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## Settlement of commercial disputes

### Preparation of uniform provisions on written form for arbitration agreements

### Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

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\* The late submission of this document is due to the need to accommodate the completion of consultations.



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## Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460; this document is available, along with all other documents of UNCITRAL listed hereafter, on the UNCITRAL website at [www.uncitral.org](http://www.uncitral.org)). One of the topics raised for consideration was the extent to which modernization of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as “the New York Convention”) was needed in respect of the formation of the arbitration agreement.<sup>1</sup> The Commission decided that future work on article II(2)<sup>2</sup> (hereafter referred to as “article II(2)”) of the New York Convention which required that the arbitration agreement be in written form “in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams” needed to be modernized.<sup>3</sup> The Commission felt that work might be needed on two general issues addressed in the note by the Secretariat (A/CN.9/460, paras. 22-31), namely the issue of the written form requirement and its implications with respect to modern means of communication and electronic commerce, and the issue of consent by the parties to an arbitration agreement where the arbitration agreement was not embodied in an exchange of letters or telegrams.<sup>4</sup> As well, the Commission pointed out that special attention might need to be given to specific fact situations that posed serious problems under the New York Convention, including tacit or oral acceptance of a written purchase order or a written sales confirmation, an orally concluded contract referring to written general conditions or certain brokers’ notes and other instruments or contracts transferring rights or obligations to non-signing third parties.<sup>5</sup>

2. Various views were expressed as to the means through which modernization of the New York Convention could be sought,<sup>6</sup> including: by way of additional protocol;<sup>7</sup> indirectly revising article II(2) by adopting model legislation to supersede

<sup>1</sup> *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17, A/54/17*, para. 344.

<sup>2</sup> Article II of the New York Convention reads as follows:

“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.”

<sup>3</sup> *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17, A/54/17*, para. 344.

<sup>4</sup> *Ibid.*, para. 345.

<sup>5</sup> *Ibid.*, para. 346.

<sup>6</sup> *Ibid.*, paras. 347-349.

<sup>7</sup> *Ibid.*, para. 347; some concern was expressed as to the status of such a protocol and the possibility that any attempt to revise the New York Convention might jeopardize the results achieved to date by the New York Convention. In response to that concern, it was pointed out that the very success of the New York Convention (...) should make it possible for UNCITRAL

that article in reliance of the more favourable law provision of article VII(1)<sup>8</sup> (hereafter referred to as “article VII(1)”) of the New York Convention;<sup>9</sup> additionally to such model legislation, by preparing guidelines or other non-binding materials to guide State courts in the application of the New York Convention;<sup>10</sup> or by drafting a new convention separate from the New York Convention to deal with those situations which arose outside the sphere of application of the New York Convention, including (but not necessarily limited to) situations where the arbitration agreement failed to meet the form requirement established in article II(2).<sup>11</sup>

3. The Commission referred the issues to the Working Group on Arbitration,<sup>12</sup> which studied the issues at its thirty-second session (Vienna, 20-31 March 2000).

4. At its thirty-second session, the Working Group discussed possible alternative ways of achieving a broader interpretation of article II(2), as had been outlined by the Commission, by either: (a) adopting a declaration, resolution or statement addressing the interpretation of the New York Convention and providing that, for the avoidance of doubt, article II(2) was intended to cover certain situations or to have a certain effect; or (b) encouraging a broader interpretation of the New York Convention by following the approach of some State courts of interpreting

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to undertake a limited overhaul of the text if such work was needed to adapt its provisions to changing business realities.

<sup>8</sup> Article VII of the New York Convention reads as follows:

*“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.”*

<sup>9</sup> *Ibid.*, para. 348; it was noted that such a solution could be pursued only if article II(2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing, but would instead be understood as establishing the maximum requirement of form. It was also suggested that any model legislation that might be prepared with respect to the formation of the arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) to facilitate interpretation by reference to internationally accepted principles (see as well paras. 26 to 30 and footnote 59 of this document).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 349; whilst some support was expressed in favour of this suggestion, another view was that experience indicated that the process of adopting and securing widespread ratification of a new convention could take many years and that, meanwhile, there would be an undesirable lack of uniformity. It was stated that the suggested approach might be particularly suited to deal with a number of specific fact situations that posed serious problems under the New York Convention (see para. 1 of this document). However, with respect to a number of these situations (for example, transfer of rights or obligations to non-signing third parties), it was widely felt that the issues at stake went to general questions regarding the substance and validity of the underlying transaction. Accordingly, doubts were expressed as to whether it would be desirable and feasible to attempt to deal with those issues in the context of a set of provisions geared primarily to the formation of the arbitration agreement.

<sup>12</sup> *Ibid.*, paras. 344-350 and para. 380.

article II(2) in the light of the UNCITRAL Model Law on International Commercial Arbitration<sup>13</sup> (hereafter “the UNCITRAL Arbitration Model Law”); or (c) preparing practice guidelines or notes which could set out the use of article 7 of the UNCITRAL Arbitration Model Law as an interpretation tool to clarify the application of article II(2), along the lines discussed in paragraphs 33 and 34 of document A/CN.9/WG.II/WP.108/Add.1.

5. The view that prevailed at the thirty-second session of the Working Group was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of article II(2) would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement should be further studied to determine the optimal approach.<sup>14</sup>

6. At its thirty-third (Vienna, 20 November-1 December 2000) and thirty-fourth (New York, 21 May-1 June 2001) sessions, the Working Group discussed preliminary drafts of an interpretative declaration relating to article II(2).<sup>15</sup>

7. At its thirty-sixth session (New York, 4-8 March 2002), the Working Group had before it the text of the draft declaration as adopted at its thirty-fourth session<sup>16</sup> and reassessed the various options available to deal with difficulties that had arisen in the practical application of article II(2), before considering the revised draft interpretative declaration.

8. The Working Group considered at length the various arguments that were put forward in support of proposals to amend the New York Convention and the adoption of the interpretative declaration.<sup>17</sup> The Working Group acknowledged that it could not, at that stage, reach a consensus on whether to prepare an amending protocol or an interpretative declaration to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. In the meantime, the Working Group agreed that it would be useful to offer guidance on interpretation and application of the form requirement in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft text revising article 7 of the UNCITRAL Arbitration Model Law, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a “friendly bridge” between the new provisions of the UNCITRAL Arbitration Model Law and the New York Convention, pending a

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<sup>13</sup> A/CN.9/WG.II/WP.108/Add.1, para. 36, and its footnote 9.

<sup>14</sup> A/CN.9/468, paras. 88-99.

<sup>15</sup> A/CN.9/485, paras. 60-77 and A/CN.9/487, paras. 42-63, respectively; the latest draft declaration considered by the Working Group may be found at: A/CN.9/508, para. 41.

<sup>16</sup> A/CN.9/508, para. 41.

<sup>17</sup> *Ibid.*, paras. 42-48.

final decision by the Working Group on how to best deal with the application of article II(2).<sup>18</sup>

9. While no objections were raised to that course of action, the view was expressed that the mere fact of attempting to address the matter in a guide to enactment of the new draft article 7 of the UNCITRAL Arbitration Model Law could prejudice the consideration of a possible amending protocol to the New York Convention. Raising issues related to the New York Convention in a guide to enactment, i.e., an ancillary text of questionable legal value, appended to a new provision of the UNCITRAL Arbitration Model Law, which itself was not a mandatory instrument, was said to be a counterproductive exercise. It was stated that it would be preferable not to attempt to address in any way the issues raised by the interpretation of the form requirement under the New York Convention. The Working Group took note of those comments.<sup>19</sup>

10. Exploring how courts have defined what constitutes an agreement in writing in the New York Convention may assist in identifying divergent court interpretations regarding the form of an arbitration agreement. This note considers how State courts have interpreted the form requirements in article II(2) and explores the extent to which article VII(1) of the New York Convention might assist in modernising the form requirement for arbitration agreements.

