to stay their hand and defer to arbitral agreements unless they are "null and void, inoperative or incapable of being performed," but it does not define any of those three types of defect. Article III requires courts to enforce arbitral awards, Article IV sets down the formal requirements of applications for enforcement, and finally, Article V identifies exceptions, that is to say defects in an award which may justify non-enforcement – but it does not define the broad concepts that justify those exceptions, such as fair process, excess of authority, or incompatibility with public policy.

We may understand this better if we perceive that the Convention did not seek to substitute for national laws of arbitration. When the UN turned its attention to the task of harmonizing the legal regimes for international commercial arbitration, it did so in the form not of another treaty, but by the United Nations Commission International Trade Law ("UNCITRAL") Model Law of 1985, which is a comprehensive body of rules.[3] The Convention with which we are concerned does not seek to establish when awards should or should *not* be enforced; nor does it regulate when awards should be annulled. It simply requires that unless they are found to be fundamentally defective, awards must be enforced. The appraisal of defects is ultimately left to the discernment of national courts, as are the consequences of annulment by the courts of the place of arbitration. In a phrase, it is impossible to violate the New York Convention by enforcing an award, only when *not* doing so.

One could hardly imagine a clearer indication of a pro-enforcement attitude, as national courts have indeed recognized when applying the Convention. This core characteristic of the Convention is carried through by the combination of Article IV, which identifies the simplified set of documents an applicant is required to produce to achieve enforcement, and the fact that the party resisting enforcement has the burden of proof with respect to most of the exceptions of Article V.

Realism nevertheless compels us to observe that what the New York Convention leaves unsaid could fill volumes, and that its aims could easily be defeated if national courts filled those gaps in an attitude of suspicion and resistance. Realism also compels us to acknowledge that treaties are signed by States not as a matter of enlightenment but of self-interest. While facile general proclamations of adherence to treaties abound, in particular cases it is not a foregone conclusion that public officials, including judges, perceive the national interest to demand loyal compliance with the New York Convention. The lengthy roster of signatory States may bespeak brilliant success, but commitment has not always followed.

As we shall see in Chapter II, the Convention does not provide for an international jurisdiction to sanction non-compliance. Among a large group of signatory States, the Convention does indeed achieve the aim of facilitating confidence in international commercial exchanges, and amply justifies Mustill's famous phrase. But the reality is that in another large group of signatory States the treaty has remained an illusion, its application unreliable. The borders between the two sets of States are fluid,

3. *See* UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006)*, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

and the promoters of arbitration evidently must see their task as being to strive to ensure that the movement is in the single direction of the latter migrating to the former.

When viewed in isolation, the Convention may not seem to be remarkably favorable to the enforcement of awards. Especially the strictures pertaining to the validity of the arbitration agreement (both under Article II and Article V(1)(a)) and the opportunities for courts to stop enforcement under the guise of the Convention for reasons of public policy or national procedural impediments may leave the reader with the impression that the Convention does not secure a pro-enforcement bias after all. Yet, it is the comparison with its predecessors, the Geneva Conventions of the 1920s and the drafts leading up to the Convention that proves the undeniable progress made towards the effectiveness of international arbitration. Yet, the ultimate goals of the Convention undoubtedly depend on judicial perceptions of the legitimacy of the arbitral process.

This chapter seeks to give an overview of the background of the New York Convention and of the concepts that lie at its core, revealing both its purpose, and the consequences of thwarting that purpose.

§1.02 THE DRAFTING CONFERENCE IN NEW YORK

> Soon after the establishment of the United Nations after World War II, attempts were made to work out a multilateral solution to the problems of enforcing foreign arbitral awards. In 1953, the International Chamber of Commerce [hereinafter "the ICC"] requested the Economic and Social Council ("ECOSOC") of the United Nations to conclude a Convention on the subject. On April 6, 1954, the Council established an Ad Hoc Committee to study the Convention proposed by the ICC. This Ad Hoc Committee considered the proposed Convention and eventually produced a Draft Convention of its own, which was submitted to various member and non-member countries and also to interested nongovernmental organizations for their comments. These comments were submitted in the Secretary General's report to the ECOSOC.[4]

If the international community sees profit in peaceful commerce, it is less likely to disrupt it by fighting wars. So it was thought after the devastation of World War I.[5] The ICC was created in its immediate aftermath. One of the first organs of the ICC was its Court of Arbitration. One of the first missions of that Court was to enlist the support of the national courts, so that the international arbitral process could be integrated into a system of compliance effective across borders. This notably took the form of two treaties which had self-explanatory titles: the Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927, each concluded in Geneva.

4. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1059 (1961).
5. *See* George Ridgway, *Merchants of Peace: 20 Years of Business Diplomacy through the International Chamber of Commerce* (1958).

The same impulses came to the fore, one generation later, after the ravages of the World War II. Yet the world emerging from its ruins was remarkably different, notably due to the global phenomenon of decolonization. Relations among national systems were no longer the exclusive preserve of a handful of industrialized countries. The arbitral process, to be effective, would have to insert itself into a far more numerous and complex array of national legal systems.

The Geneva treaties of the 1920s had, however, revealed themselves to be unsatisfactory, notably with respect to the enforcement of awards. In particular, the requirement of finality was cumbersome.[6] The 1927 Convention provided that an award could be enforced only if it had become final in the country in which it had been made:

> To obtain such recognition or enforcement, it shall, further, be necessary ... that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.[7]

This need to prove finality in the country of its origin as a condition of an award's enforcement elsewhere came to be known as the "double exequatur requirement," and a great obstacle to the transborder reliability of awards and thus to the very purpose of the treaty. In the 1950s, the ICC took the lead as an advocate of enhanced party autonomy and reduced national judicial control. It proposed that the 1927 Geneva Convention be replaced. At the 1951 ICC Congress in Lisbon, business managers had criticized its defects.[8] The main target was the 1927 Convention's emphasis on the law of the country where the award was made. Only if the award was in accordance with that law and perceived as final by the local courts of that country could it be enforced elsewhere. This, it was said, defeated legitimate expectations.[9] What came to be known as "the ICC Draft" was presented in 1953 as a remedy.[10] It envisaged an international treaty, so the ICC stated, that would accommodate truly international arbitration and give full sway to the will of the parties. The ICC Draft was the first step of the process toward the New York Convention.

6. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Comments by Governments and Organisations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: January 1956 - March 1958*, at 6, U.N. DOC/E/2822/Add.4 (comments by the Netherlands and UK on Arts 1, 3, 4, 8, 9).
7. Convention on the Execution of Foreign Arbitral Awards, Art. 1(d) (Sep. 26, 1927), 92 L.N.T.S. 30.
8. *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention* (ICC Publication No. 174 1953), *reprinted in* ICC Ct. Bull. 32, 32 (1998) (hereinafter the "ICC Draft"); Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 32, U.N. DOC E/Conf.26/8/Rev.1 (1958) (hereinafter "ICC Explanatory Note") (in the annex).
9. ICC Explanatory Note, at 33.
10. *Ibid.*, at 32.

The dynamics of the movement that led to the new Convention were that of a remarkable *valse hésitation*: two steps forward, two steps backward, and miraculously, at the eleventh hour, three steps forward.

The first steps forward were those of the ICC Draft of 1953, prepared by persons well acquainted with and enthusiastic about international arbitration. Their explanatory note spoke of "*international* awards" and "full autonomy of the will of the parties:"

> In actual fact, the idea of an international award, i.e. an award completely independent of national laws, corresponds precisely to an economic requirement.[11]

These brave words, it seems, were provocative – and almost lost the day. First of all, it is hard to understand what the "economic requirement" is; commercial arbitrants assuredly do not want to be embroiled in extensive litigation about the arbitration, but that does not mean they are prepared to jettison the judicial enforceability of awards. Second, it was perhaps unnecessarily confrontational to talk about international awards detached from national laws amongst a group of representatives of States disinclined to surrender the authority of their courts to scrutinize awards rendered in their national space. The ICC Draft was presented to ECOSOC, and rather quickly generated a backlash from Member States who rejected the idea of arbitration completely independent of national laws. An ad hoc "Committee on the Enforcement of International Arbitral Awards"[12] was set up by ECOSOC, comprised of representatives of eight Member States.[13] Their mindset was well illustrated by the fact that they pointedly did not copy the name that had been given to their Committee when they entitled their draft "Convention on the Recognition and Enforcement of *Foreign National* Arbitral Awards" – a direct riposte to the ICC's notion of "international awards." What they proposed was in fact a reversion to the requirement under the 1927 Geneva Convention that the applicant for enforcement must prove that the award was final and enforceable in the country of origin.[14] Thus, the ICC proposal had led to a reaction which risked defeating the entire exercise, and doubtless holding the international arbitral process back for a generation or more.

11. *Ibid.*, at 32.
12. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Comments received from Governments regarding the Draft Convention on the Enforcement on International Arbitral Awards*, at 2, U.N, Doc. E/AC.42/1 (Jan. 21, 1955).
13. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Rep. on the Enforcement of International Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention)*, at 2, U.N. Doc. E/2704 and U.N. Doc. E/AC.42/4/Rev.1 (Mar. 28, 1955) (The following States were represented: Australia, Belgium, Ecuador, Egypt, India, Sweden, Union of Soviet Socialist Republics and the United Kingdom.).
14. *See* Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Rep. on the Enforcement of International Awards (Resolution of the Economic and Social Council establishing the Committee, Composition and Organisation of the Committee, General Considerations, Draft Convention)*, Art. III(b), Annex at 1, U.N. Doc. E/2704 and U.N. Doc. E/AC.42/4/Rev.1 (Mar. 28, 1955) (hereinafter "ECOSOC Draft") (The Annex contains the ECOSOC Draft of the Convention).

The irony is that the ICC's bark had been far worse than its bite. (This is the contrary of good diplomacy, which is to make groundbreaking proposals sound anodyne in their generality– although radical in their detail – rather than the other way around.) The ICC's announcement in its Commentary was not at all the result that the text of its Draft would have produced. For in the Draft, there was no question of awards "completely independent of national laws." It was perfectly plain that surely commercial arbitrants would not be prepared to forego the ultimate enforcement of awards *under national laws*. As for uncoupling awards from the law of the country where they are made, the ICC Draft – as we shall see in the next section – would have mandated non-enforcement of awards annulled in their country of origin. And yet, due it seems to the fanfaronade of the ICC's statement of intentions, the retrograde ECOSOC Draft was imposed, by reaction, as the basis for discussion in New York. It took an astute and adroit proposal prepared at the eleventh hour by Professor Piet Sanders, who modestly referred to it through the following decades as "The Dutch Proposal,"[15] which saved the day by blandly presenting and successfully defending revisions by reference not to their innovative import, but to the need to make the text "more easily comprehensible" – as we shall see in the following section relating to the demise of the so-called double exequatur.

The Dutch Proposal was presented on the sixth day of the three-week final Drafting Conference (which commenced on May 20 and ended on June 10, 1958). The Conference was faced with the challenging task of coming up with a treaty which would determine the possible role of international arbitration – perhaps as the supranational modus of resolving obstacles to international trade – in a world that had rapidly changed and would transition, through globalization, into a smaller world, yet one still divided into sovereign nation States. The representatives of those States were trained diplomats, defending their government's entitlement to sovereign prerogatives, but not necessarily versed in international arbitration. As the former President of the German Institution for Arbitration, Ottoarndt Glossner, would reminisce on the occasion of the Convention's fortieth anniversary:

> Ambassador Schurmann, as the elected chairman of the conference, had to shoulder the Herculean task, after five years of preparation, of presenting for signature a Convention within three weeks by orchestrating some 50 delegations, most of them diplomats accredited to the United Nations like himself and not particularly conversant in matters of arbitration on the one side and a very small group of highly sophisticated experts of arbitration on the other. He was at his best when he had to curtail delegates' rhetoric, which he did often, but gently, as if he were conferring a decoration.[16]

The text of the Convention naturally reflects compromises. The delegates departed from ideal phrasings as they negotiated less coherent formulations. The

15. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Netherlands: amendments to Articles 3, 4, 5*, Annex, U.N. Doc. E/Conf.26/L.17 (May 26, 1958).
16. Ottoarndt Glossner, *From New York (1958) to Geneva (1961) – A Veteran's diary*, at 5, in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* (United Nations 1999).

