United Nations A/CN.9/814/Add.1

General Assembly

Distr.: General
13 January 2014

Original: English

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-25 July 2014

Settlement of commercial disputes

UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

Addendum

"Article II

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

"2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

V.14-00185 (E) 270114 280114

TRAVAUX PRÉPARATOIRES ON ARTICLE II

The *travaux préparatoires* on article II as adopted in 1958 are contained in the following documents:

Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and comments by Governments and Organizations:

- Report of the Committee on the Enforcement of International Arbitral Awards: E/2704 and Annex.
- Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: E/2822, Annexes I-II; E/2822/Add.1, Annex I; E/2822/Add.2, Annex I; E/2822/Add.4, Annex I; E/2822/Add.5, Annex I; E/CONF.26/3/Add.1.

United Nations Conference on International Commercial Arbitration:

- Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/7; E/CONF.26/L.8; E/CONF.26/L.17; E/CONF.26/L.18; E/CONF.26/L.18; E/CONF.26/L.20; E/CONF.26/L.22; E/CONF.26/L.31; E/CONF.26/C.3/L.1; E/CONF.26/L.34.
- Comparison of Drafts Relating to Articles III, IV and V of the Draft Convention: E/CONF.26/L.33.
- Statement submitted by the Observer of the Hague Conference on Private International Law: E/CONF.26/L.36.
- Further Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/L.40.
- Text of Additional Protocol on the Validity of Arbitral Agreements Submitted by Working Party No. 2: E/CONF.26/L.52.
- Amendments by Governmental Delegations to the Drafts Submitted by the Working Parties and Further Suggested Drafts: E/CONF.26/L.45; E/CONF.26/C.3/L.3; E/CONF.26/L.53; E/CONF.26/L.54.
- Text of New Articles to be Included in the Convention Adopted by the Conference: E/CONF.26/L.59.
- Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Provisionally Approved by the Drafting Committee: E/CONF.26/L.61; E/CONF.26/8.

Summary records:

- Summary Records of the Seventh, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Seventeenth, Twenty-first, Twenty-third and Twenty-fourth Meetings of the United Nations Conference on International Commercial Arbitration: E/CONF.26/SR.7; E/CONF.26/SR.9; E/CONF.26/SR.11; E/CONF.26/SR.12; E/CONF.26/SR.13; E/CONF.26/SR.14; E/CONF.26/SR.17; E/CONF.26/SR.21; E/CONF.26/SR.23; E/CONF.26/SR.24.
- Summary Record of the Fourth Meeting of the Committee on the Enforcement of International Arbitral Awards: E/AC.42/SR.4.

(Available on the Internet at www.uncitral.org)

INTRODUCTION

1. Article II governs the recognition and enforcement of arbitration agreements. Provided that certain conditions are satisfied, article II mandates Contracting States to recognize an agreement in writing to submit disputes to arbitration and to enforce such an agreement by referring the parties to arbitration.

2. The scope of the New York Convention was initially meant to be limited to the recognition and enforcement of arbitral awards to the exclusion of arbitration agreements.[1] While issues pertaining to the validity of arbitration agreements had arisen in the context of discussions about the recognition and enforcement of arbitral awards in connection with articles IV(1)(b) and V(1)(a) of the Convention,[2] it was only during the Conference, less than three weeks before the Convention was adopted, that the drafters decided to include a specific provision on the recognition and enforcement of arbitration agreements.[3] By that time, most of the other provisions had already been adopted and they were not modified to reflect this late addition.[4] This explains why the recognition and enforcement of arbitration agreements is not mentioned in the Convention's title or in any other provisions, including articles I and VII.

3. For example, article I(1) which defines the scope of application of the Convention does not deal with arbitration agreements. However, the commercial reservation in article I(3) which applies to "differences arising out of legal relationships" encompasses, by its own terms, arbitration agreements set out in article II. By contrast, the Convention does not explicitly settle the issue whether the reciprocity reservation in article I(3) which deals with "the recognition and enforcement of awards made […] in the territory of another Contracting State" applies mutadis mutandis to arbitration agreements.

4. Certain courts have reasoned by analogy to article I(1) that the Convention applies only to arbitration agreements providing for a seat in a State other than the

---

[1] *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1, at 6, paras. 18-19. The Polish (E/CONF.26/7) and Swedish (E/CONF.26/L.8) proposals to add a provision on the validity of arbitration clauses were discussed during the Seventh and Ninth Meeting of the Conference but were ultimately rejected.

[2] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Eleventh (E/CONF.26/SR.11, at 7-12), Twelfth (E/CONF.26/SR.12, at 3-6), Thirteenth (E/CONF.26/SR.13, at 4-7 and 9-11), Fourteenth (E/CONF.26/SR.14, at 4-5 and 7-9), Seventeenth (E/CONF.26/SR.17, at 4-6) Meetings.

[3] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-first Meeting, E/CONF.26/SR.21, at 17. See E/2822 Annexes I and II.

[4] Ibid.

