Form of Arbitration Agreements: Current Developments within UNCITRAL and the Writing Requirement of the New York Convention

By Giuditta Cordero Moss
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1. Introduction

A large number of contracts contain arbitration clauses entered into electronically, by reference to other documents or even tacitly. This raises questions, particularly in relation to the requirement laid down in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’) that arbitration agreements should be ‘in writing’.

UNCITRAL has recently recommended that the New York Convention be interpreted broadly so that arbitration agreements entered into by electronic means of communication may be considered to comply with the writing requirement. This is in keeping with the spirit of the New York Convention, as will be seen in section 2.3 below. Also, the UNCITRAL Model Law on International Commercial Arbitration has been amended so as to exclude any doubt regarding the admissibility of arbitration agreements entered into electronically, as will be seen in section 2.2.

Some States have gone even further and abolished the writing requirement altogether, as mentioned in section 2.1 below. A similar proposal has been adopted for the UNCITRAL Model Law on International Commercial Arbitration, but, as will be seen in section 2.2, it does not seem to have won unanimous support.

The abandoning of formal requirements for the arbitration clause raises various questions. In particular, is an arbitral award enforceable under the New York Convention if it has been rendered on the basis of an arbitration clause that, while valid under the applicable national law, is not in writing as required by the New York Convention? As discussed in section 3 below, it is widely considered that the formal requirements laid down by the New York Convention prevail over any formal requirements laid down by applicable national law. This is because the New York Convention is traditionally thought to embody an approach more favourable to arbitration than is found in national laws. However, now that some national laws and the amended UNCITRAL Model Law on International Commercial Arbitration have become more arbitration-friendly in respect of formal requirements, it may rightly be asked whether that view should change and national arbitration laws be given preference.

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Article VII of the New York Convention may be of relevance in this regard, for it offers a basis for applying national laws more favourable to arbitration than the provisions of the Convention. UNCITRAL has recommended a broad interpretation of this article that will be analysed in section 3.1 below.

The enforcement of an award rendered on the basis of an arbitration agreement that is not in writing may encounter an obstacle in Article IV of the New York Convention, which requires that the original or a certified copy of the arbitration agreement shall be supplied to the enforcement court. While the UNCITRAL Model Law on International Commercial Arbitration has been amended to allow for equivalents, so as to reflect the new liberal approach to formal requirements, a corresponding recommendation has not been made in respect of the New York Convention. This will be analysed in section 3.2 below.

We are today faced with the risk of divergent interpretations of the New York Convention with regard to the writing requirement. How the Convention is interpreted will depend on whether or not the interpreter is arbitration-friendly and whether or not the formal requirements of the New York Convention are more arbitration-friendly than applicable national law. This is not necessarily a positive development, as enforcement under the New York Convention is likely to be unpredictable.

2. An award is enforceable if the arbitration agreement is valid

It is widely known that the validity of an arbitration agreement has two important consequences: firstly, a valid arbitration agreement excludes the jurisdiction of the ordinary courts of law over disputes covered by the arbitration agreement;\(^1\) and secondly, the validity of the arbitration agreement is a prerequisite for enforcing the arbitral award rendered in the dispute covered by the arbitration agreement. In international disputes, the award is generally enforced in a country other than where it was rendered, so the New York Convention is applicable. Article V of the New York Convention sets forth the only grounds that can be used to refuse enforcement of a foreign arbitral award. They include the following (Art. V(1)(a)): ‘The . . . agreement referred to in article II . . . is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.’ Article II makes reference to the arbitration agreement.

Given that both the jurisdiction of the arbitral tribunal and the enforceability of the award depend on the validity of the arbitration agreement it is important to establish the criteria that determine the validity of an arbitration agreement.

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1 This effect of the arbitration agreement is regulated uniformly for the 142 States that are signatories to the New York Convention at the present date: see <http://www.uncitral.org/uncitr/en/uncitral_texts/arbitration/NYConvention_status.html>, last visited April 2008. Article II(3) of the Convention states: ‘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.’
2.1 National arbitration laws on the validity of arbitration agreements

Article V(1)(a) of the New York Convention appears to contain a clear reference to the applicable national law (although, as will be discussed in section 3 below, this is not necessarily followed in practice). According to the wording of the article, the validity of the arbitration agreement is governed by the law to which the parties have subjected that agreement (which is not necessarily the same as the law that the parties have chosen to govern their contractual relationship) or, failing any choice in this respect, the law of the country where the award was made. The latter—the *lex arbitri*—is more commonly used, as parties rarely specify the law governing their arbitration agreement.

