the ICC Draft, which systematically listed the grounds on which recognition and enforcement shall be refused, addressed the question of whether the refusal grounds were to be examined by the court \textit{ex officio} or upon the request of one of the parties, which the Geneva Convention remained silent. In this regard, it proposed only two of the refusal grounds of the Geneva Convention – namely (i) the subject matter of the award was not capable of settlement by arbitration under the law of the country and (ii) the enforcement of the award was against the public policy or the principles of the law of the country where the enforcement was sought – as circumstances which the competent authority to whom application was made shall refuse recognition and enforcement of the award through an \textit{ex officio} examination, by dropping the reference to the violation of “the principles of the law” in the context of the latter.\textsuperscript{119} And, the rest of the refusal grounds enumerated under Article 2 of the Geneva Convention may only be invoked by the party against whom recognition and enforcement of the award was sought.\textsuperscript{120} Furthermore, the emphasis on the denationalisation of international arbitration under the ICC Draft culminated in the elimination of Article 3 of the Geneva Convention, entitling the party to contest the validity of the award in a court of law if there were other grounds under the law governing the arbitration procedure, due to the vagueness of its terms.\textsuperscript{121}

Subsequently, the United Nations Economic and Social Council (ECOSOC) established a Committee of governmental experts from eight countries\textsuperscript{122} to analyse

\textsuperscript{117} Ibid.
\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid, Article IV(a) and (b).
\textsuperscript{120} Ibid, Article IV(1)(c),(d),(e) and (2).
\textsuperscript{121} Ibid.
the ICC Draft and to prepare for the ECOSOC’s consideration of a draft convention.\textsuperscript{123} Because the model proposed by the ICC whereby international commercial arbitration would be entirely free from the control of national laws was regarded as “too radical” at that time,\textsuperscript{124} the Committee decided to soften the terms of the ICC Draft with the aim of balancing, to some extent, at least, the continuing effect of the parochial approach with the effect of nationalist sentiment regarding the benefits of control.\textsuperscript{125} With this aim in mind, it produced a ‘Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (hereinafter ‘the UN Draft’), which reflected “a compromise between the idealistic views expressed in the ICC draft of a truly international arbitration framework and the realities of sovereign States that were not prepared to accept this revolutionary idea”.\textsuperscript{126}

Apart from some reforms in the context of the scope of application, the conditions that the party seeking enforcement must supply to obtain enforcement of arbitral awards and refusal grounds, the UN Draft did not remedy the major difficulties of the Geneva Treaties. To be more precise, with respect to the scope of application, the Committee regarded the Geneva Convention’s application to arbitral awards made between parties subject to the jurisdiction of different Contracting States as “rather vague and ambiguous”.\textsuperscript{127} Thus, the UN Draft proposed to be applied to awards made between any persons as long as they were made in a country other than the one where the enforcement was sought.\textsuperscript{128} Because excluding the reciprocity requirement altogether might have been unacceptable to States willing to adhere to it only on condition of reciprocity,\textsuperscript{129} the UN Draft allowed any Contracting States to limit the scope of application by declaring reciprocity only in terms of where the award was made.\textsuperscript{130} In the absence of such declaration, the provisions of the Convention would

\textsuperscript{123} Resolution 520(VII) of the Economic and Social Council (17\textsuperscript{th} Session), 6 April 1954.
\textsuperscript{124} Wolff, R., \textit{Supra} n.51, p.12.
\textsuperscript{126} Wolff, R., \textit{Supra} n.51, p.12.
\textsuperscript{127} \textit{Supra} n.122, p.7.
\textsuperscript{128} \textit{Ibid}, p. 5.
\textsuperscript{129} \textit{Ibid}, p.7.
\textsuperscript{130} \textit{Ibid}.  

be applied by the Contracting State to arbitral awards regardless of whether they were made in a Contracting State or not.

Besides, the UN Draft eased some difficulties stemming from some of conditions that the Geneva Convention required from the party claiming enforcement and some refusal grounds. First, it revised the first condition of the Geneva Convention according to which the party seeking enforcement had to supply the original award, or a copy thereof duly authenticated according to the requirements of the law of the country where it was made. The UN Draft eliminated the words “according to the requirements of the law of the country in which it was made”, thereby allowing “a greater latitude” to the tribunal of the country where enforcement was requested with regard to the question of the law governing the authentication,131 Again, unlike the Geneva Convention, which required proving that the award was pursuance of an arbitration agreement valid under the law applicable, the UN Draft required the party claiming enforcement only to supply evidence to prove that the parties named in the award agreed in writing, either by a special agreement or by an arbitral clause in a contract, to settle their disputes by way of arbitration, without referencing to the validity of the arbitration agreement under the law applicable thereto,132 based on the view that an arbitration agreement should be considered valid as long as it was genuine and reduced to written form.133 Moreover, the Committee criticised Article 4 of the Geneva Convention, which provided that if a translation was required of the award and of the other documents into the official language of the country where the award was sought to be relied upon, any translations that the applicant supplied must be certified by the listed competent authorities from the country where the award was sought to be relied upon, for the reason that this was “too cumbersome” and “could give rise to unnecessary difficulties”.134 Accordingly, the UN Draft no longer indicated the origin of the authority deemed competent to certify translations.135 In respect to the grounds for refusal, its exhaustive formulation of the grounds for refusal, conveyed through its assertion that “recognition and enforcement of the award may only be refused if the competent authority in the country where recognition or enforcement is

132 Ibid, Articles III(1)(a) and V(1)(b).
133 Supra n.122, p.9.
135 Supra n.131, Article V(2).
sought, is satisfied [...]”\textsuperscript{136} and its omission of the opportunity provided under the Geneva Convention for the defendant to raise additional ground under the law governing the arbitration procedure, were steps forward in comparison with the Geneva Convention. Moreover, the UN Draft went further than either the ICC Draft or the Geneva Convention by adding the words, “provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced”, to the end of the refusal ground that the “award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration”.\textsuperscript{137}

Despite these efforts, major pitfalls of the Geneva Convention remained under the UN Draft to a great extent. First, unfortunately, the UN Draft plainly recalled the principle of double exequatur, by requiring to obtain recognition and enforcement that the award became “final and operative” in the country where the award was made, which was intended to mean that “an award must be a definitive adjudication of all matters at issue, and must have full legal force and effect”.\textsuperscript{138} Secondly, although the UN Draft was “cautious in the changes it suggested” in relation to hurdles to the enforcement of arbitral awards under the Geneva Convention,\textsuperscript{139} it was not as revolutionary as the ICC Draft. For instance, because the Committee regarded as unnecessary to classify refusal grounds according to by whom they were raised, the UN Draft left the question of whether the grounds for refusal were to be examined by the court \textit{ex officio} or upon the request of the one of the parties to the competent authorities.\textsuperscript{140} Likewise, in the discussion over how much weight should be given to the compatibility of the composition of the arbitral tribunal and the arbitral procedure with the law of the place of arbitration, although the Committee on the one hand acknowledged that it might be unnecessary and burdensome to prescribe that the composition of arbitral authority and arbitral procedure should follow the requirements of the national laws down to the last detail in cases where there was already agreement between the parties with respect to the arbitral procedure, it was

\textsuperscript{137} \textit{Ibid}, Article IV(1)(d), p.2.
\textsuperscript{138} \textit{Ibid}, Articles III(b) and V(1)(b); \textit{Supra} n.122.
\textsuperscript{139} Wolff, R., \textit{Supra} n.51, p.241.
\textsuperscript{140} \textit{Supra} n.122, p.13, para.53.
reluctant to accept the idea of the complete independence of international awards from national laws.\textsuperscript{141} Accordingly, the UN Draft adopted the formulation that recognition and enforcement may be refused if:

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Either the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties to the extent that such agreement was lawful in the country where the arbitration took place, or, failing such agreement between the parties in this respect, was not in accordance with the law of the country where the arbitration took place.\textsuperscript{142}
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For the first part of the provision, the agreement of the parties would be valid regardless of whether the composition of the arbitral authority and the arbitral procedure complied in all aspects with the rules of law in the country where the arbitration took place as long as this agreement was lawful in the country where the arbitration took place.\textsuperscript{143} Besides, the UN Draft’s formulation of the refusal ground in the context of the public policy was still broad in scope.\textsuperscript{144}

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The recognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with the public policy or with fundamental principles of the law (“ordre public”) of the country in which the award is sought to be relied upon.\textsuperscript{145}
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Hence, its attempt to limit the reference to the violation of the principles of the law of the country where the award was sought to be relied upon by adding the word “fundamental” before “principles of the law” was not enough to respond to the criticism made against the corresponding provision\textsuperscript{146} in the Geneva Convention exactly.\textsuperscript{147} Not only that, the UN Draft placed an additional refusal ground, which neither the ICC Draft nor the Geneva Convention incorporated, that “the award is so vague and indefinite as to be incapable of recognition or enforcement”.\textsuperscript{148} Such a formulation was “superfluous” and might be used by the defendant as a pretext for

\begin{footnotes}
\item \textsuperscript{141} Ibid, p.11, para.44.
\item \textsuperscript{142} Supra n.131, Article IV(g), p.2.
\item \textsuperscript{143} Supra n.122, p.12, para.46.
\item \textsuperscript{144} Supra n.88, Article IV(a).
\item \textsuperscript{145} Supra n.131, Article IV(1)(h), p.2.
\item \textsuperscript{146} Supra n.15, Article 1(e).
\item \textsuperscript{147} Supra n.98.
\item \textsuperscript{148} Supra n.131, Article IV(1)(f), p.2.
\end{footnotes}
delaying tactics. Also, it imposed on the enforcement court “an undue burden of interpretation which could lead to a review of the arbitral award as to its substance”.

CHAPTER 2: THE OBJECTIVE AND IMPROVEMENTS OF THE NEW YORK CONVENTION

After the completion of the UN Draft, the Secretary-General sent both the Report on the Enforcement of International Arbitral Awards and the Draft Convention on Recognition and Enforcement of Foreign Arbitral Awards to the governments of both member and non-member States of the United Nations for feedback on the text of the Draft Convention and their intention to take a further step to conclude a new convention. Moreover, the Report of the Committee and the Draft Convention were submitted to the ICC, 20 non-governmental organizations and the International Institute for the Unification of Private Law for consultation. After receiving general approval, the ECOSOC, by resolution 604 (XXI) adopted on 3 May 1956, decided to convene a conference of plenipotentiaries for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and then to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes. The Conference on International Commercial Arbitration, which was commenced on 20 May 1958 with the participation of representatives of governments of 45 States, and with observers from three

149 The representatives of Belgium, Sweden and the USSR objected to the inclusion of this additional ground for denial of enforcement. Supra n.122, p.11; UN DOC E/CONF. 26/2, Supra n.80, p.6.
152 Ibid.
153 Report by the Secretary-General, UN DOC E/2822, twenty-first session, item 8, 31 January 1956, p.2. For further information, see also UN DOC E/2822 Add.1-6; UN DOC E/2822/Corr.1; UN DOC E/Conf. 26/3 and Add.1.
155 The governments represented at the Conference: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Ceylon, Costa Rica, Colombia, Czechoslovakia, Ecuador, El Salvador, Federal Republic of Germany, Finland, France, Guatemala, Hashemit Kingdom of Jordan, Holy See, India, Iran, Israel, Italy, Japan, Laos, Monaco, Netherlands, Norway, Pakistan, Panama, Peru, Philippines, Poland, Switzerland, Sweden, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia. UN DOC E/CONF.26/8/Rev.1, Ibid, paras.3,4.
States and some inter-governmental organizations and non-governmental organizations came to fruition at the end of three weeks of effective work, on 10 June 1958, with the adoption of the Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, by 35 votes to none, with 4 abstentions, at the penultimate meeting of the Conference.

Even though the NYC did not have a preamble, where the purpose and underlying philosophy of a treaty is found, its purpose was expressed under the paragraph 16 of the Final Act that the NYC would contribute increasing the effectiveness of arbitration in the settlement of private law disputes. Because the NYC arose out of a need to remedy the shortcomings of the Geneva Treaties and to further liberalise enforcement of foreign arbitral awards and arbitration agreements, with the aim of promoting the effectiveness and development of arbitration as a means of settling disputes arising from international commerce and thereby to facilitate international commerce, it was not surprising that it gathered separate subject matters of the Geneva Protocol and the Geneva Convention, which were essential for the “institutional autonomy and systemic viability” of arbitration as a non-judicial adjudicatory process, under a single roof. In addition to its principal focus, i.e. the recognition and enforcement of foreign arbitral awards, it also had an ancillary focus, i.e. the validity of arbitration agreements and referral to arbitration in the event that the parties seek access to court in defiance of an arbitration agreement, which would make arbitration proceedings and arbitral awards possible and promote the use

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156 The Governments represented at the Conference by observers: Federation of Malaya, Indonesia, Mexico. Ibid, para.5.
of international arbitration to settle disputes arising from international business transactions. Although much of the contents of the NYC may have already been covered by the Geneva Treaties, it has been “a more refined document”.163

To be more precise, on the one hand, there was a need for “a more precise and comprehensive international instrument” than the Geneva Convention, due to “the volume and complexity of international trade” which had developed steadily since 1927, and the character of world trade, which had been reshaped by “revolutionary changes, some of them political, such as the attainment of independence by many nations, others economic, such as increased co-operation between States, and still others technical, caused by the latest scientific discoveries”,164 in order to respond to the need of international trade for “rapid, simplified, clear and efficient procedures” for eliminating disputes in business transactions.165 On the other hand, a uniform law to satisfy this need was “too ambitious”, since municipal law and practices with respect to arbitration were divergent and countries might have abstained from becoming a member where such a law would not meet the interest of their legal system.166 By taking into consideration the need for striking a happy medium between the needs of international trade and the interests of the countries in which the arbitral awards were relied upon,167 the NYC, through some fundamental changes, initiated “internationalism in arbitration” by recognising that arbitration agreements, proceedings and arbitral awards have their origin and seek to be effective in different jurisdictions, and providing international standards developed through the collective efforts of States for the recognition of arbitration agreements and recognition and enforcement of foreign arbitral awards.168 In seeking to achieve its broader purpose of favouring the development of arbitration as an efficient means of settling international disputes, the dissatisfaction with the Geneva Treaties was addressed, either by

164 See the comment by Sir Claude Corea, delegate of Ceylon, Summary Record of the Sixth Meeting (New York, 23 May 1958), UN DOC E/CONF. 26/SR. 6, 12 September 1958, p. 2.
165 See the comment by Mr. Todorov, delegate of Bulgaria, Ibid, p.3.
166 Supra n.31, p.14.
167 UN DOC E/CONF.26/SR.6, Supra n.164, pp.2, 3; Mr. Kestler Farnes, the delegate of Guatemala, noted that: “It was for the Conference to find a way of reconciling the needs of international trade with the interests of the countries in which the arbitral awards were relied upon. Certain safeguards were necessary, as an arbitral award might have different effects in different countries.” Summary Record of the Twelfth Meeting (New York, 28 May 1958), UN DOC E/CONF.26/SR.12, 12 September 1958, p.2.
168 Lew, J.D.M., Supra n.16, p.189.
covering the interests of both common and civil law in the text or leaving open.\textsuperscript{169} Thus the regime under the NYC was revolutionary as it was at a level separate from but recognised by national laws.\textsuperscript{170} This chapter will focus on the improvements envisaged by the NYC which make it a more refined document: (i) providing a universal rule for the identification of awards falling within the scope of application of the Convention, to include as many arbitral awards as possible; (ii) setting international limits to enforcement in accordance with the rules of the procedure of the country where the award is to be relied upon; (iii) simplifying the process for the party applying for recognition and enforcement of the foreign arbitral award by shifting the onus of proof from the party seeking enforcement to the defendant and eliminating the “double exequatur” requirement; (iv) limiting as much as possible the defences to enforcement to clearly defined grounds; and (v) providing an internationally uniform rule for the validity of arbitration agreements and referral to arbitration. Towards this end, this chapter will mostly move from an analysis of main provisions of the NYC, to the bigger picture, i.e. the intended effect of the NYC at its birth.

\subsection{2.1 Scope of application}

Following the order in which they appear in the NYC, the scope of application is the first of its provisions to be examined for evidence of changes resulting from its pro-recognition and pro-enforcement policy.\textsuperscript{171} The NYC adopted a uniform international rule based on the territorial criterion, which qualified an award as foreign as long as it was made in any other State than the place of enforcement.\textsuperscript{172} This formulation superseded the policies in determining the nationality of arbitral awards in some countries, which were raised against the territorial criterion during the drafting process, e.g. the Italian policy that any arbitral award between Italians was domestic, and policies in Germany and France that the procedural law under which the award was rendered determined the characterization of an arbitral award.\textsuperscript{173} This objective

\textsuperscript{169} Supra n.103.
\textsuperscript{170} Lew, J.D.M., \textit{Supra} n.16, pp.189-190.
\textsuperscript{171} Wolff, R., \textit{Supra} n.51, p.30.
\textsuperscript{172} Summary Record of the Twenty-First Meeting (New York, 5 June 1958), UN DOC E/CONF. 26/SR.21, 12 September 1958, pp. 9-17.
\textsuperscript{173} Federal Republic of Germany, France, Norway, Turkey, Italy and Yugoslavia found the UN Draft Article I incomplete. For the Republic of German, see UN DOC E/2822, \textit{Supra} n.153, Annex 1, pp.5-7. For other countries’ comments see also, Summary Record of the Fifth Meeting (New York, 22 May, 1958), UN DOC
criterion under the NYC was a clear improvement over the Geneva Convention, which applied only to arbitration awards that had been rendered in another Contracting State and between parties subject to the jurisdiction of different Contracting States. It provided a certainty and a broader scope of application by omitting the requirement “parties subject to the jurisdiction of different Contracting States” under the Geneva Convention. On the other hand, being a concise treaty, the NYC did not refer to how to determine the question of where the award was made. However, this did not mean that it left determination of the issue to individual national law. Reading the NYC as a whole led to the development of another uniform international rule that an award would be meant to be made in the place chosen by the parties in the arbitration agreement or selected by the tribunal in cases where the arbitration agreement did not indicate the arbitral seat. This is simply a corollary of Article II of the NYC, mandating Contracting States to give effect to material terms of arbitration agreement, including the parties’ agreement on the place of arbitration.

In addition, the NYC extended its scope of application by adding a non-territorial formula, ruling that the Convention also applied to awards which were made in the territory of the State where they were relied upon but which were considered to be non-domestic in that country. This additional formula resulted from a desire to cover certain other classes of arbitral awards relating to international commercial transactions, i.e. awards that were made in a State where enforcement was sought under the procedural law of another State as a result of the fact that certain national laws enabled parties to agree that arbitration could be governed by a procedural law other than the law of the place of arbitration by diverging from the general assumption that an arbitral award was governed by the law of the country where the award was made. This second criterion was not a limitation but an extension of the territorial criterion.

Moreover, the NYC reinforced its uniform international rule by introducing possible reservations and preventing States from limiting the scope of application of
the Convention via reservations corresponding to the special characteristics of particular legal systems. There were two options before the drafters of the NYC, either to give permission for a broad spectrum of reservations in order to maximise support for the Convention or to keep reservations to the minimum and allow “the standardization of their separate national bodies of law” to develop.\footnote{Summary Record of the Fifteenth Meeting (New York, 2 June 1958), UN DOC E/CONF. 26/SR.15, 12 September 1958, p. 3.\footnote{Ibid, pp.3-5.\footnote{Quigley, L.V., Supra n.40, p.1061\footnote{Supra n.172, pp.12, 15; Summary Record of the Twenty-Third Meeting (New York, 9 June 1958), UN DOC E/CONF.26/23, 12 September 1958, pp.7-9, 12; See also, Text of the Convention as Provisionally Approved by the Drafting Committee, UN DOC E/CONF.26/L.61, 6 June 1958; The intention to prevent any further limitation was also underscored in paragraph 14 of the Final Act of the Conference that: The Conference decided that, without prejudice to the provisions of its articles I(3), X, XI and XIV, no reservations shall be admissible to the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”. UN DOC E/CONF.26/8/Rev.1, Supra n.154, para.14.\footnote{The effect of the phrase “on the basis of reciprocity” on the first limitation remained unclear. Quigley, L.V., Supra n.40, p.1062.}}}} Considering the fundamental aim of the Convention, which was “to bring closer together the different national arbitration laws, thereby facilitating the recognition and enforcement of foreign awards”, the first option plainly would reduce the practical value of the Convention.\footnote{175} Then, the NYC allowed States to limit the scope of application when becoming party to the Convention by declaring only reciprocity reservation and commercial reservation, to enable accession by as many States as possible, because some countries, which were “territorially-minded”\footnote{177} or distinguished between commercial and non-commercial disputes, might otherwise refuse to become party.\footnote{178} The first limitation allowed Contracting States, on the basis of reciprocity,\footnote{179} to limit the effect of the Convention to awards which were made in the territory of another Contracting State, thereby excluding awards rendered in its territory or in a non-Contracting State, while the second possible reservation allowed the exclusion of non-commercial disputes from the scope of application of the Convention. Given that the application of the Geneva Treaties had relied upon the reciprocity requirement in terms of both the jurisdiction of the parties and the country where the award was made, establishing reciprocity as a reservation rather than an absolute requirement and in a narrower sense covering only awards rendered in another Contracting State constituted significant progress under the NYC. Thus, the scope of application provision, which was designed to include as many arbitral awards as possible, by inserting only two possible reservations which may limit its scope of application to
ensure acceptance of the NYC by as many States as possible, explicitly reflected its ambition to meet the needs of the international community via a mechanism that would advance the universal efficiency of international arbitration.\footnote{Wolff, R., \textit{Supra} n.51, pp.29, 30.}

On the other hand, the NYC made little progress on the meaning of the term, “arbitral award”. It did not provide a definition for the term, nor did the drafting history assist on this point since the delegates disagreed over whether to include a definition in the Convention.\footnote{Some delegates, such as Pakistan and Israel, advised including a provision to define the term in the Convention. See Pakistan: amendment to the Draft Convention, UN DOC E/CONF.26/L.16, 26 May 1958; UN DOC E/CONF.26/SR.6, \textit{Supra} n.164, p.6; Israel: proposed definition of words “arbitral award”, UN DOC E/CONF.26/L.18, 26 May 1958. However, others were of opinion that it was not necessary to define the term in the text of the Convention, thereby leaving the determination of whether a decision was to be deemed as an arbitral award to the law of the State where it was to be enforced. See See for the comment by the delegate of Austria, UN DOC E/2822, \textit{Supra} n.153, Annex 1, p.10.}

In that case, the status of an award would be determined by the enforcing courts. However, unlike the Geneva Convention, the NYC left no room for misunderstanding over whether it would apply to arbitral awards rendered by permanent arbitral tribunals, which then existed in some jurisdictions, by expressly covering awards made by the permanent arbitral bodies, on a voluntary basis, as well as awards made by arbitrators appointed for each case under the second paragraph of Article I.\footnote{Summary Record of the Eighth Meeting (New York, 26 May 1958), UN DOC E/CONF.26/SR.8, 12 September 1958, pp.2-5; UN DOC E/CONF.26/8/Rev.1, \textit{Supra} n.154, Article I(2).}

Such clarification was necessary; otherwise, arbitral awards made by permanent arbitral bodies could have been interpreted to be excluded from the scope of application irrespective of whether they were made on voluntary basis or not.\footnote{UN DOC E/CONF.26/SR.8, \textit{Ibid}, pp. 6-8.} Hence, the NYC crystallised the term “arbitral award” to some extent, by emphasising party autonomy by putting the principle of voluntary submission to arbitration at the centre of the determination of awards falling within its scope of application.

On the other hand, because the initial idea to cover only the recognition and enforcement of arbitral awards was changed to extend to arbitration agreements by the inclusion of Article II into the NYC at a later stage in the Conference, Article I was silent as to what arbitration agreements fall under the scope of the NYC or whether its criteria and reservations for arbitral awards apply to arbitration agreements by analogy. However, the drafting history sheds light on the point. Prior to the inclusion of Article II in the text of the Convention, the text of an additional protocol on the validity of arbitration agreements submitted by Working Party No. 2 noted that reservations...
existing in the final text of the Convention would be added to the corresponding provision in the protocol on the validity of arbitration agreements.\textsuperscript{184} However, after Article II was added to the Convention, at the stage of adoption and signing of the final act and Convention at the Conference, the delegates disagreed on the issue. For instance, according to the delegate from Argentina, it was logical to permit States to make reservations concerning provisions of Article II because the initial decision of the Conference to drop Article II from the Convention was reversed by a smaller majority.\textsuperscript{185} Mr Wortley, the delegate from the United Kingdom, responded to this interpretation as follows:

Countries should not be permitted to sign the Convention under the impression that they could avoid then its application by refusing to recognize the validity of arbitration agreements. Under the new text of article VII, paragraph 2, the present Convention was to supersede that of 1927. In those circumstances, it would be better to have no convention at all than to have one greatly inferior to the 1927 instrument. But the Conference would run that risk if it accepted the interpretation of the Argentine representative and permitted States to disregard the provision relating to the validity of arbitral agreements.\textsuperscript{186}

When the United Kingdom’s amendment to Article I(3) was put to the vote, it was adopted.\textsuperscript{187} It follows that national courts should apply the NYC to arbitration agreements which would produce arbitral awards falling under its scope of application, but should not limit it through reservations against the intention of its drafters, which was to avoid an impression that the NYC would enable Contracting States to avoid its application by refusing to recognise the validity of arbitration agreement. This means, on the other hand, that the NYC abolished the limitation imposed by the diversity-of-citizenship clause under the Geneva Protocol.

### 2.2 Arbitration Agreements

The NYC aimed to “ensure the repudiation of 19\textsuperscript{th} century legislative and judicial rules that singled out arbitration agreements for disfavour and instead to guarantee that

\textsuperscript{185} UN DOC E/CONF.26/SR.23, Supra n.178, p.8.
\textsuperscript{186} Ibid, pp.8-9.
\textsuperscript{187} Ibid, p.9.
international arbitration agreements would be valid and enforceable in national courts, pursuant to uniform international standards”.  

2.2.1 The Validity of Arbitration Agreements

The NYC laid down the fundamental rule of formal and substantive validity for arbitration agreements so that “all Contracting States have a uniform understanding” of which arbitration agreements to recognise. In examining the requirements for the existence of arbitration agreements, one should first read Article II(1):

Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Accordingly, Article II(1) of the NYC outlines five standards for the existence of an arbitration agreement: there must be (i) an agreement in writing (ii) between the parties (iii) undertaking to submit to arbitration (iv) all or any differences which have arisen or which may arise between them (v) in respect of a legal relationship, whether contractual or not. In this respect, although “a subject matter capable of settlement by arbitration” under Article II(1) may give the impression that arbitrability of the subject matter was a condition for validity of an arbitration agreement, it is clear that this is far from the intention of the drafters when considering the issue under the entirety of the Convention, which distinguishes between invalidity of arbitration agreement and arbitrability by conceiving them as two separate grounds for non-enforcement under Article V(1)(a) and Article V(2)(a) respectively. Thus, it was certain that the arbitrability was a requirement beyond the validity of an arbitration agreement. This condition is indeed related to the jurisdictional aspect of arbitration.

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189 Supra n.92, p.39.
190 UN DOC E/CONF.26/8/Rev.1, Supra n.154, Article II(1).
agreements, which have been generally accepted a “sui generis contracts with both contractual and jurisdictional features”.193

In addition, the NYC defined the first requirement, i.e. an agreement to arbitrate in writing, which clarified the question of formal validity, under Article II(2), according to which “[t]he 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”.194 This formulation resulted from a careful consideration of both international trade practices and various legal systems at the time of drafting. Considering that a requirement of writing in a strict sense, i.e. a requirement that both parties should sign the same document would be at variance with the needs and usages of international trade because it was a usual practice in international trade to conclude an arbitration agreement by an exchange of letters or telegrams,195 the drafters avoided a strict definition of “agreement in writing” for the purpose of proving the parties’ will to settle their disputes by means of arbitration.196 Besides, by being aware of the importance of the compatibility of the definition of “agreement in writing” with different legal systems, the drafters agreed not to count “confirmation in writing by one of the parties without contestation by the other party” as a form of “agreement in writing” because some delegates objected based on its incompatibility with their legal systems.197 Thus, the NYC established a uniform rule, ensuring the validity of arbitration agreements by superseding national laws of Contracting States that impose archaic or more demanding form requirements, such as

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193 Ibid, p.37, para.2-60.
194 UN DOC E/CONF.26/8/Rev.1, Supra n.154, Article II(2).
195 See for the comment by the French delegate, UN DOC E/2822, Supra n.153, Annex 1, p.18; See for the comment by the delegate from the Federal Republic of Germany, Summary Record of the Ninth Meeting (New York, 26 May 1958), UN DOC E/CONF. 26/SR.9, 12 September 1958, p.3; See for the comment by the Swiss delegate, Summary Record of the Eleventh Meeting (New York, 27 May 1958), UN DOC E/CONF.26/SR.11, 12 September 1958, p.9; See for the comment by the representative of the Hague Conference on Private International Law, Summary Record of the Thirteenth Meeting (New York, 28 May 1958), UN DOC E/CONF.26/SR.13, 12 September 1958, p.11.
197 The delegate from United Kingdom expressly stated its objection on the ground that “in common law, the failure to do something could not constitute an estoppel”. See Supra n.172, pp.20-21.
requirements for separate documents, notarized instruments or a specific font;\textsuperscript{198} to prove the content of the agreement, thereby simplifying the division of work between arbitrators and courts; and to determine the type and rules of arbitration preferred by the parties.\textsuperscript{199} Selection of a national law by the parties to govern their arbitration agreement would even make no difference to the application of Article II(2)’s maximum form requirement in preference to national form requirements.\textsuperscript{200} On the other hand, the fact that the NYC was designed as a constitutional instrument for application in a wide array of legal systems and was meant to evolve and develop over time, proved that the categories of “agreement in writing” listed under Article II(2) were non-exhaustive and could be expanded by the courts by adding additional types.\textsuperscript{201}

Taken together, the only conditions that must be met for an arbitration agreement to be recognised as valid were consent, the capacity of the parties and the formal requirements provided in the NYC.\textsuperscript{202} Hence, no further conditions for validity could be required, as doing so would violate the principle of the contractual nature of arbitration agreements.\textsuperscript{203}

\subsection*{2.2.2 The Effect of Arbitration Agreements}

In addition to the validity of arbitration agreements, Article II(3) of the NYC also addressed the effect of arbitration agreements, as a result of its “pro-arbitration” and “pro-enforcement” policies:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.\textsuperscript{204}

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\textsuperscript{198} Born, G.B., \textit{Supra} n.188, pp.668-670.
\textsuperscript{201} \textit{Ibid}, p.675; On the discussion about whether Article II(2) was to be considered to be exhaustive or non-exhaustive, the Italian delegate had proposed in the Conference that “[P]aragraph 2 should indicate that an exchange of letters or telegrams did not exhaust all the possibilities. Signed minutes of a conversation might also constitute an agreement in writing”. However, that proposal received no comments either for or against nor was it voted on during the Conference. See \textit{Supra} n.172, p.20.
\textsuperscript{202} \textit{Supra} n.192, p.38, para.2-61.
\textsuperscript{203} \textit{Ibid}, p.38, para.2-61.
\textsuperscript{204} UN DOC E/CONF.26/8/Rev.1, \textit{Supra} n.154, Article II(3); \textit{Supra} n.188, p.232
\end{flushleft}
Accordingly, the NYC ensured that parties cannot renounce an arbitration agreement merely by initiating court proceedings,\textsuperscript{205} by establishing its own express “treaty standard”\textsuperscript{206} without reference to any choice of law directive to those courts which would be resorted to in the case of challenges to the existence or the validity of an arbitration agreement, while it provided an express choice of law standard under Article V(1)(a) if the existence or validity of an arbitration agreement was raised as an objection to the enforcement of a foreign arbitral award.\textsuperscript{207} According to this, national courts were under an obligation to “refer the parties to arbitration”, providing that there was an arbitration agreement meeting the requirements of Article II,\textsuperscript{208} regardless of municipal law. Its substantive international rule of presumptive validity for arbitration agreements would be applied irrespective of the national law chosen by the parties to govern their international arbitration agreements or the question of where arbitration takes place.\textsuperscript{209} By rejecting the proposals of the delegates from Israel\textsuperscript{210} and Germany,\textsuperscript{211} both of which attempted to relate the enforceability of arbitration agreements to awards capable of enforcement under the NYC,\textsuperscript{212} the Conference developed an application of Article II independent from Article V, and also indirectly prevented reading the choice of law directive under Article V(1)(a) into Article II. Furthermore, the NYC reinforced its policy of protecting the autonomy of the parties in selecting the contractual forum by introducing a meaningful change that the “referral to arbitration” obligation of the court of a Contracting State could arise only

\textsuperscript{206} Supra n.191, p.182.
\textsuperscript{207} Ibid, pp.152,153.
\textsuperscript{209} Supra n.188, pp.108,493,562.
\textsuperscript{210} Mr. Cohn, delegate from Israel, indicated that the court at the enforcement stage could, on its own motion, refuse the enforcement of an award which was not capable of settlement under the law of the court or which was not compatible with public policy, and proposed that grounds which may justify refusal of enforcement of a foreign arbitral award under the Convention should apply to enforcement of arbitration agreements as follows: “The provisions of Article IV (E/CONF.26/L.48) shall apply to an application under this article mutatis mutandis”. Supra n.172, p.21.
\textsuperscript{211} Mr. Bulow, delegate of Federal Republic of Germany, offered to replace paragraph 3 of the Netherlands Draft by Article III of the protocol proposed by the Working Party No. 2 (E/CONF.26/L.52), but to change the words “valid under article I and capable of execution” with the words “referred to in paragraph 1 and susceptible of leading to an arbitral award capable of recognition and enforcement by virtue of this Convention”. Ibid, pp.21,22.
\textsuperscript{212} Ibid, p.22.
at the request of one of the parties.\textsuperscript{213} If a party wished to settle a dispute by arbitration, its right to arbitrate would be protected if it relied on Article II(3).

Finally, the NYC laid down two exceptions to the duty to refer the parties to arbitration. One is jurisdictional and the other is contractual. In terms of the latter, it permitted a court to refuse to refer the parties to arbitration only if the arbitration agreement was “null and void, inoperative or incapable of being performed”.\textsuperscript{214} Although it gave no guidance concerning the meaning of the terms “null and void, inoperative or incapable of being performed” under Article II(3),\textsuperscript{215} its effort in the context of arbitration agreements in parallel with the ultimate purpose of liberalising the enforcement of foreign arbitral awards imposed “implied limits” on the grounds of substantive invalidity that could be raised against international arbitration agreements.\textsuperscript{216} These implied limits excluded any national idiosyncrasies and encompassed only generally-applicable rules of contract law for challenging the validity of an international agreement under the NYC.\textsuperscript{217} The grounds allowed by the NYC for denying the validity of an international arbitration agreement were intended to be subject to international limits, i.e. “generally-applicable, internationally-neutral contract law defences”.\textsuperscript{218} This interpretation is also supported by the international principle of non-discrimination, which prevents national legislations from discriminating against arbitration agreements and subjecting them to idiosyncratic rules of validity or formation relative to other contracts.\textsuperscript{219} Hence, the NYC prevented national courts from frustrating an arbitration agreement on any defence other than classic contract defences for denying recognition of arbitration agreements under the national law of the enforcing country, and from examining the merits of the dispute covered by the agreement\textsuperscript{220} or deactivated any discretionary power that the courts

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\bibitem{213} The delegate from Turkey, Mr Koral, had proposed deleting the words “of its own motion” in the revised version of the article (Article II in UN DOC E/CONF.26/L.61), arguing that a court should not have the power to impose arbitral procedure when both the parties to the arbitration agreement desired to submit the dispute to the ordinary courts. See UN DOC E/CONF.26/8/Rev.1, Supra n.154, Article II(3).
\bibitem{214} UN DOC E/CONF.26/8/Rev.1, Supra n.154, Article II(3).
\bibitem{215} Supra n.19, p.341, para.14-40.
\bibitem{216} Born, G.B., Supra n.188, p.839.
\bibitem{217} Ibid, pp.839-840; Supra n.19, p.342, para.14-41.
\bibitem{218} Born, G.B., Ibid, p.642.
\bibitem{219} Ibid.
\bibitem{220} Garnett, R., Supra n.38, p.403; Supra n.208, p.343; Born, G.B., Ibid, p.108; Supra n.161.
may be granted by national law.\textsuperscript{221} It certainly aimed to prevent the exercise of municipal laws which maintained hostility towards arbitration based upon the view that arbitration was “a usurpation of judicial authority to adjudicate disputes”,\textsuperscript{222} in which view the arbitration agreement itself was a violation of the principle of public policy.\textsuperscript{223} While Article V(1) expressly states that the burden of proof is on the resisting party, there is no such express statement in Article II(3), which naturally raises questions of whether the court must inquire defects that would justify the refusal to recognise the agreement and refer the parties to arbitration under Article II(3) \textit{ex officio} or whether the burden of proof would be on the party contesting the validity of arbitration agreement. At that point, the interpretation of the national court would play a key role. Beyond the contractual aspect, the refusal to recognise an agreement and refer the parties to arbitration was also permitted with reference to “a subject matter capable of settlement by arbitration” under Article II(1), despite this being considered a valid arbitration agreement under the NYC. This issue may arise at the referral stage, either before the national court of one of the parties or before the national court of the seat of arbitration.\textsuperscript{224} However, the NYC did not provide what law determines arbitrability at the referral stage of a dispute, while it explicitly designated \textit{lex fori} as the relevant law to determine arbitrability before a national court at the enforcement stage the under Article V(2)(a), prescribing that enforcement of an award may be refused in a Contracting State if “the subject matter of the dispute is not capable of settlement by arbitration under the law of that country”. Although Article V(2)(a) allowed each State to rely on the non-arbitrability rules under its own law to refuse recognition and enforcement of an arbitral award, the drafters of the NYC could not have intended to require at the enforcement stage of an arbitration agreement a regard to the non-arbitrability rules of the countries in which enforcement of the arbitral award might be sought,\textsuperscript{225} and yet this provision implicitly consolidated that it left the determination of arbitrability before a national court at any other stage to \textit{lex fori}\.\textsuperscript{226} However, since the issue of arbitrability concerns the jurisdictional aspect of the

\textsuperscript{221} Supra n.191, p.180.
\textsuperscript{222} Born, G.B., Supra n.188, pp.232,494,562,641; Carbonneau, T.E., Supra n.161, p.65.
\textsuperscript{225} Supra n.188, p.599.
\textsuperscript{226} Supra n.224, p.100; (“Notwithstanding this silence, it must be presumed that for the enforcement of the arbitration agreement also the \textit{lex fori} governs the question of arbitrability. Internal consistency of
arbitration agreement, *lex fori* would not be relevant in cases where the jurisdiction of the national court before which the dispute was referred was not relevant to the specific dispute.\textsuperscript{227} In cases where the jurisdiction of the national court is relevant to the specific dispute, the central objective of launching uniform international rules imposed that the non-arbitrability exception was subject to international limits, requiring national non-arbitrability rules to be tailored narrowly, just as in the interpretation of the terms “null and void, inoperative or incapable of being performed”.\textsuperscript{228}

Consequently, by envisaging “an internationally harmonised regime, which provided for the self-executing effect of the arbitration agreements”,\textsuperscript{229} subject only to identified exceptions under Article II(3)\textsuperscript{230} and creating “a presumption in favour of arbitration”,\textsuperscript{231} the NYC would clearly “make arbitration agreements more readily enforceable, including more readily enforceable than under the 1923 Geneva Protocol, in accordance with uniform international standards”.\textsuperscript{232}

2.3 Arbitral Awards

The NYC also prompted significant changes with respect to the procedure and requirements to be observed for the recognition and enforcement of foreign arbitral awards and the grounds on which the recognition and enforcement of such awards could be refused. The improvements in this context can be observed through its Articles III, IV and V.

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the Convention requires such an analogous interpretation. Also, the main effect of an arbitration agreement is the exclusion of the competence of the courts in favour of arbitration. As a court derives its competence as a rule from its own law, it should inquire under its own law whether the competence has lawfully been excluded in favour of arbitration.”) Van den Berg, A.J., *Supra* n.18, p.152; Afrazadeh, H. (2001), ‘Arbitrability under the New York Convention: the *Lex Fori* Revisited’, *Arbitration International*, Vol.17, Issue 1, p.74.\textsuperscript{227} *Supra* n.224, p.104.

\textsuperscript{228} *Supra* n.188, pp.232,601,642.

\textsuperscript{229} *Supra* n.208, p.344.

\textsuperscript{230} Garnett, R.,*Supra* n.38, p.403.


\textsuperscript{232} *Supra* n.188, p.232.
2.3.1 Procedure

Under Article III, the NYC mandated the Contracting States to recognise arbitral awards within the scope of the Convention as binding and to enforce them in accordance with the rules of procedure of the territory where the award is to be relied upon, under the conditions laid down in subsequent articles; however, it did not allow them to impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards than are imposed on the recognition or enforcement of domestic arbitral awards. This provision resulted from a discussion during the Conference on various proposals to avoid the possibility of delay or impracticality in the enforcement of foreign arbitral awards due to the unnecessarily complicated enforcement procedures of lex fori, including the standard procedural rules that would apply to the enforcement of foreign arbitral awards, providing that arbitral awards should be enforced by summary procedure, or providing that arbitral awards recognised under the Convention should be enforceable through the same procedure as that applied to domestic arbitral awards.233 Because neither of these proposals would be efficient, i.e. on the one hand countries with different procedural law systems would not assign an identical meaning in case of the effort to spell out the applicable enforcement procedures in full detail in the text of the Convention itself and on the other hand applying the procedures for the enforcement of domestic arbitral awards to the enforcement of foreign awards might contain elements that could render the enforcement of foreign awards cumbersome or time-consuming,234 it was agreed to adopt a formulation which would ensure that “no additional restrictions were imposed which might impede the free enforcement of the arbitral award” and that “a foreign arbitral award which met the conditions of the Convention should be enforceable without unnecessary inconvenience or excessive fees”.235 Hence, the NYC deferred to the forum’s rule of procedure but did not at all set Contracting States free. It set international limits.

233 Supra n.80, p.4.
234 Ibid.
The first limitation was expressed by the words, “the conditions laid down in the following articles”, which referred to Articles IV and V. By this provision, it implicitly distinguished between rules of procedure, which it itself would control, and the procedure for obtaining recognition and enforcement of the award, to which the procedural law of the forum would apply.\textsuperscript{236} Therefore, \textit{lex fori} would determine the procedural rules to apply to the issues that were intrinsic to enforcement and not covered by the NYC, such as discovery of evidence, estoppel or waiver, set-off or counterclaim against award, entry of judgement clause, period of limitation for enforcement of the award falling within the scope of application of the Convention and interest of the award.\textsuperscript{237} It guaranteed that national courts cannot sidestep the limited conditions which the party seeking enforcement had to meet as required under Article IV, and the enumerated grounds under which enforcement may be refused pursuant to Article V, by applying \textit{lex fori} to determine procedural issues.\textsuperscript{238}

The second limitation was that the enforcement country shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of foreign arbitral awards falling within the scope of the NYC than it imposed on the recognition or enforcement of domestic arbitral awards. This was clearly not the case in States where domestic and foreign arbitral awards were equally unenforceable under the law and where there was no procedure for enforcing domestic awards. The obligation of the NYC that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”, simply required a change of the law to provide procedure for foreign awards in those countries.\textsuperscript{239} The said limitation was the case in States under the law of which there were rules of procedure for domestic arbitral awards. Here, the key point was non-discrimination against foreign arbitral awards relative to domestic arbitral awards, of which most legal systems allowed enforcement without excessive formal and substantive


\textsuperscript{237} Van den Berg, A.J., \textit{ibid}.