State of the court seized with the dispute.[5] This interpretation has been endorsed by certain commentators.[6]

5. Other commentators have suggested that article II was meant to apply to the recognition and enforcement of all arbitration agreements irrespective of the seat. Professor Minoli, for example, points out that the proposal by Israel (which was further modified by Italy) to introduce a general reservation clause enabling States not to apply article II in certain situations had been rejected during the Conference. This, suggests Professor Minoli, leaves no doubt as to the intention of the drafters of the New York Convention that article II should cover both domestic and international situations without any limitations.[7] Another early commentator of the Convention also took the view that article II, unlike the 1923 Geneva Protocol, does not require the parties to be subject to the jurisdiction of different Contracting States, thereby giving the provision a general application.[8] Other commentators have suggested that the New York Convention did not intend to incorporate any territorial limitations on the scope of application on arbitration agreements falling within the scope of article II.[9]

6. In that spirit, the High Court of Delhi held that, on the face of article II, there is no "express or implied limitation or fetter which calls for recognition and enforcement of only those arbitration agreements which will result in foreign awards. Such a construction cannot be placed upon the said article as this would go against the spirit and grain of the convention". The court concluded that "the New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce even though such an agreement does not lead to a foreign award (…)."[10] The same approach has been adopted by

---

[5] *Kaverit Steel and Crane v. Kone Corp*., Alberta Court of Queen's Bench, Canada, 14 May 1991; *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; Federal Tribunal, Switzerland, 21 March 1995, 5C.215/1994/lit; Federal Tribunal, Switzerland, 25 October 2010, 4 A 279/2010; *X v. Y*, Federal Tribunal, Switzerland, 9 January 2008, 4A_436/2007.

[6] Reinmar Wolff, *Commentary on Article II*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS — COMMENTARY 85, at 99-104 (R. Wolff ed., 2012); ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 19; Jean-François Poudret, Gabriel Cottier, *Remarques sur l'application de l'Article II de la Convention de New York*, 1995 ASA BULL. 383, at 384.

[7] Eugenio Minoli, *L'Italie et la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères,* in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 199, at 203 (P. Sanders ed., 1967). See also the *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-First Meeting, E/CONF.26/SR.21, at 14, the comments by the representative of Norway that "a reservation to the effect that the Convention would apply to disputes of an international character was essential" and by the representative of Italy that "his proposal was designed to ensure that the Convention would not apply to disputes which were not international."

[8] Frédéric-Edouard Klein, *Autonomie de la volonté et arbitrage (suite et fin)*, 1958 R.C.D.I.P. 479, at 491.

[9] See, *e.g.*, Philippe Fouchard*, La levée par la France de sa réserve de commercialité pour l'application de la Convention de New York*, 1990 REV. ARB. 571, reasoning that given France's withdrawal of the commercial reservation, article II applies to all arbitration agreements.

[10] *Gas Authority of India Ltd. v. SPIE-CAPAG SA and ors*, High Court of Delhi, India, 15 October 1993, Suit No. 1440; IA No. 5206.

United States courts pursuant to the Federal Arbitration Act and the New York Convention.[11] French courts have similarly taken the view that the Convention should apply to a challenge to the existence or validity of an arbitration agreement, and that this was not restricted in any way by the language of article I.[12]

7. Article II governs the form and effects of arbitration agreements. Article II(1) requires each Contracting State to recognize an "agreement in writing" under which the parties undertake to submit their disputes to arbitration. This provision has been interpreted as establishing a presumption that arbitration agreements are valid.[13] Article II(2), which governs the form of "agreements in writing", covers agreements that have been "signed by the parties or contained in an exchange of letters or telegrams."

8. To ensure that arbitration agreements are complied with, article II(3) requires national courts seized of a matter covered by an arbitration agreement to refer the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The underlying principle that the parties to an arbitration agreement are required to honour their undertaking to submit to arbitration any dispute covered by their arbitration agreement is given effect by the mandatory requirement on national courts to refer the parties to arbitration when presented with a valid arbitration agreement. It follows that national courts are prohibited from hearing the merits of such disputes. In accordance with the principle of "competence-competence", which empowers arbitrators to rule on their own jurisdiction, a challenge to the existence or validity of an arbitration agreement will not prevent an arbitral tribunal from proceeding with the arbitration.[14]

9. By accepting the principle of "competence-competence", national courts do not relinquish their power to review the existence and validity of an arbitration agreement as they recover their power of full scrutiny of the arbitration agreement at the end of the arbitral process, once the award is rendered by the arbitral tribunal. The question arises whether, at the pre-award stage, in complying with their obligation to refer the parties to arbitration pursuant to article II(3), national courts could conduct a full or a limited review of the arbitration agreement to determine whether a valid arbitration agreement exists. In some jurisdictions, courts have limited their scrutiny to a prima facie review, thereby leaving the arbitrators to be the first to fully decide the issue of their jurisdiction. This principle, sometimes referred to as the "negative effect of competence-competence", gives arbitrators

---

[11] *Fred Freudensprung v. Offshore Technical Services, Inc., et al*., Court of Appeals, Fifth Circuit, United States of America, 9 August 2004, 03-20226.

[12] *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Appeal of Versailles, France, 23 January 1991, upheld by *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Cassation, France, 9 November 1993, 91-15.194.

[13] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 156; ICCA'S GUIDE, supra note 6, at 37.

[14] PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965), para. 203; Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION217 (A.J. van den Berg ed., 1999).

priority in determining their jurisdiction, while the courts keep the power to conduct a full review of the existence, validity and scope of the arbitration agreement at the end of the arbitral process.[15] In other jurisdictions, courts conduct a full review of the existence, validity and scope of the arbitration agreement in order to determine whether to refer the parties to arbitration.

10. The standard to be applied by the courts in determining whether the agreement is "null and void, inoperative or incapable of being performed" when deciding whether to refer the parties to arbitration therefore remains debated.[16]

ANALYSIS

ARTICLE II(1)

A. The obligation to recognize an agreement in writing

11. Article II(1) provides that, when certain conditions are met, Contracting States "shall" recognize an agreement in writing to arbitrate.

12. The obligation to recognize an "agreement in writing" is widely accepted by national courts. The Supreme Court of the United States has held that the compulsory language "shall" in article II(1) leaves courts with no discretion as they must recognize the arbitration agreement in accordance with the clear provisions of the Federal Arbitration Act and the New York Convention.[17] Similarly, the Swiss Federal Tribunal has interpreted article II as obliging Contracting States to recognize the validity and effect of an arbitration agreement.[18] The mandatory nature of the requirement to recognize and enforce arbitration agreements has been confirmed by decisions in most jurisdictions.[19]

---

[15] Emmanuel Gaillard, Yas Banifatemi, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y.L.J. (December 2005), at 3; Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, *Article II*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 37, at 95-96 (H. Kronke, P. Nacimiento, D. Otto, N.C. Port eds., 2010).

