1. INTRODUCTION

We all are aware of the advantages of international arbitration over litigation in court; among these advantages are the possibility for the parties to tailor arbitration according to their needs, and the simple and uniform procedure for enforcing the award. It seems that the widespread use of new technologies within international business is challenging both the advantages that I have just mentioned.

This is valid, in particular, in respect of the more and more common practice to enter into contractual relationships by electronic post, rather than by signing a document or exchanging letters or faxes. If the contract

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contains an arbitration clause, then also the arbitration clause is entered into electronically. This causes various challenges for the interpreter.

The first challenge is to verify whether an arbitration clause entered into electronically meets the requirement of the written form, which is set by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. This question seems relatively easy to answer affirmatively, on the basis of an extensive interpretation of the New York Convention, as will be shown below, under 2.1.3.

The second challenge arises as a consequence of some national laws’ intention to adapt their arbitration rules to the use of new technologies, and their consequent abandonment of form requirements for the arbitration clause (as described below, under 2.1.1). Is an arbitral award enforceable under the New York Convention, if it is based on an arbitration clause that is valid under the applicable national law but not valid under the New York Convention? A relatively uniform interpretation of the New York Convention (referred to below, under 3.1) deems that the form requirements set by the New York Convention prevail against any form requirements that might be set by the applicable law. This interpretation was dictated by an arbitration-friendly attitude, as the New York Convention traditionally contained a regime that was more favourable to arbitration than the regime of the various national arbitration laws. Now that some national laws (like Swedish and, if the Governmental Bill on Arbitration is passed, also Norwegian law) are becoming more arbitration-friendly than the New York Convention in respect of form requirements, it seems appropriate to wonder whether the above mentioned uniform interpretation of the New York Convention should not be reversed, and national arbitration laws should not be given preference.

The third challenge arises in connection with this possible diversification in the interpretation of the New York Convention, depending on whether the interpreter has an arbitration-friendly attitude or not, and whether the form requirements of the New York Convention are more arbitration-friendly than the applicable national law or not. The foreseeability of enforcement under the New York Convention runs the risk of being undermined.

2. The Validity of Arbitration Agreements

The validity of an arbitration agreement is relevant, as known, in two major respects: On the one hand, a valid arbitration agreement has the effect of excluding the jurisdiction of ordinary courts of law on the dispute
covered by the arbitration agreement. On the other hand, the validity of the arbitration agreement is a condition for the enforcement of the arbitral award that has been rendered in the dispute covered by the arbitration agreement. In the case of international disputes, the award is generally enforced in the courts of a country different from the country where the award was rendered, therefore 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. Among the grounds for refusal of enforcement, is 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.

We have, therefore, established that the validity of the arbitration agreement is a prerequisite of the jurisdiction of the arbitral tribunal, as well as of the enforceability of the arbitral award. The next question that needs to be answered is, what are the criteria that determine the validity of an arbitration agreement.

2.1. CRITERIA FOR DETERMINING THE VALIDITY OF AN ARBITRATION AGREEMENT

2.1.1 National Arbitration Laws

Art. V(1)(a) of the New York Convention seems to have a clear reference to the applicable national law: according to the text of the article, the validity of the arbitration agreement is governed by the law to which the parties have subjected the arbitration 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. This latter alternative, the lex arbitri, is the most common, since the parties rarely specify what law will govern their arbitration agreement.

A literal interpretation of art. V(1)(a) of the New York Convention, therefore, leads to the application of the national law, generally of the country where the arbitral tribunal has its venue, in order to determine

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1 This effect of the arbitration agreement is regulated uniformly for the 125 States signatories to the New York Convention in article II.3 of the Convention: “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.”
whether the arbitration agreement is valid. National laws may vary considerably in respect of the form requirements of arbitration agreements. Some laws have rather strict criteria; others have loose criteria or no form requirements at all. Article 807 of the Italian Code of Civil Procedure, for example, requires the written form with the same strict criteria that govern the validity of contracts which 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, and this includes an exchange of telegrams, faxes or other means of telecommunication which provide a record of the agreement.\(^3\) Similar criteria are set forth in article 1031 of the German Code of Civil Procedure, which, however, goes even further in its definition of the written form and specifies that the requirement of the written form shall be deemed to have been complied with if the arbitration agreement is contained in a document sent to one party and if such party has not raised objections in good time.\(^4\) The English Arbitration Act requires, in section 5, that the arbitration agreement be in writing, and defines an agreement as “in writing” if it is made, evidenced or contained in an exchange in writing.\(^5\) However, sections 5(3) to 5(5) define as written

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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, telefax or other means of telecommunication which provide a record of the agreement.”

