

Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards

EXPLANATORY NOTE

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General Considerations

1. After 50 years of its existence, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (the “New York Convention”) is in need of modernization:
 - (a) A number of provisions needs to be added (for example, a definition of the scope of application with respect to agreements that fall under the referral provisions of article II(3); a waiver of a party to rely on a ground for refusal of enforcement; a reference to the arbitration agreement in the more-favourable-right provision of article VII(1));
 - (b) A number of provisions needs to be revised (for example, the written form as required by article II(2) for the arbitration agreement is stricter than almost any national law; the refusal of enforcement on the ground of a setting aside on any ground in the country of origin may import parochial annulment);
 - (c) A number of provisions is unclear (for example, the notion of an award “not considered as domestic” in article I(1); the expression “duly authenticated original award” in article IV(1)(a); the word “may” in the English text of article V(1); the words “terms of submission” and “scope of submission” to arbitration in article V(1)(c); the notion of a “suspended”

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award in article V(1)(e); the reference to “any interested party” in article VII(1));

- (d) A number of provisions is outdated (for example, the reference to “permanent arbitral bodies” in article I(2); the reference to the law under which the award was made in article V(1)(e)); and
 - (e) A number of provisions needs to be aligned with prevailing judicial interpretation (for example, the public policy referred to in article V(2) means international public policy).
2. The Preliminary Draft Convention on International Enforcement of Arbitration Agreements and Awards (the “Draft Convention”) is intended to achieve the above modernization. The Draft Convention is also intended to be readily understandable by practitioners and judges in many countries. To achieve that goal, the text is kept at a bare minimum and the solutions offered are clear and simple, and are based on what is current practice.
 3. The above shortcomings in the New York Convention cannot be remedied by the UNCITRAL Model Law on International Commercial Arbitration of 1985 (the “UNCITRAL Model Law”), as revised in 2006. The reason is that the provisions relating to enforcement of an arbitral award as set forth in the UNCITRAL Model Law are almost the same as those contained in articles III-VI of the New York Convention (article 35), because of the policy decision taken in 1985 to follow as closely as possible the New York Convention.
 4. Nor can the New York Convention’s shortcomings be remedied adequately and comprehensively by a “Recommendation regarding the interpretation” issued by international bodies such as UNCITRAL in 2006 regarding articles II(2) and VII(1). The mechanism of guidance notes in interpreting an international convention is useful for texts that can be subject to various interpretations, but its value is limited if a text is lacking or if the guidance contradicts an existing text.

5. It is expected that the time required for adherence by States to the Draft Convention is less than for the New York Convention since the Draft Convention builds on the structure and concepts of the New York Convention. Thus, articles 1 to 7 deal with matters that are similar to those contained in article I to VII of the New York Convention. Furthermore, the New York Convention having matured after 50 years of its existence, it will be readily understood that the Draft Convention constitutes a necessary update of the New York Convention.
6. The object and purpose of the Draft Convention are the same as for the New York Convention: to facilitate the enforcement of the arbitration agreement and arbitral award as much as possible. However, the Draft Convention is clearer in that the object and purpose aim specifically at international arbitration.

Title

7. The title of the Draft Convention reflects what is covered by it: the enforcement of the arbitration agreement (i.e., the referral of the dispute to arbitration) and the enforcement of the arbitral award. The title of the Draft Convention also makes clear that the Convention is intended to serve international arbitration.
8. In contrast to the New York Convention, the Draft Convention's title no longer refers to the enforcement of "foreign" arbitral awards, but rather to the "international" enforcement of arbitral awards. The word "foreign" is omitted since, insofar as its field of application is concerned, the Draft Convention does not distinguish between an award made abroad and an award made within the country in which enforcement of the award is sought (see article 1). Instead, the Draft Convention's applicability is dependent on whether the agreement or award is international according to the criteria set forth in article 1(1).

Article 1 – Field of Application

Paragraph 1 - Arbitration Agreement

9. As mentioned, the New York Convention does not contain a definition as to which arbitration agreements fall under the referral provisions of its article II(3). That lacuna is filled by the definition given in the first paragraph of article 1 of the Draft Convention.
10. The definition requires in essence that the arbitration agreement concerns international arbitration. The broad criteria for determining international arbitration as set forth in article 1(1) of the Draft Convention are a condensed version of the definition set forth in article 1 of the UNCITRAL Model Law. It therefore should be assumed that an arbitration agreement is international for the purposes of the Draft Convention unless the parties have their place of business or residence in the same State and all other elements relevant to the dispute referred to in the agreement are connected only with that State.
11. The court shall refer the dispute to arbitration under the provisions of article 2 irrespective of whether the place of arbitration is within or outside the country where the agreement is invoked. The agreement providing for international arbitration as defined in article 1(1) is not limited to an agreement providing for arbitration in a country other than the country where the agreement is invoked (which is one of the limited interpretations under article II(3) of the New York Convention).

Paragraph 2 - Arbitral Award

12. With respect to the enforcement of the arbitral award, according to its article I(1), the New York Convention applies to the enforcement of an arbitral award made in another (Contracting) State in any event (first criterion). The New York Convention further applies to the enforcement of an arbitral award that is not considered as a domestic award in the State where the enforcement is sought (second criterion).

