



FORMAL VALIDITY OF ARBITRATION AGREEMENTS CONCLUDED VIA ELECTRONIC MEANS OF COMMUNICATION

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Abstract

This topic has already been discussed in detail by several authors, but this paper shall provide a rather different approach to the issue of formal validity.

First of all, the Article II (2) of the New York Convention is examined from all possible viewpoints regarding its application, and it will be shown that the current trend of relaxed interpretation of the “writing” requirement is reflected not only in the Model Law on International Commercial Arbitration, but also in national laws and rules of arbitral institutions throughout the world.

However, after reaching the conclusion that the interpretation itself is not sufficient to provide the electronic communications with the effect of “writing” under Article II (2), it will be shown that recourse to Article VII (1) of the New York Convention is by far the most workable solution, since the article VII (1) can analogously be applied to the arbitration agreements.

This paper shall also examine the current propositions of changing the New York Convention itself by applying different legal techniques, in particular, the Convention on Electronic Communications. However, it will be shown that all these propositions at this moment are far from being effective, and their future effectiveness is also under the question.

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Index of Abbreviations

Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
Convention of the Law of Treaties	Vienna Convention on the Law of Treaties of 1969
Convention on E-Communications	United Nations Convention on the Use of Electronic Communications in International Contracts
E-Commerce Model Law	UNCITRAL Model Law on Electronic Commerce
ICC	International Chamber of Commerce
Id.	idem [the same]
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p. / pp.	Page / Pages
para(s).	Paragraph(s)
<i>per se</i>	by itself
UNCITRAL	United Nations Commission on International Trade
ICANN	Internet Corporation for Assigned Names and Numbers
LCIA	London Court of International Arbitration

Introduction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter referred to as New York Convention], has been adopted by the diplomatic conference on 10 June 1958. Since then 142 countries have become the contracting parties to the Convention¹. The New York Convention has been extremely successful promoting the development of arbitration, nowadays it is conceived to be a cornerstone of International Commercial Arbitration.

Nevertheless, in some cases the future uniformity of application of the Convention is under the question. One of such highly debated issues is a case of “writing” requirement of the New York Convention. Due to the advancement of technology and wide usage of the electronic communication in business-to-business negotiations and contracting, the problem of admissibility of the arbitration agreements concluded via electronic means has arisen, based, in essence, on diverging attitudes of the countries to validity of electronic communications and their equivalence to paper-based communication.

Although considerable research has already been made regarding this particular topic², this paper will approach the issue of formal validity of an arbitration agreement concluded by means of electronic communication from somewhat different perspective. Firstly, it will be shown, that current interpretational tendencies support the relaxed interpretation of the Article II(2) of the New York Convention, namely inclusion of the electronic communication within its scope as one of the mean by virtue of which a formally valid arbitration agreement could be concluded. In proving the above, the author is going to rely on teleological interpretation of

¹ Status of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/New_York_Conventiononvention_status.html, last visited on 25 March 2008.

² See Moss Giuditta Cordero, Risk Of Conflict Between The New York Convention And Newer Arbitration-Friendly National Legislation?, available at: < <http://folk.uio.no/giudittm/Formofarbitrationclause.pdf> >, last visited on 28 March, 2008; see also Bojana Jankovic, Formal Validity of Arbitration Agreements Entered into by Electronic Means of Communication, LLM Short Thesis, Central European University, April 2007.

the provision in question, explore its legislative and interpretative history (namely, through making a parallel to the Article 7 of the UNCITRAL Model Law on International Commercial Arbitration), and current developments in the domain of institutional arbitration (referring to the express incorporation of the electronic communication into institutional international commercial arbitration rules). Further on, this paper will rely on Article VII (1) of the New York Convention by proving that:

- Article VII (1) of the New York Convention is applicable to arbitration agreements (by reference to commentaries and case law) and explain how it applies;
- there is a practical reason for application of article VII (1) of the New York Convention
- application of Article VII (1) is a workable solution for now, as the other possibilities do not provide the necessary solution.

Lastly, proposals regarding the express change of the Article II (2) of the New York Convention, aimed at putting an end to endless discussions concerning the formal requirements of the New York Convention and non-uniform interpretations of Article II (2) of the New York Convention will be discussed. It will be submitted that the most efficient way to deal with unification of the “writing” requirement under the Article II(2) of the Convention might lay in accession to the 2005 UN Convention on Electronic Communications, which, as expressly stated in its text, is called to solve the “writing”-related problems in application of the New York Convention.

Structurally the paper is composed of introduction, three chapters embodying discussions over the issues raised (**Chapter I:** Formal validity of arbitration agreement under New York Convention: can electronic communication fulfill the requirements of Article II(2); **Chapter II:** National Laws and the writing requirement of Article II(2) of the New York

Convention: options for coexistence; **Chapter III:** Proposed express modification of the “writing” requirement of Article II(2) New York Convention) and the conclusion.

Chapter I: FORMAL VALIDITY OF ARBITRATION AGREEMENT UNDER NEW YORK CONVENTION: CAN ELECTRONIC COMMUNICATION FULFILL THE REQUIREMENTS OF ARTICLE II (2)?

This Chapter will focus on the Article II (2) as the uniform rule and the starting point in determination of formal validity of an arbitration agreement; in dealing with an interpretational dilemma set forth by this article, it will be verified, that the relaxed interpretation of the “written” requirement of the New York Convention shall prevail over strict interpretation thereof on the basis of teleological approach to interpretation, and interpretation by reference to the UNCITRAL Model Law on International Commercial Arbitration. Moreover, it will be confirmed that the Convention has to be subject to independent interpretation and references in interpretation thereof to the national laws shall be precluded, and, that the modern trend of the express inclusion of the possibility of electronic communication into institutional international arbitration rules stands in favor of the broad interpretation of the “writing” requirement of Article II(2) of the Convention.

1. Article II of the New York Convention as a starting point

The New York Convention has been chosen as a starting point because it is the most globally accepted international convention regulating the requirements to formal validity of the arbitration agreement. Currently 142 states are the parties to the Convention³, which means, with high degree of certainty, that formal validity standards of the Article II(2) of the Convention are adhered to by the national courts of the contracting states in making determination of the validity of the submission to arbitration at the phase of reference to arbitration (Art. II of the New York Convention), in establishing the originality of the

³ Status of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *Supra note 1*

arbitration agreement submitted to the enforcing court in the enforcement phase (Art. IV of the New York Convention) and, finally, in allowing or denying recognition and enforcement of an arbitral award (Article V (1) of the New York Convention).

New York Convention contains a uniform rule on the form of the arbitration agreements. Article II (1) of the New York Convention requires an arbitration agreements to be “*in writing*”, while article II(2) thereof provides that “*the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*”.

The article II of New York Convention has unified various form requirements concerning the requirement of writing.⁴ According to scholars’ opinions, any arbitration agreement that fulfils the form requirement of the Article II New York Convention must be enforced by the courts in the Contracting State, regardless of any stricter form requirements of the national arbitration law.⁵

2. Interpretations of Article II (2)

a. Black letter interpretation of the text of Article II (2) of the New York Convention

Interpretational dilemma of Article II (2) rests on the question whether Article II's “writing” requirement is exclusive or not, namely whether or not the Article II (2) incorporates a non-exclusive list of some of the types of “agreements in writing” that could satisfy the requirements of Article II(2), or this list is exhaustive.

