ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

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TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER II. HISTORICAL BACKGROUND</td>
<td>8</td>
</tr>
<tr>
<td>CHAPTER III. CURRENT INTERNATIONAL SYSTEM OF ENFORCEMENT OF ARBITRAL AWARDS: THE 1958 NEW YORK CONVENTION</td>
<td>12</td>
</tr>
<tr>
<td>A. Scope of Application</td>
<td>12</td>
</tr>
<tr>
<td>B. Enforcement Scheme</td>
<td>16</td>
</tr>
<tr>
<td>CHAPTER IV. PROBLEMS IN PRESENT SYSTEM OF ENFORCEMENT OF ARBITRAL AWARDS</td>
<td>26</td>
</tr>
<tr>
<td>A. Proposal by the Asian-African Legal Consultative Committee to Amend the New York Convention</td>
<td>28</td>
</tr>
<tr>
<td>B. Proposals to Eliminate Interventions by National Courts</td>
<td>37</td>
</tr>
<tr>
<td>C. Proposals to Narrow the Defenses under the New York Convention</td>
<td>45</td>
</tr>
<tr>
<td>D. Exclusion of National Courts from Enforcement Proceedings</td>
<td>56</td>
</tr>
<tr>
<td>E. Maintaining the Present Enforcement System</td>
<td>64</td>
</tr>
<tr>
<td>CHAPTER V. CONCLUSION</td>
<td>72</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>78</td>
</tr>
</tbody>
</table>
CHAPTER I. INTRODUCTION

There are many ways of achieving a settlement of an international commercial dispute: mediation, conciliation, arbitration and litigation. Today, one of the most popular ways of settling an international commercial dispute is arbitration.¹ This form of dispute resolution has been known to humanity for many centuries.² Today, international commercial arbitration has developed during this century.³ It has evolved: in the beginning it was used only for traditional commercial transactions, such as sale of goods. Currently it is widely used in deciding many other types of commercial disputes.⁴ Together with its development, arbi-


² E.g. Michael John Mustil, Arbitration: History and Background, 6 J. Int’l Arb. 1 43 (1989) ("Commercial arbitration must have existed since the dawn of commerce."); Gabriel M. Wilner, Acceptance of Arbitration by Developing Countries, in Resolving Transnational Disputes Through International Arbitration, 283 (Thomas E. Carbonneau ed., 1984) ("Arbitration is one of the generic types of techniques for the settlement of disputes; it has been employed over as long a period of time as the oldest judicial system.")


Arbitration has shown its clear advantages over litigation and other forms of dispute settlement.  

Arbitration's main advantage over litigation is that using a foreign court may be a disadvantage to a party to a commercial agreement because of the party's unfamiliarity with the national laws, procedures and even differences in mentality and cultural perspectives. Parties to arbitration are free to choose their own "judges", applicable law and procedural laws. Moreover arbitration is a private proceeding which enables the parties to keep it confidential. Also commercial arbitration is more "flexible and adaptable and as a result quicker and more efficient than litigation." Arbitration has been described as a positive way to solve arising disputes particularly if the parties want to continue in the future their business relationship.

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5 E.g. Berg, supra note 1, at 1, ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 22 (2d ed. 1991).


7 E.g. Redfern & Hunter, supra note 5, at 23, Holtzman, supra note 6, at 3 ("... relative simplicity, economy, speed and privacy,..."), Note, Mitsubishi: the Erosion of the New York Convention and international Arbitration, 3 Wiscon. Int'l L. J. 151, 154 (1984) ("... arbitration offers the additional advantages of speed, economy, and uniformity, and it is comparably less intrusive").

8 James E. Meason and Alison G. Smith, Non-Lawyers in International Commercial Arbitration: Gathering Splinters of the
The main advantage over mediation or conciliation is that they do not result in a binding or enforceable award. In contrast with arbitration, which is based on a voluntary agreement of the parties to submit future disputes to a binding arbitration, these two alternative dispute resolution forms may be used between parties as a possible first step in order to solve disputes before resorting to arbitration.

Nevertheless, arbitration has a number of weaknesses, which may be pointed out: limited powers of the arbitral tribunal and impossibility to bring multi-party disputes together. It is also necessary to mention that currently costs and speed of arbitral proceeding can be very high.

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Bench, 12 Nw.J. Int'l L. & Bus. 24 (1991) ("... arbitration is seen as providing the best chance to save the underlying business relationship."); Note, supra note 7, at 154 ("Business people generally prefer arbitration to court litigation because it fosters smooth business relations and is more conducive than litigation to maintaining cooperation and goodwill.").

9 E.g. Redfern & Hunter, supra note 5, at 12, Domke, supra note 4, at 8.

10 Domke, supra note 4, at 3.

11 Redfern & Hunter, supra note 5, at 25; Julian C. Chu, Consolidation of Arbitral Proceedings and International Commercial Arbitration, 7 J. Int'l Arb. 2 53 (1990) ("Although it has achieved wide acceptance as the preferred alternative to litigation, international commercial arbitration is still considered inferior in certain situations, such as when disputes involve multiple parties.

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All these and many other advantages of the international commercial arbitration will not make sense if the winning party will not receive the performance of the award. It is implied that once the parties have agreed to the binding character of arbitration then they will carry out the performance voluntarily. However, when the losing party fails to perform the award the winning party will need to enforce the performance. Efficiency of the international commercial arbitration is highly dependable on the possibility of the enforcement of the rendered award. Enforcement can be possible if a "necessary legal framework can be in-


13 Redfern & Hunter, supra note 5, at 416.

14 Martin Hunter, Judicial Assistance for the Arbitrator, in: CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 195, 203 (Julian D.M. Lew ed., 1987) ("However, it is suggested that this so called "voluntary" performance is largely illusory. Most practitioners who advise clients would confirm that, in a huge majority of cases, the losing party is thoroughly aggrieved and wants to know how he can escape from complying with the award.")

15 Redfern & Hunter, supra note 5, at 417

16 E.g. Albert Jan van den Berg, Some Recent Problems in the practice of Enforcement under the New York and ICSID Conventions, 2 ICSID Review - Foreign Investment Law Journal, 439 (1988) ( "Effectiveness of international arbitration depends ultimately on the questions whether the arbitral award can be enforced against loosing party.); Michel Gaudet, The Enforcement of Awards Relating to International Trade, in ICCA CONGRESS SERIES N 6: INTERNATIONAL ARBITRATION IN A CHANGING WORLD 203
ternationally secured."  Although some countries have domestic laws on the enforcement of awards rendered in other countries, most foreign awards are governed by bilateral and multilateral conventions. Multilateral conventions and treaties are a more effective method of creation of an international system of law rather than bilateral treaties, which are limited only to two countries. Such a multilateral legal framework is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (hereinafter the New York Convention or Convention). It has been referred as one of the major pieces of the legal

(Albert Jan van den Berg ed., 1993) ("The enforcement of the award is the key to the effectiveness of arbitration.").

17 Berg, supra note 1.

18 Redfern & Hunter, supra note 5, at 60-61.


20 E.g. Berg, supra note 1, at 1 ("... the most important Convention in the field of arbitration and as the cornerstone of current international commercial arbitration."); 2 Pieter Sanders, The New York Convention, in INTERNATIONAL COMMERCIAL ARBITRATION 293 (Pieter Sanders ed. 1960) ("...an important step forward."); Rubino-Samartano, supra note 12, at 30 ("...made arbitration a more effective instrument for solving disputes."); Ottoarndt Glossner, The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards - Some Thoughts After 30 Years - 1958-1988, in ICCA CONGRESS SERIES N4: ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION 275 (Pieter Sanders ed., 1988) ("...the New York Convention ... has established "comity""); Daniel M. Kolkey, Attacking Arbitral Awards: Rights of Appeal and Review in Interna-
framework of international commercial arbitration, and it deals with the essential two aspects of international commercial arbitration: arbitration agreement and foreign arbitral awards.\textsuperscript{21} The Convention has currently one hundred and twelve contracting states.\textsuperscript{22}

The New York Convention has been the cornerstone of the present system of the international enforcement of foreign arbitral awards by the contracting states for almost forty years. During these years the treaty has shown its efficiency in terms of enforcing foreign arbitral awards in national courts.\textsuperscript{23} Nevertheless, there are a number of problems in this field, especially with the enforcement of the rendered awards in the national courts.

The primary objective of this research will be to show the proposals that have been made in order to amend the New York Convention. Through these proposals the paper's author

\textsuperscript{21} Glossner, supra note 20, at 275.

\textsuperscript{22} UNCITRAL Home Page, Status of Conventions (last modified Feb. 5, 1997) <http://www.un.or.at/uncitral/status/index.htm#TOP>.

\textsuperscript{23} Mustil, supra note 2, at 43 notes that the Convention "perhaps could easy claim to be the most effective instance of international legislation in the entire history of commercial law".
will try to analyze the problems that the proposed modifications seek to eliminate. In general these proposals were aimed at amending the Convention in order to widen the scope of application of the Convention and to eliminate the difficulties with the enforcement of arbitral awards in national courts.

Chapter two of this paper will give a historical overview of the multilateral enforcement conventions prior to the New York Convention and a brief drafting history of the New York Convention itself. Chapter three will concentrate on the provisions referring to the scope of application and the enforcement scheme of the New York Convention. Chapter four will deal with the proposals to amend the Convention in order to eliminate the problems with the enforcement of foreign arbitral awards. It will also show the opposing view to any changes to the present system.

Finally, the paper will conclude that even though the proposals to amend the Convention are aimed at making the enforcement system work more efficiently, nevertheless the magnitude of the problems is not enough to undertake modifications. Any modification would only create uncertainty and additional problems especially today when the Convention has been universally accepted. It will be more useful to continue to harmonize national legislation and court practice on international commercial arbitration.
CHAPTER II. HISTORICAL BACKGROUND

At the beginning of this century, in the absence of multilateral treaties on international commercial arbitration, the parties involved in arbitration, were forced to rely on domestic laws. The provisions of these laws were different from each other and judiciary were usually unfavorable towards arbitration. This, together with the increase of international commercial arbitration induced the International Chamber of Commerce in Paris, after the W.W.I, to advocate an international convention in international commercial arbitration. The main objective of the proposal was to eliminate the unenforceability of the arbitral clause. The result was the first “modern and genuinely” international convention adopted in nineteen twenty three under the auspices of the League of Nations. The 1923 Geneva Protocol established the validity and enforceability

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25 Berg, supra note 1, at 6.

