

SECURING HARMONIZED EFFECTS OF ARBITRATION AGREEMENTS UNDER THE NEW YORK CONVENTION

*Leonardo D. Graffi**

I. INTRODUCTORY REMARKS	666
A. <i>The Role and the Interpretation of Article II of the New York Convention</i>	666
1. <i>The Interpretive Concerns Regarding Article II of the New York Convention</i>	669
B. <i>The Importance of a Single Harmonized Interpretation of Article II</i>	670
1. <i>Diverging National Interpretations</i>	670
2. <i>Why a Single Harmonized Approach Is Desirable</i>	671
C. <i>Ensuring a Truly International Duty of Referral to Arbitration</i>	673
II. THE DOCTRINAL FRAMEWORK	675
A. <i>The Purpose of a Readily Enforceable International Arbitration Agreement</i>	675
1. <i>Avoiding Domestic Courts</i>	675
2. <i>Avoiding Dilatory Tactics</i>	676
3. <i>The Most Common Dilatory Techniques</i>	678

* J.D. University of Bologna (honors), L.L.M. Harvard Law School (2004), Associate, Simpson Thacher & Bartlett LLP. Gratitude is owed to Professor Peter Murray for his invaluable thoughts during the preparation of this paper. I wish to thank Professor Franco Ferrari for his guidance, friendship, and encouragement in pursuing the publication of this Article. Finally, I am greatly indebted to Professor Chiara Giovannucci Orlandi for all her thoughtful remarks, which cast light on the publication of this Article. All remaining errors are my own.

664	HOUSTON JOURNAL OF INTERNATIONAL LAW	[Vol. 28:3
	<i>B. The Effects of the Arbitration Agreement</i>	679
	1. <i>Positive Effects Under the New York Convention</i>	679
	2. <i>Positive Effects Under the UNCITRAL Model Law and the UNCITRAL Arbitration Rules</i>	681
	3. <i>Negative Effects Under the New York Convention</i>	683
	4. <i>Negative Effects Under the Model Law</i>	684
	III. COURT REFERRAL TO ARBITRATION	685
	A. <i>Is the Duty of Referral a Uniform Mandatory Rule?</i>	685
	1. <i>The Dangers Associated With the Use of Domestic Procedural Devices</i>	685
	2. <i>The Obligation to Refer the Parties to Arbitration</i>	688
	B. <i>Court Referral to Arbitration: Conditions of Referral to Arbitration</i>	691
	1. <i>The Law Applicable to the Validity of the Arbitration Agreement</i>	691
	2. <i>The Principle of Autonomy of the Arbitration Agreement</i>	699
	3. <i>Request of a Party</i>	701
	C. <i>The Relationship Between Article II and the Applicable Municipal Laws</i>	702
	1. <i>The Importance of Letting the Arbitrators Decide First</i>	705
	IV. THE CASE LAW APPROACH	707
	A. <i>France</i>	707
	1. <i>The Duty of Referral Under the French Code of Civil Procedure</i>	707
	2. <i>The Relationship Between Article II of the New York Convention and Article 1458 of the French Code of Civil Procedure</i>	711
	3. <i>The Prima Facie Standard of Review</i>	712

B.	<i>The French Liberal Approach to the Issue of Substantive Validity</i>	715
1.	<i>The Hecht Decision</i>	716
2.	<i>The Dalico Decision</i>	718
3.	<i>The Bomar Oil Saga</i>	720
C.	<i>The United States</i>	723
1.	<i>The U.S. Supreme Court's Pro-Enforcement Bias</i>	723
2.	<i>The Scherk Decision</i>	724
3.	<i>The Mitsubishi Decision</i>	726
4.	<i>The Preconditions for Referral Under the Ledee v. Ceramiche Ragno Doctrine</i>	730
D.	<i>The U.S. Judicial Scrutiny on the Validity of International Arbitration Agreements: The Applicable Provisions</i>	733
1.	<i>Federal Law v. State Contract Law</i>	733
2.	<i>The Federalist Approach</i>	736
3.	<i>The State Contract Law Approach: The First Options Standard of Review</i>	738
E.	<i>Italy</i>	745
1.	<i>Referral to Arbitration in the Italian Legal System</i>	745
2.	<i>The Strict Standard of Review of Italian Courts: Form Over Substance</i>	747
3.	<i>The Strange Case of Krauss Maffei v. Bristol Myers Squibb</i>	750
V.	SECURING THE EFFECTS OF ARBITRATION AGREEMENTS UNDER THE NYC: THE PROPOSED HARMONIZED SOLUTION	753
A.	<i>A Comparison of the Different Standards of Enforcement: Advantages and Shortcomings</i>	753
1.	<i>Summary of the U.S. Approach</i>	754
2.	<i>Summary of the French Approach</i>	755
3.	<i>Summary of the Italian Approach</i>	755
B.	<i>The French Prima Facie Standard of Review as the Best Harmonized Solution</i>	756

1. <i>The Obstacles to an Amendment of Article II of the New York Convention</i>	756
2. <i>The Advantages of the French Interpretive Method</i>	760
C. <i>The Suggested Interpretive Solution: Judicial Review of Arbitration Agreements at the Final Stage Only</i>	763
VI. CONCLUSIONS	765

I. INTRODUCTORY REMARKS

A. *The Role and the Interpretation of Article II of the New York Convention*

There is little doubt that the arbitration agreement is the pillar of international arbitration.¹ The enforcement of an arbitration agreement entails a number of important effects, among which the following are the most relevant:

- the parties' rights and duties to commence the arbitration proceedings;
- the competence of the arbitral tribunal to decide the controversy;

1. Several books and articles have stressed the importance of arbitration agreements in international contracts. For a nonexhaustive bibliography on this topic, see PAUL FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* (2000); Gerold Herrmann, *The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts*, in *INTERNATIONAL ARBITRATION IN A CHANGING WORLD* 41 (Albert Jan van den Berg ed., 1994) [hereinafter Herrmann, *Arbitration Agreement*]; PAUL A. GÉLINAS, *ARBITRATION CLAUSES: ACHIEVING EFFECTIVENESS, IN IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS* 47 (Albert Jan van den Berg ed., 1999); Sam Aaron, *International Arbitration: Drafting an Arbitration Clause for International Commercial Contracts*, 107 S. AFR. L.J. 633 (1990); Xavier Boucobza, *La Clause Compromissoire Par Référence En Matière D'Arbitrage Commercial International*, REV. ARB. 495 (1998) (on file with author); Sandra Obuljen, *Joint Venture Agreements: Drafting Arbitration Clauses*, 6 CROAT. ARB. Y.B. 141 (1999); Nicholas C. Ulmer, *Drafting the International Arbitration Clause*, 20 INT'L LAW. 1335 (1986); Vera Van Houtte, *Consent to Arbitration Through Agreement to Printed Contracts: The Continental Experience*, 16 ARB. INT'L 1 (2000).

- the national courts' duties to refer the parties to arbitration;
- the parties' rights to seek enforcement of an arbitral award based on their agreement to arbitrate.

To produce these effects, the arbitration agreement is enforced under a relevant set of norms, either domestic or international. Presently, it is well known that the greatest majority of the international arbitration agreements concluded throughout the world fall under the sphere of application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC, New York Convention, or Convention).² The NYC is considered the most successful private international law treaty of the twentieth century.³ Since its adoption, more than 130 countries have entered it into force (hereinafter the Contracting States).⁴ The Convention expressly deals with the arbitration agreement under article II, which provides that:

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

2. See Albert Jan Van Den Berg, *The 1958 New York Arbitration Convention Revisited*, in ASA SPECIAL SERIES NO. 15, ARBITRAL TRIBUNALS OR STATE COURTS: WHO MUST DEFER TO WHOM? 125-26 (Pierre A. Karrer ed., 2001).

3. See *id.*; see also Martin Gusy, *The History and Significance of the New York Convention*, 4 VINDOBONA J. INT'L COM. L. & ARB. 147, 147 (2000) ("The New York Convention is one of the many, and one of the most important, attainments of the United Nations in promoting a more effective and universal rule of law. Thereby it serves international trade and commerce, which has been one of the objectives pursued during the diplomatic conference in 1958.").

4. For a list of the countries which have entered into force the NYC, see UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION § 8 (United Nations Comm. on Int'l Trade Law 1985), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 9, 2006).

exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁵

The broad wording of this rule shows that the Convention has an immense impact on the effectuation of arbitration agreements in the Contracting States. Article II governs both the enforcement of arbitration clauses and their requirements in every corner of the world. Over time, the interpretation of this provision has become increasingly complicated due to a high number of diverging applications by national courts and arbitral tribunals in several jurisdictions.

Many of these interpretive discrepancies have been ascribed to the last minute inclusion of article II in the NYC.⁶ In fact, the NYC was originally meant to deal only with arbitral awards, not with arbitral clauses. The drafters' initial intention was to address the issue of arbitration agreements in a separate protocol, but, during one of the last New York conference meetings, they decided to include a provision on agreements in the NYC.⁷ From the outset, article II suffered from a lack of

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

6. See *United Nations Conference on International Commercial Arbitration, Summary Record of the 23rd Meeting*, U. N. Doc. E/CONF.26/SR.23 (Sept. 12, 1958), reprinted in *INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION III.C.202*, 211 (Giorgio Gaja ed., 1978) [hereinafter *UN Conference on ICC*].