⁴ Van den Berg A. J. The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation (Dewenter, Kluwer Law and Taxation Publishers, 1994) p.176.

⁵ Van den Berg A. J. 203 and 204 2. Formal Validity, Uniform rule and Municipal Law, Consolidated Commentary on New York Convention, 2003 Kluwer Law International; Julian D M Lew, Loukas A Mistelis, Stefan M Kroll. Comparative International Commercial Arbitration (The Hague, Kluwer Law International, 2003), p. 113-114; Freidland, P., „US Courts’ misapplication of the “agreement in writing” requirement for enforcement of an arbitration agreement under the New York Convention”, Mealey’s International Arbitration Report, Vol. 15, #5. 1998, page 25; Alvarez, “Article II(2) of the New York Convention and the Courts”, ICCA Congress series No 9, p. 67- 69

It is not clear from the language of the article II (2) of New York Convention itself whether this provision has to be interpreted strictly or extensive interpretation can be given. In order to demonstrate the discrepancies between the equally authentic texts of the New York Convention, namely English, French, Spanish, and Russian, the comparison of these texts is provided below. While wording of English and Russian texts seem to be not exclusive in nature, the Spanish and French texts are visibly exclusive.

- ✓ English: The term "agreement in writing" *shall include*
- ✓ Russian: Термин “письменное соглашение” *включает* – The term “agreement in writing” *includes* (emphasis added)⁶
- ✓ French: *On entend par* “convention écrite” – “agreement in writing” *means* (emphasis added)
- ✓ Spanish: La expresión 'acuerdo por escrito' *denotará* – The expression “agreement in writing” *denotes/means* (emphasis added)

Even though the admission to be made here that Article II was included into the text of the New Your Convention at the last moment, more precisely, it first appeared in final draft on 6 June 1958, 4 days before the adoption of the final text of the Convention⁷, which could justify the discrepancies between the authentic texts, comparison of these texts clearly shows that a sole reference to the language of the article II(2) itself is not sufficient to clarify what interpretation has to be given to the its wording.

⁶ Hereinafter the translations are made by the author.

⁷ Van den Berg, A. J. “Field of Application”, Consolidated Commentary on New York Convention, 2003 Kluwer Law International.

b. Substantive interpretations of the Article II (2) of the New York Convention

i. Strict interpretation

Under the strict interpretation of the above provision one would literally understand a limitation imposed by the Convention over the usage of means other than exchange of letters and telegrams (besides original attachment of parties' signatures to their written clause compromissoire or compromise). Although this is obviously a situation originally envisaged by the drafters, keeping with it might well serve to the detriment of international commercial arbitration, especially in societies, where the utilization of the newer communicational means for concluding international commercial transactions is popular. This *per se* will go contrary to the mission of the New York Convention to serve the enhancement of attractiveness of international commercial arbitration and its wider acceptance as a dispute resolution mechanism.

Moreover, as the discussion below will show, there is a strong probability, that the strict interpretation of the "writing" requirement has not been anticipated by the drafters as an optimal solution *ab initio*.

ii. Relaxed interpretations

The commentaries supporting extensive interpretation rely on the wording of the English text of Article II (2), namely "*shall include*"⁸, stating that Article II (2) merely lists some of the types of arbitration agreements satisfying the Convention's requirements, and does not exclude the possibility of concluding arbitration agreements by other means of communications⁹.

⁸ Article II (2) of the New York Convention, U.N. Doc. A/CN. 9/592, para. 87

⁹ Born, G. B. International Commercial Arbitration: Commentary and Materials (Ardsley, NY. Transnational Publishers, 2d ed., 2001), pp. 135-136

For instance, in opinion of the Giuditta Cordero Moss, “*the question whether an arbitration clause entered into electronically meets the requirement of the written form, which is set by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards seems relatively easy to answer affirmatively, on the basis of an extensive interpretation of the New York Convention*”¹⁰.

1. Teleological interpretation of the Article II (2) of the New York Convention – express inclusion the promptest means of “written” communication available.

Even though it is obvious, that at the time of adoption of the New York Convention electronic communication was not normally used or even existent¹¹, its incorporation into the writing requirement of the Article II(2) of the Convention as a result of the development of technology subsequent to the adoption of the instrument has not gained a uniform acceptance among scholars and practitioners. While fairly hostile attitude to something that is not well known is normal and constitutes an integral part of the human nature, an experience of the other “alternative” to those mentioned in the Article II(2) of the New York Convention means of communication – telecommunication, fax, etc shows, that the “recognition” comes with time. Namely, while immediately after actual emergence of telecommunication as a generally accepted communication mean in commercial world its status as writing could not have been

¹⁰ See Moss Giuditta Cordero, Risk Of Conflict Between The New York Convention And Newer Arbitration-Friendly National Legislation?, available at: < <http://folk.uio.no/giudittm/Formofarbitrationclause.pdf> >, last visited on 28 March, 2008.

¹¹ As correctly noted by Moss, “the wording does not make direct reference to electronic telecommunication, but this is hardly surprising, considering that in 1958, when the convention was written, no one would have imagined that technological developments would have permitted to have electronic exchanges between the world ends, and that international business would have daily availed itself of these means. Moss Giuditta Cordero, *Supra note 10*, at 7-8; see also “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, General Assembly resolution 61/33 of 4 December 2006

accepted, the situation changed later and multiple court decisions demonstrate its recognition as such.

The revolution in information technology development actually began after 1958, while the telegrams which were frequently used at those times and constituted, in essence, the promptest mean of communication, were replaced largely by telex, later by fax, and, finally, nowadays by email¹². Indeed, as demonstrated by Jasna Arsic, from the technical viewpoint, the emails have the same qualities as the other means of communications, such as fax, telex, telegrams, etc.¹³

Thus, taking into consideration recent technological progress and noting, that it has been an intent of the drafters of the New York Convention in 1958 to include into the language of Article II(2) thereto the promptest available “written” means of communication – “telegrams”, it might be inferred, that the inclusion of e-communication into the scope of “writing” required by the New York Convention would go in line with the initial intent of the drafters and, furthermore, will serve the main purpose of the convention: ensure the enforceability of arbitration agreements and arbitral awards.

2. Interpretation by reference to the Model Law on International Commercial Arbitration

The Swiss Supreme Court has decided that the requirements put forward by the Article II (2) of the New York Convention have to be interpreted broadly within the meaning of the Arbitration Model Law, and these requirements are practically the same as the Art. 178 (1) of

¹² Redfern, Alan & Hunter, Martin, *The Law And Practice Of International Commercial Arbitration* (Sweet and Maxwell, 4th ed. 2004). Para. 3-07.

¹³ Arsic, Jasna "International Commercial Arbitration on the Internet" *Journal of International Arbitration* (Vol. 14, no. 3, September 1997), p. 219

the Swiss Private International Law Act¹⁴. The same opinion is also shared by Van den Berg¹⁵.

Speaking about Article 7(2) of the 1985 version of the Model Law¹⁶, the interpretation of the New York Convention's text in light thereof still would not provide one with a clear result if electronic communication is a mean of communication incorporated into the "writing" requirement, even despite the fact that commentators do support such inclusion. However, a recent UNCITRAL development – a new, 2006 version of the Model Law leaves the issues formal validity of the arbitration agreement concluded via exchange of e-mail communications beyond reasonable doubt¹⁷.

