CENTRAL EUROPEAN UNIVERSITY

LIBERALIZATION OF THE WRITTEN FORM REQUIREMENT OF THE ARBITRATION AGREEMENT

NATIONAL LEGISLATION REGARDING THE FORM OF THE ARBITRATION AGREEMENT IN GEORGIA AND RUSSIA

BY DAVID CHITAISHVILI

LL.M. SHORT THESIS

COURSE: INTERNATIONAL COMMERCIAL ARBITRATION

PROFESSOR: TIBOR VARADY

CENTRAL EUROPEAN UNIVERSITY

1051 BUDAPEST, NADOR UTCA 9

HUNGARY

ABSTRACT

This research is addressing the issues relating to the written form requirement of arbitration agreement and its influence on recognition and enforcement of arbitral awards. The significance of written form requirement is stipulated in the Article II(2) of the New York Convention (NY Convention), but it is outdated and creates certain problems for enforcing the awards.

The solution was found by some states by enacting the liberal laws regarding the form requirement or abolishing such requirement altogether. The paper analyzes the existing conflict between the NY Convention and arbitration-friendly jurisdictions and takes position that Article II(2) shall be interpreted according to the liberal national legislations in a manner provided in the UNCITRAL Recommendation.

The paper is based on extensive range of available literature; studying of the case-law, examining the commentaries of the leading authors and critically analyzing numerous working documents of the UNCITRAL and its Working Group II (WG) and evaluating the process of the liberalization of the written form requirement of the arbitration agreement.

Therefore, it contributes to better understanding of the written form requirement of arbitration agreement during the process of its liberalization and modification. In addition to the critical analysis the paper compares the national legislation of Republic of Georgia and Russian Federation regarding the formal requirements of arbitration agreement and finds there existing gaps and the ways of filling them.

INDEX OF ABBREVIATIONS

UNCITRAL	United Nations Commission on International Trade Law
NY Convention	United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards
Model Law 1985	UNCITRAL Model Law on International Commercial Arbitration of 1985
Model Law 2006	UNCITRAL Model Law on International Commercial Arbitration of 2006
WG	UNCITRAL Working Group II on Arbitration and Conciliation
YCA	Yearbook Commercial Arbitration
GAL	law of Republic of Georgian on Arbitration 2010
RICAL	Law of the Russian Federation on International Commercial Arbitration 1993
Vol.	Volume
p. / pp.	page / pages
para(s).	paragraph(s)
supp.	Supplement
Art.	Article
No.	Number
inter alia	"amongst other things."
per se	by itself

supra note	previously referred footnote
infra note	later referred footnote
Ibid.	Idem [the same]

TABLE OF CONTENTS

INTRODUCTION

This paper is about to analyze the small fragment of a tremendously important international Convention, which covers one of the most important segments of international business law – enforcement of arbitral awards. The New York Convention on Recognition and Enforcement of Foreign Arbitral Award (*hereinafter* NY Convention) aims to enhance and simplify the enforcement of the foreign arbitral awards.[1]

Article II of the NY Convention obliges the states to recognize an arbitration agreement "in writing." The written requirement of arbitration agreement was intended by the drafters to serve the purpose of understanding the concept of arbitration uniformly.[2] However, as it turned out later, the form requirement has caused more uncertainty and problems to the courts than created the uniformity, leading the courts in different jurisdictions to different interpretations. The reasons, *inter alia*, were caused by the advancing of the modern means of communication, which became the major way of concluding the commercial agreements and since the NY Convention was adopted more than 50 years ago some of its provision became out of date and not conforming to the existing reality. The form requirement of Article II(2) that an arbitration agreement must be "in writing" was one of the obsolete provisions.[3]

The problem of the form requirement of arbitration agreement is that Article II(2) provides the limited possibility of concluding valid arbitration agreement, disallowing other means to meet the form requirement. This uniform rule was intended to be minimum and maximum requirement, superseding the analogous provisions of national laws.[4] Unfortunately, this hegemony was not long lasting and along with development and spreading of wide usage of

[1] The Objectives of the NY Convention as provided on official cite of the UNCITRAL
[2] Schramm, Geisinger, Pinsolle in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, ed. Kronke, Nacimiento, (Kluwer Law International, 2010), p. 38
[3] Haya Sheika Al Khalifa, Enforcing arbitration awards under the NY Convention, experience and prospects, United Nations, 1999, p.17
[4] A.J. van den Berg, The New York Convention of 1958, (Deventer, Kluwer Law and Taxation Publishers, 1994), p. 178

modern means of communications, written form requirement has become the obstacle of the main objective of the NY Convention – facilitation and simplification of enforcement of awards. This was so, because Article V(1)(a) of the NY Convention sets the invalid arbitration agreement as one of the grounds for refusing the enforcement of arbitral awards.

However, this was only beginning of the problem, essence of which was in the following: the courts recognizing the need to extend the limited scope of Article II(2) of the NY Convention began interpreting it differently as they considered to be appropriate, some jurisdictions allowed liberal interpretation, while others adhered to strict interpretation.[5] As a result, the arbitration agreement could have been valid under the law of the state where award was issued, but its enforcement could have been rejected in other jurisdiction. This uncertainty was worsened by the chaotic interpretation of the Article V(1)(a) of the NY Convention, since some courts were applying the national law for determining the validity of arbitration agreement,[6] others Article II(2) of the NY Convention, while some allowed the hybrid of Article II(2) and the Article 7 of the Model Law.[7]

This work after addressing all problematic issues of the written form requirement proceeds with analysis of the process of liberalization of Article II(2) carried out in 2006 by the United Nations Commission on International Trade Law (*hereinafter* UNCITRAL), which is the supervision body of the NY Convention. After long discussions, the two-folded solution was found: firstly, UNCITRAL revised the Article 7 of the UNCITRAL Model Law and in *Option I* allows the validity of orally concluded agreements if the "content is recorded in any

[5] For example Swiss and US courts were willing to allow liberal interpretation of the Article II(2) of the NY Convention, while Italian courts did not

[6] Supreme Court of Italy, 15 April 1980, *Lanifici Walter Banci S.a.S. v. Bobbie brooks Inc.* (Corte di Cassazione), YCA, Vol. VI (1981), pp. 233-236

[7] *see* the Court of Appeal of Basel-Land, Switzerland, *Seller v. Buyer*, Obergericht Basel-Land, 5 July 1994, YCA, Vol. XXI (1996), pp. 685-689

form" and in *Option II* abolishes the form requirement altogether.[8] Secondly, to encourage the states to adopt the revised Article 7 into their legislation, UNCITRAL issued a non-binding Recommendation that states should interpret the Article II(2) of the NY Convention as the "circumstances described therein are not exhaustive."[9]

However, the main challenge of liberalization of the written form requirement is the dilemma, two opposing interests placed on two sides of the scale, on the one hand, formalities – ensuring that the parties will not be deprived of their basic right of court remedy against their true will and on the other hand, formalities – as an obstacle to the intention of the parties' to arbitrate. Therefore, this research paper studies the available literature, numerous working documents, refers to leading authors and critically evaluates the solutions, how they correspond to the interests of the party-line, to contribute to the better understanding of the dilemma of the written form requirement of arbitration agreement. After summing all up, the paper takes position that the best way of liberalizing the written form requirement can be achieved if states adopt the revised Article 7 of Model Law in their national legislations and interpret the Article II(2) as the occasions provided therein are not exhaustive.

In order to justify my thesis, in Chapter I paper generally reviews the requirements of Article II(2), studies the case law of different courts and analyzes the possibility to expansion, while Chapter II examines the UNCITRAL legislation and proposed changes critically. In Chapter III paper addresses the importance of the national legislation to the form requirement and the ways it can influence the enforcement of foreign arbitral award and afterwards applies all the previous analysis to two neighboring states Republic of Georgia and Russian Federation.

[8] See the Article 7 of UNCITRAL Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006

[9] Official Records of General Assembly, Sixty-first Session, Supp. No. 17 (A/61/17), Annex II

CHAPTER I. FORM REQUIREMENT OF ARTICLE II (2) OF THE NEW YORK CONVENTION

This Chapter will deal with the Article II(2) of the NY Convention, which is the reason of all controversies related as of the written from requirement of an arbitration agreement. The Section 1 of the paper examines the requirement of writing in details and related case-law of Member States, how they interpret it and what causes the problems of uniformity in application of the NY Convention. The Section 2 further proceeds with the important rule of the Article II(2) – minimum or maximum rule, and after studying all the specifications of "in writing" agreement addresses the need of its existence and importance for recent developmments.

The Article II (1) of the NY Convention provides that the "Contracting State shall recognize an agreement in writing…"[10] This requirement to have an "agreement in writing" has become the subject of many discussions and criticism during the years, since it is considered to be outdated.[11] The following paragraph 2 Article II of the NY Convention specifies 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."[12] The reason for establishing such strict written form requirement is that the drafters of the Convention intended to ensure the uniform understanding of the arbitration among its Member States[13] and thus, to remove the problems caused by differences of national laws.[14]

The intention of the drafters of the New York Convention was to replace the 1923/1927 Geneva treaties, which has more limited scope of application and leaves to national laws to

[10] New York Convention, Article II (1)
[11] Many legal scholars and practitioners agree that the writing requirement of the New York Convention does not correspond to the modern developments and practices of doing business. For illustration, s*ee* Schramm, Geisinger, Pinsolle, supra note 2, p. 39, *see also* Al Khalifa, supra note 3, p.17
[12] New York Convention, Article II (2)
[13] Schramm, Geisinger, Pinsolle, supra note 2, pp. 37-38
[14] Van Den Berg, supra note 4, p. 171

determine the form of arbitration agreement.[15] The Convention was adopted more than 50 years ago, and since then it has never been amended, apparently it does not satisfy the needs of modern business. As a result, some states have tried to find the solution and interpret the Article II (2) of the Convention in a way to be fair for the parties involved in modern commercial realm.[16] Consequently, this caused the lack of uniformity of the written form requirement, since the interpretations are different.[17]

The form requirement of the arbitration agreement plays a role at two different stages, first at the time of the enforcement of arbitration agreement, and second, at the time of the enforcement of arbitral award.[18] Therefore, it is important for the parties that they satisfy the requirements of Article II (2) of the Convention in order to have the agreement and later the award enforced.

1. "AGREEMENT IN WRITING"

Article II (1) of the Convention provides four requirements in order to conclude a valid arbitration agreement, one of which is the agreement shall be "in writing".[19] The formal validity of arbitration agreement is governed by the Convention and thus, it supersedes the national provisions[20] and creates a uniform rule. This uniform rule excludes the orally concluded and tacitly accepted agreements from the scope of Article II of the Convention.[21]

The writing requirement for the arbitration agreement was intended by the drafters of the Convention to serve two major functions: first, it acts as a proof that the parties have truly

[15] Schramm, Geisinger, Pinsolle, supra note 2, p. 38
[16] Julian D.M. Lew, L. Mistelis, S.M. Kroll, Comparative International Commercial Arbitration, Kluwer Law International, 2001, p. 132
[17] Schramm, Geisinger, Pinsolle, supra note 2, p. 39
[18] Van Den Berg, supra note 4, p. 170
[19] Schramm, Geisinger, Pinsolle, supra note 2, pp. 48-49
[20] Van Den Berg, supra note 4, p. 174
[21] *Ibid*. p. 190. *See also* Court of Appeal of Bari, which refused to enforce the award since the contract was accepted implicitly by the parties and there was no correspondence of the parties that confirmed the acceptance, Corte di Appelo, Bari, 28 October 1983, *H. & H. Hackenberg v. Ventrella Guido Francesco e Figli snc.* YCA, Vol. XIV (1989), pp. 680-682. However, the trend now is changing and it becomes more and more common for jurisdictions to enforce the arbitral agreements concluded orally or tacitly.

intended to arbitrate and thus, assent to arbitration and secondly, it ensures that parties understand that by agreeing to arbitrate they exclude the jurisdiction of national courts to litigate the dispute.[22] Therefore, the formal requirement of the arbitration agreement was intended by the drafters of the Convention as a mechanism to safeguard the parties from possible abuses of arbitration.

Such suspicion towards the arbitral proceedings was caused by the fact that it was a new method of handling disputes back then, when Convention was drafted 50 years ago. However, due to the universalization of arbitration in modern world the attitude towards it has been changed and the existing mistrust has disappeared, since almost all scholars and business people trusts and considers arbitration as a main mode of solving commercial disputes.[23] Therefore, I consider that nowadays the formal requirement of the arbitration agreement should serve the different purpose; it needs to correspond to the interests of the parties to arbitrate the dispute. Some authors argue, that this need is reflected in the changes adopted by the UNCITRAL in 2006, according to which the form requirement now serves the purpose of creating the record of the arbitration agreement and not to the purpose of having the contest of the parties.[24] This is, yet, the subject matter of the following Chapter II.

However, now, when the arbitration has become the main method of solving the commercial cases, the form requirement has created the dilemma – how to balance the interest of the parties, who truly intended to arbitrate and on the other hand, the possible misuses based on the same formalities. This is the dilemma of the form of arbitration agreement and the paper examines it throughout the researching different levels of legislating and provides the analysis how modern developments balance these conflicting interests of justice.

[22] Schramm, Geisinger, Pinsolle, supra note 2, pp. 73-74. *See also* Neil Kaplan, Is the need for writing as expressed in the New York Convention and the Model Law out of step with commercial practice?, 12 Arb'n Int'l 27, 2930 (1996), p. 31

[23] J. Walker, Agreeing to disagree: Can we just have words? CISG Article 11 and the Model Law writing requirement, Journal of Law and Commerce, Vol. 25, pp. 153-165, 2006

[24] *Ibid*. p. 74

Article II (2) of the Convention defines the "agreement in writing" as a clause of the contract or the separate arbitration agreement which is signed by the parties or "contained in an exchange of the letters or telegrams."[25] After getting familiarized with the opinions of some authors[26] and decisions of the courts,[27] I would divide the article II (2) of the NY Convention as it provides the following two alternatives for the agreement in writing:

- An arbitral clause, contained in the main contract, provided that the main contract is signed by the parties; and
- A separate arbitration agreement, signed by the parties or "contained in exchange of letters or telegrams".