Convention had to accommodate many national procedural frameworks: perfection had to be sacrificed. As the Japanese delegate later put it, what emerged was:

> a sound compromise between idealism and realism. Some countries doubtlessly regarded the draft as not sufficiently far-reaching and would have preferred an instrument more along the lines proposed by the International Chamber of Commerce. . . . [H]owever, the Chamber in its zeal for perfection, had failed to pay sufficient heed to the existing state of the domestic laws of many countries. While the Convention to be concluded should be sufficiently progressive to satisfy the requirements of international trade, it must not be so revolutionary as to discourage potential signatories.[17]

By this stage, however, the Dutch Proposal had done its magic. Fortunately for the cause of international commercial arbitration, it had supplanted the ECOSOC Draft in crucial respects and, with inoffensive amendments, was adopted as the final text of the Convention.[18] The "double exequatur," reemergent in the ECOSOC Draft, disappeared in the Dutch Proposal and was gently abandoned by the Conference.[19]

It was only with the Dutch Proposal that the New York Convention emerged as the text praised as "a sound compromise between idealism and realism."[20] Although the delegates spoke about the need to "adopt the prudent approach never attempting more than was genuinely possible,"[21] it is hard in retrospect to see how the Dutch Proposal had been less groundbreaking than the ICC Draft would have been. We shall see this quite clearly in the next section.

The account of the Drafting Conference is incomplete without mentioning the dramatic appearance of Article II at the last moment – even later than the "eleventh-hour" Dutch Proposal. None of the previous drafts had proposed to deal with the enforcement of arbitration agreements (and thus to supplant the 1923 Geneva Protocol). Indeed, the title of the drafted new Convention had never spoken of anything but *awards*. Notwithstanding the important addition of Article II, the Convention's title was never changed. Yet, the reality is that this is just as much a treaty on arbitration agreements as on arbitral awards, and it supplants both and not just one of the Geneva treaties. This merits some description of the events.

17. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the third meeting on 21 May* 1958, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)).
18. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. E/Conf.26/8/Rev.1 (1958).
19. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments by the Netherlands on Articles 4, 5 and Suggestion of an Additional Article*, at 4, U.N. Doc. E/Conf.26/3/Add 1. (Apr. 8, 1958) (comments of Mr. Sanders (Netherlands), explanatory note to the Dutch proposal).
20. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the third meeting on 21 May 1958*, at 2, U.N. Doc. E/Conf.26/SR.3 (Sep. 12, 1958) (comments of Mr. Urabe (Japan)).
21. *Ibid.*, at 4 (comments of Mr. Herment (Belgium)).

The mandate for the Drafting Conference was to replace the 1927 Geneva Convention only.[22] A debate did take place about the validity of arbitration agreements as a ground for refusing to enforce the award (which resulted in Article V(1)(a)). That debate inspired some delegates to think about a provision on the recognition and enforcement of arbitration agreements.[23] Even if it was not to become part of the new convention, it could form a basis for a new protocol. The Swedish delegate proposed the following draft:

> Every Contracting State shall recognize as valid any agreement in writing, concerning existing or future disputes, under which the parties agree to submit to arbitration all or some of such disputes as may arise between them on any matter susceptible of arbitration.[24]

This was rejected, on the grounds that such a provision on the recognition and enforcement of arbitration agreements was outside the scope of the Conference's mandate. Resolution 604 (XXI) instructed the Drafting Conference to adopt a convention on the recognition and enforcement of foreign awards.[25] After some adroit interventions by the representatives of Turkey and Ceylon, the delegates simply held a vote as to whether or not they had such a mandate – and the Conference decided that it had that authority.[26] Nevertheless, by nineteen votes to thirteen, with nine abstentions, the Conference decided not to insert a clause dealing with arbitration agreements in the Convention itself.[27] The solution was at that point thought to be an annex for the recognition and enforcement of arbitration agreements.[28]

The idea of including a provision on the enforcement of arbitration agreements did thus, contrary to the suppositions one often hears (and perhaps explicable in light of the evident omission in the name of the Convention), not come out of the blue. It was extensively discussed at the Drafting Conference: both the permissibility of adopting it and how to do so, including consistency with the remainder of the text of the draft Convention (and even its title).

At the very end of the Drafting Conference, another attempt was made to insert a provision on the recognition and enforcement of the arbitration agreement.

22. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Note by the Secretary-General,* U.N. Doc. E/Conf.26/2 (Mar. 6, 1958).
23. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the 9th meeting on 26 May 1958,* U.N. Doc. E/Conf.26/SR.9 (Sep. 12, 1958).
24. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Sweden: amendments to Articles 3,4 and suggestion of additional articles,* U.N. Doc. E/Conf.26/L.8 (May 23, 1958).
25. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Note by the Secretary-General,* at ¶ 1, U.N. Doc. E/Conf.26/2 (Mar. 6, 1958).
26. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the 9th meeting on 29 May 1958,* at 11-13, U.N. Doc. E/Conf.26/SR.9 (Sep. 12, 1958) (comments of Mr. Koral (Turkey) and Sir Claude Corea (Ceylon)).
27. *Ibid.,* at 13.
28. *Ibid.,* at 10.

Objections were raised once more for reasons of lack of mandate.[29] Still, in the same unobtrusive way he had used for the Dutch Proposal, Professor Sanders proposed the insertion of what became Article II:

> Mr. Sanders felt that the Conference might be prepared to reconsider the decision it had taken at its ninth meeting to have a separate protocol on the validity of arbitration agreements. Representatives had come to the Conference to adopt a single instrument, and he considered that the proposed additional protocol could be conveniently condensed into a single article of the Convention itself.[30]

And, perhaps beset with drafting fatigue, or simply happy to go along with the "convenience" identified by Professor Sanders, the delegates adopted the new article prepared by the Netherlands delegation.[31]

The Convention was signed by ten nations on June 10, 1958. Thirteen more nations signed it within the period open for signature (until December 31, 1958). To date 156 States are a party to the Convention.[32]

§1.03 ELIMINATION OF THE "DOUBLE EXEQUATUR"

The notion that the centerpiece of the New York Convention was to "do away with the 1927 Geneva Convention's 'double exequatur' requirement" will do as a headline, but there is more to the story. It is important to revert first to principles and consider in all simplicity what status a foreign award should have in its country of origin as a precondition of enforcement elsewhere. The range of conceivable answers goes from one remote extreme to the other, passing through a number of intermediate points:

No status at all: it is perfectly defensible to consider that the enforcing forum provides all the control that is required. If the award meets the criteria of the *lex fori*, there is no need to be concerned with the view taken (or conceivably to be taken in the future) by the courts of the country where it was made – which, after all, may not be the scene of any enforcement action. This consideration is especially relevant in the international context, where the place of arbitration is chosen for its convenience or neutrality, and the local judge may perceive no national interest in the arbitrants, their dispute, or the effects of the award.

29. *Ibid.,* at 13 ("The president requested the Conference to decide whether the text concerning the validity of arbitral agreements should be included in the Convention or in an annexed protocol. . . . By 19 votes to 13, with 9 abstentions, the Conference decided not to insert that clause in the Convention itself.").
30. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary of 21st meeting held on 5 June 1958,* at 17, U.N. Doc. E/Conf.26/SR.21 (Sep. 12, 1958) (comments of Mr. Sanders (Netherlands).
31. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Netherlands: Amendment to proposal made by Working Party No. 2 (E/CONF.25/L.52),* U.N. Doc. E/Conf.26/L.54, (Jun. 5, 1958); Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary of 21st meeting held on 5 June 1958,* at 17, U.N. Doc. E/Conf.26/SR.21 (Sep. 12, 1958) (The result of the vote was eighteen in favor and eight against, with four abstentions.)
32. Quigley, *supra* n. 4, at 1059, 1060.

The award must be legally binding in the country of origin. This criterion itself is not uniform, but depends on the relevant national law. What I have in mind is the case of a purely legislative rule to the effect that "awards are legally binding as of the moment they are rendered."[33] This simple rule disregards the effect of any further judicial action, such as provisional suspension pending any available challenges to an award. This requirement has the considerable advantage of simplicity; the enforcement forum can merely note the legal position in the country of origin and not involve itself in debates about the availability of challenges there, or their merits – let alone what to do if time passes and nothing at all has emerged from those courts.

The award must have specific judicial imprimatur in the country of origin. This is not the same thing as saying that an exequatur must be obtained in the country of origin before exequatur can be granted elsewhere, because the general notion of an "imprimatur" can take many forms, such as declarations of binding effect or rejection of motions to set aside in addition to straightforward orders of execution. Still, "exequatur" will do as rough but comprehensible shorthand.

The award must not be subject to the possibility of any judicial invalidation at any level of the courts of the place of arbitration. This extreme requirement would probably alter international arbitration as we know it beyond recognition, because the exhaustion of all conceivable appeals may require a decade before the real effort of execution may even begin – and even then there may be endless arguments about what ordinary and extraordinary recourse may be available, subject to statutes of limitation (consider the hypotheses of fraud or late discovery of forged evidence).

If this is the range of requirements placed on the proponent of enforcement, there are also the grounds which a party resisting enforcement may raise by reference to the courts of the place of arbitration. At one extreme, the enforcement forum might refuse to enforce if there is any legal basis to challenge the award in the country where it was made. Alternatively, it might refuse to enforce if such a challenge has *actually* been raised in a court action, or if the award has been set aside by a court, or (finally) if the award has not been set aside but the local law provides for further appeals from a refusal to annul.

The ultimate "delocalization" or "internationalization" of awards is thus a misnomer. The ultimate step would better be called "plurilocalization," meaning that the enforceability of an award (and the legitimacy of the process that led to it) falls to be policed solely by the potential enforcement fora and with effects limited to each of them. This might conceivably lead to inconsistent results, as two countries take a different view of the enforceability of the same award, but it is a consequence of the fact that national legal systems are sovereign. It is a circumstance with which we have learned to live with respect to legal outcomes generally, when the same controversy has different ramifications in different States.

"Plurilocalization" was, needless to say, not a word used by the drafters of the New York Convention. Still, the tensions inherent in the range of attitudes described

33. *See* e.g., CODE DE PROCÉDURE CIVILE (C.P.C) Art. 1484 (Fr.) ("As soon as it is made, an arbitral award shall be res judicata with regard to the claims adjudicated in that award.").

above surfaced repeatedly in the deliberations, although perhaps not with full articulation of the conceptual framework outlined above.

The delegates, assembled for the Drafting Conference in late May 1958, were tasked with supplanting the 1927 Geneva Convention, which contained the following Article 1(d):

> To obtain such recognition or enforcement, it shall, further, be necessary . . . that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition, appel or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

This was the requirement which had proved so cumbersome, leading to appellate litigation in a place where no actual enforcement was even envisaged, yet effectively paralyzing enforcement elsewhere. The ICC Draft of 1953 had suggested the following two provisions as replacements:

> (Article III). To obtain the recognition and enforcement mentioned in the preceding article, it will be necessary
>
> (b) that the composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place.
>
> (Article IV). Recognition and enforcement of the award *shall* be refused if the competent authority to whom application is made establishes (e) that the award, the recognition or enforcement of which is sought, has been annulled in the country in which it was made. (emphasis added).[34]

While the first of these two requirements does not define a need to prove the award's bona fides as a matter of specific recognition by the courts of the place of arbitration, the second one puts the lie to any suggestion that the ICC was seeking to unfetter the process from national judicial authority; annulment at the place of arbitration would be fatal.[35]

Nevertheless, as recounted above, the ICC's rhetoric had apparently alarmed the ad hoc drafting group put together by the ECOSOC, who adopted the following reactionary text, reintroducing the requirement of "finality" whose abandonment had been the paramount goal of the new Convention in the first place:

> To obtain recognition and enforcement mentioned in the preceding article it will be necessary that in the country where the award was made, the award has become final and operative, and in particular, that its enforcement has not been suspended.[36]

34. ICC Draft, Arts. III and IV(e).
35. ICC Explanatory Note, at 33.
36. ECOSOC Draft, Art. III(b), Annex at 1.

The Dutch Proposal saved the day by jettisoning the "final and operative" requirement, and instead putting forward the two provisions which now figure as Articles III and V(1)(e) of the Convention as adopted. If one compares these texts with those of the ICC five years earlier, one is struck by the fact that if anything the Dutch Proposal was more progressive than the ICC Draft. Like the ICC Draft, it disposed of the threshold of "finality." It accorded the same primacy to the parties' agreement.[37] But it went further than the ICC Draft by its permissive language ("may"), allowing but not requiring the enforcement courts to refuse to enforce an award annulled in the country where it was made.[38] Professor Sanders presented the Dutch Proposal as merely reflecting a "desire to make the Convention more easily comprehensible."[39] The rejection of the ICC Draft and the embrace of the Dutch Proposal after the rejection of the ICC Draft was, it seems, explicable above all as a matter of good diplomacy.