## **I. Interpretation of article II(2) of the New York Convention by State courts**

### **A. Interpretation of the terms “signature”, “exchange of documents”**

#### *General remark*

11. Article II(2) provides a definition of a term included in article II(1) of the New York Convention, which requires that Contracting States recognize “an agreement in writing”. Article II(2) provides for two possible ways of satisfying the requirement of “writing”, also known as the “form requirement”. The first is where an arbitration clause in a contract or an arbitration agreement is signed by the parties. The second is where an arbitration clause in a contract or an arbitration agreement is contained in an exchange of letters or telegrams. By requiring either a signature or an exchange of documents, the form requirement ensures that the parties’ assent to arbitration is expressly recorded.

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<sup>18</sup> Ibid., para. 49.

<sup>19</sup> Ibid., para. 50.

*Signature or exchange of documents strictly required*

12. In a number of cases, State courts strictly applied the requirements defined under article II(2) and granted enforcement of arbitral awards only when either the contract containing the arbitration clause or the arbitration agreement was signed by the parties<sup>20</sup> or was contained in an exchange of letters or telegrams.<sup>21</sup> In a series of cases, State courts strictly required express acceptance, either by signature or exchange of documents by both parties.<sup>22</sup> However, the principle did not appear to require that the arbitration clause be separately approved in writing<sup>23</sup> or be

<sup>20</sup> Norway, Halogaland Court of Appeal, 16 August 1999, (Stockholm Arbitration Report, (1999), Vol 2, at 121): *the court considered that a contract concluded by an exchange of e-mails by reference to the GENCON charter party did not constitute an arbitration agreement in writing in accordance to article II(2) of the New York Convention. The court concluded that the e-mails exchanged together with the copy of the GENCON charter, which was not signed, failed to meet the "basic requirements of legal protection set up by the Convention"*; The Netherlands, Court of First Instance of Dordrecht, North American Soccer League Marketing, Inc. (USA) v. Admiral International Marketing and Trading BV (Netherlands) and Frisol Eurosport BV (Netherlands), 18 August 1982, (Yearbook Commercial Arbitration X (1985), p. 490); Germany, Brandenburg Court of Appeal, 13 June 2002, (No. 8, Sch 2/01); Spain, Supreme Court, Delta Cereales España SL (Spain) v. Barredo Hermanos SA, 6 October 1998, (Yearbook Commercial Arbitration XXVI (2001), p. 854): *the enforcement of the arbitral award was not granted as the document supplied by the parties, containing the arbitration clause, was not signed.*

<sup>21</sup> The Netherlands, Court of Appeal, Hertogenbosh, Sneek Hardhout Import BV (Netherlands) v. Karl Schlueter KG (GmbH & Co) (Germany), 14 July 1995, (Yearbook Commercial Arbitration XXI (1996), p. 643): *an arbitration agreement, contained in general terms of contract, signed by one party and faxed to the other party, who signed and faxed the document back, was held to be valid*; Austria, Supreme Court, 22 May 1991, (OGH 22.5.1991, 3 Ob 73/91, SZ 64/61): *in relation to article V(1), a court found that enforcement might (upon application of the party opposing enforcement) be denied if the form requirements "exclusively and exhaustively contained in article II(2)" were not met*; United States, District Court for the Southern District of New York, Sen Mar, Inc. v. Tiger Petroleum Corporation (1991) (774 F Supp. 879): *the court decided that an arbitration clause was enforceable under the New York Convention only if it was found in a signed written document or an exchange of letters; there was no enforceable agreement in that case because the arbitration agreement was contained only in a telex that was objected to in its entirety by the other party.*

<sup>22</sup> United States, District Court for the Western District of Washington, Richard Bothell and Justin Bothell, d/b/a Atlas Technologies and Atlas Bimetals Labs Inc. v. Hitachi Zosen Corp et al, 19 May 2000 (97 F Supp 2d 1048): *the court considered that there was no indication on the face of the purchase orders or any other document exchanged between the parties of an agreement to arbitrate.*

<sup>23</sup> Italy, Supreme Court, Krauss Maffei Verfahrenstechnik GmbH (Germany) v. Bristol Myers Squibb (Italy), 10 March 2000, (Yearbook Commercial Arbitration XXVI (2001), p. 816): *the court declared that it was not necessary for the arbitration clause to be separately approved in writing but that such clause was valid when contained in a document signed by both contracting parties: "once it is clear that the parties must sign the arbitration clause and that their unequivocal intention to refer the dispute to arbitrators must appear unambiguously, it follows that an arbitration clause is not valid when it is contained (...) in the documents (...) signed by the foreign seller, and it does not appear in the document (...) by which the buyer accepted the seller's offer".*

specifically discussed by the parties.<sup>24</sup> At least one court concluded that the form requirement must not be derogated from, even in situations where a finding that an arbitration agreement did not satisfy the form requirement of article II(2) would be contrary to principles of good faith.<sup>25</sup> These requirements prevailed over more or less demanding requirements of national laws (see below, paragraph 32).<sup>26</sup>

*Combination of alternative form requirements*

13. Besides situations where both parties had signed the same document,<sup>27</sup> State courts have also concluded there to be a signature where there was a combination of alternative form requirements, recognizing the validity of an arbitration agreement when both parties had fulfilled either the signature or the exchange requirement but not to be met where only one party complied with the writing requirement.<sup>28</sup> Based on the notion that there must be a mutual agreement to arbitrate, either by signature or by exchange of documents, courts generally ruled out oral arbitration agreements,<sup>29</sup> even if confirmed by the other party in writing, or even if there was

<sup>24</sup> Korea, Supreme Court, Kukje Sangsa Co Ltd (Korea) v. GKN International Trading (London) Ltd (UK), 10 April 1990, (Yearbook Commercial Arbitration XVII (1992), p. 568): *the court held that the form requirement of article II(2) was fulfilled when a sales contract was concluded by accepting purchase orders in accordance with the terms as stated therein including an arbitration clause; the court denied the argument of the defendant that the arbitration clause was not accepted because it was printed in smaller letters than the other terms and conditions and was not discussed by the parties.*

<sup>25</sup> Italy, Supreme Court, Robobar Limited (UK) v. Finncold sas (Italy) 28 October 1993, (Yearbook Commercial Arbitration XX (1995), p. 739): *the argument that it would be contrary to good faith to contest the validity of the arbitration clause was rebutted on the basis that formal requirements could not be derogated from.*

<sup>26</sup> Austria, Supreme Court, 22 May 1991, (OGH 22.5.1991, 3 Ob 73/91, SZ 64/61): *in relation to article V(1), a court found that enforcement might (upon application of the party opposing enforcement) be denied if the writing requirements which were "exclusively and exhaustively contained in article II(2)" were not met; Germany, OLG Schleswig, 30 March 2000, (16 SchH 05/99): the court stated that article II(2) superseded any national law with respect to formal requirements and the principle of autonomous interpretation meant that national law could not be applied to the interpretation and scope of the arbitration agreement; Switzerland, Supreme Court, Insurance Company (Sweden) v. Reinsurance Company (Switzerland), 21 March 1995 (Yearbook Commercial Arbitration XXII (1997), p. 800): *the court stated that formal requirements were to be exclusively determined by article II(2), which should be interpreted independently, without assistance of national law; Germany, OLG Koeln, 22 June 1999, (9 Sch 08/99): the court held that the form requirement of article II(2) was fulfilled when parties signed a contract containing an arbitration clause.**

<sup>27</sup> Austria, Supreme Court (OGH), 21 February 1978, 3 Ob 120/77, SZ 51/18 (Yearbook Commercial Arbitration X (1985), p. 418).