\textsuperscript{238} Wolff, R., \textit{Supra} n.51, pp.202,203; \textit{Supra} n.92, p.117.

\textsuperscript{239} Quigley, L.V., \textit{Supra} n.40, p.1066.
requirements\(^\text{240}\) in terms of the rules of procedure.\(^\text{241}\) It brought flexibility to the Contracting States by setting the criteria with the word “substantially” and allowed “slight variations in treatment between foreign and domestic awards”.\(^\text{242}\) Hence, it set a “relative standard” and allowed “for the variations which normally occurred between procedural systems and schedules of costs of different countries”.\(^\text{243}\)

### 2.3.2 Formalities for applications for enforcement and grounds for refusal

The provisions of the NYC in relation to the formalities to be observed in an application for recognition and enforcement of arbitral awards and the grounds on which the recognition and enforcement of foreign arbitral awards may be refused, i.e. Articles IV and V, were significant improvements over the previous regime. The NYC drew a clear distinction between the questions of proof and grounds for refusal of the recognition and enforcement of awards, and set forth a share of the burden of proof in such a way that the burden of proof was less onerous for the party seeking recognition and enforcement of the award.\(^\text{244}\)

In respect of the formalities with which the party seeking enforcement had to comply, the NYC removed the barriers that existed under the Geneva Convention and presented “simple and clear rules” under Article IV.\(^\text{245}\) Specifically, it abolished the requirement to submit documentary or other evidence to prove that the award became final, in the sense defined by the Geneva Convention, in the country where it was made so that the award could be enforced elsewhere, thereby eliminating the difficulties arising from the finality requirement, particularly the issue of double exequatur requirement, which resulted from de facto application.\(^\text{246}\) The drafters of the NYC considered an exequatur both in the country where the enforcement of the award was sought and in the country where the award was made but no enforcement was sought as futile.\(^\text{247}\) Moreover, such a requirement would enable the losing party to

\(^{240}\) Supra n.92, p.118.

\(^{241}\) UN DOC E/CONF.26/SR.10, Supra n.235, p.3.

\(^{242}\) Contini, P., Supra n.27, p.297; Wolff, R., Supra n.51, pp.204.

\(^{243}\) UN DOC E/CONF.26/SR.10, Supra n.235, p.3.

\(^{244}\) Netherlands: Amendments to the Draft Convention, UN DOC E/CONF.26/SR.11, Supra n.195, p. 6.

\(^{245}\) Kronke, H., Nacimiento, P. et al. (eds), Supra n.92, p.202.

\(^{246}\) Wolff, R., Supra n.51, p.209; Kronke, H., Nacimiento, P. et al. (eds), Ibid, pp.145,188.

prevent enforcement for many years by instituting proceedings for the annulment of
the award in the country where the award had been made.\textsuperscript{248} Thus, the NYC avoided
any formulation that would reproduce this most onerous shortcoming of the Geneva
Convention, i.e. the principle of double exequatur (e.g. the UN Draft’s requirement of
evidence to prove that the award had become final and operative, and in particular
that its enforcement had not been suspended in the country where it was made). It
also transformed most of conditions to be fulfilled by the party seeking enforcement
under the Geneva Convention into grounds that the defendant may rely on to resist
enforcement under Article V\textsuperscript{249} and required from the claimant only positive evidence
that prima facie justified the application for enforcement, which significantly improved
the position of the party seeking recognition or enforcement of a foreign arbitral
award.\textsuperscript{250} Accordingly, the NYC streamlined the formal requirements of enforcement
of arbitral awards by enabling the party to proceed with the enforcement of the award
as soon as the award has been rendered and by requiring from the applicant, at the
time of application, only a prima facie justification of the application to the
enforcement, i.e. the submission of (i) the duly authenticated original award or a duly
certified copy thereof, (ii) the original agreement referred to in Article II or a duly
certified copy thereof and (iii) a duly certified translation of these documents into the
language of the country where enforcement was sought if they had been made in a
language other than the official language of that country. In examining this
formulation, it should first be noted that the wording “agreement referred to in Article
II” under the second formality should not raise doubts about the prima facie
justification with respect to the evidence of the arbitration agreement because it was
inserted in Article IV(1)(b) by the Drafting Committee of the Conference, whose task
was limited to “making a linguistically proper and consistent wording of the text of the
Convention.”\textsuperscript{251} Additionally, the NYC liberalised the authentication and certification
requirements by not specifying any law governing the consideration of formalities for
authentication and certification. While adopting the formality of authentication of
original documents to substantiate the signature of the arbitrator and the formality of

\textsuperscript{248} UN DOC E/CONF.26/SR.11, \textit{Ibid}.
\textsuperscript{249} Summary Record of the Seventeenth Meeting (New York, 3 June 1958), UN DOC E/CONF.26/SR.17, 12
September 1958, p. 2.
\textsuperscript{250} ‘Switzerland No.33, R SA v. A Ltd., Geneva, Cour de Justice [Court of Appeal], 15 April 1999’, in Albert
\textsuperscript{251} Van den Berg, A.J., \textit{Supra} n.18, p.250.
certification to attest that a copy is a true copy of the original documents,\textsuperscript{252} it did not lay down either requirements for these formalities or the competent authority to perform these formalities.\textsuperscript{253} Nonetheless, discussions regarding this issue and the rejection of the proposal to permit authentication “by the consulate of the country where the award is relied upon” indeed disclosed that the Conference chose to embrace the allowance in the UN Draft of “greater latitude” with regard to the question of which law would govern the authentication to the tribunal of the country in which the recognition or enforcement was being requested.\textsuperscript{254} Finally, it should be highlighted that the NYC adopted a pragmatic approach by not specifying the origin of the competent authorities to certify translation of listed documents if such a translation was required. Consequently, this provision served the purpose of the NYC by presumptively ruling in favour of enforcement “without any need for the slightest expression of approval of the place of arbitration”,\textsuperscript{255} but only on submission by the applicant of its exhaustively listed formal requirements, which superseded any additional requirements applicable under national laws for domestic or non-convention awards in Contracting States.\textsuperscript{256} Hence, the advances through Article IV proved that the purpose of the Convention was to encourage the development of arbitration as a dispute resolution mechanism by facilitating and liberalising the enforceability of foreign arbitral awards. Besides eliminating the requirement to prove that the award has become final, the NYC also excluded the requirement of documentary or other evidence to prove the validity of the underlying arbitration agreement, which had been required under both the Geneva Convention.

As for the list of grounds for refusing to recognise and enforce awards under Article V, the NYC provided a universal rule for its Contracting States with respect to the question of whether the enforcing court had to examine the refusal grounds ex officio or at the request of the interested party, thereby preventing the diversity resulting from the Geneva Convention, which had left the question to the court of the enforcement country. Taking account of the view expressed by some delegates that both the burden of proof upon the party seeking enforcement and the party against whom the award was invoked and the exact task of the competent authority from

\textsuperscript{252} Supra n.249, p.7.
\textsuperscript{254} Supra n.249, pp.6,7.
\textsuperscript{255} Paulsson, J., Supra n.34, p.6; Wolff, R., Supra n.51, p.208.
\textsuperscript{256} Supra n.92, p.187.
whom recognition and enforcement was sought should be clarified,257 Article V was formulated by dividing the grounds for refusing the recognition and enforcement of the award into two types: grounds to be raised by the defendant and grounds to be examined by the court ex officio. According to this structure, five of these grounds – namely, those concerning jurisdictional issues (Articles V(1)(a) and (c)), procedural defects and fairness in the arbitral process (Articles V(1)(b) and (d)) and annulment by a competent court in the place of arbitration (Article V(1)(e)) – may be examined for a refusal of recognition and enforcement only upon the request of the defendant. Only two of the grounds, non-arbitrability and public policy (Articles V(2)(a) and (b) respectively), may be examined ex officio by the competent authority of the country where recognition and enforcement were sought. This division was intended to facilitate the work of the enforcement court, which may have a difficulty considering some of these grounds if these claims were not brought and substantiated by the opposing party.258 This was evident, for instance, when considering whether the award was never binding on the parties or had been set aside under Article V(1)(e), as these issues concerned a foreign law and would not be familiar to the enforcing court.259 Thus, once the party seeking enforcement presents prima facie evidence for obtaining recognition and enforcement, the court will grant recognition and enforcement as long as an ex officio examination does not lead to the discovery of either non-arbitrable subject matter or an incompatibility between the recognition and enforcement of the award and the public policy of the country where enforcement is being sought, and the defendant does not instantiate any of the refusal grounds enumerated in the NYC. This was clearly a step forward in pursuit of its purpose, in comparison with the uncertainties with respect to the question of whether the enforcement court had to examine the refusal grounds ex officio or upon the request of one of the parties under the Geneva Convention.

257 The delegate of the Republic of German commented that: “Article IV, clauses (b),(e),(g) are designed chiefly to protect the party against whom the award is invoked. Hence it appears unnecessary for the authority concerned to ascertain whether the grounds for refusal provided by these clauses are present, and preferable to leave it to the party in question to decide whether or not to invoke them. Not until a party invokes the one or other of these grounds should the court enquire whether the objection is valid.” UN DOC E/2822, Supra n.153, Annex 1, p.23; See also, UN DOC E/CONF.26/SR.12, Supra n.167, p.4; See the comment by the delegate of Lima, UN DOC E/CONF.26/SR.13, Supra n.195, pp.4,5.
258 Supra n.249, pp.2-3.
259 Ibid, pp.11-12.
The NYC was also more restrictive than the Geneva Convention in relation to the grounds for refusing to enforce foreign arbitral awards as a result of its seeking to render foreign arbitral awards more readily enforceable than under the Geneva Convention or any national law. While strengthening the trust of both the arbitrating parties and Contracting States in the system, Article V avoided undermining the main objectives of arbitration, namely settling disputes efficiently and avoiding long and costly litigation, by exhaustively enumerating exceptional grounds which could justify the refusal to recognise and enforce a foreign arbitral award, leaving no room for the use of residual discretion as to grounds for refusing to enforce a foreign arbitral award or a review by an enforcement court of errors of substantive law or the merits of the case.\textsuperscript{260} Equally importantly, it did not contain any grounds leading to uncertainty or having the potential to be exploited as delaying tactics, such as the ground under the Geneva Convention entitling the party to contest the enforceability of the award based on any further ground under the law governing the arbitration procedure, and the ground under the UN Draft for refusing recognition and enforcement where the award was “so vague and indefinite as to be incapable of recognition or enforcement”\textsuperscript{261}

The NYC reinforced this posture by introducing substantial changes to the grounds for refusal. For instance, some of these grounds, namely Articles V(1)(a) and (d), introduced a uniform conflict of laws rule specifying which laws govern the substantive validity of arbitration agreements and the capacity of the parties and the composition of arbitral tribunal and the arbitral procedure respectively, to be applied by courts in all Contracting States identically, thereby avoiding the risk of non-enforcement of a foreign award based upon a determination of a conflict of laws by enforcement courts under their municipal laws and contributing to the efficiency of arbitration as a dispute resolution mechanism. To start with the first ground, the drafters eliminated the difficulty of determining the applicable law in accordance with the law of the enforcement court, by inspiring from court decisions which, to reduce the risk of parallel proceedings, interpreted the “law applicable thereto” to the validity of the arbitration clause or the arbitration agreement in the enforcement of award proceedings under the Geneva Convention by looking to the law applicable to the


\textsuperscript{261} UN DOC E/CONF.26/L.17, \textit{Supra} n.244, Article IV; UN DOC E/CONF.26/SR.11, \textit{Supra} n.195, p.6; For the eliminated grounds, see \textit{Supra} n.15, Article 3. Also see, \textit{Supra} n.131, Annex, Article IV(f).
proceedings under Article 2 of the Geneva Protocol, and concluded that the law applicable to the validity of the arbitration clause or arbitration agreement was not the *lex fori* of the enforcement court but the law chosen by the parties or, in the failure of this indication, the law of the place of arbitration.\textsuperscript{262} Accordingly, they brought the will of the parties to the fore through a formulation that “the said 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”.\textsuperscript{263} Moreover, they clarified that the capacity of the parties should not be determined according to the law applicable to the award but rather to the law governing their personal status, by adding the words “the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity” to the beginning of the formulation.\textsuperscript{264} Likewise, the ground under Article V(1)(d) was purged of any wording that would result in the inefficient enforcement of foreign arbitral awards. For instance, because the requirement of the agreement to be “lawful in the country where arbitration took place” in the context of the examination of the compatibility of the composition of the arbitral tribunal and the arbitral procedure with the agreement of the parties under the UN Draft had been highly criticised by the ICC and some governments,\textsuperscript{265} the drafters did not include the words “to the extent that such agreement was lawful in the country where the arbitration took place” of the UN Draft for the refusal ground concerning the composition of the tribunal and arbitral

\textsuperscript{262} Supra n.39, pp.41-43.
\textsuperscript{263} UN DOC E/CONF.26/SR.23, Supra n.178 pp.14, 15.
\textsuperscript{264} UN DOC E/CONF.26/SR.24, Supra n.159, p.7; Text of Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Approved by the Drafting Committee on 9 June 1958, UN DOC E/CONF.26/8, Article V(1)(a).
\textsuperscript{265} Switzerland had pointed out that this requirement, which enabled the court of the country of enforcement to determine whether the arbitration agreement was lawful in the country where the arbitration took place, enabled “the losing party to resort to further delaying tactics”, thereby leading to the possibility of protracted proceedings. Switzerland had also raised concern that it could bring “the weapon of annulment” into play too easily, since the court of the enforcement country would have authority to annul an arbitral award on the ground that it had not complied with the law of the country where the arbitration took place, even in cases where the award would not be null and void under that law itself, the possibility of which would be against the intentions of the drafters of the UN Draft certainly. See UN DOC E/2822, Supra n.153, Annex 1, p.26; The ICC criticised this restriction because it would mean that the enforcement courts would have to evaluate the validity of arbitration agreements according to a law which was foreign to them. See Supra n.153, Annex II, p.18; The representative of France had attacked this requirement, arguing that Article IV(g) of the UN Draft “recognized the autonomy of the parties only to destroy it immediately”. See Summary Record of the Fourteenth Meeting (New York, 29 May 1958), UN DOC E/CONF.26/SR.14, 12 September 1958, p.9.
Accordingly, this provision indicated a great respect for the contractual autonomy of the parties by prioritizing the rules agreed by the parties regarding the composition of the arbitral tribunal and arbitral procedure, and referred to the law of the place of arbitration as the relevant standard, in cases where the parties have not reached any agreement regarding the composition of the arbitral tribunal or the arbitral proceedings or where their agreement has not dealt with a certain issue. On the other hand, although the wording of this provision was similar to the corresponding provision in the ICC Draft, the drafting history indicated that it was not intended to embrace the concept of international arbitral award adopted by the ICC draft. Thus, even if party autonomy was maintained, it was intended to rely on a national law.

The next significant change introduced by the NYC was through Article V(1)(b). It secured minimum requirements for “a fair arbitral procedure”, which were essential for the integrity of dispute resolution mechanisms, by means of Article V(1)(b): “The party against whom the award is invoked was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”. Even if it seemed to be formulated to have a similar meaning to the corresponding provision under the Geneva Convention, it was a more comprehensive provision through which not only cases where a party was not given proper notice of the appointment or the arbitration proceedings but also circumstances where the party was otherwise unable to present his case were deemed to violate due process. On the other hand, the Conference did not make any change regarding the lack of specification of the law governing the notion of due process,

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266 Working Party No. 3-Text of Articles III, IV and V of the draft Convention proposed by the Working Party for Adoption of the Conference UN DOC E/CONF.26/L.43, 3 June 1958, Article IV(1)(d); In reporting on the draft of Working Party No. 3, Mr de Sydow, the chairman of the Working Party, had pointed out that this formulation stemmed from the view that “there was no need to subordinate the arbitral procedure chosen by the parties to the law of the country where arbitration took place”. See Supra n.249, pp.2-3.

267 UN DOC E/CONF.26/L.43, Ibid.

268 The Italian delegate, Mr Matteucci, highlighted that it was “inserted on the understanding that the parties enjoyed discretion only to the extent that they could select the national law applicable in the matter”, and thereby it “should not be interpreted to mean that the parties could agree to disregard all national laws and determine some special procedure applicable to their case alone”. See Supra n.249, p.10.

269 Wolff, R., Supra n.51, pp.279, 280.

270 Supra n.15, Article 2(b).

despite an earlier proposal in this regard.\textsuperscript{272} In addition, its pro-enforcement purpose was demonstrated through a raising of the threshold for challenging the enforcement of foreign arbitral award by allowing the enforcement court to examine this ground for refusal only if the party objecting to the recognition and enforcement of the foreign arbitral award substantiated his/her objection in this regard.\textsuperscript{273}

Also, the drafters acknowledged that “in a commercial arbitration, the extraneous matter introduced by the arbitrator into the award might be of a very incidental nature”, but believed that inclusion of the principle of severability would prevent an “injustice” or “unjustified hardship” that the applicant might encounter in cases where the enforcement court refused enforcement altogether merely because a minor detail fell outside the scope of the arbitration agreement.\textsuperscript{274} So, the NYC added the principle of severability under Article V(1)(c), in the context of the defence to enforcement on the ground that the arbitral authority exceeded its authority, which itself was founded on the principle that the source and limits of the authority of the arbitral tribunal is the arbitration agreement.\textsuperscript{275} Accordingly, the NYC improved the regime by providing the possibility of a partial enforcement of an award which contains matters not submitted to arbitration, if the decisions on matters submitted to arbitration can be separated from those not so submitted.

As for Article V(1)(e), which provided two grounds for refusal, i.e. (i) the award has not yet become binding and (ii) the award has been set aside or suspended, there were a number of advances facilitated by the NYC. First, the NYC replaced the word “final” with the word “binding” while transferring the Geneva Convention’s requirement that the award has become final as a refusal ground. The drafting history indicated that the drafters intentionally used the word “binding” and avoided any wording that implied “final”, such as “operative” or “capable of enforcement”, so that it would not be interpreted as requiring the award to fulfil all conditions for

\textsuperscript{272} The New Zealand indicated that the UN Draft did not specify clearly by what law these criteria were to be interpreted and proposed to expressly provide that the law of the place where the award had been made should apply to them. Comments by Governments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards- Comments by New Zealand on Articles 1, 4, 5, 10 March 1958, E/CONF.26/3, p.2.

\textsuperscript{273} Wolff, R., \textit{Supra} n.51, pp.281,282.

\textsuperscript{274} See for the comments by the delegates from India, Italy, Bulgaria and Argentina, \textit{Supra} n.249, pp.9, 10.

\textsuperscript{275} \textit{Supra} n.92, p.259; Text of Articles III, IV and V of the draft Convention as adopted by the Conference at its 17th meeting, E/CONF.26/L.48, 4 June 1958, Article IV(1)(c); UN DOC E/CONF.26/8, \textit{Supra} n.264, Article V(1)(c).
enforcement in the country where it was rendered.\textsuperscript{276} Even though the drafting history clarified that the term “binding” was not intended to mean a requirement of proof that the award had been enforceable in the jurisdiction whose law had governed the arbitration, it did not reveal an agreement on its actual meaning.\textsuperscript{277} Second, the NYC differed from the Geneva Convention within the context of the second part of this provision in two ways. It included the circumstances in which the award was set aside or suspended by a competent authority of the country under the law of which it was made into the formulation, thereby aiming to remedy a situation in which the defendant could be deprived of challenging the award in the country where the award was made as the court of that country may consider the award to be a foreign award and therefore refuse to hear it.\textsuperscript{278} This change obviously stemmed from the same reasoning that led the field of application to be extended through the inclusion of the additional definition of foreign award. Moreover, unlike the Geneva Convention, in which being open to opposition, appeal or \textit{pourvoi en cassation} or a mere application for any proceedings for the purpose of contesting the validity of the award would prevent the finality of the award and thus hinder the enforcement of awards in other Contracting States,\textsuperscript{279} under the NYC neither cases in which the award was open to other means of recourse for other irregularities, in particular procedural defects\textsuperscript{280} nor the presence of a pending proceeding before the court in another country for the purpose of contesting the validity of the award were a refusal ground. Accordingly, under Article V(1)(e) of the NYC, enforcement may be refused only if the award was set aside or suspended. For cases in which an application for the setting aside or suspension of the award was made to the competent authority listed in Article V(1)(e), the NYC only granted a discretionary power to the enforcement court whether or not

\textsuperscript{276} \textit{Supra} n.249, p. 3.
\textsuperscript{277} For instance, the Italian delegate indicated that by “binding”, the Working Party meant that “the award would not be open to ordinary means of recourse”. However, the delegate from Guatemala objected to the Italian delegate’s interpretation of the word “binding” and proposed that “an award would not become binding until all means of recourse, both ordinary and extraordinary, had been exhausted and all formalities completed”, stating that, to his delegation, “binding” meant “final and enforceable”. The delegates from Argentina and El Salvador interpreted the word “binding” as having the same meaning as terms frequently used in various legal systems, such as “res judicata”, “final” and “enforceable”. See \textit{Ibid}, pp. 13-15; UN DOC E/CONF.26/SR.23, \textit{Supra} n.178, p.15.
\textsuperscript{278} See for the comment by the delegate of Norway, \textit{Supra} n.249, pp.10, 11; See for the comment by the USSR delegate, UN DOC E/CONF.26/SR.23, \textit{Ibid}.
\textsuperscript{279} \textit{Supra} n.15, Article 1(d).
\textsuperscript{280} On the other hand, the award which was still open to a genuine appeal on the merits of the award to a second arbitral instance or a court, thereby being open to the possibility of another decision, was not to be regarded as binding. Van den Berg, A.J., \textit{Supra} n.18, p.342.
to adjourn its decision on the enforcement of the award by considering if an application for annulment or suspension of the award in the country where it was given was made for a good reason, with the possibility of ordering the party opposing enforcement to give a suitable security upon the request of the party seeking enforcement under Article VI. Hence, the NYC aimed to prevent the losing party from abusing the possibility of challenging the validity of the award for frustrating or delaying the enforcement of the award.

Furthermore, while providing the Contracting States with a “safety valve” via the arbitrability and public policy defences under Article V(2), i.e. by permitting the determination whether the subject matter of the dispute is arbitrable under the law of the country where enforcement is sought and whether the enforcement of the award is compatible with the public policy of the enforcement country, it limited an enforcement court to a narrower examination than the review permitted under the Geneva Convention. The NYC eliminated the references to “principles of the law” under the Geneva Convention and avoided any formulation that would lead to difficulties of interpretation or would open the merits of the award to review (e.g. the UN Draft, which required that both the recognition or enforcement of the award and the subject matter thereof be compatible with both the public policy and fundamental principles of the law of the country in which the award is sought to be relied upon). Having limited the relevant ground for refusal to the incompatibility of the recognition or enforcement of the award with the public policy in the country, the NYC considerably narrowed this ground, which concerned a matter within the discretionary power of each country.

Although the NYC did not identify broad concepts under its exceptional grounds, such as fair opportunity to be heard, exceeding to submission to arbitration,

281 Supra n.249, pp.3-4 and 16. Mr Sanders, whose amendments (UN DOC E/CONF.26/L.17) at the Conference set the foundation for improvements in relation to the formalities to be observed for an application for recognition and enforcement of arbitral awards and possible grounds for refusing enforcement, noted that: “The judge in the country of enforcement must be given complete latitude either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made. To require him to await the outcome of such proceedings would be to permit the losing party to delay enforcement for a very long period. It was far better to leave the decision to the judge of the country of enforcement; by taking what was in fact a very slight risk, it would be possible to end the dilatory practice which had hitherto hindered the development of international arbitration.” See UN DOC E/CONF.26/SR.11, Supra n.195, pp.5-6.

282 Wolff, R., Supra n.51, pp.381,406.

283 See for the criticisms by some governments and organizations, Supra n.80, p.7; Supra n.249, p.3; UN DOC E/CONF.26/8, Supra n.264, Article V(2)(b).
determination of the binding force of arbitral award, non-arbitrable subject matter and contradiction to public policy, and left their characterization to the consideration of national courts, its policy of seeking to remove previous obstacles to enforcement of foreign arbitral awards, penetrated into Articles III, IV and V and the general features of refusal grounds would ease their task and assist in the development of an attitude of compliance with the spirit of the Convention.

2.4  Relationship to other instruments

The NYC has introduced improvements with respect to its relationship with the other instruments concerning the recognition and enforcement of arbitration agreements and arbitral awards through two paragraphs under Article VII.

Under the first paragraph, to be able to achieve the grand purpose of “worldwide simple enforcement of arbitral awards”\textsuperscript{284} or “international circulation of awards”\textsuperscript{285} via its own framework, the NYC introduced the rule that its ratification would not affect the validity of the multilateral or bilateral agreements concerning recognition and enforcement of arbitral awards that the Contracting States previously entered into with non-Contracting States, thereby encouraging States to accede to it.\textsuperscript{286} The NYC also maintained the provision of the Geneva Convention that allowed a party seeking enforcement of a foreign arbitral award to base his enforcement request on a national law or other treaties, with the aim of enabling the enforcement of foreign awards “in the greatest number of cases possible”.\textsuperscript{287} Accordingly, the NYC, which on the one hand removed domestic conditions for recognition and enforcement of foreign arbitral awards that were stricter than its provisions, on the other hand allowed “the application of the provisions from the Contracting States’ domestic laws and other treaties that give more favourable rights to a party seeking to enforce a foreign award than the NYC does”.\textsuperscript{288} Hence, it even took the risk of losing its own


\textsuperscript{286} Wolff, R., \textit{Supra} n.51, p.451.

\textsuperscript{287} Van den Berg, A.J., \textit{Supra} n.18, pp.81,83.

\textsuperscript{288} Wolff, R., \textit{Supra} n.51, p.452; In the context of conflict of treaties, the New York Convention expressly and officially recognised the principle of maximum efficacy, which was developed by the doctrine and case law. Hence, a treaty enabling the enforcement of the award would be applicable irrespective of
efficacy and becoming a universally acceptable minimum standard of harmonisation for the sake of progressing the international efficacy of arbitral awards by means of other instruments.\textsuperscript{289} This provision was the literal expression of the pro-enforcement spirit of the Convention. In addition, under the second paragraph, the NYC defined the position of its Contracting States with regard to the Geneva Protocol and the Geneva Convention by clarifying that both instruments automatically cease to have relevance for the Contracting Parties to this Convention.\textsuperscript{290} Thus, this provision was an exception to the rule that the NYC would not affect the validity of treaties concerning the recognition and enforcement of awards.\textsuperscript{291}

Despite these improvements, the applicability of Article VII(1) remained limited to the recognition and enforcement of arbitral awards on the face of it; however, both the legislative history and the motivation of the Conference backed the conclusion that the non-inclusion of arbitration agreements under Article VII(1) was not purposeful.\textsuperscript{292} The last minute addition of the provision on the validity and effect of arbitration agreements did not allow the drafters to edit the text of the NYC so as to link Article II to Article VII and other provisions. The fact that the drafters included the Geneva Protocol in paragraph 2 of Article VII also confirmed that the omission from the first paragraph of Article VII was unintentional and the need for a change to incorporate “arbitration agreement” into Article VII(1) merely escaped the drafters’ attention.\textsuperscript{293} In addition, the drafters, whose ultimate aim was to increase the effectiveness of arbitration in the settlement of private law disputes, cannot be deemed to have intentionally excluded arbitration agreements from the application of Article VII(1). Thus, it would be safe to say that the intended contribution via Article VII(1) would also extend to the recognition and enforcement of arbitration agreements under a regime testing other traditional principles, namely lex posterior derogat priori and lex specialis derogat generali. Van den Berg, A.J., \textit{Ibid}, pp.90-91.


\textsuperscript{290} Summary Record of the Eighteenth Meeting (New York, 4 June 1958), UN DOC E/CONF. 26/SR.18, 12 September 1958, p.2; Amendments to Draft Convention submitted by the Polish Delegation, E/CONF.26/7, 21 May 1958, para. 6.

\textsuperscript{291} UN DOC E/CONF.26/SR.18, \textit{Ibid}, pp.2,6,7; Text of Article VI of the draft Convention as adopted by the Conference at its 18\textsuperscript{th} meeting, UN DOC E/CONF.26/L.50, 4 June 1958, Article VI(2).


\textsuperscript{293} Wolff, R., \textit{Supra} n.51, pp.149,464.
more lenient than the form requirements of arbitration agreements under Article II(2) of the NYC.294

2.5 Other possible measures

After completing its consideration of the proposal to adopt a new Convention, the Conference turned its attention to the consideration of other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes, as it agreed at its first meeting.295 At its fifth meeting held on 26 May 1958, the Conference had established a committee to consider the issue and to prepare an outline programme aimed at improving existing arbitration facilities and legislations.296 Hence, when the time came for it to consider the matter, the Conference had before it the report and the draft recommendation, annexed to the report, of the Committee on Other Measures.297

The Committee prepared the report and draft recommendation after a study of the note by the Secretary-General, which provided a useful survey and analysis of other possible measures for increasing effectiveness of arbitration in the settlement of private law disputes.298 According to the note by the Secretary-General, who had relied on information obtained from governments and from organizations interested in international commercial arbitration and the work done in the field by the Economic Commission for Europe and the Economic Commission for Asia and Far East, a concerted action was necessary on a number of points:

(i) creation of new arbitration facilities in certain geographic areas and branches of trade;

(ii) adaptation of some of the existing national arbitration centres to the requirements of international commercial arbitration;

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294 Ibid, p.464; Supra n.188, pp.670,672,673.
296 Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes (Item 5 on the Agenda), Report of the Committee on Other Measures, UN DOC E/CONF.26/L.60, 6 June 1958.
297 Ibid.
298 Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes, Note by the Secretary-General, UN DOC E/CONF.26/6, 1 May 1957.

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(iii) better coordination of the activities of various arbitration centres, harmonisation of their rules of arbitral procedure and wider use of joint standard arbitration rules;
(iv) carrying out of educational programmes for promoting knowledge about existing arbitration facilities and for training potential arbitrators;
(v) creation of impartial machinery for choosing neutral arbitrators and places of arbitration in disputes between nationals of different countries;
(vi) elimination of conflicts of laws and of other obstacles to the use of arbitration caused by differences or shortcomings in existing municipal law;
(vii) drawing up model clauses to facilitate the adoption of adequate legislative standards on subjects such as validity of arbitration agreements, establishment and competence of arbitral tribunals, applicable procedural rules for arbitration and the procedures for enforcement of awards.²⁹⁹

Thus, the note by the Secretary-General had indicated that the Conference might consider taking other measures for increasing the effectiveness of arbitration in the settlement of private law disputes. In this respect, the collection and publication of information on existing arbitration laws and facilities was indicated as a primary step for any further activities purposing the improvement of arbitration facilities and legislations.³⁰⁰ The Secretary-General had noted that the Conference may recommend that the Economic and Social Council consider encouraging interested organisations to collaborate on making arrangements for publishing existing arbitration laws and facilities throughout the world and updates via supplements and to invite both governments and organs of the United Nations to facilitate such publication by furnishing any relevant information.³⁰¹

Secondly, the Secretary-General had indicated that the Conference might promote the efficiency of arbitration by adopting a resolution attracting the attention of the governments and organizations providing practical facilities for arbitration in international commercial arbitration matters about the need for improvements to the existing arbitration facilities in some geographic regions or branches of trade, and offering activities, such as encouraging existing arbitral institutions to include

²⁹⁹ Ibid, pp.2,3.
³⁰⁰ Ibid, p.3.
³⁰¹ Ibid, p.4.
arbitrators of foreign nationality on their panels and to adopt rules allowing the
designation of a neutral site as the place of arbitration, the establishment of new
arbitration centres in countries or branches of trade where there are no institutional
facilities for arranging arbitration.\textsuperscript{302} Additionally, the Secretary-General had stated
that the Conference may adopt a resolution to encourage the use of technical
assistance as a means of improving arbitral legislations or of establishing better
facilities for international commercial arbitration.\textsuperscript{303} Furthermore, the note of the
Secretary-General had indicated that the Conference may adopt a recommendation
addressed to the Economic and Social Council to attract the attention of the regional
economic commissions to convenience of regional study groups, seminars or working
parties in order to accelerate the harmonisation of national laws and develop practical
arbitration facilities in the region by removing the legal and practical obstacles to the
efficiency of arbitration.\textsuperscript{304} In addition, since the parties frequently did not agree on
the choice of the place of arbitration or of the applicable law and rules which would
govern the arbitral proceedings, the Secretary-General had identified the need to
create an impartial mechanism to assist the parties in the designation of neutral
arbitrators and places of arbitration in such cases as another subject that the
Conference might want to consider further.\textsuperscript{305}

Finally, the Secretary-General had emphasised that uniformity in the national
laws governing arbitration to a great extent would be useful since it would remove
conflicting provisions from arbitration laws, thereby settling disputes involving several
countries by arbitration without the risk that the application of the law of one country
would not call into question the validity of the arbitration agreement, proceedings or
award in other countries.\textsuperscript{306} However, having concluded from the limited success of
previous attempts to unify arbitration law that the time was not yet ripe for measures
aimed at a uniform regulation of all aspects of arbitration proceedings, the Secretary-
General had noted that the Conference might select some areas for which the
preparation of model provisions would be important to guide countries which did not
have adequate arbitration laws or which intended to amend their existing arbitral
legislation, such as the validity of arbitration agreements, the rules of arbitral

\textsuperscript{302} Ibid, pp.5,6.
\textsuperscript{303} Ibid, p.7.
\textsuperscript{304} Ibid, pp.7,8.
\textsuperscript{305} Ibid, p.9.
\textsuperscript{306} Ibid, p.10.
procedure, applicable law governing the substance of arbitral awards and rules governing the procedural aspects of enforcement of arbitral awards, and express its support for the view that the work already carried out by inter-governmental organizations and scientific institutions should progress further.\textsuperscript{307}

The Committee expressed views on the principal subjects that the Conference might wish to adopt, as suggested by the Secretary-General in his note. In this respect, since the wider diffusion of data on arbitration legislations, practices and facilities would promote the development of commercial arbitration, the Committee agreed that it was essential to recognise the work done in the field by the Economic Commission for Europe and by other interested organizations and to enable such efforts to continue through a coordination of efforts.\textsuperscript{308} Secondly, the Committee expressed in the draft recommendation both the desire to encourage the establishment of new arbitration facilities and improve existing facilities and the belief that necessary work should be done by governmental and other organizations, particularly avoiding duplication of efforts and focusing on measures that would provide the greatest practical benefit to the regions and branches of trade concerned.\textsuperscript{309} Towards this end, it encouraged interested governments and organizations to furnish technical assistance in the development of effective arbitral legislation and institutions.\textsuperscript{310} Moreover, it recognised the utility of regional study groups, seminars or working parties for productive results and encouraged a consideration of convening such meetings.\textsuperscript{311} Finally, the draft recommendation recognised the significance of the uniformity of national laws on arbitration for the promotion of effectiveness of arbitration in the resolution of private law disputes, and suggested that attention be given to the identification of appropriate subject matters for model arbitration laws and other measures for encouraging the development of such legislations, thereby furthering the works already done in the field by various existing organizations.\textsuperscript{312} Thus, the Committee expressed that further study of these

\textsuperscript{307} Ibid, pp.10-12.  
\textsuperscript{308} Supra n.296.  
\textsuperscript{309} Ibid.  
\textsuperscript{310} Ibid.  
\textsuperscript{311} Ibid.  
\textsuperscript{312} Ibid.
measures was desirable and the United Nations would take such steps to encourage this. The Conference adopted the draft recommendation in its entirety.\footnote{Supra n.295, pp.2-3; UN DOC E/CONF.26/SR.23, Supra n.178, p.4.}

**CONCLUSION OF PART I**

The analysis presented in Part I with the aim of addressing the first research question, i.e. what was the scope of harmonisation intended by the drafters of the NYC began with an overview of the harmonising tools preceding the NYC. This indicated that with the rise of State sovereignty and the formalisation of arbitration in the 18\textsuperscript{th} century, international regulation of arbitration became necessary for the purpose of ensuring the enforcement of arbitral awards due to the divergence of national laws, which mostly manifested as an unwillingness to recognise arbitration as a business decision by the parties, and the hostile attitude of national courts towards arbitration. Following the First World War, the idea of “idealistic internationalism” was intensified. This gave rise to the first fruits, the Geneva Protocol and the Geneva Convention, which dealt with the two main matters of commercial arbitration, i.e. the unenforceability of an agreement to refer future disputes to arbitration in many countries and the lack of an expeditious method of enforcing in one country an award made in another.\footnote{Mustill, M., Supra n.1, p.49.} With the idea of “the autonomy of international arbitration”,\footnote{Supra n.289, p.124.} the Geneva Treaties, which were made under the auspices of the League of Nations, provided for standards both of the validity of international arbitration agreements and arbitral awards, and of the enforceability of arbitration agreements by specific performance; they also recognised the autonomy of parties to choose the substantive law governing their disputes and to select the arbitration procedure.\footnote{Supra n.188, p.67.} The Geneva Treaties briefly recognised the international effect of both arbitration agreements and arbitral awards, without imposing too many conditions.\footnote{Supra n.163.}

However, the Geneva Treaties were wide off the mark on the recognition of the autonomy of international arbitration and harmonisation in this context because they left the recognition and enforcement of arbitral awards subject to national laws which diverged with respect to provisions and practices and therefore served to obstruct

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\footnotesize{\textsuperscript{313} Supra n.295, pp.2-3; UN DOC E/CONF.26/SR.23, Supra n.178, p.4.}  
\footnotesize{\textsuperscript{314} Mustill, M., Supra n.1, p.49.}  
\footnotesize{\textsuperscript{315} Supra n.289, p.124.}  
\footnotesize{\textsuperscript{316} Supra n.188, p.67.}  
\footnotesize{\textsuperscript{317} Supra n.163.}
recognition and enforcement. The real value of the Geneva Treaties could be expressed no better than by the words of Pierre Tercier:

It is in this city that a small number of eminent lawyers had the bright idea to imagine a Protocol and a Convention on Recognition and Enforcement of foreign awards (the so-called Geneva Convention). This was an incredible step, an incredible idea. They were real visionaries, they were real pioneers. Why? Because they imagined to prepare, under the auspices of the League of Nations (the predecessor of the UN), an Act that would later on lead to the globalisation of the dispute resolution system worldwide. Indeed, if the Geneva Convention has not had a very important practical influence because it was only ratified by a small number of states, it was really the first step made in favour of the birth of modern arbitration. Its influence has been huge, and ultimately led to the New York Convention and its incredible success.318

Given that the Geneva Treaties were still far from bringing an international spirit to the field of arbitration, to remedy the shortcomings in the Geneva Treaties, which interfered with an efficient procedure, and thereby to address the needs of international trade, the ICC triggered the movement forward, and eventually the NYC emerged.

While it had the same impetus as the Geneva Treaties, the NYC constituted a big step forward in terms of its framework. To reassure commercial parties that their agreements would be upheld and that the award resulting from the arbitral process would not be merely a vindication of rights on paper,319 thereby safeguarding the effectiveness of international commercial arbitration, it followed a moderate and pragmatic policy by directly focusing upon two vital aspects of the international commercial arbitration process. On the one hand, it gave effect to the will of the parties via uniform international rules requiring national courts (i) to recognise the validity of arbitration agreements and to refer the parties to arbitration, subject to given exceptions under Article II, and (ii) to recognise and enforce foreign arbitral awards, subject to limited and exhaustive list of exceptions for possible court intervention, which attenuated “the imposition of parochial views”320 and enabled the

parties to choose the law and the forum and to predict what law would govern their dispute and how the resulting arbitral award would be enforced.\textsuperscript{321} On the other hand, it did not require States to discard their legal systems.\textsuperscript{322} It pursued a “cautious”\textsuperscript{323} and “decentralized”\textsuperscript{324} route to harmonisation in the recognition and enforcement of arbitral awards and arbitration agreements.

\textsuperscript{323} \textit{Supra }n.289, p.138.
\textsuperscript{324} \textit{Supra }n.321.
PART II: ACHIEVEMENTS AND LIMITATIONS OF THE NEW YORK CONVENTION

INTRODUCTION

Moving into the present, Part II aims to address two research questions, namely (i) what is the harmonising impact of the NYC in reality and (ii) what is the contemporary relevance of the NYC for further harmonisation in the field of arbitration. For this purpose, Part II will be divided into three comprehensive chapters. The first two chapters of this Part concern the former research question while the last chapter focuses on the latter research question.

Chapter 3 will examine the application and interpretation of the NYC by courts of Contracting States and investigate whether courts have given rise to harmonisation of arbitration concepts by reference to it. Towards this end, Chapter 3 will give an overview of whether the courts in Contracting States have uniformly applied the international rules of the NYC in cases where the NYC and national law both contain rules on the same issue but the Convention is more favourable. The chapter will also explore whether the courts have characterised the broad concepts which were inserted as exceptions to the recognition and enforcement of arbitration agreements and foreign arbitral awards in such a manner so as not to be constrained by the limitations of domestic law, but rather to apply international legal principles.

Chapter 4 aims to reveal if the NYC has had a harmonising effect on arbitration laws as distinct from its original intended effect. It will consider if national legislations have incorporated the principles of the NYC, i.e. respecting the parties’ agreement to arbitrate and their autonomy, reducing the role of local courts by recognising the authority of arbitral tribunals and ensuring enforcement of arbitration agreements and arbitral awards, subject to limited exceptions.