A literal interpretation of Article V(1)(a) of the New York Convention therefore generally leads to the application of the law of the country where the arbitral tribunal is seated to determine whether the arbitration agreement is valid. National laws may vary considerably in the formal requirements they lay down for arbitration agreements. Some lay down strict criteria, while others are less demanding or lay down no formal requirements at all.

Article 807 of the *Italian Code of Civil Procedure*, for example, lays down a strict writing requirement analogous with contracts that go beyond administration in the ordinary course of business.²

Article 178(1) of the *Swiss Private International Law Act* requires the arbitration agreement to be in writing, which is said to include an exchange of telegrams, faxes or other means of telecommunication that provide a record of the agreement.³

Similar criteria are found in Article 1031 of the *German Code of Civil Procedure*, which in addition specifies that the writing requirement will be deemed to have been met if the arbitration agreement is contained in a document sent to one party and if such party has not raised objections in good time.⁴

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² Article 807 of the Italian Code of Civil Procedure reads: ‘The submission to arbitration shall, under penalty of nullity, be made in writing and shall indicate the subject matter of the dispute. The written form requirement is considered complied with when the intention of the parties is expressed by telegram or telex. The submission to arbitration is subject to the provisions governing the validity of contracts which go beyond administration in the ordinary course of business.’

³ Article 178(1) of the Swiss Private International Law Act reads: ‘The arbitration agreement has to be made in writing, by telegram, telex, telex or other means of telecommunication which provide a record of the agreement.’

⁴ Article 1031 of the German Code of Civil Procedure reads: ‘(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement. (2) The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and—if no objection was raised in good time—the contents of such document are considered to be part of the contract in accordance with common usage . . . ’
Section 5 of the **English Arbitration Act** requires that the arbitration agreement be in writing, which is explained as meaning that it has been made or evidenced in writing or is contained in an exchange in writing.\(^5\)

However, section 5 goes on to qualify as written also agreements that are made otherwise than in writing, as long as they refer to terms that are in writing, and agreements that have been recorded in writing only by one party. It also specifies that reference to anything being written or in writing includes its being recorded by any means.

Even more liberal is the **Swedish Arbitration Act**, Article 1 of which recognizes any arbitration agreement, provided it has been agreed by the parties, without laying down any particular form for that agreement.\(^6\)

A similar provision is found in the **Norwegian Arbitration Act**.\(^7\)

An arbitration agreement that is entered into by reference, tacitly or even orally would satisfy applicable formal requirements only if the applicable law is liberal in its requirements or lays down no formal requirements at all. On the other hand, an arbitration agreement entered into electronically would be valid not only where applicable law is liberal in its requirements or lays down no formal requirements, but also even where there is a writing requirement, since this requirement may be construed as including exchanges by various means of telecommunication. The same construction is possible for Article II of the New York Convention too, as will be discussed below in section 2.3.

### 2.2 UNCITRAL Model Law on the validity of arbitration agreements

The 1985 UNCITRAL Model Law on International Commercial Arbitration is—along with the New York Convention—one of the most successful products of the United Nations Commission on International Trade Law (UNCITRAL). It has been adopted in more than fifty countries and is widely used as a reference elsewhere. The Model Law was intended as a source of harmonization in international arbitration. To this end, and to ensure continuity, it was deliberately aligned with the New York Convention.\(^8\) Article 7(2) of the Model Law originally defined the scope of the writing requirement for arbitration agreements as follows: An agreement is in writing if it is contained in a document

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\(^5\) Section 5 of the English Arbitration Act reads:

'(1) The provisions of this Part apply only when the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purpose of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing—

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.'

\(^6\) Article 1 of the Swedish Arbitration Act reads:

"Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. . . ."

\(^7\) Section 3-10 of the Norwegian Arbitration Act reads:

'(1) The parties may agree to submit to arbitration disputes which have arisen, as well as all or certain disputes which may arise in respect of a defined legal relationship. . . .'

signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement . . .

