

# Written Arbitration Agreements—What Written Arbitration Agreements?

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This article considers the issue of an oral arbitration agreement in relation to the New York Convention. As Townsend once said “[a]rbitration offers a means to an end, and the end is to the resolution of disputes.”<sup>1</sup> This end would be extremely difficult to achieve without the approval of national courts. Fortunately, with 146 signatory countries signed on the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (The New York Convention), the success of this Convention has attracted businessmen into using arbitration to resolve their disputes. Nevertheless, a voluntary arbitration cannot be commenced without a valid arbitration agreement. Setting out to achieve harmonisation in the enforcement of arbitration agreements, art.II of the New York Convention provides the written requirements to be followed by all 146 signatory countries. Accordingly, written requirements for arbitration are imposed upon all signatory countries and they are obliged under the convention to recognise all arbitration agreements which are made in writing. Article II reads:

- “1. Each Contracting State shall recognize an agreement in writing; under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term ‘agreement’ in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

However, in reality, it is acknowledged that form requirements are not always followed or reflected in business practice. As Lew and Mistelis pointed out that:

“While in certain areas of trade parties often rely on oral agreements, strict form requirements can defeat an agreement to arbitrate, the existence of which is beyond doubt. It has been criticised correctly that the parties can orally agree a page multi-million dollar contract which will be considered to be valid but for the arbitration clause. The arbitration agreement would be invalid

<sup>1</sup> John Townsend, “Quo Vadis Arbitration?” in Albert Jan van der Berg (ed.), *50 years of the New York Convention - ICCA International arbitration Conference*, (Wolters Kluwer, 2009), p.636.

irrespective of whether it can be established that the parties actually agreed on arbitration. A party can enforce the substantive provisions of a contract while being able to walk away from the agreement to arbitrate concluded at the same time.”<sup>2</sup>

To address this issue, increasingly one has witnessed the trend in abandoning the strict written requirements imposed by art.II of the New York Convention and moving towards the recognition of arbitration agreements which are not subject to formalities. This is especially the case since the amendments were made to the UNCITRAL Model Law (The Model law) in 2006 which is followed by some national arbitration laws.

Starting from the amendments made to art.7 of the UNICTRAL Model Law and s.7(1) of the New Zealand Arbitration Amendments Act in 2006, a major change effected by s.4 of the Arbitration (Scotland) Act 2010 and art.1507 of the new French Arbitration Law 2011 (The French Arbitration Law 2011) has seen New Zealand, Scotland and France relax their grips on arbitration agreements over the issue of formalities required for a valid arbitration agreement. This so-called liberal step has caught the eyes of international academics and practitioners as it appears to be contradictory to the arts II and IV of the New York Convention which has laid down the legal framework for recognition and enforcement of convention awards since 1958.

In the case of Scotland, s.4 of the Arbitration (Scotland) Act 2010 provides that

“[a]n ‘arbitration agreement’ is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with arbitration provisions contained in a separate document).”

One year later, similar wordings appear in the new French Arbitration Law 2011. According to art.1507 of the New French Arbitration Law enacted on January 13, 2011 (Le Décret du 13 Janvier 2011, Le Nouveau Droit Francais de l’Arbitrage), in the case of international arbitration, no formality is required as far as arbitration agreements are concerned. Article 1507 reads: “An arbitration agreement shall not be subject to any requirements as to its form.”

However, this “liberal step” is rather different from the requirements practiced in the majority of jurisdictions and international conventions which require written formalities to be fulfilled in order to ascertain the parties’ wishes to subject their dispute to arbitration as seen in s.5 of English Arbitration Act 1996 which states that:

“The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing”,<sup>3</sup>

as well as art.II(1) of the New York Convention mentioned above.

It is clear that New Zealand, France and Scotland have abandoned the written requirements for arbitration agreements laid down in the New York Convention. The immediate question is whether these jurisdictions have moved too fast for the

<sup>2</sup> Julian M. Lew and Loukas A. Mistelis, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), para.7-8.

<sup>3</sup> English Arbitration Act 1996 s.5(1)

purpose of the New York Convention. Although it is accepted that the New York Convention leaves a number of matters to be determined by municipal laws,<sup>4</sup> the issue concerning the formalities of arbitration agreements may not be one of them. Such issue is dealt with in art.II of the Convention with an intention to provide an internationally accepted standard. Under the duties associated with the ratification of the Convention, the standard contained in the New York Convention is supposed to supersede the relevant provisions of municipal law. Article II is no exception.

However, a survey of the arbitration laws of 90 jurisdictions<sup>5</sup> which implement the New York Convention has revealed that the requirements imposed by art.II of the New York Convention and the relevant provision of domestic arbitration legislations are different. This situation is not only limited to the implementation of art.II but also art.IV which requires the party relying on an award to seek recognition and enforcement of the award in another signatory country to supply the enforcing court with the arbitration agreement or a certified copy of it. Clearly this situation is against the intention of the New York Convention and its aim to have consistent jurisprudence when the Convention was introduced.

The purpose of this article is to highlight this issue and seek potential resolution within the New York Convention and the suggested Hypothetical Draft Convention 2008 by examining the issue of oral arbitration agreements and the discrepancy existing in adapting the written requirements imposed by arts II and IV of the New York Convention among different jurisdictions. With the scope of research limited to oral arbitration agreements, the first part of the study will highlight the importance of arbitration agreements and the discrepancy in implementing arts II and IV of the New York Convention. It will be followed by an examination into the impact of the written requirements which may have on the evidence required for the application of recognition and enforcement of arbitral awards. By applying the “more favourable law provision” contained in art.VII, the question whether the relaxation of written requirements on arbitration agreements in New Zealand, France and Scotland has breached their duty under the Convention will be examined. At the end of the research, the author will endeavour to answer the question whether it should be the Convention or the municipal law setting the requirements to be followed in the enforcement of arbitration agreements and, if so, what level of requirements shall be imposed to resolve this discrepancy.

## The importance of arbitration agreements

The importance of an arbitration agreement was highlighted by Lew and Mistelis who stated:

“An arbitration agreement fulfils a number of different functions. First, it evidences the consent of the parties to submit their disputes to arbitration. Second, it establishes the jurisdiction and authority of the tribunal over that of the courts. Third, it is the basic source of the power of the arbitrators. The

<sup>4</sup> Albert van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981), p.123

<sup>5</sup> The choice of the ninety jurisdictions is wholly made on a matter of availability of sources. The author's intention is to present the inconsistency between the Convention and all domestic laws of the signatory countries where possible. However, with the full data is not possible for obvious reasons, a decision was made to look into all the jurisdictions whose domestic laws are available on Kluwer arbitration and some arbitration laws translated by the author's colleagues based in other jurisdictions, such as Mauritius and some Latin American Jurisdictions.

parties can in their arbitration agreement extend or limit the powers ordinarily conferred upon arbitration tribunals according to the applicable national law. In addition, the arbitration agreement establishes an obligation for the parties to arbitrate.”<sup>6</sup>

Lawyers are acutely aware of the importance and significance a written arbitration agreement represents in terms of evidence. The form requirements of an arbitration agreement were understood to be strictly in writing when the New York Convention was first introduced in 1958. The rationale of having arbitration agreements in a written form is threefold. First, it is to ascertain the parties’ intention to subject them to the jurisdiction of arbitration. In plain language, it is to ensure that the parties actually agree to arbitration.<sup>7</sup> Secondly, a valid written arbitration agreement acts as a vital evidence to prove to the tribunal and the court that the parties have elected to have their disputes resolved by the arbitral tribunal, rather than a court. Thirdly, a written arbitration agreement would relieve the parties’ unnecessary burdens in proving the existence and the contents of the agreement. This view is shared by Redfern and Hunter, who highlighted that most international conventions, such as the New York Convention, the UNCITRAL Model Law on International Commercial Arbitration (the Model Law),<sup>8</sup> and Inter-American Convention<sup>9</sup> all contain relevant provisions imposing written requirements for arbitration agreements because:

“A valid agreement to arbitrate excludes the jurisdiction of the national courts and means that any dispute between the parties must be resolved by a private method of dispute resolution, namely arbitration. This is a serious step to take, albeit one that has increasingly become commonplace. Good reasons exist, therefore, for ensuring that the existence of such an agreement should be clearly established. This is best done by producing evidence in writing

...”<sup>10</sup>

Moving away from no form requirements for arbitration agreements in both the Geneva Protocol of 1923 and the Geneva Convention of 1927, the importance of written arbitration agreement was addressed in art.II of the New York Convention. Since its enactment of in 1958, one 146 jurisdictions have ratified the Convention. With the ratification, art.II of the New York Convention has found its way into the national arbitration laws of all of these jurisdictions. In theory, all signatory countries should observe and implement the written requirements in its domestic arbitration as art.II(1) intends to provide a uniform rule which “prevails over any provision of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable.”<sup>11</sup> However, the reality tells a different story.