13. The first criterion also applies to the enforcement of a purely domestic award under the New York Convention if such an award was made in another (Contracting) State. In contrast, the first criterion excludes an award resulting from an international arbitration that was made in the State where enforcement is sought.
14. The applicability of the second criterion, on the other hand, depends on whether the State where enforcement is sought considers certain awards as non-domestic awards. The drafters of the New York Convention had in mind an arbitral award resulting from an arbitration that is governed by an arbitration law that is different from the arbitration law of the place of arbitration. The legislation implementing the New York Convention in the United States, as interpreted by the courts, applies the second criterion to arbitral awards that result from an international arbitration in the United States governed by federal law.
15. The uncertainties inherent to the applicability of the New York Convention are resolved by the definition given in paragraph 2 of article 1 of the Draft Convention. According to that definition, the Draft Convention applies to the enforcement of any arbitral award that concerns international arbitration, irrespective of the place where the award was made. The criteria according to which an arbitral award is international are the same as those for the arbitration agreement set forth in paragraph 1.
16. Under this approach, the same arbitration is treated in a uniform manner for the purposes of the Draft Convention's field of application. This remedies another shortcoming of the New York Convention under which it can happen with respect to the same arbitration that the arbitration agreement is deemed to fall under the referral provisions of article II(3), whilst the arbitral award does not come within the New York Convention's definition of its field of application (e.g., the award is made within the country where enforcement is sought).
17. The clear choice for international arbitration also comports with the reference to international public policy in connection with the

referral to arbitration (article 2(2)(c)) and the enforcement of the award (article 5(3)(h)).

18. The definition of the Draft Convention's scope means that the arbitration law of the place of arbitration (which is also the place where the award was or will be made) does not determine the Convention's applicability. On the other hand, the arbitration law of the place of arbitration and award can be relevant under the Convention in a number of other respects (validity of the arbitration agreement, articles 2(2)(b) and 5(3)(b); composition of the arbitral tribunal, article 5(3)(d); arbitral procedure, article 5(3)(e); binding force of the award, article 5(3)(f); setting aside of the award, article 5(3)(g); see also § 94 below). In this respect too, the Draft Convention is compliant with the UNCITRAL Model Law whose field of application is in essence territorial.
19. A consequence of the Draft Convention's field of application to the enforcement of any award resulting from an international arbitration is that the references in its text to "the country where the award was made" in article 5(3) may include the country where enforcement of the award is sought under the Draft Convention.

Paragraph 3 - Recognition

20. Paragraph 3 provides that the provisions of the Draft Convention apply to the recognition of the arbitral award accordingly. A separate provision regarding recognition is inserted for reasons of drafting so that the Draft Convention's provisions are not unduly burdened by recurring references to the recognition of the award as it is the case in the New York Convention.

No Reservations

21. Unlike article I(3) of the New York Convention, the Draft Convention does not offer States the possibility to adopt a reciprocity reservation or a commercial reservation. With respect to the reciprocity reservation, the Draft Convention is premised on the more modern principle of universal applicability of treaties. As regards the commercial reservation, that reservation has not played

any significant role in the interpretation and application by the courts of the New York Convention.

Article 2 – Enforcement of Arbitration Agreement

22. Article 2 is an elaboration of article II(3) of the New York Convention.

Paragraph 1 - General Obligation to Refer

23. Paragraph 1 sets forth the general obligation of the courts in the Contracting States to enforce arbitration agreements by means of referral to arbitration.
24. The obligation concerns arbitration agreements that fall under the Draft Convention as defined in article 1(1). See §§ 9-10 above.
25. The term “refer . . . to arbitration” is retained from article II(3) of the New York Convention. It includes other forms of enforcing arbitration agreements as practised in a number of countries (such as the “stay of court proceedings” in favour of arbitration).
26. The text mentions referral of a “dispute” to arbitration, which language is considered to be semantically more correct than referral of the “parties” to arbitration as stated in article II(3) of the New York Convention.
27. The language is mandatory (“shall,” see also paragraph 2) and, as it is the case under the New York Convention, a court does not have a discretionary power whether or not to refer.
28. The text of paragraph 1 is concerned with the situation of a dispute having been brought before a national court, like it is the case in article II(3) of the New York Convention. However, it should not be taken to exclude other types of court proceedings in relation to the arbitration agreement, such a specific action to compel arbitration.
29. It is not incompatible with the arbitration agreement to which article 2 applies for a party to request, before or during the arbitral

proceedings, from a court an interim measure of protection, and for a court to grant such measure (cf. articles 9 and 17 J of the UNCITRAL Model Law).

Paragraph 2 - Grounds for Refusal of Referral

30. Paragraph 2 of article 2 contains a limitative list of circumstances under which a court shall not refer the dispute to arbitration. Referral may not be refused on any other ground.
31. The introductory sentence of paragraph 2 makes clear that the grounds for non-referral are to be asserted and proven by the party against whom the arbitration agreement is invoked in the court proceedings. Such an express provision is lacking in the New York Convention. It corresponds to the provision in article 5(3) of the Draft Convention (built on article V(1) of the New York Convention) that the party against whom enforcement of an arbitral award is sought has to assert and prove the grounds for refusal of enforcement of the arbitral award.