The Model Law followed the New York Convention in requiring arbitration agreements to be in writing. It clarified this requirement so as to cover technological developments that were known at the time it was drafted, while at the same time allowing for future technological developments, so long as they provide a record of the agreement.

The original spirit of these instruments was to give effect to arbitration agreements made using the technological means of communication commonly employed in business practice. In other words, the wording of the instruments was not to become a burden on the parties, preventing them from making use of developments in technology that did not yet exist at the time the instruments were drafted. Hence, the original version of the Model Law could be construed as allowing arbitration agreements made electronically, and could be used as an argument in support of a similar interpretation of the New York Convention.

The Model Law was amended on 7 July 2006 at UNCITRAL's 39th session, and the amendments were recommended by the General Assembly at its 61st session. This was the culmination of a process that had begun in 1999 when the UNCITRAL Working Group on Arbitration took up the issue of the writing requirement for arbitration agreements.

With regard to qualifying an agreement made electronically as an agreement in writing, the Working Group emphasized that the clarification resulting from the amendment did not alter the existing liberal interpretation of the Model Law, but simply confirmed that interpretation.

The 2006 amendments to the Model Law included two options for Article 7 on the writing requirement. One option maintains the original structure of Article 7 and specifies what is to be understood by writing. In this first option, Article 7(3) explains that the writing requirement is a question of proof of the agreement and not a prerequisite for its existence. Article 7(4) then lays down how the writing requirement is to be understood. In doing so, it largely follows Article 6(1) of the UNCITRAL Model Law on Electronic Commerce. Thus, the writing requirement is met by an electronic communication if its content is accessible so as to be usable for subsequent reference. There then follows a non-exhaustive list of examples, including electronic data interchange, electronic mail, telegram, telex and telecopy.


See A/CN.9/WG.II/WP.118, para. 11.

The text of the amended Article 7, Option I, reads as follows: (1) [not amended: arbitration agreement]. (2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference: “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, received, sent or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. (5) Furthermore, an arbitration agreement is in writing if [wording as in the original Article 7(2): exchange of statements of claim and defence]. (6) [agreement by reference to another contract as in the original Article 7(2), amended in that the contract referred to does not need to be in writing].
The debate within the UNCITRAL Working Group on Arbitration and the first option in the Article 7 amendments can be seen as confirmation that the writing requirement should not exclude those means of communication commonly used by businesses.

This is not to say, however, that the writing requirement is on the point of being totally abandoned. While the original text of the Model Law permits arbitration agreements entered into tacitly (in an exchange of statements of claim and defence where the alleged existence of the arbitration agreement is not denied) or by reference, and while some State laws have already done away with formal requirements, as seen in section 2.1 above, no consensus reigns over whether the Model Law should follow the initiative taken by those States. This can be seen from reactions to the second option in the Article 7 amendments.\footnote{See, particularly, the comments by Italy (A/CN.9/609), Belgium (A/CN.9/609/Add.3), France (A/CN.9/609/Add.5) and Austria (A/CN.9/609/Add.6). Germany, on the other hand, favoured the second option (A/CN.9/609/Add.2)} In this option, there is no reference to any formal requirements, and therefore no need to spell out that electronic communications comply with the writing requirement or that agreements entered into tacitly or by reference are permissible. The comments made by Governments suggest that this option does not enjoy their full and unanimous support.\footnote{Option II of the amended article 7 reads: “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”} It was nevertheless adopted as an alternative to the first option.

As a consequence, States that adopt the UNCITRAL Model Law on International Commercial Arbitration will in the future have to choose between the first option requiring that the arbitration agreement be in writing, where it is clarified that electronic communication meets that requirement, and the second option, where there are no formal requirements at all.

While the first option does not appear incompatible with the New York Convention, as will be seen in section 2.3 below, the complete absence of formal requirements in the second option might create some problems, as will be seen in section 3 below.

### 2.3 Article II of the New York Convention on the validity of arbitration agreements

Article II of the New York Convention requires States to recognize arbitration agreements that have been entered into in writing (amongst certain other criteria). Article II(2) specifies: ‘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.’ Whether or not this definition also covers agreements entered into electronically depends on the interpretation made of Article II(2).

There is no explicit reference to electronic telecommunication in the wording of Article II. This is hardly surprising, as no one could have imagined in 1958, when the Convention was drafted, that technological developments would lead to electronic exchanges between opposite ends of the world and that such exchanges would be part of daily life for international business.