In clarifying the "interpretation within the meaning of the Model Law" approach, one has to keep in mind that this approach does not equal to the interpretation of the New York Convention that would allow making reference to the national laws¹⁸. Both New York Convention and the Model Law are specific legal "animals" with almost identical "parents" and akin arials of functioning in the international legal order, which makes them [to certain extant] comparable and, possibly, to specific extent dependent on each-other. In the meantime, the national laws are objects of different legal order and, though their potential applicability should not be denied on the basis of Article VII(1) of the New York Convention,

¹⁴ Switzerland, Federal Tribunal, *Compagnie de Navigation de Transports SA v. MSC Mediterranean Shipping Company SA* (1995) BGE 121 III 38, ASA Bulletin 3/1995 503

¹⁵ Van den Berg, A. J, "The application of the New York Convention by the Courts", ICCA Congress series no. 9 (Paris/1999), pp. 25 – 35, p. 31

¹⁶ The text of the relevant part of this Article provides: "[...]An agreement is in writing 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, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another [...]"

¹⁷ Option I Article 7(4) of the Uncitral Model Law 2006 provides: "(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy; Option II Article 7 states: "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defi ned legal relationship, whether contractual or not.

¹⁸ Such approach on several occasions has been demonstrated by the German courts, see for instance Bundesgerichtshof, 12 February 1976 (Romanian firm v. German firm), Yearbook II (1977) pp. 242-243 (Germany no. 12); Bundesgerichtshof, 3 December 1992 (Buyer v. Seller), Yearbook XX (1995) pp. 666-670 (Germany no. 42).

as will be described in more details below, this applicability should not be confused with and interpretation of the New York Convention “in light” of domestic developments.

3. *Independent Interpretation (reference to national laws is precluded).*

According to Van den Berg, “*The written form of the arbitration agreement as required by Art. II (2) of the Convention is an internationally uniform rule which supersedes any rule of municipal law regarding the form of the arbitration agreement in those cases where the agreement falls under the Convention*”¹⁹. A number of commentaries as well as case law support the position described above²⁰. In particular, it has been submitted, that “*national courts generally apply the New York Convention over national law when deciding on the formal validity of arbitration agreements*”²¹, as the article II (2) “*purports to suggest that a single harmonized approach to the use of article II of the NYC can lead to a more efficient effectuation of international arbitration clauses*”²².

In one of its decisions, Swiss Federal Supreme Court held that the issue of formal validity of the arbitration agreement is “*determined solely according to the Convention; the requirement of the written form according to Article II of the New York Convention is to be interpreted independently, without the assistance of a national law*”²³.

Other courts have also found that the Article II (2) is a directly applicable substantive rule that sets requirement for the formal validity of the arbitration agreement and cannot be overruled by referring to other national laws, namely stating that Article II (2) “*does not allow*

¹⁹ Van den Berg, A. J, *Supra note 15*, p. 32.

²⁰ Born, G.B., *Supra note 9*, p. 136

²¹ Lew, Julian D.M. “The Law Applicable to the Form and Substance of the Arbitration Clause”, ICCA Congress series no. 9 (Paris/1999), p. 119.

²² Graffi, Leonardo D. “Securing Harmonized Effects of Arbitration Agreements under the New York Convention. Houston Journal of International Law Spring, 2006. P.671

²³ See Swiss Federal Supreme Court Judgment of 21 March 1995, XXII Y.B. Comm. Arb. 800 (1997)

for acceptance of the validity of an arbitration clause which does not meet the said requirements”²⁴.

4. Interpretation in light of recognition of electronic communications in the Institutional International Commercial Arbitration Rules

It is the author’s position, that the wide-spread acceptance of the electronic communication (yet indeed, to different extent) by the practice and rules of the international and regional arbitration institutions testifies that certain level of acknowledgement of the electronic communication in the international commercial arbitration has been achieved. Though this factor alone would not suffice in supporting a liberal interpretation of the “writing” requirement set by the Article II(2) of the New York Convention, taken together with the other factors, that are described above, it will add to justification of the validity of alternative interpretations.

A trend towards recognition of the electronic communications as a valid type of communications is followed through the international commercial arbitration rules of international and regional arbitral institutions²⁵. The rules dealing with the issues of electronic communication could be classified into the three basic groups:

- a) those that expressly provide for the formal validity of an arbitration agreement concluded via electronic communication means
- b) those that allow electronic transmission of all notices, statements and communications

²⁴ See *ANC Maritime Co. v. The West of England Shipowners Mutual Protection and Indemnity Ass’n Ltd*, XXIII Y.B. Comm. Arb. 654 (Supreme Court of Greece 1997); see also *DIETF Ltd v. RF AG*, XXI Y.B. Comm. Arb. 685 (Basel Ct. App. 1994)

²⁵ The classification of arbitral institutions into international and regional is offered on the basis of that suggested by the *kluwerarbitration* database, available at: <http://www.kluwerarbitration.com/arbitration/toc.aspx?type=Rules>

- c) those that allow electronic transmission of certain types of notices, statements and communications

As the analysis below will demonstrate, the institutions that expressly allowed electronic communication in their work are quite widely spread geographically, which leads one to the conclusion that an e-communication is on the way to getting a global recognition in international practice of international commercial arbitration. While it is not new that e-communication has currently become a dominating mean of communication between the co-arbitrators (in coordination of their activity or drafting of the award subsequently to hearings), as well as between the arbitrators and arbitral institutions, arbitral institutions and the parties, current trend seemingly gradually establishes e-mail as an acceptable and convenient communication mean in-between the parties to the arbitrated dispute as well as between the parties and the tribunal.

- a. International Commercial Arbitration Rules that expressly for the formal validity of an arbitration agreement concluded via electronic communication means

Quoted below are the three provisions of the rules that show particular acceptance of the e-communication as complying with the formal requirements to arbitration agreement. Being the pioneers in expressly accepting electronic arbitration agreements, these Rules showed the flexibility of Asian arbitral institutions and their openness to the new trends and developments. For the sake of clarity it has to be noted, however, that in all three seats (China, Japan and Indonesia) e-communication is expressly accepted in the formation of the arbitration agreements under the arbitration law²⁶. Thus, in adopting a progressive approach,

²⁶ Art. 16(1) of the Arbitration Law of The People's Republic of China, adopted at the 9th Session of the Standing Committee of the 8th National People's Congress of the People's Republic of China, and promulgated by the President, on 31 August 1994. (Effective from 1 September 1995), published in International Handbook on Commercial Arbitration, J. Paulsson (ed.), Suppl. 18 (September/1994) and Suppl. 25 (January/1998),

the institutions were not faced with a risk of setting aside of their arbitral awards in the seat. However, it is author's opinion that an express incorporation of the e-commerce standards into the sections of the international arbitration rules governing the formal validity of arbitration agreement, being overall a step ahead, is somewhat premature, as it still might hinder an enforceability of an arbitral award at the phase of enforcement²⁷.

According to the Article 5(3) of the Arbitration Rules of China Council for the Promotion of International Trade/China Chamber of International Commerce, *"The arbitration agreement shall be in writing. An arbitration agreement is in writing if it is contained in a tangible form of a document such as a contract, letter, telegram, telex, facsimile, EDI, or Email. An arbitration agreement shall be deemed to exist where its*

provides: "An arbitration agreement includes an arbitration clause included in the contract, and an agreement on submission to arbitration that is concluded in other written forms before or after the dispute arises" (emphasis added);

Art. 13 of Japan's Arbitration Law of 25 July 2003, available at: <http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80359>, establishes that: 2) The arbitration agreement shall be in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication device for parties at a distance which provides the recipient with a written record of the transmitted content), or other written instrument. [...] (4) When an arbitration agreement is made by way of electromagnetic record (records produced by electronic, magnetic or any other means unrecognizable by natural sensory function and used for data-processing by a computer) recording its content, the arbitration agreement shall be in writing. Furthermore, according to the Nagashima Ohno and Tsunematsu Commentary to the Arbitration Law of Japan (last updated in February 2005), available at <http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80284>, "an arbitration agreement is not effective if the terms of the agreement are not set forth in written instruments (e.g., e-mail, etc.)".