\(^4\) Article 1031 of the German Code of Civil Procedure reads:

“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.

The form requirement of subsection1 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.

[…]]”

\(^5\) 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
also agreements that are made otherwise than in writing, as long as they refer to terms which are in writing, or agreements that have been recorded in writing only by one party. Moreover, section 5(6) 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, which in article 1 recognises any arbitration agreement as long as it has been agreed to by the parties. The Swedish Arbitration Act does not require any particular form for such agreement. The same regulation is contained in the Norwegian Bill on Arbitration (section 2-2), which is expected to be enacted soon.

The initial question (would an arbitration agreement entered into electronically satisfy the applicable form requirements?), therefore, can be answered differently, according to what law is applicable. The answer would be without any doubt affirmative, if the applicable law has liberal or no 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.”

7 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. […]”

8 Article 2-2 of the Norwegian Bill on Arbitration 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. […]”
form requirements; the answer would require a construction of the requirement “in writing”, if the applicable law does not expressly make reference to any means of telecommunication. The same construction is required also in connection with art. II of the New York Convention, to which I will refer below.

2.1.2 Article 7 of the UNCITRAL Model Law

The 1985 UNCITRAL Model Law on International Commercial Arbitration is, together 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 30 countries and is used as a fundamental reference also in those countries that have not directly adopted it. The Model Law was meant as a harmonisation tool within international arbitration, and has willingly followed closely the provisions contained in the New York Convention, so as to ensure harmonisation and continuity. Article 7(2) of the Model Law specifies the scope of the requirement of the written form for arbitration agreements: “An agreement is in writing if it is contained in a document 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 has followed the New York Convention in requiring the written form for arbitration agreements, and has clarified the definition of written form so as to cover the technological developments that were known at the time the Model Law was written, at the same time opening for any future technological developments, as long as they would give a record of the agreement.

This confirms that the original spirit of these instruments is, as mentioned above, to give effect to an arbitration agreement that is entered into by applying the technological means of communication that are used in common business practice. In other words, the text of the instruments should not become a burden on the parties, preventing them from making use of the developments in technology that were not current at the time when the instruments were written.

The UNCITRAL has several Working Groups, among which the Working Group on Arbitration is considering in these days (among other things) the issue of the requirement of the written form for an arbitration

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9 See the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration (http://www.uncitral.org/english/texts/arbitration/ml-arb.htm).
agreement. This group is currently elaborating upon a proposal, which consists of a draft model provision revising article 7 of the UNCITRAL Model Law, and a draft interpretative instrument regarding art. II(2) of the New York Convention (which will be discussed below).

In the part that is relevant in our context, namely the qualification of an agreement entered into electronically as an agreement in writing, the Working Group emphasises that the proposal does not alter the existing liberal interpretation of the Model Law, but simply confirms this interpretation.

The Working Group proposes a text largely based on article 6(1) of the UNCITRAL Model Law on Electronic Commerce, which reads as follows: “The arbitration agreement shall be in writing. ‘Writing’ includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference.” A non-exhaustive list of examples follows, including also electronic mail, telegram, telex or telecopy.

The debate within the UNCITRAL Working Group on Arbitration can be taken as a confirmation that the written form requirement is not meant as an obstacle to employing the means of communication commonly used by businessmen.

2.1.3 Article II of the New York Convention

Article II of the New York Convention requires recognition of an arbitration agreement that (among few other criteria) has been entered into in writing. Article II(2) specifies that “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” Article II(2) must be construed in order to determine whether such definition covers also agreements entered into electronically.

