Haas, Schiedsgerichte in Erbsachen und das New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche, SchiedsVZ 2011, 289

Hanotiau/Caprasse, Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention, (2008) 25 J. Int. Arb. 721

Hascher, European Convention On International Commercial Arbitration of 1961 – Commentary, XX Y.B. Com. Arb. 1006 (1995)

ICC, Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards, Special Supplement 2008, ICC Publications 2008

ICCA Guide *see International Council for Commercial Arbitration*

International Council for Commercial Arbitration, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, 2011, available at http://www.arbitration-icca.org/publications/NYC_Guide.html (last visited August 3, 2012)

Kreindler/Schäfer/Wolff, Schiedsgerichtsbarkeit, Kompendium für die Praxis, Recht und Wirtschaft 2006

Kröll, Die Schiedsvereinbarung im Verfahren zur Anerkennung und Vollstreckbarerklärung ausländischer Schiedssprüche, ZZP 117 (2004), 453

Kröll, Recognition and Enforcement of Foreign Arbitral Awards in Germany, 5 Int. A.L.R. 160 (2002)

Kronke/Nacimiento/Otto/Port (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Kluwer Law International 2010

Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd ed., Otto Schmidt 2008

Lew/Mistelis/Kröll, Comparative International Commercial Arbitration, Kluwer Law International 2003

Liebscher, The Healthy Award, Kluwer Law International 2003

Mallmann, Die Bedeutung der Schiedsvereinbarung im Verfahren zur Anerkennung und Vollstreckbarerklärung ausländischer Schiedssprüche, SchiedsVZ 2004, 152

Mistelis (ed.), Concise International Arbitration, Kluwer Law International 2010

Münchener Kommentar zur Zivilprozessordnung *see Rauscher/Wax/Wenzel*

Musielak (ed.), Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz, 9th ed., Franz Vahlen 2012

Poudret/Besson, Comparative Law of International Arbitration, 2nd ed., Sweet & Maxwell 2007

Pryles, Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v. Bolwell, (1994) 10 Arb. Int'l 385

Rauscher/Wax/Wenzel (eds), Münchener Kommentar zur Zivilprozessordnung, 3rd ed., C. H. Beck 2007–2010

Redfern/Hunter see Blackaby/Partasides/Redfern/Hunter

Reithmann/Martiny (eds), Internationales Vertragsrecht, 7th ed., Otto Schmidt 2010

Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed., Mohr Siebeck 1989

Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed., C. H. Beck, Helbing & Lichtenhahn 2005

Stein/Jonas (eds), Kommentar zur Zivilprozessordnung, Vol. 9: §§ 916–1068, EGZPO, 22nd ed., Mohr Siebeck 2002

United Nations (ed.), Enforcing Arbitration Awards under the New York Convention, 1999, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf (last visited August 3, 2012)

Weigand (ed.), Practitioner's Handbook on International Arbitration, C. H. Beck, DJØF 2002

New York Convention

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958

PRELIMINARY REMARKS*

Specific Bibliography: *Di Pietro/Platte*, Enforcement of International Arbitration Awards – The New York Convention of 1958, Cameron May 2001; *Gharavi*, The International Effectiveness of the Annulment of an Arbitral Award, Kluwer Law International 2002; *Glossner*, "From New York (1958) to Geneva (1961) – a veteran's diary", in "Enforcing Arbitration Awards under the New York Convention: Experience and Prospects", United Nations 1999; *Mistelis/Brekoulakis,* Arbitrability – International & Comparative Perspectives, Kluwer Law International 2009; *Mistelis/Lagerberg*, International Arbitration: Corporate attitudes and practices 2008, PricewaterhouseCoopers, 2008 available at: http://www.arbitrationonline.org/docs/IAstudy_2008.pdf (last visited July 18, 2011); *Mustill*, "Arbitration: History and Background", (1983) 6 J. Int. Arb. 43; *Neubold/Hummer/Schreuer*, Österreichisches Handbuch des Völkerrechts, vol. 1, 4th ed. Manz 2004; *Paulsson*, Enforcing Arbitral Awards notwithstanding a Local Standard Annulment (LSA), 9(1) ICC Bull. 14 (1998); *Rubins/Kinsella*, International Investment, Political Risk and Dispute Resolution – A Practitioner's Guide, Oceana Publications 2005; *Schlechtriem/Schwenzer*, Kommentar zum einheitlichen UN Kaufrecht, 5th ed. C.H. Beck 2008; *van den Berg*, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards – Explanatory Note", prepared for the ICCA 2008 Dublin Conference, available at: http://www.arbitration-icca.org/media/0/12133703697430/explanatory_note_ajb_rev06.pdf (last visited July 18, 2011) ("Hypothetical Draft Convention"); *van den Berg*, The New York Arbitration Convention of 1958: An Overview, available at: http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (last visited July 18, 2011) ("Overview of NYC"); *van den Berg*, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958", Audiovisual Library of International Law available at: http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html (last visited July 18, 2011) ("Online Commentary"); *Wetter*, "The Present Status of the International Court of Arbitration of the ICC: An Appraisal", 1 Am. Rev. Int'l Arb. 91 (1990).

Table of Contents

* I would like to thank Zrinka Reisinger, Thomas Christ, and Khristina Siletskaya for their valuable assistance in preparing this part.

I. General Overview

1. The New York Convention

1 The New York Convention is a **key instrument in international arbitration**. One might even say that it was the Convention that has allowed arbitration to become the primary method of solving disputes in international trade and commerce. In order to be able to fully appreciate the relevance of the Convention, one should take a closer look on arbitration as such. What is arbitration?

a) Arbitration

2 **Arbitration** is a form of dispute resolution. The decision makers are not judges of state courts, but arbitrators. In many jurisdictions, the decision of the arbitrators, the award, has the same legal force as the final judgment of a state court of last instance. The parties refer their dispute to an **arbitral tribunal** (generally consisting of one or three arbitrators) by whose decision they agree to be bound. Arbitration is often used for the resolution of **commercial disputes**, especially in the context of international commercial transactions.

3 Since it constitutes a deviation from the fundamental right of recourse to the state courts, the parties must agree upon arbitration. Therefore, an **arbitration agreement** must be concluded between the parties. In practice, usually an arbitration clause is inserted into a contract for this purpose.

4 Unless the parties to arbitration settle their claims, an **arbitral award** concludes the arbitration. An arbitral award is analogous to a judgment of a state court. Arbitral awards are usually not subject to appeal and, therefore, regarded to be "**final**". Most countries, however, allow arbitral awards to be "challenged" on limited grounds, such as the violation of public policy or the lack of jurisdiction of the arbitral tribunal.

b) Enforceability

It has already been said that arbitration is a matter of great importance to international commerce. The primary advantage of international arbitration is **enforceability**. Thanks to the New York Convention, to which, by August 2012, **147 countries** had acceded (see Annex II), a foreign arbitral award is enforceable in many countries of the world. The great majority of countries of significance in international commerce are party to the Convention. 5

The Convention requires courts of Contracting States to **give effect to arbitration agreements** and to **recognize and enforce foreign arbitral awards**. Arbitral awards must, however, undergo court proceedings aiming at the declaration of enforceability in the State where recognition and enforcement are sought (*exequatur*). Certain limited defenses may be raised against recognition and enforcement (*cf.* Art. V paras 85, 128, 196, 262, 351, 418–420, 480). 6

In order to facilitate the approach to the New York Convention, a short summary of its provisions is provided below. 7

c) The Provisions of the New York Convention

Article I(1) provides that **the Convention applies to arbitral awards made in any other State than the one where recognition and enforcement are sought** and to awards that are not considered to be domestic awards in the State where their recognition and enforcement are sought (*cf.* Art. I paras 2, 12–92, 93–137). Article I(3) sets forth two reservations that can be adopted by States that accede to the Convention, the **reciprocity and the commercial reservation** (*cf.* Art. I para. 4). 8

Article II(1) **defines the arbitration agreement** and obliges the Contracting States to **recognize such an agreement**. (*cf.* Art. II para. 40). Article II(2) defines one requirement of a valid arbitration agreement, namely that it is **in writing**. (*cf.* Art. II para. 73). Article II(3) obliges the courts of the Contracting States to **refer a matter to arbitration** upon request by a party if it is covered by an arbitration agreement (*cf.* Art. II paras 189–190). 9

Article III obliges each Contracting State to **recognize arbitral awards as binding and enforce them** in accordance with the rules of procedure of the country where the award is being relied on (*cf.* Art. III para. 7). Contracting States may not discriminate against foreign arbitral awards compared to domestic awards (*cf.* Art. III para. 24). 10

Article IV sets forth the **formalities to be observed to obtain recognition and enforcement of an arbitral award**. It specifies the evidence to be submitted by the party applying for recognition and enforcement (*cf.* Art. IV paras 1, 8–37). 11

Article V, one of the Convention's core provisions, contains the **reasons why recognition and enforcement of an arbitral award may be refused**. The party against whom the award is invoked must raise certain defenses (Article V(1)) (*cf.* Art. V paras 85, 128, 196, 262, 351, 418–420, 480), other defenses **are considered directly by the court** (Article V(2)) (*cf.* Art. V para. 2). 12

Article VI allows a court of a Contracting State to **suspend the decision on enforceability** of an arbitral award if challenge proceedings have been initiated against the arbitral award in the country of the award's origin (*cf.* Art. VI paras 1, 6–23). 13

14 **Article VII** contains a **"more favorable rights" provision.**[1] A party seeking recognition and enforcement of an arbitral award may base its respective request on any other treaty or domestic law, if it deems this to be appropriate (*cf.* Art. VII para. 2, 35–62).