Finally, Chapter 5 will engage with current debates and calls for a new convention and address some of the challenges in the circulation of arbitral awards and the efficiency of international arbitration in the settlement of private law disputes, and the limits of the NYC in overcoming them.
CHAPTER 3: ACHIEVEMENT OF THE ORIGINAL OBJECTIVE

Introduction

On the final day of the Conference, the President, after summarising the ways in which the NYC improved on the Geneva Convention, indicated two prerequisites to achieve the change intended with the NYC as follows:

[I]t was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security. Nevertheless, the actual situation would not be really improved until a large number of States had ratified the Convention or acceded to it. The value of the resolutions adopted by the Conference would remain problematical until they had been given effect, and that depended on those who would have to continue the work which had been begun. In any case, it should not be forgotten that the texts drafted by the Conference marked only a small step forward in the long march towards the rule of law, to which all jurists aspired.325

Obviously, the first pre-condition for the realization of the original objective of the NYC, encouraging development of arbitration as an efficient mechanism for resolution of international commercial disputes by means of facilitating recognition and enforcement of foreign arbitral awards and arbitration agreements around the world, was accession by a large number of States. Considering the impressive evolution of adherence to the Convention, one may conveniently say that the NYC has achieved its original objective. When the Conference adopted it on 10 June 1958, the representatives of ten States, namely Belgium, Costa Rica, El Salvador, Germany, Jordan, India, Israel, the Netherlands, the Philippines and Poland, signed the Convention. The total number of Signatories reached 24 States, with a further fourteen signatures by 31 December 1958, which had been specified within the Convention as the date until which the Convention would be open for signature.326 When the Convention entered into force on 7 June 1959, which was the ninetieth day following

325 Summary Record of the Twenty-Fifth Meeting (New York, 10 June 1958), UN DOC E/CONF.26/SR.25, 12 September 1958, p.2.
the deposit of the third instrument of accession, pursuant to its Article XII(1), it had been signed by only 26 of the 45 States which participated in the Conference.327

Considering the first 20 years of the NYC, the ratification rate was considerably successful for an international convention.328 Many trading States signed it no later than its entry into force, but interestingly, the first States which acceded to were not major trading States, namely Israel, Morocco, Egypt and the Syrian Arab Republic.329 Even though, by 1970, only 34 States, including a limited number of trading States, had acceded to the Convention, that number had risen to 54 by its twentieth anniversary, representing States from various parts of the world, including most of the significant trading nations.330 The quick accession of the socialist countries at the beginning of 1960s was followed first by the European countries, and then by Anglo-American countries and the United Kingdom.331 During this period, accession from Latin America was limited to a few countries, namely Ecuador, the Netherlands Antilles,332 Trinidad and Tobago, Mexico, Cuba and Chile, which obviously was not at a desired level relative to the representation of the other parts of the world.333

However, an attempt to compensate for the low rate of accession to the NYC in Latin America was made in the form of another convention modelling the NYC but on a regional basis. In 1975, the Organisation of American States, regarded by Latin American countries as “a unique body especially capable of formulating practices and procedures to provide solutions for problems of the Western Hemisphere”, called for a conference to unify law and practice for the settlement of international commercial disputes by arbitration in the Western Hemisphere.334 Following this call, the Inter-American Specialized Conference on Private International Law was held in Panama, 6-

327 UN DOC E/CONF.26/8/Rev.1, Ibid, Article XII(1); First two accessions were by Israel and Morocco respectively, and the third rank was shared by Egypt and Syrian Arab Republic with their accessions on the same day. Status table for the Signatories, Ibid; Chronological table of Actions, available at http://www.unctral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status_chronological.htm [accessed on 10 February 2016].
329 Chronological table of Actions, Supra n.327.
330 Ibid; Sanders, P., Supra n.328.
331 Sanders, P., Ibid.
332 With the declaration of the Netherlands on 24 April 1964 to extend the application of the New York Convention to the Netherlands Antilles, pursuant to Article X(1) of the New York Convention. See Notes under Status table for the Signatories, Supra n.326.
333 Supra n.328.
30 January 1975, attended by representatives from 20 governments of the Western Hemisphere, together with observers from Canada, the OECD and other organizations.\textsuperscript{335} The Conference led to the Inter-American Convention on International Commercial Arbitration of 30 January 1975, also known as the Panama Convention, which was carefully drawn up to be almost identical to the provisions of the NYC.\textsuperscript{336} Article 1 of the Panama Convention set forth that:

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.\textsuperscript{337}

Clearly, this provision retained essential elements of Article II of the NYC.\textsuperscript{338} In this way, the Panama Convention sought to change the perception of some Latin American States, which regarded an arbitration clause as a non-binding natural obligation that must be “corroborated by a fresh submission agreement once a dispute had actually arisen”,\textsuperscript{339} thereby enabling recognition of the validity of an agreement to submit both existing and future disputes arising from international business transactions to arbitration. Likewise, Article 5 of the Panama Convention repeated grounds on which the refusal to enforce foreign arbitral awards under Article V of the NYC may be justified using similar wording as follows:

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
   a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which

\textsuperscript{335} Ibid.
the parties have submitted it, or, if such law is not specified under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or

b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.\footnote{340 Supra n.337, pp.1-2, Article 5.}

Again, Article 6 of the Panama Convention corresponds with Article VI of the NYC, in that it entitles the competent authority of the State in which recognition and execution are requested to postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, to instruct the other party to provide appropriate guarantees, in cases where the competent authority specified under Article 5.1.e. has been requested for annulment or suspension of the arbitral decision.\footnote{341 Ibid, p. 2, Article 6.}

Plainly, the intended harmonising effect of the NYC was endeavoured to be achieved among Latin American States on a regional scale through the Panama Convention, which sought to harmonise the settlement of disputes arising from international commerce in the Western Hemisphere by means of arbitration by fundamentally providing enforceability of agreements to arbitrate both existing and future disputes and of foreign arbitral awards by modelling the NYC.\footnote{342 Supra n.334, p.13; Polania, A., Supra n.336.} At the end of
the Conference, 12 States, namely Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Uruguay and Venezuela, signed the Panama Convention.\textsuperscript{343} Of these, only Ecuador was a signatory to the NYC at that time; as for the others, it is worth noting that they presented for the first time their willingness to recognise arbitration as a reliable alternative to national litigation for the settlement of international disputes even if this was limited to disputes arising from trade within the Western Hemisphere.\textsuperscript{344} This willingness on a regional basis grew in time and manifested itself in the rise of the number of States acceding to the Panama Convention.\textsuperscript{345} However, not long after, the fever of worldwide harmonisation under the NYC spread to Latin American countries as well as other countries around the world. Accession to the NYC increased steadily and more than doubled over the next 20 years, by which point it covered major trading nations including States which were known to be hostile to international arbitration.\textsuperscript{346}

The increase in the number of Contracting States not only was valuable in terms of overall legal certainty,\textsuperscript{347} but also was significant on account of representing a more balanced accession from each part of the world given that a considerable number of additional Latin American countries came on board.\textsuperscript{348} The number of Contracting States was 142 when the 50\textsuperscript{th} anniversary of the adoption of the NYC was celebrated. Although the number of Contracting States was high, some criticised that the accession rate was not fulfilling for the ultimate goal because some States still had not signed up to the NYC.\textsuperscript{349} To address this concern, it was asserted that promotional activities should have been undertaken to encourage other States to become members, because only a global membership would secure the fair treatment over

\textsuperscript{344} \textit{Ibid}, pp.1-2.
\textsuperscript{345} List of Signatories to the Panama Convention, available at \url{http://www.oas.org/juridico/english/sigs/b-35.html} (Accessed on 6 June 2016).
\textsuperscript{348} Colombia, Uruguay, Haiti, Guatemala, Panama, Argentina, Barbados, Venezuela, Bolivia, Brazil, Canada, Costa Rica, Peru, Dominica, Antigua and Barbuda, Paraguay and El Salvador. See Chronological table of Actions, \textit{Supra} n.327.
rights and obligations of the parties to international trade and investment, and would motivate the parties to enter into international transactions and investment.\textsuperscript{350} 

Since then, the number of Contracting States has reached 159, with successive accessions of Rwanda, Cook Islands, Fiji, Liechtenstein, Tajikistan, Sao Tome and Principe, Myanmar, Burundi, Bhutan, Guyana, Democratic Republic of Congo, the State of Palestine, Comoros, Andorra, Angola, Cabo Verde and Sudan.\textsuperscript{351} While full global membership might be desirable as a matter of course, such a high rate of accession has left very few spots on the world map that are not covered by the NYC.\textsuperscript{352} Any further accession would not make a significant difference, since the States that are party to the NYC constitute virtually all major trading States and most Latin American, African, Asian, Middle Eastern and former socialist States.\textsuperscript{353} 

The ratification rate of the NYC presented “an excellent example of international cooperation”.\textsuperscript{354} Its approval by a great number of States makes the Convention vitally important where there is no global convention for enforcement of judicial decisions.\textsuperscript{355} Due to this widespread adherence, the NYC supplanted and almost superseded the Geneva Treaties, as per its Article VII(2), which prescribes that the Geneva Protocol and Geneva Convention shall cease to have effect for the parties of the Geneva Treaties subsequent to becoming parties to the NYC.\textsuperscript{356} Consequently, the first pre-condition for achieving the harmonising standards by which agreements and foreign arbitral awards are to be observed by the courts of Contracting States has

\textsuperscript{350} Ibid, p.179. 
\textsuperscript{351} Status table for the Signatories, Supra n.326. 
\textsuperscript{353} Brekoulakis, S., Supra n.1, p.440; Supra n.188, p.104. 
\textsuperscript{354} Lebedev, S., ‘How long does a foreign award stay enforceable?’, in Jan C. Schultsz, Albert Jan van den Berg(eds)\textsuperscript{(1982)}, The Art of Arbitration, Kluwer, Deventer, the Netherlands, p.213. 
\textsuperscript{356} UN DOC E/CONF.26/8/Rev.1, Supra n.154, Article VII(2).
been satisfied to a large extent, thanks to this high adoption rate, and the NYC has become “an effective uniform law or code” on the elements of international arbitration law. Hence, although ratification of the NYC does not provide automatic enforcement of arbitral awards because in countries with a dualist system the ratification must be followed by incorporation of the provisions of the Convention into national law and in all Contracting States the Convention will be implemented through the national courts, the widespread adherence itself can be deemed to be “a meaningful indicator” that States have converged on the idea of recognising and supporting international arbitration as a reliable alternative to national litigation.

Thus, the ability of the NYC to achieve its purpose highly depended on whether its principles were implemented correctly by the national courts. Even in cases where States have failed to comply with their international obligation under the Convention that they should give effect to the Convention domestically by enacting any legislation necessary to that effect, either by not ensuring incorporation of the Convention into the national legal order or by doing it imperfectly, it is the national courts of each State that would ensure its compliance with its international obligations, either by interpreting the meaning of the implementing legislation in a manner which is consistent with the Convention or by considering the Convention directly applicable in the absence of such national law. Even if the NYC is international as a source of law, it is its implementation which would give effect to it in each Contracting State.

However, since there is no supranational judicial authority, like the Court of Justice of the European Union (CJEU) in Luxembourg, to monitor and secure uniformity in the interpretation and application of the provisions of the NYC in its Contracting States, correct implementation of the scheme provided by the NYC remains the responsibility of the Contracting States.

Various sources have published court decisions in which the provisions of the NYC have been applied and interpreted. The International Council for Commercial Arbitration (ICCA) Yearbook of Commercial Arbitration, which has been published since

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357 Brekoulakis, S., Supra n.1, p.440.
358 Garnett, R., Supra n.38, p.405.
360 Hale, T., Ibid; Brekoulakis, S., Supra n.1, p.439.
361 Supra n.163, p.28.
362 Ibid.
363 Brekoulakis, S., Supra n.1, p.437.
1976, represents the most comprehensive source as it has been reporting national courts decisions on the application of the NYC under Part V-A of the Yearbook annually for the last 40 years. The most recent source is the 1958 New York Convention Guide, an online platform developed by Professor Emmanuel Gaillard and Professor George Bermann at the request of the UNCITRAL to promote the uniform and effective interpretation and application of the NYC.\textsuperscript{364} Informed by these sources, this Chapter will scrutinize whether national courts in the Contracting States have uniformly applied and interpreted its provisions and thereby have prompted a harmonisation of arbitration concepts by reference to the NYC as to the enforceability of foreign arbitral awards and arbitration agreements.

On that point, it is particularly important whether the pro-arbitration and pro-enforcement policy of the NYC drove courts in Contracting States to harmonise the broad concepts underpinning the exceptions to recognition and enforcement of arbitration agreements and foreign arbitral awards, namely null and void, inoperative or incapable of being performed, fair opportunity to be heard, exceeding to submission to arbitration, “binding”, “suspended”, “the competent authority of the country under the law of which the award was made”, non-arbitrable subject matter and contrary to public policy, by characterizing them without limiting themselves to the restrictions of domestic law.

### 3.1 Harmonisation of Arbitration Concepts Regarding Standards for Enforceability of Arbitration Agreements

#### 3.1.1 Territorial scope of Article II

Although the territorial scope of the application of the NYC has been prescribed in terms of foreign arbitral awards, it has remained unanswered with respect to arbitration agreements. However, the legal uncertainty has been overcome by virtue of the interpretations of the courts and the selection by legislators of suitable criteria in Contracting States.\textsuperscript{365} By analogy to Article I, national courts have generally applied Article II if an arbitration agreement provides for a foreign arbitration, i.e. arbitration agreements


in a State other than the forum State. Some courts have unfortunately imposed additional restrictions, particularly resulting from their legislations implementing the NYC. For instance, US Courts have engaged in a four-step analysis to identify whether to apply Article II or not. According to this, they have tested (i) whether there is an agreement in writing to arbitrate the subject of the dispute, (ii) whether the agreement provides for arbitration in the territory of a signatory of the Convention, (iii) whether the agreement arises out of a legal relationship, whether contractual or not, which is considered to be commercial and (iv) whether a party to the agreement is not an American citizen, or whether the commercial relationship has some reasonable relation with one or more foreign States, and concluded that Article II is applicable if these questions can be answered in the affirmative.\(^366\) Similarly, the Russian Supreme Court has excluded application of Article II in a case where the arbitration agreement provided for arbitration in a State other than Russia between Russian parties. Despite these restrictive decisions, national courts in other jurisdictions have generally referred to Article II of the NYC for clauses providing for arbitration abroad\(^367\) and explicitly rejected any defence that the NYC would not be applicable because the country in which the goods arrived or the vessel was registered was not a Party to the Convention, finding such restrictions irrelevant and noting that “[u]nder Article II of the Convention it suffices that the judge before whom recognition of an arbitration


agreement is sought belongs to a Contracting State”. Similarly, national courts have generally avoided narrowing the applicability of Article II of the NYC by requiring foreign nationality of the parties or further international elements.

National courts have even extended the application of Article II to arbitration agreements which provided for arbitration in the forum State in cases where arbitration agreements have international elements, such as the foreign nationality of at least one of the parties, foreign transactions or performance abroad. The High Court of Delhi concluded the applicability of Article II to a case where the contract contained an arbitration clause providing for ICC arbitration in India and an applicable law clause specifying that the agreement was governed by the law of Union of India, holding that:

According to Sect. 3 of the FARE [Foreign Awards Recognition and Enforcement] Act, the courts in India are under an obligation to stay the legal proceedings in respect of the matters arising out of the arbitration agreements of the kind covered by Art. II of the New York Convention subject of course to the exceptions mentioned therein. Neither Sect. 3 nor any other provision of the Act alludes to any limitations or exceptions calling for recognition and enforcement of only those transnational arbitration agreements which are capable of resulting in a foreign award. Refusal to enforce the arbitration agreement on the ground that it will not result in a foreign award cannot be sustained in view of Art. II of the New York Convention and Sect. 3 of the FARE Act. In case such a limitation was intended, there was no reason why the Convention or the FARE Act could not specifically cater for it.


[...] I am of the view that the New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce even though such an agreement does not lead to a foreign award but the enforcement and recognition of the agreement will of course be subject to the limitations already spelt out.371

Even in cases where the arbitration agreement did not expressly provide for arbitration abroad but referred to arbitration in a general way, national courts have investigated the intention of the parties as to whether or not they desire a foreign arbitration and have applied Article II of the NYC for the referral to arbitration if the case has an international element, such as the foreign nationality of at least one of the parties, or the character of the transaction.372

3.1.2 Harmonisation around the basic characteristics of the New York Convention’s regime on arbitration agreements

This section will examine whether national courts in Contracting States, having concluded that Article II applies, have generally given rise to the harmonisation of arbitration concepts through the basic features of the NYC’s regime on arbitration agreements.

3.1.2.1 Presumptive validity of arbitration agreements

National courts have unanimously agreed on the presumptive validity of arbitration agreements and that the NYC supersedes stricter requirements for the validity of arbitration agreements under their national legislations. Thus, archaic or more demanding form requirements under the national laws have been superseded by the form requirement under Article II(2).373


For instance, Italian courts have declared that Article II of the NYC prevails not only over Article 2 of the Italian Code of Civil Procedure laying down the principle by which the parties cannot agree to derogate from the jurisdiction of the Italian courts, but also Article 1341 of the Italian Civil Code, according to which an arbitral clause incorporated in a standard contract is null and void unless specifically agreed to in writing.

Similarly, the Court of Appeal of Casablanca dismissed an objection based on Article 309(2) of the Moroccan Code of Civil Procedure requiring that the arbitration clause be hand-written and specifically approved by the parties if the parties appoint arbitrators in advance in the arbitration agreement, holding as follows:

Art. II of the New York Convention does not provide for a reference to national provisions. Rather, it is a substantive rule according to which the agreement is valid if in writing and which does not require at all that the agreement be hand-written, thereby derogating from Art. 309(2) CCP [...]. The absence of a renvoi provision [a reference to national provisions] in the New York Convention aims at avoiding the inconveniences which may arise from a conflict of laws as to the nature of the written act which is a necessary requirement for the validity of the arbitration.

The US Court of Appeals expressly held that the NYC and Arbitration Act pre-empts state statutes that directly clash with the Convention and with the Arbitration Act because they effectively reincarnate the former judicial hostility towards arbitration. Thus, national courts have agreed that the form requirements under Article II for a valid arbitration agreement prescribe the maximum standard.

However, with the development of modern usages in international trade, business rarely concludes contracts through the means listed in Article II(2). Consequently, national courts have diverged on their interpretation of the

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requirement under the NYC that arbitration agreements be in written form. These variations have resulted in part from differences of expression among the five authentic versions of the NYC. For example, its English version uses language that seems to provide a non-exhaustive definition (‘The term “agreement in writing” shall include...’), while other authentic versions use language that is meant to provide an exhaustive list for defining the term “agreement in writing”.

In this regard, national courts have increasingly avoided overly formalistic interpretations of the “agreement in writing” requirement of Article II and accepted arbitration agreements established in accordance with the practice in international trade, as in line with both the purpose of the NYC (to meet the expectations of the parties in international trade for the efficiency of international commerce) and the purpose of Article II’s written form requirement (to provide evidence for the conclusion of the arbitration agreement). For instance, in Bomar Oil N.V. v. Entreprise Tunisienne d’Activités Pétrolières – ETAP, the Court of Appeal of Paris held that:

[The] provisions of Art. II of the New York Convention do not formally exclude the case where a contract, signed by the parties, or letters or telegrams exchanged between them (to which telexes should be assimilated) incorporate by means of a general reference another document in writing which provides for arbitration. Having regard to the silence of the Convention in this respect, it is appropriate, in order to interpret it, to examine the goal which its drafters pursued. The drafters were desirous to facilitate the resolution of disputes by means of arbitration in the field of international trade. By imposing the rule of the written form of the arbitration clause, they nonetheless wanted to protect parties against undertakings of which they were unaware and which would imply a renunciation of the ordinary judge. It appears therefrom that the said Convention admits the adoption of an arbitration agreement by reference only to the extent that the agreement of the parties does not involve any ambiguity.378

Similarly, the Swiss Court of Appeal concluded that the conclusion of the arbitration clause through an explicit reference to the general conditions in the written confirmation of order and the acceptance of the general conditions in the affirmative reply by telex, which must be deemed tantamount to a communication in writing meets the requirements of Article II of the NYC.379

Some courts have also concluded that if a trade usage exists as to the use of arbitration for settlement of disputes in a particular trade and if the parties are regularly active in that certain trade, then an arbitration agreement is deemed to be concluded between the parties even without an explicit declaration to this end. For instance, the Federal Supreme Court in Germany reversed a decision by the Court of Appeal holding that since Buyer did not explicitly exclude settlement of disputes by means of arbitration, which is an international trade usage in the skin and leather trade, its declaration, not containing an explicit arbitral clause, may be deemed to include a tacit arbitration agreement.\textsuperscript{380} Likewise, in \textit{Compagnie de Navigation et Transports SA v. MSC - Mediterranean Shipping Company SA}, where Somatrans ZAE and MSC concluded a bill of lading, on the back of which were printed general conditions which included an arbitral clause, for a maritime carriage contract. The original bill of lading was signed by only MSC, and the consignee signed both the original bill of lading on the side where the general conditions were printed and a copy of the bill of lading on the side with the general conditions, noting the hand-written mention “conform to the original”, upon arrival of the container. The Swiss Supreme Court dismissed the MSC’s objection to the claim brought by the consignee’s insurer, holding that a valid arbitration clause had been concluded between the parties even though Somatrans ZAE had not signed the bill of lading.\textsuperscript{381} The Court noted that:

\begin{quote}
with the development of modern means of communication, unsigned written documents have an increasing importance and diffusion, that the need for a signature inevitably diminishes, especially in international commerce, and that the different treatment reserved to signed and unsigned documents is under discussion.\textsuperscript{382}
\end{quote}

Then, the Court explained its decision that “a certain behaviour can replace compliance with a formal requirement according to the rules of good faith” in particular situations, as in this case, in which a long-standing business relationship

\begin{footnotesize}
\textsuperscript{382} \textit{Ibid}.
\end{footnotesize}
between the parties has been based on general conditions which were already printed on the back of the bill of lading.\textsuperscript{383}

Despite the trend towards a more liberal and updated interpretation of Article II(2) of the NYC, some doubts remained and views varied in some countries as to its proper interpretation, which was an issue for international trade in the sense that “it reduced predictability and certainty of international commercial commitments”.\textsuperscript{384} There was a need to achieve a wide international consensus so that the interpretation of Article II(2) of the NYC could be extended to cover electronic commerce.\textsuperscript{385} Furthermore, there was a problem arising from the combination of the question of form and the way the arbitration agreement has come into existence, stated by the expression “exchange of letters or telegrams”, particularly in cases where this expression has been overly literally interpreted “in the sense of a mutual exchange of writings”.\textsuperscript{386} The factual situations that have posed problems as a consequence of this interpretation included the following:

tacit or oral acceptance of a written purchase order or of a written sales confirmation; an orally concluded contract referring to written general conditions (e.g. oral reference to a form of salvage); or, certain brokers’ notes, bills of lading and other instruments or contracts transferring rights or obligations to non-signing third parties (i.e. third parties who were not party to the original agreement)

such as “universal transfer of assets (successions, mergers, demergers and acquisition of companies)”, “specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party)”, or “in the case of multiple parties or group of contracts or group of companies, implicit intention of the application of the arbitration agreement to persons who were not expressly parties thereto”.\textsuperscript{387}

Moreover, national courts have differed on two issues in cases where national laws have provided less stringent form requirements than Article II of the NYC. First, there had been controversy over whether the NYC’s provisions might be combined

\textsuperscript{383} Ibid.
\textsuperscript{386} Ibid, p.7, para.24.
\textsuperscript{387} Ibid, pp.7-8, para.25.
with more liberal provisions of domestic laws, particularly in relation to the application of Article II(2) of the NYC.\textsuperscript{388} While certain state courts have held that there is no obstacle to using some of its provisions in conjunction with other, more liberal provisions in national law, certain State courts have adopted the view that

the New York Convention’s regime is a self-contained regime and [have] ruled that it would be contrary to the intentions of the authors of the New York Convention if awards made on the basis of an agreement that did not comply with the New York Convention’s requirements would nevertheless benefit from its regime.\textsuperscript{389}

Secondly, the question had been raised of whether Article VII(1) of the NYC, which allows more favourable law to apply for the enforcement of foreign arbitral awards, might also be applied with respect to arbitration agreements. Certain state courts have applied their domestic law, providing more lenient conditions for the form of arbitration agreement in determining the enforcement of arbitration agreements at the stage of referral to arbitration, interpreting Article VII(1) as also applying to enforcement of arbitration agreements.\textsuperscript{390}

With the impetus of the belief in the Final Act that in addition to the NYC some other measures should be taken to contribute to increasing the effectiveness of arbitration in the settlement of private law disputes,\textsuperscript{391} the UNCITRAL, “the core legal body in the United Nations system for the development of international trade law and a body whose work in the area of arbitration had gained universal recognition”,\textsuperscript{392} operated one of its tasks for progressive harmonisation and unification of the law of international trade, i.e. “promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade”\textsuperscript{393} and issued an interpretative instrument to speed up harmonization process based on case law,\textsuperscript{394} considering the expanding use

\textsuperscript{389} Ibid, pp.19-20, para.32-33.
\textsuperscript{390} Ibid, p.20, para.34.
\textsuperscript{391} UN DOC E/CONF.26/8/Rev.1, Supra n.154, p.4, para.16.
\textsuperscript{392} Supra n.384, p.19, para.93.
of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the NYC in relation to the form requirement for arbitration agreements. To guarantee a broad interpretation of the written form required by Article II(2) of the NYC, the instrument recommended applying Article II(2) in a manner that the circumstances described for the term “agreement in writing” in Article II(2) are not exhaustive. This is in line with the text of the English version of the NYC, which best reconciles the difference in meaning of the authentic texts of the NYC, having regard to the object and purpose of the Convention. To expand recognition of arbitration agreements that do not meet the form requirement for arbitration agreements in the NYC, it developed a solution from the NYC itself and suggested to apply its Article VII(1) to arbitration agreements, thereby allowing any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

This would mean allowing parties to rely on more lenient domestic form requirements than Article II of the NYC, not only in enforcing an arbitral award resulting from an arbitration agreement that does not meet Article II of the NYC but also in determining the enforceability of arbitration agreements at the stage of referral to arbitration. Article VII(1) of the NYC paved the way for modernising the form requirement for arbitration agreements under the regime of the NYC to respond to the needs of international trade, since it would allow an interpretation of the written form requirement of the NYC under less stringent national law and encourage both “the development of rules favouring the validity of arbitration agreements in a wider variety of situation” in line with merchants’ need and their adoption by States.

396 Ibid.
398 Supra n.395.
399 Draft interpretative instruments regarding article II, paragraph (2), and article VII, paragraph (1), of the New York Convention, in Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006), A/CN.9/592, (27 February 2006), pp.18-19, para.86. See also, Supra n.388, p.20, para.36.
3.1.2.2 Exceptions

Although some courts have unfortunately held that they have discretion, on grounds of public policy, to refuse requests to refer the parties to arbitration when there is a valid arbitration agreement, even when that agreement is not null and void, inoperative or incapable of being performed, national courts have generally concluded that the presumptive validity of such agreements can be reversed only on the basis of the exceptions listed under Article II(3). Given the silence of the NYC on how national courts should assess these exceptions, it is impressive that national courts have been careful regarding the determination of whether the dispute is arbitrable, or whether the arbitration agreement is null and void, inoperative or incapable of being performed, or the matter is arbitrable, pursuant to Article II(3).

With respect to the determination of whether a subject matter is capable of settlement by arbitration, the Fritz Scherk v. Alberto-Culver Company case, where the Alberto-Culver company brought a suit against Fritz Scherk in a Federal District Court of Illinois despite the fact that the contract of sale contained a clause providing that “any controversy arising out of agreement or breach thereof would be referred to arbitration before the International Chamber of Commerce in Paris”, is illustrative. The US Supreme Court reversed the lower court’s decision which denied a motion to stay the proceedings before it and enjoined the parties from proceeding with arbitration and enforced the arbitration agreement by stating as follows:

A parochial refusal by the courts of the country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.401

Similarly, in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., the US Supreme Court answered in the affirmative to the consideration of “whether an American court should enforce an agreement to resolve antitrust claims by arbitration


when that agreement arises from an international transaction”. Referring to its previous decisions in the Bremen and Scherk case, where the Court had established ‘a strong presumption in favour of enforcement of freely negotiated contractual choice of forum provisions’, the US Supreme Court held in that case that:

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

As for the terms “null and void, inoperative or incapable of being performed”, while some national courts have applied national law, either the national law indicated by Article V(1)(a) by analogy, the lex fori or the law governing the contract as a whole to uphold the arbitration agreement, some other national courts have interpreted exceptions under Article II(3) narrowly, limiting these grounds to those which are internationally recognised and rejecting national idiosyncrasies. In Rhone Méditerranée Compagnia francese di assicurazioni e riassicurazioni (Italy) v. Achille Lauro et al. (Italy), for example, the Court avoided any interpretation at odds with the overall purpose of the NYC or its drafting history, which suggests that a proposal to incorporate in Article II choice of law language similar to that in Article V was rejected because drafters of the Convention were concerned that a forum might then have an obligation to enforce arbitration agreements regardless of the forum law. The Court disagreed with the argument that it should not refer the parties to arbitration because any award that might be made by the arbitrators would be unenforceable in the place of arbitration (i.e. Italy), on the ground that the arbitration clause provided for an even number of arbitrators, which is null and void under Italian law, reasoning that the possibility of future unenforceable awards under the law of a foreign forum is no ground for refusal to refer to arbitration. The Court stated that:

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403 Ibid.
The meaning of Art. II, para.3, which is the most consistent with the overall purpose of the Convention, is that an agreement to arbitrate is 'null and void' only (a) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (b) when it contravenes fundamental policies of the forum state. The ‘null and void’ language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.

[...]

In other words, signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum State, nor those of States having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate. The rule of one State as to the required number of arbitrators does not implicate the fundamental concerns of either the international system or forum, and hence the agreement is not void.406

In respect of the terms “inoperative or incapable of being performed”, national courts have also tended to adopt a narrow approach and rejected the view that an arbitration agreement is “inoperative or incapable of being performed” if (i) some parties in a multi-party dispute are not parties to the arbitration agreement or (ii) if one of the parties lacks sufficient funding for arbitration. In the first instance, for example, in The City of Prince George v. A.L. Sims & Sons Ltd., the Canadian Court of Appeal reversed the decision of the court of first instance, which had found that the arbitration clause was inoperative or incapable of being performed because the action raised broader issues against the co-defendant, related to the arbitrable issues between the plaintiff and the defendant, and that it could exercise a residual discretion to refuse the stay where there was a risk of multiple proceedings and inconsistent results.407 The Court of Appeal held that “Canadian and English case law was clear that, as a general principle, whenever there are multiple parties and multiple issues, of which some are interrelated and similar, defendants are not barred from invoking an arbitration clause binding them”.408 Likewise, the Swiss Supreme Court emphasised that the parties who are not subject to the arbitration agreement could be referred to proceedings before


408 Ibid.
the courts, and the mere risk of conflicting decisions rendered in different proceedings does not make arbitration clauses inoperative or incapable of being performed under the NYC.\(^{409}\)

With respect to the second instance, although several German courts held that the financial incapacity of one of the parties renders an arbitration agreement incapable of being performed,\(^{410}\) other national courts have declined to interpret this ground so broadly. For instance, the Court of Appeal of England and Wales, in considering the question of whether the impecuniosity of one of the parties qualifies for exception by way of making the arbitration agreement “incapable of being performed” as stated in Sect.1, para.1 of the Arbitration Act 1975, stated that:

In my judgement, on the true construction of these words, ‘incapable of being performed’ relates to the arbitration agreement under consideration. The incapacity of one party to that agreement to implement his obligations under the agreement does not, in my judgement, render the agreement one which is incapable of performance within the Section any more than the inability of a purchaser under a contract for purchase of land to find the purchase price when the time comes to complete the sale could be said to render the contract for sale incapable of performance. The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it. Impecuniosity is not, I think, a circumstance of that kind.\(^{411}\)

Moreover, with the widespread acceptance that an arbitration agreement is separable from the main contract under most legal systems, national courts have generally agreed that the validity of an arbitration clause does not depend necessarily on the validity of the contract in which it is inserted. Accordingly, national courts have referred the parties to arbitration if the grounds under Article II(3) do not relate to the arbitration clause itself.

Furthermore, in the absence of guidance under Article II(3) as to the scope of the review of the validity of arbitration agreements by the court, i.e. whether a court should undertake a full or prima facie examination, while some national courts take the view that the national court can decide on the jurisdictional objection with full


\(^{410}\) Supra n.19, p. 345.

power of examining the grounds under Article II(3), without limiting its examination to a prima facie examination, in cases where the seat of arbitration is abroad,\(^\text{412}\) other national courts have adopted a more arbitration-friendly approach in light of the pro-enforcement bias of the NYC. Courts in the latter group have given priority to the arbitral tribunal to determine its own jurisdiction by carrying out a prima facie determination of the validity of arbitration agreements at the stage of referral to arbitration as long as the arbitration agreement is not manifestly invalid on the grounds of Article II(3), because courts have already been provided with a full review of the ruling of the arbitral tribunal on its jurisdiction at the stage of enforcement of an arbitral award under Article V(1)(c). Such an approach is plainly a step further towards achieving the objective of the NYC.

National courts have modelled the burden of proof rule under Articles IV and V for the purpose of assessing the exceptions under Article II(3). Accordingly, when the party invoking the arbitration agreement proves that it meets the requirements of Article II, the burden of proving the invalidity of the arbitration agreement under one of limited grounds of Article II(3) rests on the party contesting its validity.

Generally, exceptions under Article II have not been an obstacle to arbitration due to the development of national arbitration legislations and the arbitration-friendly approach of national courts.

3.1.2.3 Obligation to refer parties to a valid arbitration agreement to arbitration

National courts have almost unanimously agreed that they have no discretion over whether to recognise and refer the parties to a valid arbitration agreement to arbitration, at the request of one of the parties. They have complied with the NYC’s regime on arbitration agreements and have not attempted to resolve the dispute themselves.

For instance, national courts in the UK have expressly confirmed this conclusion. In Associated Bulk Carriers Ltd. v. Koch Shipping Inc., the Court held that Koch Shipping was entitled to a stay of the court proceedings, relying on the Arbitration Act of 1975, which implemented the NYC in the UK and imposed the

\(^{412}\) ‘Switzerland No.27, Compagnie de Navigation et Transports SA v. MSC-Mediterranean Shipping Company SA’, Supra n.381.
obligation on the court to stay the proceedings. In subsequent court decisions, UK courts have maintained this view successfully. Courts in the UK emphasised that the purpose of the 1975 Act was to give effect to the NYC, therefore in cases where the parties agree settlement of their disputes by arbitration such disputes are mandatorily determined so decided.

Likewise, courts in Australia, the US, India and Pakistan have concluded that the courts would have no discretion. In *Flakt Australia Ltd. V. Wilkens & Davies Construction Co. Ltd.*, for example, the Supreme Court of New South Wales stated:

It is significant that if the prescribed conditions are fulfilled a stay is mandatory, notwithstanding that the governing law of the arbitration agreement is that of a country not a party to the Convention, and under the law of that country a stay of proceedings on the basis of an agreement to arbitrate may be discretionary (as it is under the law of New Zealand).

The US Courts, stating that there was “nothing discretionary” about Article II(3), have consistently concluded that in cases where a court requested to refer a dispute to arbitration, the court must order arbitration unless it finds the agreement is flawed under Article II(3).

The Supreme Court of India affirmed the decision of the lower courts, which stayed suit and referred the parties to arbitration, stating that Section 3 of the Foreign Awards (Recognition and Enforcement) Act 1961, which implements the NYC in India, prevails over anything to the contrary in the Arbitration Act 1940 or the Code of Civil Procedure 1980, and, by using the mandatory expression “shall”, obliges the Court to

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pass the order staying the legal proceedings commenced by a party to the agreement if the conditions prescribed therein are met.\textsuperscript{418}

Courts in Pakistan also explicitly stated that referral to arbitration is mandatory as follows:

While dealing with the matter under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005 such discretion is not available with the Court. Sect. 4(1) provides that a party to arbitration agreement against whom legal proceedings have been brought in respect of the matter which is covered by the arbitration agreement may upon notice to the other party to the proceedings apply to the Court to stay the proceedings in so far as it concerned matter.

Sect. 4(2) of the Ordinance 2005 has taken away discretion of the Court whether or not to stay the proceeding in terms of the arbitration agreement, even on the ground of inconvenience etc. except where the arbitration agreement by itself is null and void, inoperative or incapable of being performed.\textsuperscript{419}

Clearly, national courts have correctly referred to arbitration in the presence of a valid arbitration agreement.

3.2 Harmonisation of Arbitration Concepts Regarding the Recognition and Enforcement of Foreign Arbitral Awards

3.2.1 Scope of application

National courts have broadly avoided restricting the scope of application defined by Article I(1) of the NYC by imposing additional requirements. The relevant improvement under the NYC, which is the elimination of the requirement that the parties must be subject to the jurisdiction of a Contracting State under the Geneva Convention, has been widely complied with by national courts. In cases where one of the parties is a citizen of a State which has not adhered to the NYC, courts have explicitly stated that whether the States of which the parties are subjects are Contracting States or not is not decisive for the NYC’s applicability.\textsuperscript{420} Courts in Contracting States which have


declared the reciprocity reservation of Article I(3) have also been careful when applying the reservation not to introduce the nationality requirement, which existed under the Geneva Convention, into the NYC by the backdoor in the form of a reservation. Accordingly, national courts have sought reciprocity between the country where the award has been rendered and the country where enforcement is sought, irrespective of whether the States of which the parties are subject are Contracting States or not.\textsuperscript{421}

Similarly, the requirement of divergency of citizenship, which existed under the Geneva Protocol, has been correctly found irrelevant in determining whether an arbitral award falls within the scope of application. For instance, at a time when the Italian Code of Civil Procedure prohibited enforcement of foreign arbitral awards rendered in a dispute between Italian citizens and required for the exclusion of the Italian courts that at least one party was a foreigner, although a few Italian courts limited the scope of application of the NYC, relying on this limitation under the national law as a general rule of public policy,\textsuperscript{422} Italian courts broadly acknowledged that applicability of the NYC, i.e. that the award should be made in the territory of any foreign State was not at all limited with respect to the nationality of the parties.


thereby covering arbitral awards rendered between subjects of the same State or of different States, and correctly concluded that the Italian Code of Civil Procedure was superseded by the NYC in favour of arbitration.\textsuperscript{423}

As concerns the two criteria of Article(I)(1) of the NYC, the territorial criterion under the first sentence of Article I(1) has almost become the sole principle in operation in determining whether an arbitral award falls under the NYC. The non-territorial formula under the second sentence of Article I(1), which was added to expand the scope of application because certain civil law countries like Germany and France allowed the parties to agree to arbitrate in one country under the arbitration law of another country and determined whether an award is foreign according to the procedural law chosen by the parties, has become a dead letter over time. The countries which took the lead in adding non-domestic awards as an additional formula in determining whether an award fell under the NYC have all revised their legislations and abandoned the second criterion and relied on the principle of territoriality.\textsuperscript{424} This means that these countries deem an arbitral award domestic even when the parties choose foreign procedural law to govern arbitration, just as the majority of States do. The NYC not only secured the signatures of States that might not have become members in the absence of the additional criterion, but it has set the model for the legislative changes in these countries that diverged from those of most States. This proves one of the micro-wins on the way towards the macro-win of the NYC.

However, case law has been developed in the United States in relation to non-domestic awards beyond the extent envisaged by the drafters. To be more specific, US courts have applied Section 202 of the Federal Arbitration Act, which gives effect to the NYC in the United States and under which


An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States. 425

Accordingly, the courts have qualified awards rendered in the United States as non-domestic if they have foreign elements. They have been of the opinion that awards ‘not considered as domestic’ denotes awards which are subject to the Convention not because [they are] made abroad, but because [they are] made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction

and that such expansive interpretation would be “more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards”. 426 Its practical benefit relates to the fact that the party seeking enforcement may benefit from a longer statute of limitations applicable to enforcement actions under the NYC in comparison to the statute of limitations applicable to enforcement under other laws. 427

Although it may sound as if an interpretation expanding the notion of non-domestic awards in the second sentence of Article I(1) to awards made in enforcing State under the State’s own arbitration law but involving foreign elements makes the

United States “a more hospitable forum for foreign parties intending to arbitrate within the United States”, this interpretation is not only contrary to the history of the NYC and but also incompatible with the other provisions of it, i.e. the territorial criterion in the first sentence of Article I(1) and Article V(1)(e). As the breach in relation to the legislative history is so clear in light of the reason why the non-territorial criterion was added in the NYC above, it is essential to mention the latter aspects for the sake of clarity.

First, the US courts, interpreting the non-domestic award expansively by relying on Section 202 of the Federal Arbitration Act, have overlooked the core element of the territorial criterion, i.e. the place of arbitration, under the first sentence of Article I(1), since they have taken account of other elements, such as the nationalities or domiciles of the parties, or the applicable law. This is clearly incompatible with the NYC, under which the only criterion for applicability is that the award was made in the territory of a State other than that where enforcement is sought. Secondly, such expansive interpretation has also been at odds with the consideration of the refusal ground that the award was “set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made” under Article V(1)(e). According to this interpretation, the losing party would be able to challenge the same award before US courts on the basis of similar grounds in two different procedures.

On the one hand, the losing party may resist enforcement based on refusal grounds under the NYC when the prevailing party seeks enforcement under the NYC. On the other hand, because those awards that are treated under the concept of non-domestic awards by the US courts, indeed are domestic awards as they are rendered in the United States, the losing party may challenge those awards under the domestic regime for annulment, which contains grounds for setting aside awards that are similar to

429 'US No.146, John H. Brier v. Northstar Marine, Inc.; Shamrock Marine Towing; and Cape May Marine Services, Inc. (d/b/a Sea Tow of Southern New Jersey), United States District Court, District of New Jersey, 28 April 1992 and 1 July 1992', in Albert Jan van den Berg(ed), YCA, Vol.19 (Kluwer Law International 1994) pp.766-774 (concluding that agreement to arbitrate outside the United States under the law of the place of arbitration did not fall under the New York Convention in cases where dispute was solely between U.S. citizens and there was no reasonable relationship to the foreign State).
430 Supra n.428, p.55.
431 Ibid.
the grounds for refusal of recognition and enforcement under the NYC, pursuant to Article V(1)(e).\textsuperscript{433} This expansive interpretation has complicated the enforcement of arbitral awards that are made in the United States but involve a foreign element. Unless those awards have been interpreted to fall under the heading of non-domestic awards as conceived by the NYC, they would be subject to the legal regime applicable to domestic awards, i.e. the rules under Chapter One of the Federal Arbitration Act, under which enforcement procedure is straightforward and enforcement of arbitral awards may be resisted through an action for setting aside the award.\textsuperscript{434} More importantly, the practice in the United States in relation to the second sentence of Article I(1) has unilaterally deviated from the uniform administration of the jurisdictional activity under the NYC.\textsuperscript{435}

The other point is the effect of the NYC on arbitral awards that result from arbitration proceedings which do not make any reference to a national arbitration law. This type of arbitral award, which may be referred to a “a-national”, “transnational”, “stateless” or “floating” award, is encountered in practice rather exceptionally, because parties in almost all cases agree on a national arbitration law to govern arbitration, thereby having limited practical significance for now.\textsuperscript{436} In a few cases where there has been a physical seat but arbitration lacked a legal seat, the national courts have applied the NYC to those awards. For instance, in Société Européenne d'Etudes et d'Enterprises (S.E.E.E.) v. Federal Republic of Yugoslavia, where the arbitral decision was not regarded as a Swiss award under national law because the matter had no relevance to Switzerland beyond that the tribunal was held there, the Supreme court applied the NYC to that award rendered in Laussane.\textsuperscript{437} Similarly, the US Court of Appeals of the Ninth Circuit applied the NYC to an award held by the Iran-US Claims Tribunal at The Hague, reasoning that:

Language pertaining to the 'choice of law' issue is not mentioned, or even alluded to, in Art. I, which lays out the Convention's scope of applicability. In

\textsuperscript{433} Supra n.428, p.55.
\textsuperscript{434} Ibid.
\textsuperscript{435} Wolff, R., Supra n.51, pp.64, 66.
\textsuperscript{436} Van den Berg, A.J., Supra n.236, p.57.
addition, although it is a close question, the fairest reading of the Convention itself appears to be that it applies to the enforcement of non-national awards.\textsuperscript{438}

As neither the text of the NYC in describing the foreign nature of an award under Article I(1) nor its drafting history exclude those awards from the scope, these interpretations for applying the NYC appear to be in compliance with the purpose of the NYC.