Ground (a) – Arbitration Agreement Not Invoked In Limine Litis

32. Ground (a) of paragraph 2 is to the effect that the arbitration agreement is to be invoked before submitting a statement on the substance of the dispute (in ordinary cases, that is the defendant). It is another provision that is lacking in the New York Convention but can be found in a number of arbitration laws (e.g., article 8(1) of the UNCITRAL Model Law).

Ground (b) – Lack of Valid Arbitration Agreement

33. Ground (b) of paragraph 2 addresses a major problem under the New York Convention. Article II(1) of the New York Convention requires the written form for an arbitration agreement, which is defined in article II(2) as including “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” The requirement of the written form is more stringent than is imposed by virtually all

modern arbitration laws. It prompted UNCITRAL to issue a “Recommendation regarding the interpretation” in 2006, in which it suggested to apply article II(2) “recognizing that the circumstances described therein are not exhaustive.” The interpretation, however, has its limits as the text of article II(2) requires either a signed contract or an exchange, which excludes less formal ways of acceptance.

34. It is submitted that requirements for the form of the arbitration agreement are no longer needed. Actually, modern arbitration laws are gradually abandoning the requirement of the written form, treating the arbitration clause on the same footing as other clauses in a contract (see the recent discussion at UNCITRAL, resulting in alternative options for the definition and form of the arbitration agreement in article 7 of the UNCITRAL Model Law at the thirty-ninth session in 2006). The Draft Convention follows this trend by no longer imposing an internationally required written form. Rather, as it is the case under the New York Convention in other respects regarding the arbitration agreement, the Draft Convention refers to the applicable law for question concerning the validity of the arbitration agreement. The applicable law may include provisions similar to the revised article 7 of the UNCITRAL Model Law.
35. The New York Convention does not contain a rule of conflict of laws for determining the law applicable to the arbitration agreement at the stage of referral to arbitration. The absence of conflict rules has given rise to diverging judicial interpretations, ranging from the law of the forum to the law where the award will be made or will likely be made. The Draft Convention retains the latter conflict rule since it will lead to the same law governing the arbitration agreement at the stage of enforcement of the arbitral award (see article 5(3)(a)). This option is supported by the experience in practice that, whilst a number of laws is a potential candidate for governing an arbitration agreement, the law of the place of arbitration is held to be the governing law in most cases. Furthermore, the applicability of the law of the place of arbitration

to the validity of the arbitration agreement has the advantage that a choice by the parties (or arbitral institution) for a favourable place of arbitration implies a choice for a law that is probably also favourable to the validity of the arbitration agreement.

36. Ground (c) mentions the place where the award will be made. The country where the award will be made is the same as the place of arbitration (cf. UNCITRAL Model Law, article 31(3)).
37. It will frequently happen that the place of arbitration is known at the time the validity of the arbitration agreement is to be determined under article 2 of the Draft Convention. Unlike 50 years ago, parties are now well aware of the legal significance of choosing the place of arbitration, being that it entails the applicability of the arbitration law of the place of arbitration, and that it is not to be confused with the place of arbitration in the physical sense (cf. UNCITRAL Model Law, articles 1(2) and 20(2); see also § 94 below). In many cases, the parties have fixed a place of arbitration in their arbitration agreement or have agreed on arbitration rules under which the arbitral institution or the arbitral tribunal determines the place in the absence of an agreement of the parties.
38. In those rare cases in which the place of arbitration is not yet known at that time or any indication is lacking where the award will likely be made, one has to fall back on the arbitration law of the country where the arbitration agreement is invoked.
39. It may be recalled that most arbitration laws adopt the doctrine of the separability of the arbitration agreement, that is, the invalidity of the main contract in which the arbitration agreement (clause) is included or to which the arbitration agreement relates does not affect the validity of the arbitration agreement (e.g., UNCITRAL Model Law, article 16(1)). A logical consequence of the separability doctrine is that the law applicable to the contract is not necessarily the same as the law governing the arbitration agreement (clause).

40. Questions regarding validity of the arbitration agreement should be broadly understood. They include capacity, existence, formation, scope and contents. In practice, most cases concern the scope of the arbitration agreement, i.e., whether a dispute is covered by the wording of the arbitration agreement (in the United States also referred to as “arbitrability”). With respect to contents, that matter too is to be determined under the applicable law. The sole exception is public policy (see § 44 below).
41. There is no need to include in the Draft Convention language such as that which appears in article II(1) of the New York Convention (“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”) as these matters are almost always dealt with by the applicable law (e.g., UNCITRAL Model Law, article 7, Option I and II).
42. Ground (b) of paragraph 2 allows a court to examine the validity of the arbitration agreement on a *prima facie* basis only in the context of dealing with a request to refer the dispute to arbitration under article 2 of the Draft Convention. The reasons for such a limited examination are that the referral should be decided expeditiously by the court, and that that arbitral tribunal is the first instance to conduct a full review of an objection to the validity of the arbitration agreement, subject to eventual subsequent court control in an action for setting aside or enforcement of the arbitral award.