When the requirement of "finality" was reintroduced in the ECOSOC Draft,[40] the delegates fully recognized that they were drifting back to the "double exequatur" that had necessitated the replacement of the 1927 Geneva Convention. Their problem seemed to be that they could not devise a compromise between those wanting to dispose of the proof of finality all together and those insisting on *some* evidence of enforceability of the award in the eyes of the courts of the place of arbitration. The Dutch Proposal solved the problem by dealing with it as a matter of proof, resolved by the text of what was then spoken of as Article IV(f) and now Article V(1)(e):

> Recognition and enforcement of the award may only be refused if . . . the award has been annulled in the country in which it was made or has not become final in the sense that it is still open to ordinary means of recourse.

Under this approach, no longer was the applicant to prove finality as a prerequisite to enforcement. It was a ground for refusal with express attribution of the enforcement court's authority to assess whether such refusal was justified on the basis of the evidence presented to it, and with the resisting party bearing the burden of proof. The delegates finally agreed to replace "final" with "binding" and so the final text of Article V(1)(e) took this form:

> Recognition and enforcement of the award may be refused if [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

37. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Netherlands: amendments to Articles 3, 4, 5*, U.N. Doc. E/Conf.26/L.17 (May 26, 1958) (Dutch Proposal).
38. *Ibid.*, at Art. IV(f): ("Recognition and enforcement of the award may only be refused if … the award has been annulled in the country in which it was made or has not become final in the sense that it is still open to ordinary means of recourse.")
39. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary of 11th meeting held on 27 May 1958*, at 6, U.N. Doc. E/Conf.26/SR.11 (Sep. 12, 1958) (comments of Mr. Piet Sanders (Netherlands)).
40. ECOSOC Draft, Art. III(b), Annex at 1.

"Binding" was considered to be less stringent than "final." Whether that is really so depends on the meaning of "binding" in various national regimes. In some places, "binding" means that no means of recourse whatsoever is available, even "oblique," "collateral" or "indirect" challenges and not only the ordinary means of recourse.

The ambition to depart from the Geneva Convention and its "double exequatur" was achieved; the equivalent of exequatur (an order of enforcement) in the country of origin is no longer a necessity. Yet, some ammunition was spared for the party resisting enforcement. In legal orders which understand "binding" in the sense that no means of recourse of any kind are available, that ammunition might be quite effective.[41]

§1.04 PROMOTING THE EFFECTIVENESS OF INTERNATIONAL ARBITRATION

When they adopted the final text of the New York Convention, the delegates agreed on the formulation of its purpose:

> [The New York] Convention on the recognition and enforcement of foreign arbitral awards just concluded would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field.[42]

and

> [A]rbitration as a desirable and economic method of settling disputes in international trade also recognizes the need for the enforceability of an arbitration award in a country other than the one in which it is rendered.[43]

On the occasion of the Convention's fortieth anniversary, the Secretary-General of the UN, then Kofi Annan, commemorated the success of the Convention and expressed his hope that the Convention would enhance the rule of law; international arbitration would be seen as an appropriate means of the resolution of international business transactions. The effectiveness of international arbitration requires that awards transcend borders and are accepted by all courts and nations. It is in this sense that the Convention might be a singularly important treaty for international trade.

Today, one must confront the reality of that wish: the success of the Convention depends on the attitude of courts, and this cannot be taken for granted.

That attitude ought not be spoken of as one of a pro-enforcement "bias" – to use the expression coined by the US courts – since that word implies *systematic error* in the sense of unwarranted indulgence; courts are entitled to examine international arbitration.

41. See Generally Quigley, *supra* n. 4.
42. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, ¶ 16, at 5, U.N. Doc. E/Conf.26/8/Rev.1 (1958).
43. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – General Considerations by the United States of Commerce and the International Institute for the Unification of Private Law*, at 2, U.N. Doc. E/2822/Add.3 (Mar. 23, 1956).

(1) "Each Contracting State shall recognize an agreement": does the word "shall" eliminate any residual discretion for enforcement courts? Article III, which also employs the mandatory "shall," does not leave any discretion for courts if the conditions under Articles IV and V have been met. Is it therefore correct to interpret "shall" in Article II in the same imperative manner?

(2) "Parties": who can be a party to the arbitration agreement – agents, subsidiaries, subrogees, third-party beneficiaries? Does the doctrine of *alter ego* apply? Can courts pierce the corporate veil? Can State parties rely on their sovereignty and invoke the defense of immunity of jurisdiction and execution?

(3) "Undertake to submit to arbitration": how does one exactly (formally) determine whether the parties agreed that the dispute should be submitted to arbitration?

(4) "All or any differences which have arisen or which may arise between them": this regards the material scope of the arbitration clause; is this a matter to be decided in accordance with the rules of interpretation of the forum?

(5) "Subject matter capable of settlement by arbitration": the arbitrability of the subject matter must be assessed according to *a* law. Further, a court must decide whether it will apply narrow notions of arbitrability only. Does the burden rest on respondent to prove that the matter is not arbitrable or ought the court make this assessment ex officio?

Article II(2) raises the following issues:

(6) "Shall": how much discretion does a court have to consider that the "in writing" requirement is satisfied by conduct or tacit acceptance? In practice, it often occurs that parties have not signed the arbitration agreement or that the court is unable to establish mutual intent through an exchange of documents. Telegrams are a thing of the past. In some types of commercial relations assent is manifest in imperfect acknowledgements or even mere conduct, so that the reference to arbitration is at best indirect, or only to be inferred. Can the criterion "in writing" somehow be reflected through parties' conduct or tacit acceptance in order to enable enforcement courts to align Article II with current customs in international trade?

(7) "Include"; may one rely on the UNCITRAL recommendations providing that Article II(2) is not limited to the "in writing" possibilities described therein?[1] Did the drafters intentionally avoid the restrictive word "only"? Can one invoke Article V(1) – which does employ the word "only" – *a contrario* and hold that "include" is used for a non-exhaustive list of possibilities?

(8) "Signed by *the* parties"; is signature required by all the parties? Should the French text ("*signées par les parties*") prevail so that all the parties must have

1. http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf: "*Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied. Recognizing that the circumstances described therein are not exhaustive."

signed the agreement? Where and when? On the original agreement or a copy? At the time of concluding the contract or during its performance?

(9) "Exchange of letters or telegrams": what is the status of faxes, emails, or for that matter tweets and the forms of communication that are currently being developed?[2] What constitutes an exchange? Offer and acceptance according to which law?

Article II(3) raises the following issues:

(10) "Shall": is there any discretion to refer the parties to arbitration even if the existence of an inherent defect would warrant refusal?

(11) "At the request of one of the parties": a court may thus not refer to arbitration ex officio. When must a party invoke the arbitration agreement? Does participating in court proceedings constitute a waiver, and if so exactly by what conduct?

(12) "Refer the parties to arbitration": how do courts refer the parties to arbitration? Do courts only compel arbitration or stay the court proceedings, or can they also render an anti-suit injunction? May and should they hold parties in contempt?

(13) "Unless it finds": can one apply Article V(1) by analogy? Is the burden of proof on respondent to prove that a defect warrants refusal to recognize? Or does the passage mean that the court must verify if a defect warrants refusal ex officio?

(14) "Null and void": under what law? What if the contract incorporating the arbitration clause is null and void *ab initio*? Is the arbitration clause severable?

(15) "Inoperative": under what law?

(16) "Incapable of being performed": under what law? Does the financial incapacity of one of the parties mean that the arbitration agreement is inoperative? Would the arbitration agreement become inoperative if respondent proves that the ensuing award cannot be enforced?

Finally, Article II does not define:

(17) The territorial scope.

(18) Permitted reservations.

§3.03 PRINCIPAL ELEMENTS OF ARTICLE II

Before discussing the four prongs of Article II that the court must apply in order to decide whether to recognize an arbitration agreement, it is imperative to appreciate the premises on which these prongs are built.

2. Would a Twitter feed, a Facebook posting, a text message or, in the future, a virtual means of communication via the Oculus Rift device promoted by Facebook founder Mark Zuckerberg constitute a form of communication that would fall under "exchange of letters or telegrams?"

[A] Article II(1): "Shall" – The Obligation to Refer to Arbitration

Courts must recognize arbitration agreements unless refusal to do so is warranted under Article II itself. Such an objection must be raised by the party contesting the agreement's validity. There is no ex officio review under Article II. Article III provides that courts shall recognize and enforce awards. In the same spirit, Article II creates a presumption of validity of the arbitration agreement. With respect to the possibility of the court refusing to refer parties to arbitration under Article II(3), the drafters chose the term "it finds" to enable the court to consider whether refusal to refer parties to arbitration is warranted. This choice of language recalls the word "may" in Article V(1). Furthermore, Article II(3) is similar to Article V in that the courts still have discretion to recognize an agreement even if an inherent defect exists. However, courts must ascertain whether a party's fundamental right to access to courts would be denied with a referral to arbitration.

[B] Drafting History

The delegates had discussed the idea of enabling a court to refer parties to arbitration on its own motion (*sua sponte*). The Turkish delegate, Mr. Koral, was against adding the words "on its own motion" in Article II(3). A court should not, he felt, have the power to impose arbitration when both parties to the arbitration agreement wish to submit the dispute to the ordinary courts.[3] The Israeli delegate, Mr. Kohn, agreed and pointed out that adding the words "on its own motion" would be problematic as a court should be able to ignore even a valid arbitration agreement if both the parties wished to waive their rights to invoke it because in the end they wanted to go to an ordinary court:

> [An] arbitration agreement would thus be indissoluble, regardless of the wish of the parties.[4]

The rationale and thus the essence of party autonomy were preserved by removing the term "*sua sponte*." If a party wishes to arbitrate, it can rely on Article II(3) and request the court to refer the parties to arbitration. The delegates seemed to agree that the pillar of arbitration – party autonomy – should be respected in all cases.

[C] Vienna Rules

In principle, the imperative "shall" implies that courts are obliged to recognize arbitration agreements and refer the parties to arbitration if Article II's requirements

3. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Summary record of the twenty-first meeting*, at 13, U.N. Doc. E/Conf.26/SR.23, (Sep. 12, 1958) (comments of Mr. Koral (Turkey)).
4. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Summary record of the twenty-first meeting*, at 8, U.N. Doc. E/Conf.26/SR.24, (Sep. 12, 1958) (comments of Mr. Urabe (Japan) and Mr. Cohn (Israel)).

have been met. Although there is a presumption of validity, a party cannot be forced to arbitrate a dispute if it had not validly consented thereto and thus be denied its right of access to courts. Under Article V(1), the burden is on the respondent to rebut that validity. No such burden is expressly defined in Article II. Therefore, the word "shall" in Article II(1) and II(3) shall be applied on the basis of good faith. There is no explicitly attributed discretion, only the general discretion inherent in the judicial task of decision-making. That discretion allows courts to ascertain whether there is indeed a valid arbitration agreement. In sum, there is a fine balance between the Convention's presumption of the agreement's validity – a presumption based on party autonomy – and the fundamental right of access to courts. For the latter, the party resisting the agreement's validity may submit evidence to that effect. Alternatively, both parties may choose not to invoke the arbitration agreement at all, with the effect that a claim in court followed by an unreserved answer of the merits will constitute a mutual abandonment of the arbitration agreement.