Finally, Indonesian Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution, published in International Handbook on Commercial Arbitration, J. Paulsson (ed.), Suppl. 47 (November/2006), in its Art. 4(3) provides: "In the event the agreement for resolution of disputes by arbitration is contained in an exchange of correspondence, including letters, telexes, telegrams, faxes, e-mail, or any other form of communication, the same shall be accompanied by a record of receipt of such correspondence by the parties".

²⁷ It might be presumed, alternatively, even though no data as to the nationality of the parties most frequently involved in arbitration carried out by the institutions concerned is available at their websites (see <http://www.jcaa.or.jp/e/index.html> for Japan International Commercial Arbitration Association; http://www.cietac.org.cn/english/introduction/intro_1.htm for CIETAC and http://www.bani-arb.org/bani_tempat_eng.html for BANI) and their advertised international character, that they are mostly serving national and regional clientele, in which case the risk of denial of recognition and enforcement of the arbitral awards rendered on the basis of Art. V(1)(a) of the New York Convention [particularly for non-compliance of the arbitration agreement of the form requirement] is minimal.

existence is asserted by one party and not denied by the other during the exchange of the Request for Arbitration and the Statement of Defense”²⁸ (emphasis added).

Similar solution has been adopted by the Japan Commercial Arbitration Association Commercial Arbitration Rules, which, in Art. 5(3) of its rules provided: “*When an arbitration agreement is made by way of recordation prepared electronically, magnetically, or by any other method incapable of recognition by human perception used for data-processing by a computer recording its content (hereinafter "electromagnetic records"), the arbitration agreement shall be in writing*”²⁹.

The Indonesian National Board of Arbitration (BANI) Procedural Rules reached the same outcome (i.e. expressly allowed an arbitration agreement concluded by means of e-communication) via slightly different means. Article 1 of the said rules requires the parties’ agreement to be in writing, however, further defining writing, Article 3 (m) provides: “*Writing*” shall include not only documents written or printed on paper but also electronically created and/or transmitted documentation; such writings to include not only agreements but also exchange of correspondence, minutes of meetings, telex, telefax, e-mail and other such communications; and no agreement, document, correspondence, notice or other instrument which is required to be in writing shall be denied legal effect solely for the reason that it is contained in an electronically created or transmitted message (emphasis added)”³⁰.

²⁸ Revised and adopted on 11 January 2005, effective as from 1 May 2005. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXX (2005).

²⁹ As Amended and Effective on March 1, 2004 Available online at <http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/shouji-e.html>.

³⁰ Adopted on 1 March 2003. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXVIII (2003), pp. 331 – 353.

b. International Commercial Arbitration Rules that allow electronic transmission of all notices, statements and communications

Proceeding to the second group of rules, quite numerous in its content, one has to emphasize that, as, in fact in the rules mentioned in the group a), the emphasis of the drafter has been placed on the record of dispatch. As the current state of internet technology allows for the provision of such a record, it looks like a formal barrier precluding the admission of the e-communication to regular conduct of international commercial arbitration is removed.

For example, Article 2 (2) of International Commercial Arbitration Rules of British Columbia International Commercial Arbitration Centre (BCICAC)³¹ states that "*Any written communication required or permitted under these Rules may be delivered personally, by registered mail, by facsimile, or by electronic or other means of telecommunication which provide a record of delivery*" [emphasis added]. The Article 18 of International Arbitration Rules of American Arbitration Association International Centre for Dispute Resolution (ICDR)³² expressly allow all notices, statements and written communications to be sent "*by air mail, air courier, facsimile transmission, telex, telegram or other written forms of electronic communication ... unless otherwise agreed by the parties*" (emphasis added). The Article 4 of LCIA Rules³³ also expressly allows the communications to be sent by "*e-mail or any other means of telecommunication that provide a record of its transmission*". Similarly, CAMCA Arbitration Rules³⁴ Article 20 provides that "*written forms of electronic communication may be used*" in communicating the messages. Rule 2.2 of Singapore

³¹ Adopted on 1 January 2001, available at

<http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80592>

³² Adopted on 1 July 2003. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXVIII (2003), pp. 289 - 304

³³ Adopted on 1 January 1998. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXIII (1998), pp. 369 - 393

³⁴ Adopted in 1996. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXII (1997), pp. 329 - 344

International Arbitration Centre (SIAC)³⁵ allows any written communication to be made “*by way of any form of electronic transmission*”. Article 8 (2) of Arbitration Institute of the Stockholm Chamber of Commerce³⁶ states that a communication “shall be delivered by courier or registered mail, facsimile transmission, e-mail or any other means of communication that provides a record of the sending thereof”.

The ICANN Rules for Uniform Domain Name Dispute Resolution Policy are worth mentioning due to the nature and the subject of the proceedings under these Rules. Article 2 of these rules deals with the form of communications between the parties, the penal and provider, expressly allows these communications to be sent in electronic form not only by e-mail, but also by other means available via Internet, provided the record of transmission is available.

c. International Commercial Arbitration Rules that allow electronic transmission of certain types of notices, statements and communications

The trend for expressly allowing electronic communication between the parties and arbitral tribunal spread even to the jurisdictions that are known by rather inflexible attitude towards the legal meaning attributed to electronically transmitted data. For instance, the arbitral institutions of the two leading jurisdictions of the CIS region – Russia and Ukraine, recently made steps toward the inclusion of e-mail into their general schedule of communications.

³⁵ Adopted on 22 October 1997. Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXIII (1998), pp. 424 - 440

³⁶ Adopted on 1 January 2007. available at:
<http://www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=80925>

While Article 16(3) of the new Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation³⁷ still requires that the statements of claim, explanations of the claims, notices of the hearing, arbitral awards, and orders shall be sent by registered mail with return receipt requested, the next part of the same Article allows [the] “*notices and communications [to] be sent by wire, fax, e-mail, or otherwise, provided that a record is made of the communication sent*”.

In the similar tone, Article 15(4) of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry³⁸ provides that other [than statements of claim, statements of defense, notices of the hearing, arbitral awards, orders or rulings³⁹] documents and communications shall may be sent by ordinary mail, by wire, fax, e-mail, or otherwise, provided that a record is made of the communication sent, and also may be handed over personally to the representative of a party against receipt.

Conclusion for Chapter I.

To conclude, it has to be noted, that in light of the recent developments in the state of technology and global acceptance of this developments by the parties involved in conduct of international trade, it seems reasonable to pay due attention to the relaxed interpretations of the writing requirement of Article II(2) of the New York Convention. However, this attention has to be paid with a due caution, as, even though the popularity of the “functional equivalent approach”⁴⁰ to recognition of electronic communications is rising, it has not yet been universally accepted.