7. The last minute inclusion of Article II in the New York Convention was the result of the "Dutch proposal" made by Professor Sanders. For a historical background on the "Dutch proposal," see Pieter Sanders, *The History of the New York Convention*, in *ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION* 11, 12-13 (Albert Jan Van Den Berg ed., 1998) [hereinafter *IMPROVING THE EFFICIENCY*]; see also Martin Domke, Comment, *The United Nations Conference on International Commercial Arbitration*, 53 *AM. J. INT'L L.* 414 (1959); ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 172-73 (1981); CLAUDIO MINOLI, *LA NUOVA CONVENZIONE PER IL RICONOSCIMENTO E L'ESECUZIONE DELLE SENTENZE ARBITRALI STRANIERE*, *RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE* 953 (1958) (on file with author).

coordination with other provisions of the Convention.

1. *The Interpretive Concerns Regarding Article II of the New York Convention*

Unfortunately, the last-minute inclusion of article II is only one of the factors that gives rise to interpretive concerns of the NYC. Several of the current shortcomings of this provision are related to the adoption of new arbitration laws in the Contracting States, which often seem better equipped to deal with the enforcement of international arbitration agreements rather than the NYC as a treaty.⁸

Further, although article II is held to be a uniform provision, which supersedes municipal laws,⁹ the interplay between domestic arbitration rules and the NYC is often inevitable and leads to conflicting interpretations.

The NYC does not govern every step of the enforcement of an international arbitration agreement and leaves many issues under the domain of domestic statutes and rules.¹⁰ At a preliminary stage, Contracting States' courts apply article II together with their domestic arbitration statutes when a party objects to their jurisdiction pursuant to an arbitration agreement.¹¹ This practice, however, is extremely risky at a later stage, since the Convention sets forth under article V(1)(a) a specific ground for refusing the recognition of an arbitral award rendered pursuant to an invalid arbitral clause.¹² In doing so, article V plainly requires the arbitration agreement to comply with the requirements of article II. For that reason, a preliminary review of the validity of an arbitration agreement by a court pursuant to article II is essential to ensure a

8. For an exhaustive comparative analysis of the arbitration laws of the world, with a detailed overview of the most relevant provisions and their interaction with international arbitration treaties, that is, the NYC, see JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003) [hereinafter LEW].

9. See, e.g., VAN DEN BERG, *supra* note 7, at 173; KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 133 (1993).

10. See VAN DEN BERG, *supra* note 7, at 123.

11. *Id.*

12. See New York Convention, *supra* note 5, art. V(I)(a).

successful enforcement of the award at a later stage. This is why article II plays a double role: It is the key provision for the commencement of the arbitration proceedings, and it is also a precondition for the enforcement of the arbitral award.¹³

B. The Importance of a Single Harmonized Interpretation of Article II

1. Diverging National Interpretations

Notwithstanding the importance of article II within the NYC's system and its impact on the practice of international arbitration, little has been done to ensure that national courts achieve a harmonized interpretive standard for this provision. No one can, or should, object to the need to promote arbitration as an invaluable instrument for the resolution of international commercial disputes. Indeed, the arbitration agreements must be given effect because the benefits of arbitration often outweigh its drawbacks.¹⁴ Yet, the need for an ever-increasing effective enforcement of arbitration agreements must lead the parties, the judges, and the arbitrators to strive for a consistent harmonized application of the NYC. From a policy perspective, the ratification of the Convention by virtually all the countries of the world should encourage, rather than discourage, a true international interpretation of this instrument, which should not depend on the domestic interpretations rendered in each jurisdiction. So far, however, municipal courts have expressed very different views on how to apply article II, undermining the

13. See *Herrmann, Arbitration Agreement*, *supra* note 1, at 42.

14. Many authors reached this conclusion after comparing the advantages and pitfalls of arbitration in respect to litigation and other ADR methods. See, e.g., Andrew I. Okekeifere, *Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?*, 15 J. INT'L ARB. 81, 105 (1998) ("It is obvious from the foregoing discussion that arbitration can hardly still lay claim to that hallowed description of 'fast, easy, and cheap.' It has developed several debilitating problems and its private nature has hindered development which would have helped it overcome those problems. As against litigation, arbitration is still a better dispute resolution method those problems notwithstanding. As against the ADR methods it is also, even if just by a few considerations, still a better dispute resolution method, the growing impact of conciliation and mediation notwithstanding."); see generally Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988) (discussing thoughtfully and supporting with empirical data the pros and cons of arbitration).

predictability of their outcomes. Extremely different interpretive standards can be found, for example, in American, French, or Italian case law on article II of the NYC.¹⁵ There is great uncertainty even on the most basic legal notions underlying article II. Caught by frustration, some legal commentators suggested that this provision be interpreted in the light of more enabling national statutes or even in the light of international business practices.¹⁶

2. *Why a Single Harmonized Approach Is Desirable*

This Article purports to suggest that a single harmonized approach to the use of article II of the NYC can lead to a more efficient effectuation of international arbitration clauses. A survey of the case law dealing with this provision will provide the empirical basis of this theory. The single harmonized approach is desirable for two main reasons: (1) to achieve legal certainty and predictability in all the NYC Contracting States

15. See *infra* Part IV.

16. For a liberal interpretation of arbitration agreements falling under article II, see Herrmann, *Arbitration Agreement*, *supra* note 1, at 45-46 (expressing the belief that there should be full freedom of form for arbitration agreements); 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. INT'L* 27 (1996); Toby Landau, *The Requirement of a Written Form For an Arbitration Agreement: When "Written" Means "Oral,"* in *ICCA CONGRESS SERIES NO. 11, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 19* (Albert Jan Van Den Berg ed., 2002). For a famous case supporting the liberal interpretation of the writing requirements of an arbitration agreement, see *Zambia Steel & Bldg. Supplies Ltd. v. James Clark & Eaton Ltd.*, [1986] 2 *Lloyd's Rep.* 225, 233 (CA (Civ. Div.)) where the court significantly held that:

It is said in the present case that there is nothing in writing after the oral negotiations which led to the formation of the contract in Zambia. . . . [T]hat is true. But in my judgment, I do not find that the cases require me to hold that there must be some subsequent express acknowledgment in writing of an arbitration clause forming part of a document which, on the facts of the case, is found to be a part of the agreement. For the reasons which I have already given, I am satisfied that the quotation, including the printed terms on the back of it, did form part of the agreement of sale, and as a result, the arbitration clause was incorporated into that agreement. By making the agreement, albeit orally assenting to it, once it is clear that that document formed part of the agreement, then in my judgment the requirement of s. 7 of the 1975 Act is satisfied and there was a binding agreement to arbitrate.

Id.

and (2) to provide the parties to arbitration agreements with confidence in this alternative dispute resolution legal instrument.

To achieve these goals, the application of the NYC must stay free from domestic arbitration law and procedural law concepts. Unfortunately, the unwarranted use of “domestic legal interpretations” in international arbitration is increasing.¹⁷ Although domestic arbitration statutes are an important source of interpretation for the agreements not falling under the sphere of application of the NYC, in many instances article II of the NYC is disregarded even when it should be applied. Further, the use of “parochial” legal concepts dealing with purely domestic arbitration agreements tends to frequently spill in the international arena.

In this respect, it is a matter of concern that if one jurisdiction supports the interpretation and effectuation of arbitration agreements under domestic legal standards, other jurisdictions will refuse to enforce the awards within their borders.¹⁸ In fact, the plain disregard of the wording of the NYC or its narrow reading by a court in country A, at the time of referral to arbitration, can jeopardize an efficient enforcement of arbitral awards in country B. For instance, under the article V grounds for refusal,¹⁹ courts of country B may refuse to enforce an award because the parties did not effectively agree to arbitrate pursuant to article II. Thus, a court in country A may cause the parties to initiate arbitration, even when the agreement did not comply with article II of the NYC, but then in country B the winning party will face the risk that the award may be refused under article V.

17. *See infra* Part IV.

18. *See, e.g.*, *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The U.S. Supreme Court stated that:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our law, and resolved in our courts.

Id. at 9.

19. *See* New York Convention, *supra* note 5, art. V.

To prevent the arising of a chaotic situation, the proposed single harmonized interpretation of article II of the NYC must be supported by the majority of the Contracting States to ensure a sufficient degree of predictability among the international business community. To reach the preferable harmonized solution, it is of utmost importance to compare the different judicial views on the issue.

