



**FORMAL VALIDITY OF ARBITRATION  
AGREEMENTS ENTERED INTO BY MEANS OF  
ELECTRONIC COMMUNICATION**

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## **Table of Content**

Abstract .....	2
<b>I Introduction</b> .....	3
<b>II Does electronic communication fulfill the requirements for formal validity of arbitration agreement set by the New York Convention?</b> .....	5
<b>II. 1. Article II (2) of the New York Convention – ‘agreement in writing’</b> .....	7
<b>II.2. Challenges raised by electronic communication: possible variations from Article II (2)</b> .....	13
<b>II.2.1. Article II (2): issues relating to signatures of the parties</b> .....	19
<b>II.2.2. Article II (2): issues relating to exchange of letters or telegrams</b> .....	24
<b>II.3. Article IV (1) (b): submission of the original agreement or a duly certified copy</b>	34
<b>III Practical difficulties that can arise when entering into arbitration agreement by means of electronic communication</b> .....	36
<b>III.1. Issues regarding the providing with printing records and immateriality</b> .....	36
<b>III.2. Difficulties regarding the recognition and enforcement procedure</b> .....	39
<b>IV Setting the trends and providing with the solutions: UNCITRAL proposals ....</b>	41
<b>IV.1. First alternative: adopting the instrument interpreting Article II (2) of the New York Convention</b> .....	43
<b>IV.2. Second alternative: Reference to the New York Convention in the Electronic Communications Convention</b> .....	46
<b>V Conclusion</b> .....	50
<b>Bibliography</b> .....	55

## **Abstract**

This paper represents a review of the notion of granting formal validity to the arbitration agreements entered into by various means of electronic communication. The legal basis for the relevant *pro* and *contra* reasons for the possibility of providing these agreements with the full formal validity is Article II (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the : “**New York Convention**”).

Taking into account the requirement of “written form”, this paper contains the legal analysis of different aspects taken by the different authors and expressed in court practice. Although this paper contains references to some of the national statutes and international conventions, it is focused mainly on the New York Convention. With respect to the available legislation and literature, this paper advocates in favor of the formal validity of these arbitration agreements. This standing is shown and supported by the more extensive and more flexible interpretation of the requirements prescribed within Article II (2) of New York Convention. In addition, the argumentation in this paper is based on the analogy between the use of electronic communication and the standards set by Article II (2).

Although the lack of literature that covers this topic is notable; there is still the fact that electronic commerce and electronic communication have gained a notable influence in international commerce. This fact, together with the desirable increase of the efficiency in international dispute settlement is reason enough for supporting the notion of formal validity of the arbitration agreements concluded via the electronic communication.

# **I Introduction**

Together with the increased development of new technologies, electronic commerce and electronic communication have had a notable effect in international trade. Different types of technological advantages are more frequently used between professionals and in their relations with clients<sup>1</sup>; and the International Commercial Arbitration as such can not be completely free from the effects of these new technologies. In this respect a significant number of authors strongly advocate more frequent use of the new technologies. With respect to the International Commercial Arbitration; this practically means arguing in favor of the legal recognition of conducting the procedure online or via similar means using the different means of electronic communication.

Attention in this paper will be paid to the entering into arbitration agreement. The legal basis for examining the formal validity requirements is the New York Convention 1958, especially Article II (2). Therefore, it will be reviewed whether the arbitration agreements entered into by using electronic communication should be provided with formal validity.

In order to explain the notion of electronic communication, Article 2 of the UNCITRAL Model Law on Electronic Commerce is to be taken as guidance. The mentioned article represents the guidance for the UNCITRAL Reports relating to the possible extensive interpretation of Article II (2) of the New York Convention.<sup>2</sup> Article 2 includes, however, without limitation: electronic data interchange, electronic mail, telegram, telex and telecopy as the “data messages”,

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<sup>1</sup> Lopez Ortiz A., ‘Arbitration and IT’, *21 Arbitration International*, No. 3, 2005, p 350

<sup>2</sup> UNCITRAL Working Group II (Arbitration and Conciliation): 33<sup>rd</sup> Session, Vienna 20 Nov – 1 Dec 2000; 36<sup>th</sup> Session, New York 4 -8 Mar 2002; 41<sup>st</sup> Session, Vienna 13-17 Sep 2004, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html), site visited 19 Jan 2007

which, by analogy can be used in order to make the notion of electronic communication precise enough.<sup>3</sup>

This paper contains references to some national statutes, but the main focus will be on the respective Articles of the New York Convention. The method used in this paper is the interpretation, especially the interpretation of Article II (2) of the New York Convention. Precisely, it will be shown that the extensive and more flexible interpretation of Article II (2) is the most suitable solution for accepting the formal validity of the arbitration agreements concluded via electronic communication.

The more extensive interpretation of the New York Convention implies a comparison in order to achieve the analogy between the set conditions for formal validity; with the characteristics of the electronic communication. In that sense, with the use of ‘functional equivalence’ principle, it will be demonstrated that the electronic communication is similar enough to the traditional means of communication. Concluding, it fulfills the necessary requirements for formal validity. In addition, it is to be explained that providing these agreements with formal validity is completely in accordance with the spirit of the New York Convention.

Therefore, the conclusion reached at the end of **Chapter II** is: either via the more extensive interpretation of Article II (2); or via the application of Article VII of the New York Convention; the arbitration agreements concluded by the means of electronic communication are to be considered as formally valid.

Although the tone of this paper is supportive; in favor of the formal validity of these arbitration agreements; it nevertheless has to be stressed that there are still a lot of doubts

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<sup>3</sup> 1996 – UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html) site visited 19 Jan 2007

regarding this issue. The notion of more flexible interpretation of the New York Convention still brings a lot of difficulties relating to the enforcement issues and non-harmonized courts' practice in this area. **Chapter III** deals with these difficulties.

Taking that into account, the possible amendments of the New York Convention are considered, in order to achieve some level of compliance with the new trends. However, these new tendencies will have to show strong basis for their acceptance, since the process of amending the New York Convention would cause a lot of arguing. The task of solving the existing disharmony between Article II (2) of the New York Convention and Article 7 (2) of the UNCITRAL Model Law is described in **Chapter IV**, especially analyzing the Reports of the UNCITRAL General Assembly and UNCITRAL Working Groups.

However, considering the strong influx of the electronic commerce transactions, and considering the tendencies towards increasing the flexibility and efficiency in international trade, these new means of electronic communication should be favored as a valid form of arbitration agreements. This will be at the same time the conclusion of this paper, presented in **Chapter V**.

## **II Does electronic communication fulfill the requirements for formal validity of arbitration agreement set by the New York Convention?**

The New York Convention 1958 represents one of the most significant and the most widely accepted international conventions. From the moment of its opening for signatures on 10 June 1958, up to this moment, there are 142 contracting parties to the NYC.<sup>4</sup> This fact clearly represents the importance and legal status of this Convention, which, naturally, led to the greater popularization of the arbitration as one of the methods of international dispute settlements.

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<sup>4</sup> Status – 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards  
[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html), site visited 19 Jan 2007

Although the significance of the New York Convention is notable; there is still the fact that it was adopted in 1958, almost 50 years ago. This fact clearly demonstrates that in some aspects the Convention simply can not be in accordance with the innovations that occurred during the last 50 years.

However, it can not be concluded from the text of the Convention that the intention of the drafters was to limit the scope of the Convention to those time's circumstances.<sup>5</sup> Neil Kaplan describes the same, by using the words of Howard Holtzmann: "The definition of an agreement in writing in that Convention (Article II (2)) stated that it should '*include*' not that it should '*be*' the kinds of agreements there specified."<sup>6</sup> More probable is that the constant harmonizing with the new tendencies is more in accordance with the spirit of the Convention itself. The mentioned harmonizing can be achieved either through the more flexible interpretation of the Convention, or through combination with modern national statutes.

This also relates to the possible granting of formal validity to the arbitration agreements entered into by the electronic communication. Naturally, the New York Convention neither explicitly, nor implicitly mentions the means of electronic communication with respect to the form of arbitration agreement. Article II (2) is clear and straightforward in defining the requirements for the formal validity of the arbitration agreements. However, since the electronic communication already represents the significant part of the everyday business world; it is present in International Commercial Arbitration, as well.

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<sup>5</sup> Wahab M., 'The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution' 21 *Journal of International Arbitration*, No. 2, 2004, p. 154

<sup>6</sup> Kaplan N., 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?', 12 *Arbitration International*, No. 1, 1996, p.38

After the careful analysis of formal requirements set by the Convention, it will be demonstrated that, according to their equivalence to the traditional means, the means of electronic communication should be subsumed under the provisions of Article II (2).

## **II.1. Article II (2) of the New York Convention – ‘agreement in writing’**

The **New York Convention** prescribes the requirement for written form with Article II (1). It is stated that “Each Contracting State shall recognize an agreement in writing.”<sup>7</sup> The following paragraph of the same Article defines that the agreement in writing “shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>8</sup>

The prior aim for prescribing very strict conditions for formal validity is better protection of the parties. Namely, it has to be ensured that party to the agreement is aware of the fact that he/she agreed to arbitration.<sup>9</sup> Or, by putting in other words; in order to ensure the fulfillment of the written form requirement, each party’s consent to arbitration should be unequivocally declared.<sup>10</sup> In addition, according to Albert Jan Van den Berg, the other reason for strict definition of the “written agreement” is to “remedy the divergence of the national laws regarding the form of the arbitration agreements.”<sup>11</sup> This reason, according to the Van den Berg’s interpretation, leads directly to his conclusion that Article II (2) supersedes the solutions from different national statutes, as the “maximum and minimum rule.”<sup>12</sup> This approach, the following

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<sup>7</sup> New York Convention, Article II (1)

<sup>8</sup> New York Convention, Article II (2)

<sup>9</sup> Van den Berg A.J., *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation*, (Deventer, Kluwer Law and Taxation Publishers, 1994), p. 171

<sup>10</sup> Holtzmann H., Neuhaus J., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer, Boston 1989), in Varady T., Barcelo J.J. III, von Mehren A. T. *International Commercial Arbitration, Transnational Prospective* (Thomson West, 3<sup>rd</sup> Edition, 2006), p. 147

<sup>11</sup> *ibid*, p.173

<sup>12</sup> *ibid*, p.176



consequences, and the relevance for this topic will be described and analyzed within Subchapter II.2.

By expressing his compliance with Arnold Wahrenwald, Mohamed Wahab sees the need “to ascertain the existence of consent and provide a tangible form of evidence” as the purpose of the Article II (2) requirements.<sup>13</sup> Further, Wahab argues that this purpose can also be achieved by using the means of electronic communication, which is to be evaluated within Subchapter II.2.