Ground (c) – Violation of Public Policy

43. Ground (c) of paragraph 2 corresponds to the terminal proviso of article II(1) of the New York Convention (“concerning a subject matter capable of settlement by arbitration”). There are three differences. First, the ground is listed as a ground for refusal of referral of the dispute to arbitration that is to be asserted and proven by the party against whom the arbitration agreement is invoked (with the possibility of the court relying on it on its own motion pursuant to paragraph 3). Second, the matter of

arbitrability forms part of public policy. Arbitrability, therefore, is not expressed as a separate ground for refusal of referral to arbitration, but is subsumed in the public policy ground. Third, the public policy is limited to the narrower category of international public policy as developed by courts in many countries in relation to public policy, including arbitrability, under the New York Convention.

44. Ground (c) of paragraph 2 concerning public policy also means that it can constitute an exception to the applicability of the law of the place of arbitration for determining the validity of the arbitration agreement as provided in paragraph 2(b). The exception will occur if the place of arbitration is in a country other than the country where the agreement is invoked. In that case, all questions regarding the validity of the arbitration agreement are to be determined under the law of the place of arbitration, with the exception of questions regarding public policy, in particular arbitrability in the sense of the dispute being capable of settlement by arbitration, which questions are to be judged under the rules of international public policy of the country where the agreement is invoked.

Paragraph 3 - Application of Public Policy by Court on Its Own Motion

45. Paragraph 3 is to be viewed in light of the fact that the New York Convention provides that a court can apply the public policy exception on its own motion with respect to the arbitral award (article V(2)). If the Convention expressly allows a court to rely on its own motion on public policy in relation to the arbitral award (see article 5(4)), a court should also be allowed to rely on public policy on its own motion in relation to the arbitration agreement. Although – to the extent that it could be researched – a court has never applied the public policy defence on its own motion, that provision is repeated in the Draft Convention for reasons of its acceptability.

Article 3 – Enforcement of Award – General

46. The sequence of the articles concerning enforcement of the arbitral award are the same as under the New York Convention: article 3 concerns enforcement in general; article 4 deals with the matters that the party seeking enforcement has to accomplish; article 5 contains the grounds for refusal of enforcement to be asserted and proven by the party against whom enforcement is sought or to be applied by a court on its own motion; and article 6 addresses the situation where the action for setting aside is pending in the country of origin. Within that sequence, a number of redundancies, obstacles and uncertainties created by the New York Convention are dealt with in the Draft Convention.
47. The obligation to enforce awards concerns arbitral awards that fall under the Draft Convention as defined in article 1(2). See §§ 12-21 above.
48. Article 3 no longer contains the New York Convention article III language “Each Contracting State shall recognize arbitral awards as binding and” as this language has not proven to be necessary in practice. Rather, like the other provisions of the Draft Convention, article 3 specifies that it is to be applied by the courts in the Contracting States.

Paragraph 1 - Conditions for Enforcement

49. Paragraph 1 expresses what is the generally accepted interpretation under the New York Convention: the conditions for enforcement are those set forth in the Convention only. Contracting States are not allowed to add, delete or amend conditions. For example, if an arbitral award comes within the scope of article 1(2) of the Draft Convention, an enforcement court is not allowed to impose other requirements as to jurisdiction in respect of a request for enforcement. Paragraph 1 applies only to awards the enforcement of which is sought under the Draft Convention (see article 7 concerning the more-favourable-right to enforce on another basis).

Paragraph 2 - Procedure for Enforcement

50. Paragraph 2 is also similar to the New York Convention. The Draft Convention does not specify the procedure for enforcement of an arbitral award, which procedure is left to the law of the country where enforcement is sought (subject to the provisions of paragraphs 3 and 4). In light of the grounds for refusal of enforcement set forth in article 5, the procedure implies that the party against whom the award is invoked is afforded the opportunity to present its case. Hence, the procedure is not *ex parte*.
51. The procedure under the law of the forum cannot be such that it affects in some manner the conditions of enforcement mentioned in the Draft Convention. Accordingly, the Draft Convention's conditions for enforcement referred to in paragraph 1 prevail over the domestic rules of procedure of enforcement referred to in paragraph 2 if they conflict with each other.

Paragraph 3 - No Onerous Requirements

52. Paragraph 3 comes in lieu of the second sentence of article III of the New York Convention (“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”).
53. The language is changed from “conditions” in article III of the New York Convention to “requirements on the procedure” in order to make clear the difference between paragraph 1 (conditions for enforcement are exclusively governed by the Convention) and paragraph 2 (procedure for enforcement is governed by the law of the country where enforcement is sought). Furthermore, the comparison with the enforcement procedure of domestic awards is abandoned so that an harmonized “light” international standard for the enforcement procedure can be achieved. The change in

language should also be viewed in light of the requirement of paragraph 4.

Paragraph 4 - Court to Act Expeditiously

54. Paragraph 4 addresses a serious problem under the New York Convention: in a number of Contracting States, the procedure for enforcement of Convention awards is unacceptably slow. The Draft Convention stipulates that the courts must act expeditiously on a request for enforcement. Corollary to that obligation is the obligation of the parties to assist the enforcement court in fulfilling the obligation. It is left to the legislature and judiciary in the Contracting States how the enforcement proceedings can be expedited in terms of procedure.
55. Paragraph 4 prevails over the provisions of paragraph 3 if and to the extent that the procedure under the law of the country where enforcement is sought has the effect of an unacceptably slow enforcement procedure for an award falling under the Draft Convention.