Obviously, the wording does not make direct reference to electronic telecommunication, but this is hardly surprising, considering that in 1958, when the convention was written, no one would have imagined that technological developments would have permitted to have electronic

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12 See A/CN.9/WG.II/WP.118, para.11.
The text of the convention has to be interpreted in light of the technological context in which the convention has been written: By making reference to exchange of letters or telegrams, the convention has included the most modern means of telecommunication that were known at that time. The intention of the convention was, therefore, to recognise arbitration agreements that were entered into by absent parties by using the means of communication that the parties usually adopt in the course of their business. In 1958 these means were letters or telegrams. Later on technological development made available the telex. Exchanges by telex were not expressly referred to in article II(2) of the New York Convention, yet there is a series of court decisions in various countries stating that article II(2) must be construed to cover also exchanges made by telex. Further technological development rendered it customary to correspond by telefax; exchanges by telefax are not referred to by article II(2) of the New York Convention, yet the courts construe the convention so as to cover also arbitration agreements entered into by telefax.

Nowadays technological development has made it customary to communicate by electronic post: it seems only natural to extend the interpretation of article II(2) once again, to cover the most modern means of communication that is widely adopted for concluding contracts. A different interpretation would be against the spirit of the convention, which aimed at recognising arbitration agreements as long as 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 (first telex, then telefax, now electronic communication); it is also confirmed in the wording that the UNCITRAL has chosen to define the form requirements for arbitration agreements in the Model Law on International Commercial Arbitration of 1985, as we saw above. The UNCITRAL Model Law does not formally constitute a basis for interpreting the New York Convention, but it is natural to construe the New York Convention in light of the

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14 See, for example, the Swiss decision published in Yearbook Commercial Arbitration XXI (1996), 685.
UNCITRAL Model Law, which represents the development of the line of thought upon which the Convention is based.\textsuperscript{15}

This interpretation, however, is not completely uncontroversial, and several voices have started requesting a clarification of the matter,\textsuperscript{16} that could prevent different courts from construing the New York Convention in different ways, thus undermining the uniformity of interpretation, which is one of the most valuable assets of the New York Convention.

To this end, the above-mentioned UNCITRAL Working Group on Arbitration is elaborating some proposals to ensure that art. II(2) of the New York Convention is interpreted uniformly, and in a way that reflects the current practice.\textsuperscript{17}

The Working Group has elaborated a “Declaration regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958” by the United Nations Commission on International Trade Law,\textsuperscript{18} that is meant as an interpretative instrument.

The declaration specifies \textit{i.a.} in item 4 that it is made in the frame of the Commission’s mandate to further the progressive harmonisation and unification of the law of international trade. The declaration is based, according to its recitals, among others on the following considerations: (i) The necessity to have a uniform interpretation of the term “agreement in writing”, in order to enhance certainty in international commercial transactions (item 9); (ii) The requirement that the Convention is interpreted having regard to its international origin and to the need to promote uniformity in its applications (item 10), and (iii) The necessity to take into account subsequent legal instruments, such as the UNCITRAL

\textsuperscript{15} 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, see van den BERG, “The Application of the New York Convention by the Courts”, in van den BERG (Ed.), \textit{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, 1999, p.32.

\textsuperscript{16} See the general observations and the discussion within the UNCITRAL Working Group on Arbitration, particularly, at its thirty-second session, referred to in the document A/CN.9/468, para. 88-106.

\textsuperscript{17} See the documentation relating to the 32nd to 36th sessions of the Working Groups on Arbitration, particularly A/CN.9/468, paras. 88-99; A/CN/WG.II/WP.110, paras. 10.14; A/CN.9/485, paras. 21-77; A/CN.9/487, paras. 22-63; A/CN.9/WG.II/WP.118, paras. 1-33. For a complete list of the UNCITRAL documents reporting the discussions on this topic, see A/CN.9/WG.II/WP.118, para.7.

\textsuperscript{18} A/CN.9/WG.II/WP.118, paras. 25-30.
Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce (item 11). The Working Group proposes to elaborate an “operative” provision, that should be based on the approach taken in the revised text (as proposed by the Working Group) of article 7 of the Model Law. At the present stage, the preliminary proposal (item 12) provides that the UNCITRAL: “[Recommends] [Declares] that the definition of ‘agreement in writing’ contained in article II(2) of the Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]”.