26 Id.

27 Redfern & Hunter, supra note 5, at 61.

of arbitration agreements.\(^9\) The Second step taken by the League of Nations was adoption of the 1927 Geneva Convention on the Execution of the Foreign Arbitral Awards.\(^{30}\) The purpose of this convention was to regulate the enforcement of Protocol awards within the territory of contracting states.\(^{31}\) Both the Protocol and the Geneva Convention are viewed by the commentators as an improvement compared with

\(^9\) *Id.* art 1:
Each of the Contracting states recognizes the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such control relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject. . . .


\(^{31}\) *Id.* art. 1:
In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences . . . covered by the Protocol on Arbitration Clauses . . . shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties. . . .
the previously existing national regimes.\textsuperscript{32} Nevertheless, these conventions had a number of loopholes: the field of application was limited and the burden of proof of the conditions of the enforcement of the award was on the party seeking the enforcement.\textsuperscript{33} Also the award, in order to be enforced, had to comply with two requirements. First, was that the award, in order to obtain the exequatur in the enforcement country it was necessary to obtain one in the country were it was rendered.\textsuperscript{34} Second, was that arbitration should have been governed by the law governing arbitration procedures, which was usually the law of the place of arbitration.\textsuperscript{35}

These "defects"\textsuperscript{36} prompted the International Chamber of Commerce to promote a new international convention right after W.W.II. This proposal was taken up by the United Nations Economic and Social Council, which prepared a draft and convened a diplomatic conference in New York in 1958.

\textsuperscript{32} E.g. Berg, supra note 1, at 7, Redfern & Hunter, supra note 5, at 62, Werner, supra note 24, at 114.

\textsuperscript{33} E.g. Berg, supra note 1, at 7, Werner, supra note, 23 at 114.

\textsuperscript{34} E.g. Rubino-Samartano, supra note 12, at 30, Berg, supra note 1, at 7 (... the award had to become "final" in the country where it was made ...).

\textsuperscript{35} E.g. Berg, supra note 1, at 7, Werner, supra note 24 at 114.

\textsuperscript{36} Werner, supra note 24, at 114.
The diplomatic conference adopted a new convention, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\(^{37}\) The New York Convention is considered as the "most important international treaty relating to international commercial arbitration."\(^{38}\)

The New York Convention contains a number of improvements over its predecessors. The field of application of the New York Convention is broader - it applies to an award made in any other state, even though the power of the first reservation may limit this only to signatory states.\(^{39}\) A second improvement is that the burden of proof now lies with the party against whom the enforcement is sought.\(^{40}\) Another improvement is that the double exequatur regime created by the Geneva Convention is abolished.\(^{41}\)

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\(^{37}\) New York Convention, supra note 19.

\(^{38}\) E.g. Redfern & Hunter, supra note 5, at 63, supra note 20.

\(^{39}\) Berg, supra note 1, at 9.

\(^{40}\) Id.

\(^{41}\) Hans Smith and Vratislav Pechota, General Multinational Conventions, 1 world Arb. Rep. s 11.3, where the authors explain double exequatur regime as a regime according to which the claimant had to provide the national court of the enforcing country a leave for enforcement (exequatur or the like) from the national court of the place of arbitration.
or not. The award may be rendered not only by ad hoc tribunals, but also by permanent arbitration bodies. The scope of the Convention does not rely on the nationality of the parties. It is sufficient that the award be made in the territory of another State or in the enforcing country for it to be considered as non-domestic. The Convention applies only to foreign awards and it does not apply to awards considered domestic.

2. Permitted Reservations

In order to narrow the scope of the Convention two reservations are permitted: the reciprocity reservation and

Id. art. II(1).

Id. art. I(2): "The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

Berg, supra note 1, at 15, Smith & Pechota, supra note 41, s 23.0 ("The nationality of the parties ... is irrelevant.")


Berg, supra note 1, at 19.

New York Convention, supra note 19, art. I(3): When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the
the commercial reservation. The first reservation\(^{50}\) permits a Contracting State, on the basis of reciprocity, to apply the Convention only to the awards made in the territory of another contracting state. A number of contracting states have also stated that they will recognize and enforce awards of non-contracting states, if such a state grant's reciprocal treatment.\(^{51}\) Currently the first reservation has eighty five contracting states.\(^{52}\) Nevertheless, the first reservation has less impact\(^{53}\) on the applicability of the New York Convention in view of the large in the number of contracting states. The second reservation permits the Contracting

recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

\(^{50}\) E.g. Redfern & Hunter, supra note 5, at 458 ("...qualification to welcome internationalism."); Berg, supra note 1, at 12 ("...more traditional view...").

\(^{51}\) Smith & Pechota, supra note 41, s 23.0. Such a declaration has been made by Belarus, Bulgaria, Cuba, Chech Republic, Lithuania, Romania, Russian Federation, Slovakia, Ukraine and Vietnam.

\(^{52}\) 21 Y.B. Comm. Arb., supra note 47, at 389.

\(^{53}\) E.g. Berg, supra note 1 at 13, Sanders, supra note 20, at 305 ("General adherence to the Convention "will narrow" the field of application of the reservation."); Redfern & Hunter, supra note 5, at 459, mentioning for the same reason that "the limited effect of the first reservation should not be exaggerated."
States to reserve the applicability of the Convention only to such transactions that are considered as commercial under its own laws. This "commercial reservation" was permitted initially in order to enable certain Civil law countries, which distinguish between commercial and non-commercial transactions, to become parties to the Convention. Currently forty-nine contracting states, including the US and other common law countries, have made this reservation.

3. Arbitration Agreement

The Convention’s title does not explicitly mention arbitration agreements, however it governs not only recognition and enforcement of arbitral awards but also arbitration agreements. Originally this matter was supposed to be regulated by a separate Protocol and only after it was realized that this is not desirable the arbitration clause was inserted into the New York Convention. Without recognition

54 E.g. Berg, supra note 1, at 51, Sanders, supra note 20, at 303 mentioning that "the non-adoption would seriously have hampered the adherence to the Convention of several States, e.g. Belgium."; Smith & Pechota, supra note 41, s 23.0 underlines that the provision "seeks to accommodate those legal systems that provide for arbitration only in matters that are commercial under their law."


56 Berg, supra note 1, at 56.
and enforcement of the primary arbitration agreement their could not be any enforcement and recognition of the award rendered according to that arbitration agreement.

The Convention refers to an arbitration agreement as an agreement "under which the parties undertake to submit to arbitration all or any differences" between them.57 Another requirement is that the agreement should be in writing.58 Also, the agreement should concern "a subject matter capable of settlement by arbitration,"59 and should not be "null and void, inoperative or incapable of being performed."60

B. Enforcement Scheme

1. Enforcement Procedures

The 1958 New York Convention imposes a general obligation for a Contracting State to recognize and enforce an arbitral award according to its procedural law together with complying with the provisions of the said Convention.61 Ac-

57 New York Convention, supra note 19, art. II(1).
58 Id. art II(1) and (2).
59 New York Convention, supra note 19, art II(1).
60 Id. art II(3).
61 Id. art III:
Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance
cording to the Article 3, the forum State should not impose higher standards on the recognition and enforcement of arbitral awards to which the New York Convention applies than those it imposes to domestic awards. The purpose of this provision is to ensure that no additional restrictions are imposed on the recognition and enforcement of foreign arbitral awards by states parties to the Convention.62

Few formalities are required to be presented by the party seeking recognition and enforcement of the award to the relevant national court.63 The party seeking the enforcement must furnish the national court the original arbitral agreement and award. In circumstances where the originals are not available, the claimant is permitted to present

with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

62 Sanders, supra note 20, at 313.

63 New York Convention, supra note 19, art. IV(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.
certified copies. Moreover, if the award and the agreement are in a language other than that of the forum, the party seeking recognition and enforcement is entitled to present certified translations.\textsuperscript{64} By complying with these procedures, the claimant has presented prima facie evidence entitling him to obtain enforcement of the award.\textsuperscript{65} Generally the court will grant recognition and enforcement of the sought award,\textsuperscript{66} unless it finds grounds for refusal permitted by the Convention.\textsuperscript{67}

2. Defenses Against Enforcement

The Convention identifies a limited number of grounds

\textsuperscript{64} \textit{Id.} art. IV(2):
If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by diplomatic or consular agent.

\textsuperscript{65} \textit{E.g.} Sanders, supra note 20, at 313, Berg, supra note 1, at 247.

\textsuperscript{66} Kolkey, supra note 20 mentions that "the beauty of the New York Convention is that the awards rendered in member jurisdictions are easily enforced ... subject to narrowly defined challenges."

\textsuperscript{67} Redfern & Hunter, supra note 5, at 461.
for refusal of enforcement of arbitral awards. Generally they may be divided into two major groups: five grounds that must be furnished by the respondent; and two grounds that may also be raised by the court on its own motion. This list is exhaustive - no other ground can be considered for determining whether enforcement should be granted. Another feature of these provisions is that the burden of proof is on the respondent. The respondent is the one who has to supply evidence of the existence of the grounds for refusal of the enforcement. Furthermore, the Convention does not permit any review on the merits of the arbitral award. This generally accepted interpretation of the Convention corresponds to the principle of "international com-

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68 New York Convention, supra note 19, art. V.

69 E.g. Redfern & Hunter, supra note 5, at 461; Sanders, supra note 20, at 313, Smith & Pechota, supra note 41, s 23.0; 21 Y.B. Comm. Arb., supra note 47, at 477.