Notwithstanding the solution provided with the Convention, other international instruments offer more liberal solutions. One of the examples is definitely the solution contained in Article I (2) (a) of the European Convention on International Commercial Arbitration, done at Geneva, on 21 April 1961 (hereinafter referred to as the “**Geneva Convention**”). According to this provision, the notion of arbitration agreement includes also “...the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between states whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.”<sup>14</sup>

This provision of Geneva Convention obviously contains broader definition of the formal requirements. According to Fouchard, Gaillard and Goldman; the respective provisions from these two Conventions have the similar spirit and purpose, and; therefore, should be interpreted in the same, extensive manner.<sup>15</sup> This is also the approach taken by Varady, Bordaš and Knežević, who are of the opinion that the written form requirement should be interpreted in more flexible way, just as prescribed by the Geneva Convention. According to them; in that case, the

<sup>13</sup> Wahab M, *Supra note 4*, p.154

<sup>14</sup> European Convention on International Commercial Arbitration, (Geneva Convention), Article I (2) (a)

<sup>15</sup> Fouchard P., Gaillard E., Goldman B. *On International Commercial Arbitration*, (The Hague, Kluwer Law International, 1999), p. 378

written form requirement would be satisfied in the cases of exchange of letters, telegrams, or in the case of use of the teleprinter.<sup>16</sup> Obviously, this conclusion would lead to the more extensive interpretation of the New York Convention.

When comparing requirements from various international instruments, it can be noted that the provision of Article 7 (2) of the UNCITRAL Model Law (hereinafter referred as the “UML”) contains the most extensive, but still precise definition of the written form of arbitration agreement. According to this provision, agreement in writing exists “if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.”<sup>17</sup> UML represents very important legal instrument, since the legislation based on the UML is adopted in more than 50 States and different territorial units within some of the States<sup>18</sup>. Great number of countries modeled their national statutes on arbitration according to the UML. This can especially be seen in the situation when via the application of Article VII (1) of the New York Convention (“more-favorable-right provision”), by applying more favorable requirements of national statute instead of Article II (2), actually the provision of Article 7 (2) UML is to be applied. Then the possible collision exists between Article II (2) of the New York Convention and Article 7 (2) of the UML. This problem, and possible solutions suggested, will be examined within Chapter IV.

In addition, attention should be paid to the two instruments regulating E-commerce. The reason for this is reference to those instruments in one of the solutions for harmonizing the provisions of Article II (2) and Article 7 (2) UML proposed by UNCITRAL (particularly, solution which proposes inclusion a reference to the NYC in the Convention on the Use of the

<sup>16</sup> Varady T., Bordaš B., Knežević G. *Međunarodno Privatno Pravo* (Forum, Novi Sad, peto izdanje, 2001), p. 574

<sup>17</sup> UNCITRAL Model Law on International Commercial Arbitration, adopted on 21 June 1985, Article 7(2)

<sup>18</sup> Status – 1985 UNCITRAL Model Law on International Commercial Arbitration, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) site visited 29 Jan 2007

Electronic Communications in the International Contracts).<sup>19</sup> Above mentioned **Model Law on E-commerce** contains in Article 6 (1) the definition of the written form requirement that is met “by a data message if the information contained therein is accessible so as to be usable for subsequent reference.”<sup>20</sup> The most important issue relating to this definition, especially taking into account the topic of this paper, is the fact that it establishes the new concept of data message. The importance of this concept can be noticed through the fact that it includes e-mail, electronic data interchange and telex, which, therefore, fulfill the written requirement prescribed for arbitration agreement.<sup>21</sup>

Similar to this provision is the provision contained in Article 9 (1) of the **Electronic Commerce Directive**, enacted by the European Parliament, which requires Member States to remove all the obstacles to legal validity and effectiveness of the contracts concluded by the use of electronic means.<sup>22</sup> This provision is not explicitly mentioned in the Reports of UNCITRAL Working Group II relating to the broader interpretation of the New York Convention. Nevertheless, some authors are still of the opinion that this definition should also be taken into account, primarily as the guidance for broader acceptance of the so-called ‘electronic contracts’. In this respect, Yu and Nassir explicitly argue in favor of the larger use of electronic contracts, especially electronic arbitration agreements, in international trade.<sup>23</sup>

As stated above, although Article II (2) is starting point while examining formal validity of arbitration agreements; there is still the open possibility, provided with Article VII (1) of the New York Convention, that “more-favorable-right provision” of the relevant national statute can

<sup>19</sup> UNCITRAL Working Group II, 33<sup>rd</sup>, 36<sup>th</sup>, 41<sup>st</sup> Session, *Supra note 2*

<sup>20</sup> UNCITRAL Model Law on E-commerce, *Supra note 3*, Article 6 (1)

<sup>21</sup> Yu H., Nasir M., ‘Can Online Arbitration Exist Within the Traditional Arbitration Framework?’ 20 *Journal of International Arbitration*, Number 5, 2003, p. 459

<sup>22</sup> Directive 2000/31/EC of the European Parliament and Council, of 8 June 2000, (‘Directive on Electronic Commerce’), OJ, L178, 17.7.2000., p 1-16, Article 9 (1)

<sup>23</sup> Yu H., Nasir M., *Supra note 21*, page 459

be applied instead. The relation between more extensive interpretation of Article II (2) and application of Article VII (1) will be examined in Subchapter II.2.

At this point attention will be paid to the provisions of some national statutes, that prescribe broader definitions of the written form requirement. This will be used as an illustration for the statement that, on one way or another, the New York Convention should be interpreted in a manner that allows the use of electronic communication as the form of arbitration agreements. Anyhow, the elaboration will show, that all the conclusions reached, are in accordance with the spirit of Article II (2).

In this sense, the new Spanish Arbitration Act, passed on 23 December 2003, based on the UML but with significant modifications, provides with very up-to-date written form requirements. Article 9 of this Act prescribes that the written form requirement is fulfilled if there is a document “signed by the parties or in an exchange of letters, telegrams, telex, facsimile or any other means of telecommunications that provides a record of the agreement. This requirement shall be satisfied when the arbitration agreement appears and is accessible for its subsequent consultation in an electronic, optical, or any other type of format”.<sup>24</sup> Very important notion is the fact that, not only the agreements entered into by different means of telecommunications are valid, but also the agreements recorded in an electronic form.

One of the modern solutions regarding this issue is also the provision of Article 178 (1) of the Swiss Private International Law Act. This provision allows the written form to be satisfied with “telegram, telex, telecopier or any other means of communication which permits agreement

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<sup>24</sup> Spain’s New Arbitration Act, translation into English by David J. A. Cairns and Alejandro Lopez Ortiz, <http://www.voldgiftsforeningen.dk/files/filer/spanienat.pdf>, visited 30 Jan 2007

to be evidenced by a text”; but as an example of a modern statute does require neither signature nor exchange.<sup>25</sup>

In addition, while describing “the growing trend in national laws to accept the electronic contracting” which will, naturally, “affect the interpretation of the New York Convention”, some authors give the examples of the German Arbitration Act (1998) and England Arbitration Act (1996).<sup>26</sup> The relevant provision from the German Arbitration Act is Article 1031 (1), and from England Arbitration Act is Article 5 (6); whereas both of them recognize formal validity of arbitration agreements entered into by the different means of telecommunications which provide the record of the agreement.

Finally, it is worth mentioning that in this moment, Norway is in process of updating its Arbitration Rules. The new proposed Arbitration Act is mainly based on the UML. However, regarding the form of arbitration agreement, the proposed Norwegian Act does not contain the requirement for written form at all.<sup>27</sup>

It can be concluded that all these national statutes pose less strict formal requirements in comparison with the New York Convention. Practical value of these national statutes makes the fact that they should be “considered to prompt a future understanding on the interpretation of Article II (2) of the New York Convention, consistent with its original objectives, but also more adapted to the realities of modern international trade.”<sup>28</sup> This should be one argument more in favor of the Convention’s interpretation in accordance with new trends. This could be one way of avoiding constant and not so wide accepted application of the Article VII (1) of the Convention.

<sup>25</sup> Kaplan N., *Supra note 6*, p.38

<sup>26</sup> Wahab M., *Supra note 5*, p. 155

<sup>27</sup> “Norway updates its Arbitration Rules – follows the UNCITRAL Model Law”, by Knut Boye, <http://www.simonsenlaw.no/templates/TextPage.478.aspx> site visited 30 Jan 2007

<sup>28</sup> Alvarez G. A., ‘Article II (2) of the New York Convention and the Courts’, *ICCA Congress Series, No. 9, Paris 1999*, p. 67-81, <http://www.kluwerarbitration.com/arbitartion/arb/home/ipn/default.asp?ipn=17573> , site visited 21 Feb 2007

## **II.2. Challenges raised by electronic communication: possible variations from**

### **Article II (2)**

As already mentioned in Subchapter II.1., the purpose of written form requirement was to ensure the parties' awareness of their consent given to arbitration. Thus, the requirements were set so strictly because of the already mentioned reason. However; the present consequence is that the written form can be achieved only by very limited scope of means.

Nevertheless, if the purpose can be achieved by other means not prescribed with Article II (2) as well, may then arbitration agreements entered by those means of telecommunications be considered as valid? From this point of view, it cannot be said why those agreements should lack formal validity if the purpose is satisfied.

An attempt of achieving the above-mentioned purpose by using modern means of telecommunications can be successfully achieved by applying one of the two possible approaches. Both of them represent the solutions in accordance with purpose and spirit of the 'written form requirement'. In addition, both of the approaches reach the same conclusion, in favor of using the modern means of telecommunications. That will additionally approve the supporting tone of this paper.

The first approach for approving the use of electronic communication is more extensive and teleological interpretation of Article II (2). On the other hand, the second is the application of the provisions of more favorable national statutes, via Article VII (1) of the New York Convention. Similar identifying these two ways for dealing with the issue at hand can be found in the articles elaborating this topic.<sup>29</sup>

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<sup>29</sup> Lopez Ortiz A., *Supra note 1*, p.355

The first approach is most convincingly presented by Van den Berg; but other authors as well argue in favor of liberal interpretation of Article II (2). In that sense; when analyzing requirements from Article II (2), Martin Frederik Gusy explains that “the wording of the Article II (2) allows for such an interpretation, since the words “shall include” are not qualified as “only”.<sup>30</sup>

In addition, Fouchard, Gaillard and Goldman suggest that by interpreting Article II (2), “court could usefully refer to the generic phrases adopted in Article 7 (2) of the UML, or Article 178 (1) of the Swiss Private International Law Statute.”<sup>31</sup> This approach is inspired with the need for broader interpretation of the New York Convention, since the solutions from 1958 can not be regarded as satisfying in today’s circumstances. Some State courts were made their decisions in accordance with this approach, as well. In its decision in the case *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA*, Swiss Federal Tribunal stated that the requirements form Article II (2) should be interpreted in the light of less restrictive requirements set by the Article 7 (2) of the UML and Article 178 of the Swiss PILA.<sup>32</sup> It is worth mentioning that this way of interpretation of Article II (2) was supported by many authors, exactly by citing this case.<sup>33</sup>

Following the same line of reasoning, a decision made by another Swiss Court should be mentioned here. Namely, the Court of Appeal in Basel held in *DIETF* case that the interpretation of Article II (2) should consider the current level of developments that took place since the New

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<sup>30</sup> Gusy M. F., ‘The validity of an Arbitration Agreement Under the New York Convention’ (*Remarks on the Order of OLG Schleswig, March 30, 2000 – 16 SchH 5/99*), 19 *Journal of International Arbitration*, No. 4, 2002, p. 369

<sup>31</sup> Fouchard P., Gaillard E., Goldman B., *Supra* note 14, p. 377

<sup>32</sup> *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA* (Swiss Federal Tribunal, 16 Jan 1995), *Yearbook Commercial Arbitration*, Vol. XXI, (A.J. Van den Berg ed. 1996) p. 690-698, at p. 696

<sup>33</sup> Lew J.D.M., ‘The Law Applicable to the Form and Substance of the Arbitration Clause’, ICCA Congress Series, No. 9, Paris 1999, p. 114-145, <http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=17581> site visited 21 Feb 2007

York Convention was drafted. In addition, court stated that written form requirement should be taken as fulfilled if “the agreement is contained in a document allowing for a written proof”, and allowing the confirmation of the parties’ common intention to agree on the arbitration.<sup>34</sup>

It can be concluded that these court decisions additionally confirm standing taken in this paper. The New York Convention should be interpreted according to the current development of business practice so as to allow the use of electronic communication in International Commercial Arbitration. And in addition, it is in line with the spirit of the Convention itself; because the main purpose of the set requirements can be achieved by these means, as long as the mutual parties’ intention to arbitrate exists.