Provisions Not Included in the Draft Convention

56. A counterclaim in enforcement proceedings would in principle be incompatible with the Draft Convention, and in particular paragraphs 3 and 4 of article 3.
57. The Draft Convention does not contain provisions on the periods of limitation for the enforcement of an arbitral award. It is to be noted that these periods vary considerably. For example, the period is 6 months in PR China, 3 years in the United States, 6 years in England, and 20 years in the Netherlands.
58. Nor does the Draft Convention contain provisions on the awarding of post-judgment interest by the enforcement court. That faculty is granted to courts in some Common Law countries, but unknown in many other countries. There is no need to include provisions on interest in the Draft Convention as interest until the date of

payment is usually granted in international awards, provided that a party has specifically sought an award of such interest.

Article 4 – Request for Enforcement

59. Article 4 deals with the conditions that a party seeking enforcement of an award within the scope of the Convention should comply with.

Paragraph 1 - Conditions Entitling Leave for Enforcement

60. Paragraph 1 makes clear that the conditions set forth in article 4 are the only conditions that need to be met. Once the party seeking enforcement of the award has fulfilled them, that party is entitled to a leave for enforcement on the award, unless the party against whom the award is invoked asserts and proves one of the grounds for refusal of enforcement set forth in article 5(3), or the enforcement court finds that enforcement of the award would violate its international public policy under article 5(3)(h) in conjunction with article 5(4).
61. Paragraph 1 further specifies that the presence of grounds for refusal of enforcement can be found by a court “under the conditions of articles 5 and 6,” which include: the principles set out in article 5(1)-(2) (grounds for refusal of enforcement are exclusive and to be applied in manifest cases only); article 5(5) (waiver of right to invoke a ground for refusal of enforcement); and article 6 (setting aside action pending in country of origin, i.e., country where award was made).

Paragraph 2 - Original Award

62. Paragraph 2 requires a party seeking enforcement of an award to submit the original of the award. Paragraph 3 adds that instead of the original of the award, a certified copy can be supplied.
63. Article IV(1)(a) of the New York Convention requires the submission of: “The duly authenticated original award or a duly certified copy thereof.” In practice, a party seeking enforcement

either submits the original of the award, without any authentication, or a certified copy. The text of paragraph 2 of article 4 of the Draft Convention conforms to that practice.

Paragraph 3 - Copy of the Award

64. Paragraph 3 allows a party seeking enforcement to submit a certified copy. Under the New York Convention, most courts accept a certification by variety of authorities (the administrator of a reputed arbitral institution; a notary public; a consular service) and do not impose formalistic requirements. That practice is carried forward in paragraph 3 by providing that the certification should be in such form as directed by the court before which enforcement is sought.

Paragraph 4 - Translation

65. Paragraph 4 is also less formal than article IV(2) of the New York Convention which prescribes a translation that in all cases is certified by “an official or sworn translator or by a diplomatic or consular agent.” A number of courts no longer require the translation of documents if they are familiar with the foreign language in question (notably English). The main reason for this attitude is to avoid unnecessary costs as it is commonly known that the translation of an arbitral award can be expensive. Paragraph 4 reflects that practice.

No Submission of Arbitration Agreement

66. Unlike article IV(1)(b) of the New York Convention, article 4 of the Draft Convention does not oblige the party seeking enforcement of the award to supply (a copy of) the arbitration agreement. The abandonment of this requirement follows the liberalization of the formal requirements regarding the arbitration agreement in the Draft Convention (see § 33 above).
67. An identical amendment was made with respect to the UNCITRAL Model Law in 2006, in which the presentation of a copy of the

arbitration agreement is no longer required under article 35(2) for enforcement of the award irrespective of the country of origin.

68. Moreover, certain courts interpret article IV(1)(b) of the New York Convention as requiring the party seeking enforcement to prove the validity of the arbitration agreement, which is contrary to one of the main features of the Convention that the party against whom the enforcement is sought has the burden to prove the invalidity of the arbitration agreement. That main feature is retained in the Draft Convention (article 5(3)(a)).
69. The arbitration agreement on which the arbitral award is based is almost always referenced in the arbitral award so that no uncertainty will exist regarding the agreement on which the award is based.

Other Provisions Not Included in the Draft Convention

70. The phrase “at the time of the application” as appearing in article IV(1) of the New York Convention has not been retained either. The phrase has led to refusals of enforcement by some courts on formalistic grounds. By omitting the phrase in the Draft Convention, courts are offered more flexibility as to determining the latest moment on which a party can submit the original or certified copy of the arbitral award in the proceedings (or rectify an incorrect filing).

Article 5 – Grounds for Refusal of Enforcement

71. Article 5 is modelled after article V of the New York Convention with a number of clarifications and adjustments.

Paragraph 1 - Grounds Are Limitative

72. Paragraph 1 provides that the grounds for refusal of enforcement are listed limitatively. No other grounds may be applied. In particular, the review of the merits of an arbitral award is not one of the grounds for refusal of enforcement set forth in article 5.