The preferable application of article II should constitute a balance between the need to enforce the parties' promise to arbitrate and the need to protect the parties' actual consent to arbitrate. In this respect, the crucial issue concerning the application of article II of the NYC is the duty of the domestic courts to refer the parties to arbitration.²⁰

C. Ensuring a Truly International Duty of Referral to Arbitration

The achievement of a harmonized and truly international interpretation of the duty of referral under article II(3) will enable the parties to reasonably rely on the effectuation of their arbitration clauses by the municipal judges.²¹ Unfortunately, this is not always an automatic consequence of the NYC's entry into force in a signatory country. In fact, it is over simplistic to state that courts pay deference to arbitration agreements in any case, merely because they are bound by the NYC.²²

The first challenge, which a party to an arbitration

20. See *id.* art. II(3).

21. See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 7 (3d ed. 1999) (stressing the relevance of the argument for international commercial arbitration law by legal commentators: "It would be of little use to enforce an obligation to arbitrate in one country if it could be evaded by commencing legal proceedings in another. Therefore, as far as possible, an agreement for international commercial arbitration must be given effect *internationally* and not simply in the place where the agreement was made.").

22. For these type of unrealistic considerations, see Philip J. McConaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT'L L. 595, 608-09 (2001) ("[I]n the context of international commercial arbitration, the New York Convention, modern national arbitration laws, and national judicial deference have combined to enable parties to international transactions to elect a virtually complete divorce between their private commercial arbitration procedures and awards, on the one hand, and any significant national 'control mechanisms' or judicial review, on the other.").

agreement must face every time it seeks to initiate the proceedings against the opposing party, is the duty of referral. It is at this stage that the judge has to make a fundamental decision: To let, or not to let, the parties arbitrate. It is unnecessary to point to the theoretical importance of an arbitration agreement, if in practice the judges do not uphold the duty of referral. To do so, judges must be aware of the international character of their obligation to refer the parties for arbitration. This business leaves no room for a discretionary choice by the domestic courts.²³ First, the obligation at hand stems from an international treaty. Next, it is based on the principle of international comity. Hence, the refusal to let the parties arbitrate their dispute is an exceptional remedy, which is applied to prevent irreparable harm to one party. No easy exit strategy should be available to the recalcitrant party of an arbitration agreement. However, municipal courts have expressed very different views on this matter.²⁴ Due to the very large number of Contracting States to the NYC, this analysis will be based mainly, albeit not exclusively, on the body of case law of the United States, Italy, and France. These countries constitute a significant example of the diverging solutions reached by the courts in the interpretation and review of arbitral clauses under article II of the NYC. These judges interpret the duty of referral under standards, which rest on different legal foundations.

Parts II and III of this Article will explore the effects of international arbitration agreements along with the relationship between the NYC and municipal arbitration statutes. Part IV will analyze the distinctive features of the judicial interpretive method of France, Italy, and the United States with respect to the duty of referral to arbitration and the standard of review for the validity of arbitration agreements. Finally, Part V will explore international arbitration policy issues and propose a new interpretation of article II of the NYC that purports to enhance the efficient use of arbitration agreements and secure

23. See, e.g., VAN DEN BERG, *supra* note 7, at 135 (“The mandatory character of the referral by a court to arbitration pursuant to article II(3) is an internationally uniform rule.”).

24. See *infra* Part IV.

their effectiveness.

II. THE DOCTRINAL FRAMEWORK

A. *The Purpose of a Readily Enforceable International Arbitration Agreement*

1. *Avoiding Domestic Courts*

The parties to an international contract choose to arbitrate for a number of reasons that have been widely discussed in legal literature.²⁵ The main reason is to avoid the inefficiencies and the delays of litigation in domestic courts.²⁶ An international arbitration agreement is a very peculiar contract. It is entered into for the primary purpose of avoiding domestic jurisdictions and picking experienced private adjudicators who can better handle an international dispute than an average domestic court.²⁷ The parties to an arbitration agreement freely decide to appoint their arbitrators—or to request an arbitral institution to appoint them—and are likely to select the place of arbitration along with the applicable substantive rules. Most often the

25. See REDFERN & HUNTER, *supra* note 21, at 24-30; FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD]; PIETER SANDERS, QUO VADIS ARBITRATION? SIXTY YEARS OF ARBITRATION PRACTICE: A COMPARATIVE STUDY 2-9 (1999); FRIEDLAND, *supra* note 1, at 1-21; Earl McLaren, *Effective Use of International Commercial Arbitration: A Primer for In-House Counsel*, 19 J. INT'L ARB. 473 (2002); Robert B. von Mehren, *An International Arbitrator's Point of View*, 10 AM. REV. INT'L ARB. 203 (1999).

26. This common wisdom statement is often found in legal literature. See, e.g., Thomas E. Carbonneau, *The Exercise of Contract Freedom in The Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1200 (2003) ("Relinquishing judicial recourse in domestic matters can have a negative impact upon rights protection. Even in this setting, however, the judicial safeguarding of rights may be more theoretical than real. Arbitration has achieved prominence domestically in large measure because courts are inaccessible to prospective litigants. Delays and costs make judicial litigation remote and unattractive."); William W. Park, *The 2002 Freshfields Lecture - Arbitration's Protean Nature: The Value of Rules and The Risk of Discretion*, 19 ARB. INT'L. 279, 280 (2003) (professing the belief that the one reason to arbitrate is "the hope of avoiding a grossly mismanaged judicial system" (quoting Laurence Shore, *What Lawyers Need to Know About International Arbitration*, 20 J. INT'L ARB. 67 (2003))).

27. See THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 3 (3d ed. 2002) (stating that national courts and laws are ill-suited for international commercial litigation and that the transacting parties' interests are protected by not referring their disputes to courts).

parties will select a neutral country as the seat of their arbitration proceedings. This choice is often the result of a compromise between the different opposing interests involved in the transaction. Thus, the parties have an incentive to craft the arbitration agreement according to their specific needs and to attempt to use the most precise language possible. An accurate drafting of the arbitration agreement will reduce potential controversy on the meaning of the clause, both at the start of the arbitration proceedings and at the later stage of enforcement of the award.²⁸ Additionally, a well-written arbitration agreement will enable the parties to waive the jurisdiction of a domestic court expeditiously. It is well known that a poorly drafted arbitration agreement may eventually jeopardize a party's chances to commence arbitration.²⁹

2. *Avoiding Dilatory Tactics*

The vast majority of published case law on the NYC deals with problems of enforceability of arbitration agreements because, before dismissing the agreements' competence, the courts must determine as a preliminary issue whether the

28. The parties to an arbitration agreement often do not indicate all the features of the arbitration. In the absence of the parties' choice, it will be up to a court or to the arbitrators to fill this gap. This is why it is advisable for the parties to specify, as much as possible, the features of the arbitration dispute well in advance. For a checklist of the points to be included in an arbitration agreement, see DAVID ST. JOHN SUTTON, JOHN KENDALL, JUDITH GILL, RUSSELL ON ARBITRATION 28-29 (22d ed. 2003).

29. See GÉLINAS, *supra* note 1, at 49 (explaining that "[a] badly drafted clause is a guarantee that the party being sued will drag its feet"). For suggestions on how to avoid this problem, see FRIEDLAND, *supra* note 1, at 39 ("An astonishing number of dispute resolution clauses in international contracts are inadequate or defective because the drafters fail to begin the drafting process by consulting and using readily available standard forms. Given the widespread availability of standard forms and suggested clauses tested at law and refined by experience, there can be no excuse for clauses that botch even the few elements necessary to an effective dispute resolution clause."). See *id.* at 40 (listing a number of fundamental elements that should be included in the arbitration agreement, for example, the place of arbitration, the number of the arbitrators, and the language of the proceedings).

parties consented to arbitrate.³⁰ One of the most common and unwanted situations³¹ that occur in practice is the following: Party A and party B conclude a contract, which embodies an arbitration clause. Later, a dispute arises and party B, normally the party in breach of contract, will file a lawsuit before a court of its home country against party A, alleging a lack of consent to arbitrate and the invalidity of the arbitral clause. Party A will then object to the competence of that court and request a referral to arbitration under article II(3) of the NYC.³²

At this point it is essential to assess the validity of the clause to determine whether the parties should be permitted to proceed with their arbitration. Thus, Professor van den Berg pointed out that the first purpose of a readily enforceable arbitration agreement is “to ensure that parties seeking to obstruct the arbitration are not able to do so by exploiting court proceedings concerning the existence, scope, and validity of the

30. For a general commentary on the issue of referral to arbitration under article II(3) of the NYC and for a detailed list of cases dealing with this issue, see A. J. van den Berg, *Consolidated Commentary New York Convention: Referral to Arbitration: 217.1 In General*, in YEARBOOK COMMERCIAL ARBITRATION 608 (Albert Jan van den Berg ed., 2003).

