

**THE FORM REQUIREMENT FOR ARBITRATION
AGREEMENTS IN INTERNATIONAL COMMERCIAL
ARBITRATION**

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1 Introduction

1.1 The Theme of this Paper

Contracts may or may not be subjected to formal requirements, i.e. the conditions that have to be complied with for a contract to be deemed valid. The type of conditions the contract is subjected to will depend on the kind of contract that is under scrutiny and of course on the law governing the contract. The contract will be subjected to national law and/or international law, and these often contain differing views as to the scope of formal requirements. Arbitration agreements represent one type of contract that often have been, and still are, subjected to strict form requirements. This is valid for arbitration agreements in international commercial arbitration as well as in domestic arbitration.

The focus of this paper will be on the current position of the form requirements to arbitration agreements, using a selection of national laws and international instruments to demonstrate and exemplify the various approaches taken. Another main objective of this paper is to compare the information gathered from assessing the different varieties of the form requirement with the lack of a form requirement in the Norwegian Arbitration Act. I will investigate why there has always existed some kind of form requirement to the arbitration agreement and what the consequences will be, if any, when jurisdictions such as Norway, Sweden, New Zealand and France abandon requirements to the form of the arbitration agreement in their domestic legislation.

The New York Convention¹ is the most important instrument in the area of international commercial arbitration and contains provisions that bind its Member States to recognize and enforce arbitration agreements and arbitral awards. It also contains a form requirement to the arbitration agreement. Especially in this aspect, problems may be

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958).

expected to arise. One has to look into whether arbitration agreements and arbitral awards can be denied recognition and enforcement if the arbitration agreement is not in line with the requirements in the Convention, even though they comply with the more lenient national law. If foreign awards can be denied recognition and enforcement under the Convention, because the arbitration agreement does not fulfil the form requirement therein laid down, it is a substantial downfall for international commercial arbitration. Worldwide recognition and enforcement of awards are among the most attractive advantages of arbitration, especially when compared to national court decisions that are subject to a more narrow scope of enforceability, due to lack of a convention of the same calibre as the New York Convention. A valid award without enforceability is of limited value for the parties, and puts them in a difficult situation where the dispute will remain unsolved since a valid award, even though unenforceable, excerpts jurisdiction from the national courts.

1.2 Boundaries

This paper will only consider the theme in regard to international commercial arbitration.² Even though domestic arbitration is subjected to the New York Convention there are frequently other arguments valid for domestic arbitration than for international commercial arbitration, thus the analysis might differ in the two areas. The paper is also limited to commercial arbitration, because there are different security and protective measures to be taken into consideration regarding consumer arbitrations.

The paper will mainly focus on the most important international instruments on a world wide scale, namely the Model Law produced by the United Nations Commission on International Trade Law (hereinafter UNCITRAL) and the New York Convention. The European Convention on International Commercial Arbitration of 1961 is not treated as it is of less value than the New York Convention, due to its few Contracting States

² More detailed analysis regarding the definition and scope of international commercial arbitration is found in books on the subject, e.g. Fouchard Gaillard Goldman Chapter 1.

compared to the New York Convention, and of its regional scope.³ Institutional rules will be used for reference, but will not be exhaustively analyzed.

1.3 Sources

The UNCITRAL Model Law on International Commercial Arbitration (hereinafter the UNCITRAL Model Law)⁴ and the New York Convention, including their historical legislative documents, have been essential sources because of their wide-spread implementation around the world. Institutional arbitration rules are also of value when looking at the form requirement.

On the other hand, international instruments may be a compromise between different opinions because they are usually products of international co-operation and deliberations, thus they may not actually mirror the needs and practice of the international commercial community. This will have to be considered when assessing the value of the source.

National arbitration legislation have also been of important value when treating the form requirements to arbitration agreements, as well as judicial decisions. The decisions have mostly been used to provide examples of the different interpretations existing regarding the provisions in the New York Convention.

Documents from the work done in UNCITRAL in the area of arbitration have been instrumental, as have general books on international commercial arbitration and articles published in various international journals. Many sources regarding the form requirement may be viewed as slightly outdated compared to the latest developments in the area, thus newer articles in international journals and information available on the Internet constitute important contribution. Notwithstanding, there are few updated and relevant sources on the subject.

³ See *ibid* p. 138 for more details on this convention.

⁴ The UNCITRAL Model Law on International Commercial Arbitration of 1985.

1.4 The Outline of the Paper

Following Chapter 2, where the form requirement is reviewed in general, are chapters addressing the various approaches to the form requirement taken in the New York Convention (Chapter 3), the UNCITRAL Model Law (Chapter 4) and the national laws (Chapter 5). The New Norwegian legislation on arbitration is dealt with under 5.5 and finally the consequences of leaving out form requirements are addressed in Chapter 6. A short summary of the paper's discussion and some conclusive remarks are contained in Chapter 7.

2 The Requirement of Form for Arbitration Agreements

2.1 Introduction

2.1.1 Definition of an Arbitration Agreement

An arbitration agreement can either be in the form of a clause in the main contract, i.e. the agreement is made before any disputes have arisen or it can be in the form of a submission agreement where arbitration is agreed after the dispute has arisen. The latter is the least common situation. I find the following definition of an international arbitration agreement to be fairly accurate:

“An international arbitration agreement is an agreement in which two or more parties agree that a dispute which has arisen or which may arise between them, and which have an international character, shall be resolved by one or more arbitrators.”⁵

For the objective of this paper there is hardly any need to analyze the contents of this definition further, as it outlines the main attributes of an international arbitration agreement to the extent necessary in this connection.

2.1.2 The Doctrine of Freedom of Contract

International commercial arbitration, as other kinds of arbitration, is founded on freedom of contract, i.e. that the parties are free to agree on whatever they want and how they want. However, the party autonomy regarding arbitration agreements is subject to restrictions relating to the form and the substance of the agreement.⁶ It is the formal requirements that are under scrutiny in this paper, not the requirements regarding the substance of the agreement such as the parties' capacity to enter into an arbitration

⁵ Fouchard Gaillard Goldman p. 193.

⁶ Landau (1996) p. 121.

agreement. When the requirements are not complied with, the arbitration agreement will be deemed invalid.

A valid arbitration agreement has two consequences of utmost importance. Firstly, it excludes the jurisdiction of national courts, and secondly, it is a condition for the subsequent award to be enforceable.⁷ Thus, an invalid arbitration agreement will cause considerable damage in all stages of the arbitration process to parties that have relied on it, which underlines the significance of the subject in question.

2.2 What is the Requirement of Form?

When looking at the various documents that contain form requirements to arbitration agreements, such as the New York Convention,⁸ the Model Law,⁹ the UNCITRAL Arbitration Rules,¹⁰ the institutional Arbitration Rules¹¹ and national arbitration laws, there are many differing approaches to be found.

The international instruments and some of the Arbitration Rules, have in common that they impose a strict form requirement. The agreement has to be “in writing” and the definition of this wording is narrow, though the content of the requirement differs when analyzing the definitions separately. National laws have taken various approaches. Some countries have chosen a consensual approach where there is no requirement at all to the form of the arbitration agreement. This is a modern and new method and thus few countries at this date have opted for this solution. Others have taken a formal approach with strict requirements, whereas others again have taken an intermediate approach where the requirements are more liberal, though not completely abandoned. There exist similarities when comparing the differing approaches that contain an “in writing”

⁷ Moss pp. 2-3.

⁸ Article II (1).

⁹ Article 7 (2).

¹⁰ Article 1.

¹¹ E.g. Article 1 of the LCIA (London Court of International Commercial Arbitration) Arbitration Rules of 1998 and Article 1 of the International Arbitration Rules of the AAA (American Arbitration Association) of 1997.

requirement, albeit details in the definitions are different. These differences arise from how strict or liberal the wording “in writing” shall be interpreted. The details will be discussed later in the paper.¹²

2.3 Justifications of the Form Requirement

The arbitration agreement has always been treated differently compared to other types of contractual agreements, because of its wide-ranging consequences. The arbitration agreement is the fundament of the whole arbitration process, as well as the legal basis that forces the parties to let an arbitral tribunal decide on the dispute, and hence it restricts access to national courts. Without this agreement, the arbitral tribunal will not have competence to rule on the dispute, and the parties do not have any other alternative than to take the dispute to the appropriate national court.

The various justifications for a written form requirement may be divided into two categories.¹³

The first category contains the justifications that are most commonly cited, namely that form requirements certify the parties’ initial consent to exclude the courts and agree on arbitration. This category may be further divided into three functions: cautionary, evidential and channelling. The “cautionary” function means that, by requiring a written agreement, the parties are alerted of the special significance of the agreement, i.e. that they give up the right to take any disputes concerning the underlying contract to court. This has been the most common and important argument behind strict formal requirements. The “evidential” function of a written agreement means that it provides solid proof of the parties’ consent to arbitration. The “channelling” function is connected to the fact that the agreement to arbitrate is the legal mechanism that commences the arbitral process. Without this agreement, arbitration cannot be conducted, and therefore the agreement is subjected to the written form requirement.

¹² See Chapter 5.

¹³ See Landau (2002) pp. 21-24.

The second category of justifications of the form requirement is based on the presumption that an agreement in writing may give proof of the terms of the arbitral process. This is so because an arbitration agreement in writing may contain details regarding for example the seat of arbitration and the rules under which the arbitration shall be conducted. Thus, a written agreement may enhance certainty within the arbitral process, minimize court intervention and facilitate recognition and enforcement.

2.4 Are the Justifications for the Writing Requirement Valid?

2.4.1 The “Cautionary” Function

The “cautionary” function of a written agreement is one of the main reasons behind the strict form requirement, and it has been seen as important to imply a strict requirement to alert the parties that an arbitration agreement is a waiver of the parties’ right to take the dispute(s) to national courts.¹⁴ Access to litigation in court is a fundamental human right embodied in international conventions.¹⁵ To waive this right has been regarded as a decision with serious implications,¹⁶ and the strict form requirement was meant to ensure that the parties considered their decision more thoroughly than they would otherwise have done.

Taking into consideration the spiralling use of arbitration in the international commercial arena over the last decades,¹⁷ such reasoning carries less weight in our times. Arbitration is now widely regarded as a normal procedure considered to be providing good enough protection to all parties involved. Thus the protection of the parties to an international commercial arbitration agreement through the strict requirement to form is not as important as it was in earlier days. Firstly, many arbitral

¹⁴ This traditional view is apparent in preparatory works when national arbitration legislation has been revised, as well as evident in a variety of relevant literature on the subject.

¹⁵ E.g. Article 6 in the European Convention of Human Rights.

¹⁶ E.g. Mann p. 171.