A declaration by the UNCITRAL would not have any binding effect on governments or, even less, on national judges interpreting the New York Convention. It is even doubtful whether such an instrument could be considered as an authoritative interpretation of the Convention in the strict sense of the term, since the UNCITRAL can hardly be considered as the body that issued or enacted the instrument. However, such an instrument would without any doubt have the authority of an official view expressed by the United Nations body that is entrusted with the mandate of coordinating the UN legal activities within international trade law, and that comprises the principal economic and legal system of the world, including both developed and developing countries.

The interpretation of the UNCITRAL might, therefore, be given considerable weight when construing the New York Convention; but it remains to be seen whether the instrument of the declaration is sufficient or even adequate to found an interpretation of article II(2) that might differ considerably from the interpretation currently made in some countries.¹⁹

Interpreting the provision so as to cover also arbitration agreements entered into electronically, however, does not seem to be beyond the limits of an ordinary extensive interpretation, and has, as mentioned, already been done earlier in respect of past technological developments. The UNCITRAL declaration is, thus, in this context simply adding its authoritative voice to confirm the correctness of this construction.

¹⁹ This matter was the object of a debate reported in A/CN.9/487, para. 61, but the debate was primarily aimed at the discussion on the possibility to replace evidence of an agreement to arbitrate with evidence of a set of rules on arbitration or a law on arbitration.
3. Application of National Law or of Article II New York Convention: is there a Risk of a Lack of Coordination?

We have seen so far that the form requirements for an arbitration agreement vary considerably from country to country, and that even the uniform regulation contained in the New York Convention is under some tension, due to the necessity to interpret the text so as to cover new technological developments. The range of form requirements varies from no form requirement at all (as in Swedish law and in the planned Norwegian law) to a strict form requirement (as in Italian law).

As mentioned, the validity of an arbitration agreement has important effects in two different phases: the initial phase of a proceeding, when the jurisdiction of the arbitral tribunal has to be established, and the final phase, if and when the arbitral award has to be enforced.

If an arbitration agreement is deemed invalid in the former phase, the result will be that the arbitral tribunal does not have jurisdiction, and the dispute has to be submitted to the ordinary courts of law. If an arbitration agreement is deemed invalid in the latter phase, the result is that the arbitral award cannot be enforced.

What I would like to analyse here is the following situation: is the effectiveness of arbitration threatened by the variety of criteria for the validity of the arbitration agreement? In other words: is there a possibility that the arbitration agreement is deemed invalid at the stage of enforcement (thus preventing enforcement of the award), whereas it is deemed valid in the initial phase of the proceeding (thus preventing that ordinary courts accept jurisdiction on the dispute)? Such a lack of coordination would obviously be detrimental for the winning party, which would not be able to enforce its award and would not be able to have the case tried in ordinary courts.

In order to verify whether such a coordination problem can arise, it is necessary to look at what are the parameters, in each of the two phases, for evaluating the validity of the arbitration agreement.

3.1. PRACTICE ADOPTS ARTICLE II NEW YORK CONVENTION AS A PARAMETER

It has long and authoritatively been observed that the requirement of the written form for an arbitration agreement has to be evaluated on the basis of the criteria contained in article II(2) of the New York Convention,
irrespective of the phase in which the evaluation is made. The standard contained in article II(2) has, in other words, traditionally been considered applicable, irrespective of what national arbitration laws might say, both in connection with the question of jurisdiction, and in connection with the question of enforcement.

This latter circumstance is actually in contrast with a literal interpretation of the New York Convention, since article V(1)(a), which regulates the enforcement of an arbitral award, states that enforcement may be refused if “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”. In spite of the contrary wording of article V(1)(a), which refers the evaluation of the validity of the arbitration agreement to national law, judicial practice traditionally has deemed article II(2) to contain the applicable criteria, and only some court decisions from Italy have maintained that the parameters are different in the two phases and do not apply article II in the phase of enforcement.