31. See, e.g., Oberlandesgericht [Court of Appeal], Hamm, Nov. 15, 1994, reprinted in YEARBOOK COMMERCIAL ARBITRATION 707 (1997); Malarky Enter. v. Healthcare Tech., Ltd., 962 F. Supp. 1427 (D. Kan. 1997), rev'd, 153 F.3d 727 (10th Cir. 1998), reprinted in YEARBOOK COMMERCIAL ARBITRATION 945 (1998); Star Shipping v. China Nat'l Foreign Trade Transp. Corp., [1993] 2 Lloyd's Law Reports 445; Lancaster v. Lark Int'l Ltd., 956 F. Supp. 1131 (S.D.N.Y. 1997), reprinted in YEARBOOK COMMERCIAL ARBITRATION 1029 (1998). This problem is described also by Catherine Kessedjian, *Court Decisions on Enforcement of Arbitration Agreements and Awards*, 18 J. INT'L ARB. 1 (2001).

32. This typical hypothetical situation can be found, for example, in *Anam Indus. Co., Ltd. v. Twi Lite Int'l Inc.*, No. C-96-2323 SI, 1996 U.S. Dist. LEXIS 16060 (N.D. Cal. Oct 24, 1996), also in YEARBOOK COMMERCIAL ARBITRATION 910-11 (1998). Here, a controversy arose over the distribution in the United States of light switches manufactured by Anam, a Korean enterprise. *Anam*, 1996 U.S. Dist. LEXIS 16060 at *2-7. The agreement provided, *inter alia*, for a nonexclusive distributorship and contained an arbitration clause providing for arbitration in Seoul, Korea, under the rules of the Korean Commercial Arbitration Board. *Id.* at *4. When a dispute took place, the American company sued the Korean company in California, before the San Mateo Superior Court. *Id.* at *1. The Korean company, Anam, removed the action from state court to federal court and requested a referral to arbitration pursuant to article II(3) of the NYC. The referral was eventually granted because the arbitration clause was found to be valid. *Id.* at *21.

arbitration agreement.”³³

If party B’s claim is upheld, it will have an enormous impact on the effectiveness of an arbitration clause because the court may not only deny referral to arbitration, but may also nullify the clause. Further, B’s success in court will force A to start litigation in a foreign country and to incur high costs to enforce its right to commence the arbitration proceedings. This hypothetical case is very likely to occur in the Contracting States of the NYC,³⁴ and the courts seized by the issue will reach very different conclusions on whether the parties should be referred to arbitration. Yet, the validity objection to the arbitration clause is only one of the many dilatory tactics that a recalcitrant party can pursue to avoid arbitration.³⁵

3. *The Most Common Dilatory Techniques*

Other dilatory strategies include, but are not limited to the following: (a) the challenge of the arbitrators; (b) the request for conservative measures; (c) the filibustering of a party-appointed arbitrator; (d) the failure to pay the arbitrators’ deposit; and (e)

33. See VAN DEN BERG, *supra* note 7, at 185.

34. See W. MICHEAL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 107 (1992) (“Private international commercial arbitration depends, for its effectiveness, on substantial and predictable governmental and intergovernmental support. Plainly, an arbitration clause between businessmen in two separate jurisdictions will be effective only if, should one of the parties ignore the arbitration clause and try to select a convenient or favorable court, the courts in *all* relevant jurisdictions refuse to exercise judicial jurisdiction over the case. . .”).

35. For a list of possible claims of invalidity of the arbitration agreement, see John J. Barcelò III, *Who Decides the Arbitrators’ Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANS’L L. 1115, 1118-19 (2003) (“(1) the container contract is invalid (for a reason that would not directly invalidate the arbitration clause); (2) no arbitration agreement came into existence between the parties; (3) an existing arbitration agreement is either formally invalid (for example, not in writing) or materially invalid (for example, violative of mandatory law); (4) a disputed issue is not within the scope of the arbitration agreement; (5) mandatory law prohibits a disputed issue, though within the scope of the parties’ arbitration agreement, to be arbitrated (a special type of material invalidity respecting a specific issue fraught with public policy concerns, such as (formerly) antitrust or securities fraud); (6) some precondition for permissible arbitration has not been met (for example, a time-limit on initiating arbitration); (7) the party seeking arbitration has waived its right to arbitrate or is estopped from claiming that right.”).

the unjustified failure of a party to participate in the hearings.³⁶ This is why even a perfectly drafted arbitration clause may still not completely guarantee a successful start of the arbitration proceedings. Unlike other objections, however, the invalidity of the arbitration agreement, if upheld, will be final; that is, it will preclude the use of arbitration. Thus, it is crucial to secure the effects of arbitration agreements from the outset because the parties need be protected against obstructions and delays in the arbitral process.³⁷

B. *The Effects of the Arbitration Agreement*

1. *Positive Effects Under the New York Convention*

From a doctrinal perspective, the enforcement of an international arbitration agreement triggers two distinct sets of effects: positive effects and negative effects.³⁸ The first kind of effects, positive, can essentially be described as the power of the arbitration agreement to compel the parties to commence the arbitration proceedings. This principle can be examined in both of the following cases: (A) from the perspective of a domestic court and (B) from the perspective of an arbitral tribunal.

36. For a detailed analysis of the dilatory techniques in international commercial arbitration, see Emmanuel Gaillard, *Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international*, REVUE DE L'ARBITRAGE 759 (1990) (noting that both the parties and the arbitrators are often responsible for the delays in the arbitration proceedings). Due to the importance of this topic, the International Council for Commercial Arbitration dedicated an entire congress to the issue of dilatory tactics in arbitration. See ICCA CONGRESS SERIES NO. 5, XTH INTERNATIONAL ARBITRATION CONGRESS, STOCKHOLM, 21-29 MAY 1990 (A.J. van den Berg ed., 1991); see also MAURO RUBINO SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 608 (2d ed. 2001).

37. For thoughtful remarks on the usefulness of a correct enforcement of arbitration agreements, see REISMAN, *supra* note 34, at 107-08 ("All of the possibilities for defeating arbitration commitments exploit differences in national legal arrangements in the various pertinent jurisdictions. Dealing effectively with them is a prerequisite to a system of arbitration. But this requires securing uniform arrangements about arbitral commitments in different states."); M. Scott Donahey, *Defending the Arbitration against Sabotage*, 13 J. INT'L ARB. 93, 110 (1996) (on file with author).

38. This traditional doctrinal distinction can be found in many legal commentaries on international commercial arbitration. See, e.g., RENÉ DAVID, L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL 290 (Emmanuel Gaillard & John Savage eds., 1982); FOUCHARD, *supra* note 25, at 381; SAMMARTANO, *supra* note 36, at 250-54.

In case (A), it should be noted that the NYC expressly endorses the positive effects doctrine pursuant to article II(3), which imposes a duty upon a court to “refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed.”³⁹ Thus, the positive effects doctrine is recognized throughout the world in all the NYC Contracting States. The rule of article II(3) is also incorporated in the arbitration law of England and governs all arbitration agreements, whether domestic or foreign.⁴⁰

In case (B), the positive effect of the arbitration agreement is that it grants authority to the arbitral tribunal to rule on its own jurisdiction. This calls into question the universally accepted⁴¹ principle of kompetenz-kompetenz,⁴² also known as the French expression compétence-compétence.⁴³ Under this principle, once an arbitral tribunal is constituted, it has the power to proceed with its task of rendering an award.⁴⁴ The tribunal has no duty to stay the proceedings if a domestic court is seized with an action, and which aims to declare the arbitration agreement null and void.⁴⁵

39. New York Convention, *supra* note 5, art. II(3).

40. *See, e.g.*, Arbitration Act, 1996, c.23, § 9(4), (U.K.) (according to one of the drafters of the law, the Act is “taken directly from art. II NYC”); *see also* LORD MUSTILL & STEWARD C. BOYD, *COMMERCIAL ARBITRATION* 268 (2d ed. 1989).

41. The importance of this principle to international arbitration is such that Professor Lalive has even suggested that it should be considered a principle of public international order. *See* Pierre Lalive, *Ordre Public Transnational (ou Réellement International) et Arbitrage International*, *REVUE DE L'ARBITRAGE* 329, 350 (1986).

42. The term was first used by German legal scholars. *See* Walther Habscheid, *Das Problem der Kompetenz-Kompetenz des Schiedsgerichts*, 78 *SCHWEIZER JURISTENZEITUNG* 321 (1982) (on file with author).

43. *See* GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 55-75 (2d ed. 2001); Alan S. Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 *AM. REV. INT’L ARB.* 1 (2003); Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz*, in *IMPROVING THE EFFICIENCY*, *supra* note 7, at 217.

44. *See* CARBONNEAU, *supra* note 27, at 20.

45. *See* MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION, CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* 524 (2001) (“[I]n its simplest formulation, *compétence-compétence* means no more than that the arbitrators can look into their jurisdiction without waiting for a court to do so. In other words, there is no need to stop arbitral proceedings to refer a jurisdictional issue to judges.”) (on file with author). For a recent ICC arbitral award

2. *Positive Effects Under the UNCITRAL Model Law and the UNCITRAL Arbitration Rules*

Under the positive effects doctrine, the arbitral tribunal is empowered to rule on objections concerning its jurisdiction, including the validity of the arbitration agreement. The *compétence-compétence* principle is frequently discussed by legal commentators⁴⁶ and can be found in almost all⁴⁷ domestic arbitration statutes,⁴⁸ especially in the jurisdictions⁴⁹ that

holding this principle, see *ICC Award, December 7, 2001, no. 10623*, 21 ASA BULLETIN 82, 90 (2003), where the arbitrators stated that “[i]t would be a clear breach of the fundamental principle of *compétence-compétence* if an international arbitral tribunal were obliged to stay its proceedings in deference to a court proceeding which had specifically been instituted to determine the question of the tribunal’s jurisdiction.”