I believe that such construction of the Article II(2) of the NY Convention is more appropriate and clear and in addition it is in line with the modern trend of liberalizing the form requirement, since from the text of the article II(2) it is not clear whether the requirement of the signature and exchange applies to separately concluded arbitration agreements only, or it also applies to arbitral clauses contained in the main contract.[28] Regarding this issue there is not an uniform position even within the United States, where some courts consider that the requirement of the signature and exchange applies to all arbitration agreements, while some courts interpret Article II (2) differently and consider that requirement of signature applies to

[25] New York Convention, Article II (2)
[26] *See* Van Den Berg, supra note 4, p. 191. *See also* Schramm, Geisinger, Pinsolle, supra note 2, p. 72
[27] *See* US Court of Appeal for the Fifth Circuit, *Sphere Drake Insurance PLC v. Marine Towing, Inc.*, (1994, 16 F.3d 666.) = YCA XX (1995), 937. However some authors consider this decision to be erroneous, I am taking position that interpreting the Art. II(2) of the Convention in such a manner is more in line with the interest of the parties and gives better chance to the courts to come to the fair decision. *See also* Supreme Court of Italy, where Italian highest Court submitted that it is more logical and fair towards the "reality of the international trade" to interpret the Art. II (2) liberally and does not oblige parties to sign the arbitral clause, which is contained in the contract, Supreme Court of Italy, 18 May 1978, *Societa Altas General Timbers S.p.A. v. Agenzia Concordia Line S.p.A.* (Corte di Cassazione), YCA, Vol. V (1980), pp. 267-268.
[28] Schramm, Geisinger, Pinsolle, supra note 2, p. 72

"free-standing" arbitration agreements only and not to the arbitral clauses contained in the contract.[29]

However, in order to establish if writing requirement provided in Article II(2) of the Convention is satisfied or not, as professor Van Den Berg submits, it should be analyzed "whether signatures are necessary" and "when the acceptance in writing of a contract containing an arbitral clause can deemed sufficient in the case of an exchange."[30]

1.1. Requirement of signature

Requirement to have a written agreement is generally satisfied when there is a signature of both parties on the same document.[31] Nevertheless, when each party signs the document designed for the other party this is sufficient too, if the copies are identical.[32] However, the requirement of signature is not the same for the arbitral clause contained in the contract and for the separate arbitration agreement.[33]

In the case of the arbitral clause, which is contained in the bigger contract, the Convention requires the signature. More problematic issue here is whether it is enough to sign the main contract or the arbitral clause itself also needs to be signed. The majority of scholars together

[29] *Accord:* In 1994 the US Court of Appeals in *Sphere Drake Insurance*, supra note 27, concluded that arbitral clause that is contained in a bigger contract does not have to be signed at all. The Court interpreted the "agreement in writing" of Article II (2) to include (1) an arbitral clause in a contract; or (2) a separate arbitration agreement that is signed by the parties or contained in exchange of letters or telegrams. However, the Court of Appeals for the Second Circuit, in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, (1999, 186 F.3d 210.) = YCA XXIVa (1999), 900 in interpreting the wording of Article II (2) of the Convention gave due consideration to other official languages of the Convention and came to the different outcome. The Court, by using the literal interpretation, submitted that the phrase "signed by the parties or contained in exchange of letters or telegrams" applies not only to separate arbitration agreements, but to the arbitral clauses as well.

[30] Van Den Berg, supra note 4, p. 192

[31] Schramm, Geisinger, Pinsolle, supra note 2, p. 79

[32] Ulrih Haas, "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards," in Practitioner's Handbook on International Arbitration, ed. Frank-Berned Weigand 2002, p. 432 para 5

[33] Van Den Berg, supra note 4, p. 191

with the courts consider that the signature for the contract as whole suffices[34] and there is no required the arbitration agreement to be signed or contained in a separate document and signed.[35]

In the case of the separate arbitration agreement there is a need of a signature, as well as in the case of the separately concluded arbitration clause. Different Condition is applicable when the arbitration agreement is included in exchange of letters or telegrams and as Professor Van Den Berg argues in such case the signature is not required. He further explains that when the parties are exchanging communications they are declaring their intent thereof, and such exchange of writings constitutes the mutual consent, not the signature.[36] Even when there is an exchange of the letters and some letters are missing the signature, it still can form a valid arbitration agreement, if the authors of the letters are identifiable.[37]

The Court of Appeal of Basel declared that for having the exchange of letters it is not necessary to have the signed letters of the parties, but it is enough to establish the "written manifestation of both parties."[38] The Italian Supreme Court took the same position in *Miserocchi v. Paolo Agnesi* and observed that when arbitration agreement is concluded by the exchange of letters it is valid even if both or either of letters does not contain the signature, if "specific declarations in writing can be ascertained in some other way."[39]

[34] *See* Van Den Berg and Schramm, Geisinger, Pinsolle and the Corte di Cassazione, *Societa Altas General Timbers S.p.A* supra note 27, in which Italian Supreme Court based on the analysis of the Italian translation of Art. II(2) of the NY Convention concluded that word "signed" refers to the arbitral clause as well. However, due to the reality in the commercial world, Court submitted that the article should be interpreted more liberally and the signature of the whole contract should be sufficient. *See also,* the Corte di Cassazione, *Krauss Maffei Verfahrenstechnic GmbH v. Bristol Myers Squibb*, YCA Vol. XXVI p.820, 2001

[35] *see* Schramm, Geisinger, Pinsolle, supra note 2, p. 79

[36] Van Den Berg, supra note 4, p. 194

[37] Fouchard, Gaillard, Foldman, On International Commercial Arbitration (the Hague, Kluwer Law International, 1999, p. 374

[38] *Dutch Seller v. Swiss Buyer* (Obergeicht of Basel, June 3, 1971) = YCA, Vol. IV, pp. 309-311 (P. Sanders ed., 1979)

[39] *Ditta Augusto Miserocchi v. Paolo Agnesi S.p.A.*, Corte di Cassazione, December 13, 1971, no. 3620 (Italy no. 5) = YCA, Vol. I, pp. 190-191

However, this hegemony did not last long and in 1978 Italian Supreme Court denied the validity of the arbitral clause, since the exchanged sales confirmation lacked the signature of the party.[40] This occurrence also speaks about the outdated character of Article II (2) of the New York Convention and emphasizes that it has to be adapted to the new needs or interpreted in a manner that will be less restrictive. Without having a tool to liberalize the form requirement, Italian courts even denied the "progressive interpretation [of Article II (2)] connected to international trade practice."[41] The court further stated that even if for the conclusion of the contract the written form requirement and signature of the parties are not required the situation is different if it contains the arbitration agreement, which must be [always] "in writing and signed by the parties and if contained in the contract the contract must respect the formal requirements just mentioned."[42]

From what has been reasoned above, it is evident that in the case of *first alternative*, where arbitral clause is contained in the contract, the clause does not need to be signed separately, but the signing of the main contract suffices. The more problematic is the *second alternative*, when there is a free-standing arbitration agreement, signed or contained in the exchange of communications. The cause of the problem, as it was already mentioned above is the outdated requirement of writing of Article II (2) of the Convention and the strict interpretation of this requirement by some courts. All the authors unanimously agree that the Convention does not correspond to the new needs and it should be adapted to the existing reality.

1.2. Exchange of letters or telegrams

The exchange of letters or telegrams is the second way to satisfy the written form requirement of Article II (2) of the Convention if such an exchange contains the arbitration

[40] Corte di Cassazione, 18 September 1978, *Gaetano Butera v. Pietro and Romano Pagnan*, YCA IV (1979) pp. 296-300
[41] Corte di Appelo, Bari, November 30, 1989, *Finagrain Compagnie Commerciale Agricole et Financière SA v. Patano snc*, YCA, Vol. XXI, pp. 571-575, at p. 572
[42] *Ibid.*

clause in a contract or separate arbitration agreement.[43] This requirement raises the following two issues: what is the object of the exchange (infra, section 1.2.1.) and (infra, section 1.2.2.) what means of exchange can be used to satisfy the Article II (2) of the Convention.[44]

1.2.1. The object of the exchange

The main requirement of the exchange derives from the Article II(2) of the NY Convention providing that the exchanged should be writings – letters or telegrams, that evidences the parties' agreement to submit the dispute to arbitration.[45] Now it is important to understand what constitutes the exchange? According to Professor Van Den Berg, the exchange represents that the written proposal of one party to arbitrate is accepted by the other party, where such acceptance is communicated to the proposing party in writing.[46] The majority of the authorities consider that it is not necessary that the parties affix their signature to the communications exchanged.[47]

It should also be mentioned that the purchase orders are the ones that are the most commonly concerned with the issue of exchange. Professor Van Den Berg describes the three possible situations that appear in the practice: *first* is when parties' sign the same purchase confirmation, the *second* is when party returns the copy with or without signature, and *third*, when party refers to and accepts the confirmation in another document.[48]

[43] Regarding the exchange of letters and telegrams, Van Den Berg talks about the "arbitral clause in a contract", *see* Van Den Berg, supra note 4, p. 199, while Schramm, Geisinger and Pinsolle are talking about the "arbitration agreement", without specifying it is a clause contained in the contract or separate arbitration agreement, *see* Schramm, Geisinger, Pinsolle, supra note 2, p. 79. However, I believe that it is possible that the subject of the exchange to be a main contract, which contains the arbitral clause, or the arbitration agreement only.

[44] The structure used follows to the structure used by Schramm, Geisinger, Pinsolle, supra note 2, p. 79

[45] Schramm, Geisinger, Pinsolle, supra note 2, p. 80

[46] Van Den Berg, supra note 4, p. 199

[47] The US Court of Appeals stated that if the parties have not signed the written agreement, it is important if arbitration clause was contained in exchange of series of letters. Even though, in that case the arbitration agreement was not included in the exchange, court still found arbitration agreement to be validly formed, since "it was incorporated by the reference in the letters", US Court of Appeals for the third Circuit, *Standard Bent Glass Corp. V. Glassrobots Oy*, YCA, Vol. XXIX (2004), pp. 978-989, at p. 987.

[48] Van Den Berg, supra note 4, p. 205

From the listed scenarios, *The first* on is not problematic, since it is a case, where purchase confirmation is send to the party, who signs and returns it back. In such a case it is not required that the firs party signs the confirmation.[49]

The second scenario, like the first one, does not create many problems for the courts. This is the case when a party signs and sends the duplicate of the original purchase confirmation that contains the arbitral clause to the other party. The paper sides with the majority of authors and posits that the requirement of written exchange of Article II (2) of the Convention in such occasions should be considered to be fulfilled.[50]

The third situation is when the problems of interpretation may arise. This is a case when one party sends the contract containing the arbitral clause and the later declares its acceptance by sending the different document. In such a case in order to satisfy the requirement of exchange it is enough that the arbitration agreement is included in the first writing, which is referred in any following writing.[51] This is true even if the second letter does not explicitly refer to arbitration agreement, but refers to the contract which contains it [arbitration agreement].[52]

From the above argumentation follows that the arbitration agreement concluded in the exchange of letters and telegrams is valid if it gives the possibility to understand the true intention of the parties. This requirement, as we have seen, is relaxed form the formality of being signed by the parties, but the written requirement is met if the exchange contains the arbitration agreement and both parties are in due course aware of it.

[49] Haas, supra note 32, p. 442, para 34
[50] Van Den Berg, supra note 4, p. 201, *see also*, Schramm, Geisinger, Pinsolle, supra note 2, p. 80
[51] *Ibid*. Schramm, Geisinger, Pinsolle
[52] Obergericht Basel-Land, BJM 1995, 254 (at 256) = YCA, Vol. XXI (1996), 685 (Court of Appeal of Basel-Land, Switzerland). The court interpreted the exchange requirement of Article II (2) broadly and gave due consideration to interests it aims to protect and concluded that "it would go too far to require a specific reference to the arbitration clause contained in the general conditions also where the party receiving the offer already has them and is aware of their contents." *See* also, Court of Appeal of Florence, 8 October 1977, *Bobbie brooks Inc. v. Lanifici Walter Banci S.a.S.* (Corte di Appello di Firenze), YCA, Vol. IV (1979), pp. 289-292, at pp.289-290. In this case Florence Court of Appeal judged that the arbitration agreement was valid, notwithstanding the one party sent three purchase orders to the other and the later sent back written invoices containing only the numbers of the purchase orders.

It is also important that the case law, relating to this issue, with some exceptions[53] almost unanimously interpret the requirement of exchange broadly and give due consideration to the interests of the parties to arbitrate their disputes. Therefore, based on the above referred case-law, I consider that this part of the Article II (2) of the Convention gives clear roadmap to the courts to make a fair decision to avoid the abuses based on the mere formalities.

1.2.2. The means of exchange

The issue of what means of communications are covered by the Article II (2) of the Convention will always be the subject of discussions. The reason is the technology, which is developing all the times and probably will always provide a new means to make it easier and faster communication between people. As a consequence of technological advances, the courts will have to determine which innovation could satisfy the requirements of the New York Convention. Therefore, I consider that it is of no sense to concentrate on some specific means of communication in this Section, but I'd rather deal with two general issues: First, if the Article II(2) of the NY Convention provides the possibility of extension its scope of application to modern means of communications continuously, and secondly, what are the minimum requirements set by the Article II(2) of the NY Convention for modern means of communication, in order to satisfy the form of an arbitration agreement.

- *Possibility to Extend to Other Means*

The Article II (2) of the Convention provides that the statements of the parties should be exchanged via "letters or telegrams." As Arsic states, these were the newest word of technology back in 1958, when Convention was drafted and the fact that drafters included them in the Convention means that the advances of the technology shall not be excluded from

[53] Schramm, Geisinger, Pinsolle, supra note 2, the authors in footnote 152 submit that the some of the Italian courts require the arbitration agreements contained in the contract need to be specifically refereed and signed. For reference *see* judgment of the Court of Appeal of Bari, supra note # 21

the scope of the Article II(2).[54] This submission is in line with the opinion of the courts, which are giving broad interpretation to the terms "letters and telegrams" and equated to them faxes and telexes along with advancing the communications technologies.[55]

It is also significant what Court of Appeal of Basel explained about the means of communication and development of technology. The Court stated that the drafters by including the telegrams in Article II (2) wanted to allow the use of the latest means of communication, which were available back then and therefore, this aim should be carried on while interpreting the Convention in line with modern developments.[56] The Manitoba Court of Appeal further explained that the agreement "in writing" contained in Article II (2) is not exhaustive and it could be satisfied by various forms of written declarations.[57]

This court decisions give me the grounds to believe that the drafters of the Convention indeed intended to create the evolving mechanism that would satisfy the needs of commerce and interests of the parties without limiting the scope of application in time. Professor Van Den Berg correctly notices that the drafters added the possibility of "exchange" in Article II (2) in order to allow "the current practices of concluding contracts in international trade."[58] Therefore, in my understanding there is a room in Article II (2) for modern means of communication and the judgment of the Court of Appeal of Norway, which did not recognize the arbitration agreement contained in exchange of e-mails,[59] is erroneous.