Paragraph 2 - In Manifest Cases Only

73. Paragraph 2 addresses an issue under the New York Convention: does an enforcement court have a residual power to enforce an award notwithstanding the presence of a ground for refusal of enforcement? The answer to the question is given in paragraph 2 by providing that enforcement shall be refused in manifest cases only. In manifest cases, there is no room for the application of a residual power.
74. Paragraph 2 comports with the underlying rationale that enforcement should be refused solely in serious cases. See also article 5(5) (waiver of right to invoke ground for refusal).

Paragraph 3 - Ground for Refusal of Enforcement

75. Paragraphs 2 and 5 of article 5 combined alleviate the need to deal with the question under article V(1) of the New York Convention whether the introductory language of the grounds for refusal of enforcement should be permissive (“enforcement may be refused”) or mandatory (“enforcement shall be refused”). Having both provisions in the Draft Convention, the introductory language of paragraph 3 can be unambiguous by being mandatory.
76. The introductory language of paragraph 3 is also clearer than article V(1) of the New York Convention in respect of the distinction between an assertion and proof for the assertion.

Ground (a) - Lack of Valid Arbitration Agreement

77. Ground (a) of article 5(3) is a simplified version of article V(1)(a) of the New York Convention. First, as the Draft Convention no longer imposes requirements for the form of the arbitration agreement, there is no reference to a corresponding provision in the Convention (comp. article V(1)(a) of the New York Convention: “the agreement referred to in article II”). Second, all questions regarding the validity of the arbitration agreement are deemed to be covered by the expression “no valid arbitration agreement.” Third, the conflict rules are reduced to one simple

rule: the law of the country where the award was made. That country is synonymous to the place of arbitration. See §§ 33-40 above; see also § 66 above.

78. The uniform and simple conflict rule applies also to questions regarding the capacity of the parties to conclude the arbitration agreement. It therefore is not necessary to include in ground (a) an express reference to the incapacity of a party as it is made in Article V(1)(a) of the New York Convention (“under the law applicable, were under some incapacity”).

Ground (b) - Violation of Due Process

79. Ground (b) of article 5(3) is a modernized version of article V(1)(b) of the New York Convention. It embodies the fundamental due process rights as set forth in current arbitration legislation (e.g., UNCITRAL Model Law, article 18, the difference being that “full opportunity” is replaced by “reasonable opportunity” in the Draft Convention).

Ground (c) - Excess of Authority

80. Ground (c) of article 5(3) is a simplified version of article V(1)(c) of the New York Convention, whose language, moreover, is unclear (see § 1(c) above).
81. Ground (c) applies if the arbitral tribunal has granted more than the relief sought (*extra petita*). In that case, enforcement can still be granted for that part of the relief granted that is within the relief sought, provided that the two can be severed.
82. The matter of the relief granted outside the relief sought (*extra petita*) must be distinguished from the relief granted outside the scope of the arbitration agreement but within the relief sought. In such a case, ground (a) of article 5(3) (invalid arbitration agreement) applies, and not ground (c).

Grounds (d) and (e) - Irregular Composition of Arbitral Tribunal or Arbitral Procedure

83. Grounds (d) and (e) of article 5(3) are similar to ground (d) of article V(1) of the New York Convention. For reasons of clarity, they are presented in separate grounds.
84. If and to the extent that there is an agreement of the parties on the composition of the arbitral tribunal or the arbitral procedure, the arbitration law of the country where the award was made (i.e., the place of arbitration) does not come into play insofar as grounds (d) and (e) of article 5(3) of the Draft Convention are concerned. Under the present text of article V(1)(d) of the New York Convention, that rule has given rise to the question whether an agreement of the parties on those matters can also deviate from the mandatory rules of the arbitration law of the place of arbitration (e.g., an agreement on an even number of arbitrators in a country where an uneven number is mandatorily prescribed by the law). The text of article 5(3)(d)-(e) does not allow to refuse enforcement on the basis of such a contravention. In that case, an aggrieved party should seek the setting aside of the award in the country of origin and, if successful, seek the refusal of enforcement on ground (g), i.e., the award has been set aside in the country where it was made. The same solution is offered by the UNCITRAL Model Law (comp. article 34(2)(a)(iv) with article 36(1)(a)(iv)).
85. As mentioned before, the expression “the law of the country where the award was made” can refer to the country where enforcement of the award is sought (see § 18 above).

Ground (f) - Award Not Binding

86. Ground (f) of article 5(3) corresponds to article V(1)(e) of the New York Convention inasmuch as it concerns the expression “the award has not yet become binding on the parties.” The word “binding” had been inserted in the New York Convention in lieu of the word “final” as it appeared in the Geneva Convention of 1927 in order to denote that a leave for enforcement on the award granted by a court in the country of origin is no longer required for

enforcement abroad (the system of the so-called “double exequatur”).