¹⁷ See Derains p. 35 and his reference to diverse statistics from the International Court of Arbitration of the ICC. The spiralling use is especially noticeable and provable in institutional arbitration, where for

institutions have been established,¹⁸ and they provide neutral and well considered rules that govern the arbitration procedure where the parties have so chosen. Secondly, there has been a development regarding independent arbitration rules that parties may implement if opting for an ad-hoc arbitration.¹⁹ Thirdly, one must not forget the development in national laws, where ever more nations provide arbitration-friendly and detailed arbitration provisions. Put together, this makes the arbitration process in international commercial arbitration safer and better for the parties involved.

It is also widely recognized in international commercial business, that an agreement to arbitrate is of a positive nature because it provides for a suitable place for the parties to solve future possible disputes, rather than the parties being in an uncertain situation as to which national courts might have jurisdiction over the dispute. The quintessence of this is that:

“the selection of arbitration is not an exclusion of the national forum but rather the natural forum for international disputes.”²⁰

In international arbitration the waiver of access to national courts is outweighed by the fact that an arbitration agreement provides for a place to solve the dispute that represents a neutral territory for both parties.²¹ International commercial disputes are disputable in a national court, but the court that claims jurisdiction may not be neutral as it will often be situated in the country of one of the parties. Thus the court may be pre-imposed to one party and the other party may have the disadvantage of limited knowledge of that particular national court system.

Apart from providing a neutral dispute solution procedure and place, arbitration incorporates attributes that litigation in court does not, and may thus result in a better

example the ICC International Court of Arbitration has seen a rise in arbitrations conducted under their rules. See also Fouchard Gaillard Goldman p. 174 and the yearly Statistical Reports in the ICC Bulletin.

¹⁸ E.g. ICC International Court of Arbitration (1923), LCIA and The Arbitration Institute of the Stockholm Chamber of Commerce (1917).

¹⁹ E.g. UNCITRAL Arbitration Rules.

²⁰ Lew, Mistelis & Kröll p. 132.

²¹ Hermann p. 215.

dispute solution procedure. Such positive aspects valid in international arbitration, are that the parties may choose judges with special knowledge on the area of the dispute, it is often less time-consuming because there are limited appeal possibilities and the process is confidential due to its private nature.

The new arbitration-friendly environment that has developed over the last decades and the spiralling use of arbitration²² imply that one of the main reasons behind the strict form requirements no longer has the same value, at least not in the international commercial arena.

2.4.2 The “Evidental” Function

The “evidental” function is still of importance and is now the most common argument behind formal requirements in national laws, as has been confirmed in the revision process of many national laws.

One might pose the question of the necessity of going to such a length as requiring the agreement to be in writing to get proper evidence that an arbitration agreement has been concluded. The process when determining the formal validity is only one part of the assessment of the arbitration agreement. The agreement not only has to comply with the formal requirement where that exists, but also with the requirements to the common intention of the parties. Some countries argue that formal requirements to the agreement do not provide for better proof of an agreement than what the requirement of the common intention of the parties may provide, and thus abandon the form requirement altogether.²³ The evidental function in those countries is provided for through the normal requirements of contract conclusion. This demonstrates that even the “evidental” function of the form requirement can be taken care of by other means than through formal requirements.

²² See footnote 17.

²³ Norway is an example of this approach, see Ot.prp. nr.27 (2003-2004) Om lov om voldgift pp. 40-41.

2.4.3 The “Channelling” Function

The “channelling” function is a reason that has never been of much value to justify the strict requirement, as the requirement to the common intention of the parties will have to be verified for the arbitral tribunal to have competence over the dispute.

2.4.4 Providing Proof of the Terms of the Arbitral Process

The justifications in the second category mentioned above in 2.3, are of limited value because there are no conditions in formal requirements directed to the content of the agreement. In these days parties frequently agree to conduct arbitrations under arbitration institutions²⁴ and these provide detailed sets of rules regarding how the arbitration shall be carried out, so that arbitration can be effective even though the parties disagree on important issues regarding the arbitral proceedings. Also in ad hoc arbitrations, sets of arbitration rules are available for the parties to choose, subsequently details regarding the ad-hoc procedure are often taken care of through a reference to such arbitration rules. For these reasons parties often do not agree on any of the terms other than a set of rules or an institution, even though they agree to arbitrate in writing. Hence a writing requirement will not address possible future disagreement between the parties regarding the terms of the arbitral process, because the agreement may be in writing without having any details in regards to the procedure.

2.4.5 Summary

Even though there may still be some justifications for the writing requirement to be upheld, these frequently also exist in regard to other types of contracts. Why should one treat a contract with serious and costly implications differently to a contractual agreement to arbitrate? The situation may well then be, if this distinction is upheld, that the parties have to comply with the underlying main contract, whereas the arbitration clause contained therein is deemed invalid, since it does not comply with the formal

²⁴ E.g. ICC and LCIA.

requirements.²⁵ This may lead to unfair situations and hardly ensures the protection of the parties.

The situation might be seen as somewhat unfair if the underlying contract is found to exist, whereas the arbitration agreement incorporated in this contract is not, because it is subjected to other evidential conditions. The parties may then end up with a couple of national courts willing to claim jurisdiction over the case as the contract is international, and thus it is not necessarily clear which national court has jurisdiction over the dispute.

Furthermore, do parties in the international commercial community need this so-called protection? In most cases, the parties involved are professionals and therefore may not need the protection a writing requirement is supposed to provide. This view has been argued in some countries, which in the course of the later years have modernized and revised their arbitration laws.²⁶ The result of this view is a distinction between commercial parties and consumer parties regarding the restrictions laid down on the formal validity of the agreement.

To summarize the arguments above, there is limited value left in the justifications that traditionally have been thought to be upholding the strict form requirement. As we shall see below, the view that form requirements provide legal certainty is not necessarily true, since they frequently represent the origin of disputes in both the arbitral tribunal as well as in the national court, and therefore provides the parties with uncertainty.²⁷

Apart from the above mentioned arguments, are there other justifications to uphold the form requirement? One particularly good reason might be to comply with the form requirement in the New York Convention, deemed to be the most important convention in the international arbitration. This Convention provides for a simple enforcement procedure for international commercial arbitration agreements and arbitral awards in foreign jurisdictions. One of the conditions for an award to be enforceable under the New York Convention is that the arbitration agreement must comply with the form

²⁵ Hermann p. 215.

²⁶ E.g. the new legislation in New Zealand and Norway, treated under 5.4.

²⁷ Lew, Mistelis & Kröll p. 132.

requirements in the Convention or the national law. Which of these will prevail over the other when diverging, will be further reviewed in Chapter 6. If the New York Convention prevails, this will be a strong justification to maintain some kind of form requirement in national laws. As will be argued later,²⁸ the form requirement contained therein has been interpreted broadly and is also modified by the Model Law.²⁹ Consequently, there is hardly any need to continue the strict form requirement, nor fully abandon it, but rather choose a more liberal approach with a modernized requirement within the ambit of the Convention. This will ensure that national arbitration laws do not produce unenforceable arbitral awards but at the same time provide for the needs of the international commercial contenders, at least to a certain extent.

²⁸ See section 3.3.2.

²⁹ See Chapter 4.2.2 and footnote 70.

3 The Form Requirement in the New York Convention

3.1 Introduction

The New York Convention is the most successful convention of all time in the area of arbitration. This is largely due to its great number of Contracting States, but also because it made international commercial arbitration much more valuable by ensuring recognition and enforcement of both arbitration agreements and arbitral awards on a world wide scale. The Convention contains a form requirement for arbitration agreements in Article II, and it is therefore essential to analyze the content of this requirement since the Convention binds 135 States.³⁰ The requirement has to be scrutinized to find its character and true meaning. One of the primary questions is if the Contracting States are bound to follow up this requirement in their national laws, or if they can have more or less onerous requirements in their own laws. Another question is what the consequences may be if the requirements are diverging.

The field of application of the Convention, i.e. which arbitration agreements and arbitral awards it covers, will not be treated in this paper.³¹

3.2 Background

International commercial arbitration gradually increased in importance during the beginning of the 20th century, and arbitration has been evolving ever since.³² International arbitration as an effective dispute mechanism could not compete fully with national litigation and did not give the parties involved satisfactory protection, unless an agreement between countries was made. Without uniform international rules providing

³⁰ www.uncitral.org, Status on the Convention 9th March 2005.

³¹ For details see Lew, Mistelis & Kröll p. 111 and van den Berg (1981) pp. 20-21, 54, 70.

for recognition and enforcement of arbitration agreements and arbitral awards in foreign countries (i.e. in other countries than where they were made), international commercial arbitration could not be a viable alternative to national litigation. Many courts were hostile to arbitration and would intervene and deny arbitral tribunals' competence over disputes, render arbitral awards invalid or deny recognition and enforcement because the award was foreign. This acted as a restriction on the further expansion of arbitration since it would be unreliable to agree on arbitration.

To protect arbitration agreements and arbitral awards in the international arena, two conventions called the Geneva Treaties were made. The work was carried out by the League of Nations, and the first part of this work was the Geneva Protocol on Arbitration Clauses of 1923, which concerned the recognition of an arbitration agreement.³³ The Geneva Convention on the Execution of Foreign Awards followed in 1927 and concerned enforcement of awards. Even though these treaties represented a formidable step forward for international commercial arbitration, they did not provide the parties with the extent of certainty and predictability they sorely needed. The problem was that the treaties were restricted to awards made in the Contracting States and required both parties to be nationals of such states.³⁴ Neither did the treaties contain specific requirements to the form of the arbitration agreement, which was left to be determined by national legislation, which at that time was often very strict.³⁵ Thus a new convention was drafted by the United Nations Economic and Social Council (ECOSOC) following an initiative taken by the International Chamber of Commerce. The New York Convention was adopted in 1958 and, though based on the Geneva Treaties, it involved changes and improvements that made international arbitration more reliable than ever.

³² This is proven by the establishment of more arbitration institutions, the making of Model Laws and the revision of national laws. See also footnote 17.

³³ See 27 League of Nations Treaty Series 158 (1924).

³⁴ Fouchard Gaillard Goldman p. 122.

³⁵ Kaplan p. 31 and van den Berg (1981) p. 172.

3.3 The Function and Effect of the Convention

3.3.1 General

The Convention requires its Contracting States to recognise and enforce both foreign arbitral awards and foreign arbitration agreements as long as these comply with the requirements laid down in Article III and Article II of the Convention. This constitutes a significant contribution to the effectiveness of the arbitration process, since it imposes uniform rules regarding recognition and enforcement that prevail over national rules.³⁶ This is an especially important aspect in international arbitration because the parties frequently represent different nationalities and usually have assets in other countries than the country where the award is made. The general practice is to have the judicial seat of arbitration at a place that is neutral and which neither of the parties will have any special connection to.³⁷ Hence the parties' assets will often be in another jurisdiction than the one where the award is made.