The wording of the New York Convention needs to be interpreted in light of the technological context in which the Convention was drafted. The reference to ‘an exchange of letters or telegrams’ must be seen as a reference to the most modern
means of telecommunication that were known at the time. The intention of the Convention was therefore to recognize arbitration agreements that were entered into by absent parties using the means of communication they generally employ in the course of their business. In 1958 these means were letters and telegrams. Technological development subsequently led to the telex. Exchanges by telex were not expressly referred to in Article II(2) of the New York Convention, yet court decisions in various countries stated that Article II(2) must be construed to cover exchanges by telex, too.15 Further technological development ushered in the fax and again, although there is no explicit reference to faxes in Article II(2) of the New York Convention, courts have construed the Convention as covering arbitration agreements entered into by fax.16

Technological development has continued and today allows communication by electronic means. It seems only natural to extend the interpretation of Article II(2) once again, so as to cover the most modern means of communication widely used for concluding contracts. To do otherwise would be contrary to the spirit of the Convention, which was aimed at recognizing arbitration agreements provided they were concluded in the form that was generally adopted for the conclusion of contracts.

This interpretation is not only a natural continuation of the construction that the courts have made of Article II(2) whenever new means of telecommunication have become commonly adopted (i.e. first telex, then fax, and now electronic communication), but it is also confirmed in the original wording chosen by UNCITRAL to define the writing requirement for arbitration agreements in the 1985 Model Law on International Commercial Arbitration and in the 2006 amendments to the Model Law, as seen above. Although the Model Law does not formally constitute a basis for interpreting the New York Convention, it is natural to construe the latter in light of the former, as they are linked by a common line of development.17

Such an interpretation is not, however, uncontroversial, and clarification has been sought,18 in order to prevent different courts from construing the New York Convention in different ways and thereby undermining the uniformity of interpretation that is one of the most valuable assets of the New York Convention.

To this end, the General Assembly adopted the UNCITRAL ‘Recommendation regarding the interpretation of article II(2) and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on


16 See e.g. the Swiss decision published in Yearbook Commercial Arbitration XII (1996), 685 and, for further references, the UNCITRAL Secretariat note A/CN.9/WG.II/WP.139, supra note 15, footnote 53.

17 The Swiss Supreme Court has expressly stated that Article II(2) must be read in light of Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration, see A.J. van den Berg, The Application of the New York Convention by the Courts’ in A.J. van den Berg, ed., Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series No. 9 (The Hague: Kluwer Law International, 1999) at 32.

7 July 2006 at its thirty-ninth session’. The adoption of this document followed intensive debate within the Working Group on how best to approach the need for clarification of the New York Convention. An interpretative instrument capable of encouraging a uniform interpretation in accordance with current practice was seen as the most effective means.

To endorse its authority, the Recommendation recalls in the preamble UNCITRAL’s responsibility in contributing to the progressive harmonization and unification of international trade law and achieving a consensus between the world’s legal, social and economic systems. The preamble also recalls how important a uniform interpretation of the Convention is for promoting international trade, points out the diversity of legal practices relating to the form of the arbitration agreement, and refers to the Convention’s aim of allowing recognition and enforcement of arbitral awards to the largest possible extent. The Recommendation also refers to subsequent legal instruments, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce. On this basis, Article 1 of the Recommendation calls for Article II(2) of the New York Convention to be interpreted in such a way that the circumstances described therein are not exhaustive.

This therefore means that the exchange of letters or telegrams mentioned in Article II(2) should be considered only as an illustration, which can be supplemented with exchanges made by other means of communication.

A Recommendation by UNCITRAL does not have any binding effect on Governments and even less so on national judges interpreting the New York Convention. It is even doubtful whether such an instrument could be truly considered as an authoritative interpretation of the Convention, since UNCITRAL can hardly be regarded as the issuing or enacting body. However, it would without any doubt have the authority of an official view from the United Nations body responsible for coordinating UN legal activities in the field of international trade law, covering the principal economic and legal systems of the world in both developed and developing countries.

There is therefore every reason to give UNCITRAL’s position considerable weight when construing the New York Convention. However, it remains to be seen whether a Recommendation is a sufficient instrument on which to base an interpretation of Article II(2) that might differ considerably from the interpretation currently made in some countries.