³⁷ Adopted in 2006, Published in Yearbook Commercial Arbitration, A.J. van den Berg (ed.) Vol. XXXI (2006), pp. 462 - 489

³⁸ Approved on 17 April 2007, Available at <http://www.ucci.org.ua/arb/icac/en/rules.html>

³⁹ According to the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry these documents shall be sent to the party by registered mail with an advice of delivery or by courier mail as well as may be handed over personally to the representative of a party against receipt.

⁴⁰ According to the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), Section I (e), “The “functional equivalent approach” is based on an analysis of the purposes and functions of the

traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques". In justification of the above approach UNCITRAL Working Group IV in particular stated: "[...]among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met[...]".

Chapter II. NATIONAL LAWS AND THE WRITING REQUIREMENT OF ARTICLE II (2) OF THE NEW YORK CONVENTION: OPTIONS FOR COEXISTENCE

1. Influence of national laws in determination of formal validity of an arbitration agreement.

This Chapter will focus on the possibility and extent of the influence of the national laws on determination of formal validity of arbitration agreements.

a. The duty of the tribunal to render an enforceable award

The provisions of the New York Convention are only directly binding on the courts in the Member States and not on the arbitration tribunals⁴¹. However, a generally accepted principle of international arbitration compels the tribunal to make every effort to ensure that any award it renders is enforceable at law [ICC Rules Art 35; ICC Award of 7 December 2001 at para. 140]. “To advocate the arbitrator's equivalent to the Hippocratic Oath (*primum non nocere*, or “above all else, don't render an unenforceable award”)”.⁴² As arbitrators are neither attached to any country, nor supported by any government, they cannot be the guardians of public policy of any country and are not bound as such by the mandatory rules of any country, “they ought nevertheless have an incentive to do so out of a sense of duty to the survival of international arbitration as an institution.... [A]rbitrators should pay heed to the future of their award. They should consider that if they do not apply a mandatory rule of law, the award will in all likelihood be refused enforcement in the country which promulgated that rule. It often turns out that that country is the one, or at least one of several, exercising a de facto control

⁴¹ Lew, Julian D M., Mistelis, Loukas A., Kroll, Stefan M., Comparative International Commercial Arbitration (The Hague, Kluwer Law International 2003), p. 116

⁴² Horvath, Günther J. “The Duty of the Tribunal to Render an Enforceable Award”, Journal of International Arbitration, Vol. 18 No. 2 (2001), p. 135

over the situation; it is not reasonable to disregard its attitude”⁴³. “The ultimate purpose of an arbitration tribunal is to render an enforceable award”⁴⁴.

Similar view was supported in a number of cases. Even though certain countries may be prepared to enforce awards despite the fact that they have been set aside by the courts of the seat, as contemplated in French law and practice, and in certain decisions in the United States, the fact remains that the law of the seat and the decisions of the courts of the seat are important factors that must be taken into account.

This obligation might have several practical implications.

a) the law of the seat has still to be taken into account (Article V(1) of the New York Convention⁴⁵, the risk of award set aside – possibility of unenforceability under art. V(1)(e) of the New York Convention, formal requirements of Article IV of the New York Convention⁴⁶)

b) as the Tribunal can hardly be certain in which particular countries the enforcement will be thought, it is reasonable to refer to the delocalization theory [which still leads one to the Art. II of the New York Convention]

⁴³ Born, G.B. *Supra note 9*, p. 568; Mayer, Mandatory Rules of Law in International Arbitration, 2 Arb. Int'l 274, 284-86 (1986)

⁴⁴ Julian D.M. Lew. *Supra note 21*, p. 119

⁴⁵ As the tribunal has the duty to render an enforceable award, it has to take into consideration the possible grounds for denial of recognition and enforcement, or for setting aside. The only grounds for denial of recognition and enforcement are stated in article V New York Convention, and the Article V (1) (a) states that an award may be denied recognition and enforcement if the “[arbitration agreement referred to in Article II] is not valid under the law to which the parties have subjected it or, failing the indication thereon, under the law of the country where the award was made”.

⁴⁶ Pursuant to Article IV of the New York Convention, the party seeking enforcement of an award under New York Convention has to submit to the enforcing authority “[...] the original agreement referred to in article II or a duly certified copy thereof”. It has been mentioned during the preparatory works of the New York Convention, that the article IV is directly connected to Article II (2) of the New York Convention, as it makes a clear reference thereto: “Although the Article II directly concerns only the effects of arbitration agreements on judicial proceedings, it is clearly connected with the rules concerning the recognition and enforcement of arbitral awards” (Gaja, Giorgio, International Commercial Arbitration. The New York Convention. Oceania Publications, January 1978 part I.C.2).

i. The law of the seat

Accessing the New York Convention as the basic standard and taking for granted, that the seat of the arbitral tribunal is located in the New York Convention Member state, one may come to the conclusion, that the observance of the “local” legal requirements in regard to the form of the arbitration agreement becomes a necessity only in case such requirements are setting higher threshold than the New York Convention itself. This case is really rare⁴⁷.

ii. De-localization theory

There is a growing trend of supported by both commentators and the case law, that the arbitral as tribunals do not form a part of any country’s legal system, they should not be subject to any domestic rules at all, and the intention of the parties to arbitrate has to take priority over any form requirements whatsoever. “A transnational adjudicatory system, completely detached from national judicial control at the arbitral seat, arguably permits the arbitrator to pursue a more perfect justice by ignoring otherwise applicable rules of law that the arbitrator finds inconvenient in the case at hand”⁴⁸, the main purpose of the de-localization theory being to separate the matters of validity from any national law looking only to the parties’ intent⁴⁹. France is a notable example, where the leading scholars supporting the delocalization theory have stated that the under de-localization theory there is no link between the arbitration agreement and any particular law⁵⁰, since the tribunal is not limited by the

⁴⁷ As noted by Van den Berg: “The Italian courts applied in some early cases the stricter requirement of Arts. 1341 and 1342 of the Italian Civil Code, that the arbitration agreement in certain contracts be specifically signed”. Van den Berg, A. J, *Supra note 15*, fn. 8.

⁴⁸ Park, William. Judicial Controls in the Arbitral Process. 5 *Arbitration International* 3 (1989) pp. 232; see also Chatterjee, S.K. The Djibouti Code of International Arbitration, 4 *Journal of International Arbitration* 1 (1987) p. 59

⁴⁹ Lew, Julian, Mistelis, Loukas and Kröll, Stefan, *Supra note 41*, para. 6-73; see also Redfern, Alan; Hunter, Martin, *Supra note 12*, para 2-26; Arfazadeh, Momayoon. New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur 8 *Journal of International Arbitration* 4 (1991) p. 104

⁵⁰ Gaillard, Emmanuel and Savage, John (eds.) Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999), para. 418

applicable national law, even if it is a “most minimal indication of the parties’ intent to arbitrate”⁵¹, can be established, the arbitration agreement exists.

Thus, by establishing a unified a-national legal regime delocalization theory seemingly supports the “higher” though unified threshold in approach to “writing” requirements in international commercial arbitration agreements, which is consistent with the approach adopted by the Article II of the New York Convention.

2. Application of national laws in determination of formal validity of an arbitration agreement

a. Application of article VII (1) New York Convention to arbitration agreements⁵²

Article VII (1) of the New York Convention, embodying the “more-favorable right provision”, states: “The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon”

Being interpreted literally, this provision only allows the court which is asked to recognize and enforce an award to apply its own national law instead of the New York Convention in determination of validity of an arbitration agreement in case this national law puts less strict requirements. The alternative rather than “combined” interpretation of either the Convention or the more favorable national law is emphasized by Van den Berg.⁵³

⁵¹ Republic of Nicaragua v. Standard Fruit Co. United States, Ninth Circuit 937 F.2d 469 (9th Cir. 1991).