15 **Article VIII** specifies **which countries may join the New York Convention** and how the ratification process is to be conducted (*cf.* Art. VIII paras 1, 9–21). **Article IX** provides for the accession by States that were not among the original signatories to the Convention (*cf.* Art. IX paras 1, 6–14). **Article X** addresses the **territorial scope of application** (*cf.* Art. X paras 1, 10–45) and **Article XI** the application in federal Contracting States (*cf.* Art. XI paras 1, 9–11).

16 **Article XII** provides for the **entry into force** of the Convention (*cf.* Art. XII paras 1, 9–12) and **Article XIII** for its **denunciation** by a Contracting State (*cf.* Art. XIII paras 1, 7–19). **Article XIV** addresses issues of reciprocity among the Contracting States (*cf.* Art. XIV paras 1, 6–8). **Articles XV and XVI** specify administrative aspects (*cf.* Art. XV paras 1, 6–8 and Art. XVI paras 1–2, 5–9).

2. Objectives of the Convention

17 The **principal objective** of the Convention was to build an effective international legislative framework, which would be capable of practical application and which would **facilitate the recognition and enforcement of arbitral awards and arbitration agreements.**[2] This ambitious objective could only be achieved by drafting the Convention in a manner that would facilitate its acceptance by a large number of States. Therefore, the Convention aims at striking a balance between its main goal of facilitating international arbitration and at the same time ensuring that the various fundamental legal principles of different States are observed. This balance was indeed successfully achieved and this paved the way for the Convention's great success and widespread application. In fact, the Convention now links the world's major trading States. For this reason it is often rightfully referred to as the **"balancing act".**[3]

3. The Importance and Relevance of the New York Convention

18 The New York Convention was signed on June 10, 1958 and entered into force on June 7, 1959. As already mentioned above, as per August 2012, 147 countries had acceded to the Convention. It is, without doubt, one of the most successful international treaties. Moreover, the New York Convention is considered to be the **cornerstone of current international commercial arbitration**[4] and has been referred to as "the single most important pillar on which the edifice of international arbitration rests."[5]

19 The Convention was introduced into the international legal framework in recognition of the growing importance of international commercial arbitration. The drafters of the Convention acknowledged and, moreover, successfully addressed the needs of transnational business for a certain degree of autonomy from

[1] See also *Otto*, in: Kronke/Nacimiento/Otto/Port (eds), p. 444.
[2] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 20.
[3] *Di Pietro*, in: Mistelis/Brekoulakis (eds), paras 5–4.
[4] *van den Berg*, p. 1.
[5] *Wetter*, 1 Am. Rev. Int'l Arb. 91 (1990).

the national rules applicable to domestic trade[6] as well as for certainty with respect to the recognition and enforcement of arbitral awards.

The Convention provides for **international legislative standards** for the recognition of arbitration agreements and the recognition and enforcement of arbitral awards. As one of the most widely ratified commercial treaties in the world,[7] the Convention has contributed significantly to the globalization of international commercial arbitration. Furthermore, it provided an incentive for the Contracting States to revise their national arbitration laws in the light of modern international business needs[8] and thus, the Convention also enhanced the advantages of arbitration as a form of dispute settlement between parties to international transactions. The Convention's contribution to the development of arbitration is even clearer when it is borne in mind that litigation does not have recourse to such unified legislative standards of recognition and enforcement. The **degree of certainty** afforded to a party in arbitration **that it can have its award recognized and enforced almost anywhere in the world** is one of the most important legal advantages of arbitration over litigation.[9] In many parts of the world, it is easier to have a foreign arbitral award recognized and enforced than a foreign court judgment. However, this is not a general rule. The recognition and enforcement of foreign judgments in Member States of the European Union, for instance, has been significantly facilitated by the Brussels I Regulation,[10] which entered into force on March 1, 2002. 20

4. The Convention's Title: Recognition and Enforcement of Foreign Arbitral Awards

a) Distinction Between Recognition and Enforcement

The title of the Convention refers to recognition *and* enforcement of arbitral awards. Both recognition and enforcement are concerned with giving effect to the award rendered, as opposed to a challenge of such award, which is aimed at attacking the validity of the award. It is important to note, however, that even though the concepts of recognition and enforcement are intertwined, they are nonetheless **two distinct procedural actions.** 21

Recognition of an award is the first step in giving effect to the award. Recognition is often called *exequatur* and refers to the national court proceedings in which a court renders a decision **confirming the award.**[11] Such decision recognizes the validity of the award rendered by the arbitral tribunal and the binding effect of such award upon the parties to the arbitral proceedings. An award may be recognized without being enforced.[12] The **enforcement** of an award is considered to be a 22

[6] *Di Pietro/Platte*, p. 11.
[7] *Rubins/Kinsella*, p. 352.
[8] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 20.
[9] *Kronke*, in: Kronke/Nacimiento/Otto/Port (eds), p. 3.
[10] Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[11] *Lew/Mistelis/Kröll*, para. 26–10.
[12] *Redfern/Hunter*, 5th ed., para. 11.20; see UK: Dallal v. Bank Mellat, (1986) All E.R. 239 = [1986] 2 WLR. 745 = XI Y.B. Com. Arb. 547 (1986), where it was held that an award rendered by

further procedural step. An action for enforcement presupposes that the court has already recognized the award.

23 These concepts must be analyzed in the light of the respective objectives of each of these actions. Generally speaking, **recognition is a defensive process**, in which the court is asked to recognize the legal effect of an award. The party seeking recognition seeks to prevent the same issues, decided upon in previous arbitral proceedings, from being raised in potential new proceedings. Furthermore, recognition can be useful for tax reasons where a party wants to have proof of the existence of a debt or receivables.[13] When used as a defense, the court is asked to recognize the award by invocation of its ***res iudicata* effect**, meaning matters in issue between the parties have already been decided. In this case, the party seeking recognition of an arbitral award seeks to rely on this award by using it as a "shield" to prevent issues that have already been decided on in the award from being raised again.[14]

24 **Enforcement** is a further procedural step. Enforcement is a proactive procedural action in which a party seeks to obtain redress from the award rendered in its favor. Hence, in contrast to recognition, enforcement is used as a "sword".[15] The party requests the court to **carry out the award** rendered in its favor by applying **legal actions that may take various forms**. These legal actions are intended to compel the defaulting party to execute the award. However, it should be noted that the Convention deals with enforceability and not with enforcement as such. The actual enforcement is subject to the local rules on enforcement, that is, for instance, how to seize property or to forfeit bank accounts of the defaulting party.

25 As regards the necessity to distinguish recognition from enforcement, some authors[16] claim that the Convention's predecessor, the 1927 Geneva Convention, was clearer in this respect as it referred to "recognition *or* enforcement".

b) Recognition and Enforcement of Arbitration Agreements

26 Although the title of the Convention[17] only mentions the recognition and enforcement of arbitral awards, **the Convention also applies to the recognition and enforcement of arbitration agreements** (*cf.* Art. II para. 40). The Convention recognized and endorsed[18] the need for international commercial arbitration agreements to be given effect internationally and not solely in the place where the agreement was made.[19] Thus, the Convention in fact covers two fundamental aspects of international commercial arbitration: the recognition and enforcement of arbitration agreements and the recognition and enforcement of arbitral awards.[20] Therefore, the title of the Convention might be considered too narrow.

the Iran-US Claims Tribunal was to be recognized but was not enforceable under the New York Convention.

[13] *Lew/Mistelis/Kröll*, para. 26–11.

[14] *Redfern/Hunter*, 5th ed., para. 11.24.

[15] *Redfern/Hunter*, 5th ed., para. 11.24.

[16] *Redfern/Hunter*, 5th ed., para. 11.20.

[17] The full title of the Convention is: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards."

[18] This vital requirement was already recognized in the 1923 Geneva Protocol.

[19] *Redfern/Hunter*, 5th ed., para. 1.56.

[20] *van den Berg*, p. 383.