<sup>6</sup> Lew and Mistelis, *Comparative International Commercial Arbitration* (2003), para.6-2.

<sup>7</sup> Lew and Mistelis, *Comparative International Commercial Arbitration* (2003), para.7-7

<sup>8</sup> The Model Law 1985 art.7(2). Its 2006 amendments contain two choices on the formalities of arbitration agreement which will be discussed in the later section.

<sup>9</sup> Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2009), p.582

<sup>10</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern & Hunter on International Arbitration* (Oxford: Oxford University Press, 2009), para.2.13. Although they also pointed out that the trend in modern national legislation has moved towards the relaxation of this formal requirement.

<sup>11</sup> van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1981), p.173.

## Group One—the need for written arbitration agreements: the majority view

In order to find out whether there is consistent jurisprudence in implementing the written requirements of arbitration agreements imposed by art.II of the New York Convention, a survey was carried out to examine the relevant arbitration laws of ninety jurisdictions which include 87 signatory countries of the New York Convention and three non signatory countries (Iraq, Sudan and Taiwan). The survey reveals that the impacts of art.II can be seen in eighty three out of ninety jurisdictions. These 83 countries all require arbitration agreements to be in writing (see Chart One). They are: Algeria,<sup>12</sup> Argentina,<sup>13</sup> Australia,<sup>14</sup> Austria,<sup>15</sup> Bahrain,<sup>16</sup> Bangladesh,<sup>17</sup> Belarus,<sup>18</sup> Belgium,<sup>19</sup> Bermuda,<sup>20</sup> Brazil,<sup>21</sup> Cambodia,<sup>22</sup> Canada,<sup>23</sup> Chile,<sup>24</sup> China,<sup>25</sup> Colombia,<sup>26</sup> Costa Rica,<sup>27</sup> Croatia,<sup>28</sup> Czech Republic,<sup>29</sup> Denmark,<sup>30</sup> Egypt,<sup>31</sup> Finland,<sup>32</sup> Germany,<sup>33</sup> Greece,<sup>34</sup> Guatemala,<sup>35</sup> Hong Kong,<sup>36</sup> Hungary,<sup>37</sup> India,<sup>38</sup> Iran,<sup>39</sup> Iraq,<sup>40</sup> Ireland,<sup>41</sup> Israel,<sup>42</sup> Italy,<sup>43</sup> Japan,<sup>44</sup> Jordan,<sup>45</sup> Kenya,<sup>46</sup> Kuwait,<sup>47</sup>

<sup>12</sup> The New Algerian arbitration law 2008 Law No.08–09 on the Code of Civil and Administrative Procedure arts 1008 and 1040.

<sup>13</sup> National Code of Civil and Commercial Procedure Law No.17.454 of September 19, 1967 arts 739, 740

<sup>14</sup> International Arbitration Act 1974 (Cth) Act No.136 of 1974 as amended 2010 art.3.

<sup>15</sup> Code of Civil Procedure Pt Six, Chapter Four, Arbitration Procedure (in effect July 1, 2006) art.583

<sup>16</sup> Decree Law No.9 of 1994 with respect to the Promulgation of the Law on International Commercial Arbitration Law art.1.

<sup>17</sup> The Arbitration Act 2001 (Act I of 2001) s.9(2).

<sup>18</sup> Law of Arbitration 1999 art.11.

<sup>19</sup> Judicial Code, Sixth Part: Arbitration (adopted July 4, 1972 and last amended on May 19, 1998) art.1677.

<sup>20</sup> The Bermuda International Conciliation and Arbitration Act 1993, in force June 29, 1993 arts 2, 29.

<sup>21</sup> Law No.9.307 of September 23, 1996 arts 3, 4.

<sup>22</sup> The Commercial Arbitration Law of the Kingdom of Cambodia, adopted by The National Assembly Phnom Penh, March 6, 2006 art.7.

<sup>23</sup> International Commercial Arbitration Act, in force 1991 and current to October 8, 2004 art.7.

<sup>24</sup> Chile Law No.19.971 on International Commercial Arbitration art.7.

<sup>25</sup> Arbitration Law of The People's Republic of China arts 16 and 22.

<sup>26</sup> Law 963 — 2005, arts 70, 71, 118, 119.

<sup>27</sup> Law No.8937, International Commercial Arbitration Law 2011 art.7(2).

<sup>28</sup> Law on Arbitration 2001 art.6

<sup>29</sup> Act No.216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards s.3.

<sup>30</sup> Danish Arbitration Act 2005 Act No.553 of June 24, 2005 on Arbitration s.7

<sup>31</sup> Law No.27 for 1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, as last amended by Law No.8/2000 (Official Gazette No.13, 4 April 2000) art.12.

<sup>32</sup> Arbitration Act (October 23, 1992/967, including amendments to June 27, 2003/689) s.3.

<sup>33</sup> German Arbitration Act 1998 (Book 10 ZPO) (The provisions refer to documents) arts 1029, 1031.

<sup>34</sup> Law 2735/1999—International Commercial Arbitration art.7(3).

<sup>35</sup> Decree Number 67–95 art.10.

<sup>36</sup> Arbitration Ordinance (Cap. 341) 2011 s.19.

<sup>37</sup> Act LXXI of 1994 on Arbitration s.5(3).

<sup>38</sup> The Arbitration and Conciliation Act 1996 (No.26 of 1996) ss.7(3), 44.

<sup>39</sup> The Law on International Commercial Arbitration 1997 arts 1, 7.

<sup>40</sup> Iraqi Civil Procedure Code; Law No.83 of 1969.

<sup>41</sup> Arbitration Act 2010 (No.1 of 2010) s.2.

<sup>42</sup> Arbitration Law 5728—1968 s.1.

<sup>43</sup> Code of Civil Procedure, Book Four, Title VIII, Arbitration, Amended by Legislative Decree of February 2, 2006, No.40 art.808

<sup>44</sup> Arbitration Law 2003 Summary and art.13.

<sup>45</sup> Arbitration Law (Law No.31 of 2001) art.10

<sup>46</sup> The Arbitration Act, 1995—No. 4 of 1995 and s.9(1) of the Amendment 2009s.4(2).

<sup>47</sup> Code of Civil and Commercial Procedure (Law No.38 of 1980) art.184.

Latvia,<sup>48</sup> Lebanon,<sup>49</sup> Libya,<sup>50</sup> Lithuania,<sup>51</sup> Luxemburg,<sup>52</sup> Malaysia,<sup>53</sup> Malta,<sup>54</sup> Maritania,<sup>55</sup> Mauritius,<sup>56</sup> Mexico,<sup>57</sup> Morocco,<sup>58</sup> The Netherlands,<sup>59</sup> Nigeria,<sup>60</sup> Oman,<sup>61</sup> Pakistan,<sup>62</sup> Paraguay,<sup>63</sup> Peru,<sup>64</sup> Poland,<sup>65</sup> Portugal,<sup>66</sup> Qatar,<sup>67</sup> Romania,<sup>68</sup> Russia,<sup>69</sup> Saudi Arabia,<sup>70</sup> Serbia,<sup>71</sup> Singapore,<sup>72</sup> Slovenia,<sup>73</sup> South Africa,<sup>74</sup> South Korea,<sup>75</sup> Spain,<sup>76</sup> Sri Lanka,<sup>77</sup> Sudan,<sup>78</sup> Switzerland,<sup>79</sup> Syria,<sup>80</sup> Taiwan,<sup>81</sup> Thailand,<sup>82</sup> Tunisia,<sup>83</sup> Turkey,<sup>84</sup> Uganda,<sup>85</sup> Ukraine,<sup>86</sup> UAE,<sup>87</sup> England,<sup>88</sup> USA,<sup>89</sup> Venezuela,<sup>90</sup> Vietnam,<sup>91</sup> Yemen,<sup>92</sup> Zambia<sup>93</sup> and Zimbabwe.<sup>94</sup>

Taking a few jurisdictions as examples, art.16 of the Chinese Arbitration Law 1994 provides that a valid arbitration agreement not only has to be in writing but also needs to contain other necessary information stipulated in second paragraph of the provision before arbitration can commence. It reads:

<sup>48</sup> The Law of the Republic of Latvia, Civil Procedure Law Part D: Arbitration Court 1999 arts 492, 514.

<sup>49</sup> New Code of Civil Procedure (Decree-Law No.90/83) 1985 art.766

<sup>50</sup> New Draft Law on Arbitration 2009 art.583.