In the absence of a definition of the term ‘arbitral award’ in the NYC, national courts have adopted a pragmatic approach, in line with the spirit of the NYC,\textsuperscript{439} when determining whether a decision can be categorised as an arbitral award under the NYC. The prevailing view among courts has been to look at the nature of the decision rather than how it has been described. The courts have commonly held that as long as a decision made by an arbitral tribunal ultimately determines disputes between the parties and has res judicata effect, it would be an award the recognition and enforcement of which the NYC is concerned with. For instance, in \textit{Publicis Communication v. Publicis S.A., True North Communications Inc.}, where the arbitral tribunal signed an order instructing Publicis to provide True North with tax information, the US Court of Appeal criticised Publicis’ argument that “an arbitral ruling can be final in every respect, but unless the document bears the word ‘award’ it is not final and is unenforceable”, calling it “extreme and untenable formalism”.\textsuperscript{440} The Court held that despite the arbitral tribunal’s designation as an ‘order’ rather than an ‘award’, its decision was final, reasoning that the content of an arbitration decision, not its nomenclature, determines finality for purposes of enforcement under the NYC.\textsuperscript{441} In a similar vein, the German Federal Supreme Court held that a partial award on jurisdiction containing a decision on costs was enforceable to the extent that it


ruled on costs because “the arbitral tribunal decided on the costs of the procedural phase dealing with jurisdiction in a final manner”. More recently, in determining a decision which was called as a ‘partial award’ but was by its nature and scope an award finally settling several claims, the Supreme Court of Justice of Colombia stated that such partial awards were final “not because they put an end to the arbitration or to the tribunal’s function but because they settle in a final manner some of the disputes that have been submitted to arbitration”.

The NYC’s emphasis on the voluntary submission to arbitration by covering not only awards resulting from arbitration where arbitrators are appointed for a specific case but also awards ensuing from arbitration where the parties have referred to permanent arbitral tribunals has been recognised internationally. Reported cases have showed that courts have recognised a broad variety of arbitral awards rendered by various permanent arbitral bodies, such as the Vienna Commodity Exchange, the Arbitration Board of the Coffee Trade Federation in London, the Arbitration Board of the International Council of Hide and Skins Sellers, the Chamber of Commerce and Industry of Ukraine and the Arbitration Institute of the Central Chamber of Commerce of Finland. Clearly, given the prevailing understanding that an award falls under the scope of the NYC as long as it results from an arbitration that is based on voluntary submission, the term “permanent arbitral bodies” inserted into the NYC has completed its mission.

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3.2.2 Harmonisation of enforcement of foreign arbitral awards under the regime of the New York Convention

National courts have generally complied with the principles under Article III, i.e. the presumptive obligation to recognise arbitral awards as binding and enforce them under the conditions prescribed by the Convention itself and the application to the procedures governing the recognition and enforcement of foreign arbitral awards the rules of procedure of the territory where recognition and enforcement of the award is sought subject to international limits given by the NYC.

3.2.2.1 Presumptive obligation to recognise arbitral awards

With respect to the first principle, national courts have emphasised the mandatory character of Article III and recognised and enforced awards if the requirements under Article IV of the NYC are met and unless one of the grounds for refusal of recognition and enforcement under Article V is present.449

3.2.2.1.1 Formalities under Article IV

Regarding the requirements under Article IV, few national courts violated their international obligations as a Contracting State to the NYC by imposing additional requirements under their national arbitration legislation.450 Most national courts have abided by the intention of the drafters of the NYC that the requirements under Article IV would supersede national legislation that imposed additional evidentiary conditions.451 Moreover, in the absence of further description of the contents and

450 Eg. ‘Bulgaria No.1, ECONERG Ltd. v. National Electricity Company AD, Supreme Court of Appeal, Civil Collegium, Fifth Civil Department, 356/99, 23 February 1999’, in Albert Jan van den Berg(ed), YCA, Vol.25 (Kluwer Law International 2000), p.678(Supreme Court in Bulgaria rejected the argument that lower court should not have allowed appeal on the ground that the arbitral award was not authenticated by the arbitral tribunal and was not accompanied by a certificate by the same tribunal to the effect that it had entered into force.); ‘Colombia No.6, Pollux Marine Services Corp. v. Colfletar Ltda, Supreme Court of Justice of Colombia, 12 May 2011’, in Albert Jan van den Berg(ed), YCA, Vol.37 (Kluwer Law International 2012), pp.198-199(The Court denied recognition of the foreign award since the claimant had not provide evidence that the award had been final by not submitting a certification of the authority that rendered it, as required in Colombian Law, in addition to meeting the requirements under Article IV of the New York Convention).
nature of the formal obligations under Article IV, courts have generally interpreted the provision in the spirit of the NYC, aiming to reduce as much as possible the formalities for the party seeking recognition and enforcement of a foreign award. Although few courts have construed the requirement of “original agreement referred to in article II or duly certified copy thereof” as if the applicant is required to prove that the arbitration agreement is validly concluded\(^\text{452}\) and meets the formal requirements of Article II\(^\text{453}\) or the requirement of “the duly authenticated original award or a duly certified copy thereof” as if the applicant must prove the finality of the award,\(^\text{454}\)

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452 ‘Spain No.37, Union de Cooperativas Agrícolas Epis-Centre v. Aguciersa, SL, Tribunal Supremo [Supreme Court], 1678/199, 7 July 1998’, in Albert Jan van den Berg(ed), YCA, Vol.5 (Kluwer Law International 1998), pp.260-262(The court dismissed the request for enforcement since the claimant did not satisfy one of the conditions for recognition provided in Article IV by not submitting an arbitration agreement within the meaning of Article II of the New York Convention); ‘Italy No.132, Finagrain Compagnie Commerciale Agricole et Financiere SA v. Patano snc, Corte di Appello [Court of Appeal], Bari, Not Indicated, 30 November 1989’, in Albert Jan van den Berg(ed), YCA, Vol.21 (Kluwer Law International 1996), pp.571-575; ‘Spain No.32/E15, Consmaremma-Consortio tra produttori agricoli Societa Cooperativa a responsabilita limitata v. Hermanos Escot Madrid, SA,Tribunal Supremo [Supreme Court], 20 February 2001’, in Albert Jan van den Berg(ed), YCA, Vol.26 (Kluwer Law International 2001), pp.858-862(Supreme Court in Spain granted enforcement by noting that even though the sales confirmation was not a written arbitration agreement within the meaning of Article II, formal requirement for recognition set by Article IV(1)(b) was met since contractual relationship was completed by a later contract, which was signed by both parties and expressly referred to the sales confirmation.); ‘Norway No.1, Charterer v. Shipowner, Halogaland Court of Appeal, 16 August 1999’, in Albert Jan van den Berg(ed), YCA, Vol.27 (Kluwer Law International 2002), pp.519-523(The requirement to submit arbitration agreement under Article IV was not satisfied since the correspondence was occurred by means of emails, which did not constitute arbitration agreement in writing under Article II); ‘US No.539, Guang Dong Light Headgear Factory Co., Ltd. (PR China) v. ACI International, Inc. (US), United States District Court, District Court of Kansas, not indicated, 10 May 2005’, in Albert Jan van den Berg(ed), YCA, Vol.31 (Kluwer Law International 2006), pp.1105-1124. See also, Mistelis, L.A, Di Pietro, D., ‘New York Convention, Article IV [Formalities required to obtain recognition and enforcement]’ in Loukas A. Mistelis (ed)(2015), Concise International Arbitration, 2\(^{nd}\) edition, Kluwer Law International, p.16.

453 E.g. ‘Chile No.1, Max Mauro Stubrin (Argentina), Walter Gerardo Stubrin (Argentina) and others v. Inversiones Morice S.A. (Chile), Corte Suprema [Supreme Court], First Chamber, Not indicated, 11
national courts have almost unanimously held that the party seeking enforcement is not required to prove the validity of the arbitration agreement nor that the award has executory force in the country of origin to be able to have an obligatory force elsewhere, and that a submission of the listed documents in Article IV provides evidence of the existence of the award and the arbitration agreement, thereby giving the applicant a prima facie right to recognition and enforcement, in line with the plain language of Article IV and the intent of the drafters of the NYC. Additionally, national courts have not exploited the silence of the plain language of Article IV regarding whether the authenticity or certification of the listed documents under Article IV must be in conformity with the law of the country in which, or under the law of which, the award is made or with the law of the country where enforcement is

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sought. Although a few courts have adopted a strict interpretation, definitely at odds with the spirit of the NYC, national courts have mostly enforced foreign arbitral awards, commonly without even addressing the law governing authentication or certification and occasionally holding expressly that the claimant can provide the documents authenticated or certified according to either the law of the country where the award was made or the law of the country where the award was to be relied upon.

Furthermore, national courts have avoided excessive formalism when evaluating the manner in which a duly certified translation of the award and the arbitration agreement is submitted, pursuant to Article IV(2). Accordingly, courts have dismissed objections that the requirement of the duly certified translation of the award and arbitration agreement under Article IV is not met, if such translation concerns the entirety of the arbitration agreement and arbitral award. Likewise, the courts have remained flexible regarding the question of which country the listed authorities to certify translation must be chosen from and have left the applicant free to choose the competent authority from either the state of the rendition of the award or the state where the enforcement is sought. Also, courts have avoided interpreting the requirement that the translation of the arbitral award be certified by an official or sworn translator, or by a diplomatic or consular agent, to mean that such translation must be done personally by any such person, as to do so would be against the purpose of the NYC, which sought to improve the position of the party seeking

456 Supra n.92, p. 178.
457 ‘Italy No.52, Societe Italo-Belge pour le Commerce et l’Industrie v. S.p.a. I.G.O.R., Corte Di Appello of Brescia, 27 December 1980’, in Pieter Sanders(ed), YCA, Vol.8 (Kluwer Law International 1983), pp.383-385 (holding that even if the said documents are authenticated or certified according to the law of the country where the award was made, a second authentication or certification is required to be made according to the law of the country where the recognition or enforcement is sought.); ‘Bulgaria No.1, ECONERG Ltd. v. National Electricity Company AD’, Supra n.450, pp.678-682 (rejecting enforcement by reasoning that the authentication of the award must be made by the court at the seat of arbitration).
459 ‘Switzerland No.33, R SA v. A Ltd.’, Supra n.250, pp.863-868 (noting that the objection that the applicant did not supply documents requested by Article IV of the Convention by submitting a translation of which only first and last pages were certified, was “purely formal” because the appellant did not contest the translation’s correspondence to the original award); ‘Switzerland No.37, Italian party v. Swiss company, Bezirksgericht, Zurich, 14 February 2003 and Obergericht, Zurich, 17 July 2003’, in Albert Jan van den Berg(ed), YCA, Vol.29 (Kluwer Law International 2004), pp.819-833 (rejecting the argument that a certified translation of excerpts of the license agreement, including arbitral clause, did not meet the conditions of Article IV(2)); ‘Switzerland No.46, X SA v. Z LLC, Federal Supreme Court of Switzerland, 2nd Civil Law Chamber, 5A_754/2011, 2 July 2012’, in Albert Jan van den Berg(ed), YCA, Vol.37 (Kluwer Law International 2012), pp.305-308.
460 ‘Austria No.3, Not indicated v. Not indicated’, Supra n.458.
recognition and enforcement of arbitral award. Instead, courts have found that a duly certified translation, irrespective of by whom it is made, sufficient to meet the requirement.461

3.2.2.1.2 Grounds for refusal

National courts in many jurisdictions have recognised key features of the grounds for refusing recognition and enforcement of arbitral awards in Article V of the NYC in practice. Accordingly, despite the fact that some courts have unfortunately overshadowed the uniform understanding of the exhaustive nature of the refusal grounds by applying additional grounds, such as manifest disregard of the law and forum non conveniens, both of which are traditional US legal doctrines that apply in domestic arbitration, non-retroactivity,462 national courts have widely recognised that


the grounds for refusing recognition and enforcement of an arbitral award are exhaustive,\textsuperscript{463} and that they are not allowed to review the merits of arbitral awards at the enforcement phase.\textsuperscript{464} National courts have kept on the right side of the intention


\textsuperscript{464} E.g. ‘Italy No.22, Società La Naviera Grancebaco S.A. v. Ditta Italgrani, Tribunale Di Napoli, 30 June 1976’, in Pieter Sanders(ed), YCA, Vol.4, (Kluwer Law International 1979), pp.277-279, para.8 (The Court rejected a request of re-examination of the merits of the arbitral decision by holding that: “the New York Convention, which derogates from Art. 798 CCP, does not provide for re-examination on the merits. It would be contrary to the spirit of international cooperation to introduce additional requirements and conditions to a Convention which extensively regulates the recognition and enforcement of foreign arbitral awards, which it is designed to facilitate.”); ‘Italy No.34, S.A.S. Wieland K.G. v. Società Industriale Meridionale (S.I.M.), Court of Appeal of Messina, 19 May 1976’, in Pieter
of the drafters of the NYC, and exceptional grounds for refusing enforcement, which were construed as innovations in 1958, have become “unchallenged enforcement standards” in time. Likewise, despite a few court decisions that shifted the burden to the applicant under the refusal grounds in Article V(1), it has become a common notion that enforcement may be refused only if the party against whom the award is invoked asserts and furnishes grounds for refusal enumerated in Article V(1), and


465 Brekoulakis, S., Supra n.1, p.440.
466 ‘Greece No.6, Charterer v. shipowner, Court of First Instance of Athens, 3359, 1983’, in Albert Jan van den Berg(ed), YCA, Vol.11 (Kluwer Law International 1986), pp.500-501(changing the burden of proof to the party seeking enforcement by concluding that it could not determine whether the arbitration agreement was valid according to the law of the place of arbitration since the party seeking enforcement had not produced the relevant statutory provisions together with its translation into the enforcing country’s language); ‘Germany No.126/E21, Clothing manufacturer (Ukraine) v. Textiles manufacturer (Germany), Oberlandesgericht [Court of Appeal], Munich, 34 Sch 04/08, 19 January 2009’, in Albert Jan van den Berg(ed), YCA, Vol.35 (Kluwer Law International 2010), pp.362-364(rejecting the enforcement in a case where the respondent did not substantiate its objection to the existence of a valid arbitration agreement under Article V(1)(a), reasoning that the party seeking enforcement of a foreign arbitral award failed to provide any evidence against the respondent’s objection).

More significantly, the effort to liberalise enforcement proceedings of foreign arbitral awards under the NYC has been furthered by national courts by developing a pro-enforcement interpretation with respect to some terms, namely terms “binding” and “suspended” and the phrase “the competent authority of the country under the law of which the award was made” in Article V(1)(e) without restricting themselves to the limitations of domestic law, and by developing a narrow understanding for defining arbitrability in Article V(2)(a) and a narrow concept of international public policy under Article V(2)(b).
3.2.2.1.2.1 The term “binding”

In the absence of a precise definition of the term in the NYC, national courts have differed over how to establish that the award is not binding pursuant to Article V(1)(e). To be more specific, some national courts have referred the question to the applicable arbitration law, i.e. either the law of the country of the origin of the award or the rules of the arbitral institution, while others have taken the approach that an arbitral award is binding as soon as it is no longer open to ordinary means of recourse, such as appeals to a court or a second arbitration instance. Regardless of what approach they have adopted to the determination of the term “binding”, however, national courts have consistently understood this refusal ground to mean there is no requirement to obtain an exequatur in the country where the award is rendered so that the award becomes binding and enforceable, in conformity with the drafters’ intention to abandon the double exequatur requirement of the Geneva Convention. Also, they have agreed that initiation of an action for setting aside proceedings does not mean that the award is not binding. For instance, in *S.A. Tradax Export v. S.p.a. Carapelli*, where the defendant opposed enforcement on the argument that the award was not executory in Italy as no enforcement order had been given by an English court, as required under Italian law, the Court of Appeal of Florence rejected this defence, holding that an “enforcement order of the court of the country where the award is made is no longer necessary since the New York Convention only requires in its Art. V, para.1 under e that the award be binding between the parties”. ⁴⁶⁹

In *Joseph Müller A.G. v. Sigval Bergesen*, Joseph Müller resisted enforcement on the ground that the award had not become binding pursuant to Article V(1)(e) by noting that New York State Law, the applicable arbitration law, had ruled that “[t]he Court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in Section 7511”, and arguing that an arbitral award could become binding and enforceable only after it had been confirmed by the New York Court, which had not occurred. ⁴⁷⁰ The Federal Supreme Court of Switzerland held that “[t]he requirement of

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a declaration of enforcement in the country of the arbitral award’s origin would go
squarely against the New York Convention’s aim of avoiding the double exequatur”,
and that the parties excluded any recourse against the award by agreeing that the
award rendered by the majority could be enforced by any competent court and would
be final and binding for the parties anywhere in the world, in addition to their
agreement that the arbitral procedure should be subjected to the Laws of New York
State. In another case, where the arbitrators made execution of the award
conditional upon an exequatur to be issued by the court of the country where the
award is rendered, the Federal Supreme Court of Switzerland held that the NYC “does
not require that a foreign arbitral award be executory in the country of origin and must
only be ‘binding’ on the parties”, which is the case where ordinary means of recourse
are no longer open.

Likewise, in Inter-Arab Investment Guarantee Corporation v. Baque Arabe et
Internationale d’Investissements, where the agreement of the parties stated that the
arbitral award shall be final and binding, the Court of Cassation of Belgium rejected an
argument that the award was not binding on the parties since under Jordanian law,
which was the law of the country of origin of the award, an award is binding only if has
been confirmed by a competent court, emphasising that to do otherwise would
produce a double exequatur effect. The Court substantiated its decision by analogy
to Article V(1)(a) and (d) as follows:

\[
\text{[I]t clearly appears that the Convention considers the will of the parties to be}
\text{fundamental to the arbitration proceedings. Read as a whole, these provisions}
\text{indicate that the award must be binding ‘on the parties’ […]}. \text{Both letters a and d}
\text{refer to the law of the country where the award is rendered only where an}
\text{indication, of a law or agreement, by the parties is lacking. The alternative of}
\text{letter e follows the same logic. The interpretation given on this point by the}
\text{lower court […] is relevant, and this Court refers to it. The agreement of the}
\text{parties provides that the award of the arbitral tribunal shall be final and binding,}
\text{and thus immediately enforceable upon being rendered. It does not provide an}
\text{appeal. According to the agreement of the parties, the award has become}
\text{binding upon being rendered. In fact, the arbitral award states that it ‘is}
\text{effective as of the date hereof’. Further, the award has been neither annulled}
\]

471 Ibid.
473 ‘Belgium No.11, Inter-Arab Investment Guarantee Corporation v. Baque Arabe et Internationale d’Investissements, Cour de Cassation[Supreme Court], 5 June 1998’, in Albert Jan van den Berg(ed), YCA,
nor suspended by a competent authority of Jordan or of a country under the law of which it was made.\textsuperscript{474}

Also, in \textit{Antilles Cement Corporation (Puerto Rico) v. Transficem (Spain)}, the Supreme Court of Spain rejected the allegation that enforcement of foreign award should be denied since the ICC award was not final and binding on the parties under the French Code of Civil Procedure, according to which an award becomes final following an exequatur by the competent court of first instance, reasoning that:

\begin{quote}
[T]he binding character of the award may not be made to depend on an exequatur by the courts of the State of rendition, as [Transficem] maintains. This would mean incorrectly equating the binding character of the arbitral decision, to the purposes of its enforcement, with its efficacy in the State of rendition, thereby confusing a condition for enforcement and a condition for efficacy in the State [of rendition].\textsuperscript{475}
\end{quote}

The Court concluded that the award was final and binding under the applicable ICC Rules, under which the parties are deemed to have waived their right to any form of recourse after submitting to ICC arbitration.\textsuperscript{476}

In \textit{Compagnie de Saint Gobain-Pont a Mousson v. The Fertilizer Corporation of India LTD.}, where the enforcement of the foreign award was resisted based on Article V(1)(e) with a claim that the award had not become binding on the parties because it was not confirmed by an Indian court, the court of First Instance dismissed the objection, emphasising that “under the New York Convention an award is to be regarded as binding when (a) the award has been regularly made and (b) when it complies with formalities required for an arbitral award”, regardless of whether it is still open to means of recourse.\textsuperscript{477}

In \textit{Fertilizer Corporation of India v. IDI Management Inc.}, where the defendant alleged that the award was not binding within the meaning of the NYC until it was reviewed by an Indian court for errors of law, and the petitioner argued that challenging an award before the Indian court does not negate the binding effect of the

\textsuperscript{474} Ibid.
\textsuperscript{475} ‘Spain No.46, Antilles Cement Corporation (Puerto Rico) v. Transficem(Spain), Tribunal Supreme(Supreme Court), Civil Chamber, First Section, Not indicated, 20 July 2004’, in Albert Jan van den Berg(ed), \textit{YCA}, Vol.31 (Kluwer Law International 2006), pp.846-852.
\textsuperscript{476} Ibid.
award, the US District Court concluded that the award was final and binding “if no
further recourse may be had to another arbitral tribunal (that is, an appeals
tribunal)”\(^\text{478}\). Notably, the Court noted that “an award is binding on the parties when
made but that it has res judicata effect in that it may be relied upon in litigation of the
same subject matter between the parties”.\(^\text{479}\)

Similarly, case law in Germany revealed that courts held that neither the
possibility of initiating the setting aside proceedings at the seat of arbitration nor a
pending action of this kind before the court in the country of origin prevents the
arbitral award from becoming binding. For instance, in *French seller v. German (F.R.)
buyer*, having noted that “the word ‘binding’ means that the award is not open to
arbitral or judicial appeal, irrespective of the admissibility of an action for setting
aside”, the Regional Court of Bremen held that the award was binding on the parties in
that case because the applicable arbitration law excluded appeal.\(^\text{480}\) In *SpA Ghezzi v.
Jacob Boss Söhne*, the Federal Court of Justice of Germany granted enforcement by
rejecting an argument that the award could not be enforced because it lacked a leave
for enforcement in the country where the award was rendered, reasoning as follows:

> The arbitral award is binding pursuant to Art. 24(1) of the ICC Rules of
> Arbitration. It can neither be appealed before an arbitration board with
> appellate jurisdiction, nor can it be attacked in a state court by means of legal
> remedies. The possibility of subsequently setting aside the arbitral award in the
country of rendition by means of a legal action similar to the German action for
annulment does not affect its binding character. Also, the granting of an
exequatur in the country of rendition is not required for the award to be
binding.\(^\text{481}\)

In *Film distributor v. Film producer*, the Higher Court of Appeal of Bavaria noted that
the arbitral award would be binding within the meaning of Article V(1)(e) once the

\(^{478}\) *Fertilizer Corporation of India v. IDI Management Inc.*, United States District Court, S.D. Ohio, W.D.,

\(^{479}\) *Ibid*.

\(^{480}\) ‘Germany No.3, French seller v. German(F.R.) buyer, Landgericht Bremen, Not indicated, 8 June
‘Germany No.38, Seller v. Buyer, Bundesgerichtshof[Federal Supreme Court], III ZR 269/8838., 18
‘Germany No.119, Buyer(Ukraine) v. Supplier(Germany), Kammergericht[Court of Appeal], Berlin, 20 Sch
02/08, 17 April 2008’, in Albert Jan van den Berg(ed), YCA, Vol.34 (Kluwer Law International 2009),
pp.510-515.

\(^{481}\) ‘Germany No.33, SpA Ghezzi v. Jacob Boss Söhne, Bundesgerichtshof [Federal Supreme Court], Not
pp.450-454.
award “cannot be impugned in appellate arbitration proceedings or before a state court”, and found that this was the case for the case before it as “the parties did not agree on a review of the arbitral award by a higher arbitral instance.” The Court also noted that commencement of the annulment proceeding in state court by the defendant would not interfere with the bindingness of the award or its enforcement.

3.2.2.1.2.2 The term “suspended”

In the absence of a clear meaning of the term in the NYC, national courts mostly have reached a consensus that this term does not refer to a suspension which occurs in some countries automatically following initiation of setting aside proceedings in the country where the award is rendered, but rather to a formal suspension ensuing from a court decision. For instance, in AB Götaiverken (Sweden) v. General National Maritime Transport Company (Libya), the respondent argued that under French law the application to challenge the award automatically bars and suspends the enforcement proceedings until the judgement is made on the specific grounds for challenging the validity of the award. The Supreme Court of Sweden stated that the relevant provision which was promulgated based on Article V(1)(e) of the NYC “refers in this respect to a situation where, after specific consideration of the matter, the foreign authority orders the setting aside of a binding and enforceable award or the suspension of its enforcement” and dismissed the respondent’s objection, reasoning that it did not claim that “such a decision has been made in the procedure for challenging the award or otherwise”. In SPP (Middle East) Ltd. v. The Arab Republic of Egypt, the District Court of Amsterdam clearly held that the suspension by operation of law cannot be brought under Article V(1)(e), reasoning as follows:

The text of the Convention is clear on this point: a judicial authority must have had the opportunity to consider the question whether a request for suspension is made for good cause. A broader interpretation deviating from the text of the

483 Ibid.
grounds of refusal, which are listed limitatively, would be in violation of the system of the Convention.485

The Grand Court of the Cayman Islands emphasised the same point, noting that:

It seems to me that the whole scheme of Art. V(1)(e), as contrasted with Art. VI of the New York Convention, is predicated upon a conscious decision of the competent authority concerned to set aside or to suspend a particular Convention award in the country in which or under the law of which it was made.486

This view embraced by courts in Sweden, the Netherlands and the Cayman Islands has been smoothly approved by subsequent court decisions in the UK and the Russian Federation.487 Moreover, the Swiss Supreme Court, which held in the past that the suspensive effect by the law of an appeal against the award to the courts in France was a ground for opposition under Article V(1)(e) of the NYC, recently adopted the opposite view in another case where the defendant argued that the award had been suspended in France because French law provided that an action for setting aside had an automatic suspensive effect on the enforcement of the award.488 The Court concluded that:

[S]uspension of the award in the state of origin is a ground for opposition in the sense of Art. V(1)(e) Convention only if the suspension was granted by court decision, not if it simply ensues by law from the action filed against the award.489

Similarly, although US courts initially took a position incompatible with this view by concluding that the award was suspended for the purposes of Article V(1)(e) in cases where the pendency of the annulment action brought within the time limit has a

488 ‘Switzerland No.40, Compagnie X SA v. Federation Y’, Supra n.455.
489 Ibid.
suspensive effect under the procedural law of the place in which the award was rendered, they later reversed their position and aligned with the majority view. In *Alto Mar Girassol (France) v. Lumbermens Mutual Casualty Company*, in which the defendant argued that enforcement should be denied because the award had been suspended by operation of French law pending setting aside proceedings in France, the US District Court dismissed this objection, indicating that such an interpretation was consistent with neither the language of Articles V(1)(e) and VI nor the intent of the NYC to facilitate the enforcement of arbitration awards by enabling parties to enforce the awards in third countries without first having to obtain either confirmation of such awards or leave to enforce the awards from a court in the country of the arbitral situs.

Hence, by developing an understanding with respect to the term “suspension” that a suspension by operation of the law exceeds the context of Article V(1)(e), national courts have prevented the recalcitrant party from hindering enforcement merely by applying for setting aside proceedings in the country where the award is rendered.

3.2.2.1.2.3 The phrase “the competent authority of the country under the law of which the award was made”

Article V(1)(e) of the NYC not only imposes limitation on the forum where an action to set aside or suspend the award validly but also specifies the scope of the jurisdictional competence of other national courts so that they cannot annul a foreign award but only refuse enforcement. Some courts have circumvented Article V’s narrow limits for denial of enforcement, allowing actions to set aside or suspend a foreign award based on domestic law grounds other than those listed in Article V of the NYC by interpreting the phrase, “the competent authority of the country under the law of which the award was made”, to refer to the law governing the arbitration agreement. Nevertheless, it is great achievement that national courts generally have avoided interfering with foreign arbitral awards, referring to the applicable arbitration law with regard to the said phrase. For instance, in *Int’l Standard Elec. Corp. v. Bridas S.A.*, the US Court stated that

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490 ‘US No.197, Creighton Limited v. The Government of the State of Qatar (Ministry of Public Works)’, *Supra* n.420.
“under Article V(1)(e) of the Convention, ‘an application for the setting aside or suspension of the award’ can be made only to the courts or the ‘competent authority of the country in which, or under the law of which, the award was made.’”

In clarifying its position, the Court correctly noted that:

[The] argument, that a generalized supervisory interest of a state in the application of its domestic substantive law (in most arbitrations, the law of contract) in a foreign proceeding, is wholly out of step with the universal concept of arbitration in all nations. The whole point of arbitration is that the merits of the dispute will not be reviewed in the courts, wherever they be located [...]. Accordingly, we hold that the contested language in Article V(1)(e), ‘[...] the competent authority of the country under the law of which, [the] award was made’ refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case. 493

In Karaha Bodas Company v. Persusahaan Pertambangan Minyak Dan Gas Bumi Negara,494 Pertamina filed an annulment action in Central Jakarta District Court, and that Court unfortunately reviewed and annulled an award made outside Indonesia on the assumption that it had primary jurisdiction under the NYC because the dispute was governed by Indonesian law. However, when Pertamina challenged the enforcement of the award on the argument that the annulment by the Indonesian court was a defence to enforcement under the NYC, the US court successfully granted enforcement, holding that Indonesia did not have primary jurisdiction to set aside the award and therefore its annulment ruling did not constitute a defence to enforcement under the NYC.495 The US Court of Appeals held in line with the NYC that:

[T]he parties expressly agreed that Switzerland would be the site for the arbitration. This agreement presumptively selected Swiss procedural law to apply to the arbitration. There is no express agreement [...] that Indonesia would be the country ‘under the law of which’ the arbitration was to be conducted and

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493 Ibid.
the Award was to be made. [...] In selecting Switzerland as the site of the arbitration, the parties not choosing a physical place for the arbitration to occur, but rather the place where the award would be ‘made’. [...] The arbitration proceeding in this case physically occurred in Paris, but the Award was ‘made in’ Geneva, the place of the arbitration in the legal sense and the presumptive source of the applicable procedural law.496

In *Four Seasons Hotels and Resorts, B.V. (Netherlands) v. Four Seasons Hotels Ltd. (Canada), Four Seasons Caracas and others*, the US District Court granted enforcement to the arbitral tribunal’s partial award, holding that it had jurisdiction to decide whether the dispute was arbitrable and that the dispute was in fact arbitrable as it did not affect immovable property rights, and rejecting the respondent’s argument that enforcement should be denied because the award was set aside by the Venezuelan court on the ground that the agreements effectuating arbitration of the disputes were invalid under Venezuelan law.497 The Court held that the Venezuelan courts were not a competent authority under the NYC because a court of the country that supplied the procedural law used in the arbitration is the competent authority.498

Indian courts misinterpreted the phrase, but this erroneous position has been overruled through recent decisions. In *National Thermal Power Corporation v. The Singer Company*,499 the parties inserted an arbitration clause in the General Terms and Conditions which would be under the auspices of the ICC and Indian law was chosen as the governing law. After a dispute arose, since the parties did not agree on the place of arbitration, the ICC Court decided on London. The National Thermal Corporation sought to annul the award in India, relying on the Indian Arbitration Act 1940, which applied to domestic awards. The High Court of Delhi dismissed the annulment recourse, stating that the Arbitration Act 1940 did not apply because the award was foreign, the parties had agreed Indian law for determination of their rights, not for governing arbitration procedure, and London had been chosen as the seat of arbitration by the ICC Court; because the law governing the arbitration agreement was the law of the seat of arbitration, only English courts had authority to set aside the

award. However, this decision was reversed by the Supreme Court of India, which allowed the appeal as recognising the award as a domestic award, and set the award aside by authorizing Indian courts after holding that:

To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement.

The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractually chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country in which the arbitration is held can in any matter supersede the overriding jurisdiction and control of the Indian law and the Indian courts.

[...]

[T]he choice of the place of arbitration was, as far as the parties are concerned, merely accidental in so far as [...] the choice was made by the ICC Court for reasons totally unconnected with either party to the contract. On the other hand, apart from the expressly stated intention of the parties, the contract itself, including the arbitration agreement contained in one of its clauses, is redolent of India and matters Indian. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. In the circumstances, the mere fact that the venue chosen by the ICC Court for the conduct of arbitration is London does not support the case of the Singer on the point. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties.

Obviously, the Supreme Court interpreted the choice of Indian law by the parties to indicate their choice of the law to govern the arbitration agreement, and did not find the mere fact that London was assigned as the seat of arbitration sufficient to assert the control and jurisdiction of English courts over those of Indian courts.

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500 Ibid.
501 Ibid.
Other cases also have resulted in the annulment of a foreign award if the governing law was the law of that court. In *Bhatia International v. Bulk Trading S.A.*, for example, the Supreme Court held that Part I of the Arbitration and Conciliation Act of 1996 would also apply to international commercial arbitration held outside of India as long as the parties do not exclude any of these provisions by agreement explicitly or implicitly.\(^{502}\) However, by this decision, the Supreme Court departed from both the language of the Act of 1996 and Article 1(2) of the Model Law, which specifies the scope of application of the Law for arbitrations, the place of which is in the territory of the State, and caused Indian courts to take “an unconventional path with respect to the supervisory jurisdiction in cases of international arbitration”.\(^{503}\) The confusion resulting from the *Bhatia* decision continued in *Venture Global Engineering v. Satyam Computer Services Ltd.*, in which the Indian court heard the challenges to a foreign award under Section 34 of Part I of the Act and annulled it.\(^{504}\)

This confusion in India has been settled in recent court decisions. The Supreme Court has changed the previous practice of Indian courts to exercise a supervisory role over awards rendered outside India, which constitutes a significant step towards a pro-arbitration regime. First, in *Bharat Aluminium Co v. Kaiser Technical Services*, the Supreme Court held that Indian Courts do not have the jurisdiction to supervise international commercial arbitrations seated outside, relying on the fact that the Arbitration Act of 1996 adopted the territoriality principle of the UNCITRAL Model Law.\(^{505}\) Furthermore, the Supreme Court correctly clarified the concept of a competent court that:

\[\text{The two courts indicated in Sect. 48(1)(e) [corresponding to provision to Article V(1)(e) of the NYC] do not have concurrent jurisdictions to annul an award; rather, the second alternative – ‘under the law of which’ – is an exception to the}\]

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\(^{503}\) Ibid.


general rule in the first alternative – ‘the country in which’ – and available only if the latter is not.\(^{506}\)

On this issue, the Court underlined that the reference to “under the law of which” refers to “the procedural law governing the arbitration, the law of the seat, rather than the law of governing the substantive contract or the law governing the jurisdictions supported this conclusion”.\(^{507}\) Thus, the Supreme Court precluded the possibility of bringing an annulment action before an Indian court for a foreign award unless the procedural law of arbitration is Indian law.\(^{508}\) This view also was confirmed in another court decision, namely *Videocon Industries Ltd. v. JMC Projects*.\(^{509}\) These decisions hold out the promise that the practice of Indian courts is becoming aligned with the practice of the courts in other jurisdictions.

3.2.2.1.2.4 Arbitral subject matters and the public policy defence

The interpretation of national courts on arbitrable subject matters in the sense of Article V(2)(a) has evolved over time from a restrictive to an arbitration-friendly approach. While the justification for the limitation initially relied on public policy concerns in Contracting States, this justification has lost significance along with the growing acceptance of arbitration over time.\(^{510}\) For instance, the US District Court dismissed the respondent’s objection that enforcement of foreign arbitration awards would violate US antitrust laws, stating as follows:

> The public policy defense under the Convention is generally construed narrowly in order to promote the Convention’s goal of encouraging the prompt enforcement of awards. A defense based on public policy must touch the ‘forum state’s most basic notions of morality and justice’. Here, the defendant’s antitrust argument fails to reach the standard contemplated by the Convention.\(^{511}\)

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\(^{507}\) *Ibid*.

\(^{508}\) *Supra* n.502, pp.62-63.


\(^{510}\) Wolff, R., *Supra* n.51, p.387.

\(^{511}\) ‘US No.58, Shaheen Natural Resources Company, Inc. (USA) v. Societe Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (Sonatrach)(Algeria)’, *Supra* n.420.
In *Fincantieri-Cantieri Navali Italiani SpA v. Oto Melara SpA, M. and others*, the Federal Supreme Court of Switzerland reflected an arbitration friendly understanding of the arbitrability defence under Article V(2)(a) by noting that:

By opting for a material regulation of arbitrability, the federal legislator chose a solution which undoubtedly does not rule out that enforcement of awards rendered in Switzerland be denied in this or that State. However, [the legislator] made this choice in all awareness, leaving it to the parties alone to evaluate the risk of the arbitral award not being recognized, so that the existence of such risk does not justify a restrictive approach toward arbitrability.\(^{512}\)

In *Stemcor UK Limited v. Guiceve S.A.C.*, the Superior Court of Justice of Lima emphasised the need for a narrow interpretation of arbitrability, observing that:

\[\text{In general the law has excluded from arbitration issues involving public policy, which go beyond the strict scope of private law. This legal restriction takes away from bodies outside the Judiciary disputes in which rights are at issue of which private parties may not freely dispose. However, this exception must be interpreted restrictively, since the general principle is that disputes of which the parties can freely dispose can be submitted \[to arbitration]. Thus, in case of doubt arbitrability must be favored.} \(^{513}\]

Also, national courts have developed a policy in favour of arbitration in the application of the public policy defence under Article V(2)(b). This defence could have been applied in a way that would undermine the NYC’s effort to reduce the impact of national legislation. However, not only have national courts avoided circumventing the other provisions of the NYC in applying Article V(2)(b), but they have strived for harmonisation of the standard of public policy by favouring a narrow understanding of public policy.

For instance, the Supreme Court of Cassation of Italy rejected the contention that the arbitral clause in question was invalid because it had not been specifically approved in writing as is required by Articles 1341 and 1342 of the Italian Civil Code, reasoning that the principles laid down in those provisions of the Italian Civil Code

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“have an imperative nature, but do not pertain to a principle of international public policy, and, hence, can be derogated from by international conventions”.514

The Supreme Court of Spain dismissed an objection that it would be against internal Spanish public policy to grant recognition and enforcement of a foreign arbitral award which was made without observing the formalities prescribed by Spanish law in respect to the number of arbitrators and the procedure to be followed, emphasising that the NYC does not allow the resisting party to invoke violation of the law of the country where the enforcement is sought.515 Similarly, Mexican courts avoided imposing the formalities established by the Mexican procedural legislation regarding notices in applying Article V(2)(b).516

Courts almost unanimously have interpreted the public policy defence in Article V(2)(b) narrowly, either by expressly distinguishing between domestic and international public policy and limiting the application of the public policy defence in Article V(2)(b) to the concept of international public policy or by determining this defence only in very serious cases. For example, the US Courts have adopted the position that enforcement of foreign arbitral awards may be denied on the basis of public policy only where enforcement would violate “the forum state’s most basic notions of morality and justice”.517 In Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De l’Industrie Du Papier (RAKTA), and Bank of America, in which the appellant argued that enforcement of an award based on the feasibility of the appellant’s returning to work in defiance of the US officials’ various actions subsequent to the severance of American-Egyptian diplomatic ties which forced the appellant to


abandon the project would clearly violate US public policy, the US Court of Appeals held that:

The legislative history of the provision offers no certain guidelines to its construction. [...] Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention’s basic effort to remove pre-existing obstacles to enforcement. [...] [T]he Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice. [...] In equating ‘national’ policy with United States ‘public’ policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy’. Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.518

Subsequent case law has indicated that US courts, referring to this decision, have been mindful that neither US national policy nor the general body of law should be equated with US public policy in applying Article V(2)(b).519

Similarly, the Supreme Court of Hong Kong has adopted the view that the public policy defence of the Convention must be interpreted narrowly and be applied only where enforcement would infringe the forum state’s most basic notions of morality and justice.518

518 Ibid.
morality and justice. The Court has emphasised that this ground “must not be seen as a catch-all provision to be used whenever convenient” and must be applied “sparingly”.

Indian courts have applied a narrow notion of international public policy. Although the High Court of Delhi refused to grant enforcement on grounds of public policy, rejecting the argument of the party seeking enforcement that sought to distinguish between domestic and international public policy, subsequent court decisions in India have adopted a narrower concept of the public policy defence under the NYC, thereby becoming more aligned with the case law in other countries. For instance, the Supreme Court of India, interpreting the public policy defence in Article V(2)(b) in a narrow sense and as applied in private international law, held that the enforcement of a foreign award would be refused on the ground that it is against public policy if such enforcement would violate a fundamental policy of Indian law, the interest of India, or justice or morality.

The Court of Appeal in Italy held that the question of whether the award is consistent with public policy must be determined within the limited context of international public policy, describing it as a “body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions”.

The Court of Appeal of England and Wales held that considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution:

It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary

521 Ibid.
reasonably and fully informed member of the public on whose behalf the powers of the State are exercised.\textsuperscript{525}

The French courts have expressly distinguished between international public policy and national public policy,\textsuperscript{526} and emphasised that a court shall only examine whether the award’s recognition or enforcement constitute “a flagrant, effective and concrete violation of international public policy”.\textsuperscript{527}

In Germany, the courts have repeatedly held that not all violations of mandatory provisions of German law constitute a breach of public policy and accepted the public policy defence only in extreme cases. Accordingly, the Court of Appeal in Germany revealed its narrow understanding of public policy in applying Article V(2)(b) as follows: “Such a contravention only exists under German law if the arbitral award violates a rule which regulates the basic principles of public or economic life or if it plainly contradicts, in an intolerable way, the German concepts of justice.”\textsuperscript{528} In similar vein, the German Federal Supreme Court upheld the Court of Appeal’s decision which reversed the lower court’s decision that rejected the request for enforcement on the grounds that the award was contrary to the principle of impartial administration of justice, the arbitrator having been appointed by only one party. The Court’s reasoning in this case took into consideration the distinction made in the law of international civil procedure between domestic public policy and international public policy as follows:

As far as the recognition of foreign court decisions is concerned, narrow limits are drawn for the concept of German public policy in the interest of international trade and with regard to the fact that in essence the effect of the decision is within the German context confined to its enforcement. The same


\textsuperscript{526} ‘France No.25, Ministry of Public Works v. Societe Bec Freres, Cour d’Appel[Court of Appeal], Paris, Not indicated, 24 February 1994’, in Albert Jan van den Berg(ed), YCA, Vol.22 (Kluwer Law International 1997), pp.682-690 (The Court of Appeal held that the prohibition of the State to conclude an arbitration agreement is limited to contracts of a domestic nature; therefore, such prohibition is not an obstacle before the enforcement of the international contracts which are subject to the requirements of international public policy.)