Interpreting Article II(2) as covering arbitration agreements entered into electronically would not appear to overstep the limits of customary broad interpretation. As mentioned earlier, this has already been done in the past in respect of previous technological developments. The UNCITRAL Recommendation is thus simply adding its authoritative voice to confirm the correctness of such a construction.

The situation is different, however, with respect to arbitration agreements entered into tacitly or orally. Neither the UNCITRAL Recommendation nor Article II(2) of the New York Convention would appear to provide in their wording such a clear basis for interpretation. A construction permitting such agreements would be quite detached from a literal interpretation of Article 2.

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20 Article 1 of the Recommendation reads: ‘Recommends that article II, paragraph 2, of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive; . . .’
To summarize, the New York Convention appears easily to accommodate the situation created by technological progress and, in particular, electronic communication. However, extending the writing requirement to new means of communication does not necessarily open the way to recognizing arbitration agreements that are not in the written form. In this latter respect, the New York Convention does not match the more progressive regulations found in some national laws and in the second option of the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration. Some consequences of this lack of coordination are analysed below.

3. Competition between State law and Article II of the New York Convention

As seen above, the formal requirements for arbitration agreements differ considerably from one country to another, and even the uniform regulation contained in the New York Convention is under some strain caused by the need to cover new technological developments. The range of requirements relating to form vary from none at all (as in Swedish and Norwegian law) to strict conditions (as in Italian law). The debate over the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration shows a lack of consensus on eliminating the writing requirement.

As already mentioned, the validity of an arbitration agreement has important consequences at two stages: firstly when the jurisdiction of the arbitral tribunal is being established, and then if and when the arbitral award has to be enforced. If an arbitration agreement is deemed invalid at the first stage, the arbitral tribunal will have no jurisdiction, so the dispute will have to be submitted to the ordinary courts of law. If an arbitration agreement is held to be invalid at the stage of enforcement, this will prevent the arbitral award from being enforced.

It is legitimate to enquire whether an arbitration agreement could be deemed invalid at the enforcement stage (thus preventing enforcement of the award), while having been considered valid in the initial phase (thus preventing ordinary courts from having jurisdiction over the dispute). Such a lack of coordination would obviously be detrimental to the winning party, which could neither enforce its award nor have the case tried in the ordinary courts. To ascertain whether such a risk really exists, it is necessary to look at the parameters for evaluating the validity of the arbitration agreement at each stage.

Article V(1)(a) of the New York Convention regulates the enforcement of an arbitral award and states that enforcement may be refused if ‘[t]he . . . agreement referred to in article II . . . is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’. In spite of this wording, which refers the evaluation of the validity of the arbitration agreement to national law, judicial practice has traditionally considered Article II(2) to contain the applicable criteria.\(^1\) It is only in Italy that some court decisions have been

rendered in which different parameters were held to apply at the two stages with Article II not applying at the enforcement stage.22

The reason for considering Article II(2) as solely applicable stems from the fact that for fifty years (and especially in the early decades of its existence) the New York Convention represented an internationally uniform standard, more often than not simpler and less cumbersome than the provisions of national arbitration laws. The preference given to Article II(2) therefore reflects a desire to apply a more arbitration-friendly system than that offered by national laws.

However, the standard of what is considered as arbitration-friendly has shifted during recent years, as a result of reforms in national arbitration laws.23 Whereas it would have been relatively uncontroversial some decades ago to state that ‘[t]he meaning of the uniform rule character of Art. II(2) [is] that it constitutes both a maximum and a minimum requirement, thereby prevailing over either more or less demanding requirements of municipal law’,24 the uniform rule character of Article II(2) is now being increasingly challenged as a minimum requirement.

When national laws are more arbitration-friendly than the New York Convention, doubts may be expressed over the appropriateness of continuing to apply the Article II(2) criteria, rather than the more liberal criteria of national laws. The preference given to national law might be questionable at the initial stage of the arbitration, where the application of national law may be thought to violate the wording of Article II(2),25 but it would certainly seem appropriate at the enforcement stage, where it is rather the application of the standard contained in Article II(2) that violates Article V(1)(a). The reason for not applying Article V(1)(a) literally disappears, if the applicable national law is more arbitration-friendly than Article II(2).