46. For a recent publication on the principle of *compétence-compétence*, see Barcelò, *supra* note 35, at 1116. Further reference to the role of *compétence-compétence* can be found in the following sources: Peter Gross, *Competence of Competence: An English View*, 8 ARB. INT’L 205 (1992); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT’L ARB. 133, 140-42 (1997); ADAM SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, U.S. AND WEST GERMAN LAW 178 (1989) (“[I]f there is one thing over which modern writers on arbitration seem to agree, it is that arbitrators must be allowed to rule on their own jurisdiction.”) (on file with author).

47. See BERGER, *supra* note 9, at 351 (“All arbitration laws and the arbitration rules . . . give the tribunal the power to rule on the existence and the scope of its own jurisdiction.”).

48. For a detailed analysis of the domestic arbitration statutes which adopted the principle of *kompetenz-kompetenz*, see STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 1-60 (Cambridge 1987); LEW, *supra* note 8. For an analysis of the differences in the domestic arbitration laws with regards to this principle, see JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, DROIT COMPARÉ DE L’ARBITRAGE INTERNATIONAL 407 (2002).

49. At the present time, legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in the following: Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Canada, Chile, China (Hong Kong Special Administrative Region and Macau Special Administrative Region), Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, the United Kingdom (Scotland, Bermuda, and overseas territories), the United States of America (California, Connecticut, Illinois, Oregon and Texas), Zambia, and Zimbabwe.

implemented the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law or ML).⁵⁰ The Model Law expressly sets forth this principle in article 16: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.”⁵¹

Even if some legal systems did not expressly incorporate this principle, the parties can always choose to make reference in their arbitration agreement to the 1976 UNCITRAL Rules or the rules of the most important arbitral institutions, for example, the ICC Rules,⁵² which incorporate the doctrine of *kompetenz-*

UNCITRAL website, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration_status.html (last visited Apr. 9, 2006).

50. UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION (United Nations Comm. on Int'l Trade Law 1985) [hereinafter UNCITRAL Model Law], available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf> (last visited Apr. 9, 2006). For bibliographical references to the Model Law, see *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, Introduction, ¶ 1, U.N. Doc. A/CN. 9/264/1985; PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS: AN INTERNATIONAL COMPARISON OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (London, 2004) (on file with author); MICHAEL J. BONELL, UNA NUOVA DISCIPLINA MODELLO SULL'ARBITRATO COMMERCIALE INTERNAZIONALE, DIRITTO DEL COMMERCIO E DEGLI SCAMBI INTERNAZIONALI 3 (1987) (on file with author); ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1990); Philippe Fouchard, *La Loi-type de la C.N.U.D.C.I. sur l'arbitrage commercial international*, JOURNAL DE DROIT INTERNATIONAL 861-85 (1987) (on file with author); Gerold Herrmann, *The UNCITRAL Model Law-Its Background, Salient Features and Purposes*, 1 ARB. INT'L 6 (1985); ARI HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989) (on file with author); Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 ARB. INT'L 1 (1995); Martin Hunter, *International Commercial Arbitrations: The UNCITRAL Model Law*, INT'L BUS. LAW. 189 (1984) (on file with author); ISAAK I. DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE (1993).

51. UNCITRAL Model Law, *supra* note 50, art. 16.

52. See RULES OF ARBITRATION, art. 6, ¶ 4 (Int'l Chamber of Commerce 1998) (“Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is nonexistent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective

kompetenz. For instance, article 21(1) of the UNCITRAL Rules provides that “the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”⁵³

It is clear from this language that under the positive effects doctrine, the arbitral tribunal has the first word on the validity of the arbitration agreement. The arbitrators are entitled to decide on the parties’ objection, with priority over the courts.⁵⁴

3. *Negative Effects Under the New York Convention*

Professors Fouchard, Gaillard, and Goldman define the negative effects of the arbitration agreement as the power to prevent the courts from deciding the controversy.⁵⁵ Under this view, courts should take a very limited scrutiny on the validity of arbitration agreements and should refrain from holding jurisdiction unless they find the arbitration clause to be manifestly null and void. As Professor Barcelò pointed out in a recent paper, the “primary policy justification for this approach

rights of the parties and to adjudicate their claims and pleas even though the contract itself may be nonexistent or null and void.”), available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (last visited Apr. 9, 2006).

53. UNCITRAL Model Law, *supra* note 50, art. 16 ¶ 1.

54. See, e.g., SAMUEL, *supra* note 46, at 181 (“Where the arbitrator is seized of a dispute he has the right to rule on his own jurisdiction. . . . Only after he has rendered an award or interim ruling on the jurisdictional question, can a municipal court decide the issue itself.”). Notwithstanding this clear cut reading of the *Kompetenz-Kompetenz* principle, it should be noted that a much less clear situation can occur when the debate over this doctrine takes place before a court. See TIBOR VÁRADY, JOHN BARCELÒ III & ARTHUR T. VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION 117 (2d ed. 2003) (“Arbitrators are competent to rule on their own jurisdiction, but so are courts. If one party seeks relief from a court while the other party asserts arbitral jurisdiction, two approaches are possible. On one hand, a broad understanding of the *Kompetenz-Kompetenz* idea suggests that the court should let the arbitrators first decide whether they have competence. On the other hand, one can argue that the court is obliged first to establish its own competence or incompetence. In the latter case—assuming the court would be competent in the absence of an arbitration agreement—the court will only refer the case to arbitration after it establishes that there is a valid and operative arbitration agreement, because only valid and operative arbitration agreements ‘oust’ the jurisdiction of courts.”).

55. See FOUCHARD, *supra* note 25, at 402.

is to prevent a party from obstructing or delaying arbitration.”⁵⁶

In international arbitration disputes, the negative-effects doctrine seeks to facilitate a waiver of the jurisdiction of domestic courts. Under the NYC, the negative effects are laid down in article II(3), according to which:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁵⁷

4. *Negative Effects Under the Model Law*

The negative effects principle for article II(3) of the NYC is mirrored in article 8(1) of the Model Law:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁵⁸

Thus, once the existence of an arbitration agreement is contested, the competent domestic court must stay its proceedings and let the arbitrators decide the controversy, unless it finds the agreement to arbitrate null and void or the matter not capable of being settled by arbitration.⁵⁹

56. See Barcelò, *supra* note 35, at 1125 (“The French doctrine allows greater court scrutiny if a party goes to court before the case has been presented to arbitrators, on the theory that such a party is more likely to be acting in good faith with legitimate concerns about the arbitrators’ jurisdiction. But even here, initial court review is only to establish a prima facie case for arbitration. If this prima facie test is met, or if an arbitral tribunal is already seized, the arbitrators themselves must be the first to give full consideration to jurisdictional challenges. Since most arbitration statutes and institutional rules provide for the arbitrators to render a preliminary award on jurisdiction, in most cases such a preliminary award will not be long in coming.”).

57. New York Convention, *supra* note 5, art. II(3).

58. UNCITRAL Model Law, *supra* note 50, art. 8(1).

59. For a more detailed discussion of this general rule, see BERGER, *supra* note 9,

In spite of this clear and efficient rule, the extent to which a court may decide to exercise discretion in reviewing the validity of the arbitration agreement greatly differs from country to country. Because the international arbitration treaties do not provide a harmonized standard of review, the door is left open for undesired judicial review of the arbitral clauses through the lenses of domestic substantive law. Such attitude might eventually jeopardize the whole purpose of the positive- and negative-effects doctrines.

III. COURT REFERRAL TO ARBITRATION

A. *Is the Duty of Referral a Uniform Mandatory Rule?*

1. *The Dangers Associated With the Use of Domestic Procedural Devices*

According to Professor van den Berg, “[T]he mandatory character of the referral by a court to arbitration pursuant to article II(3) is an internationally uniform rule,” which supersedes domestic law along with the judge’s discretionary power.⁶⁰ Yet, although the principles just discussed are recognized in virtually all of the Contracting States to the NYC, the level of deference that courts pay to them may be different. Because the NYC is silent on many issues, the extent to which the effects of the arbitration agreement are recognized largely

at 322-24 stating that:

A valid arbitration agreement excludes the competence of the court . . . the court has to declare that it has no jurisdiction over the case if:

- the defendant invokes the plea of an existing arbitration agreement;
- the plea is raised before submitting or no later than when submitting a first statement on the substance of the dispute;
- the defendant, in invoking the arbitration agreement, does not merely take advantage of a formal legal position established by the arbitration agreement and the claimant does not invoke the plea of *exceptio doli*;
- the subject matter of the dispute is arbitrable;
- the arbitration agreement is not ‘invalid’ or not ‘null and void, inoperative, incapable of being performed’ under the applicable law.