[16] For a full discussion, see infra [A/CN.9/814, Add.2], paras. 79-99.

[17] *Scherk v. Alberto-Culver Company*, Supreme Court, United States of America, 17 June 1974, 73-781. See also: *Lindo (Nicaragua) v. NCL (Bahamas), Ltd*., Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367; *Ernesto Francisco v. Stolt Achievement MT*, Court of Appeals, Fifth Circuit, United States of America, 4 June 2002, 01-30694.

[18] *Tradax Export SA v. Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984.

[19] Australia: *Seeley International Pty Ltd. v. Electra Air*, Federal Court, Australia, 29 January 2008, SAD 157 of 2007; Colombia: *Sunward Overseas SA v. Servicios Maritimos Limitada Semar*, Supreme Court of Justice, Colombia, 20 November 1992, 472; France: *SA C.F.T.E. v. Jacques Dechavanne*, Court of Appeal of Grenoble, France, 13 September 1993; Hong Kong: *Westco Airconditioning Ltd. v. Sui Chong Construction & Engineering Co Ltd.*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, A12848; India: *Renusagar Power Co Ltd. v. General Electric Company and anor*., Supreme Court, India, 16 August 1984; Italy: *Louis Dreyfus Corporation of New York v. Oriana Soc. di Navigazione S.p.a*, Court of Cassation, Italy, 27 February 1970, 470, I Y.B. COM. ARB. 189 (1976).

B. Meaning of "agreement"

13. Article II(1) deals with the agreement to arbitrate. When deciding whether to enforce an arbitration agreement, courts rely on the consent of the parties to establish whether they have agreed to submit the underlying dispute to arbitration.

14. The task of a court in determining an agreement to arbitration has been defined as follows by the Supreme Court of the United States under both the Federal Arbitration Act and the New York Convention: "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate" the dispute.[20] As confirmed by an Australian court, consent falls to be assessed on a case-by-case basis.[21]

15. Reported case law in various jurisdictions applying the Convention[22] shows that parties were referred to arbitration pursuant to article II(3) when courts have found that the parties had consented to arbitration. Consent to arbitration has been found in a variety of situations, including when the parties (i) participated in the negotiation of the contract, (ii) participated in the performance of the contract, (iii) participated in both the negotiation and performance of the contract, (iv) had knowledge of the arbitration agreement, or (v) participated in the arbitral proceedings without raising any objection to the arbitral tribunal's jurisdiction.

16. *First*, a United States court held that participation in the negotiation of the contract containing the arbitration clause through an exchange of documents evidences the parties' consent to arbitrate any dispute arising out of that contract, thereby satisfying the requirements of article II.[23] In so ruling, the court noted that the party had affixed its stamp to the broker's slip as further evidence of consent.

17. *Second*, evidence of consent has been found in the parties' conduct in performing the contract. In situations where a party does not sign the contract or return a written confirmation, but nevertheless performs its obligations, many courts have held that such conduct amounts to a tacit acceptance of the terms of the

---

[20] *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, Supreme Court, United States of America, 2 July 1985, 3-1569.

[21] *ACD Tridon v. Tridon Australia*, Supreme Court of New South Wales, Australia, 4 October 2002, 5738 of 2001. See also: *Moscow Dynamo v. Alexander M. Ovechkin*, District Court, District of Columbia, United States of America, 18 January 2006, 05-2245 (EGS) where the United States District Court of Colombia denied enforcement of the alleged arbitration clause as it was unable to find "*factual predicate or legal authority to support [the] argument that a written agreement to arbitrate can be found absent a written exchange demonstrating both parties' agreement to arbitrate with one another.*"

[22] This study is based on more than 350 decisions from Australia, Belgium, Brazil, Canada, China, Colombia, Egypt, France, Germany, Hong Kong, India, Italy, the Russian Federation, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela. These decisions can be found on the Internet at www.newyorkconvention1958.org.

[23] *Chloe Z Fishing Co. Inc., et al. v. Odyssey Re (London) Ltd., formerly known as Sphere Drake Insurance, P.L.C., et al*., District Court, Southern District of California, United States of America, 26 April 2000, 109 F.Supp.2d 1236 (2000).

contract, including the arbitration agreement.[24] For example, the Indian Supreme Court has enforced an arbitral award notwithstanding the fact that the arbitration agreement was neither signed nor contained in an exchange of documents. It held that the party's conduct, in particular its opening of the letters of credit in reliance on the contract and its invoking the contract's force majeure clause, demonstrated an acceptance of the terms of the written contract, including the arbitration clause.[25] Following the same reasoning, but applying French law on the basis of the "more-favourable-right" provision,[26] a French court upheld an arbitration agreement contained in a booking note on the ground that the parties had performed the booking note. The court held that since the parties had knowledge of the booking note, which constituted the parties' sole "meeting of minds", they were bound by the arbitration agreement contained therein.[27]

18. *Third*, when a party that did not sign the contract containing the arbitration agreement had nevertheless participated in the negotiation of, and performed obligations under, that contract, certain courts have referred that non-signatory to arbitration. In a case concerning an action to set aside an award, but dealing with the issue of the binding character of an arbitration agreement on a non-signatory, the Paris Court of Appeal confirmed that the parent company that participated in the negotiation of and assumed obligations under the main contract was bound by the arbitration agreement, despite not being a party to the main contract.[28] However, this approach is not universally accepted. For instance, in the *Dallah* case, the English Supreme Court, relying on the New York Convention, refused to grant leave to a party seeking to enforce an award rendered against the Islamic Republic of Pakistan on the grounds that there was no evidence that the common intention of the parties was to add the Government of Pakistan as a party to the main contract,