With reference to Subchapter II.1., several presumptions have to be examined before explaining Van den Berg’s key arguments for the more liberal interpretation of Article II (2). Starting point of his elaboration is the purpose of requirements set by Article II (2). Explaining that the purpose is “to ensure that a party is aware that he is agreeing to arbitration”<sup>35</sup> Van den Berg is arguing for teleological interpretation of Article II (2). He explains that, since the provisions of the New York Convention were intended to supersede different national statutes, they represent the “maximum and minimum rule”. This particularly means that the court may not require fulfillment of stricter requirements, but, may also not accept less than provided by Article II (2) for the form of arbitration agreement.<sup>36</sup>

By accepting the doctrine of “maximum and minimum rule”, we additionally accept uniformity in the application of Article II (2) in all jurisdictions. Although this may seem as legitimate and logical aim of the drafters, we still have to be aware of the fact that the parties

<sup>34</sup> DIETF Ltd v. RF AG ( Obergericht, Basel-Land, 5 July 1994), Yearbook Commercial Arbitration Vol.XXI, (A.J. Van den Berg ed. 1996) p.685-689, at p.687

<sup>35</sup> Van den Berg A.J., *Supra note 9*, p.171

<sup>36</sup> *ibid*, pages 176, 179



from states with more liberal statutes will probably intend to invoke Article VII (1). And, this will, naturally, affect the uniform interpretation.

In order to avoid this situation, Van den Berg proposes less strict interpretation of Article II (2), primarily by invoking the “spirit” of the Convention as the main argument. In that sense, Van den Berg cites the opinion of the Court of First Instance of Rotterdam given in case *Rechtbank of Rotterdam*, June 26, 1970, where it was stated that: “the spirit of this provision is that on the basis of written documents each party to the contract must be given information.... that the other party knows and agrees that disputes.... will be submitted to arbitration.”<sup>37</sup> Again, the position taken is that the spirit and purpose are sufficiently achieved by ensuring that parties are well informed about the arbitration. As long as this purpose is achieved, the means of telecommunications by which it can be achieved should be admitted as valid form of arbitration agreement.

Further, Van den Berg proposes one more reason in favor of more liberal interpretation of Article II (2). Stating that, “in the current international trade practice, contracts tend to be concluded in a rather informal way” he is of the opinion that strict interpretation of Article II (2) would leave outside its scope the “great number of international contracts containing an arbitral clause.”<sup>38</sup> This would again lead to the more often invoking of Article VII (1), which tends to be avoided, as explained.

Concluding, formal validity of arbitration agreements entered into by the means of electronic communication will depend on fulfillment of the purpose of Article II (2). It seems that, by concluding the arbitration agreements via these means of telecommunications, interested parties can be informed on arbitration in the very same way as with the traditional methods. In

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<sup>37</sup> *ibid*, p. 191 (Rechtbank of Rotterdam, June 26, 1970, Israel Chemicals and Phosphates Ltd. v N.V. Algemene Oliehandel)

<sup>38</sup> *ibid*, p. 192

addition, the use of these modern means of telecommunications clearly represents part of the new trend of concluding the contracts in more informal way. Taking that into account, there should be no obstacles to recognize formal validity of agreements entered into by electronic communication.

The second possible approach by which the using of electronic communication can be justified as valid form of arbitration agreement; relies on the application of Article VII (1) of the Convention, which leads to direct application of more favorable national statute. Article VII (1) applies only to the recognition of arbitral awards and not to recognition of arbitration agreements as well. Therefore, this approach will show that, even the arbitral awards based on agreements concluded via electronic communication are to be considered as valid. Consequently, this fact goes in favor of accepting the electronic form of arbitration agreements as valid form, according to the New York Convention.

Some of the eminent scholars see the application of Article VII (1) as solution completely in line with the spirit of the New York Convention. In that manner, Fouchard, Gaillard and Goldman argue that the New York Convention contains “nothing to prevent the combination of its provisions with national law rules which may be more liberal in some respects”.<sup>39</sup>

As already described in Subchapter II.1., provisions of national statutes can provide with the liberal solutions in different scope. Hence, if the application of more flexible national statutes is acceptable, then their liberal solutions should be acceptable, as well. In this way, the use of electronic communication can be observed as valid form of arbitration agreement.

In addition, some court decisions show their approach regarding the legitimacy of application of Article VII (1). In that sense, the Court of Appeal of Cologne, deducing it from the purpose of Article VII (1), argued that “Article II of the New York Convention does not provide

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<sup>39</sup> Fouchard P., Gaillard E., Goldman B. *Supra note 14*, p.376

for a uniform rule”.<sup>40</sup> This statement also supports the approach in favor of using the Article VII (1) for the purpose of achieving the compliance with the new developments.

Other well-known authors also recognized this possibility as the legitimate way to achieve the harmonization of the New York Convention with new trends. Neil Kaplan, within his deliberations on harmonization of the New York Convention with the current commercial practice, has the same standing. He argued that more attention should be given to Article VII (1), in order to make the necessary step towards new trends in commercial practice.<sup>41</sup>

In addition, as already cited, Alejandro Lopez Ortiz, who supports the same concept of these two approaches, also supports the use of Article VII (1). He advocates that this Article should be used in order to achieve “the recognition of the arbitral awards based on an arbitration agreement entered into using electronic means.”<sup>42</sup>

Concluding, both of presented approaches to the question at hands lead to the same conclusion – the use of electronic communication should be allowed in formation of arbitration agreements, which, as such, wouldn’t lack their formal validity, because of the means by which they are formed. Whether the solution accepted is more extensive interpretation of Article II (2); or application of Article VII (1), the result is basically the same – these agreements should be regarded as formally valid, and the awards based on them should be recognized. The main argument for this conclusion is the answer to question whether the purpose of these Articles and the Convention itself can be achieved by using these modern means of telecommunications. It was demonstrated that this purpose can be sufficiently achieved; the only choice to be made is whether to reach this conclusion by using one method or another.

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<sup>40</sup> Seller v Buyer (Oberlandsgericht, Cologne, 16 Dec 1992), Yearbook Commercial Arbitration Vol.XXI, (A.J. Van den Berg ed. 1996) p.535-542, at p.537

<sup>41</sup> Kaplan N., *Supra note 6*, p. 45

<sup>42</sup> Lopez Ortiz A., *Supra note 1*, p.355

### **II.2.1. Article II (2): issues relating to signatures of the parties**

Before starting discussion regarding the nature and purpose of the requirement of signatures, attention should be paid first to the fact that the main argumentation in this paper will be based on “functional equivalence” of arbitration agreements contained in exchange of letters and telegrams, and those concluded via electronic communication. The analysis of this comparison, as well as deduced equivalence, will be presented in details within following Subchapter.

Hence, at this place, the requirement of parties’ signatures will not be examined in general, but only in the part closely related to exchange of letters or telegrams. It will be discussed whether the signatures are necessary in these cases, and if not, what is the justification for that allegation.

According to Article II (2) of the New York Convention, the enforcement of arbitral awards is to be granted when either the contract containing the arbitral clause or arbitration agreement itself was signed; or when it was contained in an exchange of letters or telegrams. For the purpose of this paper, the notion of particular importance is literal interpretation of wording used in Article II (2).

The Convention’s provisions, especially Article II (2) should be interpreted in a way that signature is not expressly required if arbitration agreement is contained in an exchange of letters or telegrams.<sup>43</sup> In other words, – arbitration agreement concluded via exchange of letters will be considered as formally valid also in the case when some or all of the letters are not signed.<sup>44</sup> Some authors are going even further as to include the modern means of telecommunications here as well. In that respect, it is argued that “in the exchanges of telegrams or *faxes*, the signature of

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<sup>43</sup> Wahab M., *Supra note 4*, p. 156

<sup>44</sup> Fouchard P., Gaillard E., Goldman B., *Supra note 14*, p. 377

the parties is not required.”<sup>45</sup> Therefore; parties’ agreement to arbitrate should be expressed either by their signatures, or by the exchange of letters or telegrams.

However, it should always bear in mind the purpose of formal requirements (proof of the parties’ intention to arbitrate), and think about achieving it without the signature. Although the exchange itself proves that parties are informed on the procedure and that they agreed on terms; permanent record of the agreement should be obtained, regarding the need of identifying the authors of these written statements.

Therefore, the first issue to be dealt with is the purpose and significance of the signatures. In other words; why is the need for signature set as very important requirement here?

The significance of this requirement should be observed through several functions of signature. First of all, the existence of signature provides with certain security, mainly providing with the authentication. Further, the signature identifies respective transaction, indicates that documents are in final forms; and finally, clearly represent the parties’ mutual intention and consent given to arbitration.<sup>46</sup> Once again, it can be concluded that the main intention of drafters was to secure the proof of parties’ intention to solve their dispute in arbitration. Therefore, the accent is on the expression of parties’ will, not on the mean by which this purpose is to be achieved.

The provision of Article 7 (2) of the UML, which requires existence of record of the agreement, is in accordance with described functions of signature. Also, following from the solutions of national statutes, it is very important to prove the parties’ intention to arbitrate. Concluding; as long as that purpose can be achieved, and requirement of authentication can be

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<sup>45</sup> Rubino-Sammartano M. *International Arbitration Law* (Deventer , Kluwer Law and Taxation Publishers,1990), p.949

<sup>46</sup> Arsic J.,’ International Commercial Arbitration on the Internet - Has the Future Come Too Early?’, *14 Journal of International Arbitration*, No. 3, 1997, p. 209

satisfied; arbitration agreements concluded by the use of electronic communication should be allowed as formally valid.

However, the main question to be dealt with, is: Whether the existence of signature is also necessary in case when arbitration agreement is concluded by the exchange of letters, telegrams or other similar means functionally equivalent to them?