<sup>28</sup> Austria, Supreme Court, 7 November 1979, (OGH 7.11.1979, 3 Ob 144/79, SZ 52/160); Italy, Supreme Court, Universal Peace Shipping Enterprises SA (Panama) v. Montedipe SpA (Italy), 28 March 1991 (Yearbook Commercial Arbitration XVII (1992) p. 562): *the court held that an oral contract for sale and a bill of lading which included an arbitration clause sent by one party but not signed did not satisfy the form requirement of article II(2) of the New York Convention.*

<sup>29</sup> Italy, Supreme Court, Marc Rich & Co AG v. Societa Italiana Impianti SpA, 25 January 1991, (Yearbook Commercial Arbitration XVII (1992), p. 554 and decision of the Court of Justice of the European Community, dated 25 July 1991, p. 233): *the contract was concluded by an exchange of telexes; since a later telex by Marc Rich stating further terms of the contract including an arbitration clause was not replied to, and accepted by, Impianti, the court found that there was no proof of a mutual written agreement to arbitrate and thus the Italian courts had jurisdiction to hear the case; the Court held that "as far as arbitration clauses for foreign*



subsequent appearance by both parties before the arbitrator,<sup>30</sup> tacit acceptance<sup>31</sup> or performance of the contract.<sup>32</sup> As well, it did not allow for recognition of an arbitration agreement by regular prior use of general conditions of trade.<sup>33</sup>

*Diverging interpretations of the signature requirement*

14. The requirement of signatures under article II(2) has not been interpreted consistently by State courts. Diverging interpretations in that respect may be found in decisions of State courts in the United States, which considered, in certain cases, that the requirement for signature or exchange, contained in article II(2), applied only to an arbitration agreement as distinct from the contract and not to an arbitration clause in a contract.<sup>34</sup> According to that interpretation, article II(2) would consist of two separate regimes, one being “an arbitration clause in a

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*arbitration are concerned, the written form is always required under the New York Convention.”*

<sup>30</sup> Germany, OLG Duesseldorf (1971) (Yearbook Commercial Arbitration II (1977), p. 237).

<sup>31</sup> Germany, OLG Rostock, 22 November 2001, (1 Sch 03/2000); Italy, Supreme Court, Marc Rich & Co AG v. Societa Italiana Impianti SpA, 25 January 1991, (Yearbook Commercial Arbitration XVII (1992), p. 554).

<sup>32</sup> Italy, Supreme Court, Robobar Limited (UK) v. Finncold sas (Italy) 28 October 1993, (Yearbook Commercial Arbitration XX (1995), p. 739).

<sup>33</sup> The Netherlands, Court of Appeal at The Hague, James Allen (Ireland) Ltd v. Marea Producten B.V. (Netherlands), 17 February 1984, (Yearbook Commercial Arbitration X (1985), p. 485): *the parties had conducted at least 25 prior transactions in accordance with standard conditions which included an arbitration clause; the last transaction, subject to the dispute, did not refer to those standard conditions and the court decided that regular prior use of general conditions of trade (containing an arbitration clause) could not constitute an enforceable arbitration agreement in a case where those general conditions had not specifically been referred to; the court stated that the requirement of the “agreement in writing” referred to in the New York Convention foreclosed the possibility of invoking such continuous use.*

<sup>34</sup> United States, Court of Appeals for the fifth Circuit, Sphere Drake Insurance plc v. Marine Towing, Inc., 23 March 1994, (16 F 3d 666, Yearbook Commercial Arbitration XX (1995), p. 937): *that case involved an insurance contract that was not signed by the insured party. The insured contended that because it did not sign the contract, there was no “agreement in writing” within the meaning of the New York Convention; to be enforceable under the New York Convention, either the contract containing the arbitration clause had to be signed by the parties, or the parties had to demonstrate their assent thereto by an exchange of correspondence. The court rejected that interpretation and ruled that the New York Convention’s definition of “agreement in writing” included either (1) an arbitration clause in a contract or (2) an arbitration agreement (a) signed by the parties or (b) contained in an exchange of letters or telegrams. In reaching its decision, the court cited, but declined to follow the decision from the US District Court for the Southern District of New York, Sen Mar, Inc v. Tiger Petroleum Corporation (1991)(774 F Supp. 879), which had taken a contrary view of the interpretation of article II(2).*

*The Sphere Drake (1994) interpretation was followed in Stony Brook Marine Transportation Corporation v. Leslie Wilton, Compagnie d’Assurances Maritimes Aeriennes et Terrestres and Lev A. Osman (1996) 94 CV 5880 (JS) involving an arbitration clause contained in an insurance certificate issued after the loss occurred and unsigned by the insured, but referred to in a written order slip prepared by the insured’s agent and signed by the underwriter. The Sphere Drake (1994) interpretation apparently also influenced the US District Court of Minnesota in Polytek Engineering v. Jacobson Companies and Jacobson Inc. (1997) 984 F Supp 1238 (although it did not explicitly mention the case, it came to the conclusion that an unsigned purchase order that twice referred to an attached contract containing an arbitration clause, which was partially performed by the party trying to avoid arbitration, fulfilled the writing requirement).*

contract” and the other “an arbitration agreement (a) signed by the parties or (b) contained in an exchange of letters or telegrams”. That reasoning had been subsequently followed in a first instance judgement, where the court considered that unsigned purchase orders represented an “arbitral clause in a contract” and as such, were not caught by the requirements of signature or exchange.<sup>35</sup> However, it should be noted that that interpretation was reversed on appeal,<sup>36</sup> and had not been widely followed in the United States, or by courts of other States. In other cases, State courts affirmed that the definition of “agreement in writing” required that such an agreement, whether it was an arbitration clause or agreement contained in a contract, be signed by the parties or contained in a series of letters or telegrams exchanged by the parties.<sup>37</sup>

*Diverging interpretations of the exchange of documents requirement*

15. The requirement of exchange of documents between the parties has not been interpreted consistently by State courts. Certain State courts interpreted strictly the word “exchange” to mean that the document containing the arbitration clause or agreement should be returned by the party to which it was sent to the party, which sent it initially.<sup>38</sup> According to that trend of case law, the requirement that there be an “exchange”, and therefore a written offer of a contract containing an arbitration clause, or of an arbitration agreement and a written acceptance excluded a wide range of fact situations.<sup>39</sup> In other cases, a reference to the arbitration clause or agreement in subsequent correspondence emanating from the party to which the

<sup>35</sup> United States, District Court, Kahn Lucas Lancaster, Inc. v. Lark International Ltd (11 August 1997) (No. 95 CIV 10506): *the court followed Sphere Drake Insurance plc v. Marine Towing, Inc. and declined to follow Sen Mar Inc. v. Tiger Petroleum Corp. : the case involved purchase orders performed by the defendant but not signed by it; the court considered that “an arbitral clause in a contract is sufficient to implicate the New York Convention; an ‘agreement in writing’ does not necessarily have to be either signed by the parties or contained in an exchange of letters or telegrams, as long as the court is otherwise able to find an arbitral clause in a contract.” On appeal (see footnote 36 below), that interpretation of article II(2) was rejected.*