87. The word “binding” in the New York Convention, however, has given rise to differing interpretations. The Draft Convention retains the prevailing interpretation that the word “binding” means that an award is not binding if it is still open to appeal on the merits before an appeal arbitral tribunal or a court in the country of origin. Appeal arbitration is allowed in a number of countries and specifically agreed to, in particular, in commodity arbitration. An appeal on the merits before a court is rare nowadays. The possibility of a setting aside or annulment of an arbitral award in the country of origin is not equivalent to an appeal on the merits. Consequently, in most cases an arbitral award can be enforced under the Draft Convention as soon as it is rendered.

Ground (g) - Award Set Aside in Country of Origin

88. The action to set aside (annul, vacate) an arbitral award is contemplated by virtually all arbitration laws. The competence to consider and decide on the setting aside of an arbitral award belongs exclusively to the courts of the country where the award was made (the country of origin, which is equivalent to the place of arbitration). Setting aside is to be distinguished from enforcement which can be considered and decided by courts of any country insofar as it concerns the courts’ (territorial) jurisdiction.
89. Ground (g) adopts the solution offered by article IX(2) of the European Convention on International Commercial Arbitration of 1961. Accordingly, the refusal of enforcement is limited to cases where the award has been set aside on grounds equivalent to grounds (a) to (e) of article 5(3) of the Draft Convention. Grounds (a) to (e) of article 5(3) correspond in turn to generally recognized grounds for setting aside an arbitral award resulting from international arbitration (see article 34(2)(a) of the UNCITRAL Model Law).

90. The term “equivalent” is chosen since the wording of the grounds for setting aside may differ under domestic law. The expression refers to grounds that may be semantically different but are comparable in content and scope.
91. The solution proposed in ground (g) of article 5(3) of the Draft Convention means, in particular, that a setting aside on (domestic) public policy or parochial grounds in the country of origin is not a ground for refusal of enforcement under the Draft Convention.
92. Ground (g) offers a solution between two extreme positions. On the one hand, article V(1)(e) of the New York Convention provides as a ground for refusal of enforcement an award that has been set aside on any ground in the country of origin. On the other, according to French courts, the setting aside of the award in the country of origin is no ground for refusal of enforcement at all in France. The French courts take that position outside an application of the New York Convention.
93. Ground (g) concerns the situation that the award has been set aside in the country of origin. If an action for setting aside the award is pending in the country of origin, the provisions of article 6 apply.
94. Ground (g) does not include the expression “under the law of which” the award was made as it is the case for article V(1)(e) of the New York Convention. Having regard to the observations made in § 36 above, the reference to the country where the award was made suffices. In practice, parties almost never agree to the applicability of arbitration law other than the law of the place of arbitration.

Ground (h) - Violation of Public Policy

95. Ground (h) corresponds to article V(2) of the New York Convention. As it is the case for the referral to arbitration (see § 43 above), there are three differences. First, the ground is listed as a ground for refusal of enforcement that is to be asserted and proven by the party against whom enforcement of the award is sought (with the possibility of the court relying on it on its own

motion pursuant to paragraph 4). Second, the matter of arbitrability forms part of public policy. Arbitrability, therefore, is not mentioned as a separate ground for refusal of enforcement, but is subsumed under the public policy ground. Third, the public policy is limited to the narrower category of international public policy as developed by courts in many countries in relation to public policy, including arbitrability, under the New York Convention.

Suspension of Award

96. The grounds for refusal of enforcement of an award under the Draft Convention do not include a suspension of the award in the country of origin. Article V(1)(e) of the New York Convention contains such a ground, which has caused uncertainty in practice. Courts interpret the ground to mean that it refers to a suspension of enforcement. The courts are divided whether it contemplates a suspension of enforcement specifically ordered by a court only or also a suspension by operation of law (which occurs in some countries when an application for setting aside is made). As matters regarding enforcement in the country of origin, including suspension of enforcement, are limited to that country, there is no need to address it in the Draft Convention.

Paragraph 4 - Application of Public Policy by Court on Its Own Motion

97. Paragraph 4 is explained in § 45 above.

Paragraph 5 - Waiver of the Right to Invoke a Ground for Refusal of Enforcement

98. With respect to paragraph 5, the New York Convention does not contain an express provision on the waiver of a right to invoke a ground for refusal of enforcement. Some courts have interpreted the Convention as implying a discretionary power not to refuse enforcement if a party can be held to have waived the right to rely on a ground for refusal of enforcement, but this is not an established interpretation. The interpretation is mainly based on the

permissive expression “enforcement may be refused” in the opening proviso in article V(1) of the New York Convention in its English text. The Draft Convention, however, employs the mandatory expression “enforcement shall be refused,” which would no longer permit the interpretation (see § 75 above).

99. For those reasons, the Draft Convention contains express provisions on the waiver of the right to invoke a ground for refusal of enforcement in paragraph 5 of article 5. The provisions are based on article 4 of the UNCITRAL Model Law.
100. The provisions of paragraph 5 apply in the enforcement proceedings under the Draft Convention irrespective of whether or not the arbitration law of the place of arbitration contains similar waiver provisions. In this manner, a better uniform treatment of the enforcement of awards can be achieved.
101. The waiver is limited to grounds (a) to (e) of article 5(3). Grounds (f) and (g) are not matters that can be the subject of a waiver since they occur subsequent to the arbitration (i.e., binding force of the award and setting aside of the award, respectively). Ground (h) is not a matter for a waiver in the arbitration either since it concerns international public policy of the country where the enforcement is sought.