While answering to this question, it should stress again the purpose of this requirement, and purpose of Article II (2) itself. By the exchange, parties inform each other on their personal intentions, and “if the communications correspond, the exchange itself constitutes a mutuality of consent.”<sup>47</sup> Since the purpose is achieved by exchange of documents, there is no real need for signatures. The exchange represents informing on their intentions and given consents to arbitration; therefore, “the absence of one or both signatures does not nullify the acceptance.”<sup>48</sup>

In order to illustrate that signatures are not required in the case of exchange, Van den Berg cites cases which approve that. Among them is already mentioned case *Rechtbank of Rotterdam*<sup>49</sup>, where the State court decided that in the case of exchange the signatures of parties are not required.

Courts’ practice regarding this question is, in general, on the standing that signatures are not required in case of exchange of letters or telegrams. In that sense, the Court of Appeal of Basel stated that for the validity of exchange of letters, as a form of arbitration agreement, was not always necessary that the letters were signed. Court stated that the valid exchange existed also “when a written manifestation of both parties can be submitted.” The Court added that this

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<sup>47</sup> Van den Berg A.J., *Supra note 9*, page 194

<sup>48</sup> *ibid*, page 194

<sup>49</sup> Van den Berg A.J., *Supra note 9*, *supra note 33*, page 194

way of interpretation could be deduced from the intention of the drafters; who would, if intended the solution to be different, prescribe it expressly.<sup>50</sup>

In addition; when citing this case, Alan Redfern and Martin Hunter are going even further in their interpretation of the necessity of signature. Namely; they express the view that signature is not necessary if arbitration agreement is in writing, whereas they cite exactly this case as an illustration for that allegation.<sup>51</sup> It should be mentioned that these two eminent scholars belong to group of authors who argue for relaxation of the strict formal requirements. They express their approach taking into account the need of efficient conducting of business transactions. In that sense, Redfern and Hunter state that formal requirements should be considered as satisfied if there is a permanent record of the agreement.<sup>52</sup> Therefore, according to them, as long as the proof of parties' intention to arbitrate can be achieved, the mean by which it will be done is not of such importance as the record of that intention.

The same approach can also be found in already cited case *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA*. Swiss Federal Tribunal similarly expressed its standing regarding the requirement of signatures in the case of exchange. Court held that "a distinction should be made between the agreements resulting from a document, which must in principle be signed, and agreements resulting from an exchange of written declarations, which are not necessarily signed."<sup>53</sup> Completely in line with standings from previous two decisions is also the court's statement expressed in the following case. Namely, in *Begro B.V. v. Ditta Voccia*, the Italian Supreme Court interpreted the requirements from Article

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<sup>50</sup> Dutch Seller v. Swiss Buyer (Obergericht of Basle, 3 June 1971), Yearbook Commercial Arbitration Vol.IV, (P. Sanders ed. 1979) p. 309-311, at p. 310

<sup>51</sup> Redfern A., Hunter M., *Law and Practice of International Commercial Arbitration*, (London, Sweet & Maxwell, 4<sup>th</sup> Edition, 2000), p. 159

<sup>52</sup> *ibid*, p.160

<sup>53</sup> *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA*, *Supra note 29*, p. 697

II (2) in the light of described approach. Court held that arbitration agreement contained in the exchange of unsigned letters was to be considered as formally valid, according to Article II (2).<sup>54</sup>

It was elaborated within previous paragraphs how the absence of signatures on letters, telegrams and similar means can be justified. However, when talking about electronic communication there is still one additional possibility; possibility to fulfill all of the functions of signature and to achieve the purpose for which it is required. Namely, by digital signature, certain level of security, authentication, identification of the parties and proof of their intention to arbitrate can be achieved.

The system known as “Pretty Good Privacy” is present worldwide and used for the purpose of ensuring authentication especially regarding E-mails. The manner in which it is to be ensured is the following. All of respective computers that are “involved” in one specific transaction are connected so as to create one specific network. While exchanging data among themselves, each participant, precisely each submission made by participant in the network is “signed”. The submissions’ “signatures” actually represent “mathematically sophisticated transformations, such that each recipient can be confident that the submission really emanated from its ostensible signatory and has not been altered in transmission.”<sup>55</sup>

Deducing from literal interpretation of Article II (2) and from the purpose of these requirements; together with provided argumentation found in the literature and case law; the only conclusion to be drawn is – the existence of signature is not necessary if arbitration agreement is concluded by exchange of letters or telegrams. The main purpose of setting this requirement can be sufficiently achieved by the exchange it self. Therefore, while elaborating and proving within

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<sup>54</sup> Begro B. V. v. Ditta Voccia (Corte di Cassazione, 25 May 1976), Yearbook Commercial Arbitration Vol.III, (P. Sanders ed. 1978) p.278-279, at p. 279

<sup>55</sup> Arsic J., *Supra note 40*, p.212



next Subchapter that electronic communication should be treated equivalent to letters and telegrams; the absence of signature will not pose the obstacle for such treatment.

### **II.2.2. Article II (2): issues relating to exchange of letters or telegrams**

It was already stressed that Article II (2) prescribes two possible ways of fulfilling the formal requirements for the validity of arbitration agreements. Besides the signatures of parties put on contract that contains arbitration clause or on the agreement itself; arbitration agreement can be contained in the exchange of letters or telegrams.

The meaning of word “exchange” was usually very strictly interpreted by the State Courts. According to these interpretations, the notion of exchange means that arbitration clause contained in written statement, or agreement itself, should be returned by the party recipient to the party that initially sent the statement.<sup>56</sup>

Further in text, it will be shown that means of electronic communication should be equated with letters and telegrams in sense of Article II (2) requirements. But first, it has to be stressed that this paper does not intend to cover all of the currently existed means of modern ways of communication. Not only that it would be quite impossible to analyze that whole area within the space provided for paper like this; but also, it would be completely ineffective. Namely, technology develops very rapidly; almost every moment can bring something new. Even the topic of this paper exists because the drafters of the New York Convention took into account only the level of technical developments at that particular moment. Since we are also not in the position to presume what new developments will be put before us; the argumentation here will be presented on more general level.

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<sup>56</sup> Ditte Freu, Milota, Seitelberger v. Ditte F. Cuccaro e figli (Corte D’Appello di Napoli, 13 Dec 1974), Yearbook Commercial Arbitration Vol. I, (P. Sanders ed. 1976) p.193

Because of those reasons, representative examples will be presented as an illustration only, and the main stress will be on purpose of posing these formal requirements. Taking that into account, it will be demonstrated that all means by which the purpose can be achieved should be regarded as valid form of arbitration agreement, no matter on what level of technical development they are currently positioned.

At this point, we will just briefly remind to what was concluded regarding the purpose and spirit of the written form requirements. As already stated in Subchapter II.1., the main intention of setting these strict formal requirements was to ensure the parties' awareness of accepting the arbitration as the method for solving the dispute.<sup>57</sup> Putting in other words, parties' intention to arbitrate has to be clearly expressed.

However, at this point, it is very important to stress again the year of drafting the New York Convention; and to pay attention to almost fifty years long period of its existence. Therefore; in order to support the legal recognition of electronic communication as valid form of arbitration agreements, it has to be presumed what was the real intention of the drafters. Since it can not be concluded from the text of the Convention that the drafters' intention was to limit the scope of the Convention to those time's circumstances,<sup>58</sup> then the reason to accept the use of electronic communication exists.

In addition, it should say that at that time the most modern mean of communication was telegram; and that the drafters "included the most modern technology without excluding future developments in ways to transmit written words."<sup>59</sup>

In order to achieve the recognition of electronic communication, it is necessary to presume that, according to their function, these means are equivalent to letters and telegrams. The only

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<sup>57</sup> Van den Berg A.J., *Supra note 9*, p.171

<sup>58</sup> Wahab M. *Supra note 5*, p.154

<sup>59</sup> Arsic J, *Supra note 41*, p.216

difference among them, observed from this point of view, is actually the advantage of electronic communication. It represents, generally speaking, modern, fast and more efficient mean of communication.

The principle of functional equivalence is strongly advocated by Alejandro Lopez Ortiz, one of the few authors who were analyzing the issue of electronic communication in arbitration proceeding. By invoking the provisions of Model Law on E-Commerce and E-Commerce Directive which establish the principle of functional equivalence, Lopez Ortiz concludes that Article II (2) should be interpreted in accordance with this principle. That would precisely mean that the term “telegram” should be interpreted so as to include “the arbitration clauses entered into by telex, fax and other electronic means.”<sup>60</sup>

If we turn again to the fact that in 1958 telegram was the most modern way of documents’ transmission; then we have to take into account the level the technology development and the way of conducting business in today’s circumstances. Thus; from legal and logical point of view, it can be easily concluded that “an electronic document is the functional equivalent of a paper document. And, from the technical point of view, it is difficult to see much difference between telegrams, telex, facsimile and e-mail.”<sup>61</sup> Other authors also argue that the term “telegram” should be interpreted so as to include other modern means of telecommunication. Arguing so, Schneider and Kuner use the practice of the Swiss Supreme Court as the illustration for supporting this view.<sup>62</sup>

Similarly, Rubino – Sammartano completely equally lists faxes in addition to letters and telegrams when explaining that signatures are not required in the case of exchange of

<sup>60</sup> Lopez Ortiz A., *Supra note 1*, p. 353

<sup>61</sup> Wahab M., *Supra note 5*, p.154

<sup>62</sup> Schneider M. E., Kuner C., ‘Dispute Resolution in International Electronic Commerce’, *14 Journal of International Arbitration*, Number 3, 1997, page 15

documents.<sup>63</sup> In that sense, this author expresses his positive attitude towards the use of electronic communication in respective sense.

Gary Born is also one of the eminent scholars who took the position that “the term “telegram” should include telexes, telecopies and other modern methods of communication”.<sup>64</sup> As an argumentation for this standing, Born is citing two cases decided before Swiss Courts. Precisely, first of them is decided before Geneva Court of Appeal. Deciding affirmatively on formal validity of arbitration agreement, court specifically referred to the use of telexes, and approved it in the respective sense. In addition, the Court stated that Article II (2) “contemplates in a general way the transmission by telecommunication of messages which are reproduced in a lasting format.”<sup>65</sup> This statement is of high importance, since it refers again to the fulfillment of the purpose of formal requirements. As the court stated here, all the methods of telecommunication that can be subsumed under the described model should be regarded as valid form of arbitration agreement.