\textsuperscript{527} ‘France No.47, Cytec Industries BV (Netherlands) v. SNF sas (France), Cour de Cassation [Supreme Court], First Civil Chamber, Appeal No. 06-15320, 4 June 2008’, in Albert Jan van den Berg(ed), YCA, Vol.33 (Kluwer Law International 2008), pp.489-494.

must apply to the recognition of foreign arbitral awards. From the viewpoint of German procedural public policy, the public interest does not require stricter scrutiny of foreign awards as opposed to decisions of foreign State courts. Rather, to a great extent in the field of arbitration, room is allowed for private autonomous arrangements. It can by and large be left to the parties to benefit from this room, in respect of the procedure as well, through suitable contractual arrangements, and to protect themselves and their interests within the framework of the contract performance. From the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions.

Swiss courts have consistently applied a narrow understanding of public policy. In *Dutch seller v. Swiss buyer*, the Court of Appeal of the Canton of Base-Stadt, referring to a decision of the Federal Supreme Court which held that Swiss public policy will be deemed violated only where “the innate feeling of justice is hurt in an intolerable manner, where fundamental provisions of the Swiss legal order have been disregarded, or where the Swiss legal thinking compels prevalence over the applicable or applied law”, held that “when foreign decisions are to be enforced, the scope of public policy is narrower than in the case of a direct application of the law”. In *Chrome Resources S.A. v. Leopold Lazarus Ltd.*, the Federal Supreme Court of Switzerland held that:

> [I]n so far as the procedure is concerned, not every irregularity will automatically entail refusal of enforcement of a foreign award, even if such irregularity would entail the annulment of an award rendered in Switzerland. It should rather involve a violation of fundamental principles of the Swiss legal order which hurts in an intolerable manner the notion of justice.

Similarly, the Court of Appeal of the Canton of Ticino held as follows:

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[R]ecognition and enforcement of a foreign (arbitral) award decision violate Swiss public policy when they manifestly contrast with justice as understood in the Swiss legal system, and deny its fundamental principles, either substantial or formal. The Swiss public policy defense has a more limited scope in the context of proceedings for the recognition and enforcement of foreign arbitral awards than [the one allowed] in proceedings before a Swiss court deciding on the merits. It ensues herefrom that a court may not refuse enforcement when it believes that the foreign law has been applied in a different manner from the manner of a Swiss court. From a formal point of view, we find that a procedural defect in the course of the foreign arbitration does not lead necessarily to refusing enforcement even if the same defect would have resulted in the annulment of a Swiss award (with the obvious exception of the violation of fundamental principles of our legal system, which would contrast in an unbearable manner with our feeling of justice). The more a Convention lists the formal requirements for enforcement in detail (as is the case with the [New York Convention]), the less the defense of Swiss public policy applies.532

The Colombian Supreme Court has held that public policy in the context of the NYC is “international public policy”, restricted to “basic or fundamental principles of Colombian law: prohibition of abuse of rights; good faith; impartiality of the arbitral tribunal and due process”.533

Courts have consistently recognised the validity of an arbitration agreement concluded by a State or State agency where the contract for which the arbitration agreement is agreed is an international contract and governed by a private law and therefore have rejected interfering with international commercial operations via the public policy defence.534 Also, national courts have consistently held that the reasoning of the award, which is a rule of constitutional principle in some national laws, does not apply under Article V(2)(b). For instance, the Court of Appeal of Florence, stating that the violation of public policy must be determined on the basis of the decision and not the reasoning of the award, held that what are fundamental in domestic procedural law cannot be imposed upon foreign legislatures of judicial authorities.535 Obviously, while determining what constitutes public policy in the enforcement country pursuant to Article V(2)(b), national courts have been careful so as not to frustrate the purpose of the NYC by applying the national standards of the forum.

534 ‘Morocco No.1, Office National du The et du Sucre v. Philippines Sugar Company Ltd.’, Supra n.376.
3.2.2.2 No affirmative obligation to deny enforcement

National courts mostly have not construed Article III’s presumptive obligation to recognise and enforce to imply an affirmative obligation to deny recognition and enforcement correctly. Within the context of the formal requirements in Article IV, the absence of an explicit provision concerning the appropriate response to the violation of formal requirements in Article IV generally has been managed by national courts through an interpretation in accordance with the spirit and purpose of the NYC. Although some national courts in Italy and Spain have construed Article IV as outlining the mandatory procedural prerequisites for initiating enforcement proceedings and on its own motion have refused to recognise and enforce foreign arbitral awards if the documents listed in Article IV were not presented at the time of application for recognition and enforcement,536 national courts “almost unanimously” have

interpreted Article IV as a provision concerned only with the evidentiary requirements for the recognition and enforcement of foreign arbitral awards, implying no mandatory procedural prerequisites for said recognition and enforcement, thereby exempting the applicant from authentication or certification of the documents in cases where the existence or authenticity of arbitral award or arbitration agreement is undisputed, or else allowing to the applicant to rectify the failure to meet the formal requirements.

under Article IV. 538 Some courts have even gone a step further and exempted the applicant from submitting the arbitration agreement in cases where the party resisting enforcement has not contested its alleged content. 539 In the same vein, national courts have developed a flexible approach to the application of the requirement of submission of a translation, deeming it unnecessary to translate the listed documents in Article IV into the official language of the country where the award is relied upon in cases where the court understands the original language of documents well enough, 540 reasoning that the cost of a translation would be “unreasonably high”. 541 Besides, national courts have requested the claimant to cure the formal defect of the incomplete translation. 542 Overall, national courts have furthered the NYC’s purpose of assisting the enforcement of foreign arbitral awards in Member States, by taking a


540 Supra n.485 (accepting that Article IV(2) were complied with by the submission of translation in English which was a language that the court were qualified to take full cognizance of the contents of the relevant documents); ‘Netherlands No.25, China Packaging Design Corporation v. SCA Recycling Reukema Trading B.V.,” Arrondissementsrechtbank [Court of First Instance], Zutphen, 11 November 1998’, in Albert Jan van den Berg(ed), YCA, Vol.24 (Kluwer Law International 1999), pp.724-726(holding that the agreement was in an understandable language); ‘Netherlands No.32, LoJack Equipment Ireland Ltd. (Ireland) v. A, Voorzieningenrechter [President]’, Supra n.537. 541 ‘Norway No.2, Pulsarr Industrial Research B.V. (Netherlands) v. Nils H. Nilsen A.S. (Norway), Enforcement Court, Vardo, 10 July 2002’, in Albert Jan van den Berg(ed), YCA, Vol.28 (Kluwer Law International 2003), pp.821-828.

542 ‘Austria No.16, D SA (Spain) v. W GmbH (Austria), Oberster Gerichtshof [Supreme Court], 3Ob211/05h, 26 April 2006’, in Albert Jan van den Berg(ed), YCA, Vol.32 (Kluwer Law International 2007), pp.259-265; ‘Liechtenstein No.1, Parties not indicated, Oberster Gerichtshof, 08 EX.2012.6905, 7 June 2013’, in Albert Jan van den Berg(ed), YCA, Vol.39 (Kluwer Law International 2014), pp.434-436 (holding that the lack of a duly certified translation can be cured during the proceedings through a “correction procedure” within an appropriate time limit, to be able to avoid overly formalism in the recognition and enforcement of foreign awards).
“pragmatic, flexible, and non-formalistic approach” to interpreting the requirements set forth in Article IV of the NYC.543

As for the grounds for refusal in Article V, although some courts have construed Article V as a provision leaving no discretion to the enforcement courts to enforce the award when a ground for refusal exists, national courts have generally accepted that while the NYC sets forth all possible grounds for denial of recognition and enforcement of foreign arbitral awards to prevent the Contracting States from adding further grounds, it does not prevent the courts in those States from being more lenient in their recognition and enforcement. On the other hand, the difference in approach has diminished in practical terms because national courts have consistently promoted the pro-enforcement policy of the NYC in the application of Article V. Accordingly, although the grounds for denial of enforcement under Article V have been invoked quite often, resisting parties have been rarely successful in their attempts because national courts have focused on pragmatism and construed the refusal grounds in Article V narrowly, thereby granting enforcement (i) if the procedural defect is not serious, or (ii) if there is no causal relation between the defect and the award, or (iii) if the resisting party’s objection at the enforcement proceedings is incompatible with its manner during the arbitration proceedings in a way that causes the other party to assume that an objection would not be raised later.

Although the due process defence in Article V(1)(b) has been invoked by losing parties frequently, it has not resulted in the refusal to enforce the award, except in a number of reported cases544 where refusals could have been avoided if the arbitral tribunal or the administering arbitral institution had been attentive to the procedural

543 ‘Switzerland No.46, X SA v. Z LLC’, Supra n.459.
conduct of the cases.\textsuperscript{545} Not every hurdle in the full presentation of the case has resulted in the refusal to enforce the award.\textsuperscript{546} For instance, the Court of Appeal rejected the grounds for the refusal of enforcement, raised by the Parsons & Whittemore Overseas Co. Inc., that there was a violation of due process as the arbitral tribunal refused to delay the hearing because the witnesses could not appear at the hearing due to a prior commitment to lecture at university. After stating that “the logistical problems of scheduling hearing dates convenient to parties, counsel and arbitrators scattered about the globe argues against deviating from an initially mutually agreeable time plan unless a scheduling change is truly unavoidable”, the Court of Appeal identified the due process claim of the objecting party as “hardly the type of obstacle to his presence which would require the arbitral tribunal to postpone the hearing as a matter of fundamental fairness to Overseas”.\textsuperscript{547} Thus, the Court of Appeal interpreted this ground as in line with its general understanding that refusal grounds should be construed narrowly as a requirement of the enforcement-facilitating thrust of the Convention.\textsuperscript{548} Hence, the standard for ensuring the ability of the parties to present their cases has been overviewed on a very narrow basis to limit grounds for a refusal of enforcement.

Similarly, in \textit{Shenzhen Nan Da Industrial v. Trade United Company Limited}, the Supreme Court of Hong Kong dismissed an argument that there was a prejudice to the respondents in having the arbitration carried out under the rules of the China International Economic and Trade Arbitration Commission (CIETAC), which differed on a number of points from the rules of the CIETAC’s predecessor, the Foreign Economic and Trade Arbitration Commission (FETAC), under the auspices of which the parties had agreed to arbitrate.\textsuperscript{549} Having noted that if the defendant had any objection to these new rules, it could have asked for an arbitration to be carried out under the old rules when these new rules were sent to it at the beginning of arbitration, the


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\textsuperscript{547} Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De l’Industrie Du Papier (RAKTA), and Bank of America, \textit{Supra} n.517.

\textsuperscript{548} \textit{Ibid}.

Supreme Court indeed stressed that the fact that the institution chosen by the parties had reformed its rules does not suffice to justify refusal of enforcement.

National courts have also made their narrow interpretation of the grounds for denial of enforcement on the basis of causal relation, thereby providing a careful protection to the losing party without allowing it to exploit these grounds as dilatory tactics or to seek a de facto appeal. With respect to the due process defence, in *Imperial Ethiopian Government v. Baruch Foster Corporation (BFC)*, the US Court of Appeals upheld the District Court’s decision, which had held that the defendant had been estopped from objecting to the composition of the arbitral tribunal because it had initially contested the award on the merits without questioning jurisdiction, then moved to dismiss on technical jurisdictional grounds, and lastly, invoked belatedly that the president of the arbitration panel had a material connection with the Ethiopian government, as beginning in 1954 he had served for some period as a draftsman and a member of a code commission drafting civil code for Ethiopia, which disqualifie[d] him from serving as an arbitrator.\(^{550}\) The US Court of Appeals reasoned that the defendant’s failure to come forward with anything to show that its claim of a disqualifying connection between the president of the arbitral tribunal and the Ethiopian government had any semblance of substance and was invoked in good faith and for any reason other than to delay the proceedings.\(^{551}\) Similarly, in *Guangdong New Technology Import & Export Corporation Jiangmen Branch v. Chiu Shing trading as B.C. Property & Trading Company*, the Supreme Court rejected the due process defence on an argument that the respondent received late notice of the proceedings, reasoning that this had not affected the outcome of the arbitration since the respondent could make defence to the plaintiff’s claim and he was not prejudiced.\(^{552}\)

In *Fitzroy Engineering, Ltd. v. Flame Engineering, Inc.*, in which the defendant resisted enforcement on the basis of the public policy exception in Article V(2)(b) alleging a conflict of interest on the part of its counsel, the US District Court held that “[t]o prevail such defense, however, the respondent must convincingly show that a


\(^{551}\) Ibid.

clear, direct conflict existed that could have affected the outcome of the proceeding” and rejected the alleged public policy defence since the defendant “failed to convincingly show the potential conflict of interest it has identified would render recognition of the arbitration award violative of this nation’s ‘most basic notions of morality and justice’”.

Similarly, in *German(F.R.) charterer v. Romanian shipowner*, having noted that “the recognition of an arbitral award can generally only be denied in those cases where the violation of the duty of impartial administration of justice had a real impact on the arbitral proceedings”, the Court held that the imbalance in constituting the tribunal is not sufficient.

The Hong Kong Court of Appeal promoted a pro-enforcement stance in *Apex Tech Investment Limited v. Chuang’s Development (China) Limited* when it was asked to decide the accuracy of the decision of the Court of First Instance which exercised discretion to order enforcement despite a procedural irregularity resulting from the tribunal having made its own inquiries on the dispute and reached a conclusion by relying on the results of those inquiries without giving notice of those results or giving opportunity to make a further submission. The Court of First Instance grounded its use of discretion on the wording of Article 44(2) of the Arbitration Ordinance, stating that “Enforcement of a Convention award may be refused [emphasis added]”, and reached a conclusion by relying on *Paklito Investment Limited v. Klockner East Asia Limited* and the principle to which it referred, namely that if the arbitral decision could not have been different, had the irregularity in the procedure not occurred, there would be no reason to refuse enforcement. Although the Court of Appeal reversed the judgement of the Court of First Instance, it is significant that the Court of Appeal was all of one mind about the examination of whether the arbitral award would be affected if the defendant was given opportunity to make further representation after the tribunal made its own inquiries.

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554 ‘Germany No.30, German(F.R.) charterer v. Romanian shipowner’, *Supra* n.529.


556 *Ibid*.

557 *Ibid*. 
With respect to defence on the grounds of improper tribunal composition or error in the arbitral procedure, national courts mostly observed a casual relation between the defect and the award. For instance, the Highest Regional Court of Bavaria confirmed its pro-enforcement attitude:

[Where there is a defect in the arbitration, a distinction must be made between essential and nonessential procedural defects, even if such distinction is not made in the text of Art. V(1)(d) Convention or in [...] the arbitration agreement between the parties. A procedural defect is deemed essential to the arbitral award when it is causal to it or when the arbitral tribunal would have decided differently had it not been for the procedural violation. [...] The first oral hearing of the arbitral tribunal was to take place on 24 February 2000; since the arbitral award was rendered on 15 October 2001, the fifteen-month time limit for the arbitration was therefore exceeded by less than five months. There are no reasons to deem that the arbitral tribunal would have decided differently five months earlier.”

In *Creditor under the award (Taiwan) v. Debtor under the award (Germany)* case, the Court of Appeal in Germany held that improper constitution of the arbitral tribunal can justify a refusal of recognition if it is proved that an improper composition of arbitral tribunal has affected the outcome of arbitration.559

Finally, although the NYC does not contain any express provision whether the enforcement court may preclude the resisting party from relying on the grounds for denial of enforcement under certain circumstances, national courts have promoted the NYC’s purposes by not allowing the defendant to use the refusal grounds as a dilatory tactic. Accordingly, national courts have operated preclusion from relying on the refusal grounds in Article V in cases where the party has participated in arbitral proceedings without raising any objection despite being aware of an irregularity which might lead to refusal of enforcement, referring either to the principle of the prohibition of contradictory behaviour (*venire contra factum proprium*), which is subcategory of good faith as a general principle of international law and thereby also underlying the NYC, or to the doctrine of estoppel or waiver.560 For instance, although initially some national courts concluded that the invalidity of an arbitration agreement

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559 ‘Germany No.114, Creditor under the award (Taiwan) v. Debtor under the award (Germany), Oberlandesgericht[Court of Appeal], Kalsruhe, 9 Sch 02/07, 14 September 2007’, in Albert Jan van den Berg(ed), YCA, Vol.33 (Kluwer Law International 2008), pp.541-548.

560 Wolff, R., *Supra* n.51, p. 255.
cannot be rectified by the resisting party’s appearance in the proceedings, most national courts have estopped the resisting party from objecting that there is no valid arbitration agreement between the parties if this party has attended the arbitral proceedings without raising such an objection. Similarly, national courts have mostly dismissed the objection that a party lacks the capacity to enter into an arbitration agreement under the law applicable to it pursuant to Article V(1)(a) when that party is a State or State agency, on the ground that such a claim is not consistent with its initial manner, having entered into the arbitration agreement willingly. Likewise, national courts have deemed the defendant to waive its right to object to the enforcement on the basis of the due process defence in cases where the party has been aware or should have been aware of the alleged defect but has not invoked such irregularity in the arbitration proceedings but rather has waited to see the result of the arbitration and then raised the objection in enforcement proceedings.

564 In Chromex Resources S.A.


564 ‘Switzerland No.10, Chrome Resources S.A. v. Leopold Lazarus Ltd.’, Supra n.531; ‘US No.115, International Standard Electric Corporation v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial’, Supra n.463 (holding that since “no objection to the appointment procedure used in the selection and consultation of the expert on New York law was made”, the objections of the petitioner were waived and could not be heard at the enforcement proceedings.); ‘Hong Kong No.9, Nanjing
v. Leopold Lazarus Ltd., for instance, where the appellant alleged that the arbitrator consulted an expert in the absence of the parties, the Supreme Court of Switzerland held that:

In fact, it results from the exchange of correspondence [...] between appellant and the president of the Arbitral Tribunal that the former knew that an expert had been engaged and that it had been informed of the question which had been put to the expert. Appellant has not reacted to the explanations given to it at the time, which it was free to do, the more so since the arbitral award was made one year later only. Moreover, appellant has not reacted upon receipt of this award either, but has awaited the stage of enforcement for invoking the irregularity in the arbitral procedure. Appellant’s bad faith is manifest and the objection of abuse of rights must be applied to it.\(^{565}\)

In Hebei Import & Export Corporation v. Polytek Engineering Company Limited, where the experts appointed by the arbitral tribunal inspected the equipment in the factory without the knowledge and in the absence of the respondent and the respondent objected to enforcement on the basis of that it was unable to present its case, the Supreme Court found the violation of due process argument of the respondent to be without substance since the respondent had been given a copy of the expert’s report but had not raised any objection to it during the arbitration proceedings, and therefore concluded that “[t]he Tribunal was quite entitled to regard the respondent as engaging in dilatory tactics, to refuse an extension of time and to deliver the Award”.\(^{566}\)

In that vein, in cases where the resisting party has not challenged the competence of the arbitral tribunal, national courts have precluded the defendant from relying on Article V(1)(c) in the enforcement proceedings.

Likewise, with respect to irregular compositions of the arbitral tribunal which could normally lead to refusal of enforcement under Article V(1)(d), national courts

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\(^{565}\) ‘Switzerland No.10, Chrome Resources S.A. v. Leopold Lazarus Ltd.’, \textit{Ibid}.

\(^{566}\) ‘Hong Kong No.15, Hebei Import & Export Corporation v. Polytek Engineering Company Limited’, \textit{Supra} n.564.
have concluded that the defendant, having unconditionally participated in arbitration without invoking any objection regarding the composition of the arbitral tribunal, could no longer invoke such defence in the enforcement proceedings. For instance, the US District Court dismissed an objection that the award was defective because of improper tribunal composition, noting that “it is an objection more appropriately asserted to the arbitration panel itself”.

National courts also precluded the public policy defence concerning fundamental procedural rights, which protect party interests, in Article V(2)(b) if the defendant failed to raise its claim before the arbitral tribunal. For instance, in AAOT Foreign Economic Association (VO) Technostroyexport v. International Development and Trade Services, Inc., the US Court of Appeals held that the party who had knowledge of the willingness of some members of the arbitration court to take bribes, but remained silent on the issue during the arbitration proceedings, could not raise that objection in the enforcement proceedings.

Additionally, some national courts have precluded resisting parties from relying on the grounds for denial of enforcement under the NYC if that party has not raised its objection in a timely manner through annulment action in the country where the award has been rendered, even though the law at the seat of arbitration provides efficient legal remedies against the award. German courts, for instance, until the introduction of the new arbitration law of 1998, which provides estoppel with respect to domestic awards and has been equally applied to foreign arbitral awards “to safeguard the legal certainty ensuing from the finality of arbitral awards”, allowed the party to raise the refusal grounds of the NYC only if an action for setting aside the


568 ‘US No.58, Shaheen Natural Resources Company, Inc. (USA) v. Societe Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures (Sonatrach)(Algeria)’, Supra n.420.

award on those grounds was “not time-barred from commencing an admissible and specific (as to contents) annulment action in the state of origin of the arbitral award”.

In addition to these narrow interpretations, national courts have promoted the effectiveness of international arbitration in other ways. For instance, national courts have extended the separability principle in Article V(1)(c) to the other grounds in Article V and have allowed partial enforcement of the award in the presence of a defect in the award or in the arbitration proceedings pursuant to Article V. Accordingly, national courts have recognised and enforced arbitral awards provided that they have not been affected by the defects in Article V as long as the defects relate to a separable part of the award.

Also, national courts have extended the principle of “no review of merits of the arbitral award”, which is clear from an overview of the exhaustively enumerated grounds in Article V, as to the assessment of the grounds under which the competent authorities of the country where the recognition and enforcement of arbitral award is sought may refuse such requests, in cases where the arbitral tribunal has already decided on the alleged circumstances.

570 ‘Germany No.101, Not indicated v. Not indicated ,Oberlandesgericht [Court of Appeal], Karlsruhe, 9 Sch 02/05, 26 March 2006’, in Albert Jan van den Berg (ed), YCA, Vol.32 (Kluwer Law International 2007), pp.342-346. See also, ‘Germany No.119, Buyer (Ukraine) v. Supplier (Germany)’, Supra n.480.

571 ‘Hong Kong No.5, J.J. Agro Industries(P) Ltd. v. Texuna International Ltd., Supreme Court of Hong Kong, High Court, MP 7515., 12 August 1992’, in Albert Jan van den Berg (ed), YCA, Vol.18 (Kluwer Law International 1993), pp.396-402(rejecting an argument that “because there is no specific reference to separability in the sub-section on public policy, therefore this means that the whole award has to fail if part only is affected by the public policy ground”); ‘Austria No.13/E4, Buyer (Austria) v. Seller (Serbia and Montenegro), Oberster Gerichtshof [Supreme Court], 3Ob221/04b, 26 January 2005’, in Albert Jan van den Berg (ed), YCA, Vol.30 (Kluwer Law International 2005), pp.421-436(concluding that it was possible to separate the award which was enforceable from the award which violated Austrian international public policy); ‘UK No.82, Nigerian National Petroleum Corporation v. IPCO (Nigeria) Limited, High Court of Justice, Queen’s Bench Division, Commercial Court, 17 April 2008 and Court of Appeal (Civil Division), 21 October 2008’, in Albert Jan van den Berg (ed), YCA, Vol.33 (Kluwer Law International 2008), pp.788-802(granting partial enforcement of the award in respect of the sum awarded under two headings which were not open to serious challenge in the Nigerian proceedings, reasoning that the New York Convention provided partial enforcement in Article V(1)(c)); ‘Australia No.40, William Hare UAE LLC (UAE) v. Aircraft Support Industries Pty Ltd (Australia), Supreme Court, New South Wales, 14 October 2014’, in Albert Jan van den Berg (ed), YCA, Vol.40 (Kluwer Law International 2015), pp.363-366 (granting partial enforcement by severing the part of the award which violated natural justice in a case where the party resisted enforcement on grounds of public policy through a claim of breach of natural justice in the making of the award).

572 ‘Hong Kong No.7, Qinhuangdao Tongda Enterprise Development Company, et al. v. Million Basic Company Limited’, Supra n.520 (holding that the defendant was trying to appeal the merits of the case and that was not permitted under the New York Convention); ‘Luxembourg No.2, Sovereign Participations International S.A. v. Chadmore Developments Ltd., Cour d’Appel [Court of Appeal], 28 January 1999’, in Albert Jan van den Berg (ed), YCA, Vol.24 (Kluwer Law International 1999), pp.714-723(The Court rejected a request of judicial control over the arbitral award based on Article V(1)(b), by noting that the New York Convention does not permit the enforcement court in any case to review the
3.2.2.3 Procedure

Regarding the second principle under Article III, as the NYC has given broad latitude to Contracting States to determine how to regulate recognition and enforcement proceedings taking into consideration of the limits, the procedural framework for recognition and enforcement proceedings has differed greatly from jurisdiction to jurisdiction. Some countries have applied legal provisions that directly lay down the procedural rules to apply to the recognition and enforcement of foreign arbitral awards falling under the NYC; some countries, in the absence of special provisions for the enforcement of foreign arbitral awards, have applied the provisions for the enforcement of domestic awards as long as they comply with the conditions established under the NYC; others have applied to the procedures for recognition and enforcement of foreign arbitral awards the procedures that apply to foreign court judgements. Whatever framework the Contracting States choose to apply to the procedure for the recognition and enforcement of foreign award, courts have mostly complied with the second principle under Article III. Some national courts have invoked Article III in applying the doctrine of forum non conveniens which searches for a connection between the defendant and the country where the recognition and enforcement are sought for the jurisdiction to recognise and enforce arbitral awards, based on the ground that this doctrine is classified as procedural and that it applies in the enforcement of domestic arbitral awards and therefore have refused to enforce foreign arbitral awards that have not met this requirement. Some others, under the lex fori by referring to Article III, have permitted the defendant in the enforcement proceedings to assert counterclaims or set-off objections that could not have been

574 Wolff, R., Supra n.51, p.198.

manner in which the arbitrators decided on the merits); ‘Brazil No.6, Bouvery International S.A. v. Valex Exportadora de Café Ltda, Superior Tribunal de Justiça [Superior Court of Justice], SEC No. 839-EX, 16 May 2007’, in Albert Jan van den Berg(ed), YCA, Vol.33 (Kluwer Law International 2008), pp.387-389 (The Court noted that the argument that no sale and purchase contract was concluded between the parties had already been decided by the arbitrators and rejected a review of such question since it related to the merits of the award).
raised. Generally, however, national courts have interpreted the words “rules of procedure of the territory where the award is relied upon” narrowly. They have correctly limited the application of the *lex fori* to “the practical mechanics of the award recognition and enforcement”, such as the kinds of proceedings, the form of the request for recognition or enforcement, the competent recognition court, security for costs of enforcement proceedings and the period of limitation for the recognition and enforcement proceedings, without circumventing the substantive conditions of the action and exceptions, which are regulated by the NYC itself.

Moreover, national courts have properly interpreted the other limitation on the application of the procedural rules of the enforcement country that “there shall not be imposed more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”. In enforcing this limitation, they have not construed it as an assimilation of foreign arbitral awards, for its enforcement, with domestic arbitral awards. For instance, the Court of Appeal of Naples did not apply the requirements of a deposit of the award within a specified period or an order for enforcement of the award under the Italian Code of Civil Procedure to foreign arbitral awards. Likewise, the Supreme Court of Cassation of Italy denied the appeal on the argument that the Court of Appeal, “which heard the opposition as a court of first instance, should have complied with the procedural provisions on first instance proceedings rather than with the provisions on appellate

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577 Wolff, R., *Supra* n.51, p.198.
proceedings”, reasoning that “the complex procedure for first instance proceedings” would be “at odds with the Convention’s […] aim to simplify enforcement”.580

CHAPTER 4: HARMONISATION OF LEGISLATIONS BEYOND THE INTENTION OF THE NEW YORK CONVENTION

Introduction

The scope of the NYC for the purpose of promoting the use of arbitration as a dispute settlement method for international commercial disputes to encourage international commerce has been limited. To be more specific, the NYC directly focused on two elements of the arbitral procedure, i.e. the validity and effect of arbitration agreements and the recognition and enforcement of foreign arbitral awards, referring to awards that have been made in the territory of another State or to awards that have been made in the country where recognition and enforcement are sought but that are not considered as domestic in that country. It has referred some issues to national law explicitly, while on others it has contained no rule, thereby requiring supplementation by national law, and it has been limited in some respects.

As for national laws on arbitral procedure in the early years of the NYC, most of them were in need of revision, for several reasons: they were responsive to the needs of domestic arbitration but not international arbitration and they were at odds with frequently used arbitration rules. For instance, some national laws limited the power of the parties to determine the applicable law; others did not recognise the competence of the arbitral tribunal to determine its jurisdiction or they asserted judicial control over the composition of the tribunal and sometimes over the application of substantive law; some set a certain nationality criterion for arbitrators or required the award to be accompanied by the statement of reasons whether or not the parties agreed otherwise.582 Thus, the NYC has encouraged Contracting States to revise their arbitration laws in line with the needs of the international business world, to secure their places in international trade. In this respect, the NYC has not only set

582 Ibid.
the agenda for legislative reform, but also become a model for a further harmonisation beyond its intended effect or scope of application through the incorporation of its principles – i.e. respecting the parties’ agreement to arbitrate and their autonomy, reducing the role of local courts by recognising the authority of the tribunal and ensuring the enforcement of arbitration agreements and arbitral awards, subject to limited exceptions – into national legislations.

This chapter aims to reveal the impact of the NYC beyond the context of the recognition and enforcement of arbitration agreements and arbitral awards, which was not envisaged in 1958, by observing national legislative changes. Towards this end, this chapter will focus primarily on the effect of the NYC on the development of the UNCITRAL Model Law, which has been envisaged as a prototype for standardizing national laws on arbitral procedure, thereby enabling it to address concerns with regard to national laws on arbitration, i.e. the inadequacy of domestic laws and the disparity of national laws. This step is essential to determine the effect of the NYC on national laws which have been reformed by adopting the Model Law. Then, this Chapter will elaborate the impact of the NYC on legislative revisions in Model Law countries. This will be followed by a review of arbitration law reforms in major arbitration jurisdictions, such as France, Switzerland, England and Sweden, to observe this effect on national laws which have not adopted the Model Law.

4.1 The Effect of the New York Convention on the Model Law

The NYC has not only set the agenda for reforms accompanied by the Model Law, but has also had a structuring impact on the Model Law. These impacts may be observed through consideration of the scope of application of the Model Law and the matters covered under it.

4.1.1 Scope of Application

Despite of the efforts of the NYC to cover as many arbitral awards as possible by extending its scope of application through adding a non-territorial formula that covers arbitral awards made in a State where enforcement is sought under the procedural law of another State, it has become clear over time that the NYC has been limited in its scope of application. First, unless an award is non-domestic in the sense the drafters of the NYC intended, its recognition and enforcement in the country where it is made are not covered by the NYC but would be subject to national laws. This situation is not desirable in terms of arbitrations that are held in the forum but that concern foreigners or international business transactions, causing the arbitration to have an international character. Secondly, depending on whether the Contracting State declares a reciprocity reservation under Article I(3) of the NYC, enforcement of an award rendered in the territory of another country would be subject to the national law of the country where enforcement is sought in cases where the arbitral award has been rendered in a non-Contracting State.

Such limitations in the NYC have affected the scope of application of the UNCITRAL Model Law. The Model Law has adopted a distinction between international awards and non-international awards rather than a distinction between foreign awards and domestic awards, based on substantive grounds instead of territorial borders, because of their inconvenience in view of the limited significance of the place of arbitration in international arbitration, which would further the policy of reducing the relevance of the place of arbitration and advance the vitality of international commercial arbitration.\textsuperscript{585} In this respect, the Model Law focuses on international commercial arbitration to fill the gap caused by the limited scope of application of the NYC and provides a broad internationality test, based on questioning whether the parties to an arbitration agreement have their place of business in different States at the time of the conclusion of that agreement, or whether the place of arbitration or of the performance of the obligation of the commercial relationship is a State other than the State in which the parties have their place of business, or whether the parties

explicitly agreed that the subject matter of the arbitration agreement related to more than one country.\(^586\)

Furthermore, the NYC allowed to States to restrict its application to awards arising out of legal relationships considered to be commercial under the national law of the State making the declaration, which resulted in interpretations by some national courts that were too narrow to achieve the purpose of widespread application of the NYC.\(^587\) The commercial reservation under Article I(3) of the NYC drove the makers of the Model Law to include a definition for the purpose of developing a common understanding of the term. Accordingly, in a footnote to Article 1(1), the Model Law has clarified that “[t]he term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”.\(^588\)

Finally, although the Model Law is designed to establish a special regime for cases meeting its internationality test requirements because the interest of the State in maintaining its own concepts and rules is not as strong in these cases as it is in domestic cases, the Analytical Commentary by the Secretary General notes that “any State is free to take the model law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law”.\(^589\) Thus, the impact of the NYC could also extend by means of the Model Law to the harmonisation of the regime for domestic arbitration if a large number of States adopt the Model Law for domestic arbitration as well as international arbitration.

### 4.1.2 Relationship between Arbitration and Courts

The limited scope of application of the NYC and the fact that the NYC does not deal with the relationships between arbitration and the courts other than in terms of the recognition and enforcement of arbitration agreements by the enforcement courts and recognition and enforcement of foreign awards have been influential in that the

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\(^{588}\) Supra n.586, Article 1(1).

\(^{589}\) Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.11, para.22.
Model Law entirely addresses the relationship between arbitration and the courts. In addressing the definition of the term “court”, like the NYC, the Model Law refers to the national judicial system and includes not only those organs called “court” in a given country but also any other “competent authority” by defining the term “court” as “a body or organ of the judicial system of a State”, as in line with the term “competent authority” under the NYC.\(^{590}\)

As for the extent of court involvement, the Model Law provides certainty about instances in which local courts can intervene and supervise international arbitrations under its Article 5, which states that no court can intervene in matters governed by the Model Law, except instances allowed in the Model Law.\(^{591}\) It allows for court involvement in divergent instances which are grouped at the Explanatory Note by the UNCITRAL secretariat on the UNCITRAL Model Law as follows: the first group comprises appointment, challenge and termination of the mandate of an arbitrator (Articles 11(3)-(4), 13(3) and 14 respectively), jurisdiction of the arbitral tribunal (Article 16(3)) and setting aside of the arbitral award (Article 34(2)), which are all listed in Article 6; recognition of the arbitration agreement, including its compatibility with interim measures of protection ordered by the courts (Articles 8 and 9), court assistance in taking evidence (Article 27) and the recognition and enforcement of arbitral awards (Articles 35 and 36) comprise the second group.\(^{592}\) For the sake of certainty with regard to the functions of arbitration assistance and supervision, the Model Law has adopted a strict territorial criterion, i.e. applying only if the place of arbitration is in the territory of this State, except in some instances, namely the recognition and enforcement of arbitration agreements, including compatibility with interim measures of protection, recognition and enforcement of arbitral awards.\(^{593}\)

The NYC appears to have inspired the drafters of the Model Law in this respect, not only through sub-paragraphs (a) and (d) of Article V(1), which refer to the law of the place of arbitration at a supplementary level, but also through the principle set forth under its Article V(1)(e) that an arbitral award may be “set aside or suspended by a

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\(^{590}\) Supra n.586, Article 2(c); Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Ibid.

\(^{591}\) UNCITRAL Model Law on International Commercial Arbitration, Supra n.586, Article 5.

\(^{592}\) Ibid, Articles 6,8,9,11,13,14,16,34,27,35,36; Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, Supra n.584, p.18.

competent authority of the country in which, or under the law of which, that award was made”.

In filling the gap left by the NYC with respect to the relationship between arbitration and the courts through addressing instances where the courts may become involved, the Model Law looks out for the needs of modern international business and also imports some provisions of the NYC, both for cases that fall under the scope of the NYC and for those that do not. A closer look to the instances that courts may involve under the Model Law helps to improve understanding of how the Model Law deals with the issue inspired by the NYC.

4.1.2.1 Circumstances for court involvement if the place of arbitration is in the country of the court

Instances where courts may become involved if the place of arbitration is in the country of the court are consisted of the functions listed under Article 6, and some others under various provisions in the Model Law.

To start with the functions listed under Article 6, in which the Model Law grants the courts a role in assistance and supervision on the purpose of “centralization, specialization and acceleration”\(^ {594} \) the first instance is the composition of the arbitral authority. The UNCITRAL Model Law gave the parties freedom to agree on the number of arbitrators, their nationality and the procedure for selecting them, and it rendered court involvement only in the event the parties failed to agree on a procedure for appointing the arbitrators or in cases where the parties’ agreed appointment procedure does not operate. More precisely, under Article 10(1) of the UNCITRAL Model Law, the parties have freedom to determine the number of arbitrators.\(^ {595} \) Through this provision, the UNCITRAL Model Law expressly gave effect to the choice of any number by the parties, even in legal systems requiring the number of arbitrators to be uneven to avoid a deadlock when two arbitrators cannot reach a conclusion, thereby aiming to promote the efficiency of arbitration.\(^ {596} \) Hence, parties even have


\(^{595}\) *Supra* n.586, Article 10(1).

been relieved of “overprotective legislative measures” under national laws, in support of the principle of party autonomy.\textsuperscript{597} In other words, the parties have been given freedom to decide what works best for them. They may even agree an even number of arbitrators for conceivable reasons, in spite of the high risk of deadlock. For instance, they may opt for a method involving two arbitrators, with a procedure for selecting the umpire in case of deadlock; or, the parties might agree on two or four particular persons whom they all trust.\textsuperscript{598} In Article 10, paragraph 2 provides a supplementary rule to be applied in the event that the parties either have not agreed in advance or could not agree in time regarding the number of arbitrators. According to this, the Model Law indicates that three should be appointed, as specified under the UNCITRAL Arbitration Rules (Article 5), considering the facts that this seems to be the most common number of arbitrators chosen and that parties who seek to save time and expense would agree on the issue.\textsuperscript{599} Likewise, Article 11 provided a significant principle as to the nationality of the arbitrators and the procedure for appointing them. Firstly, this provision laid down that no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.\textsuperscript{600} This removed the limitations in national laws prohibiting foreigners from being arbitrators even in international cases.\textsuperscript{601} Although it is possible for States to reflect their national policies because the Model Law is not a convention,\textsuperscript{602} it represents a significant component in “establishing truly international arbitration”.\textsuperscript{603} Moreover, while establishing the principle concerning the nationality of the arbitrators, the Model Law puts the issue to the will of the parties, who can freely place limitations on the nationality of the arbitrators. In this context, despite the fact that the term “nationality” is not defined, the Working Group required a broad interpretation so as


\textsuperscript{598} Supra n.587, p. 348.

\textsuperscript{599} Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.27.

\textsuperscript{600} Supra n.586, Article 11.

\textsuperscript{601} Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.28.


\textsuperscript{603} Supra n.587, p.359.
to include the term “citizenship”, which has been used in some national laws.\textsuperscript{604} The parties are also free to agree on the method of appointing arbitrators. Accordingly, there is no limitation on the will of the parties concerning the procedure for selecting arbitrators, and court intervention is provided only on the ground of a supplementary basis for acceleration of the process if the parties fail to choose a method or if the method they select fails to operate.\textsuperscript{605}

The second instance in which court involvement is possible is the challenge and termination of the mandate of an arbitrator. The UNCITRAL Model Law provides that a party may challenge an arbitrator only in circumstances which give rise to justifiable doubts as to his impartiality or independence, or if arbitrator lacks the qualifications agreed by the parties, and only for reasons of which the party becomes aware after the appointment.\textsuperscript{606} Parties have freedom to select the procedure for challenging the arbitrator, and in the event that their chosen method fails, the party intending to challenge the arbitrator is required to send a written statement of the reason for the challenge to the arbitral tribunal.\textsuperscript{607} The court may become involved in the process of challenging the arbitrator only if a challenge, either under the parties’ agreed procedure or under the determination of the arbitral tribunal in the failure of such agreement, fails and upon request by the challenging party within thirty days after having received notice of the decision rejecting the challenge.\textsuperscript{608} In this respect, the arbitral tribunal is authorized to continue the arbitral proceedings and make an award even when such a challenge is pending in court.\textsuperscript{609} Moreover, in cases where an arbitrator fails or is unable to act without undue delay, the courts may decide, upon the request of any party, to terminate the mandate of an arbitrator unless the arbitrator withdraws from office or unless the parties agree on the termination.\textsuperscript{610}

Third, in cases where the arbitral tribunal seizes before the court, the UNCITRAL Model Law authorizes the arbitral tribunal to rule on its own jurisdiction,
including any objections with respect to the existence or invalidity of the arbitration agreement, either as a preliminary question or in an award on the merits, providing that a plea that the arbitral tribunal does not have jurisdiction is raised not later than the submission of the statement of defence, or a plea that the arbitral tribunal is exceeding the scope of its authority is raised as soon as the alleged matter is raised during the arbitral proceedings. To avoid wasting time and money in cases where the arbitral tribunal rules as a preliminary question that it has jurisdiction, the court may have an immediate role to play in determining the jurisdiction of the arbitral tribunal. In addition, to reduce any abuse in the form of dilatory tactics, the Model Law provides the following safeguards: a short time period in which to put such a request to the court, no allowance to appeal court decision and discretion on the part of the arbitral tribunal to continue the arbitral proceedings and make an award while such a request is pending before the court.

The last instance under Article 6 at which the court may become involved if the place of arbitration is in the territory of the country of the court, is the recourse against the award. Importantly, the Model Law attempts to remedy the defect of national laws, which equate arbitral awards with court decisions and provide various means of recourse against arbitral awards with varying time periods and grounds in different jurisdictions. By contrast, the Model Law allows only one type of recourse, namely application for setting aside, in conformity with Article V(1)(e) of the NYC, and specifies the time limit for such application as three months from receipt of the award. This recourse to a court against the award is designed to be the only means of actively challenging the award and does not prejudice the right of the party to defend himself against the award by requesting a refusal of recognition and enforcement. Clearly, the Model Law maintains the two-tier review system of the NYC for international arbitration awards because of the different effects and purposes of challenging the award depending on whether that challenge is for setting aside or a refusal of enforcement. The Model Law enables such recourse on an exhaustive and

611 Ibid, Article 16(3).
612 Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, Supra n.584, p.20, para.25.
614 Supra n.586, Article 34.
exclusive list of grounds in parallel with grounds for refusal for recognition and enforcement under the Article V of the NYC, using the same wording, with few exceptions, for harmony in the interpretation and to reduce the effect of the place of arbitratio

According to this, recourse to a court against an arbitral award is permitted only when the parties lack capacity to conclude the arbitration agreement; in the absence of a valid arbitration agreement, or in the absence of notice of appointment of an arbitrator or of the arbitral proceedings; when a party is unable to present his case; when an award deals with matters not covered by submission to arbitration; when the composition of the arbitral tribunal or the conduct of the arbitral proceedings conflicts with the effective agreement of the parties or, in the absence of such agreement, with the Model Law; or in cases of non-arbitrability or violation of public policy.