[D] Judicial Application

United States (US) courts have generally found no discretion in Article II(3). A seminal early case was *McCreary*.[5] The US Court of Appeals for the Third Circuit held that "there is nothing discretionary about Article II(3)" and that "the enactment of the Convention establishes the firm commitment of Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements."[6] The holding is part and parcel of the US pro-enforcement attitude. Courts must nevertheless ascertain the validity of the agreement.

In *Ledee*, the Court of Appeals for the Second Circuit repeated that there is "nothing discretionary" about Article II(3).[7] The US Court of Appeals for the First Circuit in *InterGen v. Eric F. Grina et al.*, held that enforcing arbitration clauses under the Convention constitutes an "unflagging non-discretionary duty":

> To facilitate the performance of this obligatory task, the [Federal Arbitration Act] confers an armamentarium of powers. This arsenal includes the express authority

5. *CEAT SpA (Italy) v. McCreary Tire & Rubber Co. (USA); Mellon Bank NA, garnishee* (3rd Cir. 1974), *in* Yearbook Commercial Arbitration I (1976) p. 204 (US no. 5) at 204.
6. *CEAT SpA (Italy) v. McCreary Tire & Rubber Co. (USA); Mellon Bank NA, garnishee* (3rd Cir. 1974), *in* Yearbook Commercial Arbitration I (1976) p. 204 (US no. 5) at 204. (For the full source, see U.S. Court of Appeals for the Third Circuit - 501 F.2d 1032 (1974) at para. 30:

   > There is nothing discretionary about article II(3) of the Convention. It states that district courts shall at the request of a party to an arbitration agreement refer the parties to arbitration. The enactment of Pub. L. 91-368, providing a federal remedy for the enforcement of the Convention, including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context.)

7. *M. Sykvai Ledee, et al. v. Ceramiche Ragno, et al.* (1st Cir. 1982), *in* Yearbook Commercial Arbitration IX (1984) (United States no. 50), at 471–473, ¶ 5.

> to direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or outside of the United States.[8]

Finally, the US District Court for the Southern District of New York, in *Peter J. DaPuzzo*, equally held that "by its terms," the Federal Arbitration Act leaves no place for the exercise of discretion by a district court, but instead calls on that court to direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.[9]

The English courts also consider the referral to arbitration to be mandatory. Courts are left with no discretion if the requirements under Article II are met:

> [T]he Convention leaves little or no room for discretionary flexibility in the enforcement of an arbitration clause. Why should the English Courts in exercising their jurisdiction to restrain foreign proceedings by injunction give weight to such matter as *forum non conveniens* criteria or the risk of inconsistent decisions when those matters are entirely extraneous to the regime created by the convention? I can see no good reason why they should. To do so would simply derogate from adherence to the Convention.[10]

[E] Type of Review: Prima Facie or Full Review

A merely prima facie review of the request to recognize an arbitration agreement bears two risks: (1) denial of (ordinary) justice if there was no valid arbitration agreement and (2) a full arbitration on the basis of an invalid arbitration agreement. A prima facie review affects the burden of proof. The court must bear in mind that all parties do have a right of access to courts in the hypothetical absence of a valid arbitration agreement.

Some courts consider the threshold verification under Article II to be limited to a prima facie determination in that if the arbitration agreement is not *manifestly* inoperant, it is thus subject to full control at the enforcement stage. Other courts conduct a plenary examination at the outset. The choice is prudential and each approach has advantages and disadvantages; are there more non-meritorious challenges to arbitration agreements (wrongly impeding the claimant from proceeding) or more attempts to rely on invalid arbitration agreements (wrongly putting the respondents to useless expense)?

8. *InterGen N.V. v. Eric F. Grina, Alstom and Alstom Power N.V* (1st Cir. 2003), *in* Yearbook Commercial Arbitration XXIX (2004), (United States no. 466) at 1080–1096, ¶ 5.
9. *Peter J. DaPuzzo v. Globalvest Management Company LP, Utilitivest II LLC and Utilitivest II LP)* (District Court for the Southern District of New York 2003), *in* Yearbook Commercial Arbitration XXIX (2004) (United States no. 453) at 900–936.
10. *Welex AG v. Rosa Maritime Ltd* (Court of Appeal, Civil Division 2003), *in* Yearbook Commercial Arbitration XXX (2005), pp. (United Kingdom no. 65) at 634–648, ¶ 29. See also *Travel Automation Ltd v. Abacus International Pvt. Ltd. et al.* (High Court of Karachi 2006), *in* Yearbook Commercial Arbitration XXXII (2007) (Pakistan no. 1) at 438-448, ¶ 11–13.

[F] Judicial Application

The Swiss Supreme Court has held that a prima facie review is at odds with the court's duty to do justice and assess whether it has jurisdiction or not:

> The thesis which recognizes an arbitration objection if only there is *an appearance* of a valid arbitration agreement is at odds with the State court's duty to examine its own jurisdiction exhaustively before deciding on the merits, as well as with the possible effect of a decision by a State court not to hear the merits.[11] [Emphasis added]

The stance of the courts to decide on the jurisdiction of an arbitral tribunal is similar to the doctrine of *competence-competence* under Article V(1)(c). The doctrine of *competence-competence* allows the tribunal to decide on its own jurisdiction first. This is essential for the efficacy of international arbitration: if a tribunal is to defer to courts for a decision on jurisdiction and thus is to stay the arbitration until the court has decided, arbitration would not be an efficient method of dispute resolution. Judicial assessment under Article II is, therefore, *ante facto*: even before a tribunal is appointed the court can recognize the arbitration agreement. The assessment under Article V(1)(c) is *post facto*: the tribunal had already decided on its own jurisdiction and had rendered an award on that basis. It is at the enforcement stage that the court will review the arbitration agreement to determine whether the tribunal indeed had jurisdiction. The court determines whether an arbitral tribunal will have jurisdiction on the basis of a valid arbitration agreement. The US Court of Appeals for the Fifth Circuit has held that:

> [A]bsent allegations of fraud in the inducement of the arbitration clause itself, arbitration must proceed when an arbitration clause on its face appears broad enough to encompass the party's claims. [Emphasis added][12]

The English Court of Appeal has held that "where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it: those strong reasons must be proven by the party resisting arbitration to displace the other party's prima facie entitlement to enforce the arbitration agreement."[13] The strong reasons that would persuade the court not to recognize the arbitration agreement must be proven by respondent. Under that approach, Article II would allocate the burden of proof in much the same way as Articles IV and V.

11. *Compagnie de Navigation et Transports SA v. MSC-Mediterranean Shipping Company SA* (Supreme Court 1995), *in* Yearbook Commercial Arbitration XXI (1996) (Switzerland no. 27) at 690–698, ¶ 8.
12. *Perforaciones Marinas Del Golfo, SA Permargo v. Sedco Inc* (5th Cir.1985), *in* Yearbook Commercial Arbitration XII (1987), (United States no. 70) at 539–545, ¶ 10. See also Life of America Insurance Co v. *Aetna Life Insurance Co 744 F 2d 409, 413 (5th Cir 1984)*.
13. *Welex AG v. Rosa Maritime Ltd* (Court of Appeal, Civil Division, 2003), *in* Yearbook Commercial Arbitration XXX (2005) (United Kingdom no. 65) at 634–648, ¶ 20.

[G] Deference to National Law

Article II does not contain a choice of law clause. The drafters made an attempt to fashion one, but failed to reach agreement, and in the end left it to be sorted out by the courts. In practice, most enforcement courts have subsequently applied either their conflict of laws rules, thus variously opting for the *lex fori*, the *lex arbitri*, the *lex contractus*, or internationally recognized principles.

Article V(1)(a) does contain a conflict of laws rule: courts are to apply the law parties agreed upon.[14] Some courts have applied that law to Article II *per analogiam*. But only rarely do parties specifically choose the law applicable to the arbitration agreement, and the notion that the parties implicitly deem the law applicable to the main contract to be applicable to the arbitration clause may have intuitive appeal but is ultimately unverifiable (and does not easily coexist with the principle of severability). To ask whether parties who have agreed that their contract is governed by the laws of a country A but that any dispute is to be resolved by arbitration in country B intended to opt for the law of A or B as *lex arbitri* is to start a long inconclusive argument.

[H] Drafting History

Most delegates either did not want to indicate which law was to be applicable or they considered the *lex fori* to be applicable to determine the validity of the arbitration agreement. A minority of delegates suggested the *lex arbitri* would make more sense,[15] but that does not provide a solution in cases where it cannot be determined that the parties chose a law to govern the arbitration agreement. The US delegate, Mr. Becker, pointed out that the US courts had often spoken favorably of party choice of law, but their actual decisions had been considerably less convincing in that regard. Parties could choose the applicable law if: (1) the chosen law had some meaningful connection

14. Article V(1)(a) provides:

> The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement 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.

15. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the fourteenth meeting*, U.N. Doc. E/Conf.26/SR.14 (Sep. 12, 1958) (comment of Mr. Holleaux (France)):

> [T]he Convention was called upon to pronounce itself on the law applicable to the procedure of recognition and enforcement of the award but not on the law applicable to the arbitral agreement. … Since the beginning of the present century, his country's jurisprudence was based on the concept of autonomy of the parties, in particular with respect to the choice of the law governing the arbitral procedure and the award. France would not be able to sign or ratify a Convention which went against that concept.

with the contract, (2) the choice of law was freely arrived at on the basis of equal bargaining power, and (3) there were compelling considerations of public policy.[16]

[I] Vienna Rules

The courts must interpret the arbitration clause or the arbitration agreement on the basis of the law they deem to be applicable under Article II and with an arbitration-friendly attitude, while still respecting the rights of both parties. The latter may result in the refusal to recognize the arbitration agreement. On the basis of Article V(1)(a), courts could apply the *lex arbitri* by analogy. However, the drafting history points more to the *lex fori*. Because the outcome under both Article 31 (the text) and Article 32 (the drafting history) remains ambiguous, courts may also rely on general methods of interpretation. Courts should use the other provisions of the Convention in a purposive manner and apply the choice of law rules pertaining to the recognition and enforcement of the award to Article II.

Table §3.03[I] Applicable Law

Burden of Proof	*Article II*	*Convention in Context*	*Applicable Law and Standards*
Territorial Scope (ex officio)	Article II(1)	Article I(1)	Foreign and non-domestic according to *lex fori*
Formal Scope (applicant)	Article II(1) and (2)	Uniform Rule in Article II(2) and customs in international trade	Agreements in writing.
Material Scope (applicant)	Article II(1) and (3)	Parties' intent to arbitrate and valid agreement: Article V(1)(a) *per analogiam*	Both the *lex arbitri* and the *lex fori* on the basis of Article V(1)(a), judicial application and drafting history.
Inherent defects: (respondent)	Article II(3)	Article V(2)(a)(b)	*Lex fori* or "internationally recognized principles"

16. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the fourteenth meeting*, at 6–7, U.N. Doc. E/Conf.26/SR.14 (Sep. 12, 1958) (comment of Mr. Becker (United States)).

[J] Judicial Application

The Swiss Supreme Court applied the *lex arbitri* to determine the scope of an arbitration clause by a reference by analogy to Article V(1)(a):

> In Switzerland, some authors are of the opinion that only the perspective of the enforcement court justifies connecting the arbitration agreement … to the consequences of the possible applicability of a foreign law, whereas the referral court decided in any case, according to the substantive lex fori cumulatively under the law of the seat of the tribunal. … [B]y this manner of proceeding an arbitration agreement may cause under certain circumstances the lack of jurisdiction of the courts, whereas the arbitral award based on that arbitration agreement may be denied recognition because the agreement is invalid according to a foreign law. Hence, the conflict rules in Article V(1)(a) must be applied.[17]

In a judgment of 2006, the Supreme Court of Spain has applied its rules of private international law to determine the law governing the validity of the arbitration agreement under Article II(1) and concluded that the outcome is based on the autonomy of the parties: hence, the applicable law was the law of the State of New York as parties had clearly submitted the dispute to the AAA Rules and to the laws of the State of New York.[18] Of course the situation is more complicated if the law stipulated to govern the contract is *not* that of the place of arbitration, and the intent of the parties as to *lex arbitri* is therefore a matter of conjecture.