Similarly, in case *Tracomina S. A. v. Sudan Oil Seeds Co. Ltd.* Swiss Federal Supreme Court took the position that the exchange of telexes between the relevant parties, in which they clearly express their intent to arbitrate, was completely in accordance with the requirements of Article II (2).<sup>66</sup> Swiss Federal Supreme Court confirmed this standing in its later decision from 1989, where the court clearly stated that “the arbitration clause or arbitration agreement can also result from an exchange of telexes.”<sup>67</sup>

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<sup>63</sup> Rubino-Sammartano M., *Supra note 45*, p. 949

<sup>64</sup> Born, G.B., *International Commercial Arbitration in the United States, Commentary & Materials*, (Deventer, Kluwer Law and Taxation Publishers, 1994), page 292

<sup>65</sup> *Carbomin SA v. Ekton Corporation* (Court of Appeal of the Canton Geneva, 14 April 1983), *Yearbook Commercial Arbitration Vol. XII*, (A.J. Van den Berg ed. 1987) p. 502-505, at p.504

<sup>66</sup> *Tracomina SA v. Sudan Oil Seeds Co.* (Swiss Federal Supreme Court, 5 Nov 1985), *Yearbook Commercial Arbitration Vol. XII*, (A.J. Van den Berg ed. 1987) p. 511-514 , at p. 513

<sup>67</sup> *G. SA v. T. Ltd* (Tribunal Federal – Supreme Court, 12 Jan 1989), *Yearbook Commercial Arbitration Vol. XV*, (A.J. Van den Berg ed. 1990) p. 509-514, at p. 511

Expressing its persuasion that the exchange of telexes (from which the parties' intention to arbitrate can be clearly deduced) fulfills the requirements from Article II (2), the Court of Appeal of Bermuda ordered proceedings to stay, and referred parties to arbitration.<sup>68</sup>

It can be noticed that the Italian courts have also expressed their positive attitude towards the extensive interpretation of Article II (2); and in favor of recognition of the exchange of telexes as the valid method of concluding arbitration agreements. Thus, the Court of First Instance of Savona concluded that, besides telegrams, telexes should be held as valid form, too, stating additionally that "a telegram is a result of transcription, whereas telex has the character of originality."<sup>69</sup>

Some decisions from the Austrian court practice also show the same tendency. In that sense, the Supreme Court of Austria in case from 2 May 1972 clearly expressed its perception that "*now* also arbitration agreements concluded by an exchange of telegrams or telexes are considered to be valid, *even if they have not been signed*."<sup>70</sup>

Besides in the court decisions, the approach which favors exchange of telexes as valid form of arbitration agreements is expressed in arbitral awards as well. In that sense; in the award of 18 July 1986, after the arbitration proceeding between FR German buyer and Greek seller, when deciding about formal validity of arbitration agreement, the arbitral tribunal took the position that "telexes also meet the requirement of written form."<sup>71</sup>

It seems that a significant part of court practice approves the interpretation of the Convention's requirements in accordance with the level of modern developments. The formal

<sup>68</sup> Dupont Scandinavia AB v. Coastal Limited (Court of Appeal of Bermuda, 9 Nov 1988), Yearbook Commercial Arbitration Vol. XV, (A.J. Van den Berg ed. 1990) p. 378-384, at p. 382

<sup>69</sup> Dimitrios Varverakis v. Compania de Navigation Artico SA (Court of First Instance of Savona, 26 March 1981), Yearbook Commercial Arbitration Vol. X, (P. Sanders ed. 1985) p. 455-458, at p. 457

<sup>70</sup> Parties not indicated, both Austrian (Oberster Gerichtshof, 2 May 1972), Yearbook Commercial Arbitration Vol. X, (P. Sanders ed. 1985) p. 417-418, at p. 417

<sup>71</sup> FR German buyer v. Greek seller (Award of 18 July 1986), Yearbook Commercial Arbitration Vol. XVI, (A.J. Van den Berg ed. 1991) p. 13-15, at p. 15

requirements posed by Article II (2) should be interpreted extensively, so as to include modern ways of telecommunications, commonly used in today's business transactions. Broader interpretation of Article II (2) which comprises the other means of telecommunications is widely accepted by some well-known authors.<sup>72</sup> It is notable that they are mainly focused on the recognition of the use of telexes. However, since the argumentation in this paper is presented through the analysis of formal requirements' purpose, the same principle should be applied to other means of telecommunications, as well.

According to the same principle, in some cases and articles the main focus is on telefaxes. The fact that the New York Convention does not mention telefaxes as it does not mention other methods of modern ways of telecommunications, should be interpreted exactly in the same way as already explained. Namely, "the omission of the telefax in the New York Convention was not an error; it constitutes a proof of the speedy development of modern techniques."<sup>73</sup> Confirming this point of view, the Court of Appeal in Basel, in its decision in DIETF case (already cited above), took the position that solution of Article 178 (1) of the Swiss PILA was completely in accordance with Article II (2); whereas the exchange of telexes and telefaxes satisfied the requirements of written form, set by Article II (2).<sup>74</sup> The acceptance of the fact that reference to telegrams covers additionally more modern methods of telecommunication (in this case telefax); is expressed and illustrated exactly with this case by the scholars who were discussed the form of arbitration agreement.<sup>75</sup>

<sup>72</sup> Van den Berg A. J., *Supra note 9*, p. 204; Fouchard P., Gaillard E., Goldman B., *Supra note 14*, p. 376

<sup>73</sup> Foustoucos A. C., 'Conditions required for the validity of an arbitration agreement', 5 *Journal of International Arbitration*, Number 4, 1988, p.113,  
<http://www.kluwerarbitration.com/arbitration/arb/home/ipn/default.asp?ipn=11144>, site visited 21 Feb 2007

<sup>74</sup> DIETF Ltd. v. RF AG *Supra note 32*, p.687

<sup>75</sup> Van Houtte V., 'Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience', 16 *Arbitration International*, Number 1, 2000, p.1

This approach is more clearly expressed in the opinion of German Court of Appeal of Hamburg in its decision from 30 July 1998. The Court explicitly stated that “it is generally recognized that telexes and telefaxes, just like telegrams, are the same as letters.” Concluding, according to the Court’s statement, the exchange of these ways of telecommunications satisfies the formal requirements from Article II (2) of the New York Convention.<sup>76</sup>

The literature and court practice have not significantly dealt with the exchange of E-mails through the perspective of formal validity of arbitration agreements. The most probable reason for this is the fact that E-mails represent the most modern of all the mentioned methods of telecommunications. The future practice will most probably include greater number of cases that deal directly with the exchange of E-mails; however, here will be shown that courts should express positive approach towards it.

The first argument in favor of legal recognition of the exchange of E-mails is comparison with the exchange of telegrams. Taking into account the already mentioned purpose of written form requirement, exchange of E-mails can be functionally identified with exchange of telegrams.<sup>77</sup> Additionally, the advantages of the E-mails’ exchange are more than obvious.

At the same time, it has to be dealt with usual doubts regarding the possible shortcomings of E-mails. Therefore, it should be said that E-mails are not only faster and more efficient, but also, they represent more secure way of telecommunications than telegrams. Explaining that, Jasna Arsić states that the address of sender, automatically contained in E-mail, serves as the clear information about sender. Contrary, according to Arsić “there was often no identification procedure for dispatching telegrams.”<sup>78</sup>

<sup>76</sup> Shipowner v. Time charterer (Oberlandsgericht Hamburg, 30 July 1998), Yearbook Commercial Arbitration Vol. XXV, (A.J. Van den Berg ed. 2000) p. 714-716 at p.715

<sup>77</sup> Hill R., ‘On-line Arbitration: Issues and Solutions’, *15 Arbitration International*, Number 2, 1999, p.200

<sup>78</sup> Arsić J., *Supra note 45*, p. 216

In addition; in order to verify the identity of the party who sent respective E-mail, it can be used not only the sender's address, but also the context and content of E-mail. Further, it is argued that this does not significantly differ from the procedures with ordinary letters and faxes. Also, taking into account today's computer technology, it can be concluded that E-mails can not be so easily forged as letters or faxes.<sup>79</sup>

E-mails can also be identified with letters and faxes, with respect to paying attention to the possible transmission errors. In that sense printed copies of all sent and received E-mails can be maintained in order to show whether there were some transmission errors.<sup>80</sup> Also, there is always the possibility to ask the recipient of respective E-mail to send the confirmation of receipt, which "reproduces the reliability of return-receipt registered mail."<sup>81</sup>

Taking into account all of the mentioned, it is hard, from technical point of view, to notice any significant difference between the various means of telecommunications such as: telegrams, telex, facsimile or E-mail.<sup>82</sup> Bearing that in mind, it can be concluded that by exchange of E-mails the parties' intention to arbitrate can be clearly expressed; therefore, the main purpose of written form requirement is to be satisfied. Concluding, if we take into the consideration all of the elaborated arguments, "there should be no obstacles to interpret Article II (2) in a way to recognize the exchange of E-mails as a written form for the purpose of conclusion of arbitration agreements."<sup>83</sup>

Besides usual argument based on the functional equivalence of E-mails with telegrams, telexes and facsimiles; some authors accent other arguments when supporting the use of E-mails. The line of reasoning is the following. Since the greatest number of concluded online sale

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<sup>79</sup> Hill R., *Supra note 75*, p. 200

<sup>80</sup> *ibid*

<sup>81</sup> *ibid*

<sup>82</sup> *ibid*, p. 201

<sup>83</sup> Arsić J., *Supra note 45*, p. 216



contracts are recognized as legally binding; nothing seems to be more natural than to recognize the validity of arbitration agreements transmitted electronically.<sup>84</sup>

In comparison with great number of cases that deal with validity of arbitration agreements entered into by exchange of telexes or telefaxes; there are still not so many examples of courts' opinions expressed with respect to E-mails. However, the decision of the Court of Appeal of Basel should be mentioned in this respect. By stating that Article 178 (1) of the Swiss PILA is in accordance with Article II (2), as already explained above, the Court stressed that the adaptation to technical developments of various means of telecommunications was necessary. In that sense, according to the Court, "any other form of communication allowing for written proof" is acceptable as valid form of arbitration agreement. This conclusion arises directly from respective provision of the Swiss PILA, and Court held that it was completely consistent with Article II (2). The Court's explanation for this statement was the fact that this technical development of telecommunications represented "only a continuation of the technical progress which was only beginning in 1958."<sup>85</sup> Although the Swiss Court does not explicitly mention E-mails in this concrete case, it is still worth citing, because E-mails can be easily subsumed under generic term of modern means of telecommunications. It seems that in this case, the Court did not want to limit the scope of this decision, but to make the precedent which could be later used on more general level for all the possible methods of telecommunications. This, of course, if those methods would comply with the principles set by the Court: providing with a written proof and confirmation of parties' intention to arbitrate.

The case decided before Halogaland Court of Appeal is the example of a very interesting case, which is mentioned in both *pro* and *con* contexts. As explained in details by Van den Berg,

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<sup>84</sup> Yu H., Nasir M., *Supra note 21*, p. 461

<sup>85</sup> DIETF Ltd v. RF AG, *Supra note 34*, p. 687

although according to the concrete circumstances in this case, Court indeed decided otherwise; “it is submitted that an arbitration agreement concluded by E-mail can be brought under Article II (2).”<sup>86</sup> Van den Berg further states that the exchange of E-mails can be regarded as formally valid if the electronically reliable signatures exist; or when the exchange itself is “sufficiently recorded, or can be proven in writing by other means.”<sup>87</sup> Therefore, although the decision expressed opposite view, this is to be assigned to the circumstances of the case. According to the wording of the Court, in this present case “the contents of the E-mails appear incomplete and reflect just fragments of an agreement... The basic requirements of legal protection set up by the Convention Article II (2) are hereby not satisfied.”<sup>88</sup> Therefore, it seems legitimate to apply *argumentum a contrario* and to conclude that if the content of respective E-mails had been clear and complete, the purpose of the written form requirement would be satisfied, and E-mails could be observed as valid form of arbitration agreement.