---

[24] *Metropolitan Steel Corporation Ltd. v. Macsteel International U.K. Ltd*., High Court of Karachi, Pakistan, 7 March 2006, XXXII Y.B. COM. ARB. 449 (2007), at 451-452; *Standard Bent Glass Corp. v. Glassrobots OY [Fin.]*, Court of Appeals, Third Circuit, United States of America, 20 June 2003, 02-2169; *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; *Smita Conductors Ltd. v. Euro Alloys Ltd*., Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996. *Contra: Concordia Trading B.V. v. Nantong Gangde Oil Co., Ltd.*, Supreme People's Court, China, 3 August 2009, [2009] MinSiTaZi No. 22.

[25] *Smita Conductors Ltd. v. Euro Alloys Ltd*., Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996.

[26] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 81; Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 69, at 70 (E. Gaillard, D. Di Pietro eds., 2008).

[27] *SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG*, Court of Appeal of Basse Terre, France, 18 April 2005.

[28] *Société Kis France et autres v. Société Générale et autres*, Court of Appeal of Paris, France, 31 October 1989, 1992 REV. ARB. 90. For a similar reasoning, finding that the Government of Turkmenistan "acted as the alter ego of [a State owned entity] in regard to this Joint Venture with [the claimant in the arbitration]": *Bridas S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil and Gas Ventures, Ltd., and Bridas Corp v. Government of Turkmenistan*, Court of Appeals, Fifth Circuit, United States of America, 21 April 2006, 04-20842.

despite its participating in negotiations and in the performance of certain obligations under that contract.[29]

19. *Fourth*, consent has also been found in situations where a party had knowledge of the arbitration agreement. For instance, when the arbitration agreement is printed on the back of the contract (or contained in general terms and conditions printed on the back of the contract), parties have been deemed to have knowledge of the agreement to arbitrate as they had the opportunity to review the arbitration agreement.[30] In this vein, in a dispute where the arbitration agreement was contained in a document other than the main contract, the Italian Court of Cassation noted that, in order to establish the parties' consent to an arbitration agreement, the parties had to have knowledge of the arbitration agreement through a specific reference to it in the main contract ("*per relationem perfecta*").[31]

20. In some jurisdictions, parties are deemed to have knowledge of the arbitration agreement when, irrespective of whether they had actual knowledge of the arbitration agreement, they should reasonably have known about it. In such cases, courts will enforce arbitration agreements when parties are aware of the arbitration agreement or should have been aware of the arbitration agreement. For instance, the Italian Court of Cassation now recognizes that, when the parties are professional businessmen who should be aware of the content of general terms and conditions in their field, a generic reference to such terms and conditions ("*per relationem imperfecta*") satisfies the requirement of article II of the Convention.[32] German courts also admit that consent can be implied from relevant international trade usages when the contract is typical of the industry and the parties are active in the relevant field of business.[33]

21. Some courts have also ruled that parties are bound by an arbitration agreement incorporated by reference on the grounds that they should have been aware of its terms. It is indeed very common in international trade for parties not to set out the terms of their contract in detail, but instead to refer to separate documents, such as general conditions and standard-form agreements produced by professional bodies, which may contain arbitration agreements.[34] Some courts have accepted that, by referring to general terms and conditions in their contract, the parties have consented to the arbitration agreement therein because they should reasonably have

---

[29] *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, Supreme Court, England and Wales, 3 November 2010, UKSC 2009/0165. See also the contrary decision by the French Paris Court of Appeal in the same matter: *Gouvernement du Pakistan — Ministère des affaires religieuses v. société Dallah Real Estate and Tourism Holding Company*, Court of Appeal of Paris, France, 17 February 2011, 09/28533, 09/28535 and 09/28541, 2011 REV. ARB. 286.

[30] Court of Appeal of the Canton of Basel-Landschaft, Switzerland, 5 July 1994, 30-94/261; *Bobbie Brooks Inc. v. Lanificio Walter Banci s.a.s.*, Court of Appeal of Firenze, Italy, 8 October 1977, IV Y.B. COM. ARB. 289 (1979), at 291.

[31] *Louis Dreyfus S.p.A. v. Cereal Mangimi S.r.l.*, Court of Cassation, Italy, 19 May 2009, 11529.

[32] *Del Medico & C. SAS v. Iberprotein Sl*, Court of Cassation, Italy, 16 June 2011, 13231.

[33] Bundesgerichtshof [BGH], Germany, 3 December 1992, III ZR 30/91.

[34] Domenico Di Pietro, *Validity of Arbitration Clauses Incorporated by Reference*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS — THE NEW YORK CONVENTION 1958 IN PRACTICE at 355 (E. Gaillard, D. Di Pietro eds., 2008).

known about the arbitration agreement.[35] Indeed, as noted by an Indian court, article II does not specify that the agreement to arbitrate must be contained in a single document.[36] Hence, in a case where the Convention applied, a United States court upheld an arbitration agreement contained in general terms and conditions on the grounds that the parties had tacitly consented to the general terms and conditions to which the contract referred, notwithstanding the fact that the plaintiff had never been in possession of those general terms and conditions. The court reasoned that failure to request the terms and conditions referred to in a contract implied tacit acceptance of its terms, including the arbitration agreement.[37] In the same vein, in *Bomar*, relying on both the Convention and French law, a French court held that an arbitration agreement contained in a document referred to in the main contract should be enforced insofar as it can be demonstrated that the parties were aware or should have been aware of it.[38] A number of courts have thus upheld arbitration agreements contained in general conditions referred to in the main contract.[39] In the same vein, in a dispute arising out of a bill of lading expressly referring to a charter party agreement, the Indian Supreme Court upheld an arbitration agreement contained in the charter party agreement.[40] As confirmation of this approach, article 7(6) (Option I) of the UNCITRAL Model Law on Arbitration expressly provides that a reference in a contract to any document containing an arbitration clause qualifies as an arbitration agreement in writing.[41]