[54] J. Arsic, International Commercial Arbitration on the Internet – has the future come too early?, *Journal of Int'l Arbitration*, Vol. 14 No. 3 (1997), pp. 209-222

[55] *See* Oberlandesgericht, Thuringia, 10 March 2004, *Buyer v. Seller*, YCA, Vol. XXXIII (2008), pp. 495-499, p. 497; *see also* Supreme Court of New York, Appellate Division, *Gabriel Capital, L. v. CAIB Investment Aktiengesellschaft*, 814 N.Y.S.2d. 66 = YCA, XXXI (2006), pp. 1482-1484

[56] *Obergericht Basel-Land, BJM* 1995, 254 (at 256) = YCA, Vol. XXI (1996), 685 (Court of Appeal of Basel-Land, Switzerland).

[57] Manitoba Court of Appeal, 11 December, 2002, *Leon Schellenberg v, Sheldon Proctor*, YCA, Vol. XXVIII (2003), pp. 745-751. *See also*, UNCITRAL document A/61/17, supra note 9, para 1, which states that "Article II(2) should be applied recognizing that the circumstances therein are not exhaustive."

[58] Van Den Berg, supra note 4, p. 204

[59] Court of Appeal, Norway, 16 August 1999, *Charterer v. Shipowner* , Hålogaland YCA, Vol. XXVII (2002), pp. 519-523

- *Requirements for Extension*

After answering the first issue affirmatively, now the paper shall examine what minimum requirements shall be met by the means of communication in order to be in compliance with Article II(2) of the NY Convention. Obviously, all the means that are available nowadays could not come under the scope of the Convention, but only those, which meet some minimum requirements. The language of Article II (2) of the Convention does not provide any minimum requirement for the means of exchange; rather it explicitly provides the "letters of telegrams." However, as it was mentioned above, the circumstances of Article II (2) shall not be interpreted exhaustively, but due consideration is to be given to the "developments that has taken place" and to the needs "of promoting the progressive harmonization and unification of the law of international trade"[60]

The way out from this deadlock was found by the majority of the scholars by interpreting the Article II (2) in light of the UNCITRAL Model Law,[61] which provides the concept of "record of the agreement" to satisfy requirement of writing.[62] Thus, if the means of communication, used for exchange, makes it possibility to provide a record of the agreement in writing, is in compliance with the Convention.[63]

This line of thinking was used by the Court of Appeal of Basel, which followed the Article 7(2) of the Model Law in interpreting the Article II (2). The Court explained that the UNCITRAL by adopting Article 7(2) intended to adapt the Article II (2) of the Convention to the new needs without modifying them and concluded that the requirement of writing is

[60] UNCITRAL document A/61/17, supra note 9, Paragraph 1 of the UNCITRAL Recommendation, in Annex II
[61] Schramm, Geisinger, Pinsolle, supra note 2, p. 82; *see also* Haas, supra note 32, p. 442, para 35
[62] UNCITRAL Model Law 1985, Article 7(2). *See* for more information the following Chapter II
[63] This submission is in line with the position of UNCITRAL, which while working on the amendments of Model Law, changed the purpose of the writing requirement and observed that: "what [is] to be recorded [is] the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement." Thus, it is obvious that if exchange gives possibility to provide the record of the arbitration agreement, it complies with writing requirement of Article II (2) of the Convention. For further reference *see* UNCITRAL document A/61/17, supra note 9, pp. 25-26, para 153

satisfied if "the agreement is contained in a document allowing for a written proof and confirmation of the mutual agreement of the parties."[64] Few years before this this judgment, the Court of Appeal of Geneva, gave even broader interpretation and submitted that any kind of means of communication that allows the text of the agreement to "be reproduced in a lasting format" complies with the written requirement.[65]

Thus, it follows, that modern means of communication that are used for exchange of declarations of parties satisfy the requirement of writing if they provide the record of the arbitration agreement.

2. THE MINIMUM OR MAXIMUM REQUIREMENT?

As it was mentioned above, the Article II(2) of the NY Convention is superior over the form requirements enacted in the national laws of the Member States. The question whether the Convention sets the minimum or maximum requirement is important in cases where there is a collision between the requirements set in Article II(2) and the requirements of municipal law regarding the formalities of arbitration agreement. The collision could be of two types, first, when national legislation is more liberal as of the formalities than the Article II(2) of the NY Convention and second, when the municipal law provisions are stricter.

According to prevailing opinion when national law contains more demanding requirements than Article II(2) does, then the later supersedes.[66] This is logical and in line with the purpose of the NY Convention, since the drafters wanted to protect the arbitration agreements, which satisfied the writing requirement and thus, "simplify the recognition and enforcement of arbitral awards."[67] In conformity with the majority opinion, the paper takes position that if the

[64] *Obergericht Basel-Land, BJM* 1995, 254 (at 256) = YCA, Vol. XXI (1996), 685 (Court of Appeal of Basel-Land, Switzerland).
[65] Van Den Berg, supra note 4, p. 178; *see also* Court de justice, Geneva, 14 April, 1983, *Carbomin S.A. v. Ekton Corporation*, YCA, Vol. XII (1987), pp. 502-505
[66] Van Den Berg, supra note 4, p. 178
[67] Fouchard, Gaillard, Goldman, supra note 37, p. 375

drafters intended to subject the arbitration agreement to stricter requirements than those of the Convention, they would have done so explicitly.

In the cases, where national law is more favorable than the Convention, like French law, which by Decree of 1981 has abolished the requirements for formal validity of arbitration agreements,[68] the answer is not as clear. In *Bomar Oil* case, notwithstanding the French law is more liberal than the Convention, the Court of Appeals of Paris ruled that Article II is a "substantive rule which must be applied in all cases."[69] Fouchard, Gaillard and Goldman disagree with such interpretation of Article II and consider that when national law is more liberal the requirements of the Convention shall not be enforced. The authors consider that based on the more-favorable right provision of Article VII(1) the French court should have chosen to apply less restrictive provisions of French law and excluded the application of the Convention after showing that the former is more liberal.[70]

Those above mentioned scenarios clearly demonstrate that the suggested outcome is always pro-enforcement and pro-more-favorable to the parties. Therefore, those authors who construe the Article II(2) of the NY Convention to contain both minimum and maximum rule[71] are not in compliance with the "spirit" of the Convention. Firstly, If we accept such interpretation of the Article II(2) than we lock the doors to flexible interpretation of the Convention which would balance the conflicting interests between formalities and the interests of the parties, leaving the only possibility to do so by the way of amending it.

[68] *Ibid*, pp. 369-370, para 8
[69] *Bomar Oil N.V. v. Enterprise Tunisienne d' Activities Petrolieres*, (Court d' Appel, Paris, 20 January, 1987), YCA, Vol. XIII (1988), pp. 466-470, at p. 469
[70] *see* Fouchard, Gaillard, Goldman, supra note 37, p. 373
[71] *see* Van Den Berg, supra note 4, p. 179. Professor Van Den Berg along with English version analyzes the other authentic languages of the Article II (2) of the NY Convention and concludes that the Article II(2) should be deemed to be the minimum and maximum rule, meaning that "court may not require more, but may also not accept less…"

Secondly, interpreting the Article II(2) as being both minimum and maximum rule, then Article VII(1) of the NY Convention, which allows more favorable national law provision to be applicable, would become meaningless. However, it should be kept in mind that the enforcement of the award should be based on the NY Convention and not on the municipal law, with the exception of formal requirement.[72]

Keeping in mind the need, to accept the validity of arbitration agreements which does not meet the strict requirements of Article II(2) of the NY Convention and possibility to enforce the award by virtue of Article VII(1) (this will be dealt in more details in Chapter III) the concept of minimum or maxim rule loses its importance. To establish a strict uniform rule regarding the form of arbitration agreement could have been of crucial importance couple of decades ago. However, the reality is different nowadays and everyone agrees that there is a need to liberalize the strict requirements of Article II(2), allowing arbitration agreement to escape from being somewhere in between of minimum and maximum form requirements.

[72] Van Den Berg, supra note 4, p. 180

CHAPTER II. WRITTEN FORM REQUIREMENT UNDER UNCITRAL MODEL LAW

United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on International Commercial Arbitration on 21st June 1985.[73] Before drafting the Model Law the arbitration laws of the states were outdated and were inconsistent with the existing needs. The purpose of the UNCITRAL Secretariat was to create the vehicle that would harmonize the national laws of the states regarding arbitration and to help the states in preparing the new laws.[74]

The scope of application of Model Law is very broad and covers all phases of arbitral process, starting from arbitration agreement finishing by the enforcement of the awards.[75] Article 7 of Model Law deals with the form requirement of the arbitration agreement and the intention of the UNCITRAL was to modify the outdated written form requirement of Article II (2) of the NY Convention without amending the Convention itself.[76]

However, there was a dilemma before the UNCITRAL Secretariat to draft the article that would be preferable and would lead to the fair outcome for the parties. On the one hand, there were formalities that could jeopardize the true intention of the parties to arbitrate the case and possible abuses based on such formalities, while on the other hand there was a danger of depriving parties the recourse to the local courts, which is their basic right. Thus, it is of crucial importance to find the balance between these two interests of the parties, to avoid the possible abuses and in addition to have the uniform rule.

[73] *see* Explanatory Note by the NUCITRAL Secretariat on the1985 Model Law on International Commercial Arbitration p. 15, para 1
[74] *Ibid*, para 3
[75] *Ibid*, para 2
[76] This aim was further extended by the Secretariat when they amended the original text of Article 7 in 2006 and when they issued nonbinding "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 done in New York, 10 June 1958" (A/61/17, Annex 2)

In the following two sections I would separately analyze the written form requirement under 1985 and 2006 Model Laws to see the differences and how each of them addresses the existing dilemma.

1. ARTICLE 7 OF UNCITRAL MODEL LAW 1985

Paragraph 2 of Article 7 of 1985 Model Law required arbitration agreement to be in writing. The original text of Article 7 closely followed the Article II (2) of the New York Convention, regarding structure and its written form requirement.[77] In order to satisfy this requirement it was not enough to provide the written evidence of arbitration agreement; rather it required that "the agreement itself be in writing."[78] The basic test, according to the authors, was whether there was a declaration of consent to arbitration from each party. This meant that the examples, where there was a written offer accepted orally or oral offer confirmed in writing, did not satisfy the written form requirement of Model Law.[79] As a result, it was possible that parties who initially agreed to arbitrate at the later stage had the ground for objecting the validity of such an agreement, if the agreement was not concluded in writing.[80]

The UNCITRAL Secretariat took into consideration the concerns of practitioners that sometimes it was impossible to make a written document and thus, to satisfy the form requirement, and amended the Article 7 in 2006.[81] However, the amended text will be analyzed in the following Section of the paper, while here I will continue the analysis of the text of 1985 Model Law.

[77] Explanatory note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, pp. 27
[78] T. Varady, J.J. Barcelo III, A.T. Von Mehren, International Commercial Arbitration, Transnational Perspective 4th edition 2009, p. 160
[79] *Ibid*, p. 160
[80] Explanatory note to Model Law 2006, supra note 77, p. 28
[81] *Ibid.*

When drafting article 7(2) of the Model Law, the UNCITRAL Secretariat raised the problems regarding the detailed definition of written requirement.[82] They realized that the Article II(2) of the NY Convention was outdated and there was the need to adopt it to the modern trade practices. Notwithstanding, the main goal of Model Law to harmonize and improve the national legislations[83] it also contributes to the broader interpretation of the NY Convention as well.[84] However, Article 7(2) was drafted in a way that it went slightly further than Article II(2) of the NY Convention[85] but still did not abolish the notion of signature and exchange contained in Article II(2).[86]

Still it is important to examine how the original text of Article 7(2) of 1985 Model Law was balancing and corresponding to the interests of the party-line and whether it could have been applied uniformly? For effective evaluation of Article 7(2) and for determination of how it was addressing the dilemma, the paper provides the analysis of the court practices in different jurisdictions and how the 1985 Model Law was interpreted.

In *Smal v. Goldroyce* Hong Kong court had to adjudicate whether there was an agreement between the parties satisfying the requirement of writing and applied the Article 7(2) of 1985 Model Law. It was a simple case about sale of the goods where buyer agreed to purchase some goods from the seller and sent him terms and conditions in written form, which contained, *inter alia*, arbitration clause. The seller without signing the Order performed the main obligation and delivered the goods while, buyer performed his part of the obligation by

[82] Al Khalifa, supra note 3, p.17
[83] Explanatory note to Model Law 1985, supra note 73, p.15
[84] Schramm, Geisinger, Pinsolle, supra note 2, p. 40; *see also* Court of Appeal of Basel-Land, Switzerland, *Obergericht Basel-Land, BJM* 1995, 254 (at 256) = YCA, Vol. XXI (1996), at p. 686
[85] As it was demonstrated in the first Chapter, the New York Convention defines the arbitration agreement very narrowly and limits it to "an arbitral clause in a contract" or "arbitration agreement", which should be signed by the parties or contained in exchange of letters or telegrams. As *Holtzmann & Neuhaus* explain, the Article 7(2) only clarified that written form requirement was satisfied by using the modern means of telecommunication and by reference in a contract to a document, which contains general conditions. *See also* Kaplan, supra note 22, were author argues that both Article 7(2) of Model Law and Article II (2) of the Convention "fail to provide satisfactory solution of problems that arise in practice".
[86] Al Khalifa, supra note 3, p.17

paying the amount indicated in therein. Later, quality dispute arouse and buyer went to the court asking to appoint the arbitrator on behalf of the seller, who had refused to arbitrate on the grounds that the requirements of Article 7(2) were not satisfied. The court asked applicant to provide it with document from seller to establish the compliance with Article 7(2) and since former failed to do so, the Hong Kong court ruled that there was no valid arbitration agreement.[87]

In another case with similar factual circumstances, Italian *Corte di Cassazione* found that purchase confirmations sent by the buyer to seller did not satisfy the form requirement of the arbitration agreement.[88] In this case Italian Supreme Court very narrowly applied the requirement of writing and found that the seller had not consented by letter or telegram to the arbitration clause. The court disregarded the fact that seller performed the obligation according to the very same purchase confirmation, which contained the arbitration clause and found that there was no "agreement in writing".[89]

It is undisputed that the outcome of the two cases referred above was clearly not arbitration-friendly. However, this is not enough to assess how Article 7(2) was corresponding to the interests of the parties and dealt with the dilemma of written form requirement. I shall identify if in each of these cases there was a true intention of the parties to arbitrate and whether there was an abuse on the ground of the formalities, enacted in the Model Law.