Without the Convention, the situation would be uncertain as to whether an award or agreement would be recognisable and enforceable in a foreign jurisdiction. A valid award will be worthless if it is not recognized and enforced, because the winning party cannot get hold of the other party's assets. An agreement would also be worthless if unrecognisable and unenforceable, as it will deny the arbitral tribunal competence over the dispute. The Convention provides for a system that gives arbitration agreements and arbitral awards almost the same effect as they have in the country where they are made. It also restricts refusal of such recognition and enforcement to a limited number of causes. The enforcement process would be more time-consuming and unpredictable if not conducted under the Convention, since national courts would then have to apply the national law which might not contain as simple and arbitration friendly rules as the Convention. Hence the Convention provides the parties with legal certainty and predictability.

³⁶ Fouchard Gaillard Goldman p. 122.

³⁷ Redfern & Hunter p. 284.

Arbitral awards complying with the conditions in the New York Convention are more easily recognised and enforced abroad than national court decisions, especially outside the areas where the Lugano Convention³⁸ applies.³⁹ This reflects one of the essential attributes of arbitration, one that litigation can hardly compete with, and shows the importance of arbitration on the international commercial arena.

I will assess the relationship between the form requirement in the Convention and the form requirements in national laws in Chapter 6, but prior to that, I will analyse the interpretation of the form requirements contained in Article II.

3.3.2 The Form Requirement in Article II

Article II of the Convention originated late in the deliberations regarding the Convention.⁴⁰ The idea was to keep the provisions regarding the arbitration agreement in a separate convention to the one treating the arbitral award, as had been done in the previous Geneva Treaties. This was revised in the last days of the negotiations, thus minimal consideration and debate went into this provision compared to the other provisions in the Convention. This is why the scope of Article II, as well as the relationship between Article II and other provisions in the Convention, are uncertain.

The Convention has been thought to provide for an international uniform rule to the form of the agreement,⁴¹ but this is subject to some disagreement, especially during the latest years, both between national courts and authors.⁴² This will be treated in more depth under 6.3 where I will be assessing the relationship between Article II and Article V.

³⁸ Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (Lugano, Sept.16, 1988). This Convention provides for enforceability of judicial decisions and applies in the European Union and in the Member States of EFTA.

³⁹ E.g. Canada, Russia and Australia.

⁴⁰ See van den Berg (1981) p. 56.

⁴¹ See e.g. van den Berg (1981) p. 9, Alvarez p. 68, Born pp. 180-181 and Mann p. 172.

⁴² Hermann does not agree that Article II is a uniform rule cf. p. 217. Neither does Rubino-Sammartano p. 211.

Article II (1) requires a contracting state to recognize the agreement if it is “in writing”. This is defined in Article II (2) as agreements “signed by the parties or contained in an exchange of letters or telegrams”. The requirement in the Convention is very strict and excludes cases involving acceptance by performance/conduct and tacit acceptance due to the requirement of exchange in writing (of letter or telegrams).⁴³ The drafters of the Convention explicitly wanted to leave such agreements out of the definition when looking into the history of the Convention.⁴⁴ However, the interpretation of the provision shows that not all agreements incorporated by oral/tacit reference to a written document are excluded.⁴⁵

Case law and arbitration practice have demonstrated that the tendency is to tolerate arbitration agreements:⁴⁶

- concluded by the exchange of telexes and facsimiles, or entered into by e-mail or other means of electronic communication,⁴⁷
- concluded by the exchange of purchase and confirmation orders or bills of lading and charter parties that refer to standard conditions or by other reference to general conditions,⁴⁸
- concluded through an agent (national courts greatly differ in this area though),⁴⁹
- in cases of renewal of an agreement and other connected contracts,
- concluded pursuant to trade usages.

The requirement in the Convention has thus in case law been interpreted broadly to validate agreements that by the strict wording of the provision, would not have been considered within its ambit. This has been done by interpreting the provision in line

⁴³ van den Berg (1998) p. 31.

⁴⁴ Ibid p. 196 and Born p. 127.

⁴⁵ Fouchard Gaillard Goldman p. 376.

⁴⁶ See www.unctad.org, Module 5.7 p. 12.

⁴⁷ E.g. Yearbook XII (1987) p.502; Oberlandesgericht Hamburg, 30 July 1998 and Cour d’appel, Paris, 20 January 1987.

⁴⁸ Alvarez p. 73 and the decision in U.S. Court of Appeals for the Second Circuit, 1 April 1987.

⁴⁹ Alvarez p. 79.

with the technological developments the drafters of the convention did not have in mind, as well as with the evolving needs of the international commercial community. There exists, however, no overall consensus between the various national courts regarding the validity of the numerous types of agreements mentioned above.⁵⁰ How the form requirement is interpreted will depend on how arbitration-friendly the national court and the national arbitration law are. Consequently, not all the situations mentioned above will be seen as providing a valid arbitration agreement in all jurisdictions. This implies that there is currently no uniform interpretation of Article II (2) and the users therefore are in an uncertain position where the predictability is limited regarding the validity and enforceability of the agreement and the subsequent award.

The exact boundaries, i.e. which type of arbitration agreements are within the scope of interpretation of the form requirement in Article II, will not be further assessed. Essential in this connection is to nail down that oral agreements not evidenced in any kind of writing, are excluded from the ambit of Article II, and may therefore be denied recognition by a country. I shall explore in more detail at a later stage in this paper,⁵¹ the consequences this may have on arbitral awards based on oral agreements.

3.3.3 Reasons behind the Strict Form Requirement in Article II

One of the reasons for the strict requirement is that the Convention was drafted almost half a century ago, and now is somewhat outdated. Over the subsequent years, international commercial arbitration has evolved in harmony with the accelerated use of arbitration and continuing growth in cross-border trade. The rise in international trade has resulted in an increasing number of international disputes, and this has made arbitration ever more common. Arbitration may now in many instances, be regarded as the preferred dispute resolution method in international commercial disputes. The

⁵⁰ See Hermann p. 215 and Born p. 127, e.g. implied/tacit acceptance enough cf. *Zambia Steel & Building Supplies Ltd. v. James Clark & Eaton Ltd.*, [1986] 2 Lloyd's Rep. 225. But in other cases not deemed as a valid arbitration agreement, cf. the Swiss case *J.A. Walsum NV v. Chevelines SA*, 64 *Schweizerische Juriste-Zeitung* 5 (1968) and the French case *Cass. com.*, Feb. 25, 1986 (C.O.N.F.E.X. v. Dahan).

⁵¹ See Chapter 6.

situation was different in 1958, when international arbitration was seen as a less secure way to solve disputes than litigation in court and arbitration was thus subjected to strict conditions to provide protection for parties opting for arbitration.

The relatively short time spent on the provision is another explanation for the strict requirement, hence its scope of application was not fully examined or well considered, and it was not made technology neutral. Another reason is that the drafters wished to get as many states as possible to sign the Convention, which is why the Convention could not be too liberal for its time. If states regarded it to be too liberal compared to their national laws, they might hesitate to sign it due to the consequences of inherent obligations. Emphasis was put on attracting as many signatory states as possible in order to reach the aim of facilitating international commercial arbitration.

One of the main arguments against having a strict form requirement, has been that since the requirement is so inconsistent with the commercial community's practice, there have been situations where the parties can rely on and perform the main contract and still deny arbitration even though the contract contains an arbitration clause. This is the consequence of having different requirements to the arbitration agreement and the substantive contract.⁵² As mentioned above,⁵³ however, there may not be that many arguments left to support that the arbitration agreement is subjected to stricter form requirements than the main contract.

Thus, there are few arguments left of importance against interpreting the Convention liberally. A liberal interpretation is in line with the main objectives of the Convention, which are to make arbitration effective and provide for enforceability of as many international awards as possible.⁵⁴ On the other hand, a liberal interpretation may result in substantial disparities, because some national courts may still opt for a formal interpretation. This may be against another aim of the Convention, which is that it should be interpreted as uniformly as possible by the courts in all the Contracting States, so that the national approaches will not diverge too much. Liberal interpretation should

⁵² See Kaplan p. 30 where he criticises the Hong Kong case *Smal v. Goldroyce* ([1994] 2 HKC 526).

⁵³ See section 2.4.

⁵⁴ See www.unctad.org, Module 5.7, Chapter 10.

thus be treated with cautiousness, so as not to ruin the uniform interpretation that the New York Convention sorely needs to continue being the most important instrument in international commercial arbitration.

4 The UNCITRAL Model Law

4.1 Introduction to UNCITRAL and its Model Law

The model law technique is effective and influential due to the number of jurisdictions adopting such laws, the speed of implementation in national laws and the level of harmonisation it provides.⁵⁵ The UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law) contains a requirement to form in Article 7 and it is of importance to this paper's subject to interpret the scope of that requirement having in mind its influential nature.⁵⁶

The UNCITRAL is a body within the United Nations (UN) with an objective to harmonize the rules in various areas on international trade. The Model Law was made as an incentive to unify the differing national arbitration laws and thus strengthen trade across jurisdictional borders. It became effective in 1985, and many countries around the world have modelled their national laws on this;⁵⁷ as it provides for a detailed and well considered set of rules that is a result of a time-consuming international co-operation. UN also issued a resolution⁵⁸ that recommended Member States of the UN to use the Model Law when revising their national legislation on arbitration, and albeit just a recommendation, it puts pressure on these states to at least consider the Model Law as an alternative when revising.

The objective when adopting the Model Law should be to make as few amendments as possible, since its agenda is the harmonisation of the laws, though countries are free to make amendments or add provisions on issues not addressed in the Model Law. Quite a

⁵⁵ Hermann p. 213.

⁵⁶ 49 jurisdictions have adopted the Model Law since it was finished in 1985 cf. www.uncitral.org, status on text 9th March 2005. Even more countries have used it as a reference tool when revising their arbitration laws, e.g. England and Sweden.

⁵⁷ E.g. some American States, Germany, New Zealand, Norway.

⁵⁸ December 11 1985, No. 40/72.

few countries have done so, but there are more additions than deviations.⁵⁹ Thus many national laws are quite different from the Model Law even though they are recognized as Model Law countries. To be recognized as a Model Law state, the country has to use the Model Law as a basis and include most of the provisions, as well as not having any provisions that are against international arbitration practice.⁶⁰ It is advantageous to be recognized as a Model Law country because it proves that the country has arbitration-friendly legislation and therefore it will be more attractive to conduct arbitrations in that country.