22. *Fifth*, courts have relied on the procedural behaviour of the parties to infer their consent to arbitrate their disputes. Hence, participation in the arbitral proceedings without any objections to the jurisdiction of the arbitral tribunal has

---

[35] *Owners & Parties Interested in the Vessel M.V. Baltic Confidence, et al. v. State Trading Corp. of India, et al. (India)*, Supreme Court, India, 20 August 2001, Special Leave Petition (civil) 17183 of 2001; *Tradax Export SA v. Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984; *X S.A. v. Y Ltd.*, Federal Tribunal, Switzerland, 12 January 1989, 5P.249/1988.

[36] *Gas Authority of India Ltd. v. SPIE-CAPAG SA and ors*, High Court of Delhi, India, 15 October 1993, Suit No. 1440; IA No. 5206.

[37] *Copape Produtos de Pétroleo LTDA. v. Glencore LTD.*, District Court, Southern District of New York, United States of America, 8 February 2012, 11 Civ. 5744 LAK.

[38] *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Appeal of Versailles, France, 23 January 1991, upheld by *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Cassation, France, 9 November 1993, 91-15.194. See also *SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG*, Court of Appeal of Basse Terre, France, 18 April 2005.

[39] *Del Medico & C. SAS v. Iberprotein Sl*, Court of Cassation, Italy, 16 June 2011, 13231; *Copape Produtos de Pétroleo LTDA. v. Glencore LTD.*, District Court, Southern District of New York, United States of America, 8 February 2012, 11 Civ. 5744 LAK; *Standard Bent Glass Corp. v. Glassrobots OY [Fin.]*, Court of Appeals, Third Circuit, United States of America, 20 June 2003, 02-2169; *SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG*, Court of Cassation, France, 21 November 2006, 05-21.818; Court of Appeal of the Canton of Basel-Landschaft, Switzerland, 5 July 1994, 30-94/261; Oberlandesgericht [OLG] Cologne, Germany, 16 December 1992, XXI Y.B. COM. ARB. 535 (1996).

[40] *Owners & Parties Interested in the Vessel M.V. Baltic Confidence, et al. v. State Trading Corp. of India, et al. (India)*, Supreme Court, India, 20 August 2001, Special Leave Petition (civil) 17183 of 2001. See also: *Tradax Export SA v. Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984; *Welex A.G. v. Rosa Maritime Ltd.*, Court of Appeal, England and Wales, 3 July 2003, A3/02/2230 A3/02/2231.

[41] Article 7(6) (Option I) of the UNCITRAL Model Law on Arbitration (with amendments as adopted in 2006).

been held to establish the parties' agreement to arbitrate.[42] For instance, having found that an unsigned arbitration agreement did not comply with the requirements of article II(2), the Brazilian Superior Court of Justice nevertheless enforced an award rendered under that arbitration agreement on the grounds that the parties had consented to the arbitral tribunal's jurisdiction by participating in the arbitral proceedings without raising any objections to the arbitral tribunal's jurisdiction.[43] Likewise, an Australian court enforced an arbitral award on costs rendered under the auspices of the International Chamber of Commerce (ICC) in Paris where the arbitral tribunal found that it did not have jurisdiction as the arbitration agreement was invalid. The Australian court held that, by signing the Terms of Reference, the parties had consented to submit their dispute to arbitration.[44]

23. The reliance placed by courts on the parties' consent to arbitration is consistent with the Convention's philosophy of providing "satisfactory evidence of the agreement".[45] Commentators have emphasised the importance of the intention of the parties and whether there is a "meeting of minds".[46]

C. Scope of the "agreement in writing"

24. Article II(1) requires national courts to recognize an agreement in writing under which the parties have undertaken to submit to arbitration all "differences" in respect of a legal relationship which is capable of settlement by arbitration.

a. Meaning of "differences"

25. Article II(1) refers to the parties' undertaking to submit to arbitration "all or any differences" which have arisen or which may arise between them, and which are covered by their agreement.

26. Very few reported cases have addressed this issue and all of them have adopted a broad interpretation of "differences" in line with the pro-arbitration bias of the Convention.

27. In interpreting the word "differences", the High Court of Hong Kong has held that the parties should be referred to arbitration even when there is a dispute as to the existence of a dispute.[47] The court concluded that whether or not a dispute existed was a matter for the arbitral tribunal to determine. The Australian Supreme

---

[42] *CTA Lind & Co. Scandinavia AB in Liquidation's bankruptcy Estate v. Erik Lind*, District Court, Middle District of Florida, Tampa Division, United States of America, 7 April 2009, 8:08-cv-1380-T-30TGW; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 13 July 1994, 1992 No. MP 2411; Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 SchH 05/99.

[43] *L'Aiglon S/A v. Têxtil União S/A*, Superior Court of Justice, Brazil, 18 May 2005, SEC 856.

[44] *Commonwealth Development Corp v. Montague*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No. 8159 of 1999; DC No. 29 of 1999.

[45] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Comments by the United Kingdom, E/2822/Add.4, Annex I, at 5.

[46] REINMAR WOLFF, THE NEW YORK CONVENTION, supra note 6, at 128-132; ICCA'S GUIDE, supra note 6, at 45.

[47] *Guangdong Agriculture Ltd. v. Conagra International Far East Company Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 24 September 1992, HCA003032/1992.