[K] Time of Application: Estoppel and Waiver

Under Article II(3), the contractual right to arbitrate must be invoked "at the request of one of the parties." Thus, the Convention leaves the possibility that either party may waive the right. For example, the party may do so by unreservedly participating in court proceedings on the merits. The party invoking the arbitration agreement will usually nevertheless participate in the proceedings for reasons of prudence, reserving its objection to court jurisdiction, to avoid a default judgment if the court were ultimately to dismiss to reject the request to recognize the arbitration agreement. In such cases, the party seeking arbitration will generally invoke the arbitration agreement as a threshold obstacle, and urge that it be decided as a preliminary matter.

[L] Judicial Application

This is not a problematic area, as illustrated by the following two judgments which seem entirely uncontroversial. The Spanish Supreme Court has held that a defendant in court proceedings who raises an objection of lack of jurisdiction based on an arbitration clause and only discusses the merits of the claim on the alternative basis in case its

17. *Insurance Company v. Reinsurance Company* (Supreme Court of Switzerland 1995), *in* Yearbook Commercial Arbitration XXII (1997) (Switzerland no. 29) at 800–806, ¶¶ 10-11.
18. *Kern Electronica SA v. Goldstar Company Limited* (Supreme Court of Italy 200), *in* Yearbook Commercial Arbitration XXXI (2006) (Spain no. 44) at 825–833, ¶¶ 12–16.

arbitration objection is denied, does not implicitly submit to the jurisdiction of the Spanish courts and preserves any rights it may have to contest a refusal to defer to arbitration.[19]

A US Court of Appeals has held that "although arbitration is a contractual right which can be waived and Article II contemplates the possibility of waiver of an arbitration, the case at hand did not demonstrate a waiver … because defendant, in its special defense, served notice on plaintiff of the arbitration defense."[20] The burden of proof is on the one who alleges such a waiver.[21] The same court put it this way in another case:

> [W]aiver of arbitration is not a favored finding, and there is a presumption against it.[22]

[M] How to Refer to Arbitration: (1) Ordering Anti-suit Injunction, (2) Compelling Arbitration and (3) Staying Court Proceedings

Judicial compliance with Article II in the presence of a valid arbitration agreement (usually in the form of a clause in a contract) may take a number of forms, e.g., a stay of the court proceedings (leaving it to a party to take the initiative of commencing arbitration), an order compelling arbitration, or indeed an anti-suit injunction, restraining a party which has agreed to arbitration in country A from going to court in country B.[23,24,25]

For example, in *Welex v. Rosa Maritime*, the English Court of Appeal again granted an anti-suit injunction with respect to an arbitration in London enjoining parties from commencing court proceedings in Poland:

19. *Rederij Empire CV v. Arrocerias Herba SA and Prevision Espanola SA* (Supreme Court of Spain, 2002), *in* Yearbook Commercial Arbitration XXXII (2007) (Spain no. 55) at 567-570,¶ 4: "[W]hen the defendant raises the arbitration objection in the statement of defense … and replies on the merits of the claim only for the event that the objection is denied, it carries out a correct procedural activity and does not mean to tacitly submit to the jurisdiction of the court."
20. *Perforaciones Marinas Del Golfo, SA Permargo v. Sedco Inc* (5th Circ. 1985), *in* Yearbook Commercial Arbitration XII (1987) (United States no. 70) at 539–545.
21. *Perforaciones Marinas Del Golfo, SA Permargo v. Sedco Inc* (5th Circ. 1985), *in* Yearbook Commercial Arbitration XII (1987) (United States no. 70) at 539–545, ¶ 22. See also *Hilti v. Oldach*, 392 F 2d 368, 371 (1st Cir 1968).
22. See also *Keytrade USA Inc v. MV/Ain Temouchent, Transport Maritime & Compagnie Nationale Algerienne de Navigations Maritime* (5th Circ. 2005), *in* Yearbook Commercial Arbitration XXX (2005) (United States no. 486) at 777–789.
23. *Peter J. DaPuzzo v. Globalvest Management Company LP, Utilitivest II LLC and Utilitivest II LP* (District Court for the Southern District of New York 2003), *in* Yearbook Commercial Arbitration XXIX (2004) (United States no. 453) at 900–936.
24. Under s. 206 of the FAA, a court may order to compel arbitration and direct that arbitration be held in accordance with the agreement.
25. *InterGen N.V. v. Eric F. Grina, Alstom and Alstom Power N.V* (1st Circ. 2003), *in* Yearbook Commercial Arbitration XXIX (2004), (United States no 466) at 1080–1096.

> English courts will ordinarily exercise discretion to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum can show strong reasons for suing in that forum.[26]

Subsequently, the difficulties of such injunctions within the European Union became apparent in the much-debated *West Tankers* case, a European rather than an arbitration problem.[27] English courts continue without hesitation to issue injunctions against court actions outside the EU if they are inconsistent with an arbitration agreement governed by English law.[28]

In *Sulamericana*, the English Court of Appeal, Civil Division – after having determined that the arbitration agreement was governed by English law – issued an anti-suit injunction enjoining parties from submitting the dispute to the Brazilian courts.[29]

Although courts ought to use any instrument at their disposition to allow for an arbitration to go forward, the use of those instruments are inappropriate if the sovereignty of another Contracting State is jeopardized: both party autonomy and sovereignty are the Convention's pillars. For a court of one forum to prohibit the court of another forum to review the validity of an arbitration agreement is at odds with the Convention's purpose and does not comport with the notion that decisions under the Convention only have territorial effect.

[N] Intertwining Doctrine

The intertwining doctrine is triggered when a party asserts several causes of action, at least one of which falls within the exclusive jurisdiction of the federal courts. In such a case, notwithstanding the existence of an arbitration clause, the entire dispute must remain in federal court to avoid encroachment by the arbitrator into an area that Congress had deemed to be within the federal court's exclusive jurisdiction.[30]

26. *Welex AG v. Rosa Maritime Ltd* (Court of Appeal, Civil Division 2003), *in* Yearbook Commercial Arbitration XXX (2005) (United Kingdom no. 65) at 634–648, ¶ 20.
27. *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, et al. v. West Tankers, Inc. (The FRONT COMOR* (Court of Justice of the European Communities, Grand Chamber 2009), *in* Yearbook XXXIV (2009) (European Union no. 2) 485–493.
28. *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, et al. v. West Tankers, Inc. (The FRONT COMOR* (Court of Justice of the European Communities, Grand Chamber 2009), *in* Yearbook XXXIV (2009) (European Union no. 2) 485–493. ¶ 17: the House of Lords had held that:

> the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court."

29. *Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA* (Court of Appeal, Civil Division 2012) at http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=886.
30. *Perforaciones Marinas Del Golfo, SA Permargo v. Sedco Inc* (5th Cir.1985), *in* Yearbook Commercial Arbitration XII (1987) (United States no. 70) at 539–545, ¶ 6.

The intertwining doctrine seeks to override an arbitration agreement and prevent piecemeal adjudication. However, the US Court of Appeals for the Fifth Circuit has ordered the parties to perform their arbitration agreement because of the Supreme Court's rejection of the intertwining doctrine:

> [T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims … even where the result would be the possible inefficient maintenance of separate proceedings in different forums. … The [Convention] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.[31]

Thus procedural efficiency or the avoidance of piecemeal adjudication does not trump the will of the parties if they have chosen arbitration. The US courts do use the intertwining doctrine in favor of arbitration, holding that a non-signatory to an arbitration agreement may compel a signatory to arbitrate a dispute if the issues the non-signatory seeks to refer to arbitration are intertwined with the agreement.[32]

§3.04 THE FOUR PRONGS OF ARTICLE II

A court must recognize an arbitration agreement and refer parties to arbitration if that agreement meets a four-prong test: (1) it falls under the territorial scope of Article I; (2) it satisfies the formal requirement of Article II(1)(2) that it be in writing; (3) it qualifies substantially under Article II(1) (valid arbitration agreement); and (4) it does not suffer from inherent defects that would make it impracticable (Article II(3)).

§3.05 PRONG I: TERRITORIAL SCOPE

[A] Textual Lacuna

Does the Convention apply only to international awards? Does it apply to foreign awards that are purely domestic in the country where they were made? Article I answers those questions; Article II does not with respect to arbitration agreements. This may be a consequence of the late decision to include Article II in the Convention. Article I gives little clue as to whether it applies to Article II, and Article II is silent as to whether Article I might apply by analogy. The interpreter is left with general

31. *Perforaciones Marinas Del Golfo, SA Permargo v. Sedco Inc* (5th Cir.1985), *in* Yearbook Commercial Arbitration XII (1987) (United States no. 70) at 539–545, ¶ 8. See also *Dean Witter Reynolds v. Byrd US* 105 S Ct 1238, 84 L.Ed.2d 158 (1985) in which the Supreme Court rejects the intertwining doctrine.
32. *JLM Industries (US and Europe), JLM International, Tolson Holland v. Stolt-Nielsen (Luxembourg and Liberia), Odfjell (Norway and US), Jo Tankers (Netherlands and US) and Tokyo Marine* (2nd Circ. 2004), *in* Yearbook Commercial Arbitration XXX (2005) (United States no. 505) at 963–985.

methods of interpretation and the Convention's drafting history.[33] Applying Article I *per analogiam* to Article II would create legal certainty for parties in arbitration, Contracting States, and enforcement courts. There would then be only one limitation: an agreement providing for national arbitration in the forum State does not fall under the Convention since such an agreement is a matter of domestic law.

[B] Judicial Application: The US Ledee Test[34]

The US Court of Appeals for the First Circuit in the *Ledee* case articulated a test in four parts for the territorial and formal scope of Article II.[35] First, is there an arbitration agreement in writing (Article II(2))? Second, is the arbitration to take place in the territory of a signatory to the Convention (the reciprocity reservation (Article I(3)))?[36] Third, does the agreement pertain to a commercial matter (the commercial reservation (Article I(3)))?[37] Fourth, is there a foreign party to the arbitration agreement, or does the commercial relationship have some reasonable relation with one or more foreign States (the foreign element) at section 202 of the Federal Arbitration Act.[38] Only if these four requirements are met will the court proceed under Article II and verify whether the arbitration agreement is valid.[39] The *Ledee* court refused to interpret Article II narrowly

33. For the discussions about the reservations, see Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary record of the Twenty-first meeting*, U.N. Doc. E/Conf.26/SR.21 (Sep. 12, 1958).
34. *M. Sykvai Ledee, et al. v. Ceramiche Ragno, et al.* (1st Circ. 1982), *in* Yearbook Commercial Arbitration IX (1984) (United States no. 50), at 471–473.
35. See the section in this Chapter on the formal scope below.
36. The United States have made the reciprocity reservation which the courts apply by analogy to the arbitration agreement as per 9 U.S.C. s. 206 of the Federal Arbitration Act; Declaration of the United States upon accession, reprinted in 9 U.S.C.A. at 154 n. 29 (1982 Supp.).
37. The United States have made the commercial reservation, which the courts apply by analogy to the arbitration agreement as per 9 U.S.C., s. 202 of the Federal Arbitration Act. The drafting history is not entirely clear on this point. The delegates seemed to disagree as to whether the reservations should apply to the arbitration agreement.
38. Title 9, US Code, ss 1–14, was first enacted Feb. 12, 1925 (43 Stat. 883), codified Jul. 30, 1947 (61 Stat. 669), and amended Sep. 3, 1954 (68 Stat. 1233). Ch. 2 was added Jul. 31, 1970 (84 Stat. 692). Section 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

39. See para. 3 of the decision: "If the district court resolves those questions in the affirmative, as it properly did in this case, then it must order arbitration unless if finds the agreement null and void, inoperative or incapable of being performed."

in order to refuse recognition because that would undermine the purpose of the Convention.[40]

Some US courts, however, have read section 202 to deny Convention coverage to US citizens if they arbitrate their dispute outside of the US and if the matter is entirely domestic. The US Court of Appeals for the Second Circuit denied a request under Article II because the main contract involved a relationship that was entirely between citizens of the US, did not involve property located abroad, nor foreshadowed enforcement in England – the chosen seat – or had some other reasonable relation with England; it was an entirely US affair.[41] The Court gave a restrictive interpretation of "the foreign element" of section 202.[42]

The Russian Supreme Court also held that an arbitration agreement pertaining to arbitration outside Russia between Russian citizens cannot be recognized under the Convention:

> [T]here are no other jurisdictions and applicable laws than Russian. As the relations are not of an international nature: the parties to the contract are Russian legal entities, and the services, which are the subject of the contract are to be provided in the Russian Federation.[43]

The parties had intended to arbitrate the dispute in Sweden under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. There is no obstacle under the Convention choosing a neutral seat, one of the pillars and advantages of international arbitration is the freedom to choose one's venue.