<sup>36</sup> United States, Court of Appeals for the second Circuit, Kahn Lucas Lancaster, Inc. v. Lark International Ltd, 29 July 1999 (186 F 3d 210): *the court stated that the definition of “agreement in writing” required that such an agreement, whether it was an arbitration agreement or an arbitration clause in a contract, be signed by the parties or contained in a series of letters or telegrams exchanged by the parties.*

<sup>37</sup> *The reasoning in the Kahn Lucas appeal case has been followed in subsequent cases by the US District Court of Connecticut, Coutinho Caro & Co USA Inc v. Marcus Trading Inc., 14 March 2000, Judy Tien Lo v. Aetna International (2000) WL 565465 and the US District Court for the Southern District of California, in Chloe Z Fishing Co., Inc v. Odyssey Re (London) Ltd, 29 April 2000, 109 F Supp 2d 1236, where the court noted the different interpretations and expressed its preference for the Kahn Lucas (1999) interpretation (as opposed to Sphere Drake (1994)), noting however that the facts of Kahn Lucas could not be transposed to the current case. A number of other cases have expressly followed the Kahn Lucas interpretation: US District Court for the Western District of Washington, Bothell and Bothell v. Hitachi Rosen Corporation, 19 May 2000, (97 F Supp 2d 1048), where the court denied a motion to stay legal proceedings on the basis of a very restrictive interpretation of exchange; the reasoning in the Kahn Lucas appeal case has been mentioned as well in the case from United Kingdom, Queen’s Bench Division, Commercial Court, XL Insurance Ltd v. Owens Corning, 28 July 2000, 2 Lloyd’s Rep 500, (Yearbook Commercial Arbitration XXVI (2001) p. 869).*

<sup>38</sup> Italy, Court of Appeal of Naples (1974) (Yearbook Commercial Arbitration I, (1976) Case No. 11, p. 193).

<sup>39</sup> A/CN.9/WG.II/WP.108/Add.1, para. 12.

arbitration clause or agreement was sent was considered as sufficient to meet the form requirement of article II(2).<sup>40</sup>

## **B. Application of other legal principles where the form requirements are otherwise not satisfied**

### *Reliance on the conduct of the parties (“estoppel”)*

16. The question arose whether, in the case where a party acted specifically in respect of an arbitration agreement, without objection, that party was subsequently barred, for reasons of good faith, from invoking non-compliance of the arbitration agreement with the written form, as required by article II(2). No leading approach is evident from the case law.

17. In a number of decisions, State courts have recognised an arbitration agreement in the absence of writing, based on the conduct of the parties, either by reference to domestic contract law principles,<sup>41</sup> or by considering that the permissive language in article V(1) “may be refused” allowed the courts some flexibility in the determination of whether an arbitration agreement has been validly concluded.<sup>42</sup> As well, a court found that the lack of written form was cured by participation in arbitration without objection.<sup>43</sup> The limits of the application of this principle were however less clear with some court decisions suggesting that the acts of performance must refer directly to the arbitration agreement or allow a court to deduce that a party wished to accept the arbitration agreement.<sup>44</sup>

<sup>40</sup> Italy, Court of Appeal of Florence (1977), (Yearbook Commercial Arbitration IV (1979), Case No. 29, p. 289).

<sup>41</sup> United States, Court of Appeals, Seventh Circuit, Mary D. Slaney (US) v. International Amateur Athletic Federation (Monaco), 27 March 2001, (Yearbook Commercial Arbitration XXVI (2001), p. 1091): *the court stated that non-signatories to an arbitration agreement might nevertheless be bound according to ordinary principles of contract and agency, including estoppel.*

<sup>42</sup> Hong Kong, High Court, China Nanhai Oil Joint Service Corporation Shenzhen Branch (PR China) v. Gee Tai Holdings Co Ltd, 13 July 1994, (Yearbook Commercial Arbitration XX (1995), p. 671): *the Supreme Court analysed the doctrine of estoppel and held that the doctrine was inherent to the New York Convention.*

<sup>43</sup> Greece, Court of Appeal of Athens, Greek Company v. FR German Company, Decision No. 4458, (1984) (Yearbook Commercial Arbitration XIV (1989), p. 638): *the lack of written form was cured by participation in arbitration without objection; to reach that conclusion, the court applied the domestic law governing the arbitration proceedings (without referring to article VII(1) of the New York Convention).*

<sup>44</sup> Spain, Supreme Court, Delta Cereales Espana SL (Spain) v. Barredo Hermanos SA (Spain), 6 October 1998, (Yearbook Commercial Arbitration XXVI (2001), p. 854): *“the court’s interpretation aims at ascertaining, from the communications and acts of the parties, whether they wished to include the arbitral clause in their contract or, in general, to submit their dispute to arbitration”; however, in that case, neither the documents supplied by Delta nor by Barredo contained an arbitration clause satisfying the requirements of article II(2) since they were not signed by the other party; Switzerland, Court of Appeal, Geneva, C Import and Export Company (PR China) v. G SA (Switzerland), 11 December 1997, (Yearbook Commercial Arbitration XXIII (1998), p. 764): *the court stated that the New York Convention allowed, apart from written and signed acts, those acts which had a less strict form but were accepted by the trade usages of the parties.**

*Incorporation of arbitration clause or agreement by mere reference or usual commercial relations*

18. The New York Convention did not address the issue of recognition of an arbitration clause or agreement that, whilst not satisfying the form requirement, was found to be incorporated into a contract or exchange of letters or telegrams by mere reference.

19. In respect of incorporation by reference, State courts found that article II(2) required that the arbitration agreement must be referred to in the main contract,<sup>45</sup> unless the parties had an ongoing business relation.<sup>46</sup> In the case of an ongoing relation, an arbitration clause was considered to be incorporated by reference even if the other party did not receive the actual term on the basis that the party was presumed to have knowledge of the arbitration clause.<sup>47</sup>

20. A number of cases have taken an even broader approach finding that incorporation by reference might be found even if the arbitration clause was not in the main contract, provided there was some written reference to the document containing that clause and that the party against whom it was invoked was aware of the contents of the document when concluding the contract and accepted the incorporation of the document in the contract.<sup>48</sup> In another case, noting that the New

<sup>45</sup> Italy, Supreme Court, Molini Lo Presti SpA (Italy) v. Continentale Italiana SpA (Italy), 2 March 1996, (Yearbook Commercial Arbitration XXII (1997), p. 734): *the reference in a contract to an arbitration clause contained in a standard agreement was considered sufficient to incorporate the arbitration clause per relationem.*

<sup>46</sup> France, Supreme Court, Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d'Activités Pétrolières ETAP (Tunisia), 9 November 1993 (Yearbook Commercial Arbitration XX (1995), p. 660): *exchange of telexes, which referred to "Standard Industry Practice", "the standard contract" and "the practice in International Trade" established proof of consent to arbitration;* Germany, The BayObLG, 17 September 1998 (4 Z Sch 01/98): *a contract of sale signed by the parties, which expressly incorporated "the terms and conditions printed on the other side", including an arbitration clause, satisfied the form requirement of article II(2) since it did not refer to a separate document.*