4.2 The Form Requirement in Article 7 of the Model Law

4.2.1 Introduction

Article 7 (2) was modelled on Article II of the New York Convention,⁶¹ but the UNCITRAL thought that some improvements within the scope of Article II were needed. Firstly, to keep up with the development in communications technology, and secondly, to accommodate for the needs of the international commercial community that had changed since the Convention was made.⁶² By improving the text and language in the Convention, the UNCITRAL provided for a detailed and more precise requirement in the Model Law amending the uncertainty ruling on the interpretation of the Convention that was apparent through the different views taken by the various national courts. These amendments were all within the ambit of Article II (2), so that awards and agreements complying with the requirement in Article 7(2) would also comply with the requirement in Article II (2), and hence be recognisable and enforceable under the Convention.⁶³ It was important for the UNCITRAL to ensure that the Model Law would not produce unenforceable awards by introducing a form requirement not in line with Article II (2). It would also be valuable to have a similar requirement so that the case law connected to Article II, would still be valid when interpreting the text in Article 7.

⁵⁹ Hermann p. 213.

⁶⁰ Ot.prp. nr.27 (2003-2004) p. 19.

⁶¹ See A/CN.9/207 para.40 and A/CN.9/216 paras. 40-41.

⁶² See Broches pp. 40-41.

⁶³ See Binder p. 55.

With a completely new requirement, this would all be lost and new uncertainties would probably arise.

4.2.2 Contents of the Provision

The major requirement to the arbitration agreement is that it shall be “in writing”. The requirement is a matter of the existence of the arbitration agreement, not just a matter of proof.⁶⁴ Since the requirement in Article 7(2) is modelled on the requirement in the New York Convention, the interpretation of this definition is almost identical. The difference is that Article 7 contains a more thorough explanation of what kind of “exchange” is regarded as providing for a valid agreement. It is also explicitly stated that reference in a contract to a document in writing containing an arbitration clause is valid. The text excludes oral agreements albeit evidenced in writing,⁶⁵ or in cases where one of the parties has not consented in writing.⁶⁶ In the debate leading up to the Model Law, suggestions were offered that bill of lading should be covered by the requirement, but this was turned down, since it was argued that this kind of agreement would not be within the scope of the Convention’s requirement.⁶⁷

Article 7 in the Model Law was intended to establish maximum standards, so that the countries using it as a model when drafting their own arbitration law should not incorporate a stricter standard than the one contained in Article 7(2). If they did, they might not be recognised as a Model Law country because of their arbitration hostile environment. What will be the case, however, if a country provides for a more liberal approach and for example abandons the requirement altogether? New Zealand which is one of the states that does not have any form requirement to the arbitration agreement, is still accepted as a Model Law country, hence Article 7 is not a minimum standard, only a maximum.⁶⁸

⁶⁴ See Sanders p. 31.

⁶⁵ See A/CN.9/232, para. 42, Binder p. 55 and Lew, Mistelis & Kröll p. 134.

⁶⁶ See Broches p. 41.

⁶⁷ See Holtzmann & Neuhaus p. 261.

⁶⁸ www.uncitral.org. See also the analysis of the Norwegian approach in section 5.5.2 and footnote 121.

Arbitration has long been at the centre of attention in UNCITRAL's efforts concerning the facilitation of international trade, and deliberations were particularly directed to formulating a requirement that would unify the differing national approaches. As a consequence, countries should be particularly cautious not to impose another requirement or abandon the requirement altogether when adopting the Model Law.⁶⁹

A further question is if arbitration agreements complying with national legislation based on Article 7 (2), which mirrors a broad interpretation of Article II (2) in the Convention by UNCITRAL, will be accepted in states that interpret the Convention stricter. This has not seemed to cause many problems, because the Model Law still requires the agreement to be evidenced in some kind of writing and this interpretation is in line with the general presumption of how the Convention today shall be interpreted. Judicial practice also shows that the Convention should be interpreted in view of Article 7 (2).⁷⁰

4.3 The Working Group on Arbitration

4.3.1 Introduction

The Working Group on Arbitration has been dealing with the form requirement issue since year 2000. The group was given a mandate from the UNCITRAL to discuss and find solutions to a range of areas in international commercial arbitration where court decisions had left the legal situation uncertain or unsatisfactory. The idea is that the Working Group shall do the analysis and come up with solutions, but leaving to the UNCITRAL to make final decisions on the issues.

One of the uncertain areas specifically mentioned by the UNCITRAL was the requirement of written form for arbitration agreements.⁷¹ This has become one of the most

⁶⁹ See Holtzmann & Neuhaus p. 262.

⁷⁰ E.g. the Swiss decision Fed. Trib., Jan 16, 1995 (Compagnie de Navigation et Transports). This opinion is also shared by the High Court in Hong Kong and by professor van den Berg (1998) p. 32.

⁷¹ See A/CN.9WG.II/WP.108 para. 9.

controversial areas of the Model Law⁷² because it does not meet modern standards⁷³ and there exist major disparities in national laws.⁷⁴

The work done on the issue of form requirements by the Working Group these last couple of years⁷⁵ is of high value, due to the central position of UNCITRAL. If changes are made in the Model Law and/or the UNCITRAL issues other instruments, chances are that many countries will follow this in their own national legislation, or at least use this as an interpretative tool when interpreting Article II (2) of the Convention.

The fundamental objective of the revision of the form requirement was to increase legal certainty and to encourage uniform interpretation of the Convention.

Although it remains to be seen what the final outcome on the problematic area of form requirement will be, I will briefly review the discussions and the conclusions from this work regarding the requirement of written form.

4.3.2 Presentation of its Deliberations

After having read the reports of the Working Group and the UNCITRAL regarding the writing requirement, there are a few issues that must be particularly mentioned. First and foremost, it is apparent from the reports that the form requirement is a highly debated and disputed area. There is agreement that the requirements in both the Model Law and the Convention are too strict,⁷⁶ but one cannot necessarily conclude from this that there is consensus as to what might replace this fairly old and strict requirement. It is in relation to this aspect that the discussions have taken place, i.e. how a revised requirement in the Model Law shall look like, and what kind of agreements it shall cover. There has hardly been any consideration given, or proposal suggested, of abandoning the writing requirement altogether. The Members of the Working Group have

⁷² Binder p. 54.

⁷³ Ibid. p. 60.

⁷⁴ A/CN.9WG.II/WP.108/Add.1 para. 8.

⁷⁵ Reports from the Working Group: A/CN.9/468, A/CN.9/485, A/CN.9/487, A/CN.9/506, A/CN.9/508.

⁷⁶ A/CN.9WG.II/WP.108/Add.1 para. 7.

consented all along that one could not deviate too much from the requirement in the Convention.⁷⁷

The discussions and proposals have been relating to modifying and modernizing the requirement so that it will harmonize with the international commercial practice and needs, and also provide for certainty and predictability of commitments in international trade.⁷⁸ Having a too strict or too lenient requirement will not simplify the use of arbitration; it will only represent an obstacle.⁷⁹ The target is to avoid going against the requirements in the New York Convention, and rather clarify how the form requirement in Article II shall be interpreted in our time, taking into consideration the technological developments, the needs of the users and the fact that Article II in the Convention was written rather hurriedly.

The Working Group concluded, following lengthy discussions as to how to solve the problem, that three measures should be taken to ensure uniform interpretation of the form requirement. Firstly Article 7 in the Model Law should be revised by a draft model legislative provision. Secondly a guide to clarify this provision should be made. Thirdly an interpretation declaration or an amending protocol addressing the interpretation of Article II (2) in the Convention should be issued.⁸⁰

4.3.3 Position Audit

The position taken by the UNCITRAL in its session in 2002⁸¹ was that the issue should be put on hold to give the member and observer States time to debate it more thoroughly since the Working Group could not agree on whether to draft an amending protocol or an interpretative instrument to the New York Convention's Article II (2).⁸² A further reason was that the UNCITRAL thought it best that also the “more favourable

⁷⁷ A/CN.9/485 para. 22.

⁷⁸ Ibid.

⁷⁹ A/CN.9WG.II/WP.108/Add.1 para. 8.

⁸⁰ A/CN.9/468 para. 99.

⁸¹ A/57/17 para. 183.

⁸² See A/CN.9/508 para. 6.

right” provision⁸³ should be examined more closely regarding its meaning and effects due to its close connection to Article II.⁸⁴

The UNCITRAL agreed in its session in 2003 that solutions to some issues, amongst them the written form requirement, would not be finalized by its thirty-seventh session in 2004.⁸⁵ Therefore, at the time of writing this paper, no final decisions regarding the form requirement have been taken, and little work regarding the writing requirement has been done since the Working Group’s 36th session. The Working Group did adopt the proposal discussed in its thirty-sixth session⁸⁶, but the revised Article 7 has yet to be finalized and accepted by the UNCITRAL.⁸⁷

There was, however, agreement in the Working Group on including a reference to the New York Convention in the UNCITRAL Model Law on Electronic Commerce, caused by the expectation that this might assist in clarifying and modernizing the writing requirement in the Convention’s Article II.⁸⁸ Further deliberations on this issue are scheduled for the UNCITRAL’s 38th session in July 2005.⁸⁹

Only time will tell what the changes will be. Though one thing is evident from the reports: the form requirements to arbitration agreements are in an era of change and the interesting question is how far the UNCITRAL will or can go.

⁸³ Article VII in the New York Convention.

⁸⁴ A/57/17 para. 183.

⁸⁵ A/58/17 para. 203.

⁸⁶ A/CN.9/508 para. 39.

⁸⁷ A/57/17 para. 183.

⁸⁸ A/CN.9/569 paras. 73-79.

⁸⁹ A/CN.9/573 para. 97.

5 The Form Requirement in Various National Laws

5.1 Introduction

National legal systems have different types of form requirements that the arbitration agreement is subjected to. A few countries have taken a consensual approach and hence do not impose any form requirements on the agreement.⁹⁰ Others have taken a formal approach, and subject the arbitration agreement to strict formal requirements, e.g. that both parties of the agreement have to consent in writing to validate the agreement. There are also some countries that have taken an intermediate approach by laying down form requirements that are less strict, and are of a more evidential nature. This is frequently done by giving a broad interpretation of the “in writing” definition, so that the requirements are more liberal than the ones in the New York Convention and the Model Law, though within their ambits.

In the subsequent chapters I will analyze the various approaches taken in order to find the similarities and differences and possibly explore what prompted the various States to choose their approach and what reasoning it was based on.

5.2 The Formal Approach

Italy is a good example of the strictly formal approach, and is one of few countries that still opt for this approach. Article 807 of the Italian Code of Civil Procedure requires the agreement to “be made in writing”. The interpretation of this requirement is strict and its approach is formal.⁹¹ The provision shows that Italy practices a strict form requirement, where both parties have to consent in writing for the agreement to be deemed valid.

⁹⁰ Fouchard Gaillard Goldman p. 361.