It is certain that in both cases the performance of the obligations were based upon general conditions and purchase orders which were sent by one party to another. The provisions of

[87] The judgment of Hong Kong court is not published officially but it is referred in Kaplan, supra note 22, pp. 29-30

[88] Supreme Court of Italy, 28 October 1993, *Robobar Limited v. Finnocold SAS* (Corte di Cassazione), YCA, Vol. XX (1995), pp. 739-741

[89] Italian Supreme Court in his judgment referred to the principle of autonomy of arbitration clause from the contract in which it is contained. According to this principle arbitral clause and the container contract are independent ones and their validity should be determined independently as well. Therefore, the Court denied the argument of the petitioner that it was against the principle of good faith to invalidate arbitral clause contained in the main contract, while later was found to be perfectly valid.

these documents were given full credit by the parties and they were not contested at any point. The only provision disregarded and later found to be invalid, was the arbitration clause for the reason of absent of signature. Therefore, the protest of many legal scholars[90] is justified, since the outcome is contrary to the principle of good faith. The protest becomes more severe if the parties involved are businessmen or have long business relationship and have established certain business practices between them.

The party sending a purchase order that contains arbitration clause has expectation that he has concluded a valid contract and arbitration agreement as well. It is, of course, unjust and against the interest of that party to allow the contrahent to invalidate the arbitration agreement without having objected to it. As it was demonstrated in the *Smal v. Goldroyce* and the *Robobar* cases, during the whole period of doing business there was no contestation from the other party about the arbitration clause before the dispute arose. Thus, we can assume that the party who sends the arbitration agreement has the legal basis to believe that there is a valid arbitration agreement concluded. On the other hand, we cannot argue that the other party does not undertake the obligation to be bound by the arbitration agreement. Therefore, some jurisdictions, which strictly adhere to the written form requirement set out in the New York Convention and in Model Law, disregard the interests of the parties.

On this issue, Kaplan, in agreement with Professor Van Den Berg, argues[91] that if a proposal of Dutch delegate Mr. Sanders would have been accepted by the drafters of the New York Convention the problem of objecting the arbitration clause would have been solved. The proposal was to add Article II (2): "Confirmation in writing by one of the parties without contestation by the other party,"[92] but unfortunately it was rejected. This proposal was aimed to

[90] *See* Kaplan, supra note 22, pp. 28-46, *see also* Pieter Sanders Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?, 20 ARB. INT'L 243 (2004)
[91] Kaplan, supra note 22, pp. 31-32
[92] *Ibid* p. 31

satisfy the requirement of written agreement in the situations where the arbitration clause was sent by the one party and was not contested by the other. In terms of such developments, both the *Smal v. Goldroyce* and the *Robobar* cases would have satisfied the written form requirement of Article II (2) of the NY Convention and Article 7(2), which would have followed the terms of the Convention.[93]

While now, even though both cases met the requirement of Article 7(2) and in most jurisdictions would have also satisfied the requirements of Article II(2) as well, there are still some jurisdictions which have come to the opposite end. However, some other jurisdictions have interpreted and applied Article 7(2) of the Model Law broadly and gave more significance to the party interests. In those cases the courts have fond arbitration agreements to be valid and satisfied the Article II(2) of the Convention, although the signature from one party was missing.

In one of its judgments Supreme Court of Switzerland approved the decision of Cantonal Court that the arbitration agreement was valid, although the bill of lading was not signed by the shipper.[94] In this case, Supreme Court interpreted the writing requirement of the NY Convention in the light of Article 7(2) of Model Law, which was designed to adapt the regime of the Convention to modern developments.[95] The court concluded that since the bill of lading was filled in by the shipper and signed by the other party, both parties have expressed their adhesion to arbitration clause printed on the back of the document and thus, requirement of Article II (2) of the Convention was satisfied.[96] The United States court of Appeals went even further and distinguished the arbitration agreement and the arbitral clause contained in the contract, concluding that when at tissue is an arbitral clause the a signature is not required.[97]

These two cases give me the ground to conclude, that the courts, if they take into account the established practices between the parties as well as dig into the true intention and understanding of the contract initially, can apply the Article 7(2) of the 1985 Model Law according to the interests of

[93] *Ibid*, p. 35
[94] Tribunal Fédéral, 16 January 1995, Com*pagnie de Navigation et Transports SA v. MSC - Mediterranean Shipping Company SA*, YCA, Vol. XXI (1996), pp. 690-698
[95] T. Varady, J.J. Barcelo III, A.T. Von Mehren, International Commercial Arbitration, 4th edition 2009, p. 169
[96] *Ibid*, p. 169
[97] US Court of Appeals, *Sphere Drake Insurance*, supra note 27

parties. Therefore, the text of Article 7(2) of 1985 Model Law itself gives a possibility to the courts to interpret the article in a manner to balance the existing dilemma of the form of arbitration agreement. However, the Article 7(2) still was not the good solution of the problem, since it kept the requirement of signature and exchange and was closely linked to the structure of Article II (2) of the Convention.

Consequently, it could be submitted that Article 7(2) contained in the 1985 Model Law did not address the main aspects of the problem regarding the form of arbitration agreement. The widening and clarifying the modern means of telecommunication along with covering the submission type situations and general conditions, as it turned out was not fully effective, while there was the requirement of signature in effect. The *Smal v. Goldroyce* and the *Robobar v. Finnocold* cases have demonstrated that the result of the application of Article 7 was sometimes unjust and unfair and therefore, against the interests of the party-line.

2. NEW ARTICLE 7 OF UNCITRAL MODEL LAW 2006

As it was demonstrated in previous Sections of the paper, the written form requirement of Article II(2) of the NY Convention and the Article 7(2) of 1985 Model Law were not in conformity with the practices of international business.[98] The UNCITRAL started to work on this issue and the UNCITRAL Working Group II on Arbitration and Conciliation (*hereinafter* WG) presented a variety of proposals on its 32nd session of the Commission in 1999.[99] During the discussions the NY Convention was considered to be "too successful to be tampered

[98] *see* Alan Uzelac, The Form of the Arbitration Agreement and the Fiction of Written Orality How Far Shall We Go? *Croatian Arbitration Yearbook, Vol. 8 (2001),* at 83-107, pp. 90-91. The author in his paper refers to the discussions that took place at the Convention's 40th Anniversary and at ICCA Conference in Paris in 1999, where it was unanimously agreed that the Article II (2) of the Convention was outdated and there was not any more need to have such strict written form requirement anymore; *see also* Publication Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, *ICCA Series, Vol. 2 (1999)*

[99] Alan Uzelac, Written Form of the Arbitration Agreement Towards a Revision of UNCITRAL Model Law, *Croatian Arbitration Yearbook, Vol. 12 (2005,)* at 111-123, p. 116

with" and the proposal of amendment was rejected for several reasons.[100] They agreed that the modification should be accomplished by promoting the liberal interpretation and by using the guidelines.[101]

The process and discussions took several years, more than the drafting the whole text of 1985 Model Law and the final outcome was reached at UNCITRAL's 39th Session in 2006. The solution found was two-folded, first, Article 7 was revised[102] and second, adoption of a non-binding Recommendation concerning the interpretation of the Article II (2) and Article VII (1) of the NY Convention.[103] In this section I will analyze the new Article 7 of Model Law, which gives states two alternatives regarding the form of arbitration agreement and in the following section I will deal with the UNCITRAL's Recommendation.

2.1. The First Alternative

The meaning of the changes that took place in 2006 by revising the Article 7 of 1985 Model Law is of the crucial importance, *inter alia*, for the reason that UNCITRAL intended to update the national laws of the states regarding the writing requirement of the arbitration agreement, without alteration of enforceability of such agreements under the NY Convention. The first alternative (or *Option I*) gives a detailed description how the written form requirement can be fulfilled while second alternative omits the requirement of writing totally.[104]

[100] There were two major reasons why UNCITRAL rejected the amendment of the Convention. Firstly, even if the best possible text was proposed for the text, it would have taken considerable time, before the amendments were accepted, not talking about the possibility that some states would have not accepted them. Secondly, this would have created the dual regime of enforcement (regime of NY Convention and the regime of New Convention), causing lack of transparency and consequently lack of legal certainty. Therefore, the UNCITRAL disapproved the possibility of amending the Convention.
[101] Report of the UNCITRALL 32nd Session (17 May – 4 June, 1999), A/54/17, at 42
[102] The text of the adopted Article 7 is contained in document A/CN.9/606, 13 April, 2006, para 4
[103] *see* Adopted text in UNCITRAL document, Supp. No. 17 (A/CN/17), Annex II, supra note 9, pp. 61-62
[104] Ibid, pp. 24-25, paras 146-147

The revised Article 7 of Model Law of 2006 consists of 6 paragraphs and unlike from the old version provides the "fact situations",[105] which reminds of the casuistic method of legislating used in the common law systems. The first paragraph is identical to what was in the old

[105] While working on the amendments UNCITRAL collected the possible problematic situations, that often occur in practice and gave due consideration in the final text of the revised Article 7. Professor Alan Uzelac, considers that these so called "fact situations" are valuable for understanding the intention of the UNCITRAL and the meaning of Article 7, Uzelac, supra note 98, p. 92. It is also worth of noting here that this list is not short and it covers problematic situations that go far beyond the *Smal v. Goldroyce* and the *Robobar* cases. The "fact situations" are contained in Document A/CN.9/WG.II/WP.108/Add, 1, para 12:

"(a) A contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of the contract text proposed by one party, which is not explicitly accepted in writing by the other party, but the other party refers in writing to that contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) Reference in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading which incorporate the terms of the underlying charter party by reference;

(f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a "further" contract may have been concluded orally or in writing);

(h) A bill of lading containing an arbitration clause that is not signed by the shipper or the subsequent holder;

(i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favor of a third party (stipulation pour autrui);

(j) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(k) Third party rights and obligations under arbitration agreements where the third party exercises subrogated rights;

(l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same;

(m) Where a claimant seeks to initiate arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate arbitration, for example, by relying on the "group of companies" theory."

version of the Article 7, while the paragraph 3 of new Article 7 is more liberal than paragraph 2 of its predecessor. The paragraph reads as follows:

> "*An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*"[106] [Emphasis added].

If compare to the corresponding part of the 1985 Article 7(2), this paragraph is broader since firstly, it abolishes the requirement of signature and exchange, secondly, provides for the possibility to be recorded in any form and lastly, it shifts the purpose of the writing requirement from demonstrating the contest of the parties towards its evidentiary function. As Schramm, Geisinger and Pinsolle correctly notice, such broad definition of the term "agreement in writing" would definitely cause that the more "fact situations" would meet the requirement of writing.[107]

As it was demonstrated in the preceding section, the concept of signature and exchange was transferred in Article 7(2) form the text of the Article II (2) and caused number of problems to the courts. The revised Article 7(3) by abolishing these requirements makes it clear that the cases where one party is performing the obligation based on general terms and conditions, bills of landings and/or other occasions where the signature of one or both parties is missing do not any more distress the validity of arbitration agreements. In addition to this, the new Article by allowing the content of the arbitration agreement to be "recorded in any form" solved the problem of the means of communication and related issues by requiring that it is possible to provide the content of the agreement. Thus, as long as the content of arbitration

[106] UNCITRAL Model Law as Amended in 2006, Article 7, *Option I*
[107] Schramm, Geisinger, Pinsolle, supra note 2, p. 76

agreement is provided, the valid arbitration agreement could be entered into any form, including orally.[108]

Furthermore, Commission expressly stated that paragraph 3 of Article 7 does not deal with the question if the parties truly reached the agreement to arbitrate, which is substantive issue left to the national legislations. Thus, paragraph 3 serves the purpose of demonstrating the obligations created by the agreement and identifying the rules governing the arbitral proceedings.[109] However, UNCITRAL did not want to disregard the intention of the parties and associates the primary function of "proof of the content of the agreement" with the consent of the parties.[110]

The paragraph 4 of the Article 7 specifically deals with the means of the electronic communications and the arbitration agreements concluded by them. It does not make the definition of writing any broader than does the third paragraph but merely clarifies and maintains consistency among the different texts of the UNCITRAL.[111] The text was reproduced from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts[112] and it was questioned whether there was a need to keep this paragraph.[113]

The paragraph 4 contains an open-list of modern means of electronic communications such as: telegram, electronic data interchange (EDI), telex, electronic mail, telecopy and other similar means of communications and subjects them to requirement that the information contained therein should be accessible for "subsequent reference."

[108] Explanatory note to Model Law 2006, supra note 77, p. 28, para 19
[109] Report of the UNCITRAL on the work of its thirty-ninth session, Supp. No. 17 (A/CN/17), p. 26, para 153
[110] *Ibid.*
[111] *Ibid.* pp. 26-27, para 158
[112] Explanatory note to Model Law 2006, supra note 77, p. 28, para 19
[113] Report of the UNCITRAL Supp. No. 17 (A/CN/17), supra note 109, p. 26, para 156

The remaining two paragraphs are transferred from the 1985 Model Law, without any changes. Paragraph 5 addresses the sporadic and very specific situation, which along with paragraph 4 is contemplated by paragraph 3. However, the UNCITRAL considered that the deletion could be "misinterpreted as invalidating arbitration agreements concluded by an exchange of statements of claim and defense in which the arbitration agreement was alleged by one party and not denied by the other."[114] And lastly, Commission adopted paragraph 6 from 1985 Model Law without any changes.[115]

It can be concluded, that Article 7(3) defines the written requirement of arbitration agreement very broadly and shields almost every possible situation that could occur in practice. I believe that the first alternative very carefully addresses the dilemma of the written form requirement of arbitration agreement, as it now requires the content of the arbitration agreement to be recorded, not the consent of the parties. By this UNCITRAL freed the arbitration agreement from mere formalities such as signature and exchange, and gave form requirement the evidentiary function to prove the certainty of parties' obligations. Such evidence, in turn, excludes the possibility of misuses based on formalities and makes it clear to the courts whether the parties truly intended to arbitrate or not.