<sup>47</sup> Germany, Schleswig, 30 March 2000, 16 SchH 05/99: *a contract, which referred to terms and conditions on reverse side of standard contract form, used by the parties for several years, was found to satisfy the written form notwithstanding that the reverse page of the contract never reached the other party;* Switzerland, Federal Supreme Court, Tradax Export S.A. (Panama) v. Amoco Iran Oil Company (US), 7 February 1984, (Yearbook Commercial Arbitration XI (1986), p. 532): *the Court stated that article II(2) was silent on the question of incorporation by reference and that there was no harmonised solutions to that question; a charter party contained a valid arbitration clause and the question was whether the arbitration clause was also incorporated by the reference to the charter party in the bill of lading; in the case at hand, well-established commercial companies were involved, which were familiar with the use of standard terms of charter parties; thus, the court came to the conclusion that, since the bill of lading referred to the totality of the clauses and conditions contained in the charter party to which also the arbitration clause belonged and due to the experience of the parties involved, it could be assumed that the defendant (belonging to the Amoco group) knew or should have known the respective aspects of the carriage contract; the court held that the arbitration clause was therefore valid.*

<sup>48</sup> France, Supreme Court, Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d'Activités Pétrolières ETAP (Tunisia), 11 October 1989, (Yearbook Commercial Arbitration XV (1990), p. 447): *the court stated that although the New York Convention did not exclude the recognition of an arbitration agreement incorporated by reference, article II(2) required "that the existence of the clause be mentioned in the main contract, unless there exists between the parties a*

New York Convention reinforced a strong policy in favour of arbitration over litigation and that this policy applied with special force in the field of international commerce, the court stated that, despite the fact that the parties did not sign an arbitration agreement, the incorporation of the arbitration clause by reference in letters exchanged between the parties was sufficient.<sup>49</sup>

21. In other cases, State courts held that the reference need not to relate specifically to the arbitration clause but rather to the contract as a whole provided that the parties had the possibility to examine the general terms, i.e. when they were printed on the back side or were known due to the regular business contact between the parties or where the parties should have known about the document due to trade usages.<sup>50</sup> In some cases, incorporation by reference had not been accepted because the reference was not explicit or was ambiguous according to usual practice of trade. According to other cases, if an arbitration agreement was incorporated in a document and if it was proven that the parties were bound by a contract, which

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*longstanding business relationship which insures that they are properly aware of the written conditions normally governing their commercial relationships.”* France, Supreme Court, Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d’Activités Pétrolières ETAP (Tunisia), 9 November 1993, (Yearbook Commercial Arbitration XX (1995), p. 660): *the court, without referring to the New York Convention, stated that: “in the field of international arbitration, an arbitration clause, if not mentioned in the main contract, may be validly stipulated by written reference to a document which contains it, for instance, general conditions or a standard contract, when the party against which the clause is invoked was aware of the contents of this document at the moment of concluding the contract and when it has, albeit tacitly, accepted the incorporation of the document in the contract”*; Australia, Supreme Court of Queensland, Court of Appeal Division, 27 June 2000, Austin John Montague v. Commonwealth Development Corporation (UK), Appeal No. 8159, (Yearbook Commercial Arbitration XXVI (2001), p. 744): *the Supreme Court of Queensland found that signature of terms of reference as part of ICC arbitration proceedings amounted to an agreement in writing*; United States, District Court for the Eastern District of New York, USA, Stony Brook Marine Transportation Corp v. Leslie Wilton et al (1996): *the order slip drawn up by one party’s agent and signed by other party’s agent, which referred to an arbitration clause was considered, in the context of custom and practice of marine insurers, as incorporating by reference the arbitration clause*; Spain, Supreme Court, Consmaremma (Italy) v. Hermanos Madrid SA (Spain), 20 February 2001, (Yearbook Commercial Arbitration XXVI (2001), p. 858): *a sales confirmation document containing an ICC arbitration clause and a reference to a form, which also contained an ICC arbitration clause, was only signed by one party. The Supreme Court found that the New York Convention was applicable and that the requirements of article II(2) were met because the original contract containing an arbitration clause, together with a subsequent contract was said to show that the parties intended to submit to arbitration disputes arising under their contract.* Switzerland, Supreme Court, G S.A. (Switzerland) v. T Ltd (UK), 12 January 1989, (Yearbook Commercial Arbitration XV (1990), p. 509): *an agreement resulting from an exchange of written documents did not need to mention the arbitration clause and a general reference to a contract containing an arbitral clause was considered sufficient to meet the form requirement of article II(2).*

<sup>49</sup> United States Court of Appeals, Third Circuit, 20 June 2003, NO. 02-2169, (Yearbook Commercial Arbitration XXIX (2004), p. 978).

<sup>50</sup> Switzerland, Court of Appeal, Basel-Land, DIETF Ltd v. RF AG, 5 July 1994, (Yearbook Commercial Arbitration XXI (1996) p. 685): *a seller had sent a confirmation order to a buyer containing reference to the overleaf general business regulations which included an arbitration clause; the buyer replied by fax referring to the confirmation order and made certain requests as to the packaging of the goods etc.; the Court found that the form requirements of article II(2) were met by stating that the written acceptance did not need to refer especially to the arbitration clause but may concern the contract as a whole.*

included the terms of that document, no further proof of the arbitration agreement was required.<sup>51</sup>

### C. New means of communication

22. The express reference to “letter or telegram” in article II(2) raised the issue of whether new means of generating and recording communications would (in addition to letters and telegrams) be considered as meeting the form requirements of article II(2). This question was answered in the affirmative by most of the State courts in respect of telexes<sup>52</sup> and telefaxes.<sup>53</sup> One court stated that article II(2) could not have intended to exclude all other forms of written communications regularly utilized to conduct commerce.<sup>54</sup> In some cases, State courts found that, even though the form requirement meant that the arbitration agreement must exist in written form, it sufficed that the agreement was contained in a document allowing for a written proof and confirmation of the common intent of the parties.<sup>55</sup>

<sup>51</sup> United Kingdom, Court of Appeal, *Zambia Steel & Building Supplies Ltd. V. James Clark & Eaton Ltd*, May 16, 1986 ((1986) 2 Lloyd’s Rep. 225): *the court, referring to the 1975 English Arbitration Act stated that “once it is clear that the assent to the written terms is not required to be contained in the written agreement, but that assent to the written terms may be proven by other evidence, then (...) any evidence which proves that the party has agreed to be bound by an [arbitration] agreement (...) contained in a document or documents is sufficient to make the document or documents an [arbitration] agreement in writing (...)”* The reasoning of *Zambia Steel (1986)* was followed in a decision by the Queen’s Bench Division of the Commercial Court, *Abdullah M Fahem and Co (Yemen) v. Mareb Yemen Insurance Co and Tomen (UK) Ltd (1997)* (Yearbook Commercial Arbitration XXIII (1998) p. 789) where a stay of court proceedings was sought invoking an arbitration agreement; the court cited the *English Arbitration Act* and held that the Act provided for a very wide meaning of the words “in writing”, which was even wider than article 7(2) of the *UNCITRAL Arbitration Model Law* but was said to be still consonant with article II(2); the court held that if an arbitration agreement was incorporated in a document and if it was proven that the parties were bound by a contract which included the terms of that document, no further proof of the arbitration agreement was required.

<sup>52</sup> United States, District Court for the Southern District of New York, *Oriental Commercial and Shipping Co Ltd (Saudi Arabia) and Oriental Commercial and Shipping Co (UK) Ltd (UK) v. Rosseel N.V. (Belgium)*, 4 March 1985, (609 F Supp 75); France, Court of Appeal, Paris, *Bomar Oil NV v. ETAP*, 20 January 1987, (1987, rev. arb. 482); Switzerland, Federal Tribunal, *G.S.A. v. T. Ltd*, 12 January 1989, (Yearbook Commercial Arbitration XV (1990)); Italy, Court of Savona, *Dimitros Varverakis v. Companis de Navigacion Artico SA*, 26 March 1981 (Yearbook Commercial Arbitration, X (1985)); Austria, Supreme Court, 2 May 1972, (Yearbook Commercial Arbitration X (1985)); Switzerland, Federal Supreme Court, *Tracom SA v. Sudan Oil Seeds Co*, 1987, (Yearbook Commercial Arbitration XII (1987)).