Article II(1) provides for the recognition of arbitration agreements (*cf.* Art. II 27
para. 40), while Article II(3) provides for the enforcement of arbitration agreements (*cf.* Art. II paras 189–190). The **enforcement of an arbitration agreement** is constituted by a **court's referral of the parties to arbitration**. At the request of one of the parties, the court shall enforce an arbitration agreement by referring the parties to arbitration unless it finds that the respective agreement is null and void, inoperative or incapable of being performed. The court may not refer the parties to arbitration on its own motion; **one of the parties must invoke** the arbitration agreement. Should a party fail to do so, the court will retain its jurisdiction over the case. However, provided the conditions are fulfilled, the **court's referral** of the parties to arbitration is **mandatory**.[21]

Unlike its scope in relation to arbitral awards, the Convention's field of applica- 28
tion with respect to arbitration agreements is not defined. The Convention does not specify which arbitration agreements come within its scope. On the basis of analogy from Article I, which refers to the field of application with regard to foreign arbitral awards (*cf.* Art. I paras 2, 12–92, 93–137),[22] **the Convention applies to arbitration agreements providing for arbitration in a State other than the State where the agreement is invoked** (*cf.* Art. II para. 26). Consequently, whenever the place (or seat) of arbitration is in a State other than the forum State, Article II applies.[23] However, Article I(1) does not apply if the place of arbitration is in the forum State (*cf.* Art. II paras 28, 32). Thus, some jurisdictions exclude the application of Article II in this case.[24] Other jurisdictions extend the scope of Article II to cases where the arbitration agreement has an international element, such as the international nature of the subject matter, the foreign nationality of one of the parties, or the existence of a foreign head office of one of the parties (*cf.* Art. II paras 27, 30).[25]

5. Distinction Between Challenge of the Award and Enforcement

While the Convention, in Article V, provides the grounds for refusal of recogni- 29
tion and enforcement of an award by the enforcing court (*cf.* Art. V paras 85, 128, 196, 262, 351, 418–420, 480), it **does not harmonize the grounds for challenging an award**. It only deals with the situation where an award has been set aside in the State in which it was made (*cf.* Art. V para. 377). In this case, a Contracting State may refuse recognition and enforcement of the award (*cf.* Art. V para. 391).

The purpose of challenging an award before a national court at the seat of 30
arbitration is usually to have it set aside in whole or in part.[26] Thus, while recognition and enforcement are concerned with giving effect to an arbitral award,

[21] *van den Berg*, Overview of NYC, p. 10.

[22] That is, arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.

[23] *Schramm/Geisinger/Pinsolle*, in: Kronke/Nacimiento/Otto/Port (eds), pp. 41 *et seq.*

[24] Switzerland: BG, 26(2) ASA Bull. 329-352 at reason 2 (2008); Switzerland: BG, 14(3) ASA Bull. 527–532 at reason 2 a (1996); see *Schramm/Geisinger/Pinsolle*, in: Kronke/Nacimiento/Otto/Port (eds), p. 42; *van den Berg*, pp. 57 *et seq.*

[25] India: Gas Authority of India, Ltd. v. SPIE-CAPAG, S.A., XXIII Y.B. Com. Arb. 688 at 697 (1998) = AIR 1994 Delhi 75; US: Smith/Enron Cogeneration, Ltd. v. Smith Cogeneration International, Inc., XXV Y.B. Com. Arb. 1088 at 1091–1095 (2000) = 198 F.3d 88 (at 92) (2nd Cir 1999) = 1999 U.S. App. LEXIS 32097; see *Schramm/Geisinger/Pinsolle*, in: Kronke/Nacimiento/Otto/Port (eds), p. 42, as well as *van den Berg*, pp. 57 *et seq.*

[26] *Redfern/Hunter*, 5th ed., para. 10.03.

the challenge of an award involves **attacking the award at its source.**[27] The grounds on which such an action may ensue are governed by domestic law and unregulated on an international level (*cf.* Art. V para. 379).

31 The international arbitral community considers this discretion given to domestic courts with respect to setting aside arbitral awards as a hindrance to a uniform international regime. As a further **step towards harmonization** of domestic legislation, in **Article 34**, the **Model Law** adopted the grounds for refusal of recognition and enforcement of an arbitral award set forth in the Convention as grounds for the setting aside of an arbitral award by a national court at the seat of arbitration.

32 The **grounds for the setting aside of an arbitral award** provided by the Model Law can be broadly organized into **grounds relating to the adjudicability of the claim** in question (such as issues of incapacity, invalid arbitration agreements, tribunal's excess of powers, or arbitrability of the dispute's subject-matter), **procedural grounds** (such as lack of due process, or irregularities in the composition of the arbitral tribunal), and **substantive grounds** (violation of public policy).[28]

33 Whereas, so far, over 40 States have adopted legislation based on the Model Law, the extent to which they followed, *inter alia*, the provision of Article 34 varies quite significantly.[29] The **heterogeneity of national laws in respect of the validity of arbitral awards** induces unpredictability and encourages forum shopping (*cf.* Art. V para. 385).[30] Thus, this lack of regulation still allows national arbitration laws to have far-reaching international effects.

34 Deviations from Article 34 of the Model Law exist in the form of both more and less stringent modalities than those of the Model Law.

35 Some States adopted **stricter measures of control** of an arbitral award than provided by the Model Law. This may pertain to a departure from the exclusivity of challenge proceedings as means of action against an arbitral award or to the adoption of more rigorous grounds for the setting aside of an award.[31]

36 The English Arbitration Act 1996, for instance, allows in its section 69(1) for an **appeal to the court on a question of law** arising out of an award. Thus, by permitting the judge to review the merits of the case, the English arbitration law deviates from the principle of exclusivity of the challenge proceedings and allows for an appeal of the arbitral award.[32] Other States, like Iran, Egypt or Brazil,[33] adopted **grounds for the setting aside of an arbitral award that are not contained in the Model Law.**

37 Other States adopted more relaxed control **measures of arbitral awards than those provided by the Model Law.** France, for instance, adopted grounds for the setting aside of arbitral awards that are less rigorous than those of the Model Law.[34] Israel even grants discretionary power to judges to refuse to set aside arbitral

[27] *Redfern/Hunter*, 5th ed., para. 11.18.
[28] See also *Redfern/Hunter*, 5th ed., para. 10.35.
[29] See also *Gharavi*, pp. 32 *et seq.*
[30] *Gharavi*, pp. 42 *et seq.*
[31] *Gharavi*, p. 33.
[32] See also *Gharavi*, p. 33.
[33] See Article 33 of the 1997 Iranian Law on International Commercial Arbitration, Article 53 of the 1994 Egyptian Law concerning Arbitration in Civil and Commercial Matters and Article 32 of the 1996 Brazilian Arbitration Act; see also *Gharavi*, pp. 36–38.
[34] Article 1520 of the French Code of Civil Procedure; see also *Gharavi*, p. 41 (referring to Articles 1504/1502 of the old law).

awards, falling under one of the grounds for setting them aside, if no miscarriage of justice has occurred.[35]

6. Achievements of the New York Convention

As stated above in para. 17, the Convention managed to strike a **balance between the development of international arbitration and the protection of the legal principles of different States.** The Convention imposes a general obligation on Contracting States to recognize and enforce arbitral awards and arbitration agreements. At the same time, it allows an exception to this general obligation when these procedural actions are considered to breach the basic principles of the legal system in which they are sought.[36] 38

Together with the other international conventions on arbitration and also the Model Law, it has brought about **modernization** and **harmonization** of the national laws governing international arbitration.[37] While the Convention (indirectly) lays down certain general principles, the Model Law provides detailed provisions for the different stages of arbitration.[38] The underlying approach is to establish **international standards for the conduct of arbitral proceedings.** 39

Still, **settlement** or **voluntary compliance** with an award seems to be the most common outcome of arbitral proceedings.[39] 40

II. History of the Convention

The roots of the Convention can be traced back to the very **beginning of the 20th century.** At that point in time, only national arbitration laws were in place and many courts in various countries did not look favorably upon arbitration.[40] The increased use of international commercial arbitration showed up the inadequacy of the existing dispute resolution framework. The idea of unifying laws on arbitration was already put forward in 1914 at the International Congress of Chambers of Commerce in Paris.[41] After World War I, the **newly established ICC**[42] took the initiative and advocated an international convention on arbitration. The ICC reiterated its idea in the form of resolutions, adopted at its London Congress in 1921 and at its Rome Congress in 1923. Meanwhile, the League of Nations urged those Member States whose legislation and court practice was not in favor of commercial arbitration to reconsider their position and to allow for steps which would ensure that arbitration agreements were respected. Finally, the initiative endorsed by the ICC and other major private organizations to provide for an international arbitration framework in the form of a convention was accepted by the League of Nations. The Assembly of the League of Nations held in Geneva on September 24, 1923 approved the **Protocol on Arbitration Clauses.** Four years later, the **Convention on the Execution of Foreign Arbitral Awards** approved by the 41

[35] Article 26 (a) of the 1968 Israeli Arbitration Law; see also *Gharavi*, p. 42.
[36] *Di Pietro*, in: Mistelis/Brekoulakis (eds), para. 5–4.
[37] *Redfern/Hunter*, 5th ed., para. 1.250.
[38] *Redfern/Hunter*, 5th ed., paras 1.238 *et seq.*
[39] *Mistelis/Lagerberg*, pp. 6 *et seq.*
[40] *van den Berg*, p. 6.
[41] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 4.
[42] The ICC was founded in 1919.