In order to support this view and to illustrate the new tendencies in international arbitration practice, it can be stressed that the US courts are usually in favor of E-mails as formally valid arbitration agreements. In decisions recently published, the US courts held that the properly drafted and formatted E-mails created binding and enforceable arbitration agreements. Although these cases were not based on the provisions of the New York Convention, but on Federal Arbitration Act, it is important to mention them here, since they contain clearly expressed approach that written form requirement can be met by E-mails and other forms of electronic communication.<sup>89</sup> As already said, although the provisions of the New York Convention were

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<sup>86</sup> Van den Berg A. J., ‘Means of telecommunication for achieving the exchange in writing’, *Consolidated Commentary on New York Convention, 2003* (Kluwer Law International, <http://www.kluwerarbitration.com>)

<sup>87</sup> *ibid*

<sup>88</sup> *Charterer (Norway) v. Shipowner (Russian Federation)*, (Halogaland Court of Appeal, 16 Aug 1999), *Yearbook Commercial Arbitration* Vol. XXVII, (A.J. Van den Berg ed. 2002) p. 519-523, at p. 522

<sup>89</sup> *Campbell v. General Dynamics Government Systems Corp.* (No. 04-1828, 1<sup>st</sup> Cir, 2005) AND *Carfagno v. Ace Ltd* (No. 04- 6184, D.N.J. 2005), *2005 National Arbitration Forum*, <http://www.arbitration-forum.com>

not applied here, it is still very important to stress that the new trend in International Commercial Arbitration implies the use of modern ways of telecommunications while entering into arbitration agreements.

Taking into account all above expressed arguments, the only conclusion to be drawn here is that the various means of electronic communication should be recognized as valid form of arbitration agreements, as long as the written proof of parties' intention to arbitrate can be provided. In that way, the main purpose of setting the written form requirements is achieved, and there are no legitimate reasons to refuse acceptance of electronic forms of arbitration agreements.

### **II.3. Article IV (1) (b): submission of the original agreement or a duly certified copy**

Article IV (1) (b) of the New York Convention poses one additional procedural requirement in front of the parties to the procedure. In order to obtain recognition and enforcement of arbitral award, party applying for that is requested to submit “the original agreement referred to in Article II, or a duly certified copy thereof.”<sup>90</sup>

Therefore, a question to be posed is – whether the requirements from this Article can be fulfilled if arbitration agreement was concluded by the use of electronic communication?

It seems that in the context of electronic communication these requirements of submitting “original” or “duly certified copy” lose their real meaning. Namely, “any copy of digitalized information is absolutely identical to the original”.<sup>91</sup> If two basic conditions are satisfied, the copy of the document can be considered as the ‘duly certified copy’. First of the conditions is that respective copy needs to include the technology that is capable of preserving information.

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<sup>90</sup> New York Convention, Article IV (1) (b)

<sup>91</sup> Lopez Ortiz A., *Supra note 1*, p. 353

And second, the authorship and integrity need to be kept protected.<sup>92</sup> According to the elaboration presented in previous Subchapters; the means of electronic communication provide with sufficient proof, whereas the integrity is also being protected. Concluding, provided copy of this digitalized information can be considered as ‘duly certified copy’, whereas the requirement from Article IV (1) (b) is fulfilled.

This approach can also be supported by the standings taken in the court practice. Namely, in already cited case *Carbomin S.A. v. Ekton Corporation*, the Court of Appeal of Geneva decided affirmatively on formal validity of arbitration agreement entered into by exchange of telexes. In addition, the court stated that Article II (2) “contemplates in a general way the transmission by telecommunication of messages which are reproduced in a lasting format.”<sup>93</sup> This statement is of high importance, since it refers to the first of requirements mentioned in previous paragraph. It is important that transmitted messages are reproduced in lasting format, which clearly speaks about preserving the information. In that sense, the Court decided that this situation was covered by Article II (2). But in addition, the Court stated that this was in compliance with requirements from Article IV of the New York Convention, as well.<sup>94</sup>

Taking into account both of the assumptions for considering the ‘regular’ copy of the document as ‘duly certified copy’ and according to the approaches taken in literature and court practice; it can be concluded that the means of electronic communication also fulfill the procedural requirements set by Article IV (1) (b) of the New York Convention.

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<sup>92</sup> *ibid*

<sup>93</sup> *Carbomin SA v. Ekton Corporation*, *Supra note 63*, p.504

<sup>94</sup> *ibid*, p. 503

### **III Practical difficulties that can arise when entering into arbitration agreement by means of electronic communication**

As already noted in the Introduction, the recognition of formal validity to arbitration agreements entered into by electronic communication is still not uniformly accepted by theory and practice. The representatives of the approach that is *contra* to formal validity stress the possible weaknesses of electronic communication regarding the entering into arbitration agreements. According to them, these weaknesses could and lead to refusing of the recognition and enforcement of arbitral awards made on the basis of those agreements.

However, simultaneously with the elaboration of this issue, it will also be demonstrated that the prominent weaknesses; especially the issues of providing with printing records and immateriality can be easily overridden. Additionally, the problem of refusing the recognition and enforcement on the basis of application of Article II (2) will be elaborated, with intention to show that this approach is not in accordance with the modern international business practice, whose development is unavoidable.

#### **III.1. Issues regarding the providing with printing records and immateriality**

When arguing opposite to formal validity of arbitration agreements entered into by electronic communication, it is usually stressed that the means of electronic communication are significantly different from the standard methods mentioned in Article II (2). Logically, this is exactly the opposite reason to one expressed in Subchapter II.2.2. when arguing in favor of formal validity of these agreements. At this point it will be shown that the mentioned differences are not of such importance, actually that significant material differences in this sense almost don't exist between traditional and modern means of telecommunications.

Among some of the critics, it is usually argued at the first place that there are significant differences in transmission process and the way of obtaining the printing records. In that sense, it is stressed that difference in transmission process represents the fact that fax is “usually created from the conventional writing”, and contrary to that, telexes, telegrams and E-mails “need not to be created from conventional writing, whereas the printed copy of the transmission is created contemporaneously with the transmission.”<sup>95</sup>

However, it is strongly advocated that E-mails’ transmission is much more flexible, secure and efficient in comparison with fax transmission.<sup>96</sup> In addition, by E-mails not only text components, but also audio and video documents can be transmitted; whereas these transmissions can be more protected and authenticated by using digital signatures, as described within Subchapter II.2.1.<sup>97</sup>

Also, the other difference usually stressed is the fact that during the reception, printed copy is created for telegram in every case; for telexes it is the usual practice; whereas for E-mails the printed copy can be created only if the parties to the transaction request that.<sup>98</sup> However, it is important here, that it is possible to make and obtain the printed copy, as proof of the existed agreement in all cases. The fact that in some occasions it has to be after the request of parties does not constitute significant difference in this sense. Therefore, “these differences do not appear to be of sufficient import to differentiate between these electronic media for what concerns the NYC.”<sup>99</sup> Or, by putting in other words – this argument would not be the obstacle for application of Article II (2).

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<sup>95</sup> Hill R., *Supra note 77*, p. 201

<sup>96</sup> Arsić J., *Supra note 45*, p. 211

<sup>97</sup> *ibid*

<sup>98</sup> Hill R., *Supra note 77*, p. 201

<sup>99</sup> *ibid*, p. 202

The main reason for declining this differentiating between the obviously similar methods is the fact that the main purpose of written requirement is satisfied with the use of electronic communication. As long as the proof of parties' intention to arbitrate can be provided, the modern methods of telecommunications should be allowed here. The Court of Appeal of Basel correctly stated that it was sufficient, if the agreement "is contained in a document allowing for a written proof, whereas the confirmation of the parties' mutual agreement needs to exist."<sup>100</sup> Thus, since in the cases of use the electronic communication, printed record, as the clear proof of parties' mutual consent to arbitration can be obtained; there is no reason why these methods should be treated differently than the letters or telegrams. Concluding, there is no reason Article II (2) not to be applied to these methods of communication, as argued in previous Subchapters.

The opponents to the use of electronic communication in formation of arbitration agreements also point that the problematic issue regarding E-mails is their "immateriality". On the other hand, Richard Hill strongly argues that this is incorrect from scientific point of view, because "any form of communication requires material alteration of a physical, material medium."<sup>101</sup> In addition, Hill explains that even if regarding the electronic communication there is no transfer of matter; there is the transfer of energy; whereas records of electronic communication are safer in sense that they last even longer.<sup>102</sup>

Concluding, since the significant differences in respective sense can not be proven, the means of electronic communication should be considered under Article II (2) of the New York Convention. Especially knowing the fact that these means can provide with printed copy as sufficient proof of parties' mutual consent, which is, also, in accordance with Article 7 (2) of the UML.

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<sup>100</sup> DIETF Ltd. v. RF AG, *Supra note 34*, p. 687

<sup>101</sup> Hill R., *Supra note 77*, p. 202

<sup>102</sup> *ibid*

### **III.2. Difficulties regarding the recognition and enforcement procedure**

Other possible scope of problems that can arise when entering into the ‘electronic’ arbitration agreements is concerning difficulties with the recognition and enforcement procedure in different states. The sources of these problems are usually different approaches applied by national judges. Critics based on this argument are serious, in sense that they can present the real danger for the future development of international trade and business.

Precisely, the problem could arise in two possible situations: first, when interested party is applying for the recognition and enforcement of arbitration agreement; and second, during the procedure of recognition and enforcement of arbitral award. However, at the very beginning, it should determine whether Article II (2) is applicable to both situations. In other words, whether the provisions of Article II (2) can be applied not only to the validity of arbitration agreement but to the validity of arbitral award as well?

According to Van den Berg, the great majority of courts accept the applicability of Article II (2) at the stage of recognition and enforcement of arbitral award. Thus, Article II (2) is invoked when deciding on arbitration agreement’s validity; but also it is invoked in order to oppose the enforcement of award on the ground of Article V (1) (a).<sup>103</sup>

Redfern and Hunter cite the case *Kahn Lucas Lancaster Inc v. Lark International Ltd* in order to pay attention to the first problematic situation. Namely, they explain that even in jurisdictions that are arbitration-friendly, it can happen that the courts refuse to enforce arbitration agreements that are “not in a written document signed by the parties or otherwise contained in an exchange of letters or telegrams.”<sup>104</sup>

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<sup>103</sup> Van den Berg, *Supra* note 9, p. 284

<sup>104</sup> Redfern A., Hunter M., *Supra* note 51, p. 161



Concerning the second situation, problem arises during the procedure of recognition and enforcement of arbitral awards, but, precisely because of the form of arbitration agreements on which the awards are based. In that sense, it can happen that, although the arbitral tribunal itself or the court within one jurisdiction considers the agreement as valid, the court in state of enforcement does not share that view. Thus, it could be very inconvenient for the party who, according to its national law enters into the ‘electronic’ arbitration agreement, and then becomes faced with refusing of the recognition and enforcement of award in another state.<sup>105</sup>

Probably the best-known and the most often cited case that demonstrates strict way of interpretation of the New York Convention is case decided by Hålogaland, Norwegian Court of Appeal. While deciding on formal validity of arbitration agreement, Court expressed its opinion that exchange of E-mails did not satisfy the written form requirement from Article II (2) of the Convention. In addition, this case represents the example of disharmonized practice, because the arbitral tribunal itself, as well as the Norwegian District Court of Lofoten decided that this agreement was formally valid. However, the Court of Appeal denied the recognition of the respective agreement under Article II (2), and Article IV (1) (b) of the Convention, stating that the “the basic requirements of legal protection set up by the Article II (2) in conjunction with Article IV (1) (b) are not satisfied.”<sup>106</sup>

However, as already noted within Subchapter II.2.2., Van den Berg explained in details that this decision was direct consequence of the concrete circumstances of the case.<sup>107</sup> It can be presumed, that if the respective E-mails were not incomplete, the prior requirement of legal protection would be satisfied. In that case, we can feel free to presume, that this decision could

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<sup>105</sup> Lopez Ortiz A. *Supra note 1*, p. 354

<sup>106</sup> Charterer (Norway) v. Shipowner (Russian Federation), *Supra note 88*, p. 522

<sup>107</sup> Van den Berg, *Supra note 86*

be different, and that the Court would decide in favor of formal validity of this arbitration agreement.