Id.

60. See VAN DEN BERG, *supra* note 7, at 135 (stating that this provision “supersedes domestic law which may provide that the court has a discretionary power whether or not to stay a court action brought in violation of an arbitration agreement”).

depends on the domestic implementing statutes and national case law. Furthermore, not all judges are aware of the “internationally uniform rule” and they keep a domestic interpretive attitude when seized with a request to enforce an arbitration agreement.⁶¹ Often, the courts read the “mandatory” rule of article II in light of their domestic procedural law principles.⁶² Domestic procedural technicalities strongly contribute to undermine the uniform mandate of article II(3) of the NYC.⁶³ To save time and effort, courts prefer to treat the enforcement of the arbitration agreement as a domestic procedural matter only, rather than an international one. Hence, the interpretation of an international arbitral clause is almost by habit entangled with many unnecessary domestic jurisdictional and procedural issues, which often lead courts to retain jurisdiction over the matter.

In the United States, domestic procedural concepts lead the courts to affirm that they should first decide whether an arbitral tribunal has jurisdiction to hear a dispute.⁶⁴ Further, domestic procedural concepts enable the parties to challenge the validity of the arbitration agreement with independent suits, which seek to nullify the arbitral clause.⁶⁵ These domestic procedural

61. Professor Park expressed criticism of the use of domestic concepts for international arbitration disputes by municipal courts. See William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1248 (2003) (holding that “[t]he spillover of domestic precedents into international cases will inevitably chill selection of U.S. cities for arbitration (with fewer fees to arbitrators and counsel) by foreign parties understandably hoping to avoid excessive judicial interference.”).

62. *Id.* at 1262-63.

63. *Id.* at 1263.

64. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (upholding the Court of Appeals' decision by agreeing that courts should independently decide whether an arbitration panel has jurisdiction over a dispute because the courts, not the arbitrators, may have a first word on the issue of arbitrability).

65. For a discussion of independent suits and their distinction from embedded suits, see *Filanto v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993), holding that:

If the suit is ‘independent,’ *i.e.*, the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or not arbitrable, and no party seeks any other relief, a final judgment ending such litigation is appealable at once. . . . If the suit is ‘embedded’ *i.e.*, a party has sought some relief other than an order requiring or prohibiting arbitration (typically some relief concerning the merits of the allegedly arbitrable

devices impose a sure limitation on the effects of the arbitration agreement and delay the commencement of international arbitral proceedings. However, domestic procedural law can be necessary to deal with issues not expressly governed by the NYC. In this respect, unlike article VI(1)⁶⁶ of the 1961 Geneva Convention or article 8(1)⁶⁷ of the Model Law, which both require the party to invoke the existence of the arbitration agreement before submitting the first statement on the substance of the dispute, article II(3) of the NYC does not indicate the time limit for this action.⁶⁸ Consequently, when the NYC applies, this issue must be decided under the applicable domestic procedural law.⁶⁹ These differences can create sharp contradictions in the case law of the Contracting States. With special regards to the central issue of the validity of the arbitration agreement, it should be stressed that there is a tendency to review the parties' agreement to arbitrate under domestic substantive contract law principles.

In the United States, the courts use an extensive power of review over NYC arbitration agreements. They often render a final decision on the scope, validity, or termination of the

dispute), orders denying arbitration are immediately appealable

Id.; see also VÁRADY, *supra* note 54, at 85 (“[I]f there are doubts about the validity of the arbitration agreement, one of the parties may wish to clarify this before seeking another form of dispute settlement. (This will yield an ‘independent suit’).”).

66. European Convention on International Commercial Arbitration of 1961, art. VI(1), Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter Geneva Convention], available at <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/> (“A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance.”).

67. UNCITRAL Model Law, *supra* note 50, art. 8(1) (noting that a “court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests *not later than when submitting his first statement on the substance of the dispute* . . .” (emphasis added)).

68. See SAMUEL, *supra* note 46, at 198; UNCITRAL Model Law, *supra* note 50; New York Convention, *supra* note 5, art. II(3).

69. It should be noted, however, that this problem cannot be overestimated because, among the reported case law on the NYC, there are no major decisions addressing the issue of time barred objections on the validity of the arbitration agreement.

arbitration agreement, rather than simply deciding if the agreement is null and void.⁷⁰ The arbitrators, not the courts, should look closely at the issue of validity. In Italy, courts are excessively focused on formal requirements under article II(2) and have often declared the arbitral clause null and void pursuant to a narrow reading of the concept of arbitration agreement “in writing.”⁷¹

In light of these preliminary considerations, it can be argued that, although article II(3) aims to create a uniform system of enforcement for arbitration agreements, its mandate has been so far disregarded by many municipal courts that it is hardly still perceived as an international uniform rule. This means that in some countries the courts do not actually feel bound by a uniform duty of referral, even though their statutes recognize this principle. It follows that courts retain jurisdiction more often than necessary.⁷²

2. *The Obligation to Refer the Parties to Arbitration*

The meaning of the third paragraph of article II is ambiguous because it fails to clarify what the court should do when seized with an arbitrable matter. Presently, when the existence of an arbitration agreement is invoked before a municipal court, the court has the following options:⁷³ (a) dismiss

70. See discussion on U.S. case law *infra* subpart IV.C.

71. See discussion on Italian case law *infra* subpart IV.E.

72. In this regard, it should be pointed out that some English commentators believe that courts should exercise discretionary power to decline jurisdiction whenever the parties' dispute is totally unsuitable for arbitration. See SIR MICHAEL J. MUSTILL & STEWARD C. BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 475-76 (2d ed. 1989).

73. According to SAMMARTANO, *supra* note 36, at 252, the arbitration agreement may have the following effects on court proceedings:

- compel state courts to declare their lack of jurisdiction;
- put the state court under an obligation to transfer the file to the arbitrators;
- cause an order to be issued compelling the parties to refer the dispute to arbitration;
- leave the state court free to decide whether proceedings should be stayed or not; or
- be of no effect in a given jurisdiction.

the case, (b) stay the court proceedings and wait for the arbitrators to rule on their jurisdiction, (c) compel the parties to arbitrate the dispute,⁷⁴ or (d) hold the arbitration agreement invalid and retain jurisdiction over the controversy.

In most countries, especially those of civil law tradition, the courts do not have the power to compel the parties to initiate arbitration; thus, they can merely render a preliminary procedural decision to stay their own proceedings.⁷⁵ Actually, if a party refuses to arbitrate in spite of a court's stay order, there might be a problem with the arbitrators' appointment, but a mere refusal to arbitrate will not prevent the arbitral tribunal from deciding the matter.⁷⁶ Thus, a court order to compel arbitration is not required because many arbitration laws provide for gap-filling mechanisms of court intervention for the appointment of the arbitrators.⁷⁷ These mechanisms eventually lead to the formation of the arbitral tribunal in spite of a party's refusal to appoint its arbitrator.⁷⁸ Unfortunately, however, the

74. This measure is a typical feature of common law countries, but is not generally available in civil law jurisdictions. See BERGER, *supra* note 9, at 327 ("[T]he court merely declines the exercise of its jurisdiction and leaves it to the parties to initiate the arbitration proceedings."); see also VAN DEN BERG, *supra* note 7, at 128-32. For a discussion of the court order compelling performance of an agreement to arbitrate under the FAA, see BORN, *supra* note 43, at 381-952.

75. See BERGER, *supra* note 9, at 327; VAN DEN BERG, *supra* note 7, at 128-32; BORN, *supra* note 43, at 381-95.

76. See, e.g., *Collins v. Int'l Dairy Queen, Inc.*, 2 F. Supp. 2d 1465, 1468 (M.D.Ga. 1998) (arbitration may be compelled despite one party's refusal to arbitrate).

77. According to POUURET & BESSON, *supra* note 49, at 445, the expression "refer the parties to arbitration" cannot be interpreted literally because the NYC leaves it up to the national laws to determine which measure shall be adopted for that purpose.

78. The Model Law, and all the arbitration laws of the jurisdictions that have enacted it, provides for a mechanism of court appointment in the event that the parties fail or refuse to appoint their arbitrators. Article 11 of the Model Law states that:

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the

NYC does not address this issue and fails to provide the interpreter with sufficient guidelines. The lack of clear language inevitably encourages the judges to follow their domestic procedural rules for all the aspects concerning the enforcement of an international arbitration agreement. Many courts then fail to interpret the duty of referral as a broad international uniform concept and treat it simply like any other domestic issue. The courts do not feel bound by the treaty rule and enjoy wide discretion on whether the parties' agreement to arbitrate should be enforced.

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- arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
- (a) a party fails to act as required under such procedure, or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

UNCITRAL Model Law, *supra* note 50, art. 11. For a discussion of the national laws providing a role for the courts in the appointment of the arbitrators, see FOUCHARD, *supra* note 25, at 519.