70 E.g. id. Redfern & Hunter, Berg, supra note 1, at 264.


72 Berg, supra note 1, at 264.

73 E.g. Redfern & Hunter, supra note 5, at 461; Berg, supra note 1, at 265.
mercial arbitration that the national courts should not inter-
fer with the substance of the arbitration." 74

a. Defenses Presented by the Respondent

The first defense that respondent may bring to the at-
tention of the national court is the invalidity of the arbi-
tration agreement. 75 The cause of the invalidity must be
that the parties were under some incapacity. 76 Under the
same provision non-compliance with the requirement of the
article II(2), concerning the form of the arbitration agree-
ment, may also constitute a ground for refusal. 77 The sec-
ond ground is when "the party against whom the award is in-
voked was not given proper notice of the appointment of the

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74 Id. Berg at 269.

75 New York Convention, supra note 19, art V(5)(a): Recogni-
tion and enforcement of the award may be refused, at the request of the party against whom
it is invoked, only if that party furnishes to the
competent authority where the recognition and en-
forcement is sought, proof that:
(a) 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; or ...

76 Berg, supra note 1, at 296.

77 Id.
arbitrator or of the arbitration proceedings or was otherwise unable to present his case."\textsuperscript{78} Commentators from various countries\textsuperscript{79} in this regard cite the United States Second Circuit Court of Appeals decision, which pointed out that "this provision essentially sanctioned the application of the forum State's standards of due process."\textsuperscript{80} The third defense under the New York Convention\textsuperscript{81} is the excess by the arbitrator of his authority.\textsuperscript{82} The main concern about this article is that the courts should not interpret it in such a way that it would permit them to re-examine the merits of

\textsuperscript{78} New York Convention, supra note 19, art V(1)(b).

\textsuperscript{79} E.g. Berg, supra note 1, at 297 ("This statement states concisely what Article V(1)(b) is all about,..."); Gaja, supra note 71, s I.C.3.

\textsuperscript{80} Parson & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta), 508 F.2d 969 (2d Cir. 1974).

\textsuperscript{81} New York Convention, supra note 19 art. V(1)(c):

... (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or ...

\textsuperscript{82} E.g. Berg, supra note 1, at 311; Redfern & Hunter, supra note 5, at 462 also characterise it as "lack of jurisdiction"; Gaja, supra note 71, s I.C.3 ("Article V(1) refers to the scope of arbitration agreement").
the award. The fourth defense is procedural irregularities. The substance of the provision is that if the parties have made an agreement on the matter of the composition of the arbitral tribunal or the arbitral procedure, any procedural irregularities have to be viewed only under the agreement of the parties. The law of the place of arbitration may be taken into consideration only if there is no other agreement between the parties on this matter.

The final defense that may be brought up by the respondent is that the "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." The main aim of this proviso is, along with eliminating the doctrine of double exequatur, not to create a situation where an award, which is not bind-

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83 E.g. Berg, supra note 1, at 322, Redfern & Hunter, supra note 5, at 463

84 New York Convention, supra note 19, art. V(1)(d): The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or ...

85 E.g. Berg, supra note 1, at 330 ("The alleged irregularity ... is to be judged under the agreement alone."); Gaja, supra note 71, s I.C.3 ("The arbitral procedure must conform to the rules set out by the parties independently.").

86 Id. Berg at 330.

87 New York Convention, supra note 19, art V(1)(e).
ing or is set aside or suspended in the country of origin would have a binding effect or be granted enforcement in the country where the enforcement is sought.\textsuperscript{88}

b. Defenses Raised by the Enforcing Court

Besides these five grounds, which may be brought in by the respondent, the Convention permits two additional grounds.\textsuperscript{89} They may be raised by the parties or the enforcing forum at its own discretion.\textsuperscript{90} The first ground is arbitrability: whether or not this matter is capable of being solved under the laws of the enforcing country concerning

\textsuperscript{88} E.g. Berg, \textit{supra} note 1, at 357; Gaja, \textit{supra} note 71, s I.C.4.; see also \textit{supra} note 41 for an explanation of the double exequator regime;

\textsuperscript{89} New York Convention, \textit{supra} note 19, art. V(2):
Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) The subject matter of the differences is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

\textsuperscript{90} Thomas E. Carronneau, \textit{National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard or Manifest Error, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?} 115, 120 (Richard B. Lillich and Charles N. Brower eds., 1994) ("The Convention nonetheless emphasized the importance of integrity of the national legal order by allowing the courts of a requested state to deny enforcement to an award on the basis of the inarbitrability defense and the public policy exception.").
arbitration. Basically a national court may refuse to enforce an award rendered by a foreign arbitrator, if the dispute cannot be settled by arbitration under the national laws in the first place. There are diverse views in the national courts as to what is non arbitrable matter. Commentators view this provision to some extent as a matter involving questions of public policy, because ultimately it is a matter of public policy what may or may not be arbitrated under national laws. The second ground for refusal is the public policy of the enforcing state. This provision may be viewed as one which delegates the "ultimate decision on the efficacy of the New York Convention to the good faith of the contracting state." However, the national courts have construed this provision narrowly, reducing the nega-

91 New York Convention, supra note 19, art. V(2)(a).


93 Infra note 184.

94 E.g. Redfern & Hunter, supra note 5, at 463; Berg, supra note 1, at 382; Gaja, supra note 71, s I.C.5. ("Two requirements which are to some extent overlapping.").

95 New York Convention, supra note 19, art. V(2)(b).

96 Martinez, supra note 92, at 508.

97 Infra note 200.
tive impact which could this article have on the effectiveness of the New York Convention.\(^9^8\)

CHAPTER IV. PROBLEMS IN PRESENT SYSTEM OF ENFORCEMENT OF ARBITRAL AWARDS.

To this day the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is the most important piece of internationally accepted framework for the enforcement of rendered foreign arbitral awards.\(^9\) It is one of the few universally accepted multilateral conventions, and currently has 112 member states. Over the years more than 650 decisions have been reported from 38 contracting states.\(^{10}\) National courts of the contracting states have applied the New York Convention to the "letter and in accordance with its spirit,"\(^{11}\) thus upholding award enforcement in most cases.\(^{12}\) All this, however, should not in any event create a false view that the New

\(^9\) New York Convention, supra note 19.

\(^{10}\) 21 Y.B. Comm. Arb., supra note 47, at 387.

\(^{11}\) E.g. Jacques Werner, Conference on the New York Arbitration Convention, 6 J. Int'l Arb. 1 153 (1989); Berg, supra note 1, at 393 also mentioning that the "courts interpret and apply the Convention in a manner which is well-disposed towards international commercial arbitration."

\(^{12}\) E.g. generally Berg, supra note 1; Gaja, supra note 71; 21 Y.B. Comm. Arb., supra note 47.
York Convention does not have any problems or difficulties in its scheme. In particular a number of obstacles in the enforcement of foreign arbitral awards should be mentioned.

First, recourse to the national courts in the enforcement country, in many cases, substantially increases the length of the enforcement proceeding and the costs related with it. This is due to the fact that the enforcement court is usually the national court of the losing party\textsuperscript{103} and the defenses under the New York Convention, under which a party may oppose the enforcement, are in may instances considered not narrow enough.\textsuperscript{104}

Second, by not regulating procedural aspects of the international commercial arbitration, the New York Convention permits the national courts, by using the national law, to interfere with the arbitration proceedings.\textsuperscript{105} This not only undermines the notions of the parties not to deal with national courts, but may create substantial difficulties in the future enforcement.

Third, in many cases a party to a arbitration agreement is a state agency which tries to invoke sovereign immunity in order to reject the enforcement of the rendered award.\textsuperscript{106}

\textsuperscript{103} See chapter IV(D).

\textsuperscript{104} See chapter IV(C).

\textsuperscript{105} See chapter IV(A) and (B).

\textsuperscript{106} See chapter IV(A).
In many countries the judiciary does not even have the power to enforce rendered arbitral awards against a state entity.¹⁰⁷ The magnitude of this problem has decreased in the recent years, especially after the collapse of the communist system of state ownership of enterprises and agencies.

This chapter attempts to analyze this and other difficulties of the New York Convention scheme through the proposals to modify the latter in order to eliminate the mentioned problems. Nevertheless, the paper will not only concentrate on the negative aspects of the current system, but will also show the opposing view to the proposed amendments and the achievements of the New York Convention.

A. Proposal by the Asian-African Legal Consultative Committee to Amend the New York Convention.

1. Substance of the Proposal.

The Asian-African Legal Consultative Committee ("AALCC") at its seventeenth session, held at Kuala Lumpur from June 30 to July 5 1976, adopted a decision proposing to the United Nations Commission on International Trade Law ("UNCITRAL") that it consider the possibility of preparing a

¹⁰⁷ Werner, supra note 101, at 159-160.
protocol to be annexed to the New York Convention. The main idea of the proposed amendment was to assure that national laws of the place of arbitration or the place where recognition and enforcement of the arbitral award is sought would not prevent parties from using procedural arbitration rules that they had freely chosen. At present the lack of rule creates a number of problems for international commercial arbitrator, who has to deal with the conflict between

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108 Secretariat Note Reporting AALCC Decision, U.N. Doc. A/CN.9/127 (1976) [hereinafter Secretariat Note]. The proposal suggested clarification of the following issues:

(a) Where the parties have themselves chosen the arbitration rules for settling their disputes, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in the law applicable to the arbitral procedure and the award rendered should be recognized and enforced by Contracting States to the 1958 New York Convention;

(b) Where an arbitral award has been rendered under procedures which operate unfairly against a party, recognition and enforcement may be refused;

(c) Where a governmental agency is a party to a commercial transaction and it has entered in respect of that transaction into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration commenced pursuant to that agreement.

For discussion of the proposal see generally e.g. Holtzman, supra note 6, at 9 - 15; 9 Klaus Peter Berger, INTERNATIONAL ECONOMIC ARBITRATION 37 - 41 (Norbert Horn et al eds., 1993).

109 Comments by the Secretariat on the decision by the Asian-African Legal Consultative Committee on international commercial arbitration taken at its seventeenth session, UN-
proceedings and mandatory norms of the national arbitration laws of the place of arbitration.\textsuperscript{110} This conflict may be used in the future as a ground for refusal under article V(1)(d) of the New York Convention.\textsuperscript{111} In this setting the international arbitrator will have to either set aside parties agreement in order to ensure its enforceability,\textsuperscript{112} or comply with party autonomy and with the possible negative consequences.\textsuperscript{113}

\begin{footnotesize}

\textsuperscript{110} Berger, supra note 108, at 38.