[C] Reservations of Article I(3)

Does Article I(3) apply by analogy to Article II? Article 31 of the Vienna Convention instructs the interpreter to look primarily at the text, context and purpose. A contextual analogous application of Article I(3) seems appropriate and that has seemed to be the practice, for instance by the US courts. Article 32 of the Vienna Convention allows for the study of the drafting history to confirm the interpretation based on Article 31.[44] The Vienna Convention treats the *travaux* in subsidiary terms. In practice, parties plead the

40. *M. Sykvai Ledee, et al. v. Ceramiche Ragno, et al* (1st Cir. 1982), *in* Yearbook Commercial Arbitration IX (1984) (United States no. 50) at 471–473, ¶ 4.
41. *Charles C. Jones, Clara E. Jones v. Sea Tow Services Freeport NYC* (2nd Cir. 1994), *in* Yearbook Commercial Arbitration XX (1995) (United States no. 188) at 994–1000, ¶¶ 7-8.
42. *Charles C. Jones, Clara E. Jones v. Sea Tow Services Freeport NYC* (2nd Cir. 1994), *in* Yearbook Commercial Arbitration XX (1995) (United States no. 188) at 994–1000, ¶ 11:

> The purported salvage operation took place just off the coast of the United States, and the [Lloyd's Open Form] was presented to Mrs. Jones for signature in the United States. It is not sufficient that English law was to be applied in the resolution of the salvage dispute and that the arbitration proceeding was to be held before an English arbitrator.

43. *OAO Company Neftyanaya and Rosneft v. Neftyanoy Terminal Belokamenka* (Supreme Court of the Russian Federation 2010), *in* Yearbook Commercial Arbitration XXXVI (2011) (Russian Federation no. 29) at 315–316, ¶ 12.
44. The Vienna Convention, Article 32, provides:

Setting a constructive example, the Swiss courts are known for their avoidance of "excessive formalism," especially when the submitted documents are not disputed.[1] Evidence to establish the prima facie existence of an enforceable award should suffice. Some enforcement courts, to the contrary, have lower tolerance for incomplete submissions. Although judicial application under Article IV has revealed a practical attitude in dealing with the various issues of submitting the correct application and exhibits, pragmatism is rejected by some courts as inappropriate in light of what they perceive as the judicial duty to apply the conditions of the Convention.

It seems perfectly possible to adopt a pragmatic and purposive approach within the limits imposed by Article IV. If there is a solution to applicant's partial failure to submit the documents under Article IV, courts ought to allow counsel to cure those defects. Article IV was not drafted to allow courts to stop enforcement for want of compliance with formalities. Fundamental defects may be raised and considered at a later stage. As always, one should recall that the Convention is *absolutely permissive* with respect to enforcement; Article VII explicitly allows enforcement applicants to rely on more pro-enforcement outcomes if they exist in the relevant jurisdiction.

§5.02 THE ELEMENTS OF ARTICLE IV

The applicant for enforcement need only prove that there is an apparent valid arbitration agreement and an enforceable award: the court looks at the evidence prima facie. Second, what is important is for the court to make sure that there is no fraud. If the court is satisfied that a copy is a true copy of the award itself, there is no need to promote form over substance.

[A] Prima Facie Review

Article IV embodies a presumption of the applicant's right to the enforcement of the award. A prima facie review of the submitted evidence does not always establish the apparent validity of the agreement and enforceability of the award. To what extent can the court presume that the award is enforceable? Some courts require sufficient evidence from the applicant that the arbitration agreement is a valid arbitration agreement as under Article II. However, a full review such as the one required for the purposes of Article II is not called for under the prima facie standard of Article IV.

1. *ASA v. B. Co Ltd and C SA* (Federal Supreme Court Switzerland 2003), *in* Yearbook Commercial Arbitration XXIX (2004) (Switzerland no. 38) at 834–842 in which the Court considered the *lex fori* - which prohibits the submission of new documents in appellate proceedings - but took into account the fact that the authenticity of the arbitral clause was undisputed and the Court of First Instance "had a copy of the clause in its file when it reached its decision to enforce the award": "[R]efusing the submission of the arbitral clause in the appellate proceedings would have been an act of excessive formalism."

[B] Drafting History

The prima facie assessment was envisaged by the drafters as follows:

> [R]equire from the claimant only positive evidence that this application for enforcement was *prima facie* justified.[2] … [l]eaving it to the party opposing enforcement to present such evidence as may be appropriate to rebut this claim.[3]

The delegates did not want to place a negative burden of proof on the prevailing party:

> [W]hen there was *prima facie* proof that the parties had agreed to submit their dispute to arbitration, it should be for the defendant to prove that the contrary was the case or that the agreement between the parties was not legally valid.[4]

It was thus agreed by the delegates, as summarized in the consolidated report by the Secretary-General:

> The Convention should therefore be based on the principle that an arbitral award constitutes a *prima facie* title for enforcement which should be refused only if a summary examination of the award by the judicial authorities of the country where it is being relied upon discloses the existence of any of the grounds stipulated in Article [V] of the Convention.[5] The Geneva treaties have not produced the widespread international enforcement of arbitration agreements and awards which was expected of them. The primary blame for this failure appears to lie with the structure of the treaties themselves. By effectively placing the burden of proof on every issue upon the successful party, the treaties have eased the path of the defaulting defendant and the partial tribunal.[6]

2. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Seventeenth meeting*, at 2, U.N. Doc. E/Conf.26/SR.17 (Sep. 12, 1958) (Comment of Mr. de Sydow (Sweden)).
3. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Seventeenth meeting*, at 2, U.N. Doc. E/Conf.26/SR.17 (Sep. 12, 1958) (Comment of Mr. de Sydow (Sweden)). See also Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Eleventh Meeting*, at 7 and U.N. Doc. E/Conf.26/SR11, (Sep. 12, 1958) (Comment of Mr. Holleaux (France)).
4. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Eleventh Meeting*, at 12, U.N. Doc. E/Conf.26/SR11, (Sep. 12, 1958) (Comment of Mr. Haight (International Chamber of Commerce)).
5. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Activities of Inter-Governmental and Non-Governmental organizations in the field of international commercial arbitration, Consolidated Report by the Secretary*-General, at 27, U.N. Doc. E/Conf.26/4, (Apr. 24, 1958). See also Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Fourteenth Meeting*, at 3, U.N. Doc. E/Conf.26/SR.14 (Sep. 12, 1958) (Comment by Mr. Adamiyat (Iran)):"[T]he Netherlands amendment was based on the principle that an award constituted a *prima facie* right and must be enforced after an examination prescribed by Article IV."
6. Leonard V. Quigley, "Accession by the Unite States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *The Yale Law Journal* (Vol. 70: 1949), p. 1050.

The Dutch proposal was in line with the intended purpose of the Convention in that it pursued the effectiveness of international arbitration.[78] The proposal relieved the applicant of the burden of proving the *absence* of an impediment to enforcement.[9] Articles IV and V do not allow for the enforcement court to reassess the applicant's right to its award: under the presumption of Article III, the award is prima facie enforceable. The Dutch delegate, Mr. Sanders, pointed out that his proposal would mean that a "legal presumption would be created, to wit that an arbitral award shall be regarded as final and operative until the contrary has been proven."[10] The enforcement court was not to impose a negative burden of proof on the applicant.[11] The award was to be enforceable until proven otherwise:

> [I]t should be remembered that one of the principal motives for the renewed study of this subject-matter was the desire to grant to the party relying on an arbitral award more ample possibilities in respect of recognition and enforcement than were laid down in the Geneva convention.[12]

The Yugoslavian delegate agreed because simplification of the request would prevent a reintroduction of the double exequatur; "the onus would be shared more equally between the complainant and the defendant."[13]

7. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Consideration of the draft convention on the recognition and enforcement of foreign arbitral awards, amendments to the draft Convention by the Netherlands delegation*, at 1-2, U.N. Doc E/Conf.26/L.17 (May 26, 1958).
8. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, comment by The Netherlands delegation*, at 6, U.N. Doc. E/Conf.26/3/Add 1, (Apr. 8, 1958).
9. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Report of the Committee on the enforcement of international arbitral awards*, at 14, U.N. Doc. E/2704/E/AC.42/4/Rev., (Mar. 28, 1955). See also the Final Act, para. 16, Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc E/Conf.26/8/Rev.1.
10. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 5, U.N. Doc. E/Conf.26/3/Add.1 (Apr. 8, 1958).
11. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Report by the Secretary-General*, at 14, U.N. Doc. E/2822, Annex II, (Jan. 31, 1956).
12. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 7, U.N. Doc. E/Conf.26/3/Add 1, (Apr. 8, 1958) (Comment of Mr. Sanders (The Netherlands)).
13. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Thirteenth Meeting*, at 8, U.N. Doc. E/Conf.26/SR.13 (Sep. 12, 1958) (Comment of Mr. Beasarovic (Yugoslavia)). See also Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Summary Record of the Thirteenth Meeting*, at 7, U.N. Doc. E/Conf.26/SR.13 (Sep. 12, 1958) (Comment of Mr. Holleaux (France)): "[The Convention] might refer to the Latin concept of *prima facie* proof. That, it seemed to him was the most that could be required."

[C] Judicial Application

> The scheme of the Convention gives limited *prima facie* credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements.[14]

What is a prima facie assessment of an *enforceable* agreement and award? In *Altain Khuder*, the Supreme Court of Victoria considered that there is a "legislative presumption of regularity" but that "apparent irregularity on the face" requires the applicant to prove that respondent is a party to the arbitration agreement.[15] The test of "apparent irregularity" in *Altain Khuder* shifts the burden to applicant. In *Altain Khuder*, the court held that the party seeking enforcement has the burden of proof that the award debtor is a party to the arbitration agreement if the applicant has not proven on the basis of probabilities that the award debtor was a party to the arbitration agreement.[16] Under Article IV, the applicant needs to submit nothing more than the arbitration agreement and the award. If the respondent wants to resist enforcement it must prove under Article V(1)(a) that it was not a party to the arbitration agreement.[17]

The decision exposes the practical difficulty between distinguishing the prima facie assessment of the *existence* of the arbitration agreement and the more thorough assessment of the *validity* of the arbitration agreement. The court in *Altain Khuder* decided:

> to place the onus on the award debtor to impugn the agreement or the award where the documents presented to the court … are regular on their face, but to require the award creditor to explain an apparent irregularity on the face of the documents. The cumulative effect … is to encourage the use of arbitration and the recognition of foreign awards by creating a legislative presumption of regularity founded upon documentary proof. That presumption guards against the unnecessary risk and expense to an award creditor should they be required to re-litigate issues in Australian courts already decided by an arbitral tribunal.[18]

14. *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* (Court of Appeal (Civil Division) 2009), *in* Yearbook Commercial Arbitration XXXIV (2009) (UK no. 87) at 887–925, under s. II.
15. *Altain Khuder LLC v. IMC Mining Inc, et al.* (Supreme Court of Victoria, Commercial and Equity Division, Commercial Court 2011) and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (Supreme Court of Victoria 2011), *in* Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35) at 242–251, ¶ 50.
16. *Altain Khuder LLC v. IMC Mining Inc, et al.* (Supreme Court of Victoria, Commercial and Equity Division, Commercial Court 2011) and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (Supreme Court of Victoria 2011), *in* Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35) at 242–251, ¶ 50, s. IV.
17. *Altain Khuder LLC v. IMC Mining Inc, et al.* (Supreme Court of Victoria, Commercial and Equity Division, Commercial Court 2011) and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (Supreme Court of Victoria 2011), *in* Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35) at 242–251, ¶ 36.
18. *Altain Khuder LLC v. IMC Mining Inc, et al.* (Supreme Court of Victoria, Commercial and Equity Division, Commercial Court 2011) and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (Supreme Court of Victoria 2011), *in* Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35) at 242–251, ¶ 50.