It can be concluded that different approaches towards the use of electronic communication expressed in the recognition and enforcement procedure, lead to disharmonized court practice among different jurisdictions, but sometimes even within one jurisdiction. All this has complete negative effect not only to development of international trade, but also to legal certainty in general.

The fact that some courts are more reluctant to modern ideas than the others should be taken into account. In order to prevent and avoid this legal uncertainty, some attempts have to be made in order to harmonize the solutions from the New York Convention with more liberal legal instruments. This will be the topic of the following Subchapter.

## **IV Setting the trends and providing with the solutions: UNCITRAL proposals**

As we saw from the previous Chapters, the main reason for legal uncertainty and disharmonized practice is the existed conflict between strict formulation of the provisions of the New York Convention and current development of international commerce.<sup>108</sup> It was already argued in this paper in favor of more extensive interpretation of the Convention, as well as for the application of the Convention's Article VII (1) (but the application of this Article would also lead to avoiding of the Convention's solutions).

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<sup>108</sup> Van den Berg, *Supra* note 9, p. 393

Taking into account current needs of international business practice, some general accepted solution needs to be offered and accepted. Solution, that would primarily extend the scope of Article's II (2) application, so as to cover the means of electronic communication directly, and to become in line with modern liberal solutions.

Definitely the most radical proposition would be attempt to amend the New York Convention, in a way to recognize expressly the validity of arbitration agreements concluded by electronic means.<sup>109</sup> However, this attempt could create even bigger legal uncertainty. On the one hand, some of contracting parties could refuse to adopt the amendments. On the other, even those which would accept them could still be in a position to apply different solutions since the time period for ratification of one international instrument is usually very long.

From this point of view, but still keeping in mind the need for harmonization with current level of developments, UNCITRAL proposed two possible solutions for this situation. The first alternative is adopting the instrument interpreting the Convention that would expressly allow formal validity of the agreements concluded via electronic communication. Definition of the 'agreement in writing' in this instrument, would be inspired by the revised text of Article 7 (2) UML, which is to be presented further in this paper.<sup>110</sup>

The second possibility for the States is to ratify recently adopted Convention on the Use of Electronic Communications in International Contracts (hereinafter referred to as the: **"Electronic Communications Convention"**) which includes reference to the New York Convention.<sup>111</sup> Both of these alternatives would lead to the common result - legal recognition of formal validity of the

<sup>109</sup> Lopez Ortiz A., *Supra note I*, p. 353

<sup>110</sup> UNCITRAL Working Group II (Arbitration and Conciliation): 36<sup>th</sup> Session, New York 4 -8 Mar 2002; <http://daccessdds.un.org/doc/UNDOC/LTD/V02/511/66/PDF/V0251166.pdf?OpenElement> , site visited 19 Jan 2007

<sup>111</sup> 2005–United Nations Convention on the Use of Electronic Communications in International Contracts; [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html) site visited 5 Mar. 07

agreements entered into by means of electronic communication. They will be discussed further in this Chapter.

#### **IV.1. First alternative: adopting the instrument interpreting Article II (2) of the New York Convention**

Since the requirements set by Article II (2) can not reflect any more the current needs of international practice, national courts have increasingly adopted more extensive interpretation of these provisions. However, even in this case, the problem of non-uniform interpretation remained, and this still reduces the legal certainty and predictability. In order to make an attempt to achieve uniform interpretation, UNCITRAL Working Group II adopted the position that there was great need to adopt “declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement.”<sup>112</sup>

The instrument interpreting the Convention is intended especially to include the express reference to the use of electronic communication when concluding arbitration agreements. Therefore, the first consideration was whether the formulation used should be in compliance with the respective provision of Article 2 of Model Law on Electronic Commerce.

It was decided that Article 2 of the Model Law on Electronic Commerce, should be used as the specific guidance for creating this kind of interpretative instrument. This decision was supported by the Guide to Enactment of the Model Law on Electronic Commerce, instrument adopted in order to achieve clarification of relationship between this Model Law and international conventions.<sup>113</sup> In that sense, Working Group II requested the Secretariat to prepare

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<sup>112</sup> UNCITRAL Working Group II (Arbitration and Conciliation), 33<sup>rd</sup> Session, Vienna 20 Nov-1 Dec 2000, <http://daccessdds.un.org/doc/UNDOC/LTD/V00/572/71/PDF/V0057271.pdf?OpenElement> site visited 19 Jan 2007

<sup>113</sup> UNCITRAL Working Group II (Arbitration and Conciliation), 33<sup>rd</sup> Session, Vienna 20 Nov-1 Dec 2000, <http://daccessdds.un.org/doc/UNDOC/LTD/V00/572/71/PDF/V0057271.pdf?OpenElement> site visited 19 Jan 2007

a draft instrument which would clearly show that Article II (2) will be interpreted in a way to include electronic communication as defined by Article 2 of Model Law on Electronic Commerce.<sup>114</sup> However, the wording of respective Article 2 of this Model Law was not intended to become directly the part of the interpretative instrument.

The actual intention in achieving uniform interpretation was to prepare a model legislative provision clarifying the scope of Article 7 (2) UML.<sup>115</sup> This new, revised text of the Article 7 (2) would simultaneously be in accordance with Article 2 of the Model Law on Electronic Commerce, and its wording would be, as such, included directly into the instrument interpreting Article II (2) of the New York Convention.<sup>116</sup>

The final structure of the new, revised text of model legislative provision of Article 7 (2) UML was presented on the forty-third session of Working Group II.<sup>117</sup> Revised text of this Article contains five paragraphs, whereas from the standing supported in this paper second and third represent the most innovative provisions. The provision of the second paragraph expressly subsumes the ‘data message’ under the term ‘in writing’, by which “it was made unambiguously clear that the arbitration agreements can be validly concluded by the electronic communication.”<sup>118</sup> In addition, under the term ‘in writing’ paragraph two also includes ‘any form that is accessible so as to be useable for subsequent reference’, which is inspired by Article 6 (1) of the Model Law on Electronic Commerce.

Further, paragraph three of the revised text of Article 7 (2) UML contains definition of what is considered as data message, which reproduces the content of Article 2 of the Model Law

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<sup>114</sup> *ibid*

<sup>115</sup> *ibid*

<sup>116</sup> UNCITRAL Working Group II (Arbitration and Conciliation), 36<sup>th</sup> Session, *Supra note 110*

<sup>117</sup> UNCITRAL Working Group II (Arbitration and Conciliation), 43<sup>rd</sup> Session, 3-7 Oct 2005,

<http://daccessdds.un.org/doc/UNDOC/LTD/V05/867/53/PDF/V0586753.pdf?OpenElement> site visited 19 Jan 2007

<sup>118</sup> *ibid*

on Electronic Commerce.<sup>119</sup> Therefore, the instrument interpreting Article II (2) of the New York Convention will be formulated as to include the solution contained in this revised text of Article 7 (2) UML. And since this revised text is in accordance with the Model Law on Electronic Commerce, the New York Convention is to be interpreted in line with the current developments of international business practice, as to allow the use of electronic communication in formation of arbitration agreements.

However, it should be mentioned that alternative proposal of the arbitration agreement's definition was also made, besides this revised draft of Article 7 (2) UML.<sup>120</sup> The main characteristic of alternative proposal is the fact that written form requirement was completely omitted. It was argued in favor of this proposal that many national laws contained the written form requirements that are regarded as outdated, whereas in some jurisdictions this requirement has already been removed. However, finally, the expressed view was that this proposal could radically depart from the traditional solutions, and that it might not be so well accepted in many countries.<sup>121</sup> As a conclusion, it was stated that intended harmonizing national laws and drafting the adequate interpretative instrument for Article II (2) of the New York Convention, could be achieved much better by the revised draft legislative provision of Article 7 (2) than by alternative proposal.<sup>122</sup>

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<sup>119</sup> *ibid*

<sup>120</sup> UNCITRAL, General Assembly, 39<sup>th</sup> Session, New York, 19June-7 July 2006,(Settlement of Commercial disputes) <http://daccessdds.un.org/doc/UNDOC/GEN/V06/530/25/PDF/V0653025.pdf?OpenElement> site visited 19 Jan 2007

<sup>121</sup> UNCITRAL, General Assembly, 39<sup>th</sup> Session, New York, 19June-7 July 2006(Report of the Working Group on Arbitration and Conciliation on the work of its 44<sup>th</sup> Session), <http://daccessdds.un.org/doc/UNDOC/GEN/V06/515/13/PDF/V0651513.pdf?OpenElement> site visited 19 Jan 2007

<sup>122</sup> *ibid*

## **IV.2. Second alternative: Reference to the New York Convention in the Electronic Communications Convention**

The United Nations Convention on the Use of the Electronic Communications in the International Contracts (“**Electronic Communications Convention**”) was adopted by the General Assembly on 23 November 2005, with primary purpose of achieving legal certainty relating to the use of electronic communication in concluding the international contracts.<sup>123</sup> According to the standing expressed in this paper; the most significant part of this Convention is the regulation of criteria for establishing functional equivalence between the means of electronic communication and traditional paper documents.<sup>124</sup>

This Convention is result of a dedicated work of UNCITRAL Working Group IV, which at its fortieth session agreed that UNCITRAL should make an attempt on removing the legal obstacles for the use of electronic communication from existing international conventions.<sup>125</sup> It was concluded that the best way of achieving this would be making the reference in the Electronic Communications Convention to the relevant international conventions that could include legal barriers for using the means of electronic communication.