Assembly of the League of Nations in Geneva, on September 26, 1927 (jointly, the "Geneva Treaties") supplemented this Protocol

42 Therefore, the Geneva Treaties constituted the legal regime preceding the New York Convention.[43]

1. The Legal Regime Preceding the New York Convention

a) The 1923 Geneva Protocol

43 The Geneva Protocol on Arbitration Clauses of 1923, commonly known as the 1923 Geneva Protocol, was approved by the Assembly of the League of Nations in Geneva and opened for signature on September 24, 1923. It entered into force on July 28, 1924. With the notable exceptions of the USA and USSR,[44] the Protocol was ratified by a number of major trading States.[45] The Protocol provided for the **recognition of arbitration agreements** relating to existing or future differences between parties who were subject to the jurisdiction of different Contracting States.[46] The Protocol also provided for the **obligation of the courts** of Contracting States **to refer to arbitration** those disputes brought before them which were subject to the aforementioned arbitration agreements.[47] Thus, the Protocol established the international validity and enforceability of arbitration clauses.[48] However, as just mentioned, the Protocol's range was limited as it only applied to arbitration agreements made between **parties from different Contracting States**.

44 Furthermore, the Protocol contained provisions regarding the arbitration procedure and was the first multilateral convention to mention the question of **enforcement of arbitral awards**.[49] It stipulated that **the will of the parties** and the law of the country in whose territory the arbitration takes place **should govern** the **arbitral procedure**.[50] Further, the Protocol made the enforcement of awards compulsory.[51] However, it only referred to the execution of arbitral awards in the territory of the Contracting State in which the award was rendered. Thus, the Protocol **did not refer to foreign awards** at all. Some of the Contracting States did not have any provisions relating to the enforcement of foreign arbitral awards in their national legal framework and in those Contracting States which did actually have respective provisions, the conditions for enforcement of foreign awards varied significantly.[52]

[43] *Gharavi*, p. 42.
[44] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 5.
[45] Contracting States: Albania, Austria, Belgium, the British Empire (Great Britain, Northern Ireland, Southern Rhodesia, Newfoundland, British Guiana, British Honduras, Ceylon, Falkland Islands and Dependencies, Gambia, Gold Coast, Gibraltar, Jamaica (Turks & Caicos Islands, Cayman Islands), Kenya, Leeward Islands, Zanzibar, Tanganyika, St Helena, Uganda, Bahamas, Burma, New Zealand, India), Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Greece, Iraq, Italy, Japan, Luxembourg, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Thailand.
[46] Article 1 of the Protocol (see Annex V 1).
[47] Article 4 of the Protocol (see Annex V 1).
[48] *van den Berg*, p. 6.
[49] *Gharavi*, p. 46.
[50] Article 2 of the Protocol (see Annex V 1).
[51] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 6.
[52] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 6.

With the growth of international trade, there was certainly a need for a multilateral treaty on the international enforcement of foreign arbitral awards.

b) The 1927 Geneva Convention

The League of Nations commenced work on a new treaty upon the initiative of 45
the ICC and in 1927 set up a special committee[53] in charge of the drafting of the new convention.[54] The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, often referred to as the 1927 Geneva Convention, was approved by the Assembly of the League of Nations in Geneva and opened for signature on September 26, 1927. It entered into force on July 25, 1929. The list of Contracting States[55] was similar to that of the 1923 Geneva Protocol, with the same notable exceptions being the USA and USSR. The 1927 Geneva Convention was the **first multilateral treaty referring to foreign arbitral awards**[56] and was considered to be a **supplement and expansion to the 1923 Geneva Protocol**. It regulated the enforcement of arbitral awards rendered under arbitration agreements that came within the scope of the 1923 Geneva Protocol.[57]

Notwithstanding the fact that this was a step forward, the 1927 Geneva Conven- 46
tion, like the 1923 Geneva Protocol, had **certain shortcomings**. The Geneva Convention applied only to awards rendered in the territory of one of the Contracting States and between parties who were subject to the jurisdiction of one of the Contracting States.[58] Further, the party seeking enforcement carried the burden of proof that the conditions necessary for enforcement were fulfilled. One of these conditions was that the **award for which enforcement was sought "has become" final** in the country in which it was made.[59] Many courts interpreted this provision so that the party seeking enforcement was firstly required to obtain a leave of enforcement ("*exequatur*") in the Contracting State in which the award was made. This requirement, in addition to the requirement of obtaining a leave of enforcement in the Contracting State in which the enforcement was actually sought, led to the situation of so-called **"double exequatur"**.[60] This later proved to be very burdensome in practice[61] and was a significant deficit of the Geneva Convention. Another condition was that the award had to be made in conformity with the agreement of the parties *and* the law governing the arbitration procedure, which was almost always the law of the Contracting State, in which the arbitration took

[53] The special committee consisted of Mr Anzilotti, Judge of the Permanent Court of International Justice who acted as chairman, Benjamin H. Connor, President of the American Chamber of Commerce in Paris and René Arnaud of the ICC.
[54] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 6.
[55] Contracting States: Austria, Belgium (including Congo, Territory of Rwanda-Burundi), United Kingdom of Great Britain and Northern Ireland (including Newfoundland, Bahamas, British Guiana, British Honduras, Falkland Islands, Gibraltar, Gold Coast, Jamaica, Kenya, Palestine, Tanganyika, Uganda, Windward Islands, Zanzibar, Mauritius, Northern Rhodesia, Leeward Islands, Malta, Burma, New Zealand, India), Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Romania, Spain, Sweden, Switzerland, Thailand.
[56] *Gharavi*, pp. 46–47.
[57] *van den Berg*, p. 7.
[58] Article I(1) of the Geneva Convention (see Annex V 2).
[59] Article I(1)(d) of the Geneva Convention (see Annex V 2).
[60] *van den Berg*, p. 7.
[61] *Gharavi*, p. 47.

place.[62] The New York Convention, on the contrary, provides that the composition of the arbitral tribunal and the arbitral procedure shall be in accordance with the agreement of the parties or (failing such agreement) in accordance with the law of the country where the arbitration took place.

47 Overall, the 1927 Geneva Convention made recognition and enforcement of foreign awards subject to a catalogue of conditions. It also **conferred a major role on the courts in the Contracting State**[63] in which the arbitral award was made and relied heavily on domestic laws. This reflected once again the compromise necessary for such an international legal framework to be accepted by the Contracting States. However, such a reliance on domestic laws resulted in significant differences in the Geneva Convention's application due to the many differences in domestic laws and practices. In addition, it **allowed the parties** against whom enforcement was sought **to raise numerous objections** and hence to delay or avoid enforcement of the award.

2. The Origins of the New York Convention – Drafting History

48 Although a step forward, the Geneva Treaties proved to be an inadequate international framework for meeting the needs of international trade. The boost of the world economy after World War II was significant and the need for a better international legal framework became greater than ever before.[64] The ICC studies in 1950 confirmed that the 1927 Geneva Convention was out of date and did not satisfy the needs of contemporary international trade.[65] As early as in 1951, at its Lisbon Congress, the ICC lobbied for a reform in this regard. On March 13, 1953, the ICC adopted its **draft Convention** and accompanying Report that reflected the underlying idea of a **truly international arbitral award** and, indeed, referred to the notion of an international award. It also aimed at arbitration proceedings that would not be governed by a particular domestic law.[66] However, the idea of a truly international commercial arbitration framework, independent of domestic laws, was considered to be too radical by the majority of States.

49 Therefore, the **United Nations Economic and Social Council** at its seventeenth session, on April 6, 1954, by means of a resolution[67] established an **ad hoc committee** to review and analyze the matter brought before it by the ICC and to propose a new draft, if it considered this necessary. The ad hoc committee produced a **new draft** of the Convention on the Recognition and the Enforcement of International Arbitral Awards.[68] The new draft was considered to be a compromise between the idealistic views expressed in the ICC draft of a truly international arbitration framework and the realities of sovereign States that were not prepared to accept this revolutionary idea. The new draft Convention was transmitted to governments, the ICC and non-governmental organizations for their comments.[69] Upon receiving the respective comments, the United Nations Economic and Social

[62] *van den Berg*, p. 7.
[63] *Gharavi*, pp. 47–48.
[64] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 8.
[65] *van den Berg*, Online Commentary, p. 1.
[66] *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 9; *van den Berg*, p. 7.
[67] Resolution No. 520 (VII).
[68] E/2704 (see Annex IV 1).
[69] *van den Berg*, Online Commentary, p. 1. See also Annex IV.