At that point, it would have been better if the Model Law had taken into account that including as grounds for setting aside public policy reasons, which have an extra-territorial effect, would mean refusing enforcement based on the local particularities of the place of arbitration, since public policy reasons might vary in substance from one jurisdiction to the next.

Apart from the circumstances mentioned under Article 6, under Article 27 of the UNCITRAL Model Law, courts in the State whose territory is the place of arbitration are granted power to assist in taking evidence to arbitrations taking place in that State in accordance with its rules on taking evidence if the arbitral tribunal or a party with the approval of the arbitral tribunal so requests. Thus, the provision aims to change national laws which provide court assistance only to other courts but not to arbitral tribunals, without interfering with national rules on procedure respecting the taking of evidence and the organization of judicial systems. Although this assistance is sought rarely and for dilatory purposes, it is conceived as helpful because arbitral tribunals do

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616 UNCITRAL Model Law on International Commercial Arbitration, supra n.586, Article 34(2); Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, ibid, p.72, paras.6, 8.
617 UNCITRAL Model Law on International Commercial Arbitration, ibid, Article 34(2).
619 Supra n.586, Articles 1(2) and 27.
not have powers of compulsion under either the Model Law or most existing national laws.\textsuperscript{621}

\textit{4.1.2.2 Circumstances for court involvement irrespective of where the place of arbitration is}

Articles 8, 9, 35 and 36 extend their effects, which are primarily set forth for cases in which the place of arbitration is in the enacting State, to the role of the courts of States other than the State whose territory is the place of arbitration, in international commercial arbitration.\textsuperscript{622} Hence, these provisions, where adopted by a State by adopting the Model Law, would apply to any international commercial arbitration irrespective of whether or not arbitration takes place in the territory of that State, if an action involving an issue that is the subject of a valid arbitration agreement is brought before the court, or if the court is required to take an interim measure, or if recognition and enforcement of an arbitral award is sought.\textsuperscript{623} This would mean a step towards a universal recognition and effect of international commercial arbitration agreements and arbitral awards, subject to wide acceptance of the Model Law.\textsuperscript{624}

In this respect, Articles 8 and 9 address the relationship between arbitration agreements and the courts in two different aspects. Modelling Article II(3) of the NYC, Article 8(1) of the Model Law requires courts before which an action is brought in a matter that is the subject of an arbitration agreement, irrespective of whether or not the place of arbitration is abroad, to refer the parties to arbitration upon a party’s request, provided that such request is submitted before his/her first statement on the substance of the dispute, and unless the agreement is null and void, inoperative or incapable of being performed.\textsuperscript{625} Plainly, like Article II(3) of the NYC, the Model Law requires referral to arbitration if the action before a court is in the same matter that the arbitration agreement concerns, and being related to the matter is not enough to

\textsuperscript{621} Ibid, p.59, para.1.
\textsuperscript{622} Supra n.586, Article 1(2).
\textsuperscript{624} Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.24, para.2.
\textsuperscript{625} Supra n.586, Article 8(1).
be referred to arbitration.626 Also, the Model Law, like the NYC, identifies the scope of the court’s determination of the validity of an arbitration agreement by determining whether the arbitration agreement is null and void, inoperative or incapable of being performed. However, such referral is conditioned on the request being raised before any pleadings on the substance, unlike the NYC.627 Moreover, the Model Law follows the order of the NYC in that the court would decline to exercise its jurisdiction and refer the parties to arbitration only upon request by a party, not ex officio.628 Obviously, the Model Law models the NYC in terms of the effect of the arbitration agreement, but adds a time limit on a party’s request to refer to arbitration. Moreover, for cases where a court and arbitral tribunal are seized of the merits or jurisdiction simultaneously, Article 8(2) of the Model Law does not lead to a different solution than the one provided by Article II(3) of the NYC, which does not lay down a priority in favour of the arbitral tribunal but requires the court to decide its own jurisdiction by taking into account the arbitration agreement.629 However, for the purpose of reducing the risk and effect of dilatory tactics of a party breaking his commitment to arbitration,630 the Model Law, under Article 8(2), makes another addition to the original text in the NYC and empowers the arbitral tribunal to continue the arbitral proceedings while the issue is pending before the court.631 Being binding on the courts of States adopting the Model Law irrespective of in which country the arbitration agreement provides arbitration, this provision aims to give global recognition and effect to international commercial arbitration agreements.632

The Model Law supports this aspect by providing the definition and form of arbitration agreements under Article 7,633 closely following Article II of the NYC but

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627 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.24, para.3.
628 Ibid.
630 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.24, para.5.
631 Supra n.586, Article 8(2).
633 Supra n.586, Article 7.
adding some clarifications, if the place of arbitration is in the territory of the State in which such action is brought before the court. For the definition of arbitration agreement, the Model Law recognises the validity and effect of arbitration agreements whether the commitment submitted by the parties concerns an existing dispute or a future dispute, thereby aiming to give full effect to the latter, which was excluded under certain national laws, and contributing to global unification in this context. In this respect, the Model Law recognises the criterion that the dispute developed out of a “defined legal relationship, whether contractual or not”, as does Article II of the NYC. Furthermore, the Model Law abolishes any existing national requirement that the agreement should be in a separate document, by recognising arbitration agreements regardless of whether they are in the form of an arbitration clause inserted in a contract or in the form of a separate agreement which is convenient for both existing disputes and future disputes. Besides, the Model Law eliminates the phrase “concerning a subject matter which could be disposed of by agreement under the applicable law” from Article 7 of the Model Law, which corresponded to the requirement under Article II(1) of the NYC of “a subject matter capable of settlement by arbitration”, regarding which the NYC has had to defer to national laws, as it aims to perform in different legal systems and thereby advance the universal efficiency of internation arbitration. However, Article 1(5) of the Model Law, which lays down that “[t]he Model Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law”, indicates that the question of the arbitrability of the subject matter may still be subject to domestic divergences. As for the form of arbitration agreement, Article 7(2) of the Model Law requires arbitration agreements to be “in writing”, as does the NYC in Article II(1); thus, it does not cover instances, frequently encountered in practice, in which one of the parties does not declare his consent to arbitration in writing, such as arbitration agreements in bills of lading, not only because many States would not accept the concept of an

634 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.21, para.2.
635 Supra n.586, Article 7(1); Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Ibid, p.21, para.4.
The Model Law places the hope for the cure of possible difficulties on that point on any other relevant treaty or on the waiver rule under Article 16(2), requiring that any objections to tribunal jurisdiction be raised in a timely manner. Moreover, the UNCITRAL Model Law also aligns the formal conditions for the requirement of “agreement in writing” with those under Article II of the NYC. The Model Law provides a more detailed definition of the formal requirement than Article II(2) of the NYC, clarifying that it covers modern means of communication, frequently used contract practices, such as the use of standard form contracts or reference to general terms, and an exchange of statements of claim and defence of an arbitration agreement, through an interpretation of the word “include” in Article II(2) of the NYC as “including inter alia”. According to this, an agreement contained (i) in documents signed by the parties, or (ii) in an exchange of letters, telexes, telegrams or other means of telecommunication that provide a record of the agreement, or (iii) 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 the other, would meet the writing requirement, as would (iv) a reference in a contract to a document containing an arbitration clause, which is deemed to meet the writing requirement if the contract is in writing and the reference is made in the said clause. Thus, the Model Law seeks to harmonise the definition and form requirement for arbitration agreements providing international commercial arbitration in the enacting State, under the guidance of the relevant provision of the NYC, thereby preventing any frustration due to the mandatory provisions of the applicable law of the expectations of the parties in relation to their agreements.

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639 Supra n.586, Articles 1(1) and 16(2); Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.22, para.6.
641 Ibid; Supra n.586, Article 7(2); Supra n.637, pp.9-10, paras.43, 44. See also, Supra n.338, p.101.
The other aspect of the relationship between arbitration agreements and the courts is reflected under Article 9, which provides that any interim measures of protection may be requested from the courts before or during arbitral proceedings. Accordingly, because the resort to a court and subsequent court action in relation to interim measures of protection would help to make arbitration efficient and to secure its expected result, a recourse by a party for any such court measures has been considered to be compatible with the intentions of parties agreeing to submit their dispute to arbitration. From this point of view, in cases where a party requests any such court measures, this would not be raised as an objection against the existence or effect of an arbitration agreement under the Model Law, and the measures taken by the courts of States where the UNCITRAL Model Law would apply would be compatible with the arbitration agreement regardless of the place of arbitration. This provision would apply irrespective of which country such recourse is made to. Hence, this provision is significant since it deals with the compatibility of the variety of possible measures by courts in different legal systems, including both steps by the parties to conserve the subject matter or to secure evidence and other measures which are required from a third party, and their enforcement, thereby being conceived to achieve global recognition of the principle of compatibility, which is not uniformly accepted in the context of the NYC.

Finally, the Model Law seeks to remedy the undesired circumstances regarding the fate of arbitral awards which fall outside the scope of the application of the NYC but indeed arise out of an international commercial arbitration. It addresses the need for a single set of provisions for international commercial arbitral awards regardless of where the place of arbitration is. By taking into account the success of the NYC, which had been adopted by a significant number of States and had given rise to few problems in its application and interpretation, the Model Law was aligned with the NYC to promote the unification of law in relation to the recognition and

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645 Ibid, p.25, para.3.
646 Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, Supra n.584, p.19.
647 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.25, para.3.
648 Ibid, p.76, para.2.
649 Ibid, p.76, para.3.
In this respect, any arbitral award rendered in international commercial arbitration must be recognised as binding and enforceable, irrespective of the country where the award is made, under certain conditions for obtaining enforcement and subject to the grounds for refusal of recognition and enforcement.

With respect to the conditions for obtaining enforcement, Article 35 of the Model Law closely follows the policy and wording of Article IV of the NYC, which has abolished the double exequatur requirement, and does not require deposit or registration of arbitral awards issued in international commercial arbitration taking place in the enforcing State or in a foreign country. The application for recognition and enforcement must be in writing, accompanied by the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in Article 7 or duly certified copy thereof, and their duly certified translations in cases where they are not in an official language of the State where the enforcement is being sought. Hence, the adoption of the abolishment of the double exequatur requirement, one of achievements of the NYC, for international arbitral awards has aimed to eliminate any difference in the enforcement of international awards depending on where the enforcement is sought. Also, this wording in the Model Law has sought to avoid the disparity of national laws which treat domestic awards under

650 Supra n.587, pp.1055, 1056.
651 Although both the Secretariat and the Working Group adopted the view that the award would be binding from the date of the award, the Commission debated the issue as part of the discussion of another provision concerning the form and contents of the arbitral award, and could not reach a conclusion despite receiving some proposals on the point in time when the award shall be recognised as binding, such as the date on which the award is made, the date on which the award is delivered to the parties or the date on which the period of time for making an application for setting aside the award expires. See for the view by Secretariat, Composite Draft Text of a Model Law on International Commercial Arbitration: Some Comments and Suggestions for Consideration, A/CN.9/WG.II/WP.50 (16 December 1983), in Yearbook of the United Nations Commission on International Trade Law 1984, Vol.XV, p.233, para.28; Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.76, para.4. See for the view by the Working Group, Supra n.604, p.36, para.148. See for the debates by the Commission, 328th Meeting, A/CN.9/SR.328 (18 June 1985), in Yearbook of the United Nations Commission on International Trade Law, 1985, Vol.XVI, p.492, paras.52-58; Supra n.638, pp.31,32, paras.256-258.
653 This is also clear from that in setting the minimum formal requirements for arbitral awards, which would apply if the place of arbitration is in the country of the court, the Model Law required the award to be made in writing and signed by the arbitrator(s), stating the date and place of arbitration, and one copy to be delivered to each party, without requiring the deposit or registry of the award for it to become binding. See for the relevant provision, Supra n.586, Article 31(1). See also, Supra n.638, p.38, paras.316, 317; Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.76, para.4.
654 Supra n.586, Article 35(1) and (2).
655 Supra n.587, p. 840.
the same favourable conditions as local court decisions, and to make the treatment of domestic awards uniform in all legal systems, without imposing any restrictive conditions. Moreover, the Model Law has mirrored the pro-enforcement bias enshrined in the NYC in Article VII by a footnote to Article 35(2) noting that the conditions laid down in this paragraph are intended to establish maximum standards, and that the adoption of less onerous conditions by States would be consistent with the harmonisation that the Model Law aims to achieve. This certainly encourages legislators to take a further step in this respect.

In addition to the conditions for recognition and enforcement, Article 36 of the Model Law has modelled the grounds under Article V of the NYC for refusal of recognition and enforcement, which are envisaged for application to foreign arbitral awards, to harmonise the grounds for refusing awards resulting from international commercial arbitration regardless of where arbitration has taken place. Guided by the grounds for refusal provided in the NYC, the Model Law set forth an identical treatment in relation to international commercial awards irrespective of whether they have been issued inside or outside the enforcing State, and has aimed to emancipate them from national legal idiosyncracies. Thus, awards falling outside of the application of the NYC would be subject to inquiry into the same grounds for refusal that applied to awards under the NYC. More precisely, the Model Law has established a regime treating all arbitral awards uniformly irrespective of whether the award is made in the country of enforcement or abroad, as long as the award is international. However, it would have been better if the Model Law had not overlooked the risk of double control for domestic international awards that may result from the two-tier review system which sets forth exactly the same grounds for active and passive remedies. On this point, by modelling Article VI of the NYC on Article 36(2) to deal with the coincidence of an application for setting aside of the award with a request of enforcement, the Model Law has disclosed that it did not envisage a regime that allowed the defendant to spoil the enforcement process for domestic awards by failing to raise timely claims. So, the grounds for refusal of enforcement of domestic awards should be interpreted taking into account Articles 4 and 16(2).

656 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.76, para.2.
657 Supra n.586, Footnote *** to Article 35(2).
658 Ibid, Article 36.
4.1.3 The Conduct of Arbitration Proceedings

The Model Law addresses the conduct of arbitration proceedings, where national arbitration laws call for revision by reason of their relevance in the context of refusal grounds under (d) and (e) of Article V(1) of the NYC, without being subject to the limitations or frustrations of national laws.\textsuperscript{659} It provides the most significant principles in relation to the conduct of arbitration proceedings under Articles 18 and 19, which envisage a liberal framework.

Article 19 of the Model Law, in its entirety, is the “Magna Carta of Arbitral Procedure”: the UNCITRAL Secretariat called it the most significant provision of the Model Law because it advanced the procedural autonomy by recognising the parties’ freedom to agree on the rules of procedure to be followed by the arbitral tribunal in conducting the arbitration proceedings, subject to mandatory provisions of the Model Law, and by empowering the arbitral tribunal, in the absence of such agreement by the parties, to deal with the conduct of the arbitration in such manner as it considers appropriate, subject to both mandatory and non-mandatory provisions of the Model Law.\textsuperscript{660} This is indeed an expression of confidence in the ability of the parties and the arbitral tribunal to conduct the proceedings in a fair and orderly manner to reach a fair resolution of the dispute.\textsuperscript{661} In this respect, parties may tailor the rules according to their needs.\textsuperscript{662} They may determine this issue either by preparing their own individual set of rules or by referring to standard rules for institutional (supervised or administered) arbitration or for ad hoc arbitration.\textsuperscript{663} They may also prefer a procedure which is anchored in a particular national law as well as those aforesaid rules. The most notable point is that if the parties opt for a particular law of civil procedure, the application of that law would be by virtue of being the choice of the parties, not by virtue of being the national law.\textsuperscript{664} In the event that the parties fail to determine the rules of procedure, the procedural discretion granted to the arbitral

\textsuperscript{659} Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, \textit{Supra} n.584, p.21, para.31.
\textsuperscript{660} \textit{Supra} n.586, Article 19; Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, \textit{Supra} n.585, p.44, para.1.
\textsuperscript{661} \textit{Supra} n.587, p.564.
\textsuperscript{662} Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, \textit{Supra} n.585, p.44, para.2.
\textsuperscript{663} \textit{Ibid}.
\textsuperscript{664} \textit{Ibid}, p.45, para.2.
tribunal covers conducting the arbitration, including the determination of admissibility, relevance, materiality and weight of any evidence.\textsuperscript{665} Arbitral tribunals would be able to adopt procedural rules familiar or acceptable to the parties.\textsuperscript{666} Hence, such discretion opens the way for commercial arbitration, in the awareness that being forced to apply the law of the country of the place of arbitration would present difficulties to any party not familiar to that particular and possibly peculiar system of procedure and evidence.\textsuperscript{667} Considering the liberal framework of the Model Law, the arbitral tribunal would meet the needs of the particular case and choose the most appropriate procedure for the conduct of arbitration proceedings and determining the specifics of collecting and considering evidence.\textsuperscript{668} Hence, by allowing the parties to mould the rules according to their specific needs, and in the absence of such an agreement, providing a supplementary discretion to the arbitral tribunal to tailor the conduct of arbitration by taking into consideration specific features of the dispute, the Model Law has been very instrumental in providing a liberal framework to suit the great variety of needs and circumstances of international cases, free from the obstructions of local peculiarities and traditional standards which might exist in the domestic law of the place.\textsuperscript{669}

That said, the principle of the autonomy of the parties and the arbitral tribunal in governing the procedural conduct of arbitration is not unlimited. The Model Law limits the parties’ freedom to agree on the arbitral procedure to be followed by the arbitral tribunal in conducting the proceedings and the discretion of the arbitral tribunal in the absence of such agreement, through some mandatory rules. The most significant of these rules is Article 18, requiring that the parties shall be treated with equality and each party shall be given a full opportunity to present his case.\textsuperscript{670} Accordingly, the determination of the procedure for the conduct of the proceedings, whether by the agreement of the parties or by the arbitral tribunal in the absence of such agreement, has been kept subject to fundamental principles of procedural

\textsuperscript{665} Supra n.586, Article 19(2).
\textsuperscript{666} Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.46, para.6.
\textsuperscript{667} Ibid.
\textsuperscript{668} Ibid, p.45, para.5.
\textsuperscript{669} Ibid, p.44, para.1.
\textsuperscript{670} Supra n.586, Article 18.
fairness in any means of dispute resolution, i.e. natural justice and equal treatment.\textsuperscript{671} The rest of mandatory provisions provides detailed mechanisms to achieve the principle set by Article 18.\textsuperscript{672} For instance, Articles 24(2) and (3), which require the parties to be given enough advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of properties or documents and require all statements or documents submitted to the arbitral tribunal by one party to be communicated to the other party, aim to guarantee fairness.\textsuperscript{673} Clearly, the corrective role of the enforcement court under Article V(1)(b) of the NYC, requiring refusal of the recognition and enforcement of the foreign award resulting from a procedure which has been operated unfairly against either party, has been modelled to be performed by the mandatory provisions of \textit{lex loci arbitri} dealing with defects in the procedure, denial of justice and lack of due process of law.\textsuperscript{674} Furthermore, the Model Law provides default rules, which were drafted by taking the UNCITRAL Arbitral Rules into account, to govern arbitration proceedings for cases where parties fail to agree on the rules of procedure to be followed by the arbitral tribunal in conducting the arbitration proceedings, and these provisions limit the discretion of the arbitral tribunal to conduct arbitration proceedings.\textsuperscript{675}

\textbf{4.1.4 The 2006 Amendment}

Twenty-one years later, in 2006, the UNCITRAL improved the Model Law by amending some articles, namely Articles 7, 17 and 35(2), to respond to “the current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures”.\textsuperscript{676} In modifying Article 7(2), the UNCITRAL intended to “update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York

\textsuperscript{671} Supra n.38, p.408; These principles were initially under Article 19 as another significant factor of the Magna Carta of Arbitral Procedure but later placed under Article 18 as a separate article to stress their fundamental significance and application to the overall proceedings. See Supra n.604, p.15, para.62; Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Supra n.585, p.44, para.1. See also, A/CN.9/SR.322 (13 June 1985), para.7; A/CN.9/SR.330 (19 June 1985), paras. 62,64; Supra n.638, p.23, para.176.

\textsuperscript{672} Supra n.587, p.550.

\textsuperscript{673} Supra n.586, Articles 24(2) and (3).

\textsuperscript{674} Supra n.597, p.77, para.12.

\textsuperscript{675} Supra n.586, Articles 19(2).

Convention”\(^{677}\) to be able to also cover arbitration agreements that do not meet the form requirement under the original version of the Model Law. The revised Article 7 has provided two options, which reflect two different approaches on the question of definition and the form of arbitration agreement.\(^{678}\) The first option provides a detailed description of how the writing requirement could be satisfied, which follows the original version but additionally refers to “electronic communication” by defining it in the same way with the United Nations Convention on the Use of Electronic Communications in International Contracts,\(^{679}\) and embraces any form of record of the content of the arbitration agreement as being “in writing” whether or not the arbitration agreement or contract has been concluded orally, by conduct or by any other means; the second option omits the writing requirement altogether.\(^{680}\) By this amendment, the UNCITRAL clearly pursues to not only make the definition of written form more consistent with the recent practice, but also to convince jurisdictions which had already removed the written form requirement for arbitration agreements to adopt the Model Law and to provide a solution to the national legislators who may desire to relax the form requirement for arbitration agreements in the future since the trend has been towards that direction.\(^{681}\)

In revising Article 17, the UNCITRAL included a new chapter, i.e. Chapter IV(A), which elaborated the conditions for granting interim measures, provisions applicable to these interim measures and envisaged a regime for enforcing interim measures ordered by arbitral tribunals.\(^{682}\) What is significant about the relevant amendment in terms of the impact of the NYC is that the 2006 Amendments derived the enforcement regime for interim measures from the legal framework laid down for enforcement of arbitral awards under Articles 35 and 36 of the Model Law, which have mirrored the rules provided in the NYC in respect of recognition and enforcement of foreign arbitral


\(^{679}\) The United Nations Convention on the Use of Electronic Communications in International Contracts aims to remove obstacles in relation to certain formal requirements contained in widely adopted international trade law treaties, such as the NYC, by establishing equivalence between electronic and written form, and to strengthen the harmonization of the rules regarding the use of electronic communications in international trade. This Convention has entered into force in 10 States only. The United Nations Convention on the Use of Electronic Communications in International Contracts, adopted on 23 November 2005, entry into force on 1 March 2013, Articles 4 and 20.

\(^{680}\) Supra n.678, pp. 4-5, Article 7, Options I and II.

\(^{681}\) Supra n.677, p. 27, para.165.

\(^{682}\) Supra n.678, pp.9-14, Chapter IV(A).
awards. Under Article 17(H), interim measures ordered by arbitral tribunals shall be recognised as binding and, unless otherwise provided by arbitral tribunals, enforced upon application to the competent court, irrespective of the country in which they have been issued, subject to provision of Article 17(I).\textsuperscript{683} Article 17(I), apart from introducing rules that are specifically geared to the recognition and enforcement of interim measures in view of the difference in nature between interim measures and arbitral awards on the merits, mirrored Article 36 to great extent.\textsuperscript{684}

Finally, in amending Article 35(2), the UNCITRAL introduced two reforms in respect to the conditions for obtaining enforcement: first, the party relying on an award or applying for its enforcement is no longer required to present a copy of arbitration agreement, but only required to submit the original award or a copy thereof; and, secondly, submission of a translation, in cases where the award is made in a language other than the official language of the State, is no longer compulsory, but subject to the court’s request.\textsuperscript{685} Thus, it liberalized the conditions for obtaining enforcement and reflected the reform made under Article 7.\textsuperscript{686}

4.2 The Effect of the New York Convention on Legislative Revisions in Model Law Countries

To date, 80 States in a total of 111 jurisdictions have reformed their arbitration legislations based on the UNCITRAL Model Law,\textsuperscript{687} and 18 of these 80 States indicated that their national law is based on the text of the UNCITRAL Model Law with amendments as adopted in 2006.\textsuperscript{688} Because to deal with all aspects of the Model Law in the countries would go beyond the scope of this thesis, this section will be limited to an observation of how States have introduced the provisions of the Model Law which has emerged with the impact of the NYC into their legislations.

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\textsuperscript{683} Ibid, pp.12, 13, Articles 17(H) and 17(I).
\textsuperscript{684} Supra n.677, p.22, paras.132,133.
\textsuperscript{685} Supra n.678, Article 35(2).
\textsuperscript{686} Ibid, p.37, Article 35(2).
Considering approaches which States have followed in introducing the Model Law into their national arbitration legislation, the regime of the Model Law has provided predictability in relation to international arbitration, and its application has been extended to domestic arbitration in some countries. To be more precise, in introducing the Model Law into their legislation, states have followed various approaches, namely (i) assimilation of the Model Law by enacting a new law for international commercial arbitration which is identical with the Model Law or almost identical, (ii) adopting the Model Law also for domestic arbitration, (iii) creating the possibility for the parties to opt into the Model Law regime for domestic arbitration by agreement, (iv) providing the parties to international arbitration with the possibility of opting-out of the Model Law regime and (v) referring in the international part of the law to provisions contained in the domestic part. In cases where a country adopts both the assimilation and opting-out approaches, the regime of the Model Law for international arbitration provides predictability to the parties at the supplementary level because its application is subject to parties’ opting out of this regime. In cases where a country adopts both the assimilation and opting in approaches, the regime under the Model Law extends to domestic arbitration.

In adopting the Model Law, States have made various modifications. Matters on which Model Law provisions have been modified include scope of application, interim measures, provisions on the jurisdiction and challenge of arbitral tribunal, recourse to a court against arbitral award and recognition and enforcement of arbitral awards.

In terms of scope of application, modifications for the term ‘international’ have not introduced an essential difference. For instance, in Turkey, Article 2 of the International Arbitration Law (hereinafter ‘IAL’) have followed the definition under (a) and (b) of Article 1(3) of the Model Law, which qualifies arbitration as international, and specifies the factor (c) of Article 1(3) of the Model Law by two circumstances. Article 1(2) of Bulgarian Arbitration Law refers only to the most clear criterion qualifying arbitration as international, i.e. where the residence or the domicile of at

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least one of the parties is not within the territory of the Republic of Bulgaria.\textsuperscript{691} Some countries have modified the term ‘international’ by broadening this term: Tunisian Law have adopted the criteria provided in the Article 1(3) of the Model Law and provided an additional definition for ‘international’, i.e. “an arbitration is international if it implicates international commercial interests".\textsuperscript{692} As for the footnote inserted under Article 1 to provide a non-exhaustive list for the term ‘commercial’, State have inserted the footnote under Article 1 in the text, which has been a harmless practice.\textsuperscript{693}

With respect to interim measures, some States addressed the issue whether interim measures ordered by arbitral tribunal may be qualified as awards and enforced by courts, before 2006 amendment. For instance, Australian Arbitration Act provided that parties may agree to apply Chapter VIII of the Model Law (on enforcement of awards) to orders under its Article 17.\textsuperscript{694} These modifications which were made by States in adopting the Model Law before the 2006 amendment has been embraced as desired standard rule, with the replacement of Article 17 of the Model Law in the 2006 amendment, which defined an interim measure as any temporary measure, whether in the form of an award or in another form and regulated recognition and enforcement by the court of interim measures ordered by the arbitral tribunal.

States have mostly complied with the rules on the jurisdiction and challenge of arbitral tribunal, with some minor modifications. With respect to the jurisdiction, for instance, only a few States have deviated from Article 16(3), which lays down that the arbitral tribunal may rule on its own jurisdiction either as a preliminary question or in an award on the merits and that any party may request the court to decide the matter in case the arbitral tribunal rules as a preliminary question that it has jurisdiction and arbitral tribunal may continue the proceedings, pending such request. Tunisian Law has omitted the rule under Article 16(3) that arbitral tribunal, pending court appeal, may continue the proceedings, and stipulated that the court shall give its decision in any case within three months from the date the request has been made.\textsuperscript{695} Both Bulgaria and Turkey have abolished the court review against the tribunal’s ruling on

\textsuperscript{692} Tunisia: Law No. 93-42 of 26 April 1993 on the Enactment of Arbitration Code, Article 48(1).
\textsuperscript{693} E.g. Egypt: No. 27 of 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, published in the Official Gazette No.16 (bis) on 21 April 1994, Article 2.
\textsuperscript{694} Supra n.689, p.16.
\textsuperscript{695} Supra n.692, Article 61(3).
the jurisdictional challenge which is envisaged under Article 16(3); instead, the tribunal’s decision on jurisdiction may be challenged during the annulment proceedings in these countries.\textsuperscript{696} As for the procedure for the challenge of arbitrators, States have generally followed the rule envisaged under Article 13, with minor differences. For instance, Egypt has followed the pattern under Article 13 but added that “if the challenge of the arbitrator is successful, the arbitral proceedings already conducted, including the arbitral award, shall be null and void”, thereby deviating from Article 15 of the Model Law, which provides for the appointment of substitute arbitrator.\textsuperscript{697} Tunisia have deviated from the Model Law by omitting a decision on the challenge to be taken by the arbitral tribunal if the parties fail to agree on the challenge procedure and ruling that challenging party may request from Tunis Court of Appeals to adjudicate the challenge request.\textsuperscript{698}

With respect to the challenge to awards, States have not made mass changes to the grounds elaborated in Article 34(2) of the Model Law in introducing the Model Law in their national legislations. To be more precisestates have covered in their laws the four grounds of Article 34(2)(a) of the Model Law, i.e. (i) incapacity of a party or invalidity of arbitration agreement; (ii) a party not being able to present his case; (iii) arbitral tribunal exceeding its authority; (iv) irregularity in the composition of arbitral tribunal or arbitral procedure, in one way or another.\textsuperscript{699} The grounds to which States have made modifications in the process of adoption are those with respect to the violation of public policy envisaged under Article 34(2)(b) of the Model Law. For instance, Australian International Arbitration Act(‘IAA’) have made clarification to avoid any doubt that an award is contrary to the public policy of Australia if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award.\textsuperscript{700} Tunisian Law have provided the violation of public policy as the only ground that the court may review \textit{ex officio}, and added that such violation would be reviewed “according to private international law”,\textsuperscript{701} which highlights the concept of

\textsuperscript{696} Supra n.690, Articles 7(H) and 15; Supra n.691, Articles 20 and 47.
\textsuperscript{697} Supra n.693, Article 19(3).
\textsuperscript{698} Supra n.692, Article 58(1) and (3).
\textsuperscript{699} Supra n.689, p.20.
\textsuperscript{700} Australia: International Arbitration Act 1974, No. 136, Compilation No. 12, compiled on 17 November 2016, including amendments up to Act No.67, registered on 18 November 2016, Section 19.
\textsuperscript{701} Supra n.692, Article 78(2)(b).
international public policy.\textsuperscript{702} On the other hand, despite the Model Law is silent on whether the parties may waive the right to challenge of the arbitration award, some States have enabled the parties to exclude setting aside. Under Article 1717(4) of Belgian Civil Code of Civil Procedure, parties may waive the right to challenge the award when none of the parties are either a Belgian national or resident or a legal person formed in Belgium or having a branch or some seat of operation in Belgium, by including in an express statement in the arbitration clause or a subsequent agreement.\textsuperscript{703} Similarly, in Tunisia, the parties who neither have neither domicile, habitual residence nor place of business in Tunis may expressly agree to waive their right to challenge the award.\textsuperscript{704} Likewise, according to Turkish IAL, parties with domiciles or habitual residences outside Turkey may exclude setting aside partially or entirely by an express statement in the arbitration agreement or by a subsequent written agreement.\textsuperscript{705}

States have made some changes in relation to the regime of the Model Law for recognition and enforcement of arbitral awards in international commercial arbitration in the adoption process. For instance, Australian IAA lays down that where both Chapter VIII of the Model Law, which applies to recognition and enforcement of arbitral awards irrespective of the country where the award has been made, and Part II of this Act, which gives effect to Australia’s obligations under the NYC, would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award because of its similarity to the NYC.\textsuperscript{706} Turkish IAL, which is the principle legislation applicable to arbitrations where the place of arbitration is Turkey and there is a foreign element, does not have any provision on recognition of arbitral awards falling into its scope of application, but lays down that a certificate for the enforceability of the award may be issued, upon the request of the party seeking enforcement, by the competent court under certain conditions, i.e. (i) if the decision rejecting the annulment application becomes final; or (ii) if the time limit for applying for annulment of arbitral award expires or the parties have waived their right to apply

\textsuperscript{702} Supra n.689, p.21.
\textsuperscript{703} Belgium: Code of Civil Procedure, 19 May 1998, Article 1717(4)(Despite this Law exists long before Belgium becomes a Model Law country in 2013, it is significant because it is the rule still in effect in the present day in Belgium); See also, Hollander, P., Draye, M. (2012), Belgium, Arbitration Guide, IBA Arbitration Committee, p.20.
\textsuperscript{704} Supra n.692, Article 78(6).
\textsuperscript{705} Supra n.690, Article 15.
\textsuperscript{706} Supra n.700, Section 20.
for annulment.\textsuperscript{707} Court's review for the latter conditions is limited to the assessment of whether the dispute is arbitrable under Turkish law and whether the award is against public policy.\textsuperscript{708} On the other hand, the recognition and enforcement of foreign arbitral awards which do not meet conditions required for the applicability of the NYC are governed by the Turkish Private International Law(thereinafter 'TPIL'),\textsuperscript{709} the regime under which differs from the NYC in a number of aspects: first, Article 61 of the TPIL, which provides formalities for applications for enforcement, has differed from Article IV of the NYC by requiring the party seeking enforcement to submit the original or duly authenticated copy of the final and enforceable, or binding arbitral award; \textsuperscript{710}secondly, Article 62(2) of the TPIL implies that the party against whom enforcement is sought will not bear the burden of proof of the facts provided under sub-paragraphs (a), \textsuperscript{711} (b)\textsuperscript{712} and (c)\textsuperscript{713} under Article 62(1), thereby differing from the corresponding provision of NYC, i.e. Article V(1)(a), which may be reviewed only upon the request of the party against whom the recognition and enforcement is sought;\textsuperscript{714}thirdly, under Article 62(1)(h) of the TPIL, recognition and enforcement of foreign awards shall be refused if arbitral award has not become final, enforceable or binding in accordance with the law applicable to the award, or in its absence, the law of the seat of arbitration, or with the applicable procedure the award is subject to,\textsuperscript{715}while the NYC limited the refusal ground under Article V(1)(e) to the fact that the award has not yet become binding on the parties.

Finally, national arbitration laws have become increasingly harmonised as a result of accession to the NYC by a large number of States and diffusion of the Model Law widely, which has resulted a trend towards harmonisation of general principles of arbitration procedure.\textsuperscript{716} Accordingly, a consensus has emerged on the principles laid

\textsuperscript{707} Supra n.690, Article 15(B).
\textsuperscript{708} Ibid.
\textsuperscript{709} 'Turkish Private International Law (Law No. 5718 of 27 November 2007)', in Ali Yesilirmak and Ismail G. Esin (eds), Arbitration In Turkey (Kluwer Law International 2015), p. 318, Article 1(2).
\textsuperscript{710} Ibid, Article 61(1)(b).
\textsuperscript{711} The enforcement of a foreign arbitral award shall be refused if no arbitration agreement has ever been entered into or the underlying contracts do not contain any arbitral clause. Ibid, Article 62(1)(a).
\textsuperscript{712} The enforcement of a foreign arbitral award shall be refused if the arbitral award is against general ethics or public policy. Ibid, Article 62(1)(b).
\textsuperscript{713} The enforcement of a foreign arbitral award shall be refused if the issue which is the subject of the foreign award is not arbitrable according to Turkish law. Ibid, Article 62(1)(c).
\textsuperscript{714} Ibid, Article 62(2).
\textsuperscript{715} Ibid, Article 62(1)(h).
down under Articles 18 and 19 of the Model Law, i.e. party autonomy in matters of procedure and due process.\textsuperscript{717}

In view of States’ adoption process, States have not deviated from one particular article of the Model Law.\textsuperscript{718} Despite of the fact that they are still not identical due to modifications made by some countries upon their adoption,\textsuperscript{719} the arbitration laws reformed based on the Model Law have come closer to each other. What is significant in terms of the focus of this thesis is that the diffusion of the NYC and the Model Law has brought predictability on the relationship between arbitration and courts and certainty on general principles of the conduct of arbitration proceedings, in the Model Law countries.

4.3 The Effect of the New York Convention on Legislative Revisions in non-Model Law Countries

Some other countries that have not adopted the Model Law nevertheless have reformed their national arbitration laws similarly and shifted the focus “from control and supervision by national law and courts, to freedom to arbitrate and non-intervention”.\textsuperscript{720} Even if arbitration legislations of some other countries are not based on the Model Law, they have moved towards harmonisation, by adopting some principles, namely the party autonomy in matters of procedure, due process and restrictive judicial review of arbitral awards. To demonstrate the effect of the NYC on national law reforms in non-Model Law countries, this section will review arbitration law reforms in major arbitration jurisdictions, namely France, Switzerland, England and Sweden.

4.3.1 France

France had already revised its arbitration law by modifying the French New Code of Civil Procedure (NCCP) in 1980 and promulgating a special chapter for international arbitration by decree in 1981.\textsuperscript{721} Under this Law, parties were almost free to provide their own arbitration procedure, either by specific agreement or by incorporating a set

\textsuperscript{717} Ibid.
\textsuperscript{718} Supra n.689, p. 36.
\textsuperscript{719} For a detailed survey respecting both modifications of provisions of the UNCITRAL Model Law and adding provisions on the adoption of the Model Law, see Supra n.338, pp.99-151.
\textsuperscript{720} Lew, J.D.M., Supra n.16, p.192.
of rules, without being obliged to refer to a national law of procedure. In cases where the parties have not made use of this autonomy, these powers were granted to the arbitrator. Hence, the Law provided “the greatest possible freedom” for the operation of party autonomy. The Law also defined the role of local courts regarding international commercial arbitration taking place in France, in view of the potential harmful effects on the effective operation of international arbitration of an approach defending non-intervention by courts completely, which might originate from either the practice of courts abroad tightening the reins, even resorting to control mechanisms not provided by France, for enforcement sought for awards rendered in France or the difficulty caused when the losing party was forced to resist an award resulting from a defective arbitration de novo in each jurisdiction where the prevailing party sought enforcement.

The 1981 Decree provided a narrow judicial control for international arbitrations taking place in France, permitting an award to be challenged on grounds similar to grounds which the NYC provided for refusal of enforcement of foreign awards, excluding Article V(1)(e). Thus, it balanced between two extreme approaches, allowing appeal against arbitral awards, whether international or domestic, on the merits for error of fact or law and a complete laissez faire manner, at the challenge of the award in the place of arbitration, by removing any grounds to appeal against international awards and providing for setting aside if an award ensuing from international arbitration was rendered in excess of the authority of the arbitration agreement, breaching due process and equal treatment of the parties or

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722 Ibid, Article 1494.
723 Ibid.
726 According to Article 1502 and 1504:
1. if the arbitrator decided in the absence of an arbitration agreement or on the basis of a void or expired agreement;
2. if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
3. if the arbitrator decided in a manner incompatible with the mission conferred upon him;
4. if due process (le principe de la contradiction) has not been respected;
5. if the recognition or enforcement are contrary to international public policy (ordre public international). See Supra n.721, Article 1502.
not complying with international public policy. The local court would secure minimum standards for international enforceability of the award. In this respect, failure to respect any provisions which were appropriate for domestic arbitration, such as the legal time for rendering award, the need for meetings in person of the arbitrators or rendering an award with a reasoned opinion, would not void international arbitral awards. Furthermore, these grounds provided in the 1981 Decree were also the standards to be applied to the recognition and enforcement of international awards, which cover both awards rendered in arbitrations where the seat of arbitration is outside France and awards rendered in France in international arbitration proceedings equally. This was significant not only because it modelled the NYC’s grounds for refusing to enforce international arbitral awards rendered in France by narrowing them, but also because it meant providing narrower standards of review for foreign awards than the grounds provided by the NYC.

France reformed its arbitration law by replacing previous provisions enacted in 1980 and 1981 with Decree No. 2011-48 of 13 January 2011, which is not based on the UNCITRAL Model Law but does not differ from it contextually either, under Articles 1442 to 1527 of the French Code of Civil Procedure, to further modernise international arbitration in France on the same track as solutions adopted in the interest of the efficiency of international arbitration by case law over the past thirty years, and to make the French law on arbitration more readily accessible to foreign practitioners.

By maintaining the dualist method of distinguishing between domestic and international arbitration, the 2011 Decree continues to provide a more liberal regime in favour of international arbitration. This reform has widened the scope of the parties’ liberty in relation to all aspects of arbitration and affirmed that court

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728 Supra n.725, p.413.
729 French case law had already established that criteria required for domestic arbitration would not apply to international arbitration, and this was codified by the Law then. Ibid, pp.413-414.
730 Supra n.724, p.32.
interference in the conduct of arbitral proceedings is possible only to assist the constitution of the arbitral tribunal\textsuperscript{733} or to gather evidence from third parties,\textsuperscript{734} and in either case it is subject to the authority of the arbitral tribunal unless the parties have agreed otherwise in their arbitration agreement directly or with reference to arbitration rules.\textsuperscript{735} However, these limitations in the 2011 Decree over court interference do not prejudice the parties' right to seek a review of the award at the end of the arbitral proceeding, and nor did the previous regime in France.