The arbitration-friendly character of some national laws is therefore biting into the character of Article II(2) as a uniform rule, at least at the stage of enforcing an award.

### 3.1 Can the more-favourable-law provision of Article VII assist?

Article VII of the New York Convention, containing the so-called more-favourable-law provision, states that the provisions of the 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 the treaties of the country where such award is sought to be relied upon’. Thus, a national law favourable to enforcement can be applied instead of the criteria of the New York Convention. UNCITRAL has pointed out the possible importance of this article in permitting the application of State laws that are more favourable than the New York Convention. It also mentions the advisability of extending this article to arbitration agreements.26 Hence, the above-mentioned

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23 Formal requirements for arbitration agreements have been liberalized over recent years in the laws of England (Arbitration Act 1996), Germany (Civil Procedure Code, 1997), Sweden (Arbitration Act, 1999) and Norway (2004). Switzerland anticipated this trend by modifying its arbitration legislation in 1987. The UNCITRAL Model Law on International Commercial Arbitration is even earlier, dating from 1985.

24 A.J. van den Berg, supra note 17 at 31.

25 See, however, the German Supreme Court decisions in Yearbook Commercial Arbitration II (1977) at 242f. and Yearbook Commercial Arbitration XX (1995) at 666ff., affirming that Article II(2) allows national law to be applied, commented in A.J. van den Berg, supra note 17 at 32.

26 See the UNCITRAL Secretariat note, supra note 15, paras. 24–34, with an extensive analysis of court practice.
Recommendation interpreting the New York Convention included an Article 2 stating that Article VII of the Convention should be read as allowing for the applicability of the law where the arbitration agreement is sought to be relied upon.\footnote{Article 2 of the Recommendation reads: ‘Recommends also that article VII, paragraph 1, of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, 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.’}

Article VII of the Convention and the UNCITRAL Recommendation do not, however, answer all problems that might arise from conflicting requirements in relation to the form of the arbitration agreement.

According to the UNCITRAL Recommendation, Article VII is of assistance only where the more favourable standard is contained in the law of the country where the arbitration agreement is sought to be relied upon. In the case of enforcement, this would need to be the law of the country where enforcement is sought (for which the validity of the arbitration agreement is a prerequisite). However, if the more favourable standard is in the law of the country where the arbitration took place, Article VII will be of no avail, not even after the UNCITRAL Recommendation. Article VII therefore only offers assistance if the law of the place of enforcement is more liberal in its formal requirements for the arbitration agreement than the New York Convention.

In practice, the liberal law upon which the parties may have relied when entering into an arbitration agreement that does not comply with strict formal criteria is more frequently the law governing the arbitration agreement, i.e. usually the law of the place of arbitration. It is unlikely that, when entering into an arbitration agreement, parties would rely on the flexibility offered by the law of place of enforcement, since that place may vary depending on who is the loser and there could indeed be several places of enforcement if a party has assets in various countries. So, reliance on such law would lead to unpredictability over the validity of the arbitration agreement. Parties are more likely to rely on the flexibility offered by the law governing the arbitration, since they have chosen this law.

In this case, however, Article VII would be of no assistance, unless the court of enforcement were to construe it so broadly as covering the law of the place of arbitration or the law chosen by the parties to govern the arbitration agreement. Yet such an interpretation would exceed the UNCITRAL Recommendation.

\subsection*{3.2 Is the procedural requirement of Article IV an obstacle?}

Article IV of the New York Convention contains what could represent an obstacle to the enforcement of an award based on an oral arbitration agreement.

It is generally thought that the New York Convention requires an award to be enforced unless one of the grounds for refusing enforcement listed in Article V applies. Whilst an oral arbitration agreement would be valid under Article V(1)(a) if governed by Swedish or Norwegian law,\footnote{Assuming one does not follow the generally accepted practice, described in section 3 above, of reading Article VI(1)(a) as containing an internal reference to Article II(2) (requiring a written agreement).} it could be suggested that enforcement under the New York Convention would be denied as it would be impossible to provide the court with ‘\[t\]he
original agreement referred to in article II or a duly certified copy thereof’, as stated in Article IV. Yet, this obstacle is not insurmountable if one considers the hierarchy between Articles IV and V of the Convention. Article V can be regarded as the central pillar of the Convention, containing the grounds for refusing enforcement of an award. It could be argued that if the conditions for validity mentioned in Article V(1)(a) are met, then Article IV should not add further conditions for validity and that its provisions are merely procedural rules and cannot deprive a party of the benefit of Article V. However, this would be to disregard one of the only two procedural conditions contained in the Convention.29

UNCITRAL’s 2006 amendments to the Model Law on International Commercial Arbitration included a change to Article 35, which corresponds in substance to Article IV of the New York Convention. In the new wording of Article 35, the requirement that the party seeking enforcement provide ‘the original agreement referred to in article 7 or a duly certified copy thereof’ has been dropped.