The rationale of this preference is that the New York Convention has represented for over 40 years (but especially in the first decades of its life) an internationally uniform standard, that more often than not contained a regulation of arbitration that was simpler and less cumbersome than the regulation contained in national arbitration laws. The preference granted to article II(2), in other words, stems from the desire to apply a more arbitration-friendly regulation than the regulation that could be expected to be offered by national laws.


3.2.  IS ART. II(2) STILL MORE ARBITRATION-FRIENDLY THAN NATIONAL LAW?

As we have seen initially, however, the standard of what is considered as being arbitration-friendly has been significantly affected in the past years, in connection with a series of reforms of national arbitration laws.\textsuperscript{23} Whereas it would have been relatively uncontroversial some decades ago to state that “The 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”,\textsuperscript{24} the uniform rule character of article II(2) is being now increasingly challenged in respect of the minimum requirement.

We have seen that article II(2) requires the written form, and describes this requirement by reference to exchange of letters or telegrams. Strictly interpreted, this article would not allow arbitration agreements entered into by telex, telefax or electronic communication; we have seen above that judicial practice has extended the interpretation to cover in any case agreements entered into by telex and telefax, and extension to cover also electronic communication is expected. Some national laws, including also those based on the UNCITRAL Model Law, do not leave doubts as to the admissibility of arbitration agreements entered into electronically. This, however, needs not be a serious shift in the standard of what is written form, since we have seen that it would not create excessive problems to construe also the New York Convention so as to cover agreements entered into electronically.

Serious modifications to the standard are represented, on the contrary, by those laws that admit agreements entered into tacitly (such as, for example, German law), or without any form requirement at all (such as, for example, Swedish law and the Norwegian bill).

When national laws are more arbitration-friendly than the New York Convention, doubts may be raised as to the opportunity to continue applying the criteria contained in article II(2), rather than applying the more liberal criteria of national law. The preference granted to national law might

\textsuperscript{23} Liberal form requirements for arbitration agreements have been introduced during the past few years: England enacted the new Arbitration Act in 1996, Germany reformed the relevant chapter of the Civil Procedure Code in 1997, Sweden enacted the new Arbitration Act in 1999, Norway is in the process of enacting its new arbitration legislation in these days. Switzerland has anticipated the liberal trend, modifying its arbitration legislation in 1987; the UNCITRAL Model Law is even earlier, from 1985.

be questionable in the initial phase of the arbitration, where application of national law may be deemed to violate the wording of article II(2), but it would certainly seem appropriate in the phase of enforcement, where it is application of the standard contained in article II(2) that violates the wording of article V(1)(a). The very 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, therefore, is cracking the character of article II(2) as a uniform rule, at least in the stage of enforcement of an award.

3.3. THE MORE-FAVOURABLE-LAW PROVISION OF ART. VII

There is another article of the New York Convention that might crack the character of article II(2) as a uniform rule, and it is article VII, containing the so-called more-favourable-law provision. Article VII provides 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”. As long as application of national law is more favourable to enforcement, therefore, national law can be applied instead of the criteria of the New York Convention.

A strict interpretation of this article, however, does not necessarily solve all the problems that may arise from conflicting standards of form requirements. Only if the more favourable standard is contained in the law of the country where enforcement is sought, article VII is of help. If the more favourable standard is contained in the law where arbitration took place, the wording of article VII does not offer any assistance (unless the court of enforcement is applying article V(1)(a) literally, contrary to the generalised practice).

4. Consequences of the Application of the Different Criteria

If different parameters are being used in different stages of the arbitration to evaluate the validity of an arbitral agreement, we can imagine various scenarios where lack of coordination might have considerable consequences.

25 See, however, the German Supreme Court decisions in Yearbook Commercial Arbitration II (1977), 242f., and Yearbook Commercial Arbitration XX (1995), 666ff., affirming that article II(2) allows the application of national law, commented in Van den BERG, A.J., “The Application of the New York Convention by the Courts”, cit., 32.
4.1. APPLICATION OF NATIONAL LAWS: COORDINATION WITH ART. IV NEW YORK CONVENTION

We can first assume that an arbitration agreement has been entered into tacitly. This agreement is valid, if it is regulated, for example, by German or Swedish law. We can so assume that the losing party does not carry out the award voluntarily, and that the winning party seeks enforcement with the courts of a country where the losing party has some assets.