<sup>51</sup> The Republic of Lithuania Law on Commercial Arbitration - April 2, 1996 art.9(2).

<sup>52</sup> New Code of Civil Procedure arts 1224–1251 (1998)art.1250.

<sup>53</sup> Arbitration Act 2005 (Act 646) s.9(2).

<sup>54</sup> Malta Arbitration Act [Ch.387] 1996 ss.2, 29.

<sup>55</sup> Loi mauritanienne portant code de l'arbitrage (No 2000-06) art.6(1).

<sup>56</sup> International Arbitration Act 2008 Act No.37 of 2008 art.4(1)(b).

<sup>57</sup> Code of Civil Procedure for the Federal District 2009 art.1423.

<sup>58</sup> Law No.05–08 Relating to Arbitration and Conventional Mediation arts 313, 327–347.

<sup>59</sup> The Netherlands Arbitration Act, in force December 1, 1986 and current to June 30, 2004 art.1021.

<sup>60</sup> Arbitration Amendment Act 2007 s.1(1).

<sup>61</sup> Sultanati Decree No.47/97 Promulgating the Law of Arbitration in Civil and Commercial Disputes art.12.

<sup>62</sup> Recognition and Enforcement (Arbitration agreements and Foreign Arbitral Awards) Ordinance 2005 — 2005 s.4.

<sup>63</sup> Law n° 1879/02 for Arbitration and Mediation 2002 arts 3, 10.

<sup>64</sup> Legislative Decree No.1071 Legislative Decree Regulating Arbitration 2008 art.13(2).

<sup>65</sup> Code of Civil Procedure Pt Five, as amended July 28, 2005 arts 1162(1), 1197(3).

<sup>66</sup> Portuguese Arbitration Law N° 63/2011 of December 14, 2011 art.2(1).

<sup>67</sup> Code of Civil and Commercial Procedure 1990 art.190.

<sup>68</sup> Book IV, Code of Civil Procedure arts 340–370. On Arbitration (as amended by Law No.59 of July 23, 1993) arts 343, 361.

<sup>69</sup> Law of the Russian Federation on International Commercial Arbitration 1993 art.7(2).

<sup>70</sup> Rules for the Implementation of the Saudi Arabian Arbitration Regulation 1985 s.6.

<sup>71</sup> Arbitration Act 2006 art.12.

<sup>72</sup> International Arbitration Act Revised Edition 2002, incorporating amendments as at January 1, 2010, ss.2, 27.

<sup>73</sup> Law on Arbitration of Slovenia 2008 art.10(2).

<sup>74</sup> Recognition and Enforcement of Foreign Arbitral Awards Act 1977 [South African]. No.40 of 1977 (Assented to March 25, 1977.) Date of Commencement: April 13, 1977 s.1.

<sup>75</sup> Arbitration Act of Korea 1999 art.8(2).

<sup>76</sup> Consolidated Arbitration Law 2011 art.9(3).

<sup>77</sup> Arbitration Act No.11 of 1995 s.3(2).

<sup>78</sup> Arbitration Act of 2005 (Law No.15/2005) s.8.

<sup>79</sup> Swiss Private International Law Act Ch.12: International Arbitration (and selected articles) 18 December 1987 art.178.

<sup>80</sup> Arbitration Act (Law No.4 of 2008) art.8.

<sup>81</sup> Arbitration Act 1998 art.1(2).

<sup>82</sup> Arbitration Act, BE 2545 (AD 2002), as in force from April 30, 2002 s.11.

<sup>83</sup> Arbitration Code (Promulgated by Law No.93-42), art.6.

<sup>84</sup> International Arbitration Law (Law No.4686 of June 21, 2001) 2001 art.4.

<sup>85</sup> The Arbitration and Conciliation Act 2000 s.4.

<sup>86</sup> Law on International Commercial Arbitration 1994 art.7(2).

<sup>87</sup> Draft Federal Arbitration Law 2009,art.12.

<sup>88</sup> Arbitration Act 1996 ss.5, 100(2)(a).

<sup>89</sup> Federal Arbitration Act 1925 s.2.

<sup>90</sup> Law on Arbitration 1999 art.6(1).

<sup>91</sup> Law 54 on Commercial Arbitration 2010 art.16(2).

<sup>92</sup> Law on Arbitration in Civil and Commercial Matters 2010 art.15.

<sup>93</sup> Arbitration Act, Government of Zambia Act No.19 of 2000 ss.2, 9, 30(1)(b).

<sup>94</sup> Arbitration Act 1996 art.7.

“An arbitration agreement includes an arbitration clause included in the contract, and an agreement on submission to arbitration that is concluded in other written forms before or after the dispute arises.

An arbitration agreement shall contain the following particulars: an expression of the intention to apply the following particulars:

- (1) an expression of the intention to apply for arbitration;
- (2) matters for arbitration; and
- (3) a designated arbitration commission.”

In the case of England, s.5 of English Arbitration Act 1996 provides that Pt One of the Act applies

“only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing”.<sup>95</sup>

Apart from stipulating the written requirements, the Act also provides an extensive explanation what constitutes “in writing”.<sup>96</sup> It stipulates:

- “(2) There is an agreement in writing—
  - (a) if the agreement is made in writing (whether or not it is signed by the parties),
  - (b) if the agreement is made by exchange of communications in writing, or
  - (c) if the agreement is evidenced in writing.
- (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
- (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
- (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
- (6) References in this Part to anything being written or in writing include its being recorded by any means.”

Similarly, art.7(2) of the Chilean International Commercial Arbitration Law sets out the written requirements of an arbitration agreement. The definition of “in writing” requires an arbitration agreement to be in the form of an arbitration clause in a contract or in the form of a separate agreement. It also covers an agreement which is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. Furthermore, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement will also fulfil the written requirements

<sup>95</sup> English Arbitration Act 1996 s.5(1).

<sup>96</sup> English Arbitration Act 1996 s.5(2)–(6).

providing that the contract is in writing and the reference is such as to make that clause part of the contract.<sup>97</sup> This requirement is also upheld by the German Federal Court which pointed out that the recognition and enforcement of the arbitral awards can be refused if the parties had dispute over whether the form requirements are fulfilled.<sup>98</sup>

Clearly, the survey shows that the written requirements stipulated in art.II of the New York Convention are implemented by most surveyed jurisdictions. This has not only rebutted van der Berg's statement made at ICCA International Arbitration Conference in 2009 that

“the written form required by Article II of the NYC for the arbitration agreement is stricter than almost any national country of origin may import parochial annulment”<sup>99</sup>

but also proven that the minimum written requirement as listed in art.II of the New York Convention has firmly established in most jurisdictions. However, the survey demonstrates a dichotomy where some jurisdictions adhere to the minimum written requirement as stated in art.II, whereas some jurisdictions impose further requirements alongside the written requirements. For instance, art.16 of the Chinese Arbitration Law 1994 imposes further detailed information than the written requirement for arbitration agreement, such as parties' express consent, the disputes and designated arbitration institution. As no mechanism in place to stop jurisdictions adopting more stringent requirements than those contained in art.II, failing to observe those domestic requirements will lead to the invalidity of arbitration agreement. Consequently, the intended effect of art.II can be limited. With more stringent requirements in place in domestic laws, the influence of art.II NYC will not prevent the possibility of annulments on grounds of lack of formal requirements.

## **Group Two—what need? No need for written arbitration agreements: the minority view**

Following the impacts of the invention of new technology on the formation of arbitration agreements as well as the introduction of the UNCITRAL Model Law on Electronic Commerce in 1996 and the United Nations Convention on the Use of Electronic Communications in International Contracts in 2005, it is agreed that an arbitration agreement can not only be made in traditional written form, but also by telex, fax, email or an electronic communication which can be recorded.<sup>100</sup> Although the majority of the jurisdictions surveyed in this study adapt the written requirements, a minority group of jurisdictions have chosen to abandon written requirements by claiming that written agreement is a thing of the past.<sup>101</sup> According to the survey, 7 out of the 90 jurisdictions do not provide expressed statutory written requirements. Among these seven jurisdictions, four countries; namely,

<sup>97</sup> Chilean Law No.19.971 on International Arbitration Law.

<sup>98</sup> This case was discussed in Lew and Mistelis, *Comparative International Commercial Arbitration* (2003), para.26-62.

<sup>99</sup> Albert Jan van der Berg, “Hypothetical Draft Convention on International Enforcement of arbitration Agreements and Awards” in Albert Jan van der Berg (ed.), *50 years of the New York Convention - ICCA International arbitration Conference* (2009), p.649.

<sup>100</sup> Option 1 of art.7 of the Model Law provides: “An agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.”

<sup>101</sup> See the later discussion on France, New Zealand and Scotland.