Council convened the **United Nations Conference on International Commercial Arbitration**. The Conference was held at the United Nations Headquarters, New York, from May 20, 1958 until June 10, 1958 and was attended by delegates from about forty States. Among them were a large number of highly respected officials and experts in the field.[70]

The new draft Convention prepared by the ad hoc committee of the United 50
Nations as well as the comments received from governments and non-governmental organizations were used as the starting point for the discussions. The objective of the Conference was to remedy the shortcomings of the existing legal regime, *i.e.* the Geneva Treaties. This would be achieved by a **completely new legal regime** regulating the recognition and enforcement of both arbitration agreements and arbitral awards and providing **uniform standards on an international level**. However, at the same time, this new legal regime was also intended to take into account the will of the sovereign States and their national courts to carry it out. Evidently, the Conference faced a very ambitious task.

One area in which there was dispute was the **scope of application** of the 51
Convention.[71] The draft Convention contained a territorial principle in such a way that it applied to an award made in the territory of a State other than that in which it was relied upon (*i.e.* where recognition and enforcement were sought). Several delegates at the Conference criticized the **emphasis laid on the place in which the award was made**, *inter alia*, the French delegate, one of whose concerns was that according to French case law, arbitral awards rendered in France pursuant to a foreign law were considered as foreign. After referral of this matter to a working group for reconciliation, the territorial criterion ultimately remained in the text of the Convention but was amended so as to **encompass awards that are considered to be foreign** although rendered in the State where they are relied upon (Article I(1) second sentence).

Another disputed matter was whether to permit **reservations limiting the scope** 52
of the Convention, in particular to awards made in the territory of another State (reciprocity) and to commercial disputes.[72] Some delegates feared that States might refrain from acceding to the Convention at all if they were not allowed to restrict its application in such a way. Others, like the Ceylonese delegate, voiced their concern that allowing such reservations could impair the Convention's effectiveness. Again, the matter was referred to a working group and, after consideration by the Plenary Meeting, a **reciprocity reservation** was included in the text of the Convention at the disposal of the States acceding to it (Article I(3) first sentence). Furthermore, on suggestion of the Dutch delegate, Pieter Sanders, a **commercial reservation** was also included (Article I(3) second sentence).

Further significant amendments to the draft Convention that were discussed and, 53
on the recommendation of Dutch delegate Pieter Sanders, ultimately adopted by the Plenary Meeting were the inclusion of a **provision on arbitral agreements** (Arti-

[70] See *e.g.* the personal recollections of Ottoarndt Glossner, delegate at the 1958 Conference, pp. 5 *et seq.*
[71] See *e.g.* E/CONF.26/L.42 (see Annex IV 1); see also *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 15.
[72] See *e.g.* E/CONF.26/L.49 (see Annex IV 1); see also *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), p. 16.

cle II)[73] and the **removal of the principle of a double exequatur** (*cf.* Art. V para. 355).[74]

54 Finally on **June 10, 1958**, the Conference adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). It **entered into force** on **June 7, 1959**. The Convention replaced the Geneva Treaties. Article VII(2) stipulates that both Geneva Treaties shall cease to have effect between Contracting States on their becoming bound by the New York Convention.

III. Temporal Scope of Application

55 Article XII provides for the entry into force of the Convention and sets forth the procedure for new Member States acceding to it (*cf.* Art. XII paras 1, 9–12). Pursuant to Articles VIII and IX, **accession** takes place by **depositing the instrument of accession with the Secretary-General of the United Nations** (*cf.* Art. VIII para. 20 and Art. IX para. 12). The Convention enters into force in the respective Contracting State ninety days after such deposit. As international conventions are not self-executing in many States, a domestic legal act declaring the Convention applicable, respectively implementing it into national law, may additionally be required.

56 The Convention does not set forth rules regarding **arbitral awards or arbitration agreements issued or concluded before the Convention comes into** force in a Contracting State. Only a few countries have addressed this issue in their implementing acts, and those that did often differ in the implementation.[75] Also courts of the Member States have answered the question of retroactive application of the Convention quite differently.[76] When the enforcement of the arbitration agreement or the arbitral award is sought, a **variety of moments may be taken into account**, in respect of both the arbitration and the Convention.[77] With regard to the arbitration, these are the date of conclusion of the arbitration agreement, the date of commencement of the arbitral proceedings, the date on which the arbitral award is rendered and the date of commencement of the recognition and enforcement proceedings of the agreement or award.[78] Where the Convention is concerned, in the absence of any implementing legislation there are two possible points in time to be considered: (i) the date when the Convention as such came into effect (June 7, 1959) and (ii) the date on which the Convention entered into force in the country where recognition and enforcement are sought.[79]

[73] E/CONF.26/SR.16 (see Annex IV 1).
[74] E/CONF.26/SR.17 (see Annex IV 1); for an overview of further amendments to the draft Convention see *Briner/Hamilton*, in: Gaillard/Di Pietro (eds), pp. 18 *et seq.*
[75] *van den Berg*, p. 73.
[76] For an overview see *Schlosser*, in: Stein/Jonas (eds), annex to sect. 1061 paras 239 *et seq.*; *van den Berg*, pp. 74 *et seq.*
[77] *van den Berg*, pp. 74 *et seq.*; *Haas*, in: Weigand (ed.), Part 3, Preliminary Remarks paras 9 *et seq.*
[78] *Haas*, in: Weigand (ed.), Part 3, Preliminary Remarks para. 10, with further references.
[79] *van den Berg*, p. 74, further mentions the date on which the Convention entered into force in the foreign State where the arbitration is taking place or where the award is made, which may be relevant if the State where the enforcement is sought has used the reciprocity reservation of Article I(3).

It is a well-established principle that **international conventions do not have** 57
retroactive effect on the contractual relations of the parties, unless a different intention appears from the treaty or is otherwise established.[80] It has been argued that Article VII(2) establishes such a different intention.[81] According to this view, a gap would exist in respect of arbitration agreements and awards made before the accession of States to the New York Convention which had adhered to the Geneva Treaties. However, it can be argued that, according to the very wording of Article VII(2), the Geneva Treaties cease to have effect only to the extent that States become bound by the Convention, which includes its temporal scope of application (*cf.* Art. VII paras 66–69).[82]

In view of arbitration being a process based on private autonomy, the better 58
reasons, in particular the **protection of the confidence** of the parties speak for the application of the Convention as of the date of its entry into force in the respective country, unless it is determined otherwise in the country's implementing legislation.[83] This is obvious for arbitration agreements. It also applies to arbitral awards. The parties entered into the arbitration on the basis of a certain set of rules. Under different rules, they may have taken a different route, *e.g.* settled the case.

Article XIII offers Contracting States an opportunity to **withdraw unilaterally** 59
without the consent of other Contracting States (*cf.* Art. XIII para. 7).[84] Such denunciation will take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations (*cf.* Art. XIII para. 10). In order to preclude Contracting States from denouncing the Convention solely in order to prevent enforcement of an unfavorable arbitral award that has already been or may soon be rendered,[85] the **Convention continues to apply to any arbitral awards** in respect of which recognition or enforcement proceedings were instituted before the denunciation takes effect (*cf.* Art. XIII para. 19).

So far, **denunciation** of the New York Convention has **never occurred**. It is 60
argued[86] that this is due in part to the Convention's widely acknowledged importance for the enforcement of arbitral awards combined with the absence of affirmative obligations for Contracting States that would make membership too burdensome or costly. Also, **possible negative implications** resulting from a withdrawal might be a consideration. Furthermore, the Convention itself allows the Contracting States **leeway for avoiding results detrimental to their national interests**.[87] Enforcement of an arbitral award can be refused based on the public policy exception (*cf.* Art. V para. 480). Invoking reciprocity and/or commercial reservation can narrow the Convention's field of application. Finally, the Convention does not provide for any direct sanction against a Contracting State that does not comply with its obligations under the Convention.

[80] See Article 28 of the 1969 Vienna Convention on the Law of Treaties.
[81] *van den Berg*, p. 78.
[82] *Schlosser*, in: Stein/Jonas (eds), annex to sect. 1061, para. 242.
[83] See also *Schlosser*, in: Stein/Jonas (eds), annex to sect. 1061, paras 241, 242.
[84] *Port/Fuhr/Simonoff*, in: Kronke/Nacimiento/Otto/Port (eds), p. 532.
[85] *Port/Fuhr/Simonoff*, in: Kronke/Nacimiento/Otto/Port (eds), p. 533.
[86] *Port/Fuhr/Simonoff*, in: Kronke/Nacimiento/Otto/Port (eds), p. 534.
[87] *Port/Fuhr/Simonoff*, in: Kronke/Nacimiento/Otto/Port (eds), p. 534.