<sup>53</sup> United States, Court of Appeals for the Second Circuit, *Titan Inc v. Guangzhou Zhen Hua Shipping Co Ltd*, 15 February 2001 (241 F 3d 135); Germany, OLG Hamburg, 30 July 1998 (Yearbook Commercial Arbitration XXV (2000), p. 714): *the court found that in the light of technological developments, telexes and faxes like telegrams were to be treated as letters within the meaning of article II(2)*; Switzerland, Federal Supreme Court, *Tracom S.A. (Switzerland) v. Sudan Oil Seeds Co Ltd (UK)*, 5 November 1985 (Yearbook Commercial Arbitration XII (1987), p. 511): *the Supreme Court found that telexes and letters to settle disputes by arbitration and appointment of an arbitrator in a telex satisfied the form requirement of article II(2)*.

<sup>54</sup> United States, District Court for the Southern District of California, *Chloe Z Fishing Co Inc et al v. Odyssey Re (London) Ltd (2000)* (109 F Supp 2d 1236).

<sup>55</sup> Switzerland, Court of Appeal in Basel, *DIETF Ltd v RF AG (1994)*.

23. In another case, a State court found that article II(2) should be interpreted and applied in the light of the less restrictive requirements of article 7(2) of the UNCITRAL Arbitration Model Law and article 178 of the Swiss Private International Law Act.<sup>56</sup> That court stated that, in the light of modern means of communication, unsigned writings play an increasingly important role and signature requirements are becoming less important and, in particular cases, specific conduct might, by virtue of the rules of good faith, substitute the form requirement. However, that interpretation was not universally accepted, and at least one court considered that an exchange of e-mail messages did not satisfy the form requirement of article II(2).<sup>57</sup>

## II. Interplay between article II(2) and article VII(1) of the New York Convention

24. The New York Convention has been described as having a “pro-enforcement” bias in that it seeks to encourage enforcement of awards in the greatest number of cases as possible. That purpose was achieved through article VII(1) by removing conditions for recognition and enforcement in national laws that were more stringent than the conditions in the New York Convention, while allowing the continued application of any national provisions that gave special or more favourable rights to a party seeking to enforce an award (A/CN.9/WG.II/WP.108/Add.1, para. 21).

25. To the extent that many national laws also regulate the formal validity of the agreement to arbitrate, State courts have had to determine how such national rules relate to the form requirements of article II(2). The question whether State courts might apply their own more liberal laws under article VII(1) rather than the stricter requirements of the New York Convention raises several questions.

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<sup>56</sup> Switzerland, Federal Tribunal, *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA* (1995) BGE 121 III 38, ASA Bulletin 3/1995 503: *article 178 of the Federal Act of Private International Law provides as follows: “As regards form, the arbitration agreement shall be valid if made in writing, by telegram, telex, telecopy or any other means of communication which permits it to be evidenced by a text. (...)”*.

<sup>57</sup> Norway, Halogaland Court of Appeal, 16 August 1999, (Stockholm Arbitration Report, (1999), Vol 2, at 121): *the court considered that a contract concluded by an exchange of e-mails by reference to the GENCON charter party did not constitute an arbitration agreement in writing in accordance to article II(2) of the New York Convention. The court concluded that the e-mails exchanged together with the copy of the GENCON charter, which was not signed, failed to meet the “basic requirements of legal protection set up by the Convention”*.

## A. Uniform or maximum form requirement

26. The first question is whether the New York Convention should be interpreted as providing a unified form requirement with which arbitration agreements must comply under the New York Convention<sup>58</sup> or whether article II(2) of the New York Convention establishes a maximum requirement of form (thus leaving States free to adopt less stringent requirements)<sup>59</sup> (A/CN.9/WG.II/WP.108/Add.1, paras. 21-22).

27. Many domestic laws have taken a broader approach in respect of the requirements in article II(2). Also, there are indeed instances in which State courts have applied domestic law in preference to the New York Convention in order to uphold an arbitration clause,<sup>60</sup> and a number of court decisions have, by relying on article VII(1), upheld the validity of an arbitration agreement under domestic law, which would not have been considered as valid under the New York Convention.<sup>61</sup> In one case, the court found that “ordinary contract principles dictate when the

<sup>58</sup> Switzerland, Federal Supreme Court, Tradax Export S.A. (Panama) v. Amoco Iran Oil Company (US), 7 February 1984 (Yearbook Commercial Arbitration XI (1986), p. 532) and Switzerland, Federal Supreme Court, Tracom S.A. (Switzerland) v. Sudan Oil Seeds Co. Ltd. (UK), 5 November 1985, (Yearbook Commercial Arbitration, XII (1987), p. 511): *in those cases, the court emphasized the uniform rule character of article II, stating that “article II contains rules of uniform applicability which, in cases where the Convention is applicable, replaces national law”*; OLG Schleswig, 30 March 2000, 16 SchH 05/99: *article II(2) superseded any national law with respect to formal requirements and the principle of autonomous interpretation meant that national law could not be applied for the interpretation and scope of the arbitration agreement, whether more or less strict than article II(2) concerning formal requirements.*

<sup>59</sup> Germany, Court of Appeal of Cologne, Danish buyer vs. German seller, 16 December 1992, (Yearbook Commercial Arbitration XXI (1996), p. 535): *the court stated that “article II(2) of the Convention does not provide for a uniform rule, as it can be deduced from article VII(1) of the Convention (...).” (See as well footnote 8 of this document.)*

<sup>60</sup> The Netherlands, Court of First Instance, Rotterdam, 28 September 1995, Petrasol BV (Netherlands), v. Stolt Spur Inc. (Liberia) (Yearbook Commercial Arbitration, XXII, pp. 762-765): *the Court affirmed that “the provisions of the New York Convention (particularly article II) do not preclude the application of article 1074 CCP, because of the more-favourable-law provision in article VII of the Convention, to be applied by analogy”*; India, Delhi High Court, 15 October 1993 (Suit No. 1440 of 1990 and I.A No. 5206 of 1990, D – 15-10-1993), Gas Authority of India, Ltd v. SPIE-CAPAG, SA (France), Nippon Kokan Corporation (Japan), Toyo Engineering Corporation (Japan), International Chamber of Commerce (Yearbook Commercial Arbitration XXIII, pp. 688 – 712): *the court affirmed that “the parties to an international commercial arbitration agreement can seek enforcement of an arbitral award on the basis of the domestic law instead of the Convention, notwithstanding the fact that they may have agreed to enforce the arbitration agreement under article II of the Convention. When the arbitration agreement does not result in an arbitral award capable of enforcement under the Convention, it can still be enforced under parallel domestic law of India, the Indian Arbitration Act”*; France, Supreme Court, Bomar Oil NV (Neth. Antilles) v. Entreprises Tunisienne d’Activité Pétrolière, 9 November 1993 (Yearbook Commercial Arbitration XX (1995) p. 660); France, Court of Appeal Versailles, Bomar Oil NV (Neth. Antilles) v. Entreprises Tunisienne d’Activité Pétrolière, 23 January 1991 (Yearbook Commercial Arbitration XVII (1992), pp. 488-490): *the issue was addressed in the 1987 decision of the Paris Court of Appeal in Bomar Oil, in which it was held that article II(2) of the New York Convention expressed a “substantive rule which must be applied in all cases”*. That decision was then reversed by the Cour de Cassation, but this issue was not directly addressed.