\textsuperscript{111} New York Convention, supra note 19, art. V(1)(d) is procedural irregularities

\textsuperscript{112} Berger, supra note 108, at 39 arguing that the arbitrator has "to ensure that the award will not be set aside at the seat, which might result in the refusal of recognition of the award abroad under the New York Convention."

\textsuperscript{113} A number of commentators have expressed a view that an international commercial arbitrator has to render an award which is enforceable under the New York Convention. E.g. Bernard G. Poznancki, The Nature and Extent of an Arbitrators’s Powers in International Commercial Arbitration, 4 J. Int’l Arb. 3 71, 86 (1987); Karl-Heinz Bockstiegel, Public Policy and Arbitrabilily, in ICCA CONGRESS SERIES N3: COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 177, 185 (Pieter Sanders ed., 1983) saying that "... the arbitrator has at least a moral obligation to give the parties an award which can be expected to stand both in case of setting aside procedures and in case of enforcement procedures, before the national court.'; Andreas Bucher, Court Intervention in Arbitration, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 29, 38 ("The arbitral tribunal should in any case undertake whatever is necessary to make sure that the award is enforceable, in particular by decid-
In its comments to the AALCC proposal the International Chamber of Commerce also suggested that UNCITRAL should also consider the effect of article V(1)(b) of the Convention\textsuperscript{114} "which gives extraterritorial effects to the setting-aside of award for violation of particular rules by granting a ground for refusal of recognition and enforcement" in the national courts.\textsuperscript{115}

2. Comments by the UNCITRAL Secretariat

In its comments to the AALCC proposal, the UNCITRAL Secretariat divided the suggestion into two issues: (a) ensuring party autonomy to agree on arbitration whilst safeguarding fairness in arbitral proceedings, and (b) the exclusion in international arbitration of reliance on sovereign immunity.\textsuperscript{116}

\textsuperscript{114} New York Convention, supra note 19, art. V(1)(b) is the due process defense.


\textsuperscript{116} Comments by the Secretariat, supra note 109, para. 3, but see Redfern & Hunter, supra note 5, at 508 dividing into three issues, such as "... judicial review of fairness and due process and the implied waiver of state immunity."
Commenting on the first issue the Secretariat stressed that the Convention was not primarily created to deal with arbitral proceedings as such. The Secretariat concluded that only if the scope of the New York Convention would be substantially modified will it cover the issue raised by the AALCC.\textsuperscript{117} Furthermore, the Secretariat concluded that the New York Convention is in favor of party autonomy.\textsuperscript{118} As an example, it mentioned article V(1)(d) of the Convention under which one of the reasons of the denial of the enforcement of the rendered award is when the "... arbitral procedure was not in accordance with the agreement of the parties, ... ." Moreover, this provision does not permit any attack on the enforcement or recognition of the award even if the arbitral procedure were not in accordance with the national laws of the place of arbitration, but were in accordance with the agreement of the parties.\textsuperscript{119} Summarizing the above, it was concluded that if the denial of the enforcement of an award may not succeed under the first part of the article then it may be achieved only with the second part - the public policy defense. Such a conclusion suggests that the proposal may have effect in the given circum-

\textsuperscript{117} Id. Comments by the Secretariat para. 5.

\textsuperscript{118} Id. para. 8.

\textsuperscript{119} Id.
stance only if the public policy defense would be replaced with a rule requiring the "minimum standard of fairness."\textsuperscript{120}

On the second issue the Secretariat stressed that the AALCC's primary intention with such an amendment is to prevent a state agency from invoking sovereign immunity during arbitration, including the stage of recognition and enforcement of the arbitral awards.\textsuperscript{121} Such circumstances are bringing uncertainty to commercial transactions.\textsuperscript{122} Thus the AALCC suggested that it should be specified in the Convention that the "plea of jurisdictional immunity" should not be upheld in cases when a governmental agency has entered into a valid arbitration agreement concerning a commercial transaction.\textsuperscript{123}

Underlining the importance of the issue, the Secretariat specified that this proposal, first of all, is intended to cover the issue of the jurisdiction of the courts of the place of arbitration over the arbitral procedure. The Secretariat concluded that this is subject to the procedural aspects of the international commercial arbitration, which the New York Convention did not intended to cover, and any modification will be unwise because of that.\textsuperscript{124} Secondly,

\textsuperscript{120} Comments by the Secretariat para. 9.

\textsuperscript{121} Id. para. 11.

\textsuperscript{122} Id. para. 10.

\textsuperscript{123} Id. para. 12.
the proposal is intended to cover the question whether such immunity may be raised at the place where recognition and enforcement is sought. This issue is within the scope of the Convention; this is why it is appropriate to include it in a protocol to the New York Convention.125

Nevertheless, the Secretariat concluded that even though the questions raised by the AALCC are of importance, preparation of a protocol to the New York Convention "may not be the most adequate way of dealing with these issues."126 The Secretariat further suggested considering the possibility of preparation of a new convention or a uniform law on international commercial arbitration.127

3. Study of the New York Convention

Prompted by the AALCC proposal and the comments made by the Secretariat, the UNCITRAL suggested the Secretary-

124 Id. para. 13.

125 Comments by the Secretariat, but see Jan van den Berg, supra note 15, at 456 saying that "this difficulty can be overcome if legislation or case law in various countries evolves to extend the currently recognized waiver of immunity from jurisdiction to encompass as well a waiver of immunity from execution for arbitral awards. For the time being, it is recommended to include in a contract with a state a clause explicitly waiving immunity from execution."

126 Id. para. 15.

127 Id.
General conduct a study to review the questions of application and interpretation of the New York Convention. The survey examined more than one hundred judgments of the national courts applying and interpreting the New York Convention.\(^\text{128}\) It concluded that most of the provisions of the Convention did not give rise to any noteworthy problems, although certain difficulties were observed in applying and interpreting articles II and V, and, to a lesser degree, article I.\(^\text{129}\)

In particular, the study mentioned that the Convention failed to address the uncertainty as to which country's law should be applicable in respect of the validity of the arbitration agreements.\(^\text{130}\) The other visible problem is that in a number of cases it was revealed that the disparity of the national laws led to different results in similar enforcement actions.\(^\text{131}\) The study concluded that the weight of these problems was not enough to justify the preparation of a protocol to the Convention. Furthermore, it was pointed


\(^{129}\) Id. para. 48.

\(^{130}\) Id. para. 49.

\(^{131}\) Id.
out that the New York Convention has "satisfactorily met the general purpose for which it was adopted." \(^{132}\)

4. UNCITRAL's Decision

After considering the AALCC's proposal, the comments of the Secretariat and the study conducted by the Secretary-General, the UNCITRAL rejected the proposal for modification of the New York Convention, stating that the Convention has proven to work successfully over the years. \(^{133}\) Instead of revising the Convention the Commission suggested to prepare a model law on international commercial arbitration, which would be the most desired path in order to achieve uniformity of arbitral procedure. \(^{134}\) Such a model law on international commercial arbitration, if implemented by different countries, modifies domestic law on arbitration to meet standards of international commercial arbitration, unifies national laws on international arbitration, and diminishes diversity between frequently used arbitration rules and national laws. \(^{135}\) Furthermore, it also incorporates the stan-

\(^{132}\) Id. para. 50.


\(^{134}\) Id.

\(^{135}\) Id. para. 78.
dard of fairness, promoted by the AALCC, and will be relevant in the context of the ICC proposal.\textsuperscript{136} Moreover, any amendment or modification of the New York Convention would also cause confusion and diminish accession to or ratification of the Convention. Finally, a model law was seen as a more realistic way to lead to harmonization in practice, rather than the less flexible approach of a convention.\textsuperscript{137}

B. Proposals to Eliminate Interventions by National Courts.

Many important questions other than recognition and enforcement of arbitration agreements and of foreign arbitral awards\textsuperscript{138} are outside the scope of the Convention. The reality of such an internationally non regulated field creates a situation where the loopholes of the New York Convention are regulated by the national laws. One such loophole is the question of interrelationship between the arbitrator or the arbitral tribunal with the national courts. What should be the degree of court intervention into arbitral proceedings? Who should have the power to rule on the subject of the provisional measures? Should this and other questions of pro-

\textsuperscript{136} Id.

\textsuperscript{137} Redfern & Hunter, supra note 5, at 509 stating that the “approach adopted was pragmatic.”

\textsuperscript{138} Supra note 41.
cedural nature be included into the revised New York Convention? Any such clarifications ultimately will widen the scope of the New York Convention by introducing new provisions dealing with the procedural aspects of international commercial arbitration.

1. Pre-award Attachment

The importance of the provisional measures, such as pre-award attachment, as security for enforcement of the eventual award, is indisputable.\(^\text{139}\) If such measures were not available it would have been impossible to seek the enforcement of the award in many circumstances due to acts which may remove the assets of the losing party from the reach of the winning party once the award has been rendered.\(^\text{140}\) The respondent can prolong the proceedings, thus using the time to place the assets in question beyond the reach of the potential creditor.\(^\text{141}\)


\(^{140}\) E.g. id. Jarvin; Berg, supra note 15, at 451.

\(^{141}\) Cremades, supra note 139, at 105.
The current international enforcement system does not contain any express provisions on the subject of the pre-award attachment. In any case the applicability of the pre-award attachment will ultimately depend on the national laws of the court where the attachment is sought. Thus, a question arises as to who should have the power to rule on the matter of the pre-award attachment? One of the commentators has expressed the view that "no court has doubted that an attachment in connection with the enforcement of an award is compatible with the New York Convention." The justification is to secure future possible payment under the award. Almost all national courts of the contracting states, which have addressed the issue have permitted that pre-award attachment. The only exception is the United States, where there is a diversity of opinion on this matter. It has been suggested that the Supreme Court of the


144 Jarvin, supra note 139, at 174, also brings the example of Australia, Germany, France, Israel, the Netherlands and Sweden.