IV. Reform Efforts

1. Criticisms of the New York Convention

a) Acknowledgments

61 At the time of its signing, the Convention represented a **major step forward** in the further development of international commercial arbitration. Even though it was not as radical as some had hoped and represented a balancing act between the need for truly international recognition and enforcement of awards and the need for the Convention to be widely accepted by the sovereign States, the Convention remains the **most successful treaty in international arbitration**. One might even argue that it was a far-sighted instrument, which facilitated international trade and international co-operation. The Convention is in fact without doubt **one of the most successful pieces of international legislation ever**. Moreover, some authors go even further in stating that the Convention "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[88] The success of the Convention is often measured by the number of Signatory States, at present 147.

b) Shortcomings

62 Having said that, nowadays, more than 50 years later, **certain adjustments** to the Convention in accordance with the current legal, technical, political and economic developments **seem necessary**.[89] There is an ongoing debate on the shortcomings of the Convention and its practical implications.

aa) Writing Requirement

63 The most debated shortcoming is certainly the definition of the term "agreement in writing" as set out in Article II(2) (*cf.* Art. II para. 73). Pursuant to said provision, the term "agreement in writing" includes an arbitral clause in a contract or an arbitration agreement, signed by the parties (*cf.* Art. II paras 94 *et seq.*), or contained in an exchange of letters or telegrams (*cf.* Art. II paras 97 *et seq.*). Courts interpret the question of whether an exchange in writing has actually been accomplished differently. One view is that the party that signed the document should return it to the party that sent it (*cf.* Art. II paras 125 *et seq.*). Another view is that it is sufficient if a reference is made to the document in subsequent correspondence (such as letters and invoices), which originate from the party to which the document was sent (*cf.* Art. II paras 145 *et seq.*).[90]

64 It is overall well established that the **form requirements of Article II(2) are *lex specialis* to domestic law**, meaning that Article II(2) supersedes domestic law regarding the form of the arbitration agreement (*cf.* Art. II para. 56).[91] However, it is debated whether the definition merely sets out an international maximum requirement for the formal validity of an arbitration agreement, or at the same

[88] *Mustill*, (1983) 6 J. Int. Arb. 43.
[89] *Di Pietro/Platte*, p. 199.
[90] *van den Berg*, Overview of NYC, p. 7.
[91] *van den Berg*, p. 178.

time also a minimum requirement (*cf.* Art. II para. 76).[92] Assumed it would be only a maximum requirement, courts would be entitled to accept less demanding requirements than the written form. Assumed it would be both a maximum and a minimum requirement, courts could demand neither more nor less than required in Article II(2). Such a fixed standard is, *e.g.*, advocated by the courts in Austria[93] and in Germany,[94] whereas the latter at the same time stress the possibility that an arbitration agreement could be valid if not under Article II(2) then under the most-favored-nation clause of Article VII (*cf.* Art. II para. 177). In view of Article VII it is clear that Article II(2) **ultimately sets forth only a maximum requirement** in respect of the recognition and enforcement of arbitral awards.

65 In any case, the requirements as set out in Article II(2) seem **no longer** to be **in line with contemporary business reality** (*cf.* Art. II para. 17). The requirement that the agreement has to be exchanged in writing is outdated. Even in 1961, when the European Convention was drafted, the provision referring to the term "agreement in writing" (which mirrored Article II(2) of the New York Convention) was extended to **encompass broader means of communication** (*cf.* Art. II paras 75, 130). As mentioned above in para. 63, some courts in the Contracting States try to overcome this shortcoming of the New York Convention by broad interpretation of the term "exchange of letters or telegrams" so that it fits contemporary business needs.

66 With the ongoing advancement of business and technology, it is certain that new questions will arise, such as the issue of whether an **agreement concluded via email** falls under Article II(2) (*cf.* Art. II paras 102, 130). Therefore, the debate on the necessity for revision of this provision will certainly continue. This is also recognized by **UNCITRAL** in its **recommendation** adopted on July 7, 2006 which recommends that Article II(2) should be "applied recognizing that the circumstances described therein are not exhaustive"[95] (*cf.* Art. II para. 111). However, the question is rather more fundamental: Why is a writing requirement necessary? The common reasons for a writing requirement are its probative force and the protection offered against precipitance. However, there are **other important areas of law where no writing requirement applies**. In many States, declarations of a merchant assuming a guarantee or acknowledging a debt are not subject to a writing requirement. Furthermore, there are **States that are quite liberal** as far as the form required for a valid arbitration agreement is concerned. A written agreement is not required, for instance, under French law on international arbitration.

bb) Grounds for Refusal of Enforcement

67 Another provision which is considered to constitute a shortcoming relates to the **grounds for refusal of enforcement**, more specifically to the ground stipulated in Article V(1)(e) that an award has been **set aside by a competent authority of the country in which or under the law of which it was made**. This means that the courts of the Contracting State in which the enforcement is sought, can refuse to recognize or enforce an award that has been set aside in another State. This

[92] *van den Berg*, p. 178; *van den Berg*, Overview of NYC, p. 7.
[93] Austria: OGH, JBl 1974, 629 = I Y.B. Com. Arb. 183 (1976).
[94] Germany: BGH, SchiedsVZ 2005, 306 = XXXI Y.B. Com. Arb. 679 (2006).
[95] A/6/17, p. 1 (see Annex IV 2).

indirectly makes the Convention **dependent upon the domestic laws** and systems of the country in which the award for which the enforcement is sought is rendered and goes against the spirit of an international, independent award (*cf.* Art. V para. 352). It is argued that this provision is a potential weakness of the Convention and exposes the Convention to the local peculiarities of the State in which the award is rendered (*cf.* Art. V para. 384).[96] In this respect, the European Convention of 1961 offers a more award-friendly solution, by limiting the grounds upon which awards can be set aside and indirectly upon which the enforcement can be refused and by excluding the *ordre public* defense in the enforcement State (*cf.* Art. V paras 392–393). In any case, under the New York Convention the courts are given the **discretion to enforce the award notwithstanding its annulment in the country in which it was rendered**. It is argued that the courts should exercise their discretion by verifying whether the basis for annulment by the court of the State in which the award was rendered was compliant with international standards (*cf.* Art. V para. 382).[97]

cc) "Public Policy"

68 The often vastly **differing views** of the Contracting States **as to the notion of "public policy"**, in particular as a ground for refusal of enforcement under Article V(2), have also proven to be a shortcoming of the Convention (*cf.* Art. V paras 480, 521 *et seq.*). So far, all attempts to agree on a uniform solution have failed (*cf.* Art. V para. 491). The concepts behind the scope of this notion are often simply too different.[98] This issue will be dealt with in para. 93.

2. The Future of the Convention

69 There is vigorous **debate on how to remedy the Convention's shortcomings** and whether the Convention is in need of revision. Some authors[99] advocate the need to revise the Convention by arguing that its shortcomings cannot be adequately remedied by other means. It is considered that the revised Model Law cannot be used as a remedy since it was decided that the Model Law should follow as closely as possible the New York Convention. Thus, the provisions regarding enforcement of arbitral awards in the Model Law are almost identical to the provisions in the Convention.[100] Further, the UNCITRAL recommendation adopted on July 7, 2006 is also claimed to be of limited assistance. Therefore, Professor van den Berg put forward his proposal for a **hypothetical draft Convention**,[101] which is intended to remedy the Convention's shortcomings. It contains, *inter alia*, additional provisions like a definition of the scope of application with respect to agreements that fall under the referral provisions of Article II(3), revisions of certain provisions like Article II(2) setting forth the written form requirement, clarifications of various kinds and alignments of provisions with prevailing judicial interpretation. Professor van den Berg's view is that since the draft builds upon the New York Convention, it

[96] *Paulsson*, 9(1) ICC Bull. 14 (1998).
[97] *Paulsson*, 9(1) ICC Bull. 14 (1998).
[98] For examples regarding concepts of European Public Policy, see, *e.g.*, *Liebscher*, pp. 25 *et seq.*
[99] *van den Berg*, in: 50 years of NYC, p. 649.
[100] *van den Berg*, in: 50 years of NYC, p. 650.
[101] *van den Berg*, Hypothetical Draft Convention.

can be interpreted as a necessary update and hence be more easily accepted by the States.

However, some argue differently. The great success of the Convention also 70
creates an impediment for reforms. If the Convention were modified, such modifications would have to be **ratified by each Signatory State individually in the form of amendments**. In the absence of such ratifications, there would not be one New York Convention, but many different "versions", depending on whether a State had ratified the particular amendment or not.[102] It is claimed that there is in fact no need for a revision purely on the basis that the language of the Convention is outdated and should be amended.[103] Further, it is often considered that there is **little chance that all 147 Contracting States would genuinely be in favor of further enhancing the enforcement process**.[104] In addition, the Convention imposes a minimum standard in terms of enforcement and acts more as a safeguard than as the sole instrument upon which basis enforcement proceedings are conducted.[105] Finally, there is the danger that States which do not adhere to the amendment might even use it to defend a more restrictive interpretation of the New York Convention by pointing out that the amendment demonstrates that certain aspects were indeed not covered in the New York Convention, otherwise there would not have been a need for amendment in the first place. In any case, **the Convention does not prevent States from passing laws that could be more liberal and favorable towards arbitration**. Thus, it is submitted that even unaltered, the Convention will not hinder the further development of arbitration law.[106]

Whether revised or not, the New York Convention will undoubtedly still main- 71
tain its relevance in the international legal framework.