⁹¹ See e.g. Moss p. 4.

5.3 The Liberalized Formal Approach

By the liberalized formal approach, I mean the approach taken in countries that imply formal requirements to the arbitration agreement, though the interpretation of the “in writing” definition is more liberal and less strict. There are quite a few countries that have opted for this solution, and I will review a selection of these.

The general approach in Article 178(1) of the Swiss Private International Law Act of 1987 is that the agreement is “valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits to be evidenced by a text.” This is almost the same approach as the one in the Model Law, but the text does not refer to exchange of documents, and thus the requirement covers all means of communication as long as evidenced by a text.⁹²

In the Netherlands, Article 1021 of the Code of Civil Procedure requires that the agreement has to be “proven by an instrument in writing ... provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.” This approach is more of an evidential than a formal requirement, and is a matter of proof,⁹³ not a matter of existence of the arbitration agreement that the requirement in Article 7 in the Model Law is. Oral proof, however, will probably not be valid since that would hardly be possible to interpret into the “in writing” standard.

Section 1031(1) of the German Code of Civil Procedure of 1997 requires that

“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 provision is much the same as the Model Law, but more detailed and has a broader interpretation of the form requirement. German legislation previously accepted orally concluded arbitration agreements, but opted for form requirement after becoming a

⁹² See Blessing p. 173.

⁹³ See Sanders p. 31.

Contracting State of the New York Convention.⁹⁴ This might explain why Germany went for a more liberal form requirement than the one contained in the Model Law. Tacit acceptance of a written document makes a valid arbitration agreement, section 1031(2), because the requirement is fulfilled as long as the agreement is evidenced in writing.⁹⁵ This liberal interpretation is also evidenced in section 1031(4): “if the latter [*bill of lading*] contains an express reference to an arbitration clause in a charter party” the arbitration agreement is valid, even though both parties have not assented in writing. The same approach regarding bill of lading is also found in Singapore and Greece.⁹⁶ Germany is a Model Law jurisdiction.

Section 5 of the English Arbitration Act 1996 provides for a detailed approach. There were proposals of abandoning the form requirement, but the legislation Committee⁹⁷ retained the requirement.⁹⁸ The current requirement is that the agreement shall be “in writing”, but the Act gives a detailed and wide definition of what shall be considered as writing. This broad definition was chosen to safeguard some industries where arbitration agreements often are made orally or contained in standard agreements,⁹⁹ though pure oral agreements that do not have anything in writing connected to them, will not comply with the requirements in Section 5.¹⁰⁰ This is really more of an evidential rule because it is not a prerequisite that the agreement is in writing as long as there exists some kind of written proof that an agreement to arbitrate was made. One author takes the view that even oral proof may do to validate an arbitration agreement.¹⁰¹ England did not base its Arbitration Act on the Model Law,¹⁰² and even

⁹⁴ Berger p. 396.

⁹⁵ Lew, Mistelis & Kröll p. 134.

⁹⁶ Sanders p. 13.

⁹⁷ The Departmental Advisory Committee on Arbitration Law (DAC).

⁹⁸ The DAC Report of 1996 para. 35: “By introducing some formality...the possibility of subsequent disputes...is greatly diminished. Indeed it seemed to us that with the extremely broad definition we have given to writing, the advantages of requiring some record of what was agreed with regard to any aspect of arbitration outweighed the disadvantages of requiring a specific form for an effective agreement.”

⁹⁹ Landau (1996) p. 121.

¹⁰⁰ Landau (2002) p. 55.

¹⁰¹ Ibid p. 47.

¹⁰² The DAC Report of 1989 p. 52.

though it was used as a reference tool so as not to diverge too much from it, it has a broader scope than the Model Law.¹⁰³

5.4 The Consensual Approach

The consensual approach has always been taken by some countries. Germany in earlier times opted for this approach, but amended their law when contracting into the New York Convention.¹⁰⁴ France has also opted for this approach for some time, as will be evident from the analysis in the next section. The latest revision of national arbitration laws, however, shows that this approach is now more relevant and is frequently chosen above a formal approach. I will analyze the situation in a selection of countries opting for the consensual approach, but will assess the revision of the Norwegian arbitration rules in a separate section.¹⁰⁵

France has taken a very liberal approach to the form requirement and is a good example of the consensual approach. France has one set of rules applicable to domestic arbitrations and another set of rules that concerns international arbitrations. The consensual approach applies only to international arbitration, whereas domestic arbitration agreements are still subjected to form requirement.¹⁰⁶ Title V of Book IV of the French New Code of Civil Procedure, the part that concerns international arbitration, does not specify any requirements to neither form nor evidence. This implies that oral agreements are valid as long as the judge can demonstrate consent of the parties.¹⁰⁷ Such consent does not have to be in writing since the law does not incorporate any evidential requirements. Case law shows that French courts do not apply French arbitration law when assessing the validity of the arbitration agreement. This view is confirmed in the Dalico case¹⁰⁸ where the *Cour the Cassation* stated that the:

¹⁰³ Landau (1996) p. 121.

¹⁰⁴ See Berger p. 396.

¹⁰⁵ See section 5.5.

¹⁰⁶ Article 1443 of the New Code of Civil Procedure.

¹⁰⁷ See Fouchard Gaillard Goldman p. 377.

¹⁰⁸ Cass. le civ., Dec. 20, 1993.

“Principle of autonomy not only renders the arbitration agreement independent from substantive provisions in the contract but also from domestic law applicable to the contract.”

The court in this case held that international arbitration rules did not contain any formal requirements to the arbitration agreement. Since the wording of the document showed the parties’ common intention to submit the dispute to arbitration, the court concluded that a valid arbitration agreement existed.¹⁰⁹ The second Bomar Oil-case¹¹⁰ established that the principle of consensualism (i.e. that the common intention of the parties suffices to deem the agreement valid) applies in France.

Sweden did not base its Arbitration Act on the Model Law, but rather used it as a reference tool. The Act does not contain any formal requirements to arbitration agreements because Sweden has taken a consensual approach. This approach did also exist prior to the revision of the legislation.¹¹¹ Article 1 of the Arbitration Act 1999 only states that disputes “may, by agreement, be referred to one or several arbitrators for resolution”. Consequently all types of agreements may be deemed valid as long as it is obvious that the parties intended and agreed on arbitration as the dispute resolution procedure.¹¹² It remains disputable whether a similar binding mechanism applies to arbitration agreements as applies to ordinary contracts, but there is no support found in case law nor doctrine to apply stricter requirements to bind the parties to an arbitration agreement than an ordinary contract.¹¹³ Thus oral agreements and oral evidence will seem to suffice for an agreement to be valid.

New Zealand does not have any form requirement at all to the form of commercial agreements in its Arbitration Act No.99,¹¹⁴ nor to the proof of the agreement, cf. Article 7(1) which states that “an arbitration agreement may be made orally or in writing”. It does not contain any requirements regarding how an oral agreement shall be

¹⁰⁹ Fouchard Gaillard Goldman p. 364.

¹¹⁰ Cass. le civ., Nov. 9, 1993.

¹¹¹ Arbitration in Sweden p. 29.

¹¹² Heuman p. 32.

¹¹³ Ibid. p. 33.

¹¹⁴ September 2, 1996.

evidenced.¹¹⁵ Arbitration agreements entered into by consumers are subjected to stricter requirements. The approach taken in New Zealand is very liberal compared to other national laws. It differs slightly from the other jurisdictions that have opted for the consensual approach, because the Act expressly states that oral agreements are acceptable and valid, whereas the other laws only implicitly state that oral agreements are valid by not imposing any formal requirements. The difference does not have any practical consequences.

5.5 The Norwegian Approach

5.5.1 Historical Background

The arbitration institute in Norway is founded on long-standing traditions when looking at its historical background and actually constitutes an older dispute resolution mechanism than that of the national courts. On the other hand, arbitration is not used to the same extent as in other countries¹¹⁶ such as for example England and Sweden; though there are some areas where arbitration is common procedure also in Norway.¹¹⁷ The limited number of arbitrations conducted in Norway concerns both international and domestic arbitration. Regardless of the limited use of arbitration, the government wanted to modernize the law. It was argued that the rules contained in Chapter 32 of the Code of Civil Procedure of 1915 might actually act as a restriction for parties to choose arbitration as the dispute resolution procedure, because the rules were viewed to be rather old-fashioned as well as lacking in detail. A modern legislation would make it more feasible to arrange for arbitration in Norway, especially international commercial arbitration. The new Arbitration Act became effective in January 2005.¹¹⁸

¹¹⁵ Binder p. 60.

¹¹⁶ NOU 2001:33 Voldgift p. 38.

¹¹⁷ E.g. motor insurance and more complex cases within shipbuilding, construction, as well as oil- and gas-related activities, see NOU 2001:33 part 5, 2.2.4.

¹¹⁸ 2005-01-01.

5.5.2 Reasons behind the New Arbitration Act

The Legislative Committee (hereinafter the Committee), had certain requirements and objectives that the new Act had to comply with, and which had to be taken into consideration when making the Act.¹¹⁹ The underlying intention with the new Arbitration Act was to establish a set of rules that would satisfy the requirements to a modern arbitration regulation. The Act should be simple for the users to find and apply, as well as provide them with the predictability and legal certainty needed, through detailed and specific rules. The Committee also had to have in mind the latest development in international arbitration, since it was decided that domestic and international arbitration should be governed by the same set of rules. A further consideration was to draft an Act that would promote an effective arbitration process as well as protect public interests.¹²⁰

The Committee discussed how the new law should be designed, and two differing approaches were mentioned. The new act could either be modelled upon the Model Law or the Committee could make the new legislation without using the Model Law, as was done e.g. in Sweden. It was considered more reasonable to base it on the Model Law because of the positive implications in being recognized as a Model Law country, thereby attracting more international arbitrations to be set in Norway. This would also explicitly demonstrate that Norway is an arbitration friendly country, as well as making it easier for foreigners to use the legislation due to the harmonisation with international commercial arbitration standards and rules.

Though the new Arbitration Act was based on the Model Law, some amendments to it were done. One of these was to abandon the requirement of form for the arbitration agreements. Even so, the Committee was aiming at establishing a set of rules that could make Norway a Model Law country. Norway has not yet been recognised,¹²¹ but the Act is new and the process may take some time. Should Norway not be recognised, it

¹¹⁹ See NOU 2001:33 p. 46 and Ot.prp.nr. 27 (2003-2004) Chapters 1 and 8.1.

¹²⁰ See Ot.prp.nr.27 (2003-2004) Chapter 2.2. These aims were also expressed in press statement No.100-2003 (19.12.2003) from the Ministry of Justice and the Minister of Justice Odd Einar Dørum.