Bulgaria, Norway, South Africa, Sweden are silent on this particular issue. Other three jurisdictions, France, New Zealand, Scotland, offer express provisions requiring no formalities for arbitration agreements. The changes brought into these three jurisdictions can be traced back to The Amendments of the Model Law 2006.

### *Option II of art.7 of the Model Law*

Option II of art.7 of the Model Law started the trend in removing the written requirements imposed on arbitration agreements by art.II(1) of the New York Convention. It reads:

“Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

The impacts of this Option can be seen in some recently enacted arbitration laws below.

### *New Zealand*<sup>102</sup>

New Zealand Arbitration Act 1996 s.2(1) allows an arbitration agreement taking the form of an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship. In its 1996 Act, the term oral arbitration agreement was not expressly provided. However, in its later amendment in 2006, art.7(1) of the First Schedule concerning the Rules became the first domestic legislation expressly allowing oral arbitration agreements. It reads:

“(1) An arbitration agreement may be made orally or in writing. *Subject to section 9*, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

This provision was incorporated with an intention to ensure that New Zealand remains up to date with international best practice as well as update Arbitration Act 1996 (the 1996 Act) in order to reflect recent changes in art.7 of the UNCITRAL Model Law in 2006 which introduces no written requirements for arbitration agreements. This change justifies its choice of the Option II of the amendment of the Model Law which provides a more general wording, contrasting with Option 1,<sup>103</sup> that arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The relevant provision accommodating the change made to the formality of the arbitration agreements can also be seen at the stage of enforcement with the phrase “if it is in writing” inserted with the reference to the issue of arbitration agreement at the recognition and enforcement stages in s.35 of the Amendments Arbitration Act 2006. It provides that if the arbitration agreement is recorded in writing, the

<sup>102</sup> However, Arbitration Act 1996 s.11(1)(c) and Arbitration Amendment 2007 s.5 provide that consumer arbitration agreement has to be in writing.

<sup>103</sup> Option 1 of art.7(1) of the Model Law reads: “The arbitration agreement shall be in writing.”

original arbitration agreement or a duly certified copy of the agreement has to be submitted to the enforcing court. Clearly, this provision takes the reference to an oral arbitration agreement stipulated in s.7(1) into consideration and allows the possibility of an oral arbitration agreement at the later enforcement stage. In other words, a written agreement is only required at the initial stage of arbitration proceedings and at the final stage of recognition and enforcement of arbitration agreement if it is made in written form. If not, arbitration proceedings can be carried out on the basis of an oral agreement and an award can be enforced with the production of the award only. Section 35 of the Arbitration Amendment Act successfully avoids the potential conflicts arising from the applications of ‘no written formalities’ stipulated in art.7 of the First Schedule of the Arbitration Act 1996 and art.IV of the New York Convention which expressly lists the documents needed to be submitted to the enforcing court at the recognition and enforcement stage.<sup>104</sup>

### *Scotland and France*

This liberal move was followed by Scotland in 2010 and France in 2011. Though abandoning its Model Law country status, Scotland decided to include Option II of art.7 of the Model Law into its new arbitration law. Section 4 of the Arbitration (Scotland) Act 2010 provides that

“[a]n ‘arbitration agreement’ is an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with arbitration provisions contained in a separate document.”

Accordingly to this provision, there is no specific form required for a valid arbitration agreement. It can be made in writing, oral and any forms which express parties’ wishes to submit their disputes to arbitration. The recognition of both oral and written agreements as a valid arbitration agreement is confirmed in the Policy Memorandum which reads:

“At present Scots law generally recognises both oral and written agreements to refer to arbitration. The policy of the Bill is that arbitration agreements should continue to be recognised whether they are concluded orally or in writing so that all arbitration in Scotland benefit from the provisions in the Bill (Although the general law may require some arbitration agreements to be in writing). If oral agreements were not recognised, they would continue to be subject to the present unsatisfactory common law and would not benefit from the provisions in the Bill.”<sup>105</sup>

The background of this provision follows the abolishment of proof by writ or oath in s.11 of the Requirements of Writing (Scotland) Act 1995 according to the recommendation made by the Scottish Law Commission.<sup>106</sup> Section 11 reads:

<sup>104</sup> The New York Convention art.IV provides: “To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) ...; (b) The original agreement referred to in article II or a duly certified copy thereof.”

<sup>105</sup> *Policy Memorandum* (January 29, 2009) paras 70–71. Also Hong-Lin Yu, *Commercial Arbitration — International and Scottish Perspectives* (DUP, 2011), p.41.

<sup>106</sup> William W. McBryde, *The Law of Contract in Scotland*, 3rd edn (Edinburgh: W. Green, 2007), para.2-35–2-36.

“Any rule of law and any enactment whereby the proof of any matter is restricted to proof by writ or by reference to oath shall cease to have effect.”

As s.1 of the Act points out that, considering most promises made in the course of business are not in writing, writing is only required for trusts, conveyances, the making of any will, employment, consumer credit, package holiday, timeshares, for a unilateral obligation for the creation, transfer, variation or extinction of a real right in land; and for a gratuitous unilateral obligation, exception an obligation undertaken in the course of business.<sup>107</sup> Arbitration Agreements do not fall into those categories, therefore they do not require to be in writing.

With oral arbitration agreements recognised as a valid form in which to submit dispute to arbitration, potential disputes between the disputing parties over the existence of an oral arbitration agreement has to be addressed, especially in the case where one party denied the existence of the oral arbitration agreement. In Scotland, the standard applied to prove the existence of an oral arbitration agreement rests the application of “balance of probabilities”.<sup>108</sup> The balance of probabilities only requires the party “prove that the fact in question is ‘more likely than not, even marginally so’”<sup>109</sup> hence, it allows both tribunal and the judges to decide whether the party claiming the existence of an oral arbitration agreement can convince them that an oral arbitration was reached between the parties from the evidence provided by the parties. Furthermore, the party does not have to be corroborated as long as the court feels confident to proceed with the case before them.<sup>110</sup> This standard does not impose upon the claiming party an absolute undertaking or require him to prove the existence beyond reasonable doubts. The claiming party only needs to prove 51 to 49 in favour of his claim then the standards are satisfied. The standards applied are what Lord Brandon stated in *Rhesa Shipping Co S.A v. Edmunds*:

“The legal concept of proof on the balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not.. If a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.”<sup>111</sup>

Once the probabilities are established in the mind of the tribunal or the judges, the tribunal will proceed with arbitration and the court will proceed with the proceedings to recognise and enforce the agreement.

Being famous as an arbitration friendly country, France also joined this minority group and removed the written requirements imposed by art.II of the New York Convention. Article 1507 of the New French Law 2011 grants an oral arbitration

<sup>107</sup> Also see Fraser Davidson, *Evidence* (Edinburgh: W. Green, 2007), para.7.16

<sup>108</sup> However, the former law continues to apply to writings made prior to August 1, 1995.

<sup>109</sup> *Miller v Minster of Pensions* [1947] 2 All E.R. 372 at 374.

<sup>110</sup> *Taylor v Taylor* 2000 S.L.T. 1419 at [14].

<sup>111</sup> *Rhesa Shipping Co S.A v. Edmunds (The Popi M)* [1985] 1 W.L.R. 948 at 956.

agreement the same status as its written form in international arbitration. It reads: “An arbitration agreement shall not be subject to any requirements as to its form.” By confirming that an arbitration agreement is not subject to any condition of form, this provision achieves its aim to consolidate art.1495 of the 1981 Decree and the French case law in the matter of the form requirements of arbitration agreements.

With the development in the French, Scottish and New Zealand arbitration laws, it appears that the traditional legal framework set up by the New York Convention which imposes “in writing” requirement is under challenge. Clearly, this development splits the jurisdictions of this survey into two groups; one group requires arbitration agreements to be in writing and the other does not. Does this situation indicate that these three jurisdictions move too fast and have gone beyond the New York Convention Regime for recognition and enforcement of arbitral awards? To answer this question, further legal analysis will be made by two aspects; namely, art.IV of the New York Convention, the national legislations implementing this article and art.VII of the New York Convention.

## **The impacts of art.IV of the New York Convention on the form of arbitration agreements**

Article IV(1) reads:

- “1. 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:
  - (a) The duly authenticated original award or a duly certified copy thereof.
  - (b) The original agreement referred to in article II or a duly certified copy thereof.