The grounds under which awards rendered in France in international arbitrations and awards rendered abroad may be reviewed in the previous law are retained in the new law but are expressed in different wording, as follows:

\begin{quote}
\begin{itemize}
  \item [if] (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) the award is contrary to international public policy.\textsuperscript{736}
\end{itemize}
\end{quote}

Nonetheless, the new regime introduced two reforms in this respect. First, the 2011 Decree provided that international awards rendered in France may be challenged before the court of appeal of the place where the award is made,\textsuperscript{737} either by an action

\begin{footnotesize}
\textsuperscript{733} However, the 2011 Decree introduces some innovations to the circumstances in which the courts may provide support. First, it characterises the President of the Tribunal de Grande Instance of Paris, who has centralized authority to rule on requests as to appointment of arbitrators, as the “judge acting in support of arbitration”. Secondly, recourse to French courts is removed completely in cases where arbitration is conducted under the auspices of an institution or under the UNCITRAL Arbitration Rules, since the administrating authority will hear challenges to the arbitrators, and the involvement of the judge acting in support of arbitration on a subsidiary basis, which is allowed in cases where the parties have not appointed a person responsible for administering the arbitration, is not beyond assisting the constitution of the arbitral tribunal after verifying that the arbitration agreement is not “manifestly void or manifestly not applicable”, with no requirements of form for international arbitration agreements to be valid and enforceable other than the consent of the parties to arbitration, and without any allowance to make any substantive assessment of the validity or scope of the arbitration agreement. Third, it formally accepts the jurisdiction of the courts in support of the arbitration not only in cases where arbitration is conducted in France or parties choose French procedural law to apply to the arbitration or authorize French courts to rule over disputes regarding the arbitral procedure, but also in cases where one of the parties is exposed to a risk of denial of justice, irrespective of any link of the case with France. The Decree No. 2011-48 of 13 January 2011, \textit{Ibid}, Articles 1448, 1452, 1453, 1505, 1507; Gaillard, E., \textit{Supra} n.731.
\textsuperscript{734} The 2011 Decree clearly expressed the superiority of the arbitral tribunal in relation to the dispute submitted to arbitration by subjecting the assisting role of French court in gathering evidence relevant to the dispute held by the third parties to the condition that the parties recouring to such measure have been invited by the arbitral tribunal to seek the court’s assistance. The Decree No. 2011-48 of 13 January 2011, \textit{Ibid}, Article 1469.
\textsuperscript{735} Gaillard, E., \textit{Supra} n.731.
\textsuperscript{736} The Decree No. 2011-48 of 13 January 2011, \textit{Supra} n.732, Article 1520.
\textsuperscript{737} \textit{Ibid}, Article 1519.
\end{footnotesize}
to set aside the award\textsuperscript{738} or by an appeal against the order declaring the award enforceable.\textsuperscript{739} Likewise, the new law provides the possibility of challenging the order granting foreign awards enforcement.\textsuperscript{740} In either case, however, either an action to set aside an international award or an appeal against an enforcement order can no longer suspend enforcement of an international award in France under the new regime, except in cases where the judge assigned to the matter stays or sets conditions for the enforcement of an award where enforcement could severely prejudice the rights of one of the parties,\textsuperscript{741} which is in line with Article VI of the NYC. Secondly, the new law enables parties to waive by agreement the right to bring an action to set aside, without placing any limitation on that right.\textsuperscript{742} However, waiving their right to bring an action to set aside does not prejudice the right of the parties to appeal an enforcement order. Thus, the new law clearly affirms its stance that the place where arbitration is seated, unlike the place where enforcement of the award is sought, is “not the most relevant feature of an international arbitration”.\textsuperscript{743}

4.3.2 Switzerland

In Switzerland, Chapter 12 of the Swiss Private International Law Act (PILA), which entered into force on 1 January 1989 and has been amended several times since, brings broad party autonomy to international arbitration, and grants discretion to the arbitral tribunal to structure and organise arbitral proceedings in cases where the parties do not avail themselves of party autonomy.\textsuperscript{744} Also, the Law prescribes very narrow mandatory rules which are essential to secure due process and equal treatment of the parties;\textsuperscript{745} it also keeps local court intervention to a minimum, by permitting it only for judicial assistance, such as taking evidence and granting provisional or protective measures, upon request,\textsuperscript{746} and for challenging proceedings before the Federal Supreme Court on very limited grounds.\textsuperscript{747}

\textsuperscript{738} Ibid, Article 1518.
\textsuperscript{739} Ibid, Article 1523.
\textsuperscript{740} Ibid, Article 1525.
\textsuperscript{741} Ibid, Article 1526.
\textsuperscript{742} Ibid, Article 1522.
\textsuperscript{743} Gaillard, E., \textit{Supra} n.731.
\textsuperscript{744} Swiss PILA, Articles 182(2), 183, 184, 187.
\textsuperscript{745} Ibid, Article 182(3).
\textsuperscript{746} Ibid, Articles 183, 184, 185.
\textsuperscript{747} Ibid, Articles 190, 191.
As these aspects indicate, although the Swiss PILA was drafted independently of the UNCITRAL Model Law, it is quite similar contextually.\textsuperscript{748} However, the Swiss PILA, unlike legislations adopting the UNCITRAL Model Law and the legislations of many other jurisdictions that are not based on the UNCITRAL Model Law, allows parties to exclude all setting aside proceedings or to limit such proceedings to one or several of the grounds enumerated in Article 190(2) by an express statement in the arbitration agreement or by a subsequent agreement in writing in cases where none of the parties has domicile or habitual residence or place of business in Switzerland.\textsuperscript{749} Even when parties completely waive their right to challenge the award, local court control remains in cases where the parties exclude all setting aside proceedings under the NYC only if the award is sought to be enforced in Switzerland.\textsuperscript{750}

4.3.3 England

Initial reforms in England preceded the Model Law. The change began with the Arbitration Act 1975, giving effect to the NYC, as it extended the effect of Article II of the NYC, which was indeed intended to operate from the aspect of the country where enforcement of a foreign award is sought, to arbitration agreements which were not domestic, even though it provided arbitration in England.\textsuperscript{751} Accordingly, any courts were obliged to enforce an agreement to arbitrate by making an order staying the legal proceedings commenced by a party to an arbitration agreement if any party to the proceedings applied to the court at any time after appearance, and before delivering any pleadings or taking any steps in the proceedings to stay the proceedings, and unless the court was convinced that the arbitration agreement was null and void, inoperative or incapable of being performed.\textsuperscript{752}

The discontent of the parties to arbitration with the case stated procedure under the Arbitration Act 1950, which permitted the parties to have questions of English Law determined by English courts either during the arbitration proceedings or in the stage after the rendering of the award, prompted the introduction of another

\textsuperscript{749} Supra n.744, Article 192(1).
\textsuperscript{750} Ibid, Article 192(2).
\textsuperscript{751} Arbitration Act 1975, Chapter 3, Section 1.
\textsuperscript{752} Ibid, Chapter 3, Section 1(1).
legislation in 1979. The Arbitration Act 1979 replaced the case stated procedure with the right of appeal, which was more limited so as not to cover setting aside or remission of an award on an arbitration agreement on the ground of errors of fact or law on the face of the award; it also allowed the parties to international arbitration to agree to exclude the right of appeal, except in cases where an arbitration award or question of law arising in the course of a reference concerned maritime matters, insurance or commodity contracts and exclusion agreements, was made after the commencement of the arbitration. Hence, judicial review over international arbitration was relaxed in view of both exclusion agreements and the limited scope for review by local courts, excluding review of the merits of the award. However, there was ongoing concern as to whether English courts would narrowly interpret the restrictions on their authority. Moreover, English law was still far from meeting the needs of the business community in cases where it was the law governing arbitration, since the English law would apply to domestic and international arbitration equally and without any exception in favour of international arbitration. Thus, in the event of the failure of the arbitral tribunal to comply with the fundamental procedures of English law, an award would still be subject to judicial recourse.

At that time, the Court of Appeal’s decision in Bank Mellat v. Helliniki Techniki SA, which concluded that “the English court should be slow to order security in international arbitrations unless there is some more specific connection with England than the parties have agreed that any arbitration is to take place there”, pursuant to the decision by the court holding that English law, as the law governing the procedure of an arbitration, determined whether the court could order security for costs, was a signal that English law, like other systems of law, was prepared to allow international arbitrations to practice in consideration of the fact that the place of arbitration might have been chosen purely for its neutrality as a forum, without having any connection to the parties. The desire to increase the attractiveness and efficiency of arbitration as a method of dispute resolution and the attraction of London as a seat for

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753 Supra n.724, p. 29.
756 Supra n.724, p.30.
international arbitration prompted England to reshape previous legislation on arbitration on more efficient terms by legislating the Arbitration Act 1996,\textsuperscript{758} which covers both domestic and international arbitration.\textsuperscript{759} The new law, starting with its explicit expression of the general principles on which its provisions are based, namely the principles of fairness, impartiality, avoidance of unnecessary delay,\textsuperscript{760} party autonomy\textsuperscript{761} and non-intervention by the court in arbitral process except as provided in the Act,\textsuperscript{762} not only provides a comprehensive structure for the conduct of arbitration, thereby addressing the need for revision of national arbitration laws regarding the conduct of arbitration proceedings, but also redefines the relationship between the local courts and arbitration proceedings or arbitral awards, by limiting the role of the local court to cases where the arbitral process needs assistance or in case of a clear denial of justice.\textsuperscript{763}

The party autonomy, due process and the restrictive judicial review of arbitral awards have been established as principles in the Arbitration Act 1996. This is evidenced by the restrictions on both the assistive roles of courts before and during arbitration proceedings and on the forms of the review of arbitration proceedings or awards.

Accordingly, to begin with the restrictions on the assistive roles of courts, the English Arbitration Act prioritises party autonomy on the composition of arbitral tribunals and brings a supplementary rule in the absence of agreement by the parties. The parties have freedom to agree on the number of arbitrators for the constitution of the tribunal and whether there is a chairman or umpire and on their functions.\textsuperscript{764} If the parties agree on an even number of arbitrators but not about whether to appoint an umpire or a chairman, it deems that an additional arbitrator shall be appointed to act as chairman of the tribunal.\textsuperscript{765} However, if the parties fail to agree on the number of

\textsuperscript{759} Ibid, Section 1(a).
\textsuperscript{760} Ibid, Section 1(b).
\textsuperscript{761} Ibid, Section 1(c).
\textsuperscript{762} Ibid, Section 15(2).
\textsuperscript{763} Sheppard, A., Supra n.758, p.979.
\textsuperscript{764} Supra n.759, Sections 15(1), 20, 21.
\textsuperscript{765} Ibid, Section 15(2).
arbitrators, the tribunal is deemed to be comprised of a sole arbitrator. Likewise, the parties’ autonomy takes priority over the procedure for appointing the arbitrator or arbitrators, including the procedure for any additional arbitrator, and only in the absence of an agreement does it provide the necessary procedure to follow under Section 16. Parties are even free to determine the next step to follow if the procedure for the appointment of the arbitral tribunal fails. Only in the absence of such agreement by the parties may the court become involved, by application of any party for assistance with the constitution of the arbitral tribunal, and having a due regard to any agreement of the parties concerning the qualifications of the arbitrators. Likewise, in cases where the parties vest an arbitral or other institution or person with power to remove an arbitrator, exercise of that power by a court may be only on the conditions listed in the Act and if the court is convinced that the applicant has first exhausted any available recourse to the arbitral or other institution or person. Regarding the arbitration proceedings, unless the parties agree otherwise, the court has for the purpose of and in relation to arbitral proceedings the same power to make orders in relation to the matters listed in the Act, namely the taking of evidence of witnesses, the preservation of evidence, making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings, the sale of any goods that are the subject of the proceedings, the granting of an interim injunction or the appointment of a receiver, as it has for the purpose of and in relation to legal proceedings. Exercise of these powers in support of arbitral proceedings also depends on the arbitral tribunal and the arbitral or other institution or person vested by the parties with power in that regard lacking the power or being unable to act effectively for the time being.

As for the restrictions on the forms of the review of arbitration proceedings or awards that the Act provides for arbitrations seated in England, a direct action brought by a party to arbitration proceedings before an arbitral award is rendered on any question as to the substantive jurisdiction of the tribunal, that is, as to whether there

766 Ibid, Section 15(3).
767 Ibid, Section 16.
768 Ibid, Section 18.
769 Ibid, Sections 18, 19.
770 Ibid, Section 24.
771 Ibid, Section 44(1) and (2).
772 Ibid, Section 44(5).
is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement,\footnote{Ibid, Sections 30(1) and 32(1).} may be considered only if the application is made with the written consent of all other parties to the proceedings or with the permission of the tribunal.\footnote{Ibid, Section 32(2).} In the latter case, the court also must be convinced that the determination of the question is likely to produce substantial savings in costs, that the application was made without delay, and that there is good reason why the matter should be decided by the court.\footnote{Ibid, Sections 30, 31 and 32; see also, Mance, J., ‘England’, in Emmanuel Gaillard (ed) (2010), The Review of International Arbitral Awards, IAI Series No: 6, pp. 126, 127.}

Besides, arbitral awards may be reviewed by the courts only upon recourse by the party challenging the award and only on the list of grounds which the Act provides rather than refering to general concepts of due process.\footnote{Hanotiau, B., Caprasse, O., ‘Introductory Report’, in Emmanuel Gaillard(ed)(2010), The Review of International Arbitral Awards, IAI Series No:6, p.40.} Hence, English courts may intervene when they consider, upon recourse by the party challenging the award, that serious irregularity of one or more of the kinds listed in the Act has caused or will cause substantial injustice to the party recoursing to court to challenge the award.\footnote{Supra n.759, Section 68(1) and (2).} The irregularities which fall under the term “serious irregularity” are provided as follows:

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);
(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
(d) failure by the tribunal to deal with all the issues that were put to it;
(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) uncertainty or ambiguity as to the effect of the award;
(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.\footnote{Ibid, Section 68(2).}
Clearly, some of these grounds correspond to the some of grounds on which the enforcement of a foreign award may be refused under the NYC. Section 68(2)(a) of the Arbitration Act 1996 reflects the concept of fairness onto the procedure in Article V(1)(b) of the NYC, allowing court interference in cases of failure by the tribunal to comply with the general duty to “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent” and to “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”. 779 Again, an excess of power by the tribunal 780 and failure by the tribunal to deal with all issues that were put to it, 781 which are two forms of serious irregularity in the Act, indeed mirror Article V(1)(c) of the NYC, under which enforcement of foreign arbitral awards may be refused if the award deals with a dispute not covered by the arbitration agreement or contains rulings on matters beyond the scope of the submission to arbitration. Also, subsections (c), (e) and (i) under Section 68(2) of the Act seems to correspond to Article V(1)(d) of the NYC. Here, public policy is inserted in narrow terms, focusing only on the way in which it was procured. 782 Even so, Section 1(b) of the Act subjects party autonomy regarding how to resolve the dispute to such safeguards as are necessary in the public interest, and Section 81 expressly states that nothing in Part I shall be construed as excluding the operation of any rule of law consistent with the provisions of the Part I, and in particular, any such rule of law as to matters not capable of settlement by arbitration and the refusal of recognition or enforcement of an arbitral award on grounds of public policy. 783 Hence, review of the merits through this last point remains inevitable in the Act. 784

Furthermore, the Act maintains the substantial powers of intervention of courts by introducing some restrictions. 785 Under Section 45 of the Act, courts are allowed to determine preliminary points of law only unless the parties agree otherwise and upon the request of a party to the arbitral proceedings. 786 Also under Section 69 of

779 Ibid, Section 33(1).
780 Ibid, Section 68(2)(b).
781 Ibid, Section 68(2)(d).
782 Ibid, Section 68(2)(g).
783 Ibid, Sections 1(b) and 81(1).
784 Supra n.776, p. 50.
785 Supra n.759, Sections 45 and 69(1); Lew, J.D.M., Supra n.16, p.193.
786 Ibid, Section 45.
the Act an appeal to the court on a question of law arising out of an award made in the proceedings may be possible unless otherwise agreed by the parties and after exhausting any available arbitral process of appeal or review and any available recourse for the correction of the award or an additional award.\(^\text{787}\) Moreover, an appeal may only be brought with the agreement of all parties or with the leave of the court upon verification by the court that all the following conditions have been met:

(a) that the determination of the question will substantially affect the rights of one or more of the parties,
(b) that the question is one which the tribunal was asked to be determine,
(c) that, on the basis of the findings of fact in the award –
   (i) the decision of the tribunal on the question is obviously wrong, or
   (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.\(^\text{788}\)

All these forms of review in the Arbitration Act 1996 indicate that, while the Act retains the power of courts to review any question regarding the substantive jurisdiction of an arbitral tribunal with determination of factual and legal issues arising in this context as necessary, the English approach is to permit review of arbitration proceedings and awards only upon a request by party to arbitral proceedings and rarely and cautiously, only on the grounds of procedural injustice, public policy or error regarding the merits of any issue submitted to arbitration, and giving considerable weight to the approval of the arbitral tribunal in the determination of any issues of fact or foreign law as to these issues.\(^\text{789}\)

### 4.3.4 Sweden

Another jurisdiction which has liberalised its arbitration legislation in a similar manner to the UNCITRAL Model Law is Sweden. Sweden adopted its current Arbitration Act in 1999, replacing the 1929 Acts, titled the Arbitration Act and the Act concerning Foreign Arbitration Agreements and Awards, except in cases where arbitral proceedings commenced or arbitration agreements concluded before the entry into force of the

\(^{787}\) Ibid, Section 69(1).
\(^{788}\) Ibid, Sections 70(2), 69(2) and (3).
\(^{789}\) Mance, J., Supra n.775, p.130.
Swedish Arbitration Act 1999.\(^{790}\) The Swedish Arbitration Act, which applies to both domestic and international arbitrations but brings specific rules regarding international arbitration and enforcement of foreign arbitral awards,\(^{791}\) allows court involvement largely for the purpose of supporting the arbitration process in the context of either constituting the tribunal or calling on a witness or an expert for testifying under oath,\(^{792}\) and leaves the authority with the parties and arbitral tribunal in terms of many aspect of arbitration.\(^{793}\) The Act provides actions against arbitral awards, in the form of either a recourse for a declaration of invalidity or an application for setting aside the award, on limited grounds before the court of appeal of jurisdiction where arbitral proceedings are held.\(^{794}\) Furthermore, parties are allowed to agree through an express written agreement to exclude or limit the application of the grounds for setting aside an award where none of the parties has domicile, habitual residence or business place in Sweden.\(^{795}\) In this respect, an award subject to such an agreement shall be recognised and enforced in Sweden under the same terms and conditions that apply to foreign awards.\(^{796}\)

**CHAPTER 5: LIMITATIONS OF THE NEW YORK CONVENTION IN RELATION TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS AND CIRCULATION OF ARBITRAL AWARDS**

The previous two chapters revealed the harmonising effect of the NYC in practice by reviewing the application and interpretation of the NYC by national courts and national legislative changes in Contracting States. This chapter aims to review call for a new convention and current debates and address the limits of the NYC to further contribute to the circulation of arbitral awards and the efficiency of international arbitration in the settlement of private law disputes, by focusing on several issues, such as its limitations regarding the scope of application, arbitration agreements, enforcement of interim measures, enforcement procedure and enforcement of annulled arbitral awards.

\(^{792}\) The Swedish Arbitration Act, Sections, 4,14,15,17,18,20.  
\(^{793}\) Ibid, e.g. Sections 10,21-25.  
\(^{794}\) Ibid, Sections 33,34,36,43.  
\(^{795}\) Ibid, Section 51.  
\(^{796}\) Ibid.
5.1 Call for a New Convention and Current Debates

In 1998, papers presented at the “New York Convention Day” to celebrate the 40th Anniversary of the NYC indicated that it was the majority view that issues related to the NYC may be dealt with by adopting measures other than a new convention. By 2008, when the 50th Anniversary of the NYC was celebrated at the ICCA Dublin Congress, the view for the appropriate mean to deal with issues related to the NYC was no longer what it used to be a decade ago. Since then, there have been two opinions within this context.

One view has been that the NYC should be revised. In this respect Professor van den Berg, who has pointed out that the NYC is showing its age and that difficulties related to the NYC cannot be remedied adequately and comprehensively by soft reforms of 2006, has proposed the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards (hereinafter ‘Draft Convention’) as an example of a potential replacement. Articles 1 to 7 of the Draft Convention deals with issues that are similar to those covered under Article I to VII of the NYC; however, the Draft Convention pursues to modernise the NYC by adding provisions on some issues and revising some of its provisions. For instance, the Draft Convention clearly defines its scope of application: it also covers enforcement of arbitration agreements by providing a definition of arbitration agreement that qualify for referral to arbitration in a condensed version of the UNCITRAL Model Law’s broad scope; in addition, it simply applies to enforcement of an arbitral award based on an arbitration agreement concerning international arbitration, thereby aiming to avoid uncertainties of the NYC’s scope. Moreover, the Draft Convention abolishes the requirement of written form of arbitration agreement under Article II(2) as it is stricter than any national laws. It follows the trend as evidenced by Option II of the revised Article 7 of the Model Law, no longer imposing an internationally required written form for the

798 Supra n.10.
799 Ibid.
arbitration agreement.\footnote{Ibid, p.16, Article 2.} Also, it introduces parallelism with enforcement of arbitral award by adding a provision that compels the resisting party to assert and prove grounds for not referring the dispute to arbitration and allows a court to refuse to refer the dispute to arbitration on its own motion if arbitration of the dispute violates international public policy.\footnote{Ibid.} Furthermore, it conditions referral of the dispute to arbitration to the condition that the party requests the referral subsequent to the submission of its first statement on the substance of the dispute in the court proceedings, just as the Model Law.\footnote{Ibid, p.16, Article 2(2)(a).} As for enforcement of arbitral award, the Draft Convention clarifies that conditions for enforcement are exclusively governed by the Convention while the procedure is governed by the law of the country where enforcement is sought, and it addresses the problem under the NYC of slow procedure for enforcement of the Convention awards in some countries, by adding a provision that obliges courts to act expeditiously on a request for enforcement of an arbitral award.\footnote{Ibid, p.17, Article 3.} In relation to the conditions for enforcement, the Draft Convention introduced a number of amendments: (i) it abolishes burdensome requirement of “duly authenticated original award” under Article IV(1) of the NYC; (ii) it provides flexibility in certification of copy of award and removes the requirement of submission of a copy of arbitration agreement; and, (iii) it makes the translation requirement less formal.\footnote{Ibid, p.17, Article 4.} Other important amendments proposed by the Draft Convention are those concerning grounds for refusal of enforcement. Article 5 of the Draft Convention set the concept of refusal “in manifest cases only”, thereby aiming to resolve the question under the NYC of whether there is a residual power to enforce notwithstanding the existence of a ground for refusal. Also, the list of grounds for refusal under Article 5(3) of the Draft Convention pursues to simplify some grounds under the NYC and to solve some problems emerging in relation to some grounds for refusal of the NYC. To be more precise, ground (a) refers to invalid arbitration agreement under the law of the country where the award was made, and thus it simplifies Article V(1)(a) of the NYC in terms of the conflict rules; ground (b) modernises Article V(1)(b) of the NYC, referring to due process, by using similar language to the Model Law; ground (c) removes the unclear language from the corresponding provision under the NYC, which refers to
“terms of submission”, “scope of submission”; the Draft Convention separates irregular composition of tribunal from irregular procedure and provides them under grounds (d) and (e) for the reason of clarity; ground (f) replaces the phrase “the award has not yet become binding on the parties” in the NYC with the phrase “the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the awards was made” to address the issue of differing interpretations of the term “binding” under the NYC, and abolishes the NYC’s reference to “suspended” awards in its Article V(1)(e) because its meaning is not clear; ground (g) limits the obligation to refuse enforcement to cases where the arbitral award has been annulled on grounds equivalent to grounds (a) to (e) of Article 5(3) of the Draft Convention, which correspond to grounds (a) to (d) of Article V(1) of the NYC, to address the lack of harmonisation on the issue when annulment at the place of arbitration would be a basis of refusal of enforcement; ground (h) narrows the Article V(2)(b) of the NYC, referring to public policy, to international public policy.  

Furthermore, the fifth paragraph of Article 5 introduces a waiver rule to the effect that a party that fails to raise a ground for refusal timely during the arbitration waives the right to use it during enforcement proceeding, which is lacking in the text of NYC. Finally, Article 7 of the Draft Convention clarifies that the more favourable right rule under Article VII of the NYC also applies to arbitration agreements.

Professor van den Berg is not the only one who highlights the age of the NYC. Having recognised the political and practical challenges before the success of such revision process, Lamm supports van den Berg’s proposal, believing that it would eliminate “much of the textual ambiguity that gave rise to the litigation and inconsistency of results”, thereby promoting “greater harmonisation and predictability”. Reflecting on the lack of a uniform reaction among jurisdictions in relation to the enforcement of annulled arbitral awards, Mayer also suggests drafting another convention, which would enter into force once it is ratified by a large number

806 Ibid, pp.18-19, Article 5(3).
807 Ibid, p.19, Article 5(5).
808 Ibid, p.20, Article 7.
of States. More recently, having acknowledged the difficulties to a replacement of a treaty that has been ratified in almost 160 States on the one hand and the legal uncertainty resulting from the lack of uniformity in the interpretation by courts of the text of the NYC on the other, Marike Paulsson proposes a structure that would be a Dual Convention that consists of the Primary and Secondary Conventions. Under this proposed structure, the Primary Convention removes national setting aside regimes and grants the party seeking enforcement the right to seek recognition in the country where the award was rendered, subject to assessment of some factors, namely validity of arbitration agreement, violation of due process, violation of mandate, compatibility of the procedure and bindingness of the award, on the basis of lex arbitri. The Secondary Convention would apply to resist the enforcement request in cases where the prevailing party could obtain the enforcement title in the country where the award was made and then take this enforcement title to other countries, and it provides that the only hurdle to enforcement would be the public policy under Article V(2) of the NYC.

The other view opposes the idea of revising the NYC. One reflection is that the NYC continues to serve its purpose overall and the revision process would do more harm than good. This view is grounded on three arguments, expressed succinctly by Professor Gaillard as “no need, no hope, and no danger”. First, having pointed out that only a serious deficiency in the enforcement process that could be remedied merely by modifying the language would justify such revision, Professor Gaillard emphasises that there are only two serious flaws in the enforcement process, namely instances of bias in favour of local companies, particularly State-owned companies, in cases where enforcing an arbitral award adversely affects their interest, and the problem of States abusing their right to resist enforcement by resorting to its immunity

812 Ibid.
813 Ibid.
814 Supra n.11, p.690.
815 Ibid.
from execution despite having concluded arbitration agreements, neither of which can be corrected merely through revision.\footnote{Ibid, p.691} As for the second argument, Professor Gaillard has no hope that a revised version of the NYC designed to make the enforcement process more efficient would be adopted by a large number of States because the pro-enforcement bias has been weakened by the fact that States are prone to develop “a defendant mindset”, which by its very nature is not eager to enhance the efficiency of the enforcement process, by virtue of the development of arbitrations based on investment treaties.\footnote{Ibid, p.692.} Finally, acknowledging that the development of arbitration law is inevitable, he states that there is no danger in leaving the NYC as it is, because it allows States under Article VII to be more liberal than its standards.\footnote{Ibid.} Professor Gaillard criticises the Draft Convention’s suggested solution regarding the issue of enforcement of an award set aside in the place of arbitration for its failure to achieve any significant progress. He calls attention to the fact that “the problem of awards conveniently set aside for the benefit of the local party, often the State or a State-owned entity”, as in the TermoRio case, remains unresolved under the Draft Convention.\footnote{Ibid, p.695.} Professor Gaillard indicates that modernizing the grounds for the review of awards by national courts would be possible through a revision of Article 34 of the UNCITRAL Model Law, which lays down the grounds for setting aside awards by simply duplicating Article V of the NYC; instead of undertaking a revision of the NYC, he argues that it would be more worthwhile to ponder such a modification, which would enable States to adopt a new set of standards regarding the setting aside of awards, which could easily be transposed for the purposes of the recognition and enforcement of awards pursuant to each jurisdiction’s ordinary rules, while maintaining the New York Convention as a minimum standard.\footnote{Ibid, p.693.}

If the NYC is to be revised, Professor Gaillard sets the bar high by arguing that only a revision that presents internationally acceptable standards rather than retaining the pure, traditional choice of law approach of the Draft Convention, in which issues are
allocated between the law of the place of arbitration and the law of the place of enforcement, would meet the expectation in the beginning of 21st century.\textsuperscript{821}

Another criticism of the idea of revising the NYC is based on the rationale that prudential interpretation and application of the NYC would answer the purpose without the need for reform.\textsuperscript{822} Veeder points out that problems such as the fact that \textit{travaux preparatoires} is “useless, irrelevant or wrong or a combination of all three” in terms of providing an insight into the NYC, and that the ordinary meaning of the language in authentic versions of the NYC diverges because it was drafted by a Dutchman and translated into the five official languages of the United Nations at a time when the United Nations did not have specialist translator for arbitration, could be resolved by reading the text “in good faith in context and in its ordinary meaning or, in other words, with a reasonable degree of intelligence and common sense”.\textsuperscript{823}

Having overviewed the current debates above, this Chapter will continue with the current difficulties causing legal uncertainties in the international arbitration and the capability of the NYC to solve these issues.

5.2 Limitations in Relation to the Scope of Application

There are two issues to raise in relation to the scope of application. One relates to the reciprocity reservation that would apply to awards falling under the NYC in cases where any Contracting State made such reservation; the other concerns awards that may appear to be beyond the scope of application of the NYC.

At the present time, 74 out of 159 Contracting States have made a reciprocity reservation.\textsuperscript{824} It is true that the practical role of the reciprocity reservation under Article I(3) has diminished with the high number of Contracting States; however, the application of this provision has raised difficulties in determining whether the country where the arbitral award has been rendered is a Contracting State.

In some States where reciprocity is required to enforce arbitral awards under the NYC, the law implementing the NYC has required a Gazette notification declaring any State to be a Convention country in order to render an award made in such State enforceable. One legislation which contains such requirement and has led to problems in practice is the Malaysian Convention on the Recognition and Enforcement of

\textsuperscript{821} Ibid.
\textsuperscript{822} Supra n.12, pp.499-506.
\textsuperscript{823} Ibid, pp.501,502.
\textsuperscript{824} Status table for the Signatories, Supra n.326.
Foreign Arbitral Awards Act 1985, which implements the NYC in Malaysia. In *Sri Lanka Cricket v. World Sport Nimbus Pte Ltd.*, the Appeal Court of Malaysia reversed the lower court’s decision granting enforcement, based on the fact that a foreign award may only be enforced in Malaysia under the NYC if it has been declared in the Malaysian Official Gazette that the country of rendition is a party to the NYC.\(^{825}\) Fortunately, in another case, the Federal Court of Malaysia reversed the lower court’s decision refusing enforcement of an award rendered in the United Kingdom because of the absence of a Gazette notification, declaring that the United Kingdom was a Contracting Party to the NYC, and holding that such notification had only evidentiary significance and therefore the question of whether a State is a Contracting State can be proved by other appropriate evidence.\(^{826}\)

Another example of a case in which the application of the reciprocity reservation has raised difficulty is from India. In *Swiss Singapore Overseas Enterprises Pvt. Ltd. v. M/V AFRICAN TRADER*, the High Court of Gujarat refused an application to refer the dispute to arbitration in South Africa, reasoning that the Indian Government did not issue a notification in the Official Gazette that South Africa became a Contracting State to the NYC, as required under Section 44(b) of the Indian Arbitration Act 1996, and therefore an award made there cannot be enforced in India, which had made the reciprocity reservation.\(^{827}\)

Although the number of reported cases indicates that only a few countries have encountered the above-mentioned difficulty, any attempt to deal with this issue will have to develop beyond the scope of the NYC.

The other issue calling for action is the arbitral awards resulting from a virtual platform. In this regard, Hermann noted that:

> While a-national (or ‘free-floating’) awards are more common in the imaginative world of radical de-localisers than in the real world, we may wish to anticipate future space awards, rendered in cyberspace (virtual ‘CYBIRATON©’ awards by

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With the increasing use of the internet, international commercial transactions are increasingly done by means of electronic communications. And, in parallel with the increasing popularity of the internet and this transformation in international transactions, the concept of online arbitration has emerged, accompanied by the problem of the enforceability of arbitral awards resulting from virtual platforms. The issue of the interpretation of the written form requirement for arbitration agreements in cases where the arbitration agreement is contained in the present or future means of communication has been dealt with by redrafting the UNCITRAL Model Law and promoting a liberal interpretation in line with the intent of the drafters of the NYC via the UNCITRAL Recommendation in 2006. However, because the Model Law does not go beyond mirroring the formalities regarding enforcement of arbitral awards provided under Article IV of the NYC, enforcement under the NYC of arbitral awards ensuing from online arbitration would depend on the existence of a more favourable law in the country where enforcement is sought pursuant to Article VII and a liberal interpretation by the enforcement courts, taking into account the nature of such awards and developing means of communication in cases where the winning party must move to enforcement proceedings because the losing party does not voluntarily fulfil the arbitral award. The NYC will not be able to contribute to the further recognition and enforcement of such awards, apart from providing a more-favourable-right provision in Article VII and allowing the application of national laws permitting enforcement of those awards.

5.3 Arbitration Agreement and Enforcement of Interim Measures

While addressing the agenda setting and structuring impacts of the NYC in the previous chapters, the efforts which were launched by the UNCITRAL has been elaborated. The NYC has nothing further to promote harmonisation within the context of these efforts.

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To be more specific, the UNCITRAL has addressed the difficulty that some states interpreted Article II(2) of the NYC liberally while some interpreted narrowly, by issuing the Recommendation regarding Article II(2) and Article VII(1) that would indicate a broad understanding for the form requirement and would allow for applying more lenient law through the application more favourable right rule under Article VII of the NYC. Additionally, it launched the Model Law with a subsequent amendment that would render arbitration agreements enforceable in a way more in line with the arbitration practice in countries which courts follow the interpretative instrument and that would fill the gap in relation to whether interim measures ordered by the arbitral tribunal could be enforced by the courts by providing possible grounds for challenging the enforcement of interim measures. From now on, it remains to be seen whether national courts will follow the Recommendation and whether national legislators will bring their laws in compliance with the 2006 amendment.

Because states may have an interest in reforming their legislations to make them familiar to the business community, to be able to attract as many foreign investments and arbitrations as possible, amendment of legislations based on the amended provisions in the Model Law may not take too long. As for the Recommendation, because it was approved only by the UNCITRAL membership in which is limited to 60 Member States only to represent the various geographic regions and the principal economic and legal systems of the world,\textsuperscript{829} and lacked an express approval also by the General Assembly of the United Nations,\textsuperscript{830} in which all Contracting States to the NYC have equal representations, it may not function as a “subsequent agreement between the parties regarding the interpretation of the treaty” which shall be taken into account together with the context in the interpretation of a treaty under the Vienna Convention on the Law of Treaties.\textsuperscript{831} On the other hand, this tool has the potential to achieve the desired modification of Article II(2) and VII(1) of the NYC under current circumstances if it is reflected in a significant body of case law and reaches to the level of “subsequent practice” in the sense of Article 31(3)(b), i.e. “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding...
its interpretation”, which shall be taken into account in the interpretation of a treaty under the Vienna Convention on the Law of Treaties. This is apparent from a compilation of the comments by governments as to the impact of the Recommendation in their jurisdiction revealing that States generally considered the Recommendation as a means to encourage the development of rules favouring the validity of arbitration agreements and thus to achieve a uniform interpretation of the NYC, despite its non-binding nature.

5.4 Inadequacies of the Actual Execution System

As discussed in Part I, at the time when the NYC was drafted, States with divergent attitudes towards arbitration were not ready to establish a uniform mechanism of international procedural rules for the enforcement of foreign arbitral awards. The NYC deferred to the forum’s rules of procedure by setting some limitations, according to which the national courts of each Contracting State would control the procedure for obtaining recognition and enforcement of the award under the domestic procedural law of the Contracting State, without deviating from the conditions for recognition and enforcement of arbitral award controlled by Article IV or from the prohibition of a more onerous regime or fees or charges for enforcement of foreign arbitral awards than for enforcement of domestic arbitral awards. However, the fact that the NYC has never extended to execution proceedings but rather allowed the country where enforcement is sought to apply local procedures that are not substantially more onerous than procedures applicable to domestic awards has had some consequences in terms of the efficiency of circulation of arbitral awards.

The Survey conducted by the School of International Arbitration of Queen Mary University of London in 2008, which analysed the perceptions and actual experiences of corporations with respect to the recognition and enforcement of arbitral awards with a specific focus on the efficiency of the actual enforcement system established by

832 Ibid, Article 31(3)(b).
domestic procedural law to implement the NYC, revealed that there is a trend among corporations to settle for a discounted award at the post-award stage rather than to attempt to recover the full value of the arbitral award through the current enforcement system. It indicated that such corporations have avoided enforcement and opted for settlement for a discounted value of the award mostly due to concerns for the efficiency of the system of award enforcement. There has been a perception that the current enforcement system is costly and time-consuming, thereby devaluing the award. Furthermore, parties point out the risk that an award might not be enforced in the end. Thus, parties have discounted the award, sometimes in excess of 50%, calculating to what extent these factors would affect the value of arbitral award. Clearly, such perception enables abuse of the enforcement system by award-debtors. Even though enforcement proceedings can be very time-consuming and costly in some jurisdictions, this does not justify a deduction from the value of the award of up to 50%. Award creditors can recover any loss resulting from lengthy enforcement proceedings as post-award interest in many national jurisdictions, while some jurisdictions even enable award-creditors to recover the costs of enforcement. Moreover, the actual experience of corporations largely disproves the perception that enforcement proceedings are inefficient. Parties, in most cases, could enforce an award in a fair amount of time and recover a value that is very close to the full amount of the award.

The effectiveness of the actual execution has always been the responsibility of Contracting States and therefore most of inadequacies of the present enforcement system, either perceived or actual, do not relate to the NYC itself but to the national procedural law of the Contracting States implementing the NYC. As the NYC never extended to execution proceedings, any further enhancement in relation to inadequacies of the actual execution system will develop beyond the scope of the NYC.

836 Brekoulakis, S., Supra n.1, p.423.
838 Ibid.
5.5 Enforcement of Annulled Awards

International arbitration is satisfying for the majority of the users of arbitration because it results in either voluntary compliance with the arbitral award or settlement;\textsuperscript{840} however, in cases where disputes are not resolved without intervention of national courts in the enforcement of arbitral awards, the question of the role of the judgement over the arbitral award in the place of arbitration has appeared if the party whose award has been set aside seeks to have the award enforced in another jurisdiction. With the dissemination of information regarding the application of the NYC in different Contracting States, it appears that there are divergent approaches to the treatment of arbitral awards that have been annulled in the country where the award has been rendered. The clash of approaches not only blurs the relationship between national courts and arbitration, but, more importantly, damages international harmonisation. Harmonised solutions to disputes are important for the development of international trade. This section aims to reveal whether the NYC may have a role to play in establishing a uniform and coordinated understanding among the Member States of the NYC as to the appropriate scope of enforcement of annulled arbitral awards.

5.5.1 Overview of approaches regarding the enforcement of annulled arbitral awards

The treatment of arbitral awards that have been annulled in the country where they have been rendered may be overviewed in the light of principle cases from Germany, the Netherlands, the United Kingdom, the United States and France.

5.5.1.1 Germany

Germany is one of countries which take the view that if an award has been set aside, it cannot be enforced as it ceases to exist. In \textit{Ukrainian dealer v. German manufacturer}, the dispute had arisen out of an Exclusive Distributorship Agreement, under which the Manufacturer granted the Dealer the exclusive distributorship in Ukraine of the machine manufactured by the Manufacturer. However, the Manufacturer sold ten harvesters directly to a customer in Ukraine in contravention of the agreement, which provided for severe penalties if the Manufacturer sold its machines in Ukraine.

\textsuperscript{840} Supra n.834, pp.323,331.
Arbitration that was commenced for the breach of the agreement at the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of Ukraine by the Dealer concluded with an award ordering the Manufacturer to pay the Dealer penalties. Upon the Manufacturer’s application, the District Court of Kiev set the award aside, reasoning that the agreement violated Ukrainian law and that the ICAC Ukraine lacked jurisdiction because the parties had not designated a specific arbitral tribunal for the resolution of disputes when agreeing that all disputes would be referred to an arbitral tribunal. The Court of Appeal affirmed the decision, finding that the award was contrary to public policy, in particular the Ukrainian law protecting the rights of buyers of agricultural machines, because the penalties in the agreement limited Ukrainian buyers in their choice of suppliers.

Upon the application of the Dealer for a declaration of enforceability of the Ukrainian award in Germany, the German Court of Appeal held that such request should not be granted under both Article V(1)(e) and Article V(2)(b) of the NYC. With respect to Article V(1)(e), the Court held that the recognition court may only examine whether the annulment court had jurisdiction and, in cases where the 1961 European Convention applies, whether the annulment decision is based on one of the grounds listed in the European Convention, without assessing whether grounds for annulment in fact existed. The Supreme Court denied Dealer’s appeal, similarly noting that:

It is true that the grounds in Art. IX(1)(a)-(d) of the European Convention are essentially identical to those in Art. V(1)(a)-(d) of the New York Convention, and thus must be examined by the German court independent of the annulment of the arbitral award abroad (Art. V(1)(e) of the New York Convention). However, pursuant to Art. V(1)(e) of the New York Convention and Art. IX of the European Convention the German court may not examine the foreign decision, even when it can find no violation in its examination under Art. V(1)(a)-(d) of the New York Convention. To this extent, Art. V(1)(e) of the New York Convention and Art. IX of the European Convention contain an independent ground for refusal which goes beyond Art. V(1)(a)-(d) of the New York Convention.

842 Ibid.
843 Ibid.
844 Ibid.
845 Ibid.
846 Ibid.
The decision of the Federal Supreme Court dated 22 February 2001 provides a further indication that German courts base their decisions on the status of the arbitral award in the country where the award is rendered. In this case, a dispute arose when the defendant did not pay the claimant for repair works to its motor vessel and the claimant commenced arbitration as provided for in the contract between the parties. After the arbitral tribunal rendered an award in favour of the claimant, the defendant successfully sought annulment of the award in Russia. In the meantime, the claimant sought enforcement of the award in Germany, and the Court of Appeal in Rostock denied application for recognition of the arbitral award, finding that the award was no longer binding on the parties and may no longer be recognisable in Germany since it had been set aside in the country of rendition.847

The Federal Supreme Court reversed the lower court’s decision after the Supreme Court of the Russian Federation had set aside the decision granting the request for annulment.848 Hence, the German court reviewed and changed its decision on recognition and enforcement of a foreign arbitral award due to the change of status of the award in the country where the award was rendered.

5.5.1.2 The Netherlands

Dutch courts have been of the opinion that, to decide whether the annulment of arbitral awards in the country of rendition impedes their recognition and enforcement, they must review the foreign annulment decision with regard to whether the recognition of such decision would be against public policy. For example, in Yukos, the Amsterdam Court of First Instance denied enforcement under the NYC because the awards had been annulled by Russian courts; however, the Court of Appeal of Amsterdam reversed the lower court’s decision and declared these awards enforceable.849 To answer the question of whether annulment of the arbitral awards by the Russian courts hinders recognition and enforcement of arbitral awards in the Netherlands, the Court noted that the NYC did not compel courts to recognise annulment decisions in the country of rendition, without assessing whether the...
annulment decision can be recognised pursuant to the rules of general private international law in the enforcement country.\textsuperscript{850} On this point, the Court stated as follows:

This means that, whatever room the 1958 New York Convention otherwise leaves for granting leave for recognition of an arbitral award that has been annulled by a competent authority in the country where it was rendered, a Dutch court is not compelled to deny leave for recognition of an annulled arbitral award if the foreign decision annulling the arbitral award cannot be recognized in the Netherlands. This applies in particular if the manner in which that decision came to exist does not comply with the principles of due process and for that reason recognition of that decision is at odds with Dutch public policy. If the decisions of the Russian civil court annulling the arbitral awards cannot be recognized in the Netherlands, then when deciding on the request for a leave to enforce the arbitral awards no account is to be taken of the decisions annulling those arbitral awards.\textsuperscript{851}

The Court concluded that the Russian annulment decisions had no effect on the enforcement of foreign arbitral awards since they did not meet those requirements.\textsuperscript{852}

Two years later, in Nikolai Viktorovich Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat, the District Court of Amsterdam followed the same approach as the Court of Appeal of Amsterdam but granted the claim for refusal of enforcement of the foreign award that had been annulled in the Russian Federation under Article V(1)(e).\textsuperscript{853} In reply to Maximov’s argument that “the proceeding in which the award was annulled by the Arbitrazh Court in Moscow (as affirmed by the Federal Arbitrazh Court in Moscow) was tainted by dependence, bias, corruption and other procedural irregularities, and for these reasons cannot be recognized in the Netherlands”, the Court held that:

In the court’s opinion, leave for the enforcement of an arbitral award that has been annulled by the ‘competent authority’ can be granted only under exceptional circumstances, because only then can the (in and of itself undesirable) consequence be accepted that an annulled arbitral award does not have the same status in all countries.