<sup>61</sup> Supreme Court (Germany), 25 May 1970, (Yearbook Commercial Arbitration 1977, p. 237); The Netherlands, Court of Appeal, The Hague, Owerri commercial Inc. (Panama) v. Dielle Srl. (Italy), 4 August 1993, (Yearbook Commercial Arbitration XIX, p. 703 ).



parties are bound by a written arbitration provision absent their signatures.”<sup>62</sup> In another case, the court enforced an arbitral award based on article VII(1) of the New York Convention because the form requirements of article II(2) were not met.<sup>63</sup>

28. In a number of cases involving international arbitration, State courts have cited the New York Convention but then applied domestic legal principles to the question whether the arbitration agreement was valid and enforceable.<sup>64</sup>

<sup>62</sup> United States, District Court for the Southern District of New York, *Beromun Aktiengesellschaft v. Societa Industriale Agricola “Tresse” di Dr. Domenico e Dr. Antonio dal Ferro*, 3 April 1979, (41 F Supp 1163).

<sup>63</sup> Germany, OLG Koeln (1992) (Yearbook Commercial Arbitration XXI (1996), p. 535).

<sup>64</sup> United States, District Court for the Southern District of New York, *Beromun Aktiengesellschaft v. Societa Industriale Agricola “Tresse” di Dr. Domenico e Dr. Antonio dal Ferro*, 3 April 1979, (41 F Supp 1163); United States, Court of Appeals for the Second Circuit, *Genesco Inc v. Kakiuchi & Co*, 1 April 1987, (815 F 2d 840): *similar approaches of applying domestic law were adopted by courts*: in *Jamaica Commodity Trading Company Limited v. Connell Rice & Sugar Co, Inc.*, United States District Court for the Southern District of New York, 24 May 1985, (85 Civ 1210) *where the court decided that, while the arbitration agreement must be in writing to be enforced, there was no requirement for a signature*; in *Astor Chocolate Corporation v. Mikroverk Ltd*, 20 January 1989, (704 F Supp 30 (EDNY)), *the US District Court for the Eastern District of New York held that while federal law governed the issue of the scope of an arbitration clause, state law governed the issue of whether or not the clause was part of the contract*. In *Progressive Casualty Insurance Co. v. C.A. Reaseguradora Nacional de Venezuela* (1993) (991 F Supp 2d 42): *the Court of Appeals for the second Circuit ignored the New York Convention and, by citing only domestic cases, found that, under New York law, the arbitration agreement was binding because it was incorporated by reference*; in *Overseas Cosmos Inc v. NR Vessel Corp* (1997) (97 Civ 5898), *the US District Court for the Southern District of California cited Genesco (1987) and held that it was well established that a party may be bound by an arbitration agreement even without having signed such agreement. In the absence of signatures, ordinary contract principles dictate whether the parties are bound by the agreement*; United Kingdom, *Queen’s Bench Division XL Insurance Ltd v. Owens Corning*, 28 July 2000 (2 Lloyd’s Rep 500, Yearbook Commercial Arbitration, XXVI (2001) p. 869); United Kingdom, Court of Appeal, *Zambia Steel & Building supplies Ltd. V. James Clark & Eaton Ltd*, May 16, 1986 ((1986) 2 Lloyd’s Rep. 225): *the court, referring to the 1975 English Arbitration Act, stated that “once it is clear that the assent to the written terms is not required to be contained in the written agreement, but that assent to the written terms may be proven by other evidence, then (...) any evidence which proves that the party has agreed to be bound by an [arbitration] agreement (...) contained in a document or documents is sufficient to make the document or documents an [arbitration] agreement in writing (...)”* The reasoning of *Zambia Steel (1986)* was followed in a decision by the Queen’s Bench Division of the Commercial Court, *Abdullah M Fahem and Co (Yemen) v. Mareb Yemen Insurance Co and Tomen (UK) Ltd* (1997) (Yearbook Commercial Arbitration XXIII (1998) p. 789) *where a stay of court proceedings was sought invoking an arbitration agreement; the court cited the English Arbitration Act and held that the Act provided for a very wide meaning of the words “in writing” which was even wider than article 7(2) of the UNCITRAL Arbitration Model Law but was said to be still consonant with article II(2); the court held that, if an arbitration clause was incorporated in a document and if it was proven that the party was bound by an agreement which included the terms of that document, no further proof of the arbitration agreement was required.*

29. State courts have not always looked at the New York Convention as superseding domestic law, and certain courts applied domestic law without referring to article VII(1) of the New York Convention,<sup>65</sup> finding that, while an arbitration agreement must be in writing, there was no requirement for a signature and, in the absence of signature, ordinary contract principles would govern whether or not parties were bound by the arbitration agreement.<sup>66</sup> On that basis, a number of State courts have held that specific incorporation by reference to an arbitration clause would satisfy the form requirement by relying on principles established by the Convention on Contracts for the International Sale of Goods (Vienna, 1980)<sup>67</sup> or domestic legal principles<sup>68</sup> or the UNCITRAL Arbitration Model Law.<sup>69</sup> At least one court considered that an arbitration agreement existed despite the fact that none of the parties signed a written contract, “which is common practice in the trade in question”.<sup>70</sup>

30. Where State courts have applied domestic laws instead of the New York Convention in determining the validity of an arbitration agreement, another area of uncertainty relates to the determination of the law applicable to that question. On that issue, the solutions provided by courts have varied. The formal validity of the agreement to arbitrate would be judged by applying the uniform rule of article II(2), whereas the substantive validity of the agreement to arbitrate might, under article V(1)(a) of the New York Convention, be determined in accordance with national laws. In certain cases, State courts have not differentiated between the formal requirement (written form) for the validity of the arbitration agreement governed by the New York Convention and the substantive requirements governed

<sup>65</sup> France, Supreme Court, *Societe Britannia v. Societe Jezequel et Maury*, 15 July 1987, (Rev arb. 1990, p. 627); France, Court of Appeal, Paris, France, *Societe Abilio Rodriguez v. Societe Vigelor* (1990) (Rev. arb. 1990, p. 691): *the court applied domestic law to consider valid an arbitration clause incorporated by reference in a sales confirmation letter issued by a broker.*

<sup>66</sup> United States, District Court for the Eastern District of New York, *Astor Chocolate Corporation v. Mikroverk Ltd* (1989) (704 F Supp 30 (EDNY)); United States, District Court for the Southern District of California, *Overseas Cosmos Inc. v. NR Vessel Corp* (1997) 97 Civ 5898 *cited Genesco* (1987); France, Supreme Court, *Bomar Oil N.V. (Neth. Antilles) v. Entreprise Tunisienne d’Activités Pétrolières ETAP* (Tunisia), 9 November 1993, (Yearbook Commercial Arbitration XX (1995) p. 660).

<sup>67</sup> United States, District Court for the Southern District of New York, *Filanto SpA v. Chilewich International Corp.*, 14 April 1992, (789 F Supp 1229, Yearbook Commercial Arbitration XVIII (1993), p. 530): *the court stated that any dispute falling within the New York Convention, whether brought in state or federal court, must be resolved with reference to that instrument; however, it then stated that courts in interpreting the writing requirement had generally started with the plain language of the New York Convention and had then applied the language in light of federal law, which consisted of generally accepted principles of contract law; it refused however to apply the Uniform Commercial Code but applied the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).*

<sup>68</sup> United States, Court of Appeals, Seventh circuit, *Mary D. Slaney (US) v. International Amateur Athletic Federation (Monaco)*, 27 March 2001, (Yearbook Commercial Arbitration XXVI (2001), p. 1091); United States, Court of Appeals for the Second Circuit, *Square v. Bombay*, 23 August 1999.