Article IV(1) is to set the evidential requirements procedures for recognition and enforcement of New York Convention awards. The party relying on the award and seeking recognition and enforcement of the award is required to provide the enforcing court a copy of the award and a copy of an arbitration agreement. Although the party is not required to prove the validity of the arbitration agreement, the agreement referred to in art.II has to be submitted in the written form to fulfil the procedural requirements for recognition and enforcement. This provision is said to impose minimum formal requirements<sup>112</sup> and shall prevail over stricter national law in respect of convention awards.<sup>113</sup>

According to the second part of the survey examining how art.IV(1) is implemented by the 90 jurisdictions, it was revealed that 69 jurisdictions require the submission of the original arbitration agreement of a duly certified copy of it along with the award when recognition and enforcement of arbitral awards is sought. They are: Algeria, Australia, Austria, Bahrain, Belgium, Cambodia, Chile, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Guatemala, Hong Kong, India, Indonesia, Ireland, Israel, Italy, Jordan, Kenya, Kuwait, Latvia, Lebanon, Libya (non-signatory country), Lithuania, Luxemburg, Malaysia, Malta,

<sup>112</sup> Lew and Mistelis, *Comparative International Commercial Arbitration* (2003), para.26-58. A discussion of this issue will be conducted in later section.

<sup>113</sup> Lew and Mistelis, *Comparative International Commercial Arbitration* (2003), para.26-58

Mauritania, Mauritius, Mexico, Morocco, The Netherlands, Nigeria, Oman, Pakistan, Paraguay, Poland, Portugal, Qatar, Russia, Saudi Arabia, Scotland, Serbia, Singapore, Slovenia, South Africa, South Korea, Sri Lanka, Switzerland, Sudan (non-signatory), Syria, Taiwan (non-signatory), Thailand, Tunisia, Turkey, UAE, Uganda, Ukraine, England, USA, Venezuela, Vietnam, Yemen and Zimbabwe. Among them, 61 out of 69 jurisdictions requires the submission of arbitration agreement and arbitral award as evidence, 8 other jurisdictions (India, Indonesia, Latvia, Oman, Sudan, Syria, Taiwan and Yemen) require further documents as evidence. Another 13 out of the 90 jurisdictions which are the signatory countries of the New York Convention but do not list any requirements in the relevant domestic arbitration laws.<sup>114</sup> As they are the signatory countries of the New York Convention, based on their convention duty, it is reasonable to assume that the minimum requirements dictated by art.IV of the New York Convention will be followed by those jurisdictions at the stage of recognition and enforcement proceedings. The survey also finds that Iraq which is not the signatory country of the New York Convention does not have specific provisions governing the evidence to be submitted for recognition and enforcement. Hence, it would be difficult to judge what documents the Iraqi court would require if the winning party would like to enforce a foreign award. Interestingly, the survey shows that there are seven jurisdictions which have less strict requirements than those listed in art.IV(1) of New York Convention and do not require the original arbitration agreement or a duly certified copy of it to be submitted as the evidence required for recognition and enforcement of arbitral awards. They are: Costa Rica, Hungary, Japan, New Zealand, Norway, Peru and Romania. For Costa Rica,<sup>115</sup> Hungary,<sup>116</sup> Japan<sup>117</sup> and Peru,<sup>118</sup> only awards are required. In the case of New Zealand, s.35(1)(b) of Arbitration Amendment Act 2006 provides that arbitration agreement is only required if it is made in writing. For Norwegian courts, awards are required but arbitration agreement may not.<sup>119</sup> Finally, according to the Romanian law, art.171 does not require the arbitration agreement to be submitted but it goes beyond the minimum requirements of art.IV and requires the party replying on the award to provide: (a) the copy of the foreign decision; (b) the proof of its final character; (c) the copy of the proof of the summons having been served and of the notification act having been communicated to the party which was not present in the foreign instance, or any other official act attesting that the party against which the decision was given knew of the summons and the notification act in due time; and (d) any other act to prove further that the foreign decision meets all the other conditions under Article 167.<sup>120</sup> (See Appendix Two).

From this survey, one can see that the minimum requirements suggested by Lew and Mistelis and set in art.IV are not strictly complied by all signatory countries of the New York Convention. Some jurisdictions have introduced fewer

<sup>114</sup> Argentina, Bangladesh, Belarus, Bermuda, Brazil, Bulgaria, China, Colombia, Croatia, Czech Republic, Iran, Ireland, Spain, Sweden, Zambia.

<sup>115</sup> International Commercial Arbitration Law Based on the UNCITRAL Model Law, Law 8937 of 2011, in effect from May 25, 2011, Costa Rica, art.35.

<sup>116</sup> Act LXXI of 1994 on Arbitration, Hungary, s.60.

<sup>117</sup> Arbitration Law 2003, Japan, art.46(2).

<sup>118</sup> Peruvian Arbitration Law arts 68 and 76.

<sup>119</sup> Arbitration Act of May 14, 2004, Norway, s.45

<sup>120</sup> Arbitration of Private International Law Book IV, Code of Civil Procedure arts 340–370 on Arbitration (as amended by Law No.59 of July 23, 1993, Romania).

requirements while others have introduced further requirements than art.IV intends to have. This can be seen in the survey that 61 out of 90 jurisdictions set the similar requirements as those listed in art.IV but the rest of the minority jurisdictions either requires more documents to be submitted or simply waive the party the obligation to supply the original arbitration agreement or a certified copy of it to the enforcing court at the stage of recognition and enforcement.

Before moving on, one question which should be investigated is whether it should be the minimum or maximum requirements introduced by art.IV. Suppose, it is the minimum requirements art.IV wishes to introduce, what would happen is that all signatory countries are allowed to add further required documents to the list to be submitted the enforcing courts for recognition and enforcement as India, Indonesia, Latvia, Oman Syria, Sudan, Yemen and Romania have done. Consequently, a party who wishes to enforce the award will have to follow different domestic evidential requirements to provide other documents along with the required original copy of the awards and arbitration agreements or certified copies of them. Putting the aim of harmonisation into this context, it is beggar's belief that Art.IV was introduced to set minimum requirements to allow domestic laws to add further required documents to the existing list. On the contrary, the author is of the opinion that art.IV was enacted to set the maximum requirements to be followed by all signatory countries in order to harmonise evidential requirements in all jurisdictions. Only such interpretation can reflect the jurisprudence of an international convention. With the maximum requirements set, by means of 'more favourable law' principle in art.VII of the New York Convention, national arbitration laws will have the power to remove the required documents listed in art.IV but not allowed to introduce further evidence required. Ideally, this should be the practice art.IV would like to see, but clearly different requirements have been applied by various jurisdictions. Hence, complication arises.

### **How complicate can it get with different requirements introduced by national arbitration laws?**

Combine these findings with the issue of the written requirements of arbitration agreement imposed by art.II of the New York Convention, one can see that some unnecessary complications may arise or may have already arisen at the stage of recognition and enforcement. The party's obligation of supplying the enforcing court the original arbitration agreement or a certified copy of it under art.IV(1)(b) of the New York Convention was upheld in various cases, such as *China Minmetals v Chi Mei*.<sup>121</sup> Such obligation raises the question of whether an oral arbitration agreement is sufficient for the purpose of application for recognition and enforcement of arbitral awards. Generally, it is accepted that verbal acceptance is insufficient under art.IV of the New York Convention.<sup>122</sup>

The difficulties associated with oral arbitration agreements can surface when, occasionally, the party who wish to rely on the award to apply for recognition and

<sup>121</sup> *China Minmetals materials Import and Export and Export Co Ltd v Chi Mei Corp* 334 F. 3d 274.

<sup>122</sup> Dirk Otto, "Article IV" in Herbert Kronke, Patrik Nacimiento (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), p.158. But it may be recognised as a valid arbitration under art.VII of the New York Convention which will be discussed in the next section.

enforcement of such award may not be in a position to supply the enforcing court the written arbitration agreement as required. There may be a situation where the written arbitration agreement was destroyed, or one party commenced the arbitration proceedings without producing a written arbitration agreement and the other party participated in the proceedings without disputing the existence of the arbitration agreement but later, at the enforcement stage, raised the issue of non-existence of a written arbitration agreement. Alternatively, a case where a losing party to the arbitral award participated the arbitration proceedings but objected to the jurisdiction of the tribunal on the basis of the lack of written arbitration agreement. It is doubtful that courts would uphold the existence of the arbitration agreement in this scenario. However, a different conclusion can be reached if a respondent decide to submit substantive claims and plead the opposite from the ones claimed by the claimant after objecting to the tribunal's jurisdiction on the ground of lack of written arbitration agreement between the parties. This is because the submission of substantive claims and the relevant pleadings without objecting to the issue of jurisdiction will be viewed as voluntary submission to the jurisdiction of the arbitral tribunal.