All of this means that the court shall deny the operation of the ruling of the Arbitrazh Court in Moscow that annulled the arbitral award (and was upheld

\textsuperscript{850} Ibid.
\textsuperscript{851} Ibid.
\textsuperscript{852} Ibid.
on appeal) only if (insofar as relevant here) the enforcement of the ruling
annulling the arbitral award would violate Dutch public policy, for example
because the annulment ruling was rendered in proceedings in which by Dutch
standards the principles of proper judicial procedure were unacceptably
disregarded.

In the present case it does not appear in a sufficient manner that such
exceptional circumstances exist. Further, it should once more be pointed out
that by his choice for arbitration under Russian law Maximov willingly and
knowingly chose to have possible disputes concerning the legal relationship
between him and NLMK dealt with by the Russian courts.854

5.5.1.3 United Kingdom

Adopting the same approach as the Dutch courts, the Court of Appeal of England and
Wales has assessed the question of whether a foreign arbitral award should be denied
enforcement on the basis of whether the annulment decision is worthy of recognition
under the law of the enforcement country. When Yukos Capital sought enforcement in
England of foreign arbitral awards that had been annulled in Russia and enforced by
the Court of Appeal of Amsterdam, which had stated that because the Russian
annulment decisions had not been made in impartial and independent proceedings,
these decisions had no effect on enforcement, the Court of Appeal reviewed the
decision of the High Court in relation to two preliminary issues: (i) whether Rosneft
was estopped by the Dutch decision from denying that Russian annulment decisions
were the result of partial and dependent judicial proceedings and (ii) the act of state
arguments.855 The Court of Appeal reversed the lower court’s decision that had
answered the question of the issue of estoppel in the affirmative, reasoning that “it
makes a great deal of difference whether the issue is being determined by reference to
Dutch public order or English public order which is (or may well be) different”.856
Plainly, the Court deemed that the annulment decision could hinder the enforcement
of a foreign arbitral award if it is worthy of recognition under English law.

5.5.1.4 United States

Some courts in the United States have concluded that the NYC has laid down a
distinction between primary and secondary jurisdictions where annulments of primary

854 Ibid.
855 'UK No.94, Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Company, Court of Appeal of England and Wales,
International 2012) pp.312-316.
856 Ibid.
jurisdiction have an extraterritorial power that obliges secondary jurisdictions to refuse enforcement of annulled awards.

Some courts have based their interpretation of Article V(1)(e) on an article discussing the accession by the United States to the NYC, which noted that although “no one wanted the Convention to require judicial proceedings in confirmation of the award in both the rendering and enforcing State”, Article V(1)(e) reflected “the inability of the Conference to agree on the solution to the problem of the ‘double exequatur’” because “an award which had been set aside by a competent authority in the State where rendered should hardly be granted enforcement in another State”.

Divergent perspectives on the issue are revealed through several court decisions. Chronologically, Chromalloy Aeroservices v. Arab Republic of Egypt is the first case to mention. In this case, the US District Court was faced with the question of whether to enforce the arbitral award rendered in favour of Chromalloy, an American company, or to defer to the annulment decision of the Egyptian court, which was based on the finding that the arbitral award was not properly grounded under Egyptian law. The US District Court held that “the parties agreed to apply Egyptian Law to the arbitration, but, more important, they agreed that arbitration ends with the decision of the arbitral panel”. The US District Court also drew attention to the mandatory language of Article VII(1), in contrast to the permissive language of Article V(1), and to US public policy that favoured final and binding arbitration of commercial disputes, and held that “[a] decision by this court to recognize the decision of the Egyptian court would violate this clear US public policy”.

Soon after the Chromalloy case, two other cases, namely Baker Marine, Ltd. v. Chevron, Ltd. and Martin I. Spier v. Calzaturificio Tecnica S.P.A., were held and both refused enforcement of annulled awards. In Baker Marine, the arbitral awards were rendered in favour of Baker Marine but then annulled by the Nigerian court on the findings that “the arbitrators had, inter alia, improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and

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857 Quigley, L.V., Supra n.40, p.1069.
859 Ibid, p.1009.
860 Ibid, pp.1007, 1010.
made inconsistent awards” and that the award was “unsupported by the evidence”.\textsuperscript{861} When Baker Marine sought to enforce the awards in the Northern District of New York under the NYC, the district court denied Baker Marine’s petition, concluding that under the Convention and principles of comity, “it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts”.\textsuperscript{862} Upon an appeal by Baker Marine with a contention that

the arbitral awards were set aside by the Nigerian courts for reasons that would not be recognized under US law as valid grounds for vacating an arbitration award, and that under Art. VII, it may invoke this country’s national arbitration law, notwithstanding the action of the Nigerian court the Court of Appeals upheld the lower court’s decision.\textsuperscript{863} The Court stated that “[n]othing suggests that the parties intended United States domestic arbitral law to govern their disputes” by the fact that “the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria”.\textsuperscript{864} Also, the Court rejected Baker Marine’s argument that Article V(1), by the use of the permissive “may”, implies that the court might have enforced the awards even if the Nigerian courts annulled them, because it did not furnish sufficient reason for refusing to recognise the judgements of the Nigerian court.\textsuperscript{865} Likewise, in Martin I. Spier v. Calzaturificio Tecnica S.P.A., the United States District Court refused to enforce an arbitral award that had been annulled in Italy on the ground that in making it, the arbitrators had exceeded their powers, declining to follow Chromalloy’s approach.\textsuperscript{866} The Court stated that:

\begin{quote}
Spier seeks to apply domestic United States arbitral law in order to escape the Italian courts’ nullification on an Italian award. That effort cannot survive the court of appeals’ observation in Yusuf that under the Convention ‘the state in which, or under the laws of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief’. The award at bar was set aside by that
\end{quote}

\textsuperscript{862} Ibid, p.911.
\textsuperscript{863} Ibid.
\textsuperscript{864} Ibid, p.912.
\textsuperscript{865} Ibid.
state’s highest tribunal, the Supreme Court of Cassation of Italy; no American court or statute may be cited to the contrary. In other words, Spier cannot be heard to argue that the Italian courts’ decisions should not be recognized on the ground that an American court would reach a different result with respect to the award if it had been rendered in the United States.

Nor may Spier introduce domestic United States law, statutory or decisional, into the case at bar through the vehicle of Art. VII of the Convention. Baker Marine precludes that effort. There is no basis for applying American law to the rights and obligations of the parties, including dispute resolution by arbitration. Just as did the parties in Baker Marine, Spier and Tecnica contracted in a foreign state that their disputes would be arbitrated in that foreign state; the governing agreements make no reference to United States law; and nothing suggests that the parties intended United States domestic arbitral law to govern their disputes.

Spier’s reference to the permissive ‘may’ in Art. V(1) of the Convention does not assist him since, as in Baker Marine, Spier has shown no adequate reason for refusing to recognize the judgments of the Italian courts.867

The opposite view to Chromalloy was consolidated with the TermoRío S.A. E.S.P. v. Electranta S.P. case.868 TermoRío concluded a power-purchase agreement with Electranta, a state-owned Colombian agency, under which arbitration clause provided for arbitration of disputes in Colombia under the Rules of the International Chamber of Commerce (ICC). However, with the transfer of Electranta’s assets and liabilities, except its obligation to buy power from TermoRío under the agreement, to another company by the Colombian government, Electranta failed to undertake its obligation to purchase power from TermoRío due to lack of resources. Arbitration that was commenced by TermoRío with the claim of breach of contract resulted in favour of TermoRío; nonetheless, the award was annulled upon the request of Electranta by the Columbian court on the ground that the arbitration had not been governed in accordance with Columbian law, which at the time of arbitration had not expressly allowed use of the ICC procedural rules in arbitration. The US District Court for the District of Colombia dismissed the enforcement action of TermoRío, and the US Court of Appeal for the District of Colombia Circuit affirmed the lower court’s decision refusing enforcement, agreeing with the appellees that because the arbitral award had been lawfully set aside by a competent authority in the primary Contracting State and because there was nothing suggesting that the annulment judgement before the

867 Ibid.
Columbian court was tainted, the appellants have no cause of action under the FAA or the NYC to enforce the award. The court expressly stated that:

For us to endorse what appellants seek would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully ‘set aside’ by a competent authority in the State in which the award was made. This principle controls the disposition of this case. 

[...] 
A judgement is unenforceable as against public policy to the extent that it is ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought’. The standard is high, and infrequently met.  

The limitation stated in the TermoRio case that the enforcement court has a narrow discretion not to defer to a foreign annulment decision when the decision violates basic notions of justice has been referred to in two recent cases, namely COMMISA v. PEMEX and Getma International v. The Republic of Guinea. In COMMISA, the Mexican court annulled the arbitral award, relying on both the 1994 Mexican Supreme Court decision, according to which administrative rescissions were “acts of authority”, and therefore could not be heard in arbitration, which is designed to resolve private disputes, and a statute that was not in effect when the parties entered into their contract which required (i) that all cases that challenged administrative rescissions could not be settled by arbitration and (ii) that the Tax and Administrative Court was to have the exclusive jurisdiction over disputes relating to public contracts, including complaints in respect of administrative rescissions, subject to 45-day period of limitations. The US District Court granted enforcement, declining to defer to the annulment decision of the Mexican court. In the consideration of the scope of its discretion to confirm an award that a competent authority in foreign country has annulled, the US District Court stated that:

The statutory phrase, ‘may’, gives me discretion but, it appears from the two important court of appeals cases on the subject, a narrow discretion. The

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869 Ibid, pp.962,965.
Second Circuit in Baker Marine did not define the scope of discretion, ruling only that the party that had won the arbitration did not give an ‘adequate reason’ why comity should not be given to the foreign court’s judgement. In Termo Rio, the D.C. Circuit gave a more substantive definition of the enforcing court’s discretion: if the judgment of nullification ‘is repugnant to fundamental notions of what is decent and just in the United States’ or, stated another way, if the judgment ‘violated any basic notions of justice in which we subscribe’, then it need not be followed.

I find that under the standard announced in Termo Rio, the decision vacating the Award violated ‘basic notions of justice’, and that deference is therefore not required.”

The District Court declined to defer to the Mexican annulment decision, concluding that it violated basic notions of justice since it relied on a law that was not in effect at the time of the parties’ contracting and left COMMISA without a remedy to obtain a hearing on the merits of its claims.

In Getma International v. The Republic of Guinea, the US District Court for the District of Columbia declined a motion to confirm and enforce a foreign arbitral award which was set aside by the Common Court of Justice and Arbitration (CCJA) on the ground that the arbitral tribunal had violated the Arbitration Rules of the CCJA, and thus, the arbitral tribunal’s “mission” to govern the arbitral proceeding in accordance with those rules, in seeking increased arbitrators’ fees from the parties, which the CCJA had exclusive authority to set. Citing the TermoRio case, the US District Court noted as follows:

The New York Convention does confer upon courts the discretion to enforce an annulled award, but that discretion is ‘narrowly’ confined and may only be exercised ‘where enforcement would violate the […] [United States’] most basic notions of morality and justice’. […] [T]he ‘test of public policy cannot be simply whether […] [a court] would set aside an arbitration award if the award had been made and enforcement had been sought […] [in the United States]’. The New York Convention ‘contemplates that different […] [countries] may have different grounds for setting aside arbitration awards’. Courts ‘must be very careful in weighing notions of “public policy” in determining whether to credit the judgement of a […] [foreign] court in […] vacating an arbitration award’. The New York Convention ‘does not endorse a regime’ in which courts ‘routinely second-guess the judgement’ of a foreign court with competent jurisdiction to annul an arbitral award. Where a foreign court has annulled an arbitral award, a court in this country may only ignore that annulment on ‘limited […] occasions’ where extraordinary circumstances have been presented. For example, ‘[i]n the classic formulation, a judgement that “tends clearly” to undermine the public interest, the public confidence in the administration of the law, or security for

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873 Ibid.
The District Court found that “the parties’ foreign arbitration process was not without some unusual events”, which were “the product of their arms’ length negotiation of the dispute resolution clause in the Concession Agreement”, and that “the parties must bear the consequences of those events unless the events violate the ‘most basic notions of morality and justice’, which is a ‘high bar’ to overcome”.

5.5.1.5 France

French courts focus on the arbitral award rather than on the judgment of courts in the country where arbitration takes place when determining whether to grant or refuse recognition and enforcement of a foreign arbitral award. Then, by applying the more favourable national law on enforcement of foreign arbitral awards through Article VII(1), French courts have enforced arbitral awards even though they have been set aside in the country of rendition.

A number of cases reveal the French approach. Chronologically, Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A. case is the first one to consider in this context. In this case, the dispute stemmed from the termination of an agency agreement between the French company Ugilor, which became Norsolor in 1977, and the Turkish company Pabalk. Arbitrators, finding that Norsolor had not conducted itself in a way which was compatible with good commercial relations, ordered Norsolor to pay damages. Norsolor sought to set aside the award in Austria, alleging that the arbitrators had acted outside the limits of the arbitration agreement by deciding in equity without authorization to do so, but this action was dismissed by the Austrian court. In the meantime, Pabalk succeeded in enforcing the award before the First Instance Court of Paris. Nonetheless, after an appeal to the Vienna Court of Appeal to set aside the award resulted in a partial annulment of the award, the Paris Court of Appeal reversed the judgment of the lower court, holding that the Vienna Court of Appeal’s decision setting aside the award should lead to a refusal of enforcement under Article V(1)(e).

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875 Ibid.
876 Ibid.
Then, upon the recourse by Pabalk to the French Supreme Court against the judgment of the Paris Court of Appeal, the French Supreme Court reversed the judgment of the Paris Court of Appeal and granted enforcement of the award, reasoning that under Article VII of the NYC the enforcement court cannot refuse enforcement if its own laws allow enforcement.\(^\text{878}\)

In the *Hilmarton* case, where a dispute arose regarding the fee to be paid by OTV, a French company, to Hilmarton, an English company, under a consultancy agreement, Hilmarton commenced arbitration in Switzerland, claiming payment of the agreed fee. However, the arbitral tribunal denied Hilmarton’s claim. Then, upon Hilmarton’s request, the Geneva Court of Appeal annulled the award.\(^\text{879}\) Before the Swiss Supreme Court affirmed the annulment,\(^\text{880}\) OTV successfully sought to have the arbitral award enforced in France.\(^\text{881}\) When the Swiss Supreme Court affirmed the annulment, Hilmarton appealed the French enforcement decision.\(^\text{882}\) The Paris Court of Appeal, which had to determine whether to recognise an award which had been annulled in its country of origin, affirmed the order granting exequatur to the arbitral award.\(^\text{883}\) The Paris Court of Appeal, referring to Article VII of the NYC, noted that “the court may not deny exequatur when exequatur is permitted under that court’s national law” and that:

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\text{The provision of Art. V(1)(e) of the Convention – according to which exequatur must be denied to an award which has been set aside in the country in which it was made – does not apply when the law of the country where enforcement is sought permits enforcement of such an award.}\(^\text{884}\)
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The Court held that the fact that an award has been set aside in the country where it was made is not a ground for refusal to enforce an award in France.\(^\text{885}\) On appeal by Hilmarton, the French Supreme Court affirmed the lower court’s decision, also finding that the award having been set aside in Switzerland was no obstacle to enforcement in

\(^{878}\) *Ibid.*
\(^{880}\) *Ibid.*
\(^{882}\) *Ibid.*
\(^{884}\) *Ibid.*
\(^{885}\) *Ibid.*
France. Following the annulment by the Swiss Supreme Court, the dispute was resubmitted to arbitration in Switzerland, and this time, an award was made in favour of Hilmarton. This award, granting Hilmarton’s claim, was granted enforcement in France. On an appeal against this decision by OTV, the Court of Appeal of Versailles affirmed the lower court’s decision; nonetheless, the Supreme Court subsequently overturned the decision of the Court of Appeal of Versailles, holding on the basis of Article 1351 of the Civil Code, which concerns principle of res judicata, that “the existence of a final French decision bearing on the same subject between the same parties creates an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it”. Thus, only the first decision granting enforcement to the first arbitral award, which had been annulled in Switzerland, maintained. On the other hand, the second arbitral award was granted enforcement in England and the Court rejected OTV’s attempt to set aside this order, finding that there were no public policy grounds on which the enforcement of the award could be refused. Hence, interestingly, each court recognised the award which was in favour of its local interest.

In the Chromalloy case, the Paris Court of First Instance granted enforcement to an arbitral award on 4 May 1995, and the arbitral award was set aside by the Egyptian Court of Appeal on 5 December 1995. Egypt subsequently appealed against this decision, and the Court of Appeal of Paris approved the decision of the lower court, stating as follows:

891 Supra n.810, p.168.
[T]he contracting parties also implicitly accepted the exception in Art. VII by which the provisions of the New York Convention do not deprive an 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.

A French judge may refuse to grant exequatur only in the cases specified and limitatively enumerated by Art. 1502 of the New Code of Civil Procedure (NCCP) which is his national law in this matter and on which Chromalloy is thus authorized to rely. Art. 1502 NCCP does not contain a number of grounds for refusal of recognition and enforcement which are provided in Art. V of the 1958 Convention, the application of which, consequently, is precluded. The award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence remains established despite its being annulled and its recognition in France is not in violation of international public policy. Thus, the ground developed by the Arab Republic of Egypt to support its appeal is unfounded.893

More recently, in *Lesbats et Fils v. Dr. Volker Grub*, where Dr Volker Grub succeeded in enforcing an arbitral award before the Paris Court of First Instance, the Paris Court of Appeal had to decide whether to uphold the decision of the lower court granting enforcement of the arbitral award after the Brussels court of first instance had set aside the award on the ground that the contract between the parties had not validly incorporated the arbitration clause in the general conditions.894 The Paris Court of Appeal upheld the lower court’s decision, stating that:

As Dr. Grub correctly stresses, Art. VII(1) of the 1958 New York Convention encourages, for efficacy’s sake, the application of a national law which is more favourable to the enforcement of awards than the Convention’s own provisions. This is precisely the case of French law, whose Art. 1502 NCCP does not list annulment of the award in the country of the place of arbitration as a ground for refusing enforcement. In fact, it is a fundamental principle of French law in respect of the denial of enforcement of awards rendered abroad that annulment by a court of the seat does not affect the existence of the award, hindering its recognition and enforcement in other national legal systems, because the arbitrator is not an integral part of the juridical system of the country of the seat – in the present case, Belgium.895


Finally in the *Putrabali* case, the dispute arose when a cargo of white pepper was lost in shipwreck during transport and Rena Holding refused to pay for the cargo.\(^896\) Subsequently, Putrabali initiated arbitration in London under the Rules of Arbitration and Appeal of the International General Produce Association (IGPA), under which the arbitral award could be revised within the arbitral institution, as agreed in the contract.\(^897\) At the first instance, the arbitral tribunal rejected the claim, holding that Rena Holding was justified in its refusal to pay the contract price. Upon appeal by Putrabali, the High Court in London set aside the award, holding that Rena Holding’s failure to pay for the cargo was a breach of contract.\(^898\) In the second set of arbitral proceedings, the IGPA tribunal issued a second award replacing the arbitral award ensuing from the first set of arbitral proceedings and granted Putrabali’s claim for payment.\(^899\) Before Putrabali could take an action to have the second award enforced in France, Rena Holding had the first award enforced in France despite its having been set aside.\(^900\) When Putrabali appealed enforcement of this arbitral award, the Paris Court of Appeal denied the application.\(^901\) The Supreme Court upheld the lower court’s decision, reasoning that the validity of international arbitral awards, which is not anchored in any national legal order, must be ascertained with regard to the rules applicable in the country where enforcement is sought and that Article VII of the NYC allowed Rena Holding to seek enforcement in France of the first arbitral award under the French rules, which do not provide that annulment of the award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country.\(^902\) Thus, the second arbitral award was not given effect because of the *res judicata* status of the first award due to its recognition in France.

In *Maximov v. Novolipetsky Steel Mill (NLMK)*, which had been rendered in Russia and set aside by Russian courts, Maximov successfully sought to enforce the arbitral award in France. The Tribunal de Grande Instance de Paris held that annulment of the award in the country where the award is rendered was not sufficient to refuse

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\(^897\) *Ibid.*


\(^899\) *Ibid.*

\(^900\) *Ibid.*

\(^901\) *Ibid.*

\(^902\) *Ibid.*
to enforce the award, and a valid arbitration agreement which had been procured in accordance with the parties’ agreed contractual method should be recognised and enforced.\textsuperscript{903} The decision of the French court is noteworthy since such arbitral awards would be recognised in other jurisdictions only in exceptional circumstances.

5.5.1.6 Evaluations of approaches adopted by courts in different jurisdictions

The court decisions given above clearly prove that there have been various approaches in practice. A closer look at these decisions in the light of Gaillard’s classification of representations of arbitration helps to reveal their differences, advantages and disadvantages.

The approach adopted by German courts seems to correspond to Gaillard’s “monolocal vision”. According to this approach, international arbitration is a “component of a single national legal order”, and thereby the law of the place of arbitration and its application by the court of place of arbitration is determinative in terms of the fate of the arbitral award in other jurisdictions.\textsuperscript{904} To be more specific, a mere annulment of the arbitral award by the competent authority in the place of arbitration would be sufficient for the defence in Article V(1)(e), without any scrutiny of the annulment decision itself. Clearly, this approach provides the losing party with one jurisdiction to attack the award with a worldwide effect in cases where the award is set aside, thereby saving the losing party from the effort of defending itself in each jurisdiction where enforcement is sought and protecting it from the differences between national laws regarding the recognition and enforcement of foreign judgements. However, a dominancy of such an approach in practice would lead the parties to forum shopping when selecting the arbitral seat, in the awareness that an annulment decision at the arbitral seat would result in the award not being enforced in other jurisdictions.\textsuperscript{905} Such deference to annulment in the country of rendition defeats one of characteristics of arbitration – to provide a neutral dispute resolution\textsuperscript{906} – in cases where the seat of arbitration is fixed in the country where the losing party is

\textsuperscript{906} Ibid.
established. Also, refusal of enforcement of an award that has been set aside in the country of rendition regardless of the character of the grounds for annulment would undermine some of the objectives of the NYC. It would not only broaden the defences against the enforcement of foreign arbitral awards in case of annulment based on the national idiosyncrasies of the arbitral seat but also recall the double exequatur requirement under the Geneva Convention. These criticisms have lost their significance to a great extent, with the development in many countries of a favourable attitude towards arbitration in the country where the award is rendered and the convergence of national arbitration laws over time. Nonetheless, both the fact that the Model Law has not been adopted universally yet and the fact that the it lays down the same reasons for setting aside the award as those on which recognition and enforcement may be refused under Article V of the NYC, particularly the grounds under Article V(2), causes local particularities to have a global effect through the setting aside, with the result that such disadvantages have not disappeared yet.

The approach adopted by courts in the Netherlands, the United Kingdom and the United States possibly amounts to what Gaillard calls the Westphalian approach. In this approach, it is observed that international arbitration is considered to be “anchored in a plurality of national legal orders”, and the legitimacy of international arbitration is based on the willingness of a number of States to recognise the effectiveness of the award under conditions which each State will decide for itself in determining the legitimacy of the process and whether the award is worth enforcing. Unlike the former approach, this view holds that posterior legitimization depends on the extent to which the award complies with the criteria of the enforcing State, and that the legitimacy of international arbitration derives from the plurality of legal systems. Accordingly, for the defence in Article V(1)(e) to apply, the annulment decision of the competent authority in the place of arbitration should meet certain requirements in the enforcement country, such as the recognisability of the annulment decision under the general rules for the recognition of foreign court decisions in the Netherlands and the United Kingdom and conformity of the annulment decision with the public policy in the United States. Plainly, in the absence of a guideline to deal with

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909 Ibid. See also, Gaillard, E. (2010), Supra n.904, pp.24-35.
the issue of annulled awards, this approach leaves recognition and enforcement of arbitral awards up to the choice of law issue which is a matter for international litigation, and local differences. The approach is based on the national rules for the recognition and enforcement of foreign judgments in each Contracting State, and therefore lacks uniformity. Moreover, since most developed jurisdictions do not allow a review of the findings of the foreign court, the authority of enforcing countries that adopt this approach for the assessment of whether or not the annulment of an arbitral award by the court of the seat should be respected would be limited to the jurisdiction of the foreign court, proceedings before that court and any potential public policy violation by its judgment.910 This indeed leaves the control over the arbitral tribunal, the arbitration proceedings and the potential for a public policy violation by the award with the foreign court.911 This approach could imply a refusal to enforce irrespective of the reasoning of the court at the place of arbitration, which could allow situations where local particularities form the basis for the annulment to pass unchallenged. Furthermore, under this approach, the control exercised under the law of the place of arbitration is not conclusive on the validity of an award but is still significant, which does not offer a great advantage over the former approach. Moreover, in countries where reciprocity is required under the national rules on recognition and enforcement of foreign judgments, there is a risk of parochial refusals to defer to annulment in cases where the local party seeks enforcement of the foreign award.912

Finally, French courts have enforced arbitral awards outside the Convention regime. In so doing, they have relied upon their national enforcement regime, which would fall under the third approach, described by Gaillard as the transnational approach. This approach assumes that “international arbitration is anchored in the collectivity of legal systems”, thereby recognising that the sources of legitimacy in arbitration are

the views developed collectively by the community of nations through instruments such as the 1958 New York Convention, the UNCITRAL Model Law and numerous guidelines which express a common view as to how an

910 Supra n.905, p.334 (mentioning these features of the judgment recognition in the context of enforcing country’s granting effect to the foreign confirmation judgment).
911 Ibid (mentioning these features of the judgment recognition in the context of enforcing country’s granting effect to the foreign confirmation judgment).
912 Ibid, p.327.
arbitration should be conducted so as to be recognized as a legitimate means of adjudication.913

At first glance, this approach seems to be arbitration-friendly as it enables enforcement of foreign awards that would not be enforced because of their annulment in the arbitral seat in other jurisdictions, provided other defences to enforcement do not apply.914 However, in cases where a second set of arbitral proceedings is held after the annulment of the first award and the result differs from that of the first proceedings, this approach clearly causes “opportunistic behaviour and unjust results” due to the lack of coordination between various control mechanisms.915 These inconveniences appeared in the Hilmarton case in the form of the denial of enforcement of the second award on res judicata grounds while this award remained in force in England. They appear in the Putrabali case in the form of Rena Holding’s attempt to enforce the first award despite it having been annulled in order to prevent the subsequent enforcement in France of second arbitral award. In addition, the lack of coordination of the various control mechanisms leaves the award-debtor with a burden to defend itself in every country where enforcement is sought.

5.5.2 Is there a future role for the New York Convention?

What matters at this point is whether the NYC has really reached the limits of its ability to address the controversy over the propriety of enforcement of annulled arbitral awards and therefore whether a further step is called for. The framework of the NYC contributes to international commerce by providing the users of arbitration with “a level of certainty about the procedural requirements and the treatment of the resulting award”.916 Despite successful legal improvements over its predecessors, i.e. the Geneva Treaties, another apparent sign of the fact that the NYC has reached its limits is the lack of guidance regarding when enforcement of an award that has been

915 Ibid, p.93.
set aside by a competent authority of the country in which, or under the law of which, the award was made would be appropriate.

The ambiguously written provision of the NYC has played a crucial role, in that courts in Contracting States take different approaches to the issue. Three provisions of the Convention are relevant to the issue of appropriate scope of enforcement of annulled awards: Articles III, V and VII.

Article III of the NYC has de-emphasised the role of the court in the country where the award is rendered, thereby facilitating recognition and enforcement by eliminating the requirement that an arbitral award must be final and operative in the country where it is rendered to obtain enforcement in the country where enforcement is sought. This article put the Contracting States under obligation to other Contracting States to enforce arbitral awards made in their territory.

Article V of the NYC lays down that “[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked”, if that party proves inter alia that the award has been set aside by the competent authority of the country in which, or under the law of which, that award was made.\\footnote{UN DOC E/CONF.26/8/Rev.1, Supra n.154, Article V(1)(e).} Hence, the NYC has allowed the courts in the country where the arbitral award has been rendered to annul the arbitral award and has placed the existence of that annulment as one of grounds for refusal of enforcement of foreign arbitral awards under Article V(1)(e), neither compelling enforcement courts to refuse enforcement of annulled awards nor prescribing under what circumstances enforcement or the refusal of enforcement would be appropriate in this case. This has created the situation in which an award that has been set aside may still be enforced somewhere else depending on the discretion of the enforcing court.

Finally, Article VII states that “[t]he provisions of the present Convention shall not [...] deprive any interested party of any rights 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”.\\footnote{Ibid, Article VII(1).} Thus, the NYC has compelled the enforcement court to uphold arbitral awards on the basis of a more favourable law of the enforcement country under Article VII. Hence, it does not exclude reliance on a more favourable national enforcement regime. In many
jurisdictions, national laws refer to the NYC; therefore, Article VII is not relevant in practice in those countries.

It seems that the structural limitations of the NYC prevent it from reconciling these conflicting perspectives on the enforcement of annulled awards. The NYC has now reached its limits and can make no further direct contribution to the enforcement of annulled arbitral awards. Any solution to the issues arising from that matter must be developed through other measures.

CONCLUSION OF PART II

Part II has sought to reveal the harmonising impact of the NYC on the development of international arbitration since 1958 and its contemporary relevance for further harmonisation in the field of arbitration. In the absence of an international judicial authority, the uniform interpretation and application of the NYC remained the responsibility of Contracting States. Chapter 3, in which various court decisions applying and interpreting the NYC were reviewed, indicated that courts have by and large applied and interpreted the NYC in a manner which favours international arbitration,919 and they have done this by increasingly being mindful of what the courts in other Contracting States have done, in order to realise the clear will to achieve uniformity and “a predictable and coherent body of international arbitration law”.920

In view of the courts’ application and interpretation of the NYC, it can be argued that the pro-arbitration and pro-enforcement policy of the NYC has induced courts to develop a narrow understanding of the grounds for judicial review. Moreover, the policy of protecting the autonomy of the contractual forum selection by the parties, which was introduced by the NYC, has driven courts to gather around the view that they should not apply domestic law but rather international legal principles to cases arising under the NYC, to avoid judicial intervention. Thus, the review revealed that the overall policy under the NYC favouring arbitration has led to further harmonisation of arbitration concepts in relation to its original intended effect.

920 Supra n.188, pp.113,114.
Chapter 4 revealed that the NYC has encouraged Contracting States to revise their arbitration laws in line with the needs of the international business world and has had a harmonising effect on national arbitration legislations. Chapter 4 began its discussion of the impact of the NYC on the development of the Model Law around two points: its role in inspiring the Model Law to address those aspects of national arbitration laws that required revision and its contribution to the structure of some concepts under the Model Law. To deal with difficulties encountered in the practice of international commercial arbitration then and to secure the functioning and recognition of international commercial arbitration as a dispute resolution method, the Model Law has provided an ambitious framework that takes the NYC into consideration. It has changed the focus from the distinction between foreign and domestic awards to the distinction between international and non-international awards. Also, it has clarified instances where courts may intervene and excluded any general or residual powers given to the courts in a domestic legal system that are not among the instances provided in the Model Law.  

Within this context, the NYC even set the model for some concepts, such as the effect of arbitration agreements, the definition and form of arbitration agreements, the conditions for obtaining enforcement and the grounds for setting aside or refusal of enforcement. Moreover, the Model Law has addressed the need for revision of national arbitration laws with respect to the conduct of arbitration proceedings, which has arisen from their relevance under the refusal grounds of the NYC, through provisions that are responsive to concerns regarding the restrictive factors in mandatory provisions of applicable laws and other local particularities that have frustrated the expectation of the parties in other ways. The Model Law has granted the parties a broad freedom in moulding the arbitration proceedings, subject to a few mandatory provisions of the Model Law, and has reduced the need to choose a law other than the law of the place of arbitration through its liberal provisions. In addition to these impacts of the NYC, the grounds for refusal of recognition and enforcement of foreign arbitral awards established a model for the grounds for refusing recognition or enforcement of interim measures, under the 2006 Amendments. Then, by a review of national legislative changes,

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whether or not they adopt the Model Law, Chapter 4 revealed that in the modernization of national laws, the NYC not only has set the agenda for legislative changes, but also has had a structuring impact in relation to some concepts. namely the form and definition of arbitration agreements, the effect of arbitration agreements, the effect of arbitral awards, the means of recourse against arbitral awards in the country where arbitration takes place, the grounds for challenging arbitral awards and the grounds for challenging the enforcement of interim measures, which collectively indicate the unexpected role of the NYC in developing the trend towards the harmonisation of national laws.

Chapter 5 considered some persistent issues in the field to assess whether the NYC continues to have a role to play. This chapter revealed that the NYC has reached the limit of its ability to make a further contribution to the circulation of arbitral awards and the efficiency of international arbitration in the settlement of private law disputes. The role of the NYC in this respect is now limited to agenda-setting for other possible measures for further improvement.
CONCLUSIONS

Overview of the Research Results

The purpose of this study has been to explore the harmonisation intended by the drafters of the NYC, the harmonising effect of the NYC in various areas of arbitration and its ability if any to further facilitate the enforcement of arbitral awards and increase the efficiency of arbitration. Accordingly, the result of this study is threefold. First, the NYC was launched to harmonise the recognition and enforcement of arbitration agreements and foreign arbitral awards by addressing the difficulties stemming from the Geneva Treaties, with the broader purpose of promoting the effectiveness and development of arbitration as a means of settling international disputes. Second, in reality, the NYC not only has harmonised standards for enforcement of foreign arbitral awards and arbitration agreements but also has affected both the attitude of national courts in developing a narrow characterisation of the grounds for judicial review and the direction of many national laws towards developing standards for annulment and enhancing the enforceability of arbitration agreements and arbitral awards. Third, issues affecting the efficiency of international arbitration signal that the NYC has no dynamic relevance other than in setting the agenda for other possible measures to increase the effectiveness of arbitration, which suggests that attention should be directed towards developing an enforcement system to promote further developments that are responsive to the needs of business practices.

Part I addressed the first research question, i.e. what was the scope of harmonisation intended by the drafters of the NYC. This part began with a review of the harmonising tools preceding the NYC, namely the Geneva Protocol and the Geneva Convention. It presented the circumstances setting the stage for the Geneva Treaties, the innovations envisaged by these tools and reactions to their shortcomings, to provide a good understanding of the context within which the NYC emerged. It revealed that the Geneva Treaties emerged from a need for the assurance of legal sanction in international commercial arbitration and made significant progress towards the enforceability of arbitration agreements and arbitral awards; however, the regime presented by them caused some problems that impeded efficient enforcement of foreign arbitral awards and triggered further efforts in this respect, which led to the
Conference where the NYC emerged. The focus of discussion then turned to the objective of and improvements implemented by the NYC. The study revealed that the original objective of the NYC in a broad sense was to encourage arbitration as a dispute resolution mechanism for disputes arising from international business transactions, and that it sought to achieve this goal by means of two sub-goals: (i) securing respect for agreements to arbitrate by requiring the courts of Contracting States to defer to the jurisdiction of arbitrators under internationally uniform standards prescribed by the Convention itself for considering the existence and validity of arbitration agreements in cases where actions in relation to issues covered by an arbitration agreement are brought before them and (ii) guaranteeing recognition and enforcement of foreign arbitral awards by requiring the courts of Contracting States to recognise and enforce foreign arbitral awards through proceedings not substantially more onerous than those applicable to domestic awards, without reviewing the merits of the decision of arbitral tribunal.

Part II addressed the second and third research questions, i.e. (i) what is the harmonising impact of the NYC in reality and (ii) what is the contemporary relevance of the NYC for further harmonisation in the field of arbitration. The first two chapters under Part II revealed the direct and indirect contribution of the NYC on the development of an impressive body of international arbitration law and practice. After emphasising the success indicated by the number of States that acceded to it, Chapter 3 overviewed cases from different jurisdictions and revealed that national courts have generally examined the validity and enforceability of arbitration agreements and foreign arbitral awards in accordance with the international standards established by the NYC, rather than apply national standards under local laws. In addition, evidence was presented that enforcement courts have developed harmonised concepts in relation to critical aspects of various provisions under the NYC, which has resulted in a high rate of enforcement of arbitral awards. Chapter 4 examined whether the NYC has had a harmonising impact beyond its intended scope of application, by observing national legislative changes that have adopted a policy favouring arbitration. Various impacts on national legislative changes were observed, first by focusing on the effect of the NYC on the development of the UNCITRAL Model Law so as to understand the effect on national laws that have been reformed on the basis of that law, and then by reviewing legislative revisions both in Model Law countries and in some non-Model
Law countries. This chapter has indicated that the diffusion of the NYC and the Model Law has leaded to harmonisation of national arbitration legislations: these influences extend to harmonisation in respect of the relationship between arbitration and courts and the conduct of arbitration proceedings in the Model Law countries; and, in the bigger picture, including both Model Law countries and non-Model Law countries, it is limited to the harmonisation of national arbitration laws on party autonomy in matters of procedure, due process and the relationship between arbitration and courts after the conclusion of arbitration proceedings, i.e. judicial review of the arbitral award. In short, this chapter has revealed the unexpected role of the NYC in developing the trend towards the harmonisation of national laws. Having demonstrated in Chapters 3 and 4 that the reformist role of the NYC at its birth has evolved into a dynamic role in the field of arbitration, this thesis focused attention in Chapter 5 on current debates and some issues requiring further efforts to improve the efficiency of arbitration, and challenged the capability of the NYC to contribute further. This chapter first pointed out that two school of thoughts have emerged: one is of the opinion that the NYC should be replaced, and the other argues against such replacement. Then, it illustrated the structural limitations of the NYC that prevent it from contributing further to harmonisation in relation to the circulation of arbitral awards and the efficiency of international commercial arbitration in this century.

**Concluding Remarks: Looking to the Future**

Having revealed the impact and limitations of the NYC in relation to the development of international arbitration, this thesis highlights that the role of the NYC for further harmonisation in the field of arbitration is no more than agenda setting for other measures to promote the effectiveness and the development of arbitration and proposes that attention and effort should be directed to other measures for dealing with the challenges facing the field and users of arbitration, thereby promoting further development in the field. This study heavily points out to measures, particularly a Model Law, that would be taken by the UNCITRAL. This is because a measure by the UNCITRAL would be more responsive to the needs of the business community since international and regional organisations, both governmental and non-governmental, with expertise in the topics under discussion are allowed to attend to the UNCITRAL Sessions as observers and decisions are generally taken by consensus rather than by
voting,\textsuperscript{923} which allows to take all concerns into account. Equally importantly, non-binding nature of Model Laws allows reaching an agreement in a relatively short time, striving for the best solution for issues without concern to reconcile various legal systems.

To start with the first limitation mentioned in Chapter 5, the difficulties in relation to the evidence that the country of rendition is a party to the NYC may be addressed by a supplement to the Model Law promoting a common understanding. For example, the United Nations Treaty Section may be contacted for the necessary information.

In relation to the difficulties that may stem from the inadequacies of the actual execution system, there may be several options for increasing the effectiveness of arbitration in the settlement of private law disputes. The most radical option would be to create an international court of arbitration that would take the place of national courts for determining the enforceability of arbitral awards, which was proposed as a task for this century by Judges Holtzmann and Schwebel more than twenty years ago.\textsuperscript{924} Besides, one may suggest launching a project in model law technique to harmonise the domestic system of execution. However, neither of these two options seems to be welcomed by Contracting States, at least at this stage, because they would interfere with the national rules of procedures. There are two viable solutions under current circumstances, to deal with difficulties in relation to the actual execution system. One is to develop the section titled as “Jurisdiction” in the online platform on the NYC, which has been launched, through the cooperation of the UNCITRAL and two experts, namely Professor Emmanuel Gaillard and Professor George Bermann, to facilitate dissemination of the information about the NYC to promote the uniform and effective application of the NYC and the harmony in the field.\textsuperscript{925} This section should be improved to disseminate information on the national mechanisms of execution in each Contracting State to enable corporations to check the real costs and timescale involved before settling for a discounted value of the award. The other is to encourage Member States of the NYC to develop specialized courts that consist of judges with expertise in arbitration, or at least to grant the jurisdiction over arbitration issues to a specific level.

\textsuperscript{923} \textit{Supra} n.829, p.6.
\textsuperscript{924} Holtzmann, H., \textit{Supra} n.3, pp.109-114; Schwebel, S.M., \textit{Supra} n.3.
of court, e.g. the highest level of civil courts, which would overall enhance effectiveness of the actual execution.

As for the conflict over the enforcement of annulled arbitral awards, this study also emphasised that any solution to the divergence in the approach to the issue of whether or not to enforce foreign awards set aside in the place of arbitration must be developed through other measures. In this respect, this study proposes amending Articles 34 and 36 of the Model Law for the use of more favourable right rule under Article VII. Accordingly, Article 34 should be amended to the effect that national courts in the country where the award is made may review the award for the grounds corresponding to those under Article V(1)(a) to (d) in the NYC, thereby removing the grounds of Article 34 in the Model Law corresponding to the provisions under Article V(2) of the NYC from the scope of review by that court. On the other hand, the review by the enforcement court under Article 36 should be limited to an ex officio review of grounds listed under Article V(2) of the NYC, i.e. arbitrability and international public policy, and a review upon request of the defendant of whether the award has been set aside on any of the grounds to be listed under the new version of Article 34. In this case, this study proposes a similar structure to the one suggested by Marike Paulsson, but in the form of an amendment of the Model Law instead of a replacement of the NYC and by maintaining the setting aside aside. Such amendment would shorten the length of the entire process, and equally importantly, would provide the test to be applied by the national courts in determining whether or not to enforce an annulled award, thereby providing predictability and consistency while avoiding the hurdles to replacement of a treaty.

Hopefully this study has successfully placed the role and significance of the NYC in the right context and will direct the attention and efforts of the arbitration community to the right sources for further development in the field.
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**Lithuania**


**Luxembourg**


**Malaysia**


**Mexico**


Morocco


The Netherlands


Nigeria


Norway


Pakistan


Peru


Philippines

Poland


Portugal


Romania


Russia


South Africa

Spain


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Annex 1: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. 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.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of
arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

**Article IV**

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or duly certified copy thereof;

(b) The original agreement referred to in article II or duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

**Article V**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) 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 law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article IX

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Article 1

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called “a submission to arbitration”) covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923 shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5

The provisions of the above Articles shall not deprive any interested party of the right of availing 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.
Article 6
The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923.

Article 7
The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified. It may be ratified only on behalf of those Members of League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8
The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9
The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present Convention.

Article 10
The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923,
applies, can be affected at any time by means of a declaration addressed to the Secretary-
General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the
Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such
denunciation.

**Article 11**

A certified copy of the present Convention shall be transmitted by the Secretary-General of the
League of Nations to every Member of the League of Nations and to every non-Member State
which signs the same.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

(1) Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

(2) The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

(3) Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

(4) The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

(5) The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

(6) The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

(7) The present Protocol may be denounced by any Contracting State on giving one year’s notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory
States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of notifying States.

(8) The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

A certified copy of the present Protocol will be transmitted by the Secretary-General to all the Contracting States.