¹²¹ See the listing at www.uncitral.org of accepted Model Law countries.

will not be because of the abolition of the form requirement¹²² since New Zealand is a Model Law country even though its legislation explicitly states that both written and oral agreements are valid.

5.5.3 The Previous Form Requirement and the Subsequent Abolition of it

The previous rules on arbitration required the arbitration agreement to be “in writing”.¹²³ This requirement was grounded on the considerations to notoriety and clarity and it was in line with the requirement in the New York Convention. By having the same rules in national law, the arbitration agreement and arbitral award must be recognised and enforced by any of the Contracting States of the New York Convention, because the arbitration agreement and the arbitral award would then comply fully with the requirements there laid down.

There is no requirement to the form of the arbitration agreement to be found in the new act, except for agreements involving consumers. This distinction between consumers and commercial contenders exists in other countries as well, and is based on the different protection needed.

The provision concerning commercial arbitration agreements is §10 (1) and it only states that:

“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.”

The Act remains oblivious also in regard to evidential requirements. Support is found in the preparatory works though, that the arbitration agreement in Norway is to be treated as any other contractual agreement, and may consequently be made in any possible form as long as there exists proof thereof.¹²⁴ The Committee argued that it would be the general evidential rules of contract conclusion for commercial contenders that should

¹²² Ot.prp. nr.27 (2003-2004) p. 38.

¹²³ Code of Civil Procedure § 452.

¹²⁴ NOU 2001:33 p. 58 and Ot.prp. nr.27 (2003-2004) pp. 40-41.

apply, whereas the Ministry of Justice argued that the evidential rules should be stricter than normal, as an arbitration agreement is a waiver of a human right, namely the access to national courts. With this evidential rule in mind, it will be difficult to provide proof solid enough in cases of oral agreements in which no written records between the parties regarding the arbitration contract exist. Hence oral agreements may not be regarded as valid in many situations. This will depend on how the Norwegian courts will interpret the provision and the statements in its preparatory work, thus some uncertainty exists here until the courts have assessed the provision and the evidential requirements that international commercial arbitration agreements are subjected to in Norway.

5.5.4 Why was the Form Requirement Abandoned?

The form requirement was a challenging area of the revision process. The view, however, taken by the Committee (with subsequent ministerial consent),¹²⁵ was that there were no longer any reasons in treating an arbitration agreement any differently than other contractual agreements. It was argued that formal requirements to the agreement were not necessary since a valid agreement always requires proof of the parties' common intention to arbitrate. The Committee stated that the requirement of the parties' common intention would accommodate for the reasons the form requirement was founded on. In terms of providing for certainty and protection for the parties, the Committee regarded it as doubtful whether a form requirement would achieve more than that of the requirement to common intention. It was also stated, as mentioned above, that common intention in regards to arbitration agreements is subjected to stricter requirements compared to normal contracts, since access to court is a fundamental human right and thus is subjected to more onerous protective measures. This implies that oral agreements with no written evidence will seldom be accepted in practice.

The Committee wanted the rules, among them the requirements to the arbitration agreement, to be flexible and have a wide range of distribution not only at this moment in time but also in the future.¹²⁶ Since the form requirement is under continuous

¹²⁵ Ot.prp. nr.27 (2003-2004) pp. 38-41.

¹²⁶ NOU 2001: 32 Rett på sak, part I, chapter 2.

development, and the tendency is towards a more liberal and lenient requirement, its abolition was regarded to cover for future developments.

On the other side, the Committee specifically mentioned in its report, and this was supported by the Ministry of Justice in their proposition, that the overriding objective with the Model Law is harmonisation of international arbitration rules, and that Norway in this respect should try to keep this aim in mind when making the new act, i.e. not to diverge too much from the provisions in the Model Law.¹²⁷ There was also agreement that the new Act should harmonize with the major international conventions. The New York Convention was mentioned as one of them, and the Ministry of Justice stated that it would be advantageous if the international awards produced under the New Norwegian Arbitration Act would be recognisable and enforceable under the New York Convention.¹²⁸ By totally abandoning the form requirement, however, they disregarded this objective.

The reason why the Committee did not opt for a liberal form requirement, and thus harmonize the Norwegian Arbitration Act with the rules of the Convention, was that a liberal form requirement might not be in line with the requirement in the Convention and hence could provide for false certainty for the parties. If no requirement was put down in the new Act, it was argued that professional contenders in the international commercial community would know that it would not be in harmony with the Convention, and therefore result in problems. This was the only argument mentioned in regards to opting for no requirement compared to a liberal one. From certain viewpoints this might be regarded as reasonable, but it seems that the Committee has interpreted the requirement in the Convention too strict, and not necessarily in line with the latest development in international arbitration. A liberal form requirement, as we have seen above, is in most situations interpreted to fall within the ambit of the requirement in the Convention.

¹²⁷ Ot.prp. nr.27 (2003-2004)section 8.3.3 p. 25.

¹²⁸ Ibid. section 8.4 p. 26.

5.6 Summary of the Analysis of the Various National Approaches

As is evident from above, most countries require the arbitration agreement to be in writing or at least be evidenced in writing,¹²⁹ and many take a broad view of the definition of a written agreement compared to Article II (2) of the New York Convention,¹³⁰ even though few go as far as to allow for an oral arbitration agreement.¹³¹ The reasons behind the differing views in national laws are that they often originate from different time periods. Older laws are predominantly stricter since most countries at that time were less arbitration friendly and did not take into consideration the technological revolution soon to take place.

The Netherlands and Switzerland have taken a liberal approach, but still subject the agreement to be evidenced in writing. England has an even more liberalized requirement. Norway, Sweden, France and New Zealand are the most liberal countries and they have chosen a consensual approach rather than the formal approach contained in the Convention and the Model Law. The Model Law countries have elected for a more formal attitude than many of the countries that have not adopted the Model Law, with the exception of New Zealand and now also Norway.

All in all, most countries have opted for a more liberal approach than that of the Convention. Only a few, however, have gone as far as abandoning the writing requirement altogether, disrespecting the writing requirement in the New York Convention.¹³²

Agreements complying with liberally interpreted form requirements will in most, if not all, cases be valid also in countries with stricter requirements since all of the agreements will have some sort of written documents connected to it and thus may fall within the

¹²⁹ Alvarez chapter III p. 68.

¹³⁰ Fouchard Gaillard Goldman pp. 369-370.

¹³¹ Lew, Mistelis & Kröll p. 130. A survey of national laws done by the ICC Secretariat in the 1980's during the process of drafting the Model Law revealed that most legal systems incorporated a writing requirement (cf. A/CN.9/207 paras. 40-41). Even where oral agreements were permitted, the survey showed that these agreements only rarely were relied upon due to the strict evidential requirements. One has to take into consideration that changes following this survey have been made in many national laws

¹³² Ot.prp. nr.27 (2003-2004) p. 37 .

ambit of Article II of the New York Convention when broadly interpreted. Agreements valid under the consensual approach might cause problems if the agreements are oral and not evidenced in writing. Even if they are valid in the country where the award was made, national courts in the country where enforcement is sought might not deem such an agreement as valid, because it does not comply with its own national form requirements and/or the requirements in the Convention.¹³³

¹³³ See Chapter 6.

6 The Consequences of Having No Requirements to Form

6.1 Introduction and Delimitations

Agreements evidenced in some kind of writing are by most national courts regarded as complying with Article II, due to a broad and creative interpretation of the provision. Hence situations in which problems might arise are rather limited, and are mostly restricted to situations where the agreement is oral. Even so, the consequences of an oral agreement in international arbitration can be severe and render the arbitration uncertain, hence it is important to assess the extent of problems caused by reliance on an oral arbitration agreement. I will therefore restrict the assessment of consequences to situations where the arbitration agreement is oral.

One consequence of an invalid arbitration agreement is that the arbitral tribunal does not have jurisdiction to decide on the dispute. Another consequence is that the arbitral award in itself may be invalidated and be unenforceable. These consequences may not cause too many complications for the parties since the dispute then will be under the jurisdiction of a national court. I will therefore presuppose that the agreement is regarded as valid at the commencement of arbitration, and that the award is valid in the country where it was made. I will rather concentrate on the implications at the stage of enforcement if the court in the enforcement country considers the arbitration agreement invalid and the arbitral award unenforceable. This, in fact, constitutes the most significant and severe consequence. The award will be valid in the country where it was made, but unenforceable in the country where it is sought enforced, and the parties will be in a deadlock- situation where the dispute cannot be finally resolved since the national courts have no jurisdiction over the dispute, and the award denied enforcement.

As demonstrated, complications may arise when a national law does not contain any form requirements to the arbitration agreement at all, such as the case in Norway, for example. It is the law of the place where the award is made that governs the validity of the arbitration agreement at the start of the arbitral process, unless the parties have

chosen otherwise (which, however, is rarely the case).¹³⁴ Thus where the arbitration is seated in a country that does not have any requirements to the form of the agreement in its arbitration law, an oral agreement will be valid and the arbitral tribunal will have the competence to rule in the dispute as well as making an award. Problems may arise when this award shall be enforced in other countries, both with and without form requirements. The essential convention in the international arbitration is the New York Convention. It provides for provisions regarding recognition and enforcement of both arbitral awards and arbitration agreements. The Convention restricts the causes on which an award can be denied recognition and enforcement. One of the stated reasons is that the agreement is invalid.

My focus will mainly be on the consequences of an invalid agreement at the enforcement stage. Since the interpretation of the relevant provisions in the Convention is not uniform, I will debate the possible consequences in relation to each interpretative approach following the analysis of Article V and Article VII of the Convention.

6.2 Article V of the New York Convention

Contracting States of the Convention are obligated to recognize and enforce arbitral awards, as is stated in Article III. This is subject to a restricted number of causes for refusal, so that the obligation of enforcing foreign awards is not too hard to take on, and at the same time ensures some uniformity in this area. Hence, Article V limits the reasons a national court may rely on to refuse recognition and enforcement of a foreign arbitral award, and this list is exclusive. There are only five possibilities to deny enforcement and recognition. A jurisdiction that refuses due to other causes, will be in breach of the Convention. This is ensuring a certain amount of predictability for parties at the stage of enforcement. The cause of importance in connection to this paper's theme is that the arbitration agreement is not valid, as stated in Article V (1) (a). This is also the most frequently invoked cause,¹³⁵ hence the four remaining ones will not be treated in this paper.

¹³⁴ See Article II in the New York Convention.

¹³⁵ See www.unctad.org, Module 5.7., Chapter 10, p. 24.