<sup>69</sup> Hong Kong, High Court, *Jiangxi Provincial Metal and Minerals Import and Export Corp v. Sulanser Company Ltd*, 6 April 1995, (Yearbook Commercial Arbitration XXI (1996), p. 546): *the court held that the definition of writing in article II(2) was not exclusive and did not bar the application of article 7(2) of the UNCITRAL Arbitration Model Law.*

<sup>70</sup> France, Court of Appeal, Paris SARL *Centro Stocaggio Grani v. SA Granit*, 8 June 1995, (Rev. Arb. 89).

by national law, and have applied the latter to both requirements.<sup>71</sup> Other State courts have taken the view that the validity of arbitration agreements should be determined under the law of the country where the award was made in the absence of an agreement by the parties.<sup>72</sup>

## B. Self-contained regime

31. The question whether the New York Convention's provisions might be combined with provisions of domestic laws had been raised mainly in relation to the application of article II(2) of the New York Convention.

32. Certain State courts have adopted the view that the New York Convention is a self-contained regime and 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. Applying this view, article VII(1) would not allow a party to combine the provisions of the New York Convention with those of domestic law on the enforcement of foreign award. It was said that a choice must be made to rely either on the New York Convention or on domestic law.<sup>73</sup>

<sup>71</sup> Switzerland, Swiss Federal Tribunal, *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA* (1995) BGE 121 III 38, (ASA Bulletin 3/1995 503): *the court found that article II(2) should be interpreted and applied in the light of the less restrictive requirements of article 7(2) of the UNCITRAL Arbitration Model Law and article 178 of the Swiss Private International Law Act. It stated that, in light of modern means of communication, unsigned writings play an important role and signature requirements were becoming less important. In particular cases, specific conduct may, by virtue of the rules of good faith, substitute the writing requirement*; Italy, Supreme Court, *Lanificio Walter Banci SaS (Italy) v. Bobbie Brooks Inc (US)* (1980) (Yearbook Commercial Arbitration VI (1981) p. 233): *the court discussed the relation between article II and article V in enforcement proceedings and came to the conclusion that, in case of enforcement, article V and not article II was applicable; as a consequence, it held that the written form of the arbitral clause was in conformity with applicable domestic law, stating that under article V(1)(a), the validity of the arbitration agreement had to be determined under the law of the country where the award was made in the absence of an agreement by the parties; the court did not ascertain whether the arbitration agreement was in conformity with article II; this view was somehow affirmed in a decision of the Supreme Court, Italy, in *Conceria G De Maio & F snc (Italy) v. EMAG AG (Switzerland)* (1995) (Yearbook Commercial Arbitration XXI (1996) p. 602): *the court held that, in enforcement proceedings, article V and not article II applied, and that the validity of the arbitration clause was to be ascertained under the applicable law.**

<sup>72</sup> Italy, Supreme Court, *Lanificio Walter Banci SaS (Italy) v. Bobbie Brooks Inc. (US)*, 15 April 1980, (Yearbook Commercial Arbitration VI (1981), p. 233); Italy, Supreme Court, *Conceria G De Maio & F snc (Italy) v. EMAG AG (Switzerland)*, 20 January 1995, (Yearbook Commercial Arbitration XXI (1996), p. 602); *Universal Peace Shipping Enterprises SA (Panama) v. Montipe SpA (Italy)* (1991), (Yearbook Commercial Arbitration XVII (1992) p. 562).

<sup>73</sup> Germany, Court of Appeal of Cologne, *Danish buyer v. German seller*, 16 December 1992, (Yearbook Commercial Arbitration XXI (1996), p. 535).

33. However, certain State courts have found that the New York Convention contained nothing to prevent the use of some of its provisions in conjunction with other more liberal provisions in national law.<sup>74</sup>

### C. Article VII(1) and the reference to arbitration agreements

34. Another question is whether article VII(1), which applies to the enforcement of arbitral awards, might also be applied in relation to arbitration agreements. Certain State courts applied domestic law in determining the question of enforceability of an arbitration agreement, therefore considering that article VII(1), which referred in its text to the enforcement of arbitral awards, should be interpreted as also applying in relation to arbitration agreements.<sup>75</sup>

## III. Concluding remarks

### A. General remarks

35. There remains a wide divergence of interpretation by State courts on the form requirement defined under article II(2). In particular, what is meant by the term “signature”, whether the signature requirement applies to both the arbitration clause in a contract as well as the arbitration agreement and what is required by an “exchange of letters or telegrams” are all matters on which there have been different and sometimes conflicting interpretations. Different judicial interpretations of the form requirement and a trend to avoid the form requirement by reference to other legal doctrines may undermine the principles of the New York Convention and the harmonisation of the law regarding recognition and enforcement of arbitration agreements.

36. Courts, in many States, have established a clear position as to the circumstances in which article VII(1) may be applied to uphold arbitration agreements where the form requirement set out in article II(2) would otherwise not be met, but those positions diverge from one State to another. The advantage of applying article VII(1) would be to avoid the application of article II(2) and, as States would enact more favourable provisions on the form requirement for arbitration agreements, would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations. Encouraging the wide adoption by States of article 7(2) of the UNCITRAL Arbitration Model Law,

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<sup>74</sup> Germany, Oberlandesgericht of Hamm, 2 November 1983, (Yearbook Commercial Arbitration XIV (1989), p. 629) : *the court simultaneously applied the provisions of both the German New Code of Civil Procedure and the New York Convention to the enforcement of a foreign award*; The Netherlands, Court of First Instance, Rotterdam, Isaac Glecer (Israel) v. Moses Asrael Glecer and Eстера Glecer-Nottman (Belgium), 24 November 1994 (Yearbook Commercial Arbitration XXI (1996), p. 635): *the court granted enforcement, finding, inter alia, that Article 1076 of the Dutch CCP applied to the enforcement under article VII(1) the New York Convention.*

<sup>75</sup> United States, Court of Appeals for the Second Circuit, Genesco, Inc v. Kakiuchi & Co., 1 April 1987, (815 F 2d 840); United Kingdom, Queen’s Bench Division, Commercial Court, XL Insurance Ltd v. Owens Corning, 28 July 2000, 2 Lloyd’s Rep 500, (Yearbook Commercial Arbitration XXVI (2001) p. 869).

currently being revised by the Working Group, could provide a useful means of achieving greater uniformity as to the form requirement, which was more responsive to the needs of modern arbitration.

## **B. Draft declaration regarding the interpretation of article VII(1) of the Convention**

37. As indicated above (paragraphs 24 to 34), there are areas of uncertainty in the application of article VII(1). Given the current work of the Working Group on article II(2), and the draft model provision revising article 7(2) of the UNCITRAL Arbitration Model Law, the Working Group might wish to consider whether the preparation of guiding principles on article VII(1) of the New York Convention would also be useful in achieving greater uniform application. The text of a declaration interpreting article VII(1) of the Model Law could read as follows:

*“Declaration regarding interpretation of article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*

*“The United Nations Commission on International Trade Law,*

*“[1] Recalling resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,*

*“[2] Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,*

*“[3] Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,*

*“[4] Conscious of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, 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,*

*“[5] Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,*

*“[6] Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference ‘considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes’,*

“[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

“[8] *Taking into account* article VII(1) of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

“[9] *Considering* the wide use of electronic commerce,

“[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

“[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

“[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

“[13] *Recommends* that article VII(1) of the Convention should be applied to allow 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.”