Since the New York Convention regulates the issues of recognition and enforcement of foreign arbitral awards, UNCITRAL Working Group II, competent for the arbitration was invited to cooperate with Working Group IV on this matter. In that sense, on its 41<sup>st</sup> Session, Working Group II agreed that the inclusion of reference to the New York Convention could provide with the uniform definition of written form requirements that would be more in accordance with

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<sup>123</sup> 2005-United Nations Convention on the Use of Electronic Communications in International Contracts; *Supra* note 111

<sup>124</sup> *ibid*

<sup>125</sup> UNCITRAL Working Group IV (Electronic Commerce), 40<sup>th</sup> Session, Vienna 14-18 Oct 2002, <http://daccessdds.un.org/doc/UNDOC/GEN/V02/593/94/PDF/V0259394.pdf?OpenElement> site visited 5 March 07

developing technological practice.<sup>126</sup> It was also noted that this solution would significantly contribute to the uniform interpretation of Article II (2), and additionally of Article IV (1) (b) of the New York Convention.<sup>127</sup>

The article relevant for the link with several international conventions is Article 20 of the Electronic Communications Convention.<sup>128</sup> However, at the very beginning it should note that the Convention in its Article 4 (c) contains the definition of ‘data message’ almost identical with definition contained in Article 2 of the Model Law on E-Commerce, which significantly proves the approach expressed at the beginning of Chapter IV. This approach was explaining the similarity of two of the UNCITRAL proposals which both lead to legal recognition of the use of electronic communication in process of formation the arbitration agreements.

As already said, the most important article, Article 20 of the Electronic Communications Convention in its paragraph 1 contains the following solution:

“The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following conventions... apply...” whereas the first among the listed conventions is the New York Convention.<sup>129</sup> The intended effect of this provision was primarily to offer the substantive rules for allowing the use of electronic communication in formation of contracts covered by these conventions; more than achieving the uniform interpretation of different solutions. Therefore, by ratifying this Convention, the State would automatically undertake the obligation to apply the provisions of this Convention to electronic communication relating to contracts covered with any

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<sup>126</sup> UNCITRAL Working Group II (Arbitration and Conciliation), 41<sup>st</sup> Session, Vienna 13-17 Sep 2004, <http://daccessdds.un.org/doc/UNDOC/LTD/V04/565/78/PDF/V0456578.pdf?OpenElement> site visited 5 March 07

<sup>127</sup> *ibid*

<sup>128</sup> United Nations Convention on the Use of Electronic Communications in International Contracts [http://www.uncitral.org/pdf/english/texts/electrocom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electrocom/06-57452_Ebook.pdf) site visited 5 March 2007

<sup>129</sup> Electronic Communications Convention, Article 20 (1), *Supra note 128*



of the listed conventions.<sup>130</sup> This would lead to legal recognition of the use of electronic communication in concluding arbitration agreements in every Contracting Party to the New York Convention which would also ratify this Convention.

However, although this solution would lead to uniform interpretation of the formal requirements set by the New York Convention, it should take into account that there are three actions required (signature, ratification, accession) before entering into force of this Convention; whereas up to now only eight countries signed the Convention.<sup>131</sup> And, according to Article 16 of the Electronic Communications Convention, the Convention is open for signatures from 16 January 2006 to 16 January 2008.<sup>132</sup>

Although there is almost a year to be seen how many Contracting Parties to the New York Convention will also ratify the Electronic Communications Convention, there is one more issue that can be problematic regarding the uniform interpretation of the written form requirement. Namely, the Electronic Communications Convention in the fourth paragraph of Article 20 contains the possibility for each Contracting Party to make declaration that “it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention (including the conventions referred to in paragraph 1 of the relevant Article)...applies.”<sup>133</sup> The direct consequence of this provision is the exclusion of the Electronic Communications Convention’s application regarding all of contracts to which the convention referred to applies. Therefore, the

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<sup>130</sup> Explanatory note by the UNCITRAL Secretariat on the Electronic Communications Convention, [http://www.uncitral.org/pdf/english/texts/electrocom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electrocom/06-57452_Ebook.pdf) site visited 5 March 2007, p.17, par 290

<sup>131</sup> Status – 2005-Electronic Communications Convention, [http://www.uncitral.org/uncitral/en/uncitral-texts/electronic-commerce/2005Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral-texts/electronic-commerce/2005Convention_status.html) site visited 5 March 2007

<sup>132</sup> Electronic Communications Convention, Article 16 (1), *Supra note 128*

<sup>133</sup> Electronic Communications Convention, Article 20 (4), *Supra note 128*

problem of disharmonized international practice would again occur even with the existence of the Electronic Communications Convention.

Finally, taking all of the mentioned into account, the comment made by Working Group II also represents the realistic view of the circumstances in international commercial arbitration and court's practice. Considering all of the advantages and disadvantages of the Electronic Communications Convention, the members of Working Group II expressed their opinion that even this direct inclusion of reference to the New York Convention could result in the very same legal uncertainty. Namely, it could happen, that even after entering into force of the Electronic Communications Convention in some of the Contracting Parties to the New York Convention; other States decide to adhere to the New York Convention in its original form.<sup>134</sup> Situation like that would again result in the lack of legal predictability.

However, Working Group II at the very same occasion concluded, that the fact that the New York Convention would be interpreted in accordance with the Electronic Communications Convention at least in the States that ratified also the second instrument, could be observed as a success.<sup>135</sup> In that sense, the following conclusion can be drawn from these prospective proposals made by UNCITRAL Working Groups and General Assembly.

Obviously, the process of amending the international legal instrument with the tradition almost 50 years long, such is the New York Convention, is the aim very difficult to achieve. New York Convention 1958 represents one of the most significant and the most widely accepted conventions with 142 Contracting Parties.<sup>136</sup> Therefore, regarding the number of Contracting Parties and the importance of the Convention itself, the process of modifying its effects would be more than complicated issue. On the other hand, there is the fact that, in some segments,

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<sup>134</sup> UNCITRAL Working Group II (Arbitration and Conciliation), 41<sup>st</sup> Session, *Supra note 126*

<sup>135</sup> *ibid*

<sup>136</sup> Status – 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Supra note 4*

especially regarding Article II (2), the Convention is not in accordance with the needs of developed business practice.

Taking into account the necessity of harmonization of very important international convention with the current level of technology developments; these progressive proposals need to be very intensively propagated. Both of the suggested UNCITRAL proposals, even with potential weaknesses, represent good solution, not only regarding the harmonization with new trends, which is above all, necessary. In addition, these proposals also contribute to prevention against the non-uniform practice even in the occasions when national judges interpret more liberally the New York Convention, trying to evade its strict requirements. In any case, for the purpose of legal certainty and uniformity, it would be advisable to accept one of the proposals, or, at least to propose some new solution that would lead to application of some substantive rules that would regulate formal validity of arbitration agreements in accordance with modern trends.

## **V Conclusion**

Discussion in this paper was concentrated on the issue of granting the formal validity to arbitration agreements entered into by electronic communication. Taking into account doubtless contribution of the New York Convention, but faced with rapid development of technology, the main question posed in this paper was: Is it possible to extend the scope of application of Article II (2) of the Convention so as to cover the use of modern means of telecommunications?

Since it was explained that the intention of the Convention's drafters had not been to limit the scope of the Convention to those time circumstances; it was concluded here that harmonization of the Convention with new tendencies was in accordance with the Convention's spirit. Therefore, this paper suggests that this harmonization and legal recognition of electronic communication can be achieved either through the more extensive and teleological interpretation

of Article II (2), or through the combination with modern national statutes, via the application of Article VII (1) of the Convention.

Both of the proposed approaches were based on relevant literature and analysis of court decisions, whereas the main argument for accepting any of these options was their identical result. Namely, it was shown that any of these two methods could be accepted because the main purpose of written form requirement (e.g. protection of the parties and providing with the proof on their intention to agree on arbitration) could be achieved in both cases. In other words, when concluding the arbitration agreements by using modern means of telecommunications, parties can be protected and informed in the same way as by using the traditional means, explicitly mentioned in Article II (2). Thus, it was demonstrated, that there should be no legal obstacles to recognize formal validity of arbitration agreements concluded in this way.

Further in this paper, when arguing for formal validity of arbitration agreements entered into by electronic communication, the doctrine of “functional equivalence” was presented as the main basis for establishing the link between traditional and modern means of communication. This standing was supported by citing great number of eminent scholars and by the analysis of significant number of court’s decisions and arbitral awards. Finally, conclusion reached was that from legal, logical and technical point of view, telexes, telefaxes, E-mails and other means of electronic communication could be treated equally to the letters and telegrams, and concluding, should be covered by Article II (2). It was stressed that on the more abstract level of observation, even possible future means of electronic communication should be treated in the very same way, because it was clearly shown by the case law that the parties’ protection and obtaining the proof of their intention to arbitrate could be established by these modern telecommunications as well.

In addition, it was shown that even the requirement of signatures could not represent an obstacle to legal recognition of electronic communication. It was supported by the significant part of case law that this requirement was not necessary in cases of exchange, as long as the mentioned purpose can be achieved in the other way. And, naturally, it was shown further that this purpose indeed could be achieved not only by signatures but by the existence of the real exchange, as well.

However, in order to have an objective prospective, and to present argumentation for both *pro* and *con* approaches, it was also dealt with the most usual critics addressing the acceptance of electronic communication in described context. The main basis for the approach opposite to recognition of formal validity to these agreements was establishing the differences between traditional and modern means of telecommunications, especially regarding the issue of providing with printing records and immateriality. However, after detailed comparing between *pro* and *con* argumentation, it seems that there are more qualitative reasons for identifying traditional and modern methods of telecommunications. While observing the technical characteristics, as well as the most important legal aspect – fulfillment of the main purpose of written form requirement; the only conclusion drawn is that means of electronic communication should be observed as valid form of arbitration agreement.

In addition, attention was paid to one of the greatest problems in this area related to the reluctance of courts in some jurisdictions to accept the interpretation of written form requirements in the light of modern circumstances. This negative attitude expressed especially in the recognition and enforcement procedure leads to disharmonized court practice among different jurisdictions, but sometimes even within one jurisdiction. All this has negative effect not only to development of international trade, but also to the legal certainty in general.

Therefore, in order to prevent and avoid legal uncertainty and unpredictability, two UNCITRAL proposals were presented. It was explained that adopting the instrument interpreting the New York Convention; or, ratifying the Electronic Communications Convention that contains reference to the New York Convention, would significantly contribute to harmonizing of the courts' practice and improvement of legal certainty.

The advantages of ratification of the Electronic Communication's Convention were specifically stressed; because, by the process of ratification, the States would automatically undertake the obligation to apply the provisions of this Convention to electronic communication relating to agreements covered with the New York Convention. This would lead to legal recognition of the use of electronic communication in concluding arbitration agreements in every Contracting Party to the New York Convention which would also ratify this Convention. However, after presenting difficulties in entering into force of this Convention, it was concluded that it would be very difficult to amend the New York Convention.

However, taking into account rapid technical development and needs of international business, it is obvious that the New York Convention needs to be amended or at least uniformly interpreted in accordance with the new trends. Whether it will be done by the great promotion and hopeful success of one of the UNCITRAL proposals, or by using some other instrument, it will be seen.

With respect to all above mentioned and in accordance with all of presented arguments, cited literature and analyzed case law, it is to be concluded that, in the absence of final and formal solution of this issue, formal requirements set by Article II (2) should be interpreted so as to include modern means of electronic communication. In other words, in expecting the legal instrument that would uniformly regulate this matter, arbitral tribunals and national courts should

take into account all of presented legal and technical arguments and decide in favor of formal validity of arbitration agreements entered into by electronic communication. This would lead to harmonization with the modern tendencies in international business. Additionally, this would lead to harmonization of the court practice on international level, which is more than necessary for the legal certainty, so valuable in the world of business transactions.

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