⁵² This view was supported by the “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, General Assembly resolution 61/33 of 4 December 2006

⁵³ Van den Berg, *Supra note 4*, p. 85-86

However, there are two reasons supporting justified expansive interpretation of Article VII (1), namely, that it applies to the arbitration agreements as well.

First, Article II (2) was inserted in the text of the New York Convention at the last moment, and the omission to mention the arbitration agreements and refer to article II (2) was unintentional⁵⁴.

Second, it would be contrary to the pro-enforcement attitude of the New York Convention, the end result being inconsistent with the nature of the New York Convention.

In addition, the principle of maximum efficacy provides that the court shall find the most efficient solution if there are conflicting provisions, and in case of international arbitration this principle is reflected in Article VII (1) of the New York Convention, it can be even said to have been implied in the Convention itself, its purpose being the maximum efficacy⁵⁵. For instance, if a court is asked for recognition and enforcement of an award, it would have to recourse to the least strict law applicable with the purpose of saving the award.

Several courts have upheld the validity of arbitration agreements under their respective national laws, although these agreements would not be enforced under the New York Convention⁵⁶

In case of Netherlands, for instance, the commentators have stated that “[t]he definition of an ‘agreement in writing’ under the law of the Netherlands can be invoked and relied upon also in cases that fall within the scope of application of the New York Convention, on the basis of the more-favorable-right provision contained in Article VII(1) of the Convention.⁵⁷ In addition, Court of First Instance in Rotterdam has held that “Arts. 1022 and 1074 CCP provide for a special rule for the (lack of) jurisdiction of the Dutch State courts in

⁵⁴ Van den Berg Consolidated Commentary on New York Convention, 2003, Kluwer Law International, p. 606

⁵⁵ *ibid*, pp. 607-608

⁵⁶ Supreme Court (Germany), 25 May 1970, (Yearbook Commercial Arbitration 1977, p. 237); The Netherlands, Court of Appeal, The Hague, Owerri commercial Inc. (Panama) v. Dielle Srl. (Italy), 4 August 1993, (Yearbook Commercial Arbitration XIX, p. 703).

⁵⁷ Lazic V., “Arbitration Law Reform in the Netherlands: Formal and Substantive Validity of an Arbitration Agreement” Electronic Journal of Comparative Law, vol. 11.1 (May 2007)

the case of an agreement for arbitration within or outside the Netherlands, respectively. In the case at issue we have a clause for arbitration in New York. According to Art. 1074(1) CCP, this Court shall declare that it has no jurisdiction unless the arbitration agreement is invalid under the law applicable thereto. The provisions of the New York Convention (particularly Art. II) do not preclude the application of Art. 1074 CCP, because of the more-favourable-right provision in Art. VII of the Convention, to be applied by analogy.⁵⁸ The examples of courts applying Article VII (1) to the arbitration agreements⁵⁹ have also been provided in the UNICTRAL Working Group documents, thus showing the possibility and the trend. In the author's opinion concurring with Van den Berg, the reference to Article VII (1) is the most workable solution out of all the possible ways mentioned earlier.

b. Ways of integration of electronic communications into the “writing” requirement in national laws

As proven above, the national laws may be applied to determine the formal validity of an arbitration agreement instead of article II (2) of the New York Convention⁶⁰. Should they provide the rule more favorable to the validity of such agreement. Consequently, the inclusion of electronic communications into the “writing” requirement in the national arbitration laws might assist in resolving the issue of uncertain position of electronic communications.

This part of the chapter will focus on the current national laws that have included the electronic communications ways and ways of integration the electronic communications into the other national laws through different instruments. The text below will intentionally overlook the Arbitration Model Law, which has been touched upon in the Chapter I above and

⁵⁸ Arrondissementsrechtbank [Court of First Instance], Rotterdam, 28 September 1995, reported in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXII (1997), p. 764

⁵⁹ United States, Court of Appeals for the Second Circuit, Genesco, Inc v. Kakiuchi & Co., 1 April 1987, (815 F 2d 840); United Kingdom, Queen's Bench Division, Commercial Court, XL Insurance Ltd v. Owens Corning, 28 July 2000, 2 Lloyd's Rep 500, (Yearbook Commercial Arbitration XXVI (2001) p. 869).reported in U.N. Doc. A/CN.9/WG.II/WP.139 of Working Group II (Arbitration) on its forty-fourth session, New York, 23-27 January 2006

⁶⁰ See Chapter II.a of this paper

will rather focus on the development that reached further than the Model Law in its 1985 version.

i. Examples of national arbitration laws most tolerant to electronic communications.

National laws may differ in respect of form requirements of arbitration agreements. Some national laws put rather strict criteria, whereas others are less rigid. Below we will briefly deal with some examples of the most progressive national acts concerning arbitration which clearly include the electronic communications in the “writing”.

In USA the formal validity of arbitration agreements is governed by Article 2 of Federal Arbitration Act, which expressly sets writing requirement to the agreement to submit a dispute to arbitration, be that a clause in a larger container contract or compromise. Although the provision itself does not put down the formal requirements for the validity of arbitration agreements, the case law has reflected that the arbitration agreements can be concluded via electronic means.

In a notable case of *Campbell v. General Dynamics Gov't Systems Corp.*⁶¹ it was held that the E-Sign Act⁶² “definitively resolves” the question whether an arbitration agreement concluded via email can be considered as “in writing” and thus valid under article 2 of the FAA.

⁶¹ *Campbell v. General Dynamics Gov't Systems Corp* 407 F.3d 546 (1st Cir. 2005).

⁶² The Electronic Signatures in Global and National Commerce Act (also known as the “E-Sign Act”), Effective October 1, 2000, provides as follows:

Notwithstanding any statute, regulation, or other rule of law ... with respect to any transaction in or affecting interstate or foreign commerce --

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

The Netherlands Arbitration Act is unique in expressly including the provision allowing a party to prove the formal validity of an arbitration agreement “by electronic means”.⁶³

English Arbitration Act goes even further in loosening the requirements for the formal validity. Although section 5 (1) requires an arbitration agreement to be in writing, the subsequent paragraphs of this article define the arbitration agreement as in “writing” if it is in writing (signature is not required), made by communications in writing, or is evidenced in writing, furthermore, it can be evidenced by any of the parties, and even the third parties, and this evidence is sufficient if it is “recorded by any means”.⁶⁴

As it has already been noted above, under the *Japanese Arbitration Law* of 2003 an arbitration agreement has to be in writing⁶⁵. However, “when an arbitration agreement is made by way of electromagnetic record (records produced by electronic, magnetic or any other means unrecognizable by natural sensory function and used for data-processing by a computer) recording its content, the arbitration agreement shall be in writing”.⁶⁶ This definition helps to establish that arbitration agreement made through an online transaction or

⁶³ Article 1021 of Netherlands Arbitration Act provides:

“The arbitration agreement must be proven by an instrument in writing ... The arbitration agreement can also be proven by electronic means”

⁶⁴ . Section 5 of the English Arbitration ACT:

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.