Interestingly, although the 2006 UNCITRAL Recommendation regarding the interpretation of Article II of the New York Convention mentioned that Article VII should be extended to arbitration agreements, it did not clarify that Article IV cannot be used to create additional grounds for refusing enforcement. This may possibly be explained by the continuing existence of the writing requirement in Article II. Even though the Recommendation encourages an extensive interpretation of Article II, the agreement must still be in writing according to Article II. Hence, Article IV’s requirement that a copy of the arbitration agreement be supplied when seeking enforcement of the award does not create an additional criterion but simply extrapolates from the criterion already existing in Article II.

Article IV would, on the other hand, create an additional criterion if a strict interpretation of Article V(1)(a) led to the application of a national law that did not require the arbitration agreement to be in writing. In the above example of an award based on an oral arbitration agreement governed by Swedish law (and therefore valid under Article V(1)(a)), a strict interpretation of Article IV might lead a court to refuse enforcement because the provision contained in Article IV cannot be complied with.

That obstacle could, however, be removed if enforcement is sought in a country whose liberal legislation is made applicable through the more-favourable-law provision of Article VII (assuming that a similar adaptation to accommodate the absence of formal requirements for arbitration agreements has been made as in Article 35 of the UNCITRAL Model Law on International Commercial Arbitration).

However, the winning party is not always able to choose the country where the award is enforced, as this depends on where the losing party has sufficient assets. If enforcement is sought in a country with formal requirements for the arbitration agreement, Article VII will be of no help, as was seen in section 3.1 above. The enforcement court will therefore have to decide whether the impossibility to comply with Article IV is a ground for refusing enforcement additional to the grounds exhaustively listed in Article V, or whether it can disregard the procedural requirement laid down in Article IV.

A Norwegian Court of Appeal has in the past refused enforcement of an award on the basis of a violation of Article IV of the New York Convention: Halogaland Court of Appeal, 16 Aug. 1999, Stockholm Arbitration Report, 1999 at 121ff., with observations by G. Nerdrum. See also my comments Nytt i Privatretten, 2000, I at 15ff.
4. Conclusion

If courts of enforcement follow the customary interpretation of Article V(1)(a) of the New York Convention—i.e. they refer to Article II(2) to determine the validity of the arbitration agreement—they will refuse enforcement of an award if the arbitration agreement does not satisfy the formal requirements laid down in Article II(2). Arbitration agreements entered into electronically easily satisfy those requirements, especially in light of the UNCITRAL Recommendation. This is not the case, however, with oral arbitration agreements, even though they may be valid under some State laws and according to the second option of UNCITRAL's 2006 amendment to Article 7 of the Model Law on International Commercial Arbitration.

If a winning party finds it impossible to obtain the enforcement of an award in its favour, it might wish to file a suit before an ordinary court of law, with a view to obtaining an enforceable judgement in preference to an unenforceable arbitral award. However, depending on the country in which the suit is brought, the court might decline jurisdiction on the ground that the dispute is covered by an arbitration agreement which, albeit oral, is valid under the law of that country.

Thus, it could be said that the liberal position taken on the form of arbitration agreements in some recent legislation and in the second option of UNCITRAL's 2006 amendment to Article 7 of the Model Law might have the opposite effect of that intended. Rather than facilitating arbitration, it might complicate the application of such a useful instrument as the New York Convention.

The texts adopted by UNCITRAL in 2006 help to reinforce the arbitration-friendly approach underlying the New York Convention. This is particularly relevant to arbitration agreements entered into electronically. However, the fact that it has been impossible to agree on the complete removal of any formal requirements for arbitration agreements shows that parties still need to be cautious where non-written arbitration agreements are concerned and should not blindly rely on the most advanced and arbitration-friendly systems.
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