The article states in letter (a) that recognition and enforcement of the award 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;”

The Contracting States may recognise and enforce awards in situations where the agreement is not valid, cf. the wording “may be refused” in Article V. This view may vary from state to state as it depends on how the judges use the discretion to rule on the recognition and enforcement, and because the wording “may” in some countries is interpreted as “shall”.¹³⁶ In situations where the requirement in the Convention is not complied with, i.e. if the agreement is invalid, the position is uncertain since the outcome will vary depending on where recognition and enforcement is sought, and thus the parties cannot fully rely on this possibility to get the award enforced in spite of it not complying with the form requirements.

The main problem with this provision is that it refers both to the requirements in Article II and to the requirements in either the law chosen by the parties or the law of the arbitral seat (which is where the award is rendered).

How shall one interpret this provision if the form requirements in the Convention diverge from the requirements in the applicable national law? Does the arbitration agreement have to comply with the requirement in Article II for the arbitral award to be recognized and enforced through the enforcement procedure provided for in the New York Convention, i.e. is the form requirement in the Convention a uniform rule that prevails over national laws regardless of the choice of law rule supplied in Article V?

¹³⁶ Lew, Mistelis & Kröll p. 707.

6.3 The Relationship Between Article II and Article V (1) (a)

6.3.1 The Traditional interpretation

Article V (1) (a) has not traditionally been interpreted literally in regard to its stated choice of law rule. Most authors and national courts agree that it is the substantive rules in the Convention's Article II that govern the validity of the arbitration agreement, because this provision is seen as a uniform international rule that prevails over national requirements.¹³⁷ Thus the arbitration agreement has to satisfy the writing requirement in Article II (2) to comply with the condition in Article V (1) (a) for an award to be enforceable under the Convention, even though the applicable national law provides for more or less onerous form requirements. There is now consensus in that the substantive conditions in Article II imply a maximum requirement, and therefore prevail over national laws that imply more onerous conditions to the form of the arbitration agreement.¹³⁸ This interpretation is clearly within the ambit of the objective of the Convention, which is to promote international arbitration and to provide for enforceability for as many international arbitral awards as possible.

Article II was an important contribution in international arbitration, since it imposed a maximum formal requirement for the arbitration agreement. At the time the Convention was made, many jurisdictions had stricter form requirements in their national law than the ones in the Convention, and thus Article II was meant to secure the parties' most fundamental rights.¹³⁹ This is accepted on a general basis,¹⁴⁰ and means that Contracting States may not deny recognition and enforcement of awards based on agreements complying with the requirement in Article II, even though the agreement would be invalid under national law.¹⁴¹

¹³⁷ Born p. 181, van den Berg (1981) p. 170 and (1998) p. 31, Alvarez p. 71, Mbaye p. 96, Moss p. 2 and 12. An exception from this view is found in some earlier Italian cases, where the Italian court let the more onerous conditions in national law prevail against the requirements in Article II. Italian courts have later moderated this view.

¹³⁸ Alvarez p. 69 and 72.

¹³⁹ See Binder p. 55.

¹⁴⁰ van den Berg (1998) p. 32.

¹⁴¹ See e.g. Lew, Mistelis & Kröll p. 113.

However, there exists disagreement regarding the full effect of the “uniform rule”-status Article II has achieved. Some authors have questioned the interpretation which implies that Article II is not only a maximum, but also a minimum requirement, and suggest that it should not prevail over national laws containing less onerous form requirements.¹⁴² Over the last few years, many national arbitration laws have been revised, and it has become increasingly common with liberal form requirements or a complete abolition of them. In these situations, the requirement in the Convention is stricter and less arbitration-friendly than national laws which make the situation for parties relying on such arbitration agreements uncertain and unpredictable. This is contrary to the main objective of the Convention, which was to facilitate international commercial arbitration by ensuring an arbitration-friendly environment.

If it is both a maximum and a minimum requirement as some agree on,¹⁴³ awards based on agreements not complying with the substantive in the Convention, may be denied recognition and enforcement under this system. Van den Berg is one of the leading legal experts on the New York Convention and he argues that Article II is also a minimum requirement. His main argument supporting this interpretation, is that it would be against the text of Article II to interpret it another way, and that such an interpretation might create lack of uniformity in the Convention.¹⁴⁴ He admits though, that the number of national courts interpreting the provision as only a maximum standard, and thus relying on the more lenient national law, is increasing.¹⁴⁵

In whatever way one views the requirements the agreement is subjected to, the overriding issues for the parties are certainty and predictability in the enforcement process. When complying with the formal requirements in the national law the parties thought to be governing the agreement, they should be protected against refusal of enforcement of the arbitral award due to stricter form requirements in other national

¹⁴² E.g. Lew, Mistelis & Kröll p. 114, Alvarez p. 72, Hermann p. 217 and Rubino-Sammartano p. 211.

¹⁴³ van den Berg (1998) pp. 31-32 and Mann p. 172.

¹⁴⁴ van den Berg (1998) p. 32.

¹⁴⁵ He cites the following cases as example of this: cf. Bundesgerichtshof, 12 February 1976 and Yearbook XX (1995) pp. 666-670.

laws or in the Convention. The objective of the Convention was to facilitate arbitration, and the international commercial community does not necessarily need this so-called protection provided by strict formal requirements, as in most situations they are fully aware of what they have agreed even though this may have been done in less formal ways.

6.3.2 The Alternative Interpretation

What will the approach be if Article V (1) (a) is interpreted differently than the traditional interpretation? The requirements for a valid agreement will then be found in the applicable law decided by the choice of law rule in the provision. Since parties seldom choose the governing law of the arbitration agreement,¹⁴⁶ the applicable law will usually be the law of the country where the award was made, i.e. the law of the judicial seat (*lex arbitri*). However, the conditions in the national laws would have to be the same or less onerous than the requirements in the Convention, in order to be applicable, as there is consensus regarding the status of Article II as a uniform maximum standard. This implies that as long as the conditions in the Convention are complied with, the agreement is valid, although national law may be more stringent.

6.4 Article VII and the “More Favourable Right” rule

Article VII (1) states that:

“The provisions of the present 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 an award is sought to be relied upon.”

This provision is called the “more-favourable-right” rule because it allows the parties to rely on rules in the country of enforcement that are more favourable than the ones provided for in the Convention.¹⁴⁷ This ensures that in situations where the Convention

¹⁴⁶ See Moss p. 3.

¹⁴⁷ Fouchard Gaillard Goldman p. 133.

proves less favourable, it can be replaced by national law and hence the provision will act as a protective measure.

Reliance on Article VII has to be pleaded by the party that seeks enforcement,¹⁴⁸ and it is only the more favourable law in regards to this party, not the favourable provisions for the respondent, which the provision allows to be used. This means that if the country of enforcement has less onerous requirements to the form of the arbitration agreement, these can be relied upon instead of Article II. Hence enforcement of the award is not denied, although the agreement is invalid under the substantive provisions in the Convention. This again implies that an award based on an oral agreement, will be enforceable if the award shall be enforced in e.g. Norway or Sweden where oral agreements are valid. As will be discussed in more detail further down in this section, enforcement under the rules of the Convention may be denied, and instead the party may have to seek enforcement under the national rules, if relying on the more favourable national form requirement.

If the country of enforcement does not have more favourable formal requirements than the ones contained in Article II, such as for example Italy, the arbitral award may be denied recognition and enforcement under both the Convention and the national law. Even though the underlying arbitration agreement was valid under the law where the award was made, the agreement will be in breach with the conditions in Article II as well as the rules in the national law.

Though Article VII may redress the enforceability of the award, the parties cannot rely on it from the beginning of the arbitral process, because the place where enforcement will be sought may not be known until after the award is made.

The full scope and content of Article VII is not absolutely clear as mentioned above, and there is disagreement, between both national courts and experts, as to how it shall be interpreted. Even the work done regarding clarification of the writing requirement by the UNCITRAL, has been put on hold until the more favourable right provision is

¹⁴⁸ Ibid. p. 375 and Lew, Mistelis & Kröll p. 698.

discussed more intently.¹⁴⁹ This signals the strong connection between these two Articles, and also the influence that Article VII has on Article II and vice versa, as well as the uncertainty that rules in regard to these provisions separately.

There are predominantly two differing views on Article VII.¹⁵⁰ One is to interpret it as providing a choice between two different regimes (the New York Convention or the *lex arbitri*, the law of the country of enforcement), but that these legal regimes cannot be used side by side. The other view is to interpret Article VII as providing a right for the party seeking enforcement to rely on the more favourable provisions in national law even though enforcement is sought under the New York Convention. The latter view is in accordance with the pro-enforcement policy of the convention.

The opinion of the status of Article II is closely connected to the interpretation of Article VII. If one argues that Article II is a uniform rule imposing both a maximum and a minimum requirement, it follows that reliance on more favourable formal conditions in national law excludes enforcement under the rules of the Convention. This is based on the presumption that if it is a uniform rule, it has to be complied with in order to be able to rely on the remainder of the provisions.¹⁵¹ Provided that the requirement in Article II is only a maximum requirement in national law, it will be possible to rely on the more favourable form requirement, and still rely on the Convention for the rest of the enforcement procedure.

Several legal experts in the area of international commercial arbitration opt for the first interpretative solution,¹⁵² and argue that the Convention may not be applied in situations where its requirements are not fully complied with. This approach is not based on solid case law, as the authors only mention a couple of cases in support of this interpretation.¹⁵³ If this interpretative approach is true, the provision only provides for

¹⁴⁹ A/57/17 para. 183.

¹⁵⁰ Lew, Mistelis & Kröll p. 698.

¹⁵¹ Fouchard Gaillard Goldman pp. 375-376.

¹⁵² van den Berg (1981) p. 119 and Lew, Mistelis & Kröll pp.114-115.

¹⁵³ E.g. Oberlandesgericht Schleswig, RIW 706 (2000) (Germany) and Supreme Court of Appeals, 8 April 1999, *Ozsoy Tarim Sanayi Ve Ticaret Ltd (Izmir) v. All Foods SA (Buenos Aires)*, 4 Int ALR N-33 (Turkey).

an opportunity to apply a more favourable requirement when enforcement is sought under another legal instrument than the Convention, such as under domestic law or another treaty/convention. Consequently, an award that does not satisfy the requirements in the Convention cannot be recognised or enforced under it. The authors have based this interpretation on the assumption that the uniform interpretation of Article II, and the Convention's intended harmonizing objective regarding enforcement of arbitration agreements and arbitral awards, will suffer if enforcement under the Convention can be sought without fulfilling its substantive conditions.¹⁵⁴ The quintessential essence of this interpretative approach is adequately described in the following statement:

“The New York Convention sets minimum formal requirements for enforcement of awards and maximum standards on which enforcement may be refused.”¹⁵⁵

If this approach imposes the right interpretation, the entire enforcement process is governed by the national law when a party chooses to rely on the more favourable rule, instead of the rule in the New York Convention. This may not provide the best solution for the party that seeks enforcement. The law might not contain as favourable rules as the Convention in regards to other areas in the enforcement process, thus the party might end up with a less agreeable enforcement process, than if opting for enforcement under the Convention.