The issues arising from written requirements do not usually happen in an institutional arbitration. This is because parties are usually required to sign the terms of reference,<sup>123</sup> despite the fact there is no written arbitration agreement. In such a situation, the terms of reference can be viewed as a written arbitration agreement between the parties even if the losing party later raised the objection due to lack of written arbitration agreement. This is because the terms of reference can be interpreted as a waiver of its right to object on jurisdiction grounds. However, such presumption will not sustain the attack raised by one party who participated the arbitration proceedings but expressly objected to the tribunal's jurisdiction on the ground of non-existence of written arbitration agreement.

More problems may arise in an ad hoc arbitration which sees no duty for both parties to complete the terms of reference as a condition to initiate arbitration proceedings. There may be a situation where the claimant commenced an ad hoc arbitration, though the respondent took part in the proceedings but raised an objection to the jurisdiction at the stage of enforcement under arts II and IV of the New York Convention.

Putting these potential issues in the context of the survey, no foreseeable difficulties can be seen if an arbitration based on an oral arbitration agreement is held in a jurisdiction which has no form requirements for arbitration agreements, such as France or Scotland and the winning party wishes to make a request for recognition and enforcement of arbitral awards in a jurisdiction, such as New Zealand, which does not require the arbitration agreement to be submitted as evidence. With New Zealand as the enforcing court, both ss.7(1) and 35(1) of Arbitration Amendments Act 2006 allows the parties not to rely on a written arbitration agreement at both stages as stated before.

However, a different conclusion will be drawn upon if an arbitration based on an oral agreement is held in one of the jurisdictions which imposes no form requirements for arbitration agreement but the recognition and enforcement of the arbitral award is sought in another country which requires the party relying on the

<sup>123</sup> ICC Rules 2012 art.23

arbitral awards to submit the original arbitration agreement or a certified copy of it as evidence. Under these circumstances, the party applying for recognition and enforcement of the arbitral award may face difficulties in providing the court with the required arbitration agreement in order to satisfy the evidential proceedings. Suppose, an arbitration based on an oral arbitration agreement is held in New Zealand which imposes no written requirement but recognition and enforcement of award is sought in 1 of the 83 countries which requires arbitration agreements to be in writing or in one of the eighty two jurisdictions which requires the original copy of arbitration agreement or a certified copy of it to be supplied to fulfil the evidential requirements for the application of recognition and enforcement of convention awards. Under these circumstances, the winning party to the award made in New Zealand will not be able to satisfy the relevant evidential requirements or the form requirements imposed to obtain the recognition and enforcement of convention awards in those jurisdictions.

The latter scenario represents an omission in the Scottish and French laws in terms of the evidence required to be submitted for recognition and enforcement request, considering that both jurisdictions allow oral arbitration agreement to be the legal basis for the jurisdiction of arbitration. In France, referring to international arbitral awards, it is confusing that an oral arbitration agreement is recognised as a valid form to initiate arbitration proceedings but the arbitration agreement is still required as evidence for recognition or enforcement of arbitral awards. Accordingly, art.1514 of the French 2011 Decree requires the party relying on the award to prove the existence of the award before the award can be recognised. It stipulates:

“An arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy.”

Furthermore, its existence has to be proven by “producing the original awards, together with the arbitration agreement, or duly authenticated copies of such documents” in accordance with art.1515.<sup>124</sup> A similar problem can also be caused by the application of s.21 of the Scottish Arbitration Law 2010 which reads:

“A person seeking recognition or enforcement of a Convention award must produce (a) the duly authenticated original award (or a duly certified copy of it), and (b) the original arbitration agreement (or a duly certified copy of it).”

As discussed, to arbitrate on the basis of an oral arbitration agreement and seek recognition and enforcement of the award in another jurisdiction may not incur any problems if both parties mutually agreed and fully participated arbitration proceedings. This is because the losing party’s full participation can be interpreted as a voluntary submission to the jurisdiction of arbitration. If there are any doubts, both parties can even conclude a written arbitration agreement before the arbitration proceedings in order to fulfil the requirements imposed by art.II of New York Convention. Problems will certainly arise if the losing party did not take part in the arbitration proceedings or simply participated under the objection to the tribunal’s jurisdiction on the ground of invalidity of arbitration agreement. If this happens, the winning party will not be able to obtain co-operation from the losing

<sup>124</sup> The New French Decree 2011 art.1515



party to prove the existence of the oral agreement. Consequently, the winning party will not be able to fulfil the written requirements under art.II and the evidential requirements imposed by art.IV of the New York Convention.

### **The impacts of art.VII of the New York Convention on written requirements**

On the face of it, New Zealand, Scotland and France appear to have moved too fast than what the New York Convention intends to facilitate. However, the conclusion cannot be drawn without examining the issue of oral arbitration agreement from the perspective of art.VII of the Convention. Article VII reads:

“The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting states nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

This provision sets out the principle of “more favourable law” or “more favourable right” which allows the winning party to take advantage of more lenient local law than the provisions of the New York Convention. Putting this into the context of the written requirements, suppose, an arbitration is held in a jurisdiction or is subject to the law requiring arbitration agreement to be in writing but the request for recognition and enforcement is made in another jurisdiction which does not require a written arbitration agreement, i.e. does not strictly follow the minimum requirements imposed by art.IV of the New York Convention. Very likely, under these circumstances, the award under an oral agreement will be enforced by such enforcing court. But, does this mean that the enforcing court has breached its obligations under the convention or a solution can be resolved by the application of art.VII of New York Convention?

#### *The traditional view*

Traditionally, the signatory countries of the New York Convention are expected to follow the duty imposed by the Convention to every letter. The success and popularity enjoyed by international commercial arbitration lies in art.I of the New York Convention 1958 (the Convention) which establishes a framework of recognition and enforcement of arbitral awards among the signatory countries and imposes them obligations to recognise and enforce the arbitral awards made in another signatory country.<sup>125</sup> It reads:

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral

<sup>125</sup> More discussions, see Hong-Lin Yu, “Is the Territorial Link between Arbitration and the Country of Origin Established by Articles I and V (1) (e) Being Distorted by the Application of Article VII of the New York Convention?” (2002) 5 *International Arbitration Law Review* 196

awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

The wording of “*made in the territory of a State*” is a clear intention to anchor international commercial arbitration to the place where arbitration is held. Such design was seen as a limited notion slowing down the progressive idea of truly international arbitral awards. Since 1958, this limited notion has dominated the practice of arbitration by emphasising the importance of the involvement of national law. For instance, supporting the territorial link between arbitration and states in geographical term, van der Berg stated that

“arbitration, international as it may be, needs at least a supporting judicial authority (*autroité d'appui*), which is, failing an international authority competent in this respect, necessarily a national court. For example, the assistance of a national court may be needed for the appointment, replacement or challenge of an arbitrator.”<sup>126</sup>

He also directly pointed out that such a link shall exist between arbitration and the country where the arbitration is held, because

“it is a generally accepted principle of the international division of judicial competence that the court of the country under the arbitration law of which the arbitration is to take, is taking or took place, is the competent judicial authority in relation to arbitration. If the applicability of an arbitration law is excluded, it will be difficult to find such court.”<sup>127</sup>

By saying

“... it is to be noted that none of the arbitral institutions which are specialised in international commercial arbitrations provide that the arbitrations conducted under their Arbitration Rules are entirely detached from the ambit of any national arbitration law”<sup>128</sup>,

he dismissed the argument invoking the idea that the avenue of “internationalised” arbitration was opened by arbitration rules of an arbitral institution.

Putting this view in the context of written requirements, the traditional view demands arbitration agreements to fulfil the written requirements stipulated in the law governing arbitration agreement, the law of the place of arbitration and furthermore, the law of the enforcing court. If any of these laws dictate the written requirements, then an arbitration agreement is required to be in writing. Otherwise, the award made on the basis of lack of written formalities will risk being set aside by the court of place of arbitration and may further be refused by the enforcing court under art.V(1)(e) of the New York Convention.

<sup>126</sup> van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1981), p.30.

<sup>127</sup> van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1981), p.30.

<sup>128</sup> van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1981), p.31.

## Interpreting the legal status of oral arbitration agreements under art.VII of the New York Convention

However, following the reasoning given by the French court in *Hilmarton* case and US court in *Chromalloy* case related to the issue whether the enforcing court should enforce an award which has been set aside in its country of origin, the French and the US courts took a different approach in interpreting their obligations under the New York Convention and their domestic laws. The purpose of this section is to use the reasoning applied in both case to give the written requirements a different interpretation. In *Hilmarton* case, the *Cour d'appel* in Paris, in December 1991, decided to affirm the leave of enforcement granted by the *Tribunal de Grande Instance* of Paris and held that, according to art.VII(1) of the Convention, the judge may not refuse to enforce unless the national law so authorises as well as the provisions of the Convention do not deprive a party of the right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. Based on art.VII, the Court decided to uphold the more favourable right principle under art.VII of the Convention and recognised the award as the ground listed in art.V(1)(e) of the Convention does not exist in art.1502 of the 1981 Decree. The court upheld:

“Considering that French law on international arbitration does not oblige a French judge to take into account an annulment decision on the award given within the framework of the foreign internal order, and that, hence the incorporation in the French legal order of an award which was rendered in international arbitration and which was annulled abroad on the basis of local law, is not contrary to international public policy within the meaning of Art.1520(5) of the New Code of Civil Procedure.”