(2) There is an agreement in writing-

(a) if the agreement is made in writing (whether or not it is signed by the parties),
 (b) if the agreement is made by exchange of communications in writing, or
 (c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

⁶⁵ Japanese Arbitration Law, Paragraph 2, Article 13

⁶⁶ Ibid, Paragraph 4, Article 13

by exchange of email communications or proved by an electromagnetic record is considered formally valid⁶⁷.

ii. Other sources of law directly affecting the formal validity

The Model Law on Electronic Commerce

E-Commerce Model Law⁶⁸ is the project of the UNCITRAL aimed at giving legal effect and legal recognition to the electronic communications. It was rather successful since it was adopted and implemented in more than 25 countries, moreover, uniform legislation influenced by the E-Commerce Model Law and the principles on which it is based has been prepared in USA and Canada, and a number of other countries have been heavily influenced by the Model Law⁶⁹.

The E-Commerce Model Law is designed to be enacted as the national law, and in case of enacting would lead to recognition of electronic communications in concluding formally valid arbitration agreements. It relies on a so-called “functional equivalent approach”, according to which an electronic communication *per se* is not equivalent to a paper-based document due to its different nature, but can be given the same legal effect if it fulfills same functions that a paper-based document would.

It was further noted by the UNCITRAL Working Group IV which had drafted the document, that “in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met”⁷⁰. Article 6 (1)

⁶⁷ Interpretative Guidelines on Electronic Commerce and Information Property Trading , (Ministry of Economy, Trade and Industry, March 2007) p. 50; available at: http://www.meti.go.jp/english/information/data/IT-policy/interpretative_guidelines_on_ec070628.pdf ; Last visited 24 February 2008; see also

⁶⁸ The Model Law on Electronic Commerce, adopted by the General Assembly on 30 January 1997, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N97/763/57/PDF/N9776357.pdf?OpenElement>

⁶⁹ Status of UNCITRAL Model Law on Electronic Commerce, available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html, last visited 24 March 25, 2008.

⁷⁰ Guide to Enactment to UNCITRAL Model Law on Electronic Commerce, para. 16

states: “Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference”. This definition, if applied to the form of arbitration agreements, in fact actually classifies an arbitration agreement as “writing”.

Even though in implementing the E-Commerce Model Law, the states are free to change it in any way, no state yet availed itself of the right to expressly exclude international commercial arbitration from the E-Commerce Model Law Coverage.

Taking into consideration a complex influence of the E-Commerce Model Law on the definition of writing in the legal system of the states that adopted it, including, implicitly, arbitration laws, the countries which have enacted the E-Commerce Model Law are more likely to allow the arbitration agreements to be concluded via electronic means.

EC Directive on Electronic Commerce

The framework of legal recognition of electronic communications in the European Union was set by the Directive on electronic commerce⁷¹ accepted by the European Parliament and the European Council on 8 June 2000. It will be demonstrated that this Directive covers not only the contracts in general, but also the arbitration agreements.

First and foremost, Art 9 (1) of the Directive states that Member States shall ensure that their legal system allows contracts to be concluded by electronic means”. In addition, Member States have to ensure that there are no obstacles to legal effectiveness and validity of contracts made by electronic means.

Second, the Article 9 (2) of the Directive sets out the exclusive list of possible derogations from the implementation of the Article 9 (1), and arbitration is not included.

⁷¹ Directive 2000/31/EC of the European Parliament and of the Council “On certain legal aspects of information society services, in particular electronic commerce, in the Internal Market” (Directive on electronic commerce) 8 June 2000.

Third, Article 17 (1) read together with recitals 51 and 52 ensure that Each Member State is required to amend any legislation liable to hamper the use of electronic communications for out-of-court dispute settlement, and even online dispute resolution.

The example of Netherlands can be taken in support of this view. In order to implement the Directive on Electronic Commerce “Emendation Act” was accepted and entered into force on 30 June 2004. And in order to comply with this Act, Article 1021 of the Arbitration was amended to ensure that formal validity of an arbitration agreement can also be proved by electronic means.⁷².

Conclusion for Chapter II

As a conclusion, although it is clear that New York Convention has the significance and priority, the national laws influence on the questions of validity of an arbitration agreement, furthermore, through application of article VII (1) to arbitration agreements the national laws may be applied in determination of formal validity of arbitration agreements instead of article II (2) of the Convention.

Thus, it would be unreasonable to undermine the significance of the national laws involved, and as shown above, the trend is to directly determine the other types of communications, such as electronic communications, as valid for concluding arbitration agreements.

⁷² Albert Jan van den Berg, The Netherlands, Note General Editor. International Handbook on Commercial Arbitration, J. Paulsson (ed.), Suppl. 43 (March/2005)

Chapter III. PROPOSED EXPRESS MODIFICATION OF THE “WRITING” REQUIREMENT OF ARTICLE II (2) NEW YORK CONVENTION

It is clear that the interpretation of Article II (2) does not solve the practical matters arising as a consequence of current technology developments. It was discussed in previous chapters that in order to save the awards some courts try to give an extensive interpretation to the Article II (2), some of them try to recourse to the national laws which have less stringent requirements. In any case, the problem is not resolved and the need for legal certainty and uniformity has lead the UNCITRAL Working Group to consider changing the New York Convention itself, and this chapter shall discuss the propositions put by the UNCITRAL in order to reach a uniform solution by changing the New York Convention

1. Amendment to the New York Convention

The New York Convention is the most successful treaty in the field of international commercial arbitration, which has been accepted by the major political and economical powers of the world.

According to scholars, there are several reasons for the Convention's widespread acceptance and success:⁷³

- ✓ the text is easy to read and apply, which makes the procedure of enforcement a relatively easy process
- ✓ Convention has exclusive list of grounds for denial of recognition and enforcement in article V

⁷³ James D. Fry. “The Federal Arbitration Act, Uncitral Model Law and New York”, International Arbitration Law Review, 2005 p. 4

✓ The Courts in most countries have accepted the pro-enforcement bias of the Convention.

The question of amending the Convention has arisen in late 90-s, and the consensus of the most authors is that the Convention, being such an incredible success, should not be amended. Looking at the issue practically, it is naïve to think that consensus over an amendment could ever be reached by the 134 member states to the Convention.⁷⁴ Even assuming that consensus could eventually be reached, it would be a long, drawn-out process, during which the existing widespread acceptance and implementation of the Convention could be undermined⁷⁵.

2. *Adoption of a protocol to the New York Convention*

There has been a similar idea of changing the New York Convention through accepting a protocol to supplement the Convention. This idea arose in 1976, when the Asian African Legal Consultative Committee considered the need for improving the uniformity in application of the Convention⁷⁶. However, it was concluded by the UNCITRAL Working Group that the Protocol could not reach the aimed result of uniform application of the Convention.⁷⁷ The success of this protocol would be under the question in any case, no matter how well drafted it would be, and this type of amendment is unnecessary.⁷⁸

⁷⁴ ; A.J. van den Berg, *Supra note 15*

⁷⁵ See A. Uzelac, "The Form of the Arbitration Agreement and the Fiction of Written Orality: How Far Should We Go?" (2001) 8 Croat. Arbit. Yearb. 83, 90

⁷⁶ A.J. van den Berg, "The 1958 New York Arbitration Convention Revisited" 125 (2001) (author's citing UN DOC/A/CN.9/127).

⁷⁷ Ibid.

⁷⁸ See J. Paulsson, "Towards Minimum Standards of Enforcement: Feasibility of a Model Law" in A.J. van den Berg ed., *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (1998), p.575.