145 E.g. Berg, supra note 1, at 139-144; Cremades, supra note 139, at 107. In McFreavy Tire Rubber Co. Ceat Spa 501 F.2d 1032 (3d Cir. 1974) the appellate court did not permit pre-award attachment. Contrary result was in Carolina Power Lights Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal 1977) where the district court permitted pre-award attachment.
United State should rule on this issue in order to stop this diversity on pre-award attachments.\textsuperscript{146}

It has been suggested that court jurisdiction over provisional measures should be excluded by an amendment to the New York Convention. Court jurisdiction over pre-award attachment is implied under the current enforcement system and such a revision would explicitly exclude national courts from it. Modification would explicitly give such jurisdiction to the arbitrator or the arbitration tribunal. It has been argued that if the parties have resorted to arbitration, explicitly avoiding the jurisdiction of the courts, the arbitrator, or the tribunal should have jurisdiction over the pre-award attachment.\textsuperscript{147} Secondly, such jurisdiction is more efficient than resorting to the national courts, because any delay on this important matter may have a serious negative effect on the future performance of the rendered arbitral award. Finally, the respondent may resort to court in order to delay the proceedings, increase the price of arbitration, or make it more difficult for the winning party to receive the performance.\textsuperscript{148}

Even though such a revision may, at first glance, make the international commercial arbitration work more efficiently, ultimately the negative effects would be higher be-

\textsuperscript{146} Berg, supra note 15, at 456.

\textsuperscript{147} Jarvin, supra note 139, at 171.

\textsuperscript{148} Id. at 178.
cause of the very nature of international commercial arbitration.\textsuperscript{149} The need for the pre-award attachment arises at the very first stage of the dispute. At this point the arbitrator may not yet be appointed or other formalities may be necessary in order for them to fulfill there duties.\textsuperscript{150} Another very persuasive argument against such jurisdiction is the cases where the assets under dispute are in the possession of third parties.\textsuperscript{151} In such circumstances the arbitrator would be powerless due to the private nature of international commercial arbitration. He or she would not have the authority to decide on matters that are beyond the scope of the arbitration agreement. The decisions of the arbitrator are binding only on the sides, who are party to the arbitration agreement.\textsuperscript{152} Furthermore, court practice has shown that the present system does not delay arbitration and is efficient enough to satisfy the needs of modern commercial arbitration.\textsuperscript{153} Taking into the account all this arguments it is indisputable that court assistance on this matter is necessary.

\textsuperscript{149} Jarvin, supra note 139, at 178.

\textsuperscript{150} Id. at 179.

\textsuperscript{151} Id.

\textsuperscript{152} Id.

\textsuperscript{153} E.g. Jarvin, supra note 139, at 178; Cremades, supra note 139, at 110.
2. Arbitration Proceedings

No less important than pre-award attachment is the question of court intervention during the arbitration proceedings. The Convention, because of its limited scope, does not basically regulate matters of arbitration proceedings. This explains why the courts using provisions of the national law actively intervene during arbitration proceedings and create further problems.

It has been suggested that, through an amendment to the New York Convention, it is necessary to prevent national courts at the place of arbitration from intervening during the arbitration proceedings.\textsuperscript{154} This should include all aspects of the arbitral process such as appointment of arbitrators, arbitration agreement, attacks on partial and/or final awards.\textsuperscript{155} This is especially true when the courts using national law, try to reduce party autonomy, the competence of the arbitrators to decide on its own jurisdiction, the arbitrators freedom to conduct the proceedings according to the parties' will, or the arbitral tribunal's decisions.\textsuperscript{156} Nevertheless, even though this proposal suggests


\textsuperscript{155} Id.

\textsuperscript{156} Werner, supra note 24, at 116.
exclusion of the intervention of courts from arbitration proceedings, it welcomes the national courts to assist in the conduct of arbitration.\textsuperscript{157} This should not be prevented where one party does not want to comply with the valid arbitration agreement or disregards the arbitral tribunal. This is also true for cases when necessary to procure evidence, if it cannot be obtained voluntarily.\textsuperscript{158} This proposal aims at making the modern international commercial arbitration more efficient by improving the autonomy of arbitration and by permitting national courts to intervene in a limited number of cases. In other instances, discussed above, the national courts will not have the power to interfere with arbitration procedures.

The current solution of this very important issue is proposed, not through the amendment of the New York Convention, but through the adoption by the countries of the UNCTARAL Model Law on International Commercial Arbitration,\textsuperscript{159} as their national legislation.\textsuperscript{160} A number of provisions of the

\textsuperscript{157} E.g. Rubino-Samartano, supra note at 116; id. Werner at 116-117, 119.

\textsuperscript{158} Id.


\textsuperscript{160} Werner, supra note 24, at 119.
Model Law are designed for courts to aid arbitral proceedings. Court intervention is permitted only in limited cases, as specified in the model.\textsuperscript{161} Even though this solution has been criticized, it seems that universal adoption of the Model Law will solve most of the existing problems, rather than modification of the Convention, which may create only uncertainty and additional difficulties to be discussed further in this paper.\textsuperscript{162}

Another proposal to eliminate difficulties during arbitration proceedings is to improve the standard arbitration clause. It has been suggested that this should be achieved through an annex to the New York Convention, which will make the new standard arbitration clause mandatory for the member states.\textsuperscript{163} It was criticized that standard arbitration clauses, which currently exist, do not cover a number of important issues and are a reason for "very heated disputes and difficulties during arbitration proceedings which contribute to their length."\textsuperscript{164} Thus, annexing a new arbitra-

\textsuperscript{161}\textit{Infra} notes 248 - 257.

\textsuperscript{162} Werner, supra note 24, at 119 where the author underlines that he "... would have much preferred the question of the parties' autonomy in the conduct of the proceedings and the assistance of the court to be dealt with by a revision of the New York Convention rather than in the Model Law." See also chapter IV(E).

\textsuperscript{163} Rubino-Samartano, supra note 154, at 187.

\textsuperscript{164} Id.
tion clause to the New York Convention will simplify the arbitral proceedings. Current standard arbitration clauses are criticized because they do not contain mandatory provisions concerning the choice of law, the set of procedural rules, the choice of place of arbitration, the language of the arbitral proceedings and, finally, the nationality of the arbitrators. Clarification should be introduced with regard to these issues. Such clarification should eliminate much misunderstanding that may arise after the dispute is submitted to arbitration. As a matter of fact, it is necessary to mention that this proposal is not viewed to be achieved separately, but as a complex of measures proposed in the context with other possible amendments to the New York Convention.  

C. Proposals to Narrow the Defenses under The New York Convention

165 Id. at 187-188, but see generally Narayanaswami Krishnamurti, Some Thoughts on a New Convention on International Arbitration, in The Art of Arbitration 207 (Jan C. Schutsz and Albert Jan van den Berg eds. 1982), who argues that the necessity of establishment the place of arbitration, and applicable law should not be introduced in the agreement of the parties, but rather the arbitrators should have freedom to decide on it afterwards.

166 E.g. generally, Rubino-Samartano, supra note 154; Werner, supra note 24.
The core of the New York Convention is article V. The article contains the limited number of grounds which may be used as defences to recognition and enforcement by the respondent,\(^{167}\) and by the court at its own discretion.\(^{168}\) Even though the grounds are limited, in many instances they are not considered narrow enough, creating difficulties in the recognition and enforcement procedures and possible attacks on the award rendered. This is one of the main arguments made for narrowing the defenses available under the New York Convention. Over the years there have been a number of proposals aimed to modify this article as a whole or to modify its specific provisions.

1. Provisions of the 1980 French Decree as a Model for Possible Modifications

One of the proposals made by a leading expert in arbitration that the grounds for rejection of recognition and enforcement of the New York Convention should be "simplified, reduced in ambit and rendered more precise."\(^{169}\) The author suggests that compared to the defenses listed in

\(^{167}\) New York Convention, supra note 19, art. V(1).

\(^{168}\) Id. art V(2).

the French Decree on International Trade Arbitration of 1980 ("French Decree"), the grounds of recognition and enforcement are "antiquated". The gist of the proposal is to narrow the possible grounds that may be introduced, by the party challenging the award or by the national court on its own discretion, in order to reduce the attacks by simplifying the recognition and enforcement challenges. The proposal suggested to use the grounds introduced in the French Decree.171

The French Decree172 follows the general principles of the grounds for refusal of enforcement introduced in the New York Convention. Nevertheless, the Decree substantially reduced the number of grounds for the refusal and, moreover, drastically simplified them. Three grounds of the New York

170 Id. This Decree has been introduced into the French Code of Civil Procedure by the Decree of May 12, 1981. Civil Code, art. 2,059 - 2,061 and Decret 81-500 of May 1981 in Journal officiel 14 May 1981 sur l'Arbitrage.

171 Schmitthoff, supra note 169.

172 Id. at 233:
It provides that a decision refusing the recognition or enforcement of a foreign award is subject to appeal only in the following instances:
1. absence, nullity or expiry of the arbitration agreement;
2. irregular appointment of the arbitrators;
3. the arbitrator's failure to respect the terms of reference;
4. violation of the principle of fairness;
5. when it is contrary to international public policy as to recognition or enforcement.
Convention concerning due process, the non-binding award, and non-arbitrability are excluded.\textsuperscript{173} It seems that the due process and the non-binding award defenses were excluded because a new defense was introduced - the violation of the principle of fairness, which in a sense summarizes the two above. As for the arbitrability ground, the French Decree concerns only matters of international trade; therefore, there is no need for this defense. Furthermore, the public policy defense has been narrowed into international public policy.\textsuperscript{174}

Overall such modifications should reduce difficulties with the enforcement of the awards in the national courts. The possibility of the attacks will be narrowed and the defenses will become more limited and less complicated.

2. Modifications of Specific Defenses

Over the years, the question of modifying the specific provisions of article V have also been raised. One of the provisions of the New York Convention, permitting refusal of the enforcement of the award if the rendered award have been set aside in the country of origin, has been particularly

\textsuperscript{173} New York Convention, supra note 19, art. V(1)(b) and (e), art. V(2)(a). Discussion on these grounds see chapter 3 of this paper.