2.2. The Second Alternative

During the process of amending the Article 7 of 1985 Model Law, UNCITRAL was considering two possible options for new Article 7. The Commission did not express its preferences in favor of any of them and offered both of them to be enacted by the states according to their needs.[116]

The *Option II,* Article 7 reads as follows:

[114] *Ibid*., p. 27, para 160
[115] *Ibid*., para 162
[116] Explanatory note to Model Law 2006, supra note 77, p. 28, para 19

> *"'Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*[117]

This alternative is silent about the form of arbitration agreement. It neither expressly provides that arbitration agreement is not subject to any form requirement nor states that arbitration agreement can be entered into orally. However, the UNCITRAL intended to the states the possibility to abolish any form requirement[118] and by adopting this text recognized the validity of arbitration agreements concluded orally.[119]

During the debates the necessity of this proposal was questioned since *Option I* had established the minimum requirements for the arbitration agreements and some delegates considered that the *Option II* by abolishing the form requirement totally was too far reaching and departing from traditional rule, including the New York Convention.[120] The proposal was still adopted for two major reasons: Firstly, some jurisdictions had already abolished the form requirements and in those jurisdictions there were not any significant problems regarding the validity of arbitration agreements. Such jurisdictions would not likely go backwards and adopt the first alternative in the world, which trends towards abolishing the formalities for the arbitration agreement. Therefore, UNCITRAL decided that Model Law should provide the solution for future and allow the states to abolish the form requirements.[121]

Secondly, UNCITRAL took into account that the Article 7 of Model Law was intended to be used by state courts for interpreting the Article II(2) of the NY Convention more liberally. They also observed that the validity of arbitration agreement, during the enforcement of award, according to the Article V(1)(a) of the NY Convention, is governed by the law of the

[117] UNCITRAL Model Law as Amended in 2006, Article 7, *Option II*
[118] Schramm, Geisinger, Pinsolle, supra note 2, p. 39
[119] Report of the UNCITRAL Supp. No. 17 (A/CN/17), supra note 109, p. 27, para 164
[120] *Ibid.*
[121] *Ibid.*, para 165

place where the award is issued. Hence, if arbitration agreement is valid under the law of the place of arbitration the award is enforceable under the NY Convention.[122]

It is undoubted that the *Option II* of Article 7 is revolutionary step that has been enacted at international level; however, it does not mean that such an approach is reasonable and always will lead to the rational outcome. This provision shall be analyzed in a manner as any other provision regarding the form of arbitration agreement, before finding it to be a good solution. The effective provision of the form requirement for arbitration agreement shall "comply with two considerations underlying the form requirement for the arbitration agreement: (a) that there was sufficient evidence of the mutual will to arbitrate and thus to exclude court jurisdiction and (b) that there was some writing with respect to arbitration and thus the parties were on notice (or were warned) that they were excluding court jurisdiction."[123]

UNCITRAL Working Group reflected those considerations in *Option I* of Article 7, which covers all the "fact situations" (except the situation mentioned under (m)) that were provided in paragraph 12 of the Document A/CN.9/WG.II/WP.108/Add.1.[124] The reason why all the above cases were included to meet the requirement of the writing was that first alternative sets as a minimum requirement that there should be "an agreement in substance between the parties […] together with written evidence of that agreement..."[125] This is not the case in *Option II*, which is completely free from any requirement as of the form. It is true that it follows the existing trend to relax from the form requirements, but on the other it completely ignores the dilemma and appears to be strictly one-sided. While *Option I*, perfectly balances the interests on the both sides of the scale, requiring the record of the content of arbitration agreement as a proof of obligations of parties and their consent to arbitrate.

[122] *Ibid*., pp. 27-28, para 166
[123] Document A/CN.9/468, p. 21, para 98
[124] Document A/CN.9/WG.II/WP.108/Add.1, p. 4, para 12
[125] Document A/CN.9/468, supra note 123, p.21, para 98

3. INTERPRETATION OF ARTICLE II(2) OF THE CONVENTION UNDER THE UNCITRAL'S RECOMMENDATION AND ARTICLE 7 OF MODEL LAW 2006

As it was already mentioned, after recognizing the need to adopt the Article II(2) of the NY Convention to the needs of the modern business practices UNCITRAL started the discussions how this aim should have been achieved. Along with other solutions, it was proposed to amend the Convention. This idea failed initially, since the NY Convention is "extremely successful" and is adopted by one hundred forty-six states[126] and the risk that the amendments would not be accepted or the process would take long time could have jeopardized its effectiveness.[127]

The other proposals included the adoption of the declaration, statement or resolution dealing with the interpretation of the Convention in a manner that Article II(2) of the Convention was not exhaustive and covered some other situations.[128] Some others proposed to encourage the liberal interpretation of the Convention as it was done by Swiss Federal Tribunal in the case *Compagnie de Navigation et Transports S.A. v. MSC S.A.*[129]

As a final solution, UNCITRAL decided: firstly, to amend the Article 7 of the Model Law (dealt in Section 2 of this Chapter) and secondly, to encourage states to adopt the revised Article 7, UNCITRAL adopted a non-binding Recommendation concerning the interpretation of Article II(2) and Article VII(1) of the NY Convention.[130] I shall address this issue below.

[126] *see* the Sstatus of the NY Convention at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
[127] Document A/CN.9/468, supra note 123, p. 19, para 92
[128] *Ibid*., pp. 19-20, para 93
[129] *Ibid*., p. 20, para 94
[130] *See* Schramm, Geisinger, Pinsolle, supra note 2, p. 39; *see also* UNCITRAL document A/CN.9/468, supra note 123, p. 21, para 99

The Recommendation issued in 2006 is an authoritative source and shall be given due consideration in interpreting the NY Convention.[131] Recommendation consist of two paragraphs addressing the interpretation of the Article II(2) and Article VII(1) of the NY Convention, respectively:

> 1. Recommends that Article II(2) *"be applied recognizing that the circumstances described therein are not exhaustive;"*
>
> 2. Recommends also that Article VII(1) *"should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."*[132]

As Schramm, Geisinger and Pinsolle consider UNCITRAL initially wanted to issue a Recommendation that would have interpreted the Article II(2) based on the circumstances provided in revised Article 7 of Model Law, but finally they did not adopt it.[133] However, based on the research of working papers of UNCITRAL[134] the paper takes position that the first paragraph of the Recommendation is inspired by the new Article 7 of Model Law, which itself sides with the position that the circumstances in Article II(2) are not exhaustive.[135] Furthermore, the language of Article 7(3) of Model Law 2006, by defining that writing

[131] Schramm, Geisinger, Pinsolle, supra note 2, p. 75; *see also* T. Landau & S. Moollan, "Article II and the Requirement of Form" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard ad Domenico Di Pietro (London: Cameron May, 2008), pp. 239-244

[132] UNCITRAL document, Supp. No. 17 (A/61/17), supra note 9, Annex II

[133] see Schramm, Geisinger, Pinsolle, supra note 2, pp. 76-77, authors in footnote 139 make reference to several working papers of UNCITRAL (UNCITRAL Document A/CN.9/607, infra note 139, at para 10, WG Report A/CN.9/508, at para 45) and conclude that UNCITRAL rejected the issuance of Recommendation that would interpret the Article II(2) of the NY Convention on the basis of new Article 7 of Model Law.

[134] UNCITRAL Document A/CN.9/WG.II/WP.118, p. 11, para 27 and the WG Report A/CN.9/508, p. 12 para 45, this last document is the same, based on which Schramm, Geisinger and Pinsolle, supra note 2, consider that the Recommendation does not interpret the Article II(2) of the NY Convention based on the revised Article 7 of Model Law

[135] During the process of the revision of Article 7, UNCITRAL was discussing that the revised version should cover almost all the majority of "fact situations" that were provided in paragraph 12 of the Document A/CN.9/WG.II/WP.108/Add.1, *see* supra note 124

requirement is met if content of arbitration agreement is "recorded in any form," clarifies that the written requirement of the Article II(2) of the NY Convention are not exhaustive and it can be satisfied by recording the content of agreement by the other forms as well.

Therefore, the first paragraph of the Recommendation is not limited only to the inspiration of revised Article 7 of Model Law 2006 but goes further and recommends the national courts to interpret the Article II(2) as the circumstances provided therein are not exhaustive. This finally resolves the argument that the Article II(2) shall be interpreted according to the English version of the Convention, providing that the agreement in writing "shall include," thus, making other ways for satisfying the writing requirement.[136]

However, importing the content of Article 7 into the Article II(2) of the NY Convention, without amending the later made UNCITRAL resort to back-door approach of the more-favorable law provision of Article VII(1).[137] According to the second paragraph of the Recommendation the more-favorable law provision of national legislation applies not only to the cases when enforcement of arbitral awards is sought, but to the enforcement of arbitration agreements as well.[138]

The UNCITRAL by creating the interpretative tool for the Article VII(1) of the NY Convention intended to encourage states to adopt the revised Article 7 of Model Law 2006 to "operate in the context of the more-favorable-law provision of article VII(1)..."[139] However, WG was concerned that even if revised Article 7 was adopted by the states into their national legislations, reliance on less restrictive form requirement in enforcing the arbitration agreements through operation of Article VII(1) of the NY Convention still was not clear-cut. The successful operation of Article VII(1) depends whether Article II(2) provides the rule

[136] *see* UNCITRAL Document A/CN.9/592, p. 19, paras 87-88
[137] Schramm, Geisinger, Pinsolle, supra note 2, p. 78
[138] UNCITRAL document, Supp. No. 17 (A/61/17), supra note 9, Annex II, para 2 of the Recommendation
[139] UNCITRAL Note, A/CN.9/607, p.5 paras 8-9; *see also* UNCITRAL Document A/CN.9/592, supra note 136, pp. 18-19, para 86; for further references *see* Schramm, Geisinger, Pinsolle, supra note 2, p. 78

that can be derogated by the state if its national law is more favorable or whether Article II(2) establishes the uniform rule regarding the form requirement that cannot be derogated.[140] Therefore, since states are recommended to rely on more-favorable law provisions through operation of Article VII(1) of the NY Convention, application of Article II(2) should be avoided when states enact less stricter laws regarding the form requirement.

Taking the above into account, UNCITRAL by the second paragraph of the Recommendation encourages states to adapt in their laws revised Article 7, which is less restrictive than Article II(2) of the NY Convention, and through operation of Article VII(1) avoid the application of the Article II(2) when a party seeks to enforce the arbitration agreement. Moreover, in order to make the Recommendation successful tool for enforcement of arbitral awards, UNCITRAL overwhelmed the Article IV of the NY Convention by amending Article 35 of Model Law and deleting the paragraph 2, which required presentation of the original arbitration agreement and its authorized copy.[141] Therefore, in those jurisdictions, which recognize the orally concluded arbitration agreements the requirement of providing of original arbitration agreement can be dispensed by applying the more-favorable law provision under Article VII(1) of the NY Convention.[142]

Thus, it can be concluded that this Recommendation if followed by the states gives the possibility to modernize the outdated written form requirement of the Article II(2). This could be a good guidance for those jurisdictions that were skeptical in interpreting the NY Convention liberally, since some other jurisdictions, as demonstrated above, have already

[140] *see* the discussions of the Working Group, UNCITRAL Note, A/CN.9/607, supra note 139, pp. 5-6, para 10

[141] UNCITRAL Document A/CN.9/592, supra note 136, paras 76-80; *see also* Article 35 of Model Law 2006, which does not contain the requirement of providing original arbitration agreement and its certified copy. For further references *see* Schramm, Geisinger, Pinsolle, supra note 2, p. 78

[142] ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, (International Council for Commercial Arbitration 2011), at pp. 68-111, p. 74, for further reference *see* the Court of Appeal of Munich (Oberlandesgericht), Germany, (12 October, 2009) *Swedish Seller v. German Buyer*, YCA, Vol. XXXV (2010) pp. 383-385, where the court submitted that for enforcement an award in Germany under the NY Convention there is no need to provide the original arbitration agreement, but only "authenticated original arbitral award or a certified copy."

found the ways to interpret the Article II(2) in a broader manner way before 2006. However, the changes that were initiated by the UNCITRAL and concluded by this Recommendation shall create more uniformity and certainty,[143] since the states are recommended to liberalize their national laws by adopting the revised Article 7 and use it to replace the outdated requirement of the Article II(2) through operation of the more-favorable law provision of the Article VII(1) of the NY Convention.

[143] UNCITRAL Note, A/CN.9/607, supra note 139, pp. 5-6, para 10

CHAPTER III. THE ROLE OF THE NATIONAL LEGISLATION IN ENFORCEMENT OF ARBITRAL AWARDS AND FORM REQUIREMENTS IN GEORGIAN AND RUSSIAN LEGISLATION

As it was mentioned many times in this paper, the NY Convention is one of the most successful international instruments that have been created to enhance the international commerce. The character of the NY Convention is international and its scope of application is defined in the Article I(1).[144] It is also important that the Convention does not provide any rules of procedure for recognition and enforcement and states do it according to the rules of procedure that are provided in their national legislation.[145]

However, the subject of this paper is not to address the issues of general interrelations of the Convention and national laws of the states. The analysis in this Chapter will be limited to firstly, studying the role of national legislation as a ground for refusing the arbitral award under the Article V(1)(a) and secondly, the national law as more-favorable law provisions under the Article VII(1) of the NY Convention.

After defining the importance and the role of the national legislation and particularly the role of the form requirement of the arbitration agreement for recognition and enforcement procedure, the paper will deal with provisions of the Georgian and Russian national legislation. In this respect I shall compare the written form requirement of arbitration agreement under the national laws of Georgia and Russia and see how they conform to the modern needs and how they balance the existing dilemma.

[144] According to the Article I(1) of the NY Convention the Convention applies to recognition and enforcement of arbitral awards in two cases: first, when the arbitral award was made in other state and secondly, when award is not considered to be domestic. This clearly demonstrates the international character of the Convention. For further references *see* Van Den Berg, supra note 4, p. 12

[145] New York Convention, Article III, see also Albert Jan Van Den Berg, the New York Convention of 1958: An Overview, p. 1; ICCA Guide, supra note 142, p. 68

1. NATIONAL RULES REGARDING THE WRITTEN FORM REQUIREMENT AND ENFORCEMENT OF ARBITRAL AWARDS

Professor Van Den Berg in 2003, when he published the general overview of the NY Convention submitted that it was believed for a long time that the written form requirement of arbitration agreement provided in Article II(2) of the Convention was an uniform rule, superseding the national law regarding the formal requirements of arbitration agreement. He further argued that this was the practice of the past times and now the Article II(2) is considered to be an uniform rule only when applicable national law imposes stricter requirements, thus it has become a maximum requirement only.[146] This position is somewhat different from what the same author was standing about 10 years prior that the Article II(2) of the NY Convention establishes uniform rule and in principle it is both a minimum and a maximum requirement.[147]

The reasons for such a dramatic change have been analyzed in previous Chapters and were mainly concerned with the need to adopt the outdated written form requirement to the modern needs and to address the interests of the parties fairly, according to their intention. Thus, as Van Den Berg concluded, the solution was found by the courts of Member States by construing the Article II(2) of the NY Convention broadly or allowing more liberal national laws to determine the compliance with the written form requirement.[148] As a result of such practices the Article II(2) have lost its function to be a minimum form requirement of the arbitration agreement.