Article 6 – Action for Setting Aside Pending in Country of Origin

102. Article 6 is similar to article VI of the New York Convention.

Paragraph 1 - Adjournment

103. Paragraph 1 codifies the prevailing interpretation by the courts under the New York Convention that an enforcement court has the discretionary power to adjourn the decision on enforcement. In order to preserve a broad power of the enforcement courts in that respect, the Draft Convention does not codify the test regularly used by the enforcement courts when considering an application to

adjourn, which is the likelihood of success of the setting aside action in the country of origin.

104. It is not deemed necessary to specify in the text of paragraph 1 that the expression “pending” refers not only to a pending setting aside action in first instance, but also to an appeal, including the period for lodging the appeal, unless a party has validly renounced the appeal.

Paragraph 2 - Security

105. Paragraph 2 expands the terminal proviso in Article VI of the New York Convention (“and may also, on the application of the party claiming enforcement, order the other party to give suitable security”).
106. If the decision on enforcement is adjourned, the enforcement court may, at the request of the party seeking enforcement, order the party against whom enforcement is sought to provide suitable security for the event that the application for setting aside is rejected in the country of origin.
107. On the other hand, if the decision on enforcement is not adjourned, the enforcement court may, at the request of the party against whom enforcement is sought, order the party seeking enforcement to provide suitable security for the event that, subsequent to enforcement, the award is set aside in the country of origin. The justification for the latter case is that the party against whom the award is enforced should be able to recover what it has paid to the other party in the enforcement action. However, courts will likely exercise more restraint in ordering security to be provided by a party seeking enforcement of an award since the Draft Convention’s goal is to facilitate enforcement.
108. The form of “suitable security” is also left to the discretion of the enforcement court. It is customary in many countries to order the relevant party to provide an appropriate bank guarantee or to pay the amount in question into an escrow account.

Article 7 – More-Favourable-Right

109. Article 7 contains a more-favourable-right provision that is based on article VII(1) of the New York Convention. It forms part of the Draft Convention’s goal to facilitate enforcement in as large a number of cases as possible. The Draft Convention is conceived as imposing minimum requirements only and a Contracting State may be less demanding than the Convention by offering a more liberal legal regime.
110. The text of article VII(1) of the New York Convention applies to the enforcement of the arbitral award only and does not mention the arbitration agreement. UNCITRAL suggests in its “Recommendation regarding the interpretation” of 2006 that article VII(1) “should be applied to allow any interested party to avail itself of the 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.” That interpretation is codified in Article 7 which expressly refers to both the arbitration agreement and the arbitral award.
111. Article VII(1) of the New York Convention is drafted in an indirect manner: the provisions of the New York Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where the award is relied upon.” Article 7 is clearer by referring to enforcement on a legal basis other than the Draft Convention in the country where the agreement or award is relied upon.
112. The “legal basis” mentioned in article 7 can be another treaty, domestic statute law or case law concerning the enforcement of arbitration agreements or arbitral awards in international arbitration. Such law and treaties may be applicable in particular to the referral of a dispute to international arbitration outside the court’s jurisdiction and the enforcement of arbitral awards rendered abroad in an international arbitration.

113. Article 7 implies a fork-in-the-road with respect to the legal basis on which enforcement is sought. If the party seeking enforcement has elected another legal basis for enforcement, that basis applies to the exclusion of the Convention. If the legal basis were a combination of the Draft Convention and another legal basis, a party seeking enforcement could select a combination that deprives the other party of its rights to defences under the Draft Convention. That would be inconsistent with the balanced scheme for the defences offered by the Draft Convention, and, hence, constitute a violation of due process.
114. Conversely, a party against whom enforcement is sought is not allowed to rely on another basis for its defences to enforcement, unless and until the party seeking enforcement has elected another legal basis. It would be incompatible with the Draft Convention if a party seeks enforcement on the basis of the Convention, but the other party is allowed to invoke in whole or in part defences originating from another legal basis.
115. In practice, however, it is expected that in almost all cases the party seeking enforcement will rely on the legal regime of the Draft Convention since it is rather favourable to enforcement.
116. Article VII(1) of the New York Convention also contains a so-called “compatibility provision,” i.e., the New York Convention does not affect the validity of other multilateral or bilateral treaties concerning enforcement. The compatibility provision is one of the provisions that is possibly to be inserted as part of the General Clauses since it is a typical treaty provision.

Article 8 – General Clauses

117. The General Clauses are to be considered and possibly included in the Draft Convention. They include amongst others:
- (a) Designation of Competent Enforcement Court
 - (b) Interpretation

- (c) Relationship with the New York Convention
- (d) References to the New York Convention in other treaties
- (e) Compatibility with other treaties
- (f) [No] reservations
- (g) General reciprocity (see also § 21 above)
- (h) Applicability of the Draft Convention to territories and in federal states
- (i) Signature, ratification and accession, and deposit
- (j) Entry into force
- (k) Retroactive [in]applicability; transitional clauses
- (l) Denunciation
- (m) Notifications
- (n) Language of authentic texts.