\textsuperscript{174} This question would be discussed further in this chapter.
discussed by Berg. It was questioned whether or not this ground needs to be changed or eliminated. The worry was expressed that by not specifying this provision there had been created a situation when the rendered award might be set aside in the country of origin on "all grounds contained in the arbitration law of the country of origin." Such an interpretation would reject the limited character of the grounds of refusal of article V and basically interfere with the uniformity to which the New York Convention is aimed.

The survey of cases under the Convention shows that this provision has not produced the negative effect which it theoretically may have. This is explained less by the fact that once the award is set aside in the country of origin it is unlikely that the enforcement would be pursued in another country, but rather that this is "initiated in exceptional cases only." The author argues that in any event elimination of this provision is not desirable. The losing party should have to have the "validity of the award finally adjudicated in one jurisdiction." Otherwise, it

175 New York Convention, supra note 19, art. V(1)(e).

176 Berg, supra note 1, at 355.

177 Id.

178 Berg, supra note 1, at 355.

179 Id.

180 Id.
may create a situation when the losing party may be pursued in different jurisdictions, with a questionable award, until it will be enforced. But in the current situation, where this provision is preserved in the New York Convention, the claimant will not have this opportunity because practically the award would not be enforced due to the set aside provision.\textsuperscript{181}

This question has been solved in the UNCITRAL Model Law on international commercial arbitration,\textsuperscript{182} where a solution has been found in order to preserve this provision and at the same time not to extend the grounds for refusal by including specifically provisions of the national law of the country of origin. Under the UNCITRAL Model law the provisions for setting aside an award in the country of origin are almost identical to the provisions under which enforcement can be rejected in the enforcement country.\textsuperscript{183} This approach permits preserving the setting aside provision and also not to widening the limited defenses under the New York Convention.

A number of proposals have been made to change the second part of article V of the New York Convention. This article gives the national courts of enforcing countries the power to deny enforcement on their own discretion if the

\textsuperscript{181} Id.

\textsuperscript{182} UNCITRAL Model Law, supra note 159.

\textsuperscript{183} New York Convention, supra note 19, art. 46.
subject matter is not arbitrable under its national laws or it would be contrary to the public policy of the enforcing country.\textsuperscript{184}

Under the first part of article V (2) of the New York Convention an arbitrator is under a dilemma while rendering an award. The difficulty may appear at the stage of recognition and enforcement, when the national court would rule that this subject matter is not arbitrable under the laws of the enforcing country. The contracting states have shown a wide diversity in regard to the non-arbitrable subject matters.\textsuperscript{185} Examples of such non-arbitrable subject matters are anti-trust, the validity of intellectual property (patents, trademarks), family law, protection of certain weaker parties, etc.\textsuperscript{186} Several courts have already ruled on the subject matter of arbitration under the New York Convention. In Scherk\textsuperscript{187} the United State Supreme Court was faced with the question of arbitrability of securities transactions. The Supreme Court concluded that even though such disputes may not be arbitrable if the contract is domestic, they are arbitrable if the contract is international. The Italian Su-

\footnotesize

\textsuperscript{184} Id. art.V (2).

\textsuperscript{185} E.g. Berg, supra note 1, at 375; Gaja, supra note 71, s I.C.4.

\textsuperscript{186} Id. at 369-370.

preme Court in *Scherk Enterprises A.G. v. Society des Grandes Marques*\(^{188}\) determined the question of the arbitrability of the trademarks. The Court held that the arbitration is valid because the action is based on the question of the contractual rights in regard to the trade marks. The Court also declared a necessity of judicial proceedings in regard of some other questions. In *LIAMCO*\(^{189}\) the United State District Court for the District of Columbia refused to enforce an award stating that nationalization is a subject matter not capable of settlement by arbitration.

Taking into consideration that the non-arbitrable subject matters widely differ from country to country and such a situation creates difficulties in the flow of international commercial arbitration, there was made a proposal to amend this part of article V (2). It was proposed to prepare an annex to the New York Convention or new convention which will establish a generally acceptable list of non-arbitrable subject matters for all contracting states.\(^{190}\) As a first practical step it was suggested that it is necessary to complete a list of non-arbitrable subject matters for


each member State, which may be regularly published.\textsuperscript{191} Furthermore, it was proposed to exclude all international trade disputes from being non-arbitrable "subject to rules of international public policy of each country."\textsuperscript{192}

This proposal was highly criticized by commentators for a number of reasons.\textsuperscript{193} First, it will be very difficult to create such a list, which will include all possible hypothetical situations that may arise in the future and be acceptable for all contracting states.\textsuperscript{194} Second, in many instances it is not clear which subject matter is not arbitrable in many systems of national law.\textsuperscript{195} Third, States may try to use this opportunity not to include non-arbitrable matters, but to include exclusively arbitrable matters, and expressly follow them.\textsuperscript{196} The latter, instead of improving the situation, will make it even more complicated.

Under the New York Convention enforcement may be denied by the national courts on their own discretion if the award

\begin{footnotesize}
\begin{enumerate}
\item Id.\textsuperscript{191}
\item Id.\textsuperscript{192}
\item E.g. Berg, supra note 1, at 375; Bockstiegel, supra note 113, at 190.\textsuperscript{193}
\item Id. Bockstiegel.\textsuperscript{194}
\item Berg, supra note 1, at 375.\textsuperscript{195}
\item Id.\textsuperscript{196}
\end{enumerate}
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is "contrary to the public policy of that country."197 National public policy has been a traditional ground used for refusal of enforcement of foreign arbitral awards, foreign judgments or the use of the foreign law. Almost all international conventions on these matters include such a provision.198 Nevertheless, it is increasingly important to differentiate between domestic and international public policy in the international context.199 The main idea of such a distinction is that the number of matters falling under public policy in international cases is smaller than in domestic cases. Such an interpretation will make this provision of the New York Convention much narrower and limit the attack on the awards rendered. That is why a proposal to amend the public policy provision of the New York Convention was made so that the national courts of the enforcing country could only apply international public policy defenses to deny recognition and enforcement of foreign arbitral

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197 New York Convention, supra note 19, art. V(2)(b).

198 Berg, supra note 1, at 360.

199 For an excellent comparison of international and domestic public policy in international commercial arbitration see generally e.g. Stephen M. Schwebel and Susan G. Lahne, Public Policy and Arbitral Procedure, in ICCA CONGRESS SERIES N3: COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 205 (Pieter Sanders ed., 1987); Piere Lalive, Transnational (or Truly International) Public Policy and International Arbitration, in ICCA CONGRESS SERIES N3: COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 259 (Pieter Sanders ed., 1987).
awards.\textsuperscript{200} Basically this proposal's purpose is to establish what has already been done by the national courts of the contracting states by distinguishing between the international and domestic public policy and narrowing interpretation of the provision of the Convention.\textsuperscript{201}

Taking into account this narrow interpretation of the New York Convention by the national courts in the various contracting states and the limited number of cases in which the public policy defense has succeeded, even though it has been frequently invoked,\textsuperscript{202} it seems that the problem has been exaggerated.

\textsuperscript{200} Howard M. Holtzmann, \textit{A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in The Internationalization of International Arbitration} 109, 113 (Martin Hunter et al eds., 1995).

\textsuperscript{201} E.g. in Scherk, supra note 187 the Supreme Court of the United State has already differed between international and domestic public policy in international commercial arbitration; in Rakta, supra note 80, at 974, the United State Court of Appeals for the Second Circuit reasoned that the enforcement under the provision of the public policy of the New York Convention should be denied only if it would "violate the forum state's most basic notions of morality and justice"; Berg, supra note 1 at 365-366 underlining that the German and Swiss courts have also constructed this provision of the New York Convention narrowly and apply it only in "extreme cases".

\textsuperscript{202} E.g. Berg, supra note 1, at 366; Gaja, supra note 71, s I.C.5.
D. Exclusion of National Courts from Enforcement Proceedings

The last resort for the winning party to receive the performance of the rendered award is the power of the national courts, where the assets of the loser are located, to enforce it. National courts of the enforcement country are the key players of the enforcement scheme under the New York Convention. This has been viewed as one of the main disadvantages of the current enforcement system of the foreign arbitral awards.203

A number of weaknesses of the recourse to the national courts have been pointed out. One of the main weaknesses viewed is that the current system, created by the Convention, results in lengthy enforcement proceedings open to attacks by the national courts.204 The next weakness is that due to the fact that assets of the losing party are usually in the country of origin, the winning party will have to enforce the award to some extent in a hostile environment.205 This weakness does away with the primary advantage of inter-

203 See generally e.g. Rubino-Samartano, supra note 154; Holtzmann, supra note 200, at 109; Stephen M. Schwebel, The Creation and Operation of an International Court of Arbitral Awards, in The Internationalization of International Court of Arbitration 115 (Martin Hunter et al eds., 1995).

204 Id. Rubino Samartano.

205 Holtzman, supra note 200, at 112.
national commercial arbitration over litigation: shorter proceedings and no resort to the national courts with whom the parties are not familiar.

Generally speaking, all the proposals for the modification of the New York Convention are aimed towards the improvement of the current enforcement system of the foreign arbitral awards. The following proposals in contrast to all previous proposals, if implemented, will totally exclude the national courts from the enforcement scheme. The aim of these proposals is to create a supranational court of international commercial arbitration, entitled for the enforcement of the rendered arbitral awards. This is foreseen to be achieved either through an amendment to the existing New York Convention\(^{206}\) or by establishment of a new convention.\(^ {207}\) Exclusion of national courts is viewed, by the authors of the proposals, as the best solution in order to minimize the weaknesses of the New York Convention. If implemented, this would totally change the system of recognition and enforcement of foreign arbitral awards.

1. Introduction of Appellate Proceedings

\(^{206}\) Rubino-Samartano, supra note 154, at 184.