V. Interpretation of the Convention

1. Rules of Interpretation

There is **no uniformity in respect of the rules of interpretation** applied by courts 72
in the Contracting States in interpreting the New York Convention and its implementing legislation. Different sources of rules come into consideration for this purpose. A **report on the Convention's legislative implementation** issued by UNCITRAL in June 2008[107] revealed the great variety of rules applied by courts in the Contracting States in interpreting the Convention and its implementing legislation.

According to UNCITRAL's findings, many States agree that the Convention 73
should be interpreted according to **Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties**, setting forth general rules of interpretation and defining supplementary means of interpretation, either in combination with other

[102] *Di Pietro/Platte*, p. 16.
[103] *Gaillard*, in: 50 years of NYC, p. 690.
[104] *Gaillard*, in: 50 years of NYC, p. 692.
[105] *Gaillard*, in: 50 years of NYC, p. 692.
[106] *Gaillard*, in: 50 years of NYC, p. 692.
[107] "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" by UNCITRAL, available from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html (last visited July 18. 2011).

rules of interpretation, or as the sole source of interpretation. Several States, upon ratifying or acceding to the Convention, made a declaration that the Convention was to be interpreted in accordance with the **principles of their constitution**. Other States use their statutes and provisions on interpretation contained in the **civil code or code of civil procedure** as source of rules for interpretation of the Convention.

74 The UNCITRAL report furthermore revealed the use of various other approaches to the interpretation of the Convention, such as the consultation of a governmental or ministerial office or **reference to the *travaux préparatoires*** of the Convention as well as, less frequently, the *travaux préparatoires* of the implementing legislation and of the Model Law. A large number of Contracting States uses court decisions, whether domestic or from other Contracting States, as guidance for interpretation of the Convention.

75 Thus, the general question is according to which rules the New York Convention is to be interpreted. In this regard, it should be borne in mind that **the Convention constitutes a treaty**. As a treaty, it is necessary to take the Convention's "**international character**" into account.[108] In respect of its interpretation, this means to recognize that the Convention is the result of international negotiations and did not come into being against the background of a national legal order.[109]

76 Therefore, the Convention **needs to be interpreted autonomously, *i.e.* without recourse to national law**. The necessity of an autonomous interpretation aside from any national law also pertains to the criteria applied to the interpretation. The international legal framework provides guidance in this regard. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties provide for rules of interpretation specifically for treaties. Therefore, it is reasonable to interpret the New York Convention according to these rules.

77 In this respect, it is **irrelevant whether the respective Contracting State is also a signatory to the Vienna Convention on the Law of Treaties**. The Convention's provisions on the interpretation of treaties, embodied in Articles 31 and 32, have been accepted by the International Court of Justice[110] not only as a treaty commitment but also as an expression of **customary public international law**.[111]

2. Methods of Interpretation

78 In general, there are four methods of interpretation: grammatical interpretation (wording), systematic interpretation (context), teleological interpretation (object and purpose) and historical interpretation (legislative history).

79 Article 31(1) of the 1969 Vienna Convention on the Law of Treaties determines that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose.

[108] See also *Ferrari*, in: Schlechtriem/Schwenzer (eds), Art. 7 para. 9 in respect of the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

[109] See also *Ferrari*, in: Schlechtriem/Schwenzer (eds), Art. 7 para. 9 in respect of the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

[110] See Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, pp. 6, 21–22, para. 41; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999, p. 1045, 1059, para. 18.

[111] Malaysian Historical Salvors SDN BHD v. The Government of Malaysia (ICSID Case No. ARB/05/10), para. 56.

80 The paramount principle of interpretation is the observance of *bona fides*, *i.e.* that a treaty is to be interpreted **in good faith**. In respect of the methods of interpretation, the **emphasis** must be laid on the **ordinary meaning of its wording** in its **context** and on the treaty's **object and purpose**.

81 Pursuant to Article 32 of the 1969 Vienna Convention on the Law of Treaties, recourse to **supplementary means of interpretation**, including the **preparatory work** for the treaty and the circumstances of its conclusion, may only be had if the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

82 This means that the historical interpretation is subsidiary to the grammatical, systematic and teleological interpretation. It can be argued that the other three should be deployed in this order. However, in practice, all three apply on a rather equal footing, the ordinary meaning having certain prevalence.

a) Wording

83 The **wording** is generally considered to be the starting point of the interpretation, *i.e.* the **ordinary meaning of the terms of the treaty** in their context.[112] According to Article 31(4) of the Vienna Convention, it may only be deviated from the customary language use in this respect if it is established that this was the intention of the parties to the treaty.

b) Context

84 As set forth by Article 31(1) of the Vienna Convention, the ordinary meaning of the terms of the treaty must be established in view of their **context**.

85 Pursuant to Article 31(2) of the Vienna Convention, the context for the purpose of interpretation of a treaty does not only comprise the **text**, its **preamble** and **annexes**, but also any **agreement relating to the treaty** which was made between all the parties in connection with the conclusion of the treaty, as well as any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an **instrument related to the treaty**.

86 Article 31(3) of the Vienna Convention broadens the scope of the "context" even further: It must also be taken into account any **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions, any **subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation and **any relevant rules of international law** applicable in the relations between the parties.

c) Object and Purpose

87 Guiding principle of the **teleological interpretation** is the intent of the law (*ratio legis*).

88 A good example for the interpretation of the New York Convention in light of its object and purpose is the observance of a "**pro-enforcement-bias**" of the Convention.

[112] *Zemanek*, in: Neuhold/Hummer/Schreuer (eds), para. 332.

89 In interpreting the Convention, several courts have been mindful of the "pro-enforcement-bias" of the Convention.[113] In advocating a narrow reading of the public policy defense, a court argued that a general pro-enforcement bias could be inferred from the history of the Convention as a whole.[114] An expansive construction of the defense, so the court, would vitiate the **Convention's basic effort to remove pre-existing obstacles to enforcement**.[115]

90 In particular, Articles IV-VI of the Convention are meant to facilitate the enforcement of an arbitral award. Also other provisions of the Convention are interpreted in light of this "pro-enforcement-bias", such as Article II(3), setting forth that a court can refuse to refer the parties to arbitration if it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed" (*cf.* Art. II para. 309). Several courts held that these words should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only (*cf.* Art. II para. 302).[116]

d) Legislative History

91 As mentioned above in para. 81, supplementary means of interpretation, including the **preparatory work** for the treaty and the circumstances of its conclusion, may only be consulted if the interpretation according to other methods of interpretation leave the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. In view of the interpretation of the New York Convention, this means that the ***travaux préparatoires*** may only be consulted subsidiarily.

3. Current Interpretation of the Convention

92 Regrettably, besides the different rules of interpretation outlined above in paras 73 and 74, there are also differences in the **interpretation of the terms of the Convention**, such as in respect of the term "agreement in writing" (*cf.* Art. II para. 73) and the notion of public policy (*cf.* Art. V para. 491). The problems associated with the writing requirement have already been outlined above (paras 63 to 66).

93 As indicated above in para. 68, the lack of uniform interpretation of the notion "**public policy**", *inter alia,* as a ground for refusal of enforcement under Article V(2) may also lead to legal uncertainty and prove to be detrimental to the importance of the Convention in the international context (*cf.* Art. V paras 521 *et seq.*).

94 The function of any public policy provision is to safeguard the "fundamental moral convictions of policies of the forum"[117] (*cf.* Art. V paras 480, 490). Often, the

[113] US: Parsons & Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier, I Y.B. Com. Arb. 205 (1976) = 508 F.2d 969 (2d Cir 1974); Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir 2004) = XXIX Y.B. Com. Arb. 1262 (2004); see also MGM Productions Group Inc. v. Aeroflot Russian Airlines, 2004 WL 234871 (2d Cir. 2004) = XXIX Y.B. Com. Arb. 1215 (2004).

[114] US: Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir 1974) = I Y.B. Com. Arb. 205 (1976).

[115] US: Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir 1974) = I Y.B. Com. Arb. 205 (1976).

[116] *van den Berg*, Overview of NYC, p. 11.

[117] *van den Berg*, p. 360, with further references.

civil law term ***ordre public*** is used interchangeably.[118] The content of public policy is **highly relative** and **depends upon the conceptions of each individual State**.[119] It is generally accepted that only the fundamental notions of a particular legal system can be regarded as belonging to public policy.[120] Naturally, the question of what is encompassed by these fundamental notions is answered differently in every State.