The court held that when it does not appear prima facie from the documents submitted with the application for enforcement that the award creditor and the award debtor are parties to the arbitration agreement, the burden of proving this condition falls on the party seeking enforcement.[19] The court further held that:

> [T]here is a jurisdictional threshold requirement that the party seeking to enforce the award – the award creditor – satisfy the enforcing court, on the balance of probabilities, that the award is binding under Section 8(1) of the [International Arbitration Act], that is, that the party against whom enforcement is sought – the award debtor – is a party to the arbitration agreement in pursuance of which the award was made.[20]

The Supreme Court of Hong Kong has made only prima facie assessments, providing there is enough evidence that the submitted document was the duly authenticated original award:[21]

> I do not think that Sect. 43(a) requires the strict proof suggested by Mr. Chung. There is before me *prima facie* proof that the document produced by Mr. Jat is the duly authenticated original award. On that evidence I find that Sect. 43(a) has been complied with.[22]

And the Swiss courts do the same:

> On the premise that the arbitral award and the arbitration agreement are valid instruments in the hands of the party relying on them, until proof of the contrary is given, the Convention shifts the burden of proof onto the defendant. By supplying the documents required, the party seeking enforcement proves *prima facie* that he has a final and binding arbitral award in his favour, rendered on the basis of a valid arbitration clause.[23]

In *Dardana*, the English Court of Appeal properly held that only a prima facie assessment of the arbitration agreement is required under Article IV. Enforcement may

19. *Altain Khuder LLC v. IMC Mining Inc, et al.* (Supreme Court of Victoria, Commercial and Equity Division, Commercial Court 2011) and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (Supreme Court of Victoria 2011), *in* Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35) at 242–251.
20. *Altain Khuder LLC v. IMC Mining Inc, et al.* (Supreme Court of Victoria, Commercial and Equity Division, Commercial Court 2011) and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* (Supreme Court of Victoria 2011), *in* Yearbook Commercial Arbitration XXXVI (2011) (Australia no. 35) at 242–251. Article 8(1) provides: "Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made."
21. *Guangdong New Technology Import & Export Corporation Jiangmen Branch v. Chiu Shing Trading as B.C. Property & Trading Company* (Supreme Court of Hong Kong, High Court 1991), *in* Yearbook Commercial Arbitration XVIII (1993) (Hong Kong no. 3) at 385–388.
22. *Guangdong New Technology Import & Export Corporation Jiangmen Branch v. Chiu Shing Trading as B.C. Property & Trading Company* (Supreme Court of Hong Kong, High Court 1991), *in* Yearbook Commercial Arbitration XVIII (1993) (Hong Kong no. 3) at 385–388, ¶ 5.
23. *R SA v. A Ltd* (Cour de Justice, Geneva 1999), *in* Yearbook Commercial Arbitration XXVI (2001) (Switzerland no. 33) at 863–868, ¶5.

be refused at the second stage only if the respondent proves that there is a warrant for refusal.[24] This holding serves as a good example of interpretation of Article IV:

> A successful party to a Convention award, as defined in Section 100(1) has a *prima facie* right to recognition and enforcement. … Recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads out in Section 103(2). … Article V(1)(a) makes clear that, at all events where an agreement apparently complies with the requirements of Article II, any challenge to its validity is a matter for the party resisting recognition and enforcement to raise and prove.[25]

[D] Authentication and Certification: The Ws – What, Whom, Where, When?

The authentication of the original award means that the signatures on the award are attested to be genuine. The certification of the copy of the award or agreement is the formality by which the copy is to be attested as a true copy of the whole original. There is no need to authenticate an original agreement. Courts are recommended to adopt a pro-enforcement attitude.

Where should the authentication and certification take place: in the country where the award was rendered or in the country where the enforcement is sought? Who can authenticate or certify: a public notary, or a consular agent? What should be certified: the entire award or only the essential parts and the dispositive part? When should the authenticated and certified documents be submitted: at the time of filing of the request for enforcement, later in the course of the enforcement proceedings, or even during a subsequent appellate phase?

Courts verify the authentication and certification on the basis of either the *lex arbitri* or the *lex fori*. Some courts apply Article IV respecting its origin in international law and its place in the Convention: they adopt a purposive approach and apply internationally recognized principles: most enforcement courts have developed a doctrine for the application of Article IV. Italian courts allow for applicant to file a new request for enforcement in order to submit any new documents. The Swiss courts allow for applicant to cure a defect later during the same proceedings. Dutch courts do not require awards in English to be translated into Dutch. US courts adopt a pro-enforcement attitude and will not be overly formalistic. Counsel is best advised to take note of the forum court's dominant approach to Article IV. To certify and authenticate in both the country where the award was rendered and where the enforcement is sought is unrealistic as the process for authentication and certification maybe costly and time consuming and not recommended in light of the statute of limitations. In

24. *Yukos Oil v. Dardana Ltd* (Court of Appeal 2002), *in* Yearbook Commercial Arbitration XXVII (2002) (United Kingdom no. 60) at 570–592, ¶ 10.
25. *Yukos Oil v. Dardana Ltd* (Court of Appeal 2002), *in* Yearbook Commercial Arbitration XXVII (2002) (United Kingdom no. 60) at 570–592, ¶ 12.

some Contracting States, counsel may contact the court's registry to ascertain how the authentication and certification process should take place.

[E] Drafting History

The use of the word "shall" in Article IV seems to mandate courts to apply the elements of Article IV in a manner with limited discretion. Yet, the delegates wanted enforcement courts to be pragmatic:

> [A] considerable latitude should be given to the tribunal, before whom recognition or enforcement is sought, to determine what would be accepted as authentication of an award, or as a certificate of its translation.[26]

The delegates discussed authentication and certification: who should do what, and according to which law?[27] The outcomes and suggestions envisaged were diverse, triggered by a variety of national legal regimes. Proposals to indicate precisely which law should apply, who should certify and authenticate, and what should be certified and where, failed to command a majority at the conference and hence the result is deference to courts.[28]

[F] Judicial Application

The Supreme Court of Bulgaria held that the authentication should have been in the country of origin, Switzerland.[29] The Court of Appeal had denied the request for enforcement because the award had not been authenticated by the arbitral tribunal. The court also demanded a certificate from that tribunal that the award had entered into force. This is not a Convention requirement. The rationale of a certification and authentication of the agreement and award is to enable the enforcement court to verify whether the documents are genuine, not whether they are binding. The Supreme Court also denied the request for enforcement but relied on the *lex arbitri*, Swiss law, to

26. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 3, U.N. Doc. E/Conf.26/3 (Mar. 10, 1958) (Comment of the New Zealand delegate).
27. The Court of Appeal of Milan applied the *lex arbitri* on the basis of Italian rules on conflict of laws: *Reinato Marino Navegacion SA (nationality not indicated) v. Chim-Metal srl (Italy)* (Corte di Appello, Milan 1979), *in* Yearbook Commercial Arbitration VII (1982) (Italy no. 43) at 338–340, ¶ 1. The Italian Supreme Court held that the *lex fori* applied: *SODIME - Società Distillerie Meridionali v. Schuurmans & Van Ginneken BV* (Corte di Cassazione, 1995), *in* Yearbook Commercial Arbitration XXI (1996) (Italy no. 140) at 607–609, ¶ 4. It referred to the rules of procedure *of the territory where the award is relied upon* in Ar. III.
28. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires –Summary Record of the Seventeenth Meeting*, at 6–7, U.N. Doc. E/Conf.26/SR. 17 (Sep. 12, 1958) (Comments of Mr. Maurtua (Peru), Mr. Herment (Belgium), Mr. Maloles (Philippines) and Mr. Dube (Monaco)).
29. *ECONERG Ltd. v. National Electricity Company AD* (Supreme Court of Appeal, Civil Collegium, Fifth Civil Department 1999), *in* Yearbook Commercial Arbitration XXV (2000) (Bulgaria no. 1), at 678–682.

determine how the authentication process should have taken place: Swiss law required authentication by the Swiss court which the applicant had not obtained.[30,31,32]

For another illustration: the cantonal court in Geneva considered the failure of an applicant to submit an authenticated original award. The applicant had translated the Chinese award into the forum's official language – French – but only the first and the last pages of that translation were certified.[33] The case exposes yet another issue under Article IV: partial certification only. How can a court know whether the translation is accurate? The first and last pages were certified by an officer of the Swiss embassy in Beijing: the first page contained the parties' name and seat; the mention "arbitral award"; the award's date and the arbitral authority: the Chinese International Economic Trade Arbitration Commission ("CIETAC"). The last page contained the decisional part of the award, the time limit to pay and the mention that the decision is final, as well as the names of the three arbitrators. The translation indicated that the CIETAC's official stamp appeared on the award. The court concluded that the essential information was certified.[34] The court held that:

> [t]he Convention differs from the [1927 Geneva Convention] in that it considerably improves the position of the party seeking recognition and enforcement of the arbitral award. The sole formal obligation for this party is to submit the documents indicated in Article IV. [Courts must show] some flexibility when evaluating the manner in which these documents are supplied.[35]

The Spanish Supreme Court did not allow for an applicant to cure the defect of submitting a certified copy of the arbitration agreement on the grounds that it would not have changed the outcome: refusal of enforcement would have followed anyway because there was no valid arbitration agreement.[36] The court relied on the fact that the agreement submitted under Article IV(1)(b) must be the one referred to in Article II. The court held that there was no valid agreement as per Article II(1) because a broker had in that case not received a mandate from the applicant showing a clear and explicit intention to agree to arbitration. The defendant had raised the issue that a valid

30. See also *Trans-Pacific Shipping Co. v. Atlantic & Orient Shipping Corporation (BVI), et al.* (Federal Court Canada 2005), *in* Yearbook Commercial Arbitration XXXI (2006) (Canada no. 21) at 601–610, ¶ 13.
31. The Court of Appeal in Munich, Germany, applied estoppel under Art. IV and applied the requirements under Art. IV in a more flexible manner by applying prevailing practice in Germany, see *Carrier v. German Customer* (Oberlandesgericht, Munich 2009), *in* Yearbook Commercial Arbitration XXXV (2010) (Germany no. 127) at 365–366, ¶ 4.
32. See for the local approaches to Art. IV the UNCITRAL Survey: Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 49–57, U.N. Doc. A/CN.9/656 (Jun. 5, 2008).
33. *R SA v. A Ltd* (Cour de Justice, Geneva 1999), *in* Yearbook Commercial Arbitration XXVI (2001) (Switzerland no. 33) at 863–868 ¶¶ 10 and 11.
34. *R SA v. A Ltd* (Cour de Justice, Geneva 1999), *in* Yearbook Commercial Arbitration XXVI (2001) (Switzerland no. 33) at 863–868 ¶ 10.
35. *R SA v. A Ltd* (Cour de Justice, Geneva 1999), *in* Yearbook Commercial Arbitration XXVI (2001) (Switzerland no. 33) at 863–868 ¶ 5.
36. *Satico Shipping Company Ltd v. Maderas Iglesias* (Supreme Court 2003), *in* Yearbook Commercial Arbitration XXXII (2007) (Spain no. 57), at 582–590.