\(^{207}\) Holtzman, supra note 200, at 112.
The first proposal\textsuperscript{208} envisages introduction of appeal procedures into international commercial arbitration. The new court - the International Arbitral Court of Appeals ("IACA") - will be responsible for appointment and supervision of the appellate proceedings, conducted by the appeal panel.\textsuperscript{209} It is argued that if the most national legal systems permit two instances in litigation then it should be permissible in arbitration as well.\textsuperscript{210} The appellate panel will have the power to review the arbitral award on the merits, which is "essential to protect the parties' rights and, in the end, also protect the arbitral institution itself."\textsuperscript{211}

\textsuperscript{208} For simplicity the proposal by Rubino-Smartano will be referred as the "first proposal" and the proposal by Holtzman as the "second proposal", due to the difference of the dates made on.

\textsuperscript{209} Rubino-Smartano, supra note 154, at 185. The author proposes that this panel should be composed of three arbitrators, two of whom will be appointed by the parties and the chairman by the IACA.

\textsuperscript{210} Rubino-Smartano, supra note 154, at 182. The author discusses two contra arguments: that the arbitrators have higher standards and substantial time increase needed an additional instance. As a justification for the new system he argues that an average arbitrator does not have higher standards than an average judge and, as for longer time needed, he proposes that the first instance should be undertaken under a new framework: one year arbitration with one arbitrator.

\textsuperscript{211} Id. at 183. It has become common to propose the necessity of the review on the merits of the arbitral awards. For another such proposal see Schmittoff, supra note at 237, where the author suggests necessity of the review on the merits of
The losing party will resort to the new court in order to appeal the previously rendered award. In cases when the losing party will neither appeal nor perform the award, the winning party will be able to apply to the IACA in order to confirm the rendered award.²¹²

The new court is viewed as a body which will be able to establish the "necessary quality of supervision"²¹³ in order to satisfy the expectations of the contracting states. This "satisfaction" will in return treat the appeal award as final and not attackable in the contracting states. This decision will afterwards be automatically enforced in the member countries. Basically the award will have total immunity against any attack from national courts.²¹⁴ The authority of the International Arbitration Court of Appeals should be the sufficient enough to justify that the national courts will not attack the award and set aside recognition proceedings. The award will become an "enforceable instrument in all contracting states."²¹⁵

²¹２ Id. at 185.

²¹³ Id.

²¹⁴ Rubino-Samartano, supra note 154, at 185.

²¹⁵ Id. at 187.
2. Creation of a Supranational Court for the Enforcement of Arbitral Awards

The second proposal, as the first one, promotes a creation of an International Court of Arbitral Awards ("ICAA"). The new court will have exclusive jurisdiction over matters of recognition and enforcement of the rendered awards under article V of the New York Convention. The new court will promote uniformity and predictability, decrease the time necessary for the recognition and enforcement of the arbitral awards and it will reduce "risks and uncertainties that business people fear when they must submit their affairs to the court of a foreign country."217

The contracting states will take on the obligations to execute judgments of the new international court concerning persons and property on its territory.218 The national courts of the parties to the convention will be obligated to give full faith and credit to the judgments of the new court.219 The new international court will even have power to impose sanctions, in a form of damages, on States that do not fulfill their obligations.220

216 Holtzman, supra note 200, at 112.

217 Id. at 114.

218 Holtzman, supra note 200, at 112.

219 Schwebel, supra note 203, at 118.
This new court will not only take over all functions of the national courts under the New York Convention, but will also be responsible for setting aside the award or enforcing it at the place of arbitration.\textsuperscript{221} Such an approach enables the parties not to deal with any national court even in the place of arbitration, if any recourse to the local court ever arises.

The ICAA will be entitled to look into questions whether recognition and enforcement of an arbitral award may be refused under the provisions of the New York Convention. Under this proposal the new court will not review the rendered arbitral award on the merits.\textsuperscript{222} It should not act, in any case, as an appellate instance not to create an additional layer of review. When the loosing party of a Contracting State brings a challenge to the rendered arbitral award in a national court, the other party will have the right to remove the challenge to the new court. The ICAA will have exclusive jurisdiction over the challenge and any national court of a Contracting State will be obligated to accept that motion.\textsuperscript{223}

\textsuperscript{220} Holtzman, supra note 200, at 112.

\textsuperscript{221} Id.

\textsuperscript{222} Schwebel, supra note 203, at 118.

\textsuperscript{223} Schwebel, supra note 203, at 119. The proposal provides a detailed description of the new court. It is proposed that the number of judges will be from 11 to 15. The ICAA will respect fully represent main legal systems, trading and arbi-
Even if the new international court will be fully responsible for recognition and enforcement procedures, a recourse to national authorities will be necessary in order to execute the rendered arbitral award. The proposal envisages that in contracting states this function will be fulfilled by the same authorities that currently are obligated to execute judgments of the national courts.\textsuperscript{224} It is suggested that if such a provision is not included in the new convention then the ICAA will become just an additional layer in the award enforcement scheme.\textsuperscript{225} The party seeking the execution of the arbitral award will have the binding judgment of the new court, which has already ruled on the matters of the validity of the render arbitral award. Basically the authorities will be actually bound by the force of the intervention nations. Bearing in mind that this mainly includes developed countries other countries should be also represented. The judges should be elected when the new convention comes into force. Only members to the convention will have the power to elect the judges, who will serve one, non-renewable, term of fifteen years. Also a number of additional judges should be in reserve to be called if the case load requires. The judges will be responsible only to the international community. The new convention should also include provisions for the adoption of the Rules of the International Court of Arbitral Awards by the new court and establishment of a registry to service the ICAA.

\textsuperscript{224} Holtzman, supra note 200, at 113.

\textsuperscript{225} Id.
ternational treaty to execute the judgments of the International Court of Arbitral Award.²²⁶

The proposal goes further than just suggesting to exclude national courts from the recognition and enforcement procedures. It is argued that in order to create greater efficiency it is necessary to delegate to the new court additional powers such as pre-award attachment. The court should have jurisdiction over the disputed assets, until it rules on the matter of the recognition and enforcement of the rendered arbitral award.²²⁷

Due to the fact that these proposals are of a more recent date, they have nor been criticized nor supported by the commentators. The general notion is that these proposals are far reaching and need further examination.²²⁸ Both authors of the proposals consider them as something for the future, for the twenty first century. In any case, it seems that total exclusion of the national courts from enforcement of the arbitral awards not only seems unrealistic, but moreover rejection of judicial review may be considered even unconstitutional in many countries. Furthermore, it seems

²²⁶ Schwebel, supra note 203, at 118.

²²⁷ Holtzman, supra note 200, at 113.

that it will be practically impossible to create such a mechanism when the countries would give up their control over the enforcement through the national courts. Even less realistic is the proposed system of the execution of the judgments, where the executive bodies would have the obligations to do it, without the national courts reviewing the matter. Today the existing international courts have major difficulties with the execution of their judgments. It seems that a new international court would have even more problems when the parties are private persons.

E. Maintaining the Present Enforcement System.\(^{229}\)

International commercial arbitral awards have been enforced worldwide under the 1958 New York Convention for almost forty years.\(^{230}\) As it was observed, the proposals to modify the provisions of the Convention were not implemented. Neither have the leading international arbitration authorities, such as UNCITRAL, nor arbitral community, in its majority, not only does not approve, but even opposes to any changes in the current enforcement system of foreign arbitral awards.

\(^{229}\) Some of the arguments against particular modification has already been previously considered this chapter.

\(^{230}\) New York Convention, supra note 19.
1. Arguments for Preservation of the Current Enforcement System.

The first and only major proposal to amend the New York Convention, proposed by AALCC, was rejected by UNCITRAL after extended review. The UNCITRAL rejected any possible modification, arguing that application and interpretation of the Convention by the national courts did not create any significant problems for such an attempt.\(^{231}\) Furthermore, the UNCITRAL considered that the difficulties were not of such magnitude as to go further with the proposed amendment. This decision has been extensively used by those commentators who are opposed to modifications of the present enforcement system.\(^{232}\)

It is argued that any modification to the New York Convention would create additional problems to the international enforcement of arbitration awards. Not only would the creation of a satisfactory text take much time, but it would presumably take even more time until the current members would become parties to the new convention or to the annex.\(^ {233}\) It took almost forty years for the New York Con-

\(^{231}\) See chapter IV(A).

\(^{232}\) E.g. Berg, supra note 1, at 2; Glossner, supra note 20, at 277, mentions that the "UNCITRAL, ..., refused either to amend the present text or to create a new convention, ostensibly for lack of cause."

\(^{233}\) Id. Berg at 394.
vention to become almost universally accepted. Two-thirds of the members of the United Nations are contracting states. It is the only widely excepted convention on matters regarding international commercial law, thus far created under the auspices of the United Nations. It is not even clear whether or not current members would wish to become parties to the revised convention. A view has been expressed that this may even give some of them a chance to cancel membership using the notion of non agreement with the proposed amendment. Thus, the created uncertainty, may have negative effect not only on the process of the enforcement of foreign arbitral awards, but on the international commercial arbitration as a whole.

Furthermore, a more or less similar judicial interpretation of the New York Convention created up to this date will be lost; it will be difficult to tell, with the exact certainty, how long it will take for new interpretations to be created by national courts. The value of a multilateral convention, where the key players are the national courts, is first connected with their application and interpretation. A number of extended studies have shown that the national courts in the contracting states have been interpreting and applying the New York Convention more or less in

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234 Id.

235 Id.
compliance to the concepts and the principles set forth in the Convention.  

Thus, such an approach of not eliminating the existing problems through changes of the current enforcement system, does not improve the present enforcement system and leaves the difficulties untouched. It may be argued whether the magnitude of the existing problems is enough for modification or not, but there is no doubt that their existence hampers the enforcement of foreign arbitral awards. That is why the solution was found in such a way so that not only would the current system be preserved, but also the problems created by the current system be solved.

2. Basic Features of the UNCITRAL Model Law on International Commercial Arbitration

The proposed solution to improve the present enforcement system, for most of the remaining problems, is adoption of the UNCITRAL Model Law by the contracting states to the Convention as their national legislation. General principles of the UNCITRAL Model Law are party autonomy, limited court intervention, significant authority of an arbitrator and, finally, harmony with the New York Convention.