National rules regarding the form requirement play also important role during the enforcement of the award in two occasions: First, Article V(1)(a) of the NY Convention, which is one of the grounds for refusing the enforcement of the award, states that recognition

[146] Van Den Berg, Overview of the NY Convention, supra note 145, p. 7
[147] see Van Den Berg, supra note 4, pp. 173-179
[148] Van Den Berg, Overview of the NY Convention, supra note 145, p. 7

and enforcement of the award may be denied by the court if the party, defending against enforcement, proves that the arbitration agreement was not valid under the law applicable to it.[149] Secondly, national provisions of the written form requirement are becoming more and more important as they are applied through more-favorable law provision of the Article VII(1) of the NY Convention. However, when talking about the Article VII(1) and the form of arbitration agreement we shall distinguish from each other the relief sought about the recognition and enforcement of the validity of the arbitration agreement (see Section 3 of the Chapter II) and the relief sought about the arbitral award.

1.1. Reference of national legislation within the setting of NY Convention Art V(1)(a)

As it was already mentioned the Article III of the NY Convention provides that courts shall use their national rules of procedure for the enforcement of arbitral awards. However, these rules of procedure are limited to the minor questions such as competent authority and the form of the request, while the conditions for the enforcement – formalities[150] and the grounds for refusing the recognition and enforcement[151] – are regulated by the NY Convention exclusively.[152] The grounds for refusing the recognition and enforcement are very important and generally characterized as, firstly – exhaustive, secondly – not allowing the review of the merits, thirdly – allocating the burden of proof to the party opposing the enforcement,

[149] *see* New York Convention, Article V(1)(a). For further references *see* Patricia Nacimiento, "Article V(1)(a)", in "Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention", Kronke, & Nacimiento, et al., Kluwer Law Arbitration, 2010, at pp. 205-230, p. 206

[150] *see* New York Convention, Article IV, which requires that the party seeking the recognition and enforcement of the arbitral award shall provide to the competent authority with duly authenticated original award and original arbitration agreement or their certified copies, and if there is a need to translate those documents into the language of the country where award is relied upon. It should be also noted that UNCITRAL by allowing the orally concluded arbitration agreements in *Option II*, also amended Article 35 and deleted the requirement of providing the original arbitration agreement, for more info *see* infra Section 3 of the Chapter III.

[151] New York Convention, Article V

[152] ICCA Guide, supra note 142, p. 69

fourthly – giving discretion to the court to enforce the award even if the ground for refusing exists,[153] and lastly – requiring the courts to apply these grounds restrictively.[154]

First ground for refusing the recognition and enforcement is incapacity of the parties or the invalidity of the arbitration agreement. Validity of the arbitration agreement should be determined according to the applicable law to the agreement, which is the one that parties chose or if parties failed to do so the law of the country where the award was made.[155] The assessing of the facts of the case by the courts is independent of the arbitral tribunal's decision and court reviews the case de novo.[156] Thus, the court has to apply the national rules and according to those rules has to see whether the agreement to arbitrate was validly concluded or not, without otherwise going into merits of the case.[157]

However, the practice of the courts does not correspond to the above conclusion and as Professor Van Den Berg reports for the majority of the courts, except the Italian Supreme Court, the applicable law to the form requirement seems to be the Article II(2) of the NY Convention, not provisions of the national law.[158] The author further criticizes the Italian Supreme Court,[159] and considers that it is against the legislative history and the "internal consistency" of the Convention to limit the scope of application of the Article II(2) to the

[153] Some authors, however, argue that it is against the purpose of the NY Convention to grant the discretionary power to the judges deciding recognition and enforcement of the awards and if the ground for refusing the recognition and enforcement enumerated in Article V exists, the courts must deny the recognition. *See* Nacimiento, supra note 149, p. 207

[154] Nigel Blackaby, Constantine Partasides, Recognition and Enforcement of Arbitral Awards in *Redfern and Hunter on International Arbitration*, Redfern, Hunter, et al. (Oxford University Press 2009), at 621-679, pp. 637-638

[155] New York Convention, Article V(1)(a)

[156] United States Court of Appeal, Second Circuit, 14 April 2005, *Sarhank Group v. Oracle Corporation*, YCA, Vol. XXX (2005) at pp.1158-1164, p. 1158

[157] For more information about the scope of review of the merits *see* Van Den Berg, supra note 4, pp. 269-273

[158] *Ibid*., p. 284, author makes references to several cases from Germany, a case from Austria and a case from Greece, where for determination of the validity of the arbitration agreement court applied the Article II(2) of the NY Convention

[159] *see* the Supreme Court of Italy, supra note 6, where Italian Supreme Court ruled that in case of the enforcement of the award the applicable law is the national rules chosen by the parties and not the Article II(2), which applies at the stage of the enforcement of the arbitration agreement.

stage of enforcement of arbitration agreement and not to apply it at the stage of enforcement of arbitral award.[160]

As of the legislative history argument, author refers to the proposal of Dutch delegate, who was not satisfied with the text of the existing draft of the Article V(1)(a) and was concerned that it would allow the tacit agreements. To avoid this result delegate proposed the wording "the agreement referred to in Article II" and the Conference accepted it. As of the internal consistency of the NY Convention, he considers that the Italian Supreme Court's decision leads to "anomalous situation", since it means that the enforcement of the arbitration agreement shall be refused since it does not comply with the Article II(2) of the NY Convention and the same arbitration agreement could be valid under the applicable national law at the stage of enforcement of the award.[161]

These two arguments made by the leading scholar of the NY Convention have the basis to exist; however, I would rather respectfully differ from this opinion for the reasoning below:

First of all, if we look at the Article V(1)(a) of the NY Convention, the expression "the agreement referred to in Article II" merely makes reference to the agreement, which is provide in Article II, thus, refers to the arbitration agreement and subjects the validity of "the said agreement" to the law, which was chosen by the parties or in case of their failure to the law of the place where the award was made. Such construction of the Article is more in compliance with the legislative history of the Convention, since at the drafting Conference the delegate of the Soviet Union proposed to clarify the issue of "the law applicable to an

[160] Van Den Berg, supra note 4, p. 285. The author is of the same position about the issue even after passing of about ten years. Notwithstanding, the fact that as the business evolved and Article II(2) of the NY Convention was considered to be outdated and not in correspondence to the interests of the parties, Professor has changed his position about the minimum and maxim requirement issue (which was analyzed in supra note 147). However, in regard of applicable law under the Article V(1)(a) he has not changed his position and seems to be still in agreement with the majority of the courts who consider Article II(2) of the NY Convention is applicable standard for the arbitration agreements under the Article V(1)(a) of the NY Convention, *see* Van Den Berg, Overview of the NY Convention, supra note 145, p. 14

[161] *Ibid.*

arbitration agreement."[162] The Conference adopted the proposal of the Soviet Union, clarifying that the ground for refusing the enforcement of award exists if the arbitration agreement is "not valid under the national law to which the parties have subjected their agreement…."[163]

Secondly, notwithstanding, agreeing with Professor Van Den Berg, that it is not reasonable to subject the formal validity of the arbitration agreement to the stricter rules (the Article II(2)) at the stage of the enforcement of the arbitration agreement than at the stage of the enforcement of arbitral award (national law), I am still of the position, that for the reasons of fairness and adopting the NY Convention to modern needs, it is better to interpret the Article V(1)(a) as making reference to the national laws, rather to the outdated and impractical Article II(2) of the NY Convention.

Therefore, I suggest that the position of the Italian Supreme Court – to apply national law for determining the validity of an arbitration agreement under the Article V(1)(a) – shall not be rejected, but further extended to the cases of enforcing the arbitration agreements. This suggestion is further in line with the position of UNCITRAL who initiated the changes in the Model Law and issued the Recommendation in order to adapt the written form requirement of Article II(2) to modern needs.[164]

[162] "Summary Record of the Twenty-third Meeting" UN DOC E/CONF.26/SR.23 (9 June, 1958), pp. 14-15

[163] "New text of Arts I(3), V(1)(a), (b) and (c) adopted by the Conference at its twenty-third meeting" UN DOC E/CONF.26/L.63 (9 June, 1958), p. 1

[164] This position solves the issue of the internal consistency of the NY Convention as was challenged by Professor Van Den Berg, since the Recommendation clearly encourages states that through operation of Article VII(1) the written form requirement of the Article II(2) shall be replaced by their more liberal national arbitration laws in cases of the enforcement of the arbitration agreements. Hence, now, the court can enforce the arbitration agreement under the Article II(3) of the NY Convention as well as determine the validity of the same arbitration agreement at the stage of enforcement of the arbitral award, by applying the national law in both cases. For further references *see* the respective analysis in Section 3 of the Chapter II and the following Subsection 1.2 of this Chapter.

1.2. Effects of Article VII (1) of the Convention

The Article VII(1) of the NY Convention is another important provision that influences the enforcement of the arbitral awards and arbitration agreements. Even those authors, who consider that under Article V(1)(a) the applicable standard for the written form requirement is the Article II(2) and not national law provisions, agree that "if at the stage of the enforcement of the award, the agreement does not comply with Article II(2), enforcement has to be sought on a different basis by virtue of the more-favorable-right provision of Article VII(1) of the Convention."[165]

Article VII(1) of the NY Convention reads as follows:

> "*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.*"

The text of the Article refers only to the arbitral awards and does not say anything about arbitration agreements, but the underlying principle applies to arbitration agreements as well.[166] This position was also strengthen by the UNCITRAL in 2006, when they adopted the Recommendation regarding the interpretation of, *inter alia*, Article VII(1) of the NY Convention.[167] This non-binding Recommendation encourages states to interpret the Article VII(1) of the NY Convention in a manner to allow the replacement of Article II(2) by form requirements of more arbitration-friendly national laws when the enforcement of the

[165] Van Den Berg, supra note 4, p. 287; *see also* Nacimiento, supra note 149, p. 225

[166] For more detailed analysis *see* Van Den Berg, supra note 4, p. 86; *see also* the judgment of Supreme Court of Spain, 14 November, 2007, *Limber, S.A. v. Cutisin, S.A.*, Tribunal Supremo, YCA, Vol. XXXIII (2008), at pp. 703-709, p. 706, where the Supreme Court of Spain submitted that: "…according to the most authoritative doctrine, [*Article VII(1)*] applies not only to the recognition of foreign awards but also to the recognition of the arbitration agreement" (emphasis added).

[167] *see* paragraph 2 of the Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the NY Convention, UNCITRAL document, Supp. No. 17 (A/61/17), supra note 9, Annex II

arbitration agreement is sought. Thus, now the position of the official body that is responsible for the NY Convention is clear and suggests states to avoid the application of Article II(2) at the stage of the enforcement of the arbitration agreement as well as at the stage of the enforcement of award under the Article V(1)(a), when checking the validity of the arbitration agreement (for more detailed analysis see Section 3 of the Chapter II).

However, the basic purpose of the Article VII(1), as intended by the drafters, is to simplify the recognition and enforcement of arbitral awards and exclusion of the provisions of the Convention when national law is more arbitration-friendly.[168] Thus, when the form requirement of the Article II(2) of the NY Convention is stricter than the one in national law of the country enforcing the award, the provisions of the later law apply.[169]

The other important feature of the Article VII(1) of the NY Convention, according to prevailing opinion,[170] is that when a party bases his relief on Article VII(1) he should rely on it entirely, thus, it excludes the possibility of the cherry-picking by the parties.[171] This is also clear from the drafting history of this article, where delegates intentionally excluded the possibility of such cherry-pick by a party in order to ensure the enforcement of an award.[172]

Taking into account the analysis of this and the preceding subparagraphs, it is clear that the influence of the national law provisions increases along with advancing the practice of the

[168] *see* Bavarian Supreme Court decision of 2004, *K Trading Co. v. Bayerische Motoren Werke AG*, YCA, Vol. XXX (2005), at pp. 568-573, p. 571, in this case Bavarian Supreme Court replaced the requirement of the NY Convention by more-favorable law provision of its national law and allowed the applicant not to provide the translation and submission of the arbitration agreement for the admissibility of enforcement of the arbitral award.

[169] Nacimiento, supra note 149, p. 225

[170] There are some exceptions from this rule however, example of which is the Oberlandesgericht, Cologne, 23 April 2004, *Israeli Trading Company v. German Buyer*, YCA, Vol. XXX (2005), pp. 557-562. In this case the Court of Appeals of Cologne superseded the requirements of the Article IV of the NY Convention relying on more favorable-law provisions of Article VII(1) and applied domestic law, which does not require the party to provide the original arbitration agreement and its translation. However, when examining the grounds of refusing the recognition and enforcement of arbitral award, court relied on Article V of the NY Convention.

[171] Van Den Berg, supra note 4, p. 85; *see also* United States Court of Appeals for the Second Circuit, *Baker Marine Ltd. v. Chevron Corp*,. 191 F.3d 194, 1994, = YCA, Vol. XXIVa, (1999), at pp. 909-914

[172] For more detailed information *see* Dirk Otto, "Article VII" in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Kronke, & Nacimiento et al. (eds), (Kluwer Law International 2010), p. 444

international arbitration. The major interactions between the NY Convention and the national legislation of the states are stipulated by the Article V(1)(a), which subjects the validity of the arbitration agreement to national laws of the state which was chosen by the parties or where the award was made at the time of recognition and enforcement of the award, and the Article VII(1), which subjects the validity of the arbitration agreement to the arbitration law of the state where the agreement is sought to be enforced in the cases that are covered under the Article II(3) of the NY Convention. There were numerous discrepancies in the practice, related to the interplay between national laws and the NY Convention,[173] but due to the work of the UNCITRAL that was carried from 1999, many things have become clear and the states have gotten the guidelines regarding the uniform interpretation of the written form requirement. All the above analysis clearly demonstrates that it is of crucial importance for the promotion of the arbitration, guaranteeing the legal certainty and protection of the interests of the parties that all the states have the arbitration laws, which are updated to the modern needs and in line with the Model Law.