B. Court Referral to Arbitration: Conditions of Referral to Arbitration

Under article II of the NYC, a court has a duty to refer the parties to arbitration only if three preliminary conditions are met: (a) the arbitration agreement is valid;⁷⁹ (b) the matter is capable of being settled by arbitration;⁸⁰ and (c) the party files a request to arbitrate.⁸¹

1. The Law Applicable to the Validity of the Arbitration Agreement

The validity of the arbitration agreement raises a twofold set of issues: formal issues and substantive issues. The judges and the arbitrators must first establish whether the agreement possesses at least the minimum formal requirements required by the NYC (the formal issue). Next, judges and arbitrators must determine whether the parties had freely consented to the agreement without fraud, duress, incapacity, or other impediments (the substantive issue).

Formal Validity

Article II(2) sets forth a uniform writing requirement, which is a necessary precondition for all arbitration agreements that fall under the NYC. This provision provides a definition of a written arbitration agreement: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁸²

Judge Neil Kaplan severely criticized the writing requirement of the NYC because of its rigidity and failure to address the needs of international business practitioners.⁸³

79. New York Convention, *supra* note 5, art. II(3).

80. *Id.* art. II(1).

81. *Id.* art. II(3).

82. *Id.* art. II(2).

83. *See, e.g.*, Kaplan, *supra* note 16, at 29 (criticizing that “[a]t this point it may be helpful to ask why there is a requirement of writing at all? We already know that substantial contracts are made and enforced only on oral terms. . . . [W]hat I have difficulty in seeing is why if one party is sent a contract which includes an arbitration

Accordingly, it has been suggested that international arbitration calls for greater flexibility, and, in response to this need, many national laws have progressively loosened their writing requirements for arbitration agreements.⁸⁴ Some domestic arbitration statutes contain a definition of agreement in writing that is more extensive than that of article II(2) of the NYC.⁸⁵ Thus, it is open to debate whether article II(2) is still a uniform provision that must supersede national law even when the latter is more favorable to the enforcement of the arbitration agreement.⁸⁶

Further, the writing requirement is probably one of the most

clause and that party acts on that contract and thus adopts it without any qualification, that party should be allowed to wash his hands of the arbitration clause but at the same time maintain an action for the price of the goods delivered or conversely sue for breach.”). Other less critical remarks can be found in Richard Hill, *The Writing Requirement of the New York Convention Revisited: Are there Black Holes in International Arbitration?*, 13 MEALEY'S INT'L ARB. REP. 11 (1998); VÁRADY, *supra* note 54, at 136-38; Michael Marks Cohen, *Arbitration 'Agreements in Writing': Notes in the Margin of the Sixth Goff Lecture*, 13 ARB. INT'L 273 (1997) (on file with author); *contra* Christofer Coakley, Note, *The Growing Role of Customized Consent in International Commercial Arbitration*, 29 GA. J. INT'L & COMP. L. 127, 148 (2000) (criticizing Mr. Kaplan's argument and pointing at the dangers of very liberal arbitration agreements: “The difficulty with Mr. Kaplan's argument for broadening article 7 is that it would open a Pandora's box concerning what constitutes an arbitration agreement. International courts are experiencing difficulties with the precise signed writing requirement of article 7. What would happen if we were to broaden the definition of what constitutes an arbitration agreement? One need only look to the United States for an answer. U.S. courts increasingly turn to alternative methods such as trade usage and industry custom to determine the validity of arbitration agreements. And, industry custom only compromises the integrity of arbitration.”).

84. See Houtte, *supra* note 1.

85. For a discussion of the relationship between article II(2) and domestic statutes, see Guillermo Aguilar Alvarez, *Article II(2) of the New York Convention and the Courts*, in IMPROVING THE EFFICIENCY, *supra* note 7, at 67; LEONARDO GRAFFI, RIFLESSIONI IN MATERIA DI FORMA DELL'ACCORDO ARBITRALE NELL'ARBITRATO COMMERCIALE INTERNAZIONALE, CONTRATTO E IMPRESA/EUROPA 72-152 (2002) (on file with author).

86. See DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958 81 (2001) (“There has been discussion whether article II establishes a maximum requirement of form, or whether article II provides a uniform formal requirement. The former would mean the Court is permitted, but not obliged, to adopt less stringent solutions (while the Convention remains applicable), while according to the latter, Article II(2) must be complied with exactly in order to obtain recognition and enforcement of the arbitration agreement under the New York Convention.”).

important conditions for enforcement because virtually every judge who deals with referral to arbitration must first assess the formal validity of the arbitration agreement. First, validity means compliance with the formal standards set forth by article II(2). This is an essential concept because there is a presumption of sorts that, if both parties have agreed in writing to arbitrate, the cautionary and evidentiary function of the requirement of article II(2) are met and the judge will be reassured that the parties really intended to arbitrate their dispute. Therefore, Professor van den Berg suggested that once the formal requirements of article II are satisfied, it is very unlikely that a judge will retain its jurisdiction and refuse to refer the parties to arbitration.⁸⁷

Although this is conventional wisdom, not every arbitration agreement is a neatly written clause highlighting the parties' consent. Most often, instead, the practical circumstances lead the parties to only partially comply with such requirements, which, as Judge Kaplan observed, may no longer be at step with commercial practices.⁸⁸

Frequently, it must be determined whether the parties actually concluded the arbitration agreement by simply performing the contract even though they had not expressly accepted the arbitration clause with an exchange of written documents.⁸⁹ Another issue is that of nonsignatory parties to the arbitration agreement,⁹⁰ for instance, subcontractors, reinsurers, or assignees of the main contract, who did not formally accept the clause. In a number of cases the courts have struggled to determine whether the writing requirements of article II are

87. See VAN DEN BERG, *supra* note 7, at 156 (“[A]lthough the written form of the arbitration agreement as required by [a]rticle II(2) does not concern questions regarding its formation, if this provision is met, a strong presumption exists that there is a ‘meeting of the minds’ since the requirements of [a]rticle II(2) are fairly strict.”).

88. See Kaplan, *supra* note 16, at 30.

89. See *Consolidated Commentary New York Convention, Formal Validity, Uniform Rule and Municipal Law*, in YEARBOOK COMMERCIAL ARBITRATION 584-87 (Albert van den Berg ed., 2003) (citing relevant cases).

90. For discussion on the issue of nonsignatory parties to arbitration agreements, with an extensive comparative analysis of different arbitration laws, see Daniel Girsberger & Christian Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, 8 ARB. INT’L 121 (1992).

met and whether a valid agreement in writing is concluded.⁹¹ Compliance with the formal requirements is thus an essential prerequisite for the validity of the arbitration agreement and constitutes the foundation of article II of the NYC, even though courts take a different approach with the interpretation of this requirement. In this regard, Italian courts have construed the meaning of an agreement in writing very narrowly.⁹²

Substantive Validity

Substantive validity of the arbitration agreement is also a preliminary issue for court referral to arbitration. It involves the assessment of the parties' actual consent to arbitrate and whether the consent existed or was tainted by fraud, violence, or unconscionability.⁹³ This must be decided under the substantive law applicable to the arbitration agreement.⁹⁴ Yet, article II does not govern issues of lack of consent, duress, fraud, or unconscionability, which may have affected the parties' decision to conclude the arbitration agreement.⁹⁵ A court may often face a daunting task when choosing the substantive law applicable to the arbitration agreement because the conflict of laws rules provide little or no guidance on this point.

If the parties did not choose the applicable law, under the principle of autonomy,⁹⁶ the law of the arbitration agreement is not necessarily that of the main contract in which the clause is embedded,⁹⁷ even though in practice the law of the main contract

91. See Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*, 34 *Geo. Wash. Int'l L. Rev.* 17, 62-74 (2002).

92. See discussion on Italian case law, *infra* subpart IV.E.

93. See Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 *BROOK. L. REV.* 1381, 1401-02 (1996).

94. See *id.* at 1386.

95. See VAN DEN BERG, *supra* note 7, at 287.

96. See *infra* subpart III.B.2.

97. This type of conclusion is often found in legal literature. See, e.g., Emmanuel Gaillard, *Validity and Scope of Arbitration Agreements*, 220 *N.Y. L.J.* 3 (1998); Pieter Sanders, *L'autonomie de la clause compromissoire*, in *ICC PUBLICATIONS: HOMMAGE À FRÉDÉRIC EISEMANN, LIBER AMICORUM* 34 (1978) (on file with author); VAN DEN BERG, *supra* note 7, at 146.

also governs the arbitration agreement.⁹⁸ Thus, the issue of the law applicable to the arbitration agreement is an extremely complex topic that falls outside the scope of this Article.⁹⁹ Suffice it to say that some authors and many court decisions, especially French decisions,¹⁰⁰ have expressed concern that the validity of the international arbitration agreement should not depend on considerations specific to any of the laws that might be connected to the case. On several occasions courts examined the validity of the arbitration agreement under existing transnational substantive law rules, such as *lex mercatoria*,¹⁰¹ or

98. See LEW, *supra* note 8, at 143 (“There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement.”); Yves Derains, *The ICC Arbitral Process Part VIII, Choice of Law Applicable to the Contract and International Arbitration*, 6 ICC INT’L CT. OF ARB. BULL. 10, 16 (1995) (“The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other as evidenced by the fact that the acceptance of the contract entails acceptance of the clause, without any other formality.”).