We know that the award must be enforced, unless there is one of the few grounds for refusing enforcement that are listed in article V of the New York Convention.

If the court decides to interpret article V(1)(a) in accordance with the generally accepted practice, i.e. as if it contained an internal reference to article II(2), this would be an obstacle to enforcement. We assume, however, that the court of enforcement interprets article V(1)(a) literally (and therefore differently from the interpretation generally accepted in practice), and considers the arbitration agreement valid because it was (invalid according to article II(2) of the convention, but) valid under the law governing the arbitration agreement.

The party that is seeking enforcement, however, encounters one more obstacle, and it is article IV of the New York Convention. This article lists the only procedural conditions that must be met in order to obtain enforcement of an award; one of the (few) conditions is that the party seeking enforcement provides the court with “The original agreement referred to in article II or a duly certified copy thereof”.

If the agreement was oral, it is obvious that it cannot be supplied in original or certified copy to the court. This does not need to be an insurmountable obstacle, as it seems more a question of determining the hierarchy between article IV and article V in the New York Convention.

It may be argued that article V is the central article in the Convention, the only article which enumerates the grounds for refusing enforcement of an award. Once established that the conditions of validity contained in article V(1)(a) are met, it should be possible to argue that article IV cannot create additional conditions for the validity of an arbitration agreement, and that therefore article IV “only” contains some procedural rules, that cannot prevent a party from the protection that he is entitled to under article V.

It is, however, not completely unproblematic to disregard completely one of the two only procedural conditions that are contained in the New York Convention.
4.2. APPLICATION OF ART. II NEW YORK CONVENTION: COORDINATION WITH THE NATIONAL LAW

We can now assume that, in the same situation as the one described above (tacit agreement to arbitrate, valid under the law that is governing the arbitration agreement), the court of enforcement decides not to abandon the generally recognised interpretation of article V(1)(a), that reads an internal reference to article II(2) as far as the validity of the arbitration agreement is concerned.

The court of enforcement will refuse enforcement of the award, because the arbitration agreement was not in compliance with the form requirements contained in article II(2) of the New York Convention. If the losing party has assets in other countries, the winning party may try to obtain enforcement of the award in these other countries. If also the courts of these countries apply the same interpretation of article V(1)(a), or if the losing party does not have assets in other countries, then the winning party has an arbitral award that cannot be enforced.

The winning party might want to file a suit before an ordinary court of law, in order to obtain a judgement instead of an (unenforceable) arbitral award; however, according to where the proper forum for the dispute is, the winning party might be faced with a refusal by the courts to take jurisdiction, because the dispute is covered by an arbitration agreement (which might be valid under the law of that court).

5. Conclusion

The scenarios described in the previous section are certainly not encouraging: A party runs the risk of going through lengthy and costly proceedings, for obtaining an arbitral award that cannot be enforced.

However, these scenarios are not the only negative consequences of the pluralism of form standards that has started to develop. Another consequence, and also a rather negative one, is that the regime regulating the enforcement of arbitral awards becomes less and less predictable.

If the New York Convention starts to be interpreted in different ways, according to whether the interpreter is or is not arbitration-friendly, the party wishing to enforce an award will have to take into account a number of variables: Is the court of enforcement arbitration-friendly? If it is, the court might want to apply article V(1)(a) as if it contained a reference to article II(2), if the otherwise applicable law has a stricter form requirement. However, if the otherwise applicable law has a more liberal form requirement, the court might want to apply that law. If the court of
enforcement is not arbitration-friendly, the two alternative possible behaviours will have to be reversed.

This is obviously detrimental for the uniform application of the New York Convention.

In conclusion, it seems that the liberal form requirements that are being permitted by new legislation, that are undoubtedly meant to facilitate the use of arbitration, might have the opposite result, of complicating the application of such a useful instrument as the New York Convention.

This should not mean, of course, that, in order to facilitate the use of arbitration, no improvements should be made to existing arbitration laws. This means only that parties should be aware of the pitfalls that they might encounter, if they decide to adopt a standard which is different from the standard contained in the New York Convention.