Referring to the French *Hilmarton* case, van der Berg believed that it is so French unilateral system providing the basis for such enforcement. He commented:

“The main reason for which no effect needs to be given in France to an annulment of an award by a court in the country of origin seems to be the view that in international arbitration an arbitral award is not incorporated in the legal order of the country where the award is merely located geographically. The French system for the recognition and enforcement of arbitral awards made in another country is a so-called unilateral system. The incorporation of the arbitral award into the French legal order is defined by French law only. These rules are territorial in nature. As is characteristic of the unilateral approach, these rules are not concerned with the incorporation of an award in a foreign legal order, even if the latter is the place where the award has been made. The question of whether the arbitral award is incorporated in another legal system does not play any role. The rational of this system is that an arbitral award which is acceptable to a French judge should not be refused force and effect because a foreign judge has different

ideas about its acceptability. Furthermore, in France, the notion of the nationality of an award does not exist.<sup>129</sup>

The same message was delivered by *Chromolloy* case, following the same line of the arguments given in the *Hilmarton* case, by resorting art.VII of the Convention and art.1502 of the 1981 Decree, the court expressed that the winning party in this case was entitled to avail itself of the more favourable right principle for enforcement in the domestic law according to art.VII of the Convention as well as the annulment of the award in its country of origin is not regarded as one of the grounds for non-recognition or enforcement in France under art.1502 of the 1981 Decree.

The US District Court, District of Columbia granted the recognition of the award in July 1996, despite that the award was annulled in the country of origin. According to the court, its decision was supported by three pillars. The court, first of all, established the need to protect the winning party's rights in seeking recognition and enforcement under the domestic law regime. Secondly, the reason for setting the award aside in Cairo was not one of the grounds for refusal of recognition and enforcement of arbitral awards under the US domestic law. Consequently, the decision made by the Egyptian court was not regarded as a good foreign court judgement by the US court and should not have binding force in the US courts. Finally, the court believed that art.VII of the Convention allows the winning party to rely on the application of domestic law that are more favourable to the recognition of foreign awards than those established under the Convention regime. This is because art.VII of the Convention provide the enforcing parties all rights to enforcement of his award that it would have in the absence of the Convention and this provision shall not be seen as a contradiction from the discretionary standard provided in art.V(1)(e).

While Gaillard pointed out that "in so doing the ruling opened the door by applying the more favourable right" principle to the recognition in France of an award set aside in the country of origin",<sup>130</sup> this view went against the traditional view which maintains that the enforcement cannot be pursued on the basis of the Convention.<sup>131</sup> For instance, Carbonneau criticised the *Chromolloy* decision handed down by the US court in the following terms:

"The exercise of would-be discretion under Art.V could destabilise the transborder framework for enforcement established by the Convention. Moreover, the meaning and effect that the court affixes to the language of Art.VII could not have been part of the intent of the drafters of the Convention and has not been part of the contemporary decisional practice under the Convention. Evaluated from the standard point of the orderliness and stability

<sup>129</sup> Albert Jan van der Berg "Annulment of awards in international arbitration" in Richard B. Lillich and Charles N. Brower (eds), *International Arbitration: In the 21st Century: towards "Judicialization" and Uniformity? Twelfth Sokol Colloquium* (Martinus Nijhoff, 1994), pp.151–152.

<sup>130</sup> Emmanuel Gaillard "Enforcement of Awards Set Aside in the Country of Origin: The French Experience" in Albert Jan van der Berg (ed.), *ICCA Congress Series Improving the efficiency of Arbitration Agreements and Awards-40 Years of Application of the New York Convention* (Kluwer, 1999), p.16.

<sup>131</sup> van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1981), pp.173–174.

of governing norms, the court's tendentious interpretative pragmatism renders the Convention framework chaotic."<sup>132</sup>

Similar doubts were also expressed by Gharavi who believed that *Hilmarton* exposed the weakness of the delocalisation theory as difficulties can arise when annulment is not effective in the country of enforcement because

"enforcing set aside awards may result in coexistence of two conflicting awards concerning the same issues between the same parties, and thus violate the intended uniformity of the convention and damage the image of international commercial arbitration."<sup>133</sup>

Bringing these debates into the discussion concerning written requirements, art.VII not only throws a lifeline to the awards made on the basis of oral agreements which do not meet the requirements of arts II and IV of the Convention, but also provide a sound legal basis for enforcement of such kind of awards. There may be a situation where an award was made on the basis of an oral arbitration agreement in a jurisdiction requiring written requirements but the request for recognition and enforcement of such award was made in a jurisdiction where written requirements are not demanded. Though there may be a risk of being set aside at the place of arbitration for not satisfying the written requirements but the justification for granting recognition and enforcement by the enforcing court can be found on the basis of the "more favourable right principle" in accordance with art.VII (1) of the New York Convention.<sup>134</sup>

This interpretation can find support in van der Berg's revised view on the principle of "more favourable law" as it indeed can be argued that the Convention confers upon a court the discretionary power to recognise and enforce an a-national award under the Convention.<sup>135</sup> Acknowledging that an enforcing court does have residual discretionary power to decide whether it has to refuse recognition or enforcement of the awards if one of the grounds for refusal stated in art.V of the Convention is present, he stated that such discretionary power can be exercised if the respondent invoking the ground for refusal can be deemed to be estopped from invoking the ground, the defect is insignificant; or it would not have led to a different result.<sup>136</sup>

The application of the more favourable right principle stipulated in art.VII can provide enforcement of awards which was set aside at the place of arbitration for failing to meet the written requirements in a jurisdiction which has more lenient form requirements for arbitration agreements. However, the more favourable right principle will not be able to help with the awards which was made in a jurisdiction requiring no written requirements, but needed to be enforced in a jurisdiction which

<sup>132</sup> Thomas Carbonneau, "Debating the proper role of national law under the New York Arbitration Convention" [1998] 6 *Tulane Journal International and Comparative Law* 277, 279.

<sup>133</sup> Hamid G Gharavi, "Chromalloy: another view" [1997] 12 *Int'l Arc. Rep.* 21.

<sup>134</sup> van der Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981), p.174.

<sup>135</sup> Gaillard "Enforcement of Awards Set Aside in the Country of Origin: The French Experience" in Jan van der Berg (ed.), *ICC Congress Series Improving the efficiency of Arbitration Agreements and Awards- 40 Years of Application of the New York Convention* (1999), p.28.

<sup>136</sup> Gaillard "Enforcement of Awards Set Aside in the Country of Origin: The French Experience" in Jan van der Berg (ed.), *ICC Congress Series Improving the efficiency of Arbitration Agreements and Awards- 40 Years of Application of the New York Convention* (1999), p.28.

requires written requirements to be fulfilled. Due to this background, a call has been made for a new Convention addressing these issues.

### **Can the Hypothetical Draft Convention resolve the issues associated with oral arbitration agreement?**

The analysis of the application and interactions between national arbitration laws and arts II and IV of the New York Convention clearly shows a high degree of discrepancy among different jurisdictions. While art.VII provides a way out for this situation by invoking the “more favourable right2 principle, its effects are only limited to the award that wishes to rely on the more lenient law of the enforcing court. Consequently, a call for a revision of the New York Convention was made in the 2009 ICCA conference. In this conference, van der Berg ignited the debates on the need for a revised convention. In relation to the issue concerning written requirements, the Hypothetical Draft Convention 2008 (the Draft Convention) suggests to abolish the written requirements stipulated in art.II of the Convention in order to get in line with the amended art.7 of the Model Law as well as taking account of the new trend in removing written requirements in the newly enacted national arbitration laws. In van der Berg’s own words:

“It is submitted that requirements for the form of the arbitration agreement are no longer needed. Actually modern arbitration laws are gradually abandoning the requirement of the written form, treating the arbitration clause on the same footing as other clauses in a contract (see the recent discussion at UNCITRAL, resulting in alternative options for the definition and form of the arbitration agreement in Art.7 of the UNCITRAL Model Law , at the thirty-ninth session in 2006). The Draft Convention follows this trend by no longer imposing an internationally required written form. Rather, as is the case under the New York Convention in other respects regarding the arbitration agreement, the Draft Convention refers to the applicable law for questions concerning the validity of the arbitration agreement. The applicable law may include provisions similar to the revised Art.7 of the UNCITRAL Model Law.”<sup>137</sup>