3. Ratification of United Nations Convention on the Use of Electronic Communications in International Contracts by New York Convention member States

All the above mentioned possible solutions, in author's opinion, lack effectiveness. The most effective way to reach a uniform solution would be to accept a separate legally binding document, which would accept electronic communications as "writing", at the same time directly referring to the New York Convention itself, thus solving any possible ambiguity and different interpretation.

The Convention on E-Communications, which could become such an instrument, was adopted by the General Assembly on 23 November 2005 and has been open for signatories until 16 January 2008⁷⁹

Article 20(1) of the Convention clearly states: *"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 international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)[...]"*. Moreover, the Convention directly refers to arbitration agreements, within the text, stating in the relevant part: *"The word "contract" in the Convention is used in a broad way and includes ... arbitration agreements"*⁸⁰. Hence, the Convention, in case it enters into force, would solve any controversy regarding the formal validity of arbitration agreements concluded via electronic means of communications.

⁷⁹ Convention has been signed by: Central African Republic, China, Colombia, Honduras, Iran (Islamic Republic of), Lebanon, Madagascar, Montenegro, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Saudi Arabia, Senegal Sierra Leone, Singapore, Sri Lanka. Status 2005 - United Nations Convention on the Use of Electronic Communications in International Contracts, available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html

⁸⁰ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, para. 5.

Additionally, Article 9 of the Convention on Electronic Communications was specifically drafted to include provisions relating to the "original form" of a communication or contract to meet the requirements of the Art. IV of the NYC. For example, Art. 9(4) of the Convention specifies that legal requirements pertaining to an "original form" are satisfied if *"there exists a reliable assurance as to the integrity of the information [the electronic communication] contains from the time when it was first generated in its final form ..."* Integrity is determined based upon the determination of whether the "information has remained complete and unaltered," allowing, of course, for "any change which arises in the normal course of communication, storage and display."⁸¹ Neither of these definitions stands in conflict with the general understanding of the term "original" used in the New York Convention⁸².

However, the successfulness of the Convention on E-Communications is under question due to following reasons:

- Since 3 actions are required for the Convention to enter into force – Signature, Ratification and Accession, it has not yet become binding on any country, and it is not clear how successful the Convention shall be.

- Although article 22 of the Convention clearly states that no reservations may be made under this Convention, it is provided in article 21 that declarations may be made as to exclude the application of the Convention to any matter governed by the Convention and any of the international treaties mentioned in article 20(1).

While in fact, from the practical point of view, there is no difference between declarations and reservations, it has been the UNCITRAL's proposal and incentive to introduce the "declaration" as opposed to "reservation" with the only difference that the

⁸¹ Report of the Working Group on Electronic Commerce on the Work of Its Forty-Fourth Session (Vienna, 11-22 Oct. 2004), U.N. Doc. A/CN.9/571, para. 132 (8 Nov. 2004), accessible at <http://www.uncitral.org/uncitral/en/commission/sessions/38th.html> (hyperlink; last visited on 23 Jan. 2006).

⁸² Anjanette H. Raymond, "Electronic Commerce and the New Uncitral Draft Convention" 19-Spg Int'l L. Practicum 66 [2006].

declaration does not trigger the formal system of acceptances and objections. The rationale behind introducing this type of instrument was that the international documents concerning international private law and commercial law transactions do not deal with the State actions, thus there is no need for the formal system of objections. The Explanatory Note to the Convention Clearly states:

*“This distinction is important because reservations to international treaties typically trigger a formal system of acceptances and objections, for instance as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties. This result would lead to considerable difficulties in the area of private international law, as it might reduce the ability of States to agree on common rules allowing them to adjust the provisions of an international convention to the particular requirements of their domestic legal system. Therefore, the Electronic Communications Convention follows this growing practice and distinguishes between declarations pertaining to the scope of application, which the Convention admits and does not subject to a system of acceptances and objections by other contracting States, on the one hand, and reservations, on the other hand, which the Convention excludes.”*⁸³

Consequently, it is even easier for a party to the Convention to exclude the application of the Convention to both New York Convention and arbitration agreements, thus undermining the underlying idea of the drafters to reach a uniform solution⁸⁴. In analyzing of effectiveness of the above provision, one of the commentators noted: “Although a State may exclude the application of the [Electronic Communication] Convention in connection with any of the international conventions specified in that State's declaration, the exclusion of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, would, in

⁸³ Explanatory note to the Convention on Electronic Communications, *Supra note 80*, para. 317

⁸⁴ Polanski Paul Przemyslaw, International electronic contracting in the newest UN Convention, *Journal of International Commercial Law and Technology* Vol. 2, Issue 3 (2007), available online at: < <http://www.jiclt.com/index.php/JICLT/article/view/42/28>>; Chong, K. W. and S. J. Chao (2006). "United Nations Convention on the Use of Electronic Communications in International Contracts - A New Global Standard." *Singapore Academy of Law Journal* 18, p. 45.

fact, frustrate the whole purpose of becoming a State party to the Electronic Communications Convention⁸⁵.

Finally, concerning the issue of reaching the uniform solution to the matters of formal validity it is very important to note the opinion of Peter A.J. van den Berg, the prominent commentator to the New York Convention: “I do not doubt that during this Congress, again, the question will come up as to whether we need to amend the Convention in the form of a Protocol or the like. I do not rule this out after 40 years of the New York Convention's existence. However, I suggest that you think twice: the more than 725 court decisions reported in the *Yearbook* show that the courts do not need an amendment of the Convention. They can make international arbitration effective with an appropriate interpretation of the existing Convention. So, I would conclude by submitting to you: Don't change a winning team!”⁸⁶

Conclusion for Chapter III

Although it was noted that determination of formal validity under the national laws through application of Article VII (2) of the New York Convention to the arbitration agreements is the most workable solution at this point in time, the need for change in the New York Convention itself is evident. However, none of the ways proposed change of Article II (2) through various instruments reaches an effective uniform solution.

⁸⁵ Francesco G. Mazzotta, Notes on the United Nations Convention on the Use of Electronic Communications in International Contracts and Its Effects on the United Nations Convention on Contracts for the International Sale of Goods, 33 Rutgers Computer & Tech. L.J. 251 (2007).

⁸⁶ Van den Berg, *Supra* note 15

Conclusion

Some of the issues concerning the formal validity may seem to have been omitted from the discussion; however, this paper was concentrated on the practical considerations rather than academic deliberations, thus it is focused on the most important practical issues concerned.

The Article II (2) in most cases has been accepted as the primary basis in determination of formal validity of arbitration agreements, however, the difference in authentic texts of the Convention due to its being inserted at the last moment, arises various interpretations. These interpretations are based on different approaches, courts throughout the world interpreting in different manner. Hence, the uniformity cannot be reached through the interpretation of the Article II (2).

The most workable solution available in case of strict interpretation of Article II (2) is application of national laws directly through application of Article VII (1) to the arbitration agreements. Basing on this approach, the current trends were examined, and it was shown that the latest amendments show the intention of legislators and the authorities involved to expressly include the electronic communications into the “writing”, in national laws and in arbitration rules respectively.

For the sake of uniformity it is the New York Convention that has to be modified. Other solutions, though indeed creating a favorable background for such acceptance of electronic communications, are not sufficient, since the risk of non-enforcement of an award in the country which has more conservative views in regard to the electronic communications is not totally excluded. Still, out of all suggestions made, none was capable of reaching an effective and uniform solution.

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