2. FORM REQUIREMENTS IN NATIONAL LAWS OF GEORGIA AND RUSSIA

The importance of the national arbitration law and its form requirement for recognition and enforcement of foreign arbitral awards is of crucial importance, especially due to the latest changes as it was discussed in previous sections. In this section I would compare the written form requirements under Georgian and Russian arbitration laws and analyze whether those two jurisdictions provide the adequate response to the modern needs of doing business and how they reflect the existing dilemma of the written form requirement.

In republic of Georgia along with other legislative problems and existing gaps there were serious problems regarding the arbitration law as well. Georgian Arbitration Law (GAL) was

[173] *see* UNCITRAL Document A/CN.9/WG.II/WP.139, pp. 15-20, which contains the analysis of court decisions from different jurisdictions and not uniform, uncertain and misleading decisions regarding the interplay of the New York Convention and the national legislations.

not in consistent with the contemporary needs[174] and it needed certain steps to be taken before Georgia would become arbitration-friendly country.[175] However, on 19 June of 2009 the Parliament of Georgia enacted the new arbitration law based on the revised version of the UNCITRAL Model Law 2006.[176] The Article 8 of the GAL defines the arbitration agreement and provides for its form requirement, it reads as follows:

> *1. 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 any contractual or other legal relationship.*
>
> *2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *3. The arbitration agreement shall be in writing.*
>
> *4. An arbitration agreement is in writing if its content is recorded in any form, regardless of the form of conclusion of the arbitration agreement or contract.*
>
> *5. 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.*
>
> *6. An arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.*
>
> *7. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*
>
> *8. If one of the parties of the contract or arbitration clause is natural person or administrative body, arbitration agreement shall be in writing. For such an agreement paragraphs 4-6 of this Article are not applicable.*[177]

Thus, as it is clear from the text of the Article, there are only the minor differences, but rest is clearly imported from the revised Article 7 of the Model Law 2006.

[174] Giorgi Tsertsvadze, Recognition and Enforcement of Foreign Arbitral Awards in Georgia, Max-Planck-Institut für ausländisches und internationales Privatrecht (Eds.), Hamburg 2009, p. 1
[175] Michael Wietzorek, New Arbitration Law in the Republic of Georgia, post on the Kluwer Arbitration Blog (www.kluwerarbitrationblog.com), p. 1.
[176] *Ibid.*
[177] There is no official English translation of this law yet, so, the translation is done by the author and is not an official

While on the other hand, according to the UNCITRAL, the arbitration of the Russian Federation is based on the UNCITRAL Model Law 1985.[178] The Article 7 of the Russian Federation law on International Commercial Arbitration (RICAL) is identical to the Article 7 of the Model Law 1985.[179] The grounds of refusing the recognition and enforcement in both Georgian and Russian legislation are the same as provided in Article V of the NY Convention and in almost all the jurisdictions. According to GAL and RICAL invalidity of the arbitration agreement of not compliance with the written form requirement is one of the grounds for refusing recognition and enforcement of the award.[180] These arbitration acts also follow the Article 36 of the Model Law 2006, which subjects the validity of the arbitration agreement to the laws which was chosen by the parties or in case of designing the governing law for the arbitration agreement the law of the country where award was made. Those grounds provided in the national arbitration laws of the neighboring countries are exhaustive and does not allow the courts to go into the merits of the arbitral award. Therefore, theoretically these two jurisdictions could be considered to be arbitration-friendly,[181] the different issue is how it works in practice and if there is an correct interpretation of the written form requirement in Georgian and Russian state courts.

In this regard what can be said without any doubt is that the arbitration in republic of Georgia is far away from maturity and the development in this regard progresses like a newborn child. The reasons for these vary, but mainly it is associated with Georgia's legal heritage, received from the Soviet Union. After breaking down of the Soviet empire the corrupt practices were

[178] *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
[179] See Law of the Russian Federation of on International Commercial Arbitration – in force 14 August 1993, Ar. 7. English version is available at http://www.jus.uio.no/lm/russia.international.commercial.arbitration.1993/
[180] see Art 45 of Georgian Arbitration Law and Art 36 of Russian Arbitration Law
[181] As it was already stated the Russian Arbitration Law is modeled after the UNCITRAL Model Law 1985, while Georgian law is completely mirroring the text of the Model Law as amended in 2006

inherited in Georgia and as a result business groups became more conservative and fearful and on the other hand lawyers and government unqualified, *inter alia*, in arbitration.[182]

The situation is different in Russian Federation. Notwithstanding the same legal heritage from the Soviet Union, Russia's arbitration dates back to 1932 since it constitutes one of the major economic markets in the world and due to the intensive commercial relationships with Europe and other major consumers of the world it had more incentives to develop the commercial arbitration.[183] As a result some *ad hoc* arbitration institutions like International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the ICAC), Arbitration Court of the Moscow Chamber of Commerce and Industry, Arbitration Court of St Petersburg Chamber of Commerce and Industry, etc.[184] Thus, there is lot more intensive case-law and legal expertise available in Russia regarding the arbitration compare to its neighboring republic of Georgia.

In Russian Federation, as in most of the progressive jurisdictions, the arbitration has turned into the new phase – towards eliminating the formalities and becoming more faithful in arbitration proceedings. My submission is based on the arbitration review submitted by the Russian lawyers who report that in past Russian courts would deny the recognition and enforcement of the foreign arbitral award, *inter alia*, if the arbitration agreement was not countersigned.[185] However, in praising of the Russian courts, this approach has been changed and in *ESF Euroservices BV v. Hyundai Merchant Marine* Presidium of the Supreme Arbitrazh Court enforced the award in a manner like the progressive courts do, based its decision on the conduct of the parties, rather looking at the formality of signature. The lower

[182] Dr. Peter Binder, LL.M, Technical Report of Georgian-European Policy and Legal Advice Centre (GEPLAC) – Phase V, "Advice on the implementation of legislation in the area of commercial arbitration" Identified problem areas and proposed solutions, available at www.geplac.ge/eng/Reports.php
[183] Patricia Nacimiento and Alexey Barnashov, Recognition and Enforcement of Arbitral Awards in Russia, September 2010, White & Case, p. 2
[184] For more information see Mikhail Ivanov and Inna Manassyan, The International Arbitration Review, Law Business Review, 2nd edition, August 2011 – ed. James H Carter, Chapter 34 – Russia, p. 380
[185] *Ibid.* p. 382

court in this case denied the enforcement of the award *inter alia*, based on the finding that the bill of lading was not signed by the parties. However, the Presidium ruled that the arbitration agreement may be valid notwithstanding the absent of signature, if from the conduct of the parties the court can determine the true intention and consent of the parties to arbitrate.[186]

However, this decision does not mean that such progressive practice regarding the form of arbitration agreement is already established in Russia. There is one interesting case, which went through almost all instances in Russian Federation before the reaching a final decision. The case involved the exclusive distributorship contract between two companies containing the arbitration clause providing the arbitration in Sweden under the Stockholm Chamber of Commerce (SCC). When dispute arose, one party proposed in writing to amend the agreement and submit the dispute to German Institution of Arbitration (DIS). The other party without objecting the modification proposed to include the set-off claims to be addressed by the arbitrators. The DIS rendered the three awards, which was enforced by the district court, whose decision was reversed by the appeal. The court reasoned, *inter alia*, that the modification of the arbitration agreement has to be in writing and the modification here was not done in a valid manner. The court further submitted that failure to object to modification of arbitration agreement does not *per se* mean that arbitration agreement was concluded validly.[187]

This decision was further appealed in the Supreme Arbitrazh Court of the Russian Federation, which reversed the decision of lower court and found that the modification of the arbitration agreement was valid under the Article V(1)(a) of the NY Convention. The court based its decision on the conduct of the parties and found that the party by appointing the arbitrator

[186] Arbitration Court at the Transportation Central agency for the city of Moscow, *ESF Euroservices BV v. Hyundai Merchant Marine*, 2010 in Ivanov & Manassyan, pp. 382-383
[187] Federal Arbitrazh Court, Central District, *Lugana Handelsgesellshaft v Ry azan Plant of Metal-Cera mic Equipment (RPMCE)*, decision of 7 September 2009, YCA, Vol. XXXV (2010), pp. 429-431

expressed its consent to the proposed amendment, thus the agreement was validly modified.[188] However, this was not the final say of Russian courts and the Presidium of the Supreme Arbitrazh Court was asked to settle the difference between the Supreme Arbitrazh Court and Federal Arbitrazh Court. By its judgment of 2 February 2010, the Presidium approved the decision of the Supreme Arbitrazh Court and ordered the enforcement of the DIS awards.[189]

This case is very interesting since it shows the difference between the courts in Russian Federation and the tendency that all the changes and the steps of development takes time before it will become the uniform within the single jurisdiction. It could be concluded that the Russia, although slowly, but still tries to be on track and to follow those countries who are in favor of the business and thus, on the side of allowing justice based on parties' intentions.

On the other hand, in republic of Georgia the firstly, courts don't have lots of cases dealing with the enforcement of arbitral awards and secondly, are still strictly following the formal requirements of the arbitration, notwithstanding having in force modern and liberal legislation.[190] In one of its decisions the Supreme Court found the case inadmissible, where the Court of Appeals strictly followed the structure of the written form requirement as it is provided in Article II(2) of the Convention.[191] However, in the other decision, in which the issue was not the formal validity of the arbitration agreement, the Supreme Court in the *obiter dictum* gave explanation that the expression of one's will in the written form eliminates the errors of the desire, since the expression of intention in writing is the result of the

[188] Supreme Arbitrazh Court, *Lugana Handelsgesellshaft v Ry azan Plant of Metal-Cera mic Equipment (RPMCE)*, 12 November 2009, YCA, Vol. XXXV (2010), pp. 429-431

[189] Presidium of the Supreme Arbitrazh Court, Lugana Handelsgesellshaft v Ry azan Plant of Metal-Cera mic Equipment (RPMCE), 2 February 2010, YCA, Vol. XXXV (2010), pp. 429-431

[190] This summary is based on the scanty case law of the Court of Appeals of republic of Georgia (available only in Georgian language), which is the authority for enforcing the internal arbitral awards, since I was not able to find the cases of recent years in Supreme Court of Georgia, which is designed for enforcement of foreign arbitral awards. *see* Art 44 of GAL, which distinguishes the role of the Court of Appeals and the Supreme Court in enforcing domestic and foreign Awards

[191] Ruling of 12 July 2010, case no. as-572-539-2010, the Supreme Court of Georgia

acknowledged behavior.[192] This decision could encourage the practice in future to ensure the liberal interpretation of the written form requirement of the arbitration agreement and by doing so to make a reasonable interpretation based on the existing possibilities, discussed in previous parts of this paper – UNCITRAL Recommendation, the revised Article 7 or even Article 8 of the GAL. Thus, Georgian courts have the possibility to eliminate the formal requirements as a barrier to the arbitration and on the other hand, to reach the outcome according to the true intention of the parties.

The different outcome will be in cases where through operation of the Article VII(1) of the NY Convention Georgian or Russian courts will apply their respective arbitration laws in cases of enforcing the arbitral award or the arbitration agreement. Unfortunately, yet there is no any published decision of the Supreme Court of Georgia, where it applied the Article 8 of GAL under the more-favorable law provision of the NY Convention to see the practical outcome. However, theoretically, the outcome under the GAL should be more arbitration-friendly than through application of the RICAL, since Article 8(4) of the GAL like Article 7(3) of the Model Law 2006 provides that the content of the arbitration agreement can be recorded in any form, thus recognizing the oral agreements as well.

However, this is the one side of the analysis only and the practice may dictate the different; this is the lesson I have studied during the comparison of these two jurisdictions. To have a perfectly modern and updated legislation does not *per se* mean that it serves its function properly. The law on the paper is not effective, but it acquires effectiveness and power in the courts. And reality today is the following: the Russian courts are using comparatively old legislation more effectively than the Georgian courts – the latest word in international commercial arbitration.

[192] *see* Ruling of 4 November 2010, case no. as-411-384-2010, the Supreme Court of Georgia

CONCLUSION

The the subject of the research of this paper was the written form of an arbitration agreement stipulated in the Article II(2) of the NY Convention and existing dilemma caused by this outdated requirement in modern world. Not uniform interpretation and not corresponding to the interests of the parties caused the process of the liberalization of written form requirement. This process has started in the courtrooms of different jurisdictions and the lack of uniformity caused uncertainty and instability in arbitration and effective and simple enforcement of arbitral awards – regulated by the NY Convention was jeopardized.

This paper has examined the writing requirement of arbitration agreement in detail based on extensive case-law, commentaries and the different working documents of UNCITRAL before concluding that the NY Convention provides the room to extend the Article II(2) to cover modern means of the communication for concluding the valid arbitration agreement. Paper also discussed the vague, but still not finally abolished policy of Article II(2) – minimum or maximum requirement and has come to the position that in order to protect the interests of the parties and avoid the abuses based on formalities Article II(2) shall be a minimum requirement only and the "circumstances described therein are not exhaustive".

The paper also went into depth of the work of the working process carried out by UNCITRAL and analyzed the Article 7 of the 1985 Model Law, as well as the revisions of 2006, which gives two alternatives as of the form of arbitration agreement. Studies of the case law regarding the Article 7 of 1985 version revealed some shortcomings and lack of uniformity, since it was drafted according to structure of the Article II(2) of the Convention and was adhering the requirement of signature and exchange. On the other hand, the revised Article 7, in *Option I*, seems to be the Golden-Middle of the dilemma of arbitration agreement. It abolishes the formalities of signature and exchange and shifts the purpose of

formalities towards the evidentiary purpose, recognizing the supremacy of the intention of the parties and thus eliminating the dilemma at most.

In addition to this the paper analyzed the UNCITRAL Recommendation of 2006 and has come to the position that nowadays the ideal for the protection of the parties, promotion of the interests of the business and for sake of justice will be if states amend their national legislations according to the revised Article 7 of Model Law and use it as a tool for interpret the Article II(2) of the NY Convention. However, this was not the only suitable solution found by this paper, since the same outcome can be reached if the states replace the Article II(2) and the related outdated mechanism of the NY Convention by their national legislation through operation of more-favorable law provision of the Article VII(1).

Furthermore, the paper examined the influence of the national legislation regarding the form of arbitration agreement and the influence it has in the process of enforcing arbitral awards. Taking into account the previous developments and modifications paper finds that it is of crucial importance that the states have updated legislation, since through the Articles V(1)(a) and VII(1) national law can influence the enforcement of the arbitration agreement and the award.