The only reference to the formality of arbitration agreement in the Draft Convention is made in art.2(2)(b) which contains one of the grounds allowing the court to deal with the dispute and not referring the parties to arbitration. The reference to written requirements in arts II and IV of the New York Convention was deleted in the Draft Convention. The intention of this provision is to relax the formalities of arbitration agreements imposed upon by the application of art.II(1) of the New York Convention. Article 2(2)(b) reads:

“The court shall not refer the dispute to arbitration is the party against whom the arbitration agreement is invoked assert and proves that there is prima facie

<sup>137</sup> Jan van der Berg, “Hypothetical Draft Convention on International Enforcement of arbitration Agreements and Awards” in Albert Jan van der Berg (ed.), *50 years of the New York Convention - ICCA International arbitration Conference* (2009), p.654.

no valid arbitration agreement under the law of the country where the award will be made...”,<sup>138</sup>

Removing the discretion enjoyed by the law of the place of arbitration under art.II(1) of the New York Convention, this particular draft provision not only removes the written requirements of arbitration agreement but also designates the enforcing court as “the only court” to determine the validity of the arbitration agreement when the recognition and enforcement is sought.

In relation to party’s obligations to supply the enforcing court a copy of the arbitration agreement under art.IV of the New York Convention is also removed in art.4 of the Draft Convention. Accordingly, art.4 of the Draft Convention does not oblige the party seeking enforcement of the award to supply the arbitration agreement or a copy of it. The only document the party who wish to apply for the recognition and enforcement of the award requires is the original arbitral award under art.4(2).<sup>139</sup> The abandonment of the submission of arbitration agreements represents the liberalization of evidential proceedings as seen in the amendment made in art.35(2) of the UNCITRAL Model Law in 2006, in which the presentation of a copy of the arbitration agreement is no longer required for enforcement of the award irrespective of the country of origin.<sup>140</sup>

It has been said that the tribunal should always measure the formal validity of the arbitration agreement against the standard contained in art.II,<sup>141</sup> nevertheless, the tribunal is contracted to apply the applicable laws, not the New York Convention, to determine the disputes. There may be a case where the arbitration agreement does not meet the formality requirements of art.II of the New York Convention but satisfies the more lenient standard of the applicable law at the seat of arbitration. In such a case, the tribunal may incline to apply the applicable law to establish its jurisdiction to ensure the award is not set aside by the competent court of where the award was made under art.V(1)(e). However, doubts will be raised at the stage of enforcement for failing to satisfy the requirements set in arts II and IV of the New York Convention.

There may be a situation where an award may encounter difficulty if the arbitration agreement meets the formality requirements of art.II of the New York Convention but does not satisfy the local requirements of the enforcing court. Under these circumstances, the questions which demand answers are: Who sets

<sup>138</sup> Jan van der Berg, “Hypothetical Draft Convention on International Enforcement of arbitration Agreements and Awards” in Albert Jan van der Berg (ed.), *50 years of the New York Convention - ICCA International arbitration Conference* (2009), p.667.

<sup>139</sup> The Draft Convention art.4 reads:

- “1. Fulfilment of the conditions set forth in this article entitles the party seeking enforcement to be granted enforcement of the arbitral award, unless the court finds that a ground for refusal is present under the conditions set forth in articles 5 and 6.
2. The party seeking enforcement shall supply to the court the original of the arbitral award.
3. Instead of an original of the arbitral award, the party seeking enforcement may submit a copy certified as conforming to be the original. The certification shall be in such form as directed by the court.
4. If the arbitral award is not in an official language of the court before which enforcement is sought, the party seeking enforcement shall, at the request of the other party or the court, submit a translation. The translation shall be in such form as directed by the court.”

<sup>140</sup> The Amendments of the Model Law art.35(2) provides: “The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.” Also see, Jan van der Berg, “Hypothetical Draft Convention on International Enforcement of arbitration Agreements and Awards” in Jan van der Berg (ed.), *50 years of the New York Convention - ICCA International arbitration Conference* (2009), p.659.

<sup>141</sup> Lew and Mistelis, *Comparative International Commercial Arbitration* (2003), para.6-48

the requirements? Is the Convention or the national law? If so, what requirements? Is it the maximum or the minimum requirements? A study on the various national laws on written requirements has shown that some of the signatory countries of the New York Convention did not implement the relevant provisions of the Convention to every letter. Consequently, discrepancy and confusion have arisen. However, considering harmonisation of the relevant provisions on recognition and enforcement of arbitral awards in different jurisdictions is the main aim of the New York Convention when it was introduced, it is reasonable to assume that the Convention did intend to create a universal standard to be followed by all signatory countries. To achieve this, the Convention should set the maximum requirements with a universal character implemented by all signatory countries so parties could have access the same requirements imposed by the New York Convention framework in all signatory countries where the recognition and enforcement is sought. While the requirements laid down in the Convention are interpreted as the maximum requirements and so implemented, national arbitration laws can enact more lenient provisions than the ones in the Convention if they wish but no more stringent standards than the New York Convention shall be introduced. With such an interpretation, there will be space for the interpretation of 'residual power' and the application of art.VII of the New York Convention allowing an award which was made in a jurisdiction requires written arbitration agreement to be enforced in a jurisdiction, does not require any formality of arbitration agreement and supply a copy of arbitration agreement as evidence.

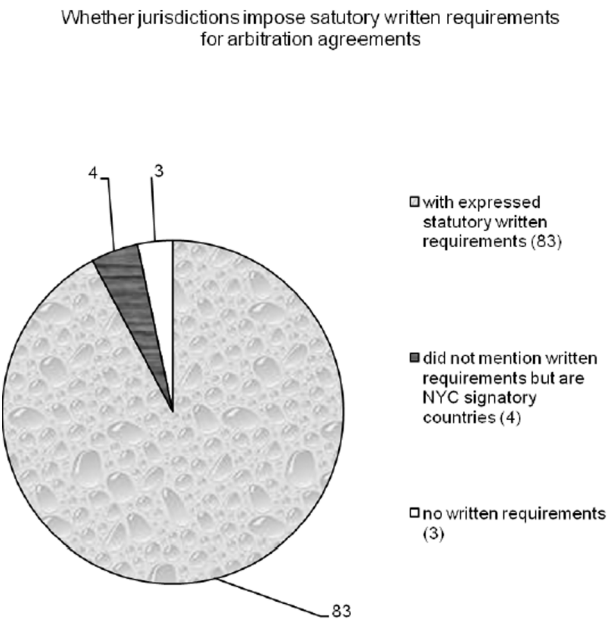
However, within the current arbitration framework, the suggested maximum requirements of the New York Convention are not followed. Consequently, it may not assist the awards which are made in a jurisdiction requiring no form for arbitration agreement, but the recognition and enforcement of such an award is sought in a jurisdiction which follows the New York Convention or has stricter requirements than those in the New York Convention. This situation was caused by the confusion concerning the standard the New York Convention intends to impose. The confusion created a situation where written requirements are given different interpretation by various national arbitration laws. This has defeated the purpose of the creation of the New York Convention. Consequently, the argument for a revised New York Convention was made. However, before moving towards the Draft Convention, one has to realise that, despite the tremendous success of the New York Convention, discrepancy existing in the implementation of the New York Convention among different jurisdictions has brought international arbitration to a national level. Consequently, harmonisation is not achieved in terms of formality of arbitration agreement within the current system. Similar discrepancy will happen again if the discretion is left to the enforcing court to determine the validity of arbitration agreement as suggested by the Draft Convention. Perhaps a provision like Option 2 of art.7 of the amended Model Law, which expressly requires no formality of arbitration agreement, should be added to the Draft Convention as well as an insertion of a provision stipulating the function of maximum requirements intended by the Draft Convention. These two provisions may ensure the harmonisation of the national arbitration laws governing the written requirements. If appropriate, the application of less stringent local standard by the enforcing court will be allowed under art.7 which reads:



“If an arbitration agreement or arbitral award can be enforced on a legal basis other than this Convention in the country where the agreement or award is invoked, a party seeking enforcement is allowed to rely on such basis.”

Without these two additional provisions being added to the Draft Convention, it will allow the signatory countries enacting and applying more stringent requirements to determine the formality of arbitration agreement, furthermore, bringing international arbitration back to the national level. But this time, it would be the level of enforcing court!

Appendix



Whether jurisdictions require a copy of arbitration agreement as evidence for the application for recognition and enforcement of arbitral awards