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236 E.g. generally Study of the New York Convention, supra note 128; Berg, supra note 1; Gaja, supra note 71; 21 Y.B. Comm. Arb., supra note 47.
Party autonomy may be considered as one of the main principle of the Model Law. Under the Model Law parties may agree, among other things, on specific arbitrable subject-matter;\(^{238}\) on the number of arbitrators;\(^{239}\) on a procedure of appointing an arbitrator or arbitrators, subject to the provisions of the same article;\(^{240}\) on procedural aspects of the challenge of an arbitrator;\(^{241}\) on the procedural rules;\(^{242}\) to determine the place of arbitration;\(^{243}\) on the language or languages of arbitration proceedings;\(^{244}\) on the framework for presenting claims;\(^{245}\) on the law governing arbitration;\(^{246}\) on settlement of the dispute during the arbitration.\(^{247}\)


\(^{238}\) UNCITRAL Model Law, supra note 159, art. 1(3)(c).

\(^{239}\) Id. art. 10 (1).

\(^{240}\) Id. art. 11(2).

\(^{241}\) UNCITRAL Model Law, supra note 159, art. 13(1).

\(^{242}\) Id. art. 19(1).

\(^{243}\) Id. art. 20(1).

\(^{244}\) Id. art. 22.

\(^{245}\) UNCITRAL Model Law, supra note 159, art. 23(1).

\(^{246}\) Id. art. 28(1) and (3).

\(^{247}\) Id. art 30(1).
A second important principle of the Model Law is the limitation on court intervention in arbitration proceedings. The provisions of the model have taken the middle road on this matter: on the one hand, preserving the right of the national courts to intervene in the arbitration proceedings, and on the other, permitting such intervention only in limited cases specifically contained in the Model Law.\textsuperscript{248} The adopting state may also choose a specific court or any other authority competent to perform assistance and supervision of the actions as specified in the Model Law.\textsuperscript{249} Courts may intervene: to order conservative measures of relief;\textsuperscript{250} if the parties fail to agree to appoint an arbitrator;\textsuperscript{251} to decide on the challenge of an arbitrator, if the parties fail to agree on it;\textsuperscript{252} to remove an arbitrator in specified circumstances;\textsuperscript{253} to decide challenges to arbitral jurisdiction;\textsuperscript{254} to assist the arbitrators in taking evidence;\textsuperscript{255} to set aside

\begin{footnotesize}
\textsuperscript{248} UNCITRAL Model Law, supra note 159, art 5.
\textsuperscript{249} Id. art. 6.
\textsuperscript{250} Id. art. 9.
\textsuperscript{251} Id. art. 11(3)(b).
\textsuperscript{252} UNCITRAL Model Law, supra note 159, art. 13(3).
\textsuperscript{253} Id. art. 14(1).
\textsuperscript{254} Id. art. 16(3).
\textsuperscript{255} Id. art. 27.
\end{footnotesize}
the award;\textsuperscript{256} and, finally, to either enforce or reject the enforcement of the award.\textsuperscript{257}

Thirdly, the UNCITRAL Model Law gives significant authority to the arbitrators. This is subject only to contrary agreement of the parties to the arbitration agreement.\textsuperscript{258} The arbitral tribunal: may decide on the challenge of an arbitrator;\textsuperscript{259} is competent to rule on its own jurisdiction;\textsuperscript{260} may order interim measures or appropriate security;\textsuperscript{261} has the power to determine the procedure for conduct and the admissibility of any evidence;\textsuperscript{262} may decide on the matter of applicable law.\textsuperscript{263}

Finally, the UNCITRAL Model Law was drafted to promote the policies and principles of the New York Convention.\textsuperscript{264} It was viewed as a vehicle to promote the goals of the Convention.\textsuperscript{265} The UNCITRAL decided that a model law would be

\begin{footnotesize}
\begin{enumerate}
\item[256] UNCITRAL Model Law, supra note 159, art. 34.
\item[257] Id. art. 35 and 36.
\item[258] Hoellering, supra note 237, at 331.
\item[259] UNCITRAL Model Law, supra note 159, art. 13(2).
\item[260] Id. art 16(1).
\item[261] Id. art. 17.
\item[262] Id. art. 19(2).
\item[263] Id. art. 28(2).
\item[264] Hoellering, supra note 237, at 329.
\end{enumerate}
\end{footnotesize}
incomplete if the recognition and enforcement provisions were not be included. This was achieved by UNCITRAL by preserving the enforcement scheme of the New York Convention in the Model Law. The articles on enforcement are almost identical to article V of the New York Convention. In this way the UNCITRAL not only preserved the enforcement scheme of a successful Convention, but also has added provisions which were not covered by the latter.

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266 Id.
CHAPTER V. CONCLUSION

The development of international arbitration into one of the most popular ways of alternative dispute resolution, during this century, has raised the question of the efficient enforcement of arbitral awards. The whole arbitration process would not make sense unless the winning party could obtain enforcement of the award. In order to oblige an unwilling losing party to comply with the award, the claimant ultimately has to resort to the national courts of the place where, for example assets of the losing party are situated. Thus, an international legal framework for the enforcement of arbitral awards must be put in place to avoid the injustice of non-compliance with awards.

At the dawn of this century the enforcement procedures where regulated by the national laws of the place where enforcement was sought. Substantial increase of international commercial arbitration and difficulties with the enforcement under different national laws, were the main reasons for the adoption of the first multilateral conventions. The Geneva Protocol established the validity and enforceability of arbitration agreements\textsuperscript{267} and the Geneva Convention regulated the enforcement of the protocol awards among the contracting

\textsuperscript{267} Supra notes 28 and 29 and accompanying text.
Even though they were considered as substantial improvement the loopholes of the conventions created substantial difficulties in practice.\textsuperscript{269} This prompted the international arbitral community to promote and establish a new convention on international commercial arbitration: the 1958 New York Convention,\textsuperscript{270} regulating recognition and enforcement of arbitration agreements and arbitral awards. Even though the Convention applies only to two essential aspects of the international commercial arbitration, it has been referred to as the cornerstone of the modern frameworks of arbitration.\textsuperscript{271} The scope of the Convention is narrowed by two permitted reservations: the reciprocity reservation and the commercial reservation.\textsuperscript{272} The Convention's enforcement scheme has been substantially modified: member states are responsible for enforcement of any foreign arbitral award with limited grounds for refusal of recognition and enforcement; the burden of proof is with the party opposing the enforcement.

The Convention currently has 112 parties. More than 650 national court judgments have been reported on the ap-

\textsuperscript{268} Supra notes 30 and 31 and accompanying text.

\textsuperscript{269} Supra notes 32 - 35 and accompanying text.

\textsuperscript{270} Supra note 19.

\textsuperscript{271} Supra note 20.

\textsuperscript{272} See chapter III (A)(2).
lication of the Convention. A number of studies analyzing the application and interpretation of the New York Convention by the national courts have concluded that in general the Convention have been applied in accordance with the ideas and principles of the latter.\textsuperscript{273}

Nevertheless, a number of problems with the enforcement exist in the current scheme. First, resort to national courts increases the length and the costs of the enforcement procedures. Second, the New York Convention regulates only two aspects of international commercial arbitration, whereas the others are regulated by the national law. This creates practical problems and difficulties, especially during the arbitration process.

Over the years, these and other gaps of the New York Convention regime has prompted various agencies, scholars, and practitioners to propose modifications of the provisions of the Convention. In general, the proposed changes are aimed at widening the scope, clarifying and/or narrowing the provisions of the Convention, and creating a more efficient enforcement scheme. But to date none of them have succeeded. The text of the Convention has not been changed since June 10, 1958, when it was first opened for signature.

There is no doubt that the New York Convention has shown success over the years. It has achieved stability in the field of international commercial arbitration, and cre-

\textsuperscript{273} Supra note 102.
ated "comity amongst trading nations." In the majority of cases, arbitral awards have been enforced by the national courts according to the principles of the New York Convention.

This author agrees with the conclusion of the UNCITRAL and other authoritative commentators that the magnitude of the problems is not enough to undertake modifications whose resultes surely to create uncertainty and additional problems. Over the years a more or less uniform interpretation of the New York Convention has been created by the national courts. It might take another forty years until the current contracting states would become parties to the new convention. All this, that have been achieved in the realm of interpretation of the Convention, would be at risk if it were to be modified.

However, leaving gaps in the Convention untouched, at the same time, does not solve the existing problems. One commentator suggested that "nothing in this world is fail-proof and eternal": it is necessary to find a solution for the existing problems.

274 Glosner, supra note 20, at 279.

275 See chapter IV(A); Berg, supra note 1; Glosner, supra note 20.

276 Supra note 233.

277 Glosner, supra note 20, at 279.
It seems, that for the time being, the best solution is to adopt by the contracting state the proposed UNCITRAL Model Law on international commercial arbitration. This will preserve the existing "dual system" in international commercial arbitration, where some aspects are regulated by international conventions and the rest by the applicable national law.\textsuperscript{278} Adoption of the Model Law harmonizes national laws on international commercial arbitration and frees international commercial arbitration "from the parochial law of any given state."\textsuperscript{279}

The current successful enforcement system is preserved and many problematic aspects are regulated under harmonized national laws. In fact, this is why the Model Law has adopted the same enforcement scheme of the New York Convention. Wide party autonomy, limited court intervention, significant authority of the arbitrator, are the general principles of the Model Law. These are the gaps of the New York Convention. By adopting the Model Law the contracting states eliminate most of the problems and preserve the enforcement scheme of the Convention.

More than twenty countries and several states of the United States have already adopted the Model law as their


\textsuperscript{279} Hoellering, supra note 237, at 327.
internal legislation. With the increase of this number the success of the Model Law approach would be evident.\textsuperscript{280}

Adoption of the Model Law is the best alternative to uncertainty and artificial problems that would be created with the modification of the New York Convention. This author fully agrees with the statement that "the era of the international conventions on international arbitration, or its amendments, is past."\textsuperscript{281} Now is the time for harmonized national laws and court decisions on international commercial arbitration through the enactment by states of the UNCITRAL Model Law and the New York Convention. Together they form a highly satisfactory regime for international commercial arbitration.

\textsuperscript{280} In the end of 60s nobody would have even imagine the present success of the New York Convention.

\textsuperscript{281} Werner, supra note 24, at 120.
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