Most courts, however, do not interpret the provision in such a way. French and Swiss courts for example, and lately also German courts, have had few problems in combining the national provisions with the rules in the Convention in the enforcement process, and thus have opted for the second interpretative view.¹⁵⁶ Support for this approach is also maintained by legal experts. These authors argue that one may rely on the more favourable law in the country of enforcement and still seek enforcement of the award under the rules of the Convention.¹⁵⁷ They base this view on the supposition that

¹⁵⁴ Lew, Mistelis & Kröll p. 114 , van den Berg (1981) p. 170 and (1998) p. 27.

¹⁵⁵ Lew, Mistelis & Kröll p. 697.

¹⁵⁶ Fouchard Gaillard Goldman p. 137.

¹⁵⁷ See Hermann p. 217, Sanders p. 31, Rubino-Sammartano p. 944 and Fouchard Gaillard Goldman p. 137 and 375.

another interpretation will unduly limit the application of the New York Convention and deprive it of its most vital function, which is to represent only the minimum, universally acceptable standard of harmonization.¹⁵⁸ Other arguments in favour of applying the more favourable national rules together with the enforcement rules of the Convention, are that Article VII does not prohibit such a solution and that there is little support to be found in the intentions of the authors of the Convention against such an interpretation. Neither will this impose any problems of practicality since it is perfectly feasible to coordinate the two sets of rules. The main argument for this approach, however, is that it is necessary to have such a protective measure for the continuing use and future relevance of the Convention now that national arbitration laws have been liberalized.

As mentioned above, this provision may act as a security measure for enforcement of awards based on pure oral agreements, but will only be of help where enforcement is sought in countries that have no form requirements. As we have seen, some national laws still impose as strict requirements as the ones in the Convention, and even though many others impose more liberal requirements, a strictly oral agreement will seldom be seen as within the ambit of these. Thus, Article VII may be of help in the situations where enforcement is sought in a country that does not impose any requirement at all, and this is at the moment, the case in only a few countries.

6.5 Article II Interpreted both as a Maximum and a Minimum Standard

If the court in the country of enforcement regards the Article as implying both a minimum and a maximum requirement, it may deny recognition and enforcement of the arbitral award based on the cause embodied in Article V (1)(a), i.e. if the arbitration agreement does not comply with the writing requirement embodied in Article II of the New York Convention. It is hardly reasonable to interpret the New York Convention as broadly as to suggest that it will also comprise oral agreements. The oral agreement will consequently be regarded as invalid, even though it is valid under the national law in the country of enforcement.

¹⁵⁸ Lew, Mistelis & Kröll p.709 and footnote 109 contained therein.

The party that seeks recognition and enforcement, however, may rely on Article VII, and thus the validity of the agreement shall be assessed with regard to the more favourable requirement in the law of the country of enforcement. This of course, will only be possible in countries that have taken a more liberal approach than the Convention implies. As discussed in section 6.4 above, the interpretation of Article VII is not uniform. The court may find that in cases where the party chooses to rely on the more favourable national form requirements, enforcement will have to be sought under the national law, rather than under the Convention. This may cause problems if the rules in the national law governing the enforcement process are not as favourable as the rules in the Convention.

This situation will only rarely arise in practice, since there are few national courts that will interpret Article II as strict as imposing a minimum requirement¹⁵⁹ and thus deny reliance on the more favourable law.

6.6 Article II Interpreted Only as Imposing a Maximum Requirement

The latest development in international arbitration is the liberalization of form requirements in national laws. These days it is more common than ever to encounter enforcement in countries with less onerous conditions imposed on the agreement compared to the New York Convention. As discussed above under 6.3, most courts and authors now interpret Article II as only imposing a maximum requirement, hence the more lenient form requirement in national laws may be used when reviewing the validity of the arbitration agreement at the time of enforcement of the award. The courts may use the standard in the law of the place where the award was made when assessing the validity cf. Article V (1) (a) and the choice of law rule therein, though this interpretation will rarely be encountered. This interpretative approach is ensuring the best possible position for the parties of an arbitration process, because it provides for certainty and predictability in that an agreement assessed as valid at the time of the commencement of arbitration will be deemed as valid also at the time of enforcement of both the arbitration agreement and arbitral award. As a consequence, an award based on

¹⁵⁹ See 6.3.1 and footnote 145.

an oral agreement will still be valid at the time of enforcement since the court will then rely on the national law of the country where the award was made or possibly on the national law in the place of enforcement.

The courts may use another method if the law of the place of enforcement implies more favourable form requirements cf. Article VII. The interpretation of this provision is closely connected to the interpretation of Article II. Consequently, if Article II is interpreted as only imposing a maximum requirement, Article VII will be interpreted as facilitating reliance on the more favourable rules in the national law at the same time as enforcement is sought under the rules of the Convention.

I would like to emphasize, however, that these interpretative approaches are not uniformly used and may depend on the arbitration-friendliness of the court in the country of enforcement, since there does not seem to exist any uniform interpretation of neither Article II nor Article VII at this moment in time. Consequently no interpretative approach may be regarded as absolutely true or false and the parties may not fully rely on which interpretation will be valid at the place of enforcement.

7 Summarizing Comments and Conclusive Remarks

The approach taken in regards to form requirements is diverging when comparing the New York Convention, the Model Law and the various national laws. Common, however, for most approaches incorporating a form requirement is that the arbitration agreement shall be "in writing". It is the interpretation of this definition that differs between the various instruments. At the time when the New York Convention became effective, it was normal to have a strict form requirement. Furthermore, national laws had even stricter requirements than the Convention, albeit some countries did not imply any requirement at all.¹⁶⁰

The interpretation of the form requirement has dramatically changed since the time the Convention became effective. The revision of national laws and case law over the past years shows that the form requirement as outlined in the New York Convention is somewhat strict compared to today's practice and needs, thus a broader interpretation is required for the Convention still to be effective. As we have seen, a liberal interpretation suffices to accommodate for the needs in international commercial arbitration as well as keeping within the scope of Article II of the Convention.

Although abandoning the form requirement, as has been done by some jurisdictions, may be valuable for the commercial contenders, such a liberal approach is not facilitating to keep the arbitration procedure effective. This uncertainty may cause more intervention from national courts and subsequent unenforceability of arbitration agreements and arbitral awards. This is providing for unpredictability for the parties in international arbitration and thus their needs are outweighed by the importance of ensuring predictability in regards to the enforcement of the final award. Even though the interpretation of Article II has become more liberal over the years, it is unfeasible to interpret it to also cover purely oral agreements, and the consequence of this is that the

¹⁶⁰ Germany for example, revised its legislation on arbitration after contracting into the New York Convention so as not to be in breach of the Convention, see footnote 94.

award based on an agreement valid under a national law with no form requirements, may be denied recognition and enforcement in another jurisdiction, since it will be in breach of the form requirement in the New York Convention.

7.1 May it be Deemed Arbitration-Friendly to Abolish the Form Requirement?

If opting for the consensual approach implies arbitration-friendliness, it would follow that this approach should be favoured in international commercial arbitration instead of the formal one.¹⁶¹ An argument supporting this view is that oral agreements are enforced in most developed legal systems, and it might not any longer be reasonable to distinguish between arbitration agreements and other agreements, as argued above in section 2.4.5. Especially since all agreements involve some kind of compromise or waiver, there is limited reason to treat arbitration agreements distinctively different from normal agreements.¹⁶² Some authors have also argued that an abolition of form requirements is in line with the international commercial practice and needs, but few recommend this approach due to the form requirement embodied in the New York Convention.¹⁶³ Others argue against a complete abolition with the fact that an arbitration agreement is the heart of any arbitration, and thus a detailed and satisfactory provision on this issue is vital¹⁶⁴ and a written agreement is preferential.

The promotion of effective arbitration is always one of the paramount objectives when revising national arbitration laws. This is an argument against abandoning the writing requirement, because, as we have seen, this might cause more intervention from national courts due to the uncertain situation such an approach produces in regard to the Convention's requirement. On the other hand, problems will only arise in a limited number of situations due to the development of a liberal and broad interpretation of Article II in national courts. Solely strictly oral agreements with no written proof will

¹⁶¹ See Born p. 134 where he argues that if the consensual approach is arbitration friendly, all form requirements should be dispensed of to allow for more international cases to be arbitrated.

¹⁶² Born p.133 ff.

¹⁶³ E.g. Moss p. 17 and David p. 196. Landau argues for a complete abandonment, but has trouble in finding a workable solution, see Landau (2002) p. 62 ff.

¹⁶⁴ Binder p. 61.

likely suffer from this. Most agreements evidenced in writing in some way or another will in most jurisdictions be interpreted to fall under the ambit of Article II of the Convention due to a creative interpretation.

7.2 Possible Solutions to the Problems Caused by a Consensual Approach

One solution to the problem regarding oral agreements may be to change the requirement in the Convention, but since the Convention as a whole is so, and it is of utmost importance for the international commercial arbitration that it continues to flourish, legal experts hesitate to recommend a revision as this may lead to a receding number of states being bound by the Convention.¹⁶⁵ Without a revision of the Convention, it will be impossible to interpret oral arbitration agreements to fall within the ambit of Article II. Thus, problems in the stage of recognition and enforcement may certainly continue to arise for parties relying on an oral agreement.

Another solution to overcome the problems caused by the strict requirement would be to provide expressly for recognition and enforcement in another instrument for agreements not complying with the requirement in the Convention.¹⁶⁶ This though, has not been suggested, nor has the UNCITRAL Working Group so far debated such a proposition.

The only remaining solutions are either to interpret the form requirement in Article II even more liberal, or to rely on the more favourable right rule in Article VII. These, however, as we have seen above, are not uniformly interpreted and Article II may not be interpreted to incorporate oral agreements. It is important for parties to be able to rely on their arbitration agreement and subsequent arbitral award. This certainty and predictability diminish when the interpretation of the Convention lacks in uniformity and hence there will be a certain possibility that the award will be unenforceable even though the requirements in the law of the place where the award was made are complied with. National legislation that has abandoned the formal requirement altogether signals

¹⁶⁵ Landau (2002) pp. 62-66. This have also been discussed in the UNCITRAL Working Group, but voted against as it could result in a declining number of Contracting States.

¹⁶⁶ Hermann p. 217.

that such an agreement will be valid also in the enforcement process if the jurisdiction is bound by the New York Convention., which is not the case.

Thus, the only solution to provide the parties with complete certainty and predictability regarding the enforceability of the arbitral award seems to be by ascertaining that the arbitration agreement complies with the requirement in Article II.

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