Court relied on the words "all or any" in article II(1) to confirm that article II(1) was to be construed broadly.[48] Similarly, the English Court of Appeal in *Fiona Trust* held that, in the absence of clear language to the contrary, arbitration clauses are to be given the broadest interpretation possible, since the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal.[49]

b. "Defined legal relationship"

28. Article II(1)'s requirement that the dispute must have arisen "in respect of a defined legal relationship, whether contractual or not", is very broad and seldom disputed in case law.

29. Relying on the text of article II, the Canadian Supreme Court has held that extra-contractual claims could fall within the scope of an arbitration agreement when the claims relate to contractual obligations.[50]

c. "Subject matter capable of settlement by arbitration"

30. The requirement that the dispute concerns a "subject matter capable of settlement by arbitration" refers to the arbitrability of the dispute.[51] Given the New York Convention's lack of guidance on this topic, national courts have determined whether a specific subject matter can be settled by arbitration either by referring to the law applicable to the arbitration agreement or by referring to their own law.

31. Some courts have determined that this issue should be resolved according to the law applicable to the arbitration agreement. In making this determination, they have referred to the conflict of laws rule in article V(1)(a) of the Convention, i.e., "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, under the law of the country where the award was made."[52] By analogy, courts have interpreted the expression "where the award was made" to

---

[48] *Seeley International Pty Ltd. v. Electra Air*, Federal Court, Australia, 29 January 2008, SAD 157 of 2007.

[49] *Fiona Trust & Holding Corp. v. Privalov*, Court of Appeal, England and Wales, 24 January 2007, 2006 2353 A3 QBCMF, upheld by *Fili Shipping Co. Ltd. and others v. Premium Nafta Products Ltd. and others*, House of Lords, England and Wales, 17 October 2007.

[50] *Kaverit Steel and Crane v. Kone Corp*., Alberta Court of Queen's Bench, Canada, 14 May 1991, AJN° 450 and *Kaverit Steel v. Kone Corp.*, Court of Appeal of Alberta, Canada, 16 January 1992, ABCA 7.

[51] Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, Article II, supra note 15, at 96-73; Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS — THE NEW YORK CONVENTION 1958 IN PRACTICE 39, at 53 (E. Gaillard, D. Di Pietro eds., 2008); Jan Paulsson, *Arbitrability, Still Through a Glass Darkly*, in ARBITRATION IN THE NEXT DECADE — 1999 SPECIAL SUPPLEMENT 95, at 96 (ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, 1999).

[52] *Misr Insurance Company v. Alexandria Shipping Agencies Company*, Court of Cassation, Egypt, 23 December 1991, 547/51 (unofficial translation).

mean "where the award shall be made", i.e. by reference to the seat of arbitration. Swiss and Austrian courts have followed this approach.[53]

32. Other courts have assessed whether a dispute was capable of settlement by arbitration pursuant to their own system of law. In so doing, courts have followed three different approaches to conclude that the lex fori should apply to determine whether a dispute is capable of settlement by arbitration.

33. *First*, a number of courts have relied on article V(2)(a) of the Convention which provides that whether the subject matter of a dispute is capable of settlement by arbitration is to be assessed pursuant to the law of the country where recognition and enforcement is sought. By analogy, the Italian Court of Cassation determined that the lex fori, that is, the law of the State of the court seized, should be applied to determine whether a dispute is capable of settlement by arbitration.[54] Belgian courts have followed the same approach.[55]

34. *Second*, in assessing whether a dispute is capable of settlement by arbitration and consequently deciding whether to refer the parties to arbitration pursuant to article II(3), courts in the United States have applied the Federal Arbitration Act, that is the lex fori, but without any reference to article V(2)(a).[56] Hence, United States courts have recognized that disputes arising out of a Statute are capable of settlement by arbitration under the Convention. By way of example, disputes arising out of the Shearman Act on antitrust,[57] the Securities Act and Exchange Act,[58] the Jones Act on employment,[59] and bankruptcy legislation[60] were held to be capable of settlement by arbitration. United States courts have also accepted that disputes

---

[53] Federal Tribunal, Switzerland, 21 March 1995, 5C.215/1994/lit; Supreme Court, Austria, 17 November 1971, I Y.B. COM. ARB. 183 (1976).

[54] *Compagnia Generale Construzioni 'COGECO' S.p.A. v. Piersanti*, Court of Cassation, Italy, 27 April 1979, XVI Y.B. COM. ARB. 229 (1996).

[55] *Colvi N.V. v. Interdica*, Supreme Court, Belgium, 15 October 2004, C.02.0216.N.

[56] *Scherk v. Alberto-Culver Company*, Supreme Court, United States of America, 17 June 1974, 73-781; *Rhone Mediterranee Compagnia Francese v. Lauro*, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523.

[57] *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, Supreme Court, United States of America, 2 July 1985, 3-1569.

[58] *Scherk v. Alberto-Culver Company*, Supreme Court, United States of America, 17 June 1974, 73-781.

[59] *Lindo v. NCL, Ltd*., Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367.