Lastly, paper applied its findings to the national legislations in two neighboring countries in Republic of Georgia and Russian Federation, compared their legislation to each other and to the latest amendments and modifications and concluded that having a perfect legislation does not *per se* guarantee the desired result, but it depends to the courts of the state, how progressive they are in their interpretations and reasoning.

BIBLIOGRAPHY

Books:

Blackaby, N., & Patrasides, C.

"Recognition and Enforcement of Arbitral Awards" in Redfern and Hunter on International Arbitration, Redfern, Hunter, et al., Oxford University Press, 2009, pp. 621-679;

Fouchard, Gaillard, Foldman

"On International Commercial Arbitration", Kluwer Law International, 1999, Kluwer Law International, http://www.kluwerarbitration.com;

Holtzmann, H.M., Neuhaus, J.E.

"A Guide to the UNCITRAL Model Law on International Commercial Arbitration, legislative history and commentary", Kluwer Law and Taxation Publishers, 1989;

Haas, Ulrih

"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards," in Practitioner's Handbook on International Arbitration, ed. Frank-Bernd Weigand, Munich: C.H. Beck, 2002;

Ivanov M., & Manassyan, I.

"Chapter 34 – Russia", in the International Arbitration Review, Law Business Review, 2nd ed., August 2011, ed. James H Carter, pp. 375-388;

ICCA Guide

ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, International Council for Commercial Arbitration 2011, Kluwer Law International, http://www.kluwerarbitration.com;

ICCA Congress Series

"The Application of the New York Convention by the Courts", ICCA Congress Series No. 9 (Paris, 1999), pp. 25-35, Kluwer Law International, http://www.kluwerarbitration.com;

Kronke, Nacimiento, Otto, Port

"Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention", Kluwer Law International, 2010, Kluwer Law International, http://www.kluwerarbitration.com;

Kröll, Lew, Mistelis

"Comparative International Commercial Arbitration", Kluwer Law International, 2003, Kluwer Law International, http://www.kluwerarbitration.com;

Landau, T., & Moollan, S.

"Article II and the Requirement of Form" in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, ed. Emmanuel Gaillard ad Domenico Di Pietro, London: Cameron May, 2008;

Nacimiento, Patricia

"Article V(1)(a)" in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Herbert Kronke et al.(eds), Kluwer Law International, 2010, Kluwer Law International, http://www.kluwerarbitration.com;

Otto, Dirk

"Article VII" in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Herbert Kronke et al.(eds), Kluwer Law International, 2010, Kluwer Law International, http://www.kluwerarbitration.com;

Van den Berg, A.J.

"The New York Convention of 1958 – Towards a Uniform Judicial Interpretation", Dewenter, Kluwer Law and Taxation Publishers, 1994, Kluwer Law International, http://www.kluwerarbitration.com;

"The New York Convention of 1958: An Overview", Yearbook Commercial Arbitration Vol. XXVIII (2003), Kluwer Law International, http://www.kluwerarbitration.com;

Varady T., Barcelo J.J. III, von Mehren, A.T.

"International Commercial Arbitration, Transnational Perspective", WEST Academic Publishing, 4th ed. 2009

Articles:

Al Khalifa, Haya Sheika

Enforcing arbitration awards under the NY Convention, experience and prospects, United Nations Publication, 1998, United Nations, http://www.uncitral.org;

Arsic, Jasna

"International Commercial Arbitration on the Internet: Has the Future Come Too Early?" Journal of International Arbitration Vol. 14 no. 3 (September 1997), pp. 209-221;

Binder, Peter

"Advice on the implementation of legislation in the area of commercial arbitration: Identified problem areas and proposed solutions." Technical Report of Georgian-European Policy and Legal Advice Centre (GEPLAC) - Phase V, www.geplac.ge/eng/Reports.php;

Kaplan, Neil

"Is the need for writing as expressed in the New York Convention and the Model Law out of step with commercial practice?" Arbitration International, Vol. 12, No. 1, (1996), pp. 28-46;

Nacimiento, P., & Barnashov, A.

"Recognition and Enforcement of Arbitral Awards in Russia", (White & Case, September 2010), http://www.whitecase.com;

Sanders, Pieter

"Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?" Arbitration International Vol. 20**,** (2004), pp. 243-268;

Tsertsvadze, Giorgi

"Recognition and Enforcement of Foreign Arbitral Awards in Georgia", Max-Planck-Institut für ausländisches und Internationales Privatrecht (Eds.), Hamburg 2009;

Uzelac, Alan

"Written Form of the Arbitration Agreement: Towards a Revision of UNCITRAL Model Law" Croatian Arbitration Yearbook, Vol. 12 (2005), pp. 111-123;

"The Form of the Arbitration Agreement and the Fiction of Written Orality How Far Shall We Go?" Croatian Arbitration Yearbook, Vol. 8 (2001), pp. 83-107;

Walker, Janet

"Agreeing to disagree: Can we just have words? CISG Article 11 and the Model Law writing requirement", Journal of Law and Commerce, Vol. 25 (2006), pp. 153-165;

Wietzorek, Michael

"New Arbitration Law in the Republic of Georgia", post on the Kluwer Arbitration Blog

Kluwer Arbitration Blog, www.kluwerarbitrationblog.com.

Legislative Acts:

International instruments

1958 – Convention on Recognition and Enforcement of Foreign Arbitral Awards, the "New York" Convention;

1985 – UNCITRAL Model Law on International Commercial Arbitration;

1985 – UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006;

2006 – Recommendation regarding the interpretation of article II (2), and article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958);

Explanatory Note by the NUCITRAL Secretariat on the1985 Model Law on International Commercial Arbitration;

Explanatory Note by the NUCITRAL Secretariat on the1985 Model Law on International Commercial Arbitration as Amended in 2006;

UNCITRAL Documents:

- Document A/54/17 – Report of the UNCITRAL on the work of its thirty-second session, 17 May – 4 June 1999;
- Document A/61/17, Report of UNCITRAL on the work of its thirty-ninth session, 19 June-7 July 2006;
- Document A/CN.9/468, Report of the Working Group on Arbitration on the work of its thirty-second session, Vienna, 20 – 31 March 2000;
- Document A/CN.9/508 – Report of the WG II on the work of its thirty-sixth session New York, 4-8 March 2002;

- Document A/CN.9/592 – UNCITRAL Thirty-ninth session, New York, 19 June-7 July 2006;
- Document A/CN.9/606 – UNCITRAL Thirty-ninth session, New York, 19 June-7 July 2006;
- Document A/CN.9/607 – UNCITRAL Thirty-ninth session, New York, 19 June- 7 July 2006;
- Document A/CN.9/WG.II/WP.108/Add.1, Thirty-second session, Vienna, 20-31 March 2000;
- Document A/CN.9/WG.II/WP.118, UNCITRAL WG II Thirty-sixth session New York, 4-8 March 2002.
- Document A/CN.9/WG.II/WP.139 – UNCITRAL WG II, Forty-fourth session New York, 23-27 January 2006;
- General Assembly Official Records Sixty-first session, Supplement No. 17 (A/61/17);

United Nations Documents:

- UN DOC E/CONF.26/L.63 – "New text of Arts I(3), V(1)(a), (b) and (c) adopted by the Conference at its twenty-third meeting", 9 June, 1958.
- UN DOC E/CONF.26/SR.23 – "Summary Record of the Twenty-third Meeting", 9 June, 1958.

National laws

2009 – Republic of Georgia Law on Arbitration;

1993 – Russian Federation Law on the International Commercial Arbitration.

On-Line Sources:

Kluwer Law International, http://www.kluwerarbitration.com;

Kluwer Arbitration Blog, www.kluwerarbitrationblog.com;

United Nations, http://www.uncitral.org;

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html;

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html;

http://www.jus.uio.no/lm/russia.international.commercial.arbitration.1993/;

Georgian-European Policy and Legal Advice Centre, www.geplac.ge/eng/Reports.php.

TABLE OF CASES

Court Decisions:

Canada

Manitoba Court of Appeal, 11 December 2002, *Leon Schellenberg v, Sheldon Proctor,* YCA, Vol. XXVIII (2003), pp. 745-751.

France

Paris Court of Appeal, France, 20 January 1987, *Bomar Oil N.V. v. Enterprise Tunisienne d' Activities Petrolieres,* (Court d' Appel, Paris), YCA, Vol. XIII (1988), pp. 466-470.

Georgia

Supreme Court of Georgia, Ruling of 12 July 2010, *case no. as-572-539-2010;*

Supreme Court of Georgia, Ruling of 4 November 2010, *case no. as-411-384-2010;*

Germany

Oberlandesgericht, Thuringia, 10 March 2004, Buyer v. Seller, YCA, Vol. XXXIII (2008), pp. 495-499;

Oberlandesgericht, Cologne, 23 April 2004, *Israeli Trading Company v. German Buyer,* YCA, Vol. XXX (2005), pp. 557-562;

Bavarian Supreme Court, 23 September 2004, *K Trading Co. v. Bayerische Motoren Werke AG* (Bayerisches Oberstes Landesgericht), YCA, Vol. XXX (2005), pp. 568-573;

Court of Appeal of Munich, 12 October 2009, *Swedish Seller v. German Buyer,* (Oberlandesgericht, Munich), YCA, Vol. XXXV (2010), pp. 383-385.

Hong Kong

High Court of Hong Kong, 13 May 1994, *H. Small Limited v. Goldroyce Garment Limited*, unpublished decision, CLOUT Case 64: MAL 7.

Italy

Supreme Court of Italy, December 13 1971, *Ditta Augusto Miserocchi v. Paolo Agnesi S.p.A.*, (Corte di Cassazione), YCA, Vol. I (1976), pp. 190-191;

Court of Appeal of Florence, 8 October 1977, *Bobbie brooks Inc. v. Lanifici Walter Banci S.a.S.* (Corte di Appello di Firenze), YCA, Vol. IV (1979), pp. 289-292;

Supreme Court of Italy, 18 May 1978, *Societa Altas General Timbers S.p.A. v. Agenzia Concordia Line S.p.A.* (Corte di Cassazione), YCA, Vol. V (1980), pp. 267-268;

Supreme Court of Italy, 18 September 1978, *Gaetano Butera v. Pietro and Romano Pagnan* (Corte di Cassazione), YCA, Vol. IV (1979), pp. 296-300;

Supreme Court of Italy, 15 April 1980, *Lanifici Walter Banci S.a.S. v. Bobbie brooks Inc.* (Corte di Cassazione), YCA, Vol. VI (1981), pp. 233-236;

Court of Appeal of Bari, 28 October 1983, *H. & H. Hackenberg v. Ventrella Guido Francesco e Figli snc*, (Corte di Appello, Bari) YCA, Vol. XIV (1989), pp. 680-682;

Court of Appeal of Bari, 30 November 1989, *Finagrain Compagnie Commerciale Agricole et Financière SA v. Patano snc*, (Corte di Appelo, Bari), YCA, Vol. XXI (1996), pp. 571-575;

Supreme Court of Italy, 28 October 1993, *Robobar Limited v. Finnocold SAS* (Corte di Cassazione), YCA, Vol. XX (1995), pp. 739-741;

Supreme Court of Italy, 10 March 2000, *Krauss Maffei Verfahrenstechnik GmbH, et al. v. Bristol Myers Squibb*, (Corte de Cassazione), YCA, Vol. XXVI (2001), pp. 816-822.

Norway

Hålogaland Court of Appeal, Norway, 16 August 1999, *Charterer v. Shipowner*, YCA, Vol. XXVII (2002), pp. 519-523

Russia

Arbitration Court at the Transportation Central agency for the city of Moscow, 2010, *ESF Euroservices BV v. Hyundai Merchant Marine*, in Ivanov & Manassyan;

Federal Arbitrazh Court, Central District, 7 September 2009, *Lugana Handelsgesellshaft v Ry azan Plant of Metal-Cera mic Equipment (RPMCE)*, YCA, Vol. XXXV (2010), pp. 429-431;

Supreme Arbitrazh Court, 12 November 2009, Lug*ana Handelsgesellshaft v Ry azan Plant of Metal-Cera mic Equipment (RPMCE)*, YCA, Vol. XXXV (2010), pp. 429-431;

Presidium of the Supreme Arbitrazh Court, 2 February 2010, *Lugana Handelsgesellshaft v Ry azan Plant of Metal-Cera mic Equipment (RPMCE)*, YCA, Vol. XXXV (2010), pp. 429-431.

Spain

Supreme Court of Spain, 14 November 2007, Lim*ber, S.A. v. Cutisin, S.A.* (Tribunal Supremo), YCA, Vol. XXXIII (2008), pp. 703-709.

Switzerland

Supreme Court of Basel, 3 June 1971, *Dutch Seller v. Swiss Buyer* (Obergeicht of Basel), YCA, Vol. IV, pp. 309-311;

Court de justice, Geneva, 14 April, 1983, *Carbomin S.A. v. Ekton Corporation*, YCA, Vol. XII (1987), pp. 502-505;

Court of Appeal of Basel-Land, Switzerland, 5July 1994, *DIETF Ltd. v. RF AG*, YCA, Vol. XXI (1996), pp. 685-689;

Tribunal Fédéral, 16 January 1995, *Compagnie de Navigation et Transports SA v. MSC - Mediterranean Shipping Company SA*, YCA, Vol. XXI (1996), pp. 690-698.

United States

Supreme Court of New York, Appellate Division, First Department, 25 April 2006, Gabriel Capital, L.P., et al. v. CAIB Investmentbank Aktiengesellschaft, etc., et al., (814 N.Y.S.2d. 66), YCA, Vol. XXXI (2006), pp. 1482-1484;

United States Court of Appeals, Fifth Circuit, 23 March 1994, *Sphere Drake Insurance PLC v. Marine Towing, Inc.*, (1994, 16 F.3d 666.) = YCA, Vol. XX (1995), pp. 937-942;

United States Court of Appeals, Second Circuit, 12 August 1999, *Baker Marine Ltd. v. Chevron Corp,*. (191 F.3d 194), = YCA, Vol. XXIVa (1999), at pp. 909-914;

United States Court of Appeals, Second Circuit, 14 April 2005, *Sarhank Group v. Oracle Corporation,* YCA, Vol. XXX (2005), pp.1158-1164;

United States Court of Appeals, Second Circuit, 29 July 1999, *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, (1999, 186 F.3d 210.) = YC, Vol. XXIVa (1999), pp. 900-908;

United States Court of Appeals, Third Circuit, 20 June 2003, *Standard Bent Glass Corp. V. Glassrobots Oy.*, YCA, vol. XXIX (2004), pp. 978-989.