95 EC competition law is a quite vivid example of the different interpretation of the notion of "public policy" (*cf.* Art. V para. 579). As early as in 1969, the German Federal Court of Justice held that **EC law belongs to German public policy** to the extent that it establishes the foundations of the Common Market and is not just concerned with the "expedient organization of affairs."[121] The Austrian Supreme Court held that the fundamental principles, for instance those of the internal market, have to be taken into account considering the denial of enforcement of a foreign award on the ground of violation of public policy. Examples are Articles 81 and 82 of the ECT.[122] The **Swiss Supreme Court**, however, **does not consider EC competition law to be part of international public policy**, which constitutes the applicable standard in case of an annulment claim.[123]

96 The aim should be to achieve **uniform judicial interpretation**, *i.e.* a definition of the scope of the notion "public policy" in international commercial arbitration.

VI. Implementing Legislation

1. The 2008 UNCITRAL Report

97 In 1995, **UNCITRAL** decided to undertake a survey with the aim of **monitoring the implementation of the New York Convention in national laws** and of considering the procedural mechanisms that various States have put in place to make the Convention operative. The report on the survey,[124] which evaluated the responses of 108 States and was published in 2008, highlighted the main trends that could be identified as to the implementation and interpretation of the Convention and with regard to the requirements and procedures applicable when enforcing a Convention award.

98 The report revealed that constitutions of the various Contracting States prescribed a **variety of procedures** for authorizing the ratification of, or accession to, a treaty or a convention.[125] Many States required approval by both the Executive and

[118] Due to the limited scope of this introduction, the similarities and differences between these two notions cannot be further explained. For this purpose see, *e.g.*, *Liebscher*, pp. 25 *et seq.*

[119] *Hanotiau/Caprasse*, in: Gaillard/Di Pietro (eds), p. 788.

[120] *Hanotiau/Caprasse*, in: Gaillard/Di Pietro (eds), p. 789.

[121] Germany: BGH, NJW 1969, 978.

[122] Austria: OGH, ÖJZ 1994, 513 = XXIVa Y.B. Com. Arb. 923 (1999). Arts. 81 and 82 ECT have meanwhile been replaced by Arts. 101 and 102 of the Treaty on the Functioning of the European Union.

[123] Switzerland: BGE 132 III 389.

[124] "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" by UNCITRAL, available from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html (last visited July 18, 2011).

[125] "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" by UNCITRAL, available from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html (last visited July 18, 2011) paras 9 *et seq.*

the Legislature, whereas in others a "declaration of ratification" or "proclamation" by the head of State was sufficient. In order to gain force of law in the individual legal order, for a vast majority of States, the Convention was considered as "self-executing" or "directly applicable". For several other States, the adoption of an implementing legislation was required.

99 The report further showed that where States adopted implementing legislation, the text of that legislation was reported in certain instances to differ from the text of the Convention.[126] Furthermore, different responses were given to the question whether the original text of the Convention or the implementing legislation would prevail in case of conflict (the correct approach being the prevalence of the text of the Convention). In respect of the way in which the Convention was adopted, more than half of the States indicated that the Convention as implemented in the legislation stood alone, whereas others incorporated it in a broader legislation. Generally, the responses to the survey suggested that there were no significant differences between the implementing legislation and the Convention.

2. The 2008 ICC Task Force Report

100 In light of the 50th anniversary of the New York Convention in 2008, the **ICC Commission on Arbitration** decided to establish a task force to conduct a **study of national rules** of procedure for the recognition and enforcement of foreign arbitral awards. The report prepared by the task force[127] focuses on national rules of procedure for recognition and enforcement of foreign awards under Articles III and IV. In addition, it addresses any more favorable legal basis for recognition and enforcement of foreign awards that may exist in a country.

101 With 147 current Contracting States under the New York Convention, it is not surprising that there are **considerable differences in the national rules of procedure**. The lack of uniformity of the procedural requirements for recognition and enforcement of foreign awards can have major practical impacts on a party's ability to obtain recognition and enforcement in a given Contracting State. Practitioners in international arbitration should, therefore, be aware of the importance of these different rules of procedure.

VII. Improving the Implementation of the New York Convention

102 The **different interpretations** of the notion of public policy by the various Contracting States (*cf.* Art. V para. 491), and, procedurally, the **lack of a supervising judicial authority** for the uniform interpretation of the provisions of the New York Convention constitute the biggest obstacles to the implementation of the Convention. Despite all honorable efforts to amend its text, even to re-draft it in its entirety, the New York Convention most probably will, for the time being, maintain its status of a historical singularity.

[126] "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" by UNCITRAL, available from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html (last visited July 18, 2011) paras 18 *et seq.*

[127] "Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards", ICC Bull. 2008 Special Supplement.

Besides the question of **whether it is feasible to achieve significant amendments** 103 to the Convention with the consensus of all or at least a substantial number of Contracting States, it remains **questionable whether this would provide a lasting solution** for all issues arising in the context of the Convention. The most efficient and, at the same time, a very pragmatic approach is to **promote the uniform interpretation of the Convention's provisions**. It has already been suggested[128] that a "judicial direction" be created in the form of an international body or working group consisting of internationally renowned arbitration practitioners who would collate and analyze judgments from all the jurisdictions and issue recommendations on the interpretation of the articles of the Convention. UNCITRAL, for instance, has used recommendations on the interpretation of the articles of the Model Law for adoption by practitioners and judiciaries.

This approach should be developed even further. The suggested judicial direction 104 could emerge as a **judicial authority concerned with the interpretation of the provisions of the New York Convention and their equal application**. Any Contracting State would be free to transfer its judicial powers in this regard to this new authority. This would avoid going through lengthy proceedings to amend the text of the Convention and create an opportunity to achieve uniform interpretation and application of the Convention in those Contracting States that wish to do so.

[128] *Cheng*, in: 50 years of NYC, p. 685.

the Legislature, whereas in others a "declaration of ratification" or "proclamation" by the head of State was sufficient. In order to gain force of law in the individual legal order, for a vast majority of States, the Convention was considered as "self-executing" or "directly applicable". For several other States, the adoption of an implementing legislation was required.

99 The report further showed that where States adopted implementing legislation, the text of that legislation was reported in certain instances to differ from the text of the Convention.[126] Furthermore, different responses were given to the question whether the original text of the Convention or the implementing legislation would prevail in case of conflict (the correct approach being the prevalence of the text of the Convention). In respect of the way in which the Convention was adopted, more than half of the States indicated that the Convention as implemented in the legislation stood alone, whereas others incorporated it in a broader legislation. Generally, the responses to the survey suggested that there were no significant differences between the implementing legislation and the Convention.

2. The 2008 ICC Task Force Report

100 In light of the 50th anniversary of the New York Convention in 2008, the **ICC Commission on Arbitration** decided to establish a task force to conduct a **study of national rules** of procedure for the recognition and enforcement of foreign arbitral awards. The report prepared by the task force[127] focuses on national rules of procedure for recognition and enforcement of foreign awards under Articles III and IV. In addition, it addresses any more favorable legal basis for recognition and enforcement of foreign awards that may exist in a country.

101 With 147 current Contracting States under the New York Convention, it is not surprising that there are **considerable differences in the national rules of procedure**. The lack of uniformity of the procedural requirements for recognition and enforcement of foreign awards can have major practical impacts on a party's ability to obtain recognition and enforcement in a given Contracting State. Practitioners in international arbitration should, therefore, be aware of the importance of these different rules of procedure.

VII. Improving the Implementation of the New York Convention

102 The **different interpretations** of the notion of public policy by the various Contracting States (*cf.* Art. V para. 491), and, procedurally, the **lack of a supervising judicial authority** for the uniform interpretation of the provisions of the New York Convention constitute the biggest obstacles to the implementation of the Convention. Despite all honorable efforts to amend its text, even to re-draft it in its entirety, the New York Convention most probably will, for the time being, maintain its status of a historical singularity.

[126] "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" by UNCITRAL, available from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html (last visited July 18, 2011) paras 18 *et seq.*

[127] "Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards", ICC Bull. 2008 Special Supplement.

Besides the question of **whether it is feasible to achieve significant amendments** 103 to the Convention with the consensus of all or at least a substantial number of Contracting States, it remains **questionable whether this would provide a lasting solution** for all issues arising in the context of the Convention. The most efficient and, at the same time, a very pragmatic approach is to **promote the uniform interpretation of the Convention's provisions**. It has already been suggested[128] that a "judicial direction" be created in the form of an international body or working group consisting of internationally renowned arbitration practitioners who would collate and analyze judgments from all the jurisdictions and issue recommendations on the interpretation of the articles of the Convention. UNCITRAL, for instance, has used recommendations on the interpretation of the articles of the Model Law for adoption by practitioners and judiciaries.

This approach should be developed even further. The suggested judicial direction 104 could emerge as a **judicial authority concerned with the interpretation of the provisions of the New York Convention and their equal application**. Any Contracting State would be free to transfer its judicial powers in this regard to this new authority. This would avoid going through lengthy proceedings to amend the text of the Convention and create an opportunity to achieve uniform interpretation and application of the Convention in those Contracting States that wish to do so.

[128] *Cheng*, in: 50 years of NYC, p. 685.