[60] *Société Nationale Algérienne Pour La Recherche, La Production and others v. Distrigas Corp*., District Court, District of Massachusetts, United States of America, 17 March 1987, 86-2014-Y.

arising out of employment[61] and distributorship contracts[62] are capable of settlement by arbitration.[63]

35. *Third*, French courts have rejected the application of a particular national law to assess whether or not a dispute is capable of settlement by arbitration. Relying on article VII of the Convention, the Paris Court of Appeal held that French principles were applicable as being more favourable than article II. It further held that the principle of the validity of international arbitration agreements, which is a "substantive rule of French international arbitration law", establishes the validity of any arbitration clause "irrespective of any reference to national law".[64] The Paris Court of Appeal expressly distinguished this principle from articles II and V of the Convention "which call, in particular, for the application of national laws to render the clause valid."[65] By way of example, a French court referred the parties to arbitration on the basis of an arbitration agreement contained in an employment contract notwithstanding the petitioner's argument that employment disputes were not capable of settlement by arbitration. The court noted that the Convention applied since the employment contract was international and France had withdrawn its commercial reservation.[66]

ARTICLE II(2)

36. Article II(2) defines the "in writing" requirement. An "agreement in writing" includes[67] "an arbitral clause in a contract, or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

37. Prior to UNCITRAL addressing the issue, national courts had diverged on whether the more-favourable-rule principle embodied in article VII(1) of the Convention applied to the requirement that an arbitration agreement be "in writing" within the meaning of article II. In 2006, UNCITRAL confirmed that article VII(1) "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to

---

[61] *Lindo v. NCL, Ltd*., Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367; *Jane Doe v. Princess Cruise Lines, LTD., a foreign corporation, d.b.a. Princess Cruises*, Court of Appeals, Eleventh Circuit, United States of America, 23 September 2011, 10-10809.

[62] *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, Court of Appeals, Third Circuit, United States of America, 17 July 1978, 77-2566, 77-2567; *Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited*, District Court, Southern District of New York, United States of America, 10 September 2012, 12 Civ. 3483(DLC).

[63] In so doing, courts have assessed whether, for each Statute, it was the congressional intent to have a specific category of disputes capable of settlement by arbitration: *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, Supreme Court, United States of America, 2 July 1985, 437 U.S. 614. More generally, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 769 and 778.

[64] *Ste A.B.S. American Bureau of Shipping v. Copropriété Maritime Jules Verne et autres*, Court of Appeal of Paris, France, 4 December 2002, 2001/17293, upheld by *Copropriété Maritime Jules Verne et autres v. Société A.B.S. American bureau of shipping*, Court of Cassation, France, 7 June 2006, 03-12.034.

[65] *Ste A.B.S. American Bureau of Shipping v. Copropriété Maritime Jules Verne et autres*, Court of Appeal of Paris, France, 4 December 2002, 2001/17293.

[66] *SA C.F.T.E. v. Jacques Dechavanne*, Court of Appeal of Grenoble, France, 13 September 1993.

[67] On the bearing of the word "include", see infra [A/CN.9/814, Add.2], para. 53 and the footnote 91.

be relied upon, to seek recognition of the validity of such an arbitration agreement."[68] Since then, national courts have more consistently enforced arbitration agreements pursuant to the less stringent formal requirements available under their national laws or treaties as provided for by article VII with respect to arbitral awards.[69]

A. "Arbitral clause in a contract" versus "arbitration agreement"

38. The Convention provides that an "agreement in writing" may be either an "arbitral clause in a contract" or an "arbitration agreement".

39. Examples of "arbitral clauses in a contract" within the meaning of article II(2) have been found when the arbitration agreement is printed on the back of the contract.[70]

40. Regarding the "arbitration agreement", an Australian court has confirmed that the Terms of Reference signed in arbitration proceedings under the auspices of the International Court of Arbitration of the International Chamber of Commerce in France qualified as an "arbitration agreement" and an "agreement in writing" within the meaning of article II(2).[71] In that case, one of the respondents in the arbitral proceedings had successfully objected to the jurisdiction of the arbitral tribunal. The arbitral tribunal then issued an award on costs in favour of that respondent who then sought to enforce the award. The appellant opposed enforcement on the grounds that the arbitral tribunal had found that there was no valid arbitration agreement binding the respondent. The Supreme Court of Queensland enforced the award, finding that the Terms of Reference signed by the parties to the arbitration proceedings constituted an "agreement in writing" within the meaning of article II.

41. The distinction between an arbitral clause in a contract and an arbitration agreement, sometimes referred to as a "submission agreement",[72] has lost most of

---

[68] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), *Official Records of the General Assembly*, Sixty-first Session, Supplement No. 17 (A/61/17), paras. 177-181 and Annex II, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. The *Travaux préparatoires* to the Recommendation are contained in *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 313; Ibid., Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 183; and in United Nations documents A/CN.9/468, paras. 88-106; A/CN.9/485, paras. 60-77; A/CN.9/487, paras. 42-63; A/CN.9/508, paras. 40-50; A/CN.9/592, paras. 82-88; A/CN.9/WG.II/WP.118, paras. 25-33; A/CN.9/607; and A/CN.9/609, and its addenda 1 to 6.

[69] For a more detailed analysis on the interaction between articles II and VII, see the commentary on article VII, paras. 31-35.

[70] See supra para. 19. See also: Bayerisches Oberstes Landesgericht [BayObLG], Germany, 17 September 1998, BayObLG 4 Z Sch 1/98; Bundesgerichtshof [BGH], Germany, 25 May 1970, VII ZR 157/68; Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 SchH 05/99; Bundesgerichtshof [BGH], Germany, 12 February 1976, III ZR 42/74.

[71] *Commonwealth Development Corp v. Montague*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No. 8159 of 1999; DC No. 29 of 1999.

[72] The expression "arbitration agreement" is sometimes used in a broader sense to include both arbitration clauses and submission agreements. See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1999), at 193-196.

its relevance in contemporary arbitral practice. In a 1994 decision, the United States Court of Appeals for the Fifth Circuit distinguished between an arbitral clause in a contract and an arbitration agreement. It ruled that, within the meaning of article II(2), while the former needed to be signed by the parties, no such requirement applied to the latter.[73] This position was subsequently rejected by the United States Court of Appeals for the Second Circuit. It held that the signature requirement in article II(2) of the Convention applies to both contracts containing an arbitral clause and arbitration agreements, unless they are contained in an exchange of letters or telegrams.[74]

B. The signature requirement

42. Pursuant to article II(2), the requirement of an agreement in writing is complied with when an arbitral clause or an arbitration agreement is signed by the parties.