arbitration agreement was lacking. The court then placed the burden on applicant to prove that a valid mandate existed.[37] As in *Altain Khuder*, the test of apparent irregularity was applied by the Spanish court and the burden on applicant was increased. The court admitted that, in principle, the applicant should be allowed to cure defects later because access to justice should not be denied on the basis of a "strict and formalistic interpretation" but considered that principle to be trumped by the principle of procedural economy, which "dictates that a party should not be allowed to cure defects when enforcement would still be denied even if the defects were cured."[38,39]

The Italian courts are pragmatic in one way and inefficient in another: if applicant has not complied with the requirements under Article IV, courts will still allow the applicant to submit a new application to cure its omission to submit the documents under Article IV rather than to dismiss the request altogether. Applicant must file a new application as the submission of those documents is considered to be prerequisite for commencing the enforcement proceedings. The Court of Appeal in Florence denied enforcement of an award because applicant had not submitted an original or certified copy of the award – only a photostatic copy of the award was submitted which had not been certified:

> Article IV … is a prerequisite for the commencement of the enforcement proceedings. Non-compliance prevents the granting of an exequatur and can be taken into consideration by the court on its own initiative.[40]

The Italian Supreme Court confirmed the Italian doctrine that defects in the submission of the request for enforcement could not be cured during those same proceedings.[41] The Supreme Court confirmed the Court of Appeal's decision in that Article IV is a prerequisite for commencing the enforcement proceedings, not a condition on which the merits of the request depend.[42] For procedural efficiency, however, courts ought to allow the applicant to cure the defects under Article IV during the proceedings. It does not follow from the scheme of the Convention that Article IV is a prerequisite for enforcement nor could this be established by the drafting history of Article IV. The Italian interpretation is not in line with the effectiveness of international

37. *Satico Shipping Company Ltd v. Maderas Iglesias* (Supreme Court 2003), *in* Yearbook Commercial Arbitration XXXII (2007) (Spain no. 57), at 582–590, ¶¶ 13 and 24.
38. *Satico Shipping Company Ltd v. Maderas Iglesias* (Supreme Court 2003), *in* Yearbook Commercial Arbitration XXXII (2007) (Spain no. 57), at 582–590, ¶¶ 9–10, 13: "[T]hat is, if those errors are indeed errors and are not the consequence of passivity or negligence of or default of the parties."
39. *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd and Another* (Supreme Court of Singapore, High Court 2006), *in* Yearbook Commercial Arbitration XXXII (2007) (Singapore no. 5) at 489–506, ¶¶ 14 and 15.
40. *H. & H. Hackenberg GmbH v. NCS di Sbrolli Franco & C.snc* (Court of Appeal of Florence 1991), *in* Yearbook Commercial Arbitration XXI (1996) (Italy no. 136) at 587–589, ¶¶ 2 and 3. See also *WTB v. Costruire Societa cooperative a responsabilita limitata - CREI* (Court of Appeal in Bologna 1993), *in* Yearbook Commercial Arbitration XXI (1996) (Italy no. 137) at 590–593.
41. *Srl Campomarzio Impianti v. Lampart Veypary Gepyar* (Supreme Court 1995), *in* Yearbook Commercial Arbitration XXIV (1999) (Italy no. 150) at 698–702.
42. *Srl Campomarzio Impianti v. Lampart Veypary Gepyar* (Supreme Court 1995), *in* Yearbook Commercial Arbitration XXIV (1999) (Italy no. 150) at 698–702, ¶ 3.

arbitration. Article IV forms part of the "conditions" referred to in Article III. The Supreme Court of Italy interpreted the Convention's scheme in a different manner:

> [T]his conclusion follows from the special discipline of the enforcement proceedings which can be inferred from a joint reading of Articles IV and V of the Convention. While the former only provides that the party seeking recognition and enforcement of the foreign arbitral award shall submit the original award and arbitration agreement at the time of application, Article V provides for the cases, other than the failure to comply with the above, in which recognition and enforcement may be refused.[43]

The Swiss courts allow the applicant to cure defects in the submission of documents later, even in appellate proceedings.[44] The arbitration agreement is most often a copy of the original and in one illustrative case the copy was not certified, but that omission was not criticized by the respondent. An award had been rendered in London between a Swiss party and an Ecuadorian party. The enforcement was sought in Geneva. At first instance, the applicant had only submitted a photocopy of the arbitration agreement. The copy had not been certified. When the applicant appealed, it submitted the original agreement. The Supreme Court finally granted the request for enforcement.[45] The court considered the *lex fori* – which apparently prohibited the submission of new documents in appellate proceedings – but took into account the fact that the authenticity of the arbitral clause was undisputed and that the Court of First Instance "had a copy of the clause in its file when it reached its decision to enforce the award."[46]

In the Indian case of *GEC v. Renusagar*, GEC had submitted only a photostat copy of the arbitral award. Only the first and the last page were certified: the Secretary-General of the ICC had endorsed and signed those pages, as a "certified copy of the original," but the cover letter stated incorrectly that not a copy but the original was enclosed. The High Court of Bombay held:

> It is necessary to bear in mind that while enforcing a foreign award one should not be extremely strict and technical as to the compliance with the requirements of [Article IV(1)(a) of the Convention].[47] (Emphasis added)

In the same spirit, the German Federal Supreme Court held that the matter of certification was "merely a provision concerning evidence."[48] Award debtors should

43. *Srl Campomarzio Impianti v. Lampart Veypary Gepyar* (Supreme Court 1995), *in* Yearbook Commercial Arbitration XXIV (1999) (Italy no. 150) at 698–702, ¶ 4.
44. *A SA v. B Co Ltd and C SA* (Federal Supreme Court 2003), *in* Yearbook Commercial Arbitration XXIX (2004) (Switzerland no. 38) at 834–842.
45. *A SA v. B Co Ltd and C SA* (Federal Supreme Court 2003), *in* Yearbook Commercial Arbitration XXIX (2004) (Switzerland no. 38) at 834–842.
46. *A SA v. B Co Ltd and C SA* (Federal Supreme Court 2003), *in* Yearbook Commercial Arbitration XXIX (2004) (Switzerland no. 38) at 834–842: "[R]efusing the submission of the arbitral clause in the appellate proceedings would have been an act of excessive formalism."
47. *General Electric Company (US) v. Renusagar Power Company (India)*(High Court, Bombay 1988), *in* Yearbook XV (1990) (India no. 18) at 465–492, ¶ 29.
48. *Investor v. Republic of Poland* (Bundesgerichtshof 2000), *in* Yearbook Commercial Arbitration XXVI (2001) (Germany no. 52) at 771–773, ¶ 6.

not be able to rely on immaterial deficiencies to prevent enforcement. Similarly, the United States District Court for the District of Eastern Michigan did not allow the respondent to assert "technical deficiencies to defeat or delay confirmation of a valid award."[49] The United States Court of Appeals for the Second Circuit dismissed the objection that the documents were not authenticated or certified:

> [S]uch interpretation is unnecessarily restrictive and at odds with a common sense reading of the provision. Copies of the award and the agreement, which have been certified by a member of the arbitration panel, provide a sufficient basis upon which to enforce the award and such were supplied in this case.[50]

The Federal Court of Canada granted enforcement in a case in which the formal validity of the copy of the award was not disputed.[51]

The extent to which courts can be pragmatic is strongly fact-based. If courts can, they must adopt a purposive approach and stay clear from an "overly technical approach."[52]

[G] Submission of the Arbitration Agreement (Article IV(1)(b))

> To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application supply … the original agreement referred to in article II or a duly certified copied thereof. (Article IV(1)(b))

Article IV refers to Article II as does Article V(1)(a). First, under Article IV, the court may look at the arbitration agreement or its copy only to ascertain prima facie that there is an agreement. Under Article V(1)(a), the respondent must show that there is no valid agreement between the parties referred to in Article II. Article IV refers to the agreement in Article II. Courts have frequently held that a valid arbitration agreement may be established through the parties' conduct. Courts should interpret Article IV(1)(b) in a similar manner, to align judicial practice under Article IV(1)(b) with Article II (See Chapter III). Finally, if the exchange has taken place through electronic communications, the applicant cannot submit the physical "original." It must then submit hard copies of the email thread and certify that copy. Again, courts should not refuse the request for enforcement for immaterial formal reasons.

49. *Audi-NSU Auto Union AG (Germany) v. Overseas Motors Inc. (USA* (Eastern District of Michigan (South Division) 1977*), in* Yearbook Commercial Arbitration III (1978) (US no. 16) at 291–293, last paragraph: only copies, not certified copies, had been submitted.
50. *Sigval Bergesen as owners of the M/T SYDFONN, FROSTFONN and NORDFONN (Norway) v. Joseph Müller AG (Switzerland)* (2nd Cir. 1983), *in* Yearbook Commercial Arbitration IX (1984) (US no. 54) at 487–494, s. VI.
51. *Trans-Pacific Shipping Co. v. Atlantic & Orient Shipping Corporation (BVI), et al.* (Federal Court of Canada 2005*), in* Yearbook Commercial Arbitration XXXI (2006) (Canada no. 21) at 601–610, ¶ 13.
52. See also (Handelsgericht, Zurich 1990), *in* Yearbook Commercial Arbitration XVII (1992) (Switzerland no. 21) at 584–586, ¶5.

[H] Judicial Application

The Austrian Supreme Court has held that an arbitration clause signed by a person who was authorized to bind the party was a valid arbitration agreement.[53] The court held that "the contract including the arbitral clause is signed in such a manner that it corresponds to the signing by the contractual parties according to Article II(2) of the Convention."[54]

Some courts consider Article IV to be a matter of scope. The Court of Appeal of the Canton of Geneva has held that the "in writing" requirement was a condition precedent to the applicability of the Convention: it relied on a contextual interpretation – with reference to Articles II(2) and V(1)(a) – that "the form of the agreement in writing is one of the conditions for the applicability of the Convention."[55] The court held that Article IV constitutes a preliminary requisite for application of the Convention, which is not something the drafters had in mind.[56]

[I] Submission of the Award (Article IV(1)(a))

> To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of application supply … the duly authenticated original award or a duly certified copied thereof. (Article IV(1)(a))

The successful party in an arbitration must submit the award it seeks to enforce. The drafters did not define which award should be submitted and how: should only the final award be admitted or also any partial award that led to it? Furthermore, the award, if an original is submitted, must be authenticated in order to enable the court to make sure that the signatures are genuine. Does this mean that the signatures must be authenticated as stated in the award or will the court demand the authentication of all arbitrators' signatures even if the original does not contain all the signatures?

If a copy is submitted, that copy must be certified in order to prove that the copy is a true copy of the original. Must the entire copy be certified or only the essential parts thereof? The drafting history is silent on these matters. Many courts, however, have approached these matters in a pragmatic, purposive matter.

53. *Seller v. Buyer* (Oberster Gerichtshof 1991), *in* Yearbook Commercial Arbitration XXI (1996) (Austria no. 9) at 521–523, ¶¶ 6–8.
54. *Seller v. Buyer* (Oberster Gerichtshof 1991), *in* Yearbook Commercial Arbitration XXI (1996) (Austria no. 9) at 521–523, ¶ 2.
55. *Carbomin SA (Switzerland) v. Ekton Corporation (Panama)* (Cour de Justice 1983), *in* Yearbook Commercial Arbitration XII (1987) (Switzerland no. 11) at 502–505, ¶¶ 2–5.
56. *Carbomin SA (Switzerland) v. Ekton Corporation (Panama)* (Cour de Justice 1983), *in* Yearbook Commercial Arbitration XII (1987) (Switzerland no. 11) at 502–505.For further references, see *China Tree Gorges Project Corporation v. Rotec Industries Inc* (District of Delaware 2005*), in* Yearbook Commercial Arbitration XXXI (2006) (United States no. 548), at 1231–1235.