43. When the parties to the contract or instrument containing the arbitration agreement have signed such contract or instrument, the signature requirement of article II(2) is to be regarded as satisfied. This has been generally followed by courts.[75]

44. Conversely, certain courts have refused to enforce arbitration agreements against parties that have not signed it.[76] For example, the Chinese Supreme Court denied enforcement of an award on the ground that only one party had signed the contract containing the arbitration clause.[77] Similarly, the Brazilian Superior Court

---

[73] *Sphere Drake Insurance PLC v. Marine Towing*, Court of Appeals, Fifth Circuit, United States of America, 23 March 1994, 93-3200. See also: *Borsack v. Chalk & Vermilion Fine Arts, Ltd*., District Court, South District of New York, United States of America, 7 August 1997, 96 CV 6587 (BDP).

[74] *Kahn Lucas Lancaster, Inc. v. Lark International Ltd*., Court of Appeals, Second Circuit, United States of America, 9 July 1999, 97-9436. See also: *Czarina, L.L.C. v. W.F. Poe Syndicate*, Court of Appeals, Eleventh Circuit, United States of America, 4 February 2004, 03-10518; *Moscow Dynamo v. Alexander M. Ovechkin*, District Court, District of Columbia, United States of America, 18 January 2006, 05-2245 (EGS).

[75] *Sunward Overseas SA v. Serviocios Maritimos Limitada Semar*, Supreme Court of Justice, Colombia, 20 November 1992, 472; *Krauss Maffei Verfahrenstechnik GmbH et al. v. Bristol Myers Squibb S.p.A.*, Court of Cassation, Italy, 10 March 2000, 58; *Steve Didmon v. Frontier Drilling (USA), INC., et al*., District Court, Southern District of Texas, Houston Division, United States of America, 19 March 2012, H-11-2051; *Kahn Lucas Lancaster, Inc. v. Lark International Ltd*., Court of Appeals, Second Circuit, United States of America, 29 July 1999, 97-9436; *Smita Conductors Ltd. v. Euro Alloyw Ltd.*, Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996; Bundesgerichtshof [BGH], Germany, 8 June 2010, XI ZR 349/08; Bundesgerichtshof [BGH], Germany, 25 January 2011, XI ZR 350/08.

[76] Court of Appeal of the Republic and Canton of Ticino, Second civil Chamber, Switzerland, 2 April 2003.

[77] *Concordia Trading B.V. v. Nantong Gangde Oil Co., Ltd.*, Supreme People's Court, China, 3 August 2009, [2009] MinSiTaZi No. 22.

of Justice refused to enforce an arbitration agreement because the parties had not signed the contract containing the arbitration agreement.[78]

45. In the same vein, in *Javor v. Francoeur*, the Canadian Supreme Court of British Columbia refused to enforce an award rendered against the respondent because it had not signed the arbitration agreement. During the arbitral proceedings, the tribunal found that the respondent was the alter-ego of the corporate party which had signed the arbitration agreement and consequently ordered the respondent to participate in the arbitral proceedings. The court relied on the text of article II(2) of the British Columbia Foreign Arbitral Awards Act (which mirrors article II(2) of the Convention) and ruled that the purpose of the Act was to limit enforcement of awards to "part[ies] signatory to the [arbitration] agreement." Since the respondent was not a named party or a signatory to the arbitration agreement, the award could not be enforced against it.[79]

46. By contrast, a number of courts have enforced arbitration agreements against parties that had not signed the arbitration agreement. For instance, United States courts have held that non-signatories can be bound by an arbitration agreement to the extent that the arbitration agreement is not null and void under the Convention and that a contract law theory — such as agency, estoppel, or principles relating to alter-egos and third party beneficiaries — applies to the case at hand.[80] In France, entities that had not signed the arbitration agreement have sometimes been referred to arbitration pursuant to the group of companies doctrine.[81]

---

[78] *Plexus Cotton Limited v. Santana Têxtil S/A*, Superior Court of Justice, Brazil, 15 February 2006, SEC 967; *Indutech SpA v. Algocentro Armazéns Gerais Ltda*., Superior Court of Justice, Brazil, 17 December 2008, SEC 978; *Kanematsu USA Inc. v. ATS — Advanced Telecommunications Systems do Brasil Ltda*., Superior Court of Justice, Brazil, 18 April 2012, SEC 885.

[79] *Javor v. Francoeur*, Supreme Court of British Columbia, Canada, 6 March 2003. See also: *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, Supreme Court, England and Wales, 3 November 2010, UKSC 2009/0165.

[80] *Formostar, LLC, et al. v. Henry Florentius, et al*., District Court, District of Nevada, United States of America, 13 July 2012, 2:11-cv-01166-GMN-CWH; *Flexi-Van Leasing, Inc. v. Through Transport Mutual Insurance Association, Ltd., et al*., Court of Appeals, Third Circuit, United States of America, 18 August 2004, 03-3383; *Sarhank Group v. Oracle Corporation*, Court of Appeals, Second Circuit, United States of America, 14 April 2005; *Milton Escobal v. Celebration Cruise Operator Inc., Celebration Cruise Line LLC*, Court of Appeals, Eleventh Circuit, United States of America, 20 July 2012, 11-14022. See also, for a case where none of the contract law theories were found applicable: *Bel-Ray Co., Inc. (US) v. Chemrite (Pty) Ltd. (South Africa)*, Court of Appeals, Third Circuit, United States of America, 28 June 1999, No. 98-6297; *Sarhank Group v. Oracle Corporation*, Court of Appeals, Second Circuit, United States of America, 14 April 2005, 02-9383.

[81] *Société Kis France et autres v. Société Générale et autres*, Court of Appeal of Paris, France, 31 October 1989, 1992 REV. ARB. 90.