99. For a discussion on the issue of the applicable law in international commercial arbitration, with special reference to the law applicable to the arbitration agreement, see Marc Blessing, *The Law Applicable to the Arbitration Clause and Arbitrability*, in IMPROVING THE EFFICIENCY, *supra* note 7, at 168; Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, in IMPROVING THE EFFICIENCY, *supra* note 7, at 197; Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, 52 DISP. RESOL. J. 3, 24 (1997); GIUDITTA CORDERO MOSS, INTERNATIONAL COMMERCIAL ARBITRATION, PARTY AUTONOMY AND MANDATORY RULES 279-99 (1999); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT’L & COMP. L. REV. 235 (1985-86); Berthold Goldman, *Les conflits de lois dans l’arbitrage international de droit privé*, 109 RECUEIL DES COURS 347 (1963-II) (on file with author); LEW, *supra* note 73, at 114; Julian D.M. Lew, *Relevance of Conflict of Law Rules in the Practice of Arbitration*, in ICCA CONGRESS SERIES No. 7, PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION, 447 (1994); G. Sauser-Hall, *L’arbitrage en droit international privé, Rapport et Project de Resolutions*, 44 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL I 558 (1952) (on file with author); Jessica Thrope, *A Question of Intent: Choice of Law and The International Arbitration Agreement*, 54 DISP. RESOL. J. 16 (1999); C. Chatterjee, *The Reality of the Party Autonomy Rule in International Arbitration*, 20 J. INT’L ARB. 539 (2003); Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629 (1988-89).

100. See *infra* subpart IV.A.

101. French legal scholars have strongly encouraged recourse to *lex mercatoria* and contributed to its theorization in the 1960s. For the role of *lex mercatoria* in international commercial arbitration and its applicability, see LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., 1998); BERTHOLD GOLDMAN, LA LEX MERCATORIA DANS LE CONTRATS ET L’ARBITRAGE

even the 1980 Vienna Sales Convention.¹⁰² However, U.S. courts do not share this approach, as they normally apply either state common law contract principles or federal common law principles.¹⁰³ Italian courts, on the other hand, do not focus on this conceptual distinction and normally apply the substantive law of the main contract.

The Residual Role of Conflict of Laws Approach

The NYC does not indicate which law should apply to the validity of the arbitration agreement.¹⁰⁴ It simply enables the domestic court to retain the case if it finds the clause null and void, inoperative, or incapable of being performed.¹⁰⁵ In the absence of the parties' choice, the judges can either resort to the choice of law method or to the substantive contract law rules of the forum (*lex fori*).¹⁰⁶ The choice of law method for the law applicable to international arbitration agreements has been advocated by some authors,¹⁰⁷ who point to the conflicts rule of

INTERNATIONAUX: RÉÉALITÉ ET PERSPECTIVES, CLUNET 475 (1979) (on file with author); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985); Bruno Oppetit, THÉORIE DE L'ARBITRAGE 92 (1998); Michael Pryles, *Application of the Lex Mercatoria in International Commercial Arbitration*, 18 MEALEY'S INT'L ARB. REPORT 21 (2003); Ning Jin, Comment, *The Status of Lex Mercatoria in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 163 (1996).

102. For a U.S. decision applying the 1980 Vienna Sales Convention to determine the validity of an arbitration agreement, see *Filanto v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), available at <http://cisgw3.law.pace.edu/cases/920414u1.html>.

103. See discussion on U.S. case law, *infra* subpart IV.C.

104. See Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 19 (2002).

105. See *id.* at 33-34.

106. See *id.* at 17-18.

107. See LEW, *supra* note 8, at 145 ("Art. V(1)(a) of the New York Convention which provides that recognition and enforcement of the award may be refused on the ground that the arbitration agreement is void under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, may be the key to today's strict control of national courts and national legal systems on arbitration agreements compared to principles as regards the law and rules of law applicable to the merits."); MOSS, *supra* note 99, at 291; Sauser-Hall, *supra* note 99; John B. Tieder Jr., *Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration*, 20 J. INT'L ARB. 393 (2003).

Article V(1)(a). This provision states that:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.¹⁰⁸

This argument, however, does not take into account that the rule applies only at the stage of enforcement of the arbitration award. The rule cannot help the judge determine which law should apply when reviewing the issue of validity at the referral stage.¹⁰⁹ A drafter of the NYC stated that the proposal to include the article V(1)(a) choice of law rule into article II had been specifically rejected because of the concern that the forum might then have an obligation to enforce arbitration clauses regardless of its 'local' law.¹¹⁰

Another flaw in the conflict of laws approach is the impossibility of identifying the law applicable to the arbitration agreement under the characteristic performance criterion. It is

108. New York Convention, *supra* note 5, art. V(1)(a).

109. See Bernardini, *supra* note 99, at 200 ("[A] distinction must be made depending on whether the court is seized initially of an action notwithstanding the presence of an arbitration clause or at the stage of the annulment or enforcement of the award. I share the view that the law to be applied by a court in the first case, as contemplated by [a]rt. II(3) of the [NYC], has nothing to do with the law to be applied by a court, in case of a request for enforcement, under [a]rt. V(1)(a) of the Convention. While in the former case the court will apply the *lex fori* to determine the validity of the arbitration agreement, with the issue being whether its jurisdiction was validly derogated from by the parties, in the latter case it will apply to the same purpose the law referred to [a]rt. V(1)(a) (the law of autonomy or, failing the parties' choice, the law of the seat of arbitration)."). *But see* GIORGIO BERNINI, *L'ARBITRATO: DIRITTO INTERNO CONVENZIONI INTERNAZIONALI* 125 (1993) (noting that the conflicts of law rule of article V(1)(a) of the NYC should also be used by the national judge at the stage of referral to arbitration to determine the law applicable to the arbitration clause).

110. G.W. HAIGHT, *CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE*, 27-28 (1958).

hard to decide which party of an arbitration agreement is performing a distinctive obligation because both parties mutually agree to submit the controversy to arbitration without taking up any further specific duty. In agreeing to arbitrate, the parties undertake the same type of obligation. Thus, for example, in Europe, arbitration agreements are expressly excluded from the sphere of application of the 1980 Rome Convention¹¹¹ on the Law Applicable to Contractual Obligations, under article 1(2)(d).¹¹²

According to Professor van den Berg, the determination of the substantive law applicable to the validity of the arbitral clause may not be essential, provided that the formal requirements of article II(2) have been met.¹¹³ Under this theory, the substantive invalidity of the arbitration agreement may be absorbed in compliance with the formal standards of article II, which will most often bar a lack of consent defense.¹¹⁴ This means that the conflict of laws approach should be used only as a residual method if there is evidence of fraud, duress, or unconscionability. In such cases, the defenses based on the lack of the parties' consent can be judged under the law applicable to the parties, which is determined under the private international law rules of the forum. In all other cases, the fulfillment of the uniform requirement of article II(2) provides a sufficient

111. For bibliographic reference on the 1980 Rome Convention, see Georges R. Delaume, *The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?*, 22 VA. J. INT'L L. 105 (1981); H. Matthew Horlacher, Note, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L. J. 173 (1994).

112. See Convention on the Law Applicable to Contractual Obligation, June 19, 1980, 1980 O.J. (C 27) 36 art. 1(2)(d) [hereinafter Rome Convention]. For the reasons concerning the exclusion of arbitration agreements from the sphere of application of the Rome Convention, see Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 23 OFFICIAL J. OF THE EUR. COMMUNITIES 1 (1980).

113. See VAN DEN BERG, *supra* note 7, at 287.

114. See *id.* at 287-88 ("[I]t is submitted that the defense of lack of consent for the arbitration agreement will hardly be successful if the arbitration agreement complies with [a]rticle II(2) of the Convention. As [a]rticle II(2) poses fairly demanding requirements for the form of the arbitration agreement, it can be argued that in most cases its compliance absorbs the questions regarding the lack of consent.").

guarantee of the parties' intent to arbitrate and will avoid a time consuming analysis of the substantive law applicable to the arbitration agreement.

2. *The Principle of Autonomy of the Arbitration Agreement*

The autonomy or separability of the arbitration agreement is another important principle. This is a universally recognized rule¹¹⁵ which mandates that the arbitration agreement remain independent of the main contract; for instance, it is "isolate[ed] [from the] flaws affecting the main contract" in which it was embedded.¹¹⁶ Here, it must be stressed that all the supreme courts of the jurisdictions analyzed in this Article have recognized this principle. The existence of the rule was acknowledged by the U.S. Supreme Court in the *Prima Paint* case,¹¹⁷ by the French Cour de Cassation in the *Hecht* case,¹¹⁸

115. FOUCHARD, *supra* note 25, at 199 ("Today, the autonomy of the arbitration agreement is so widely recognized that it has become one of the general principles of arbitration upon which international arbitrators rely, irrespective of their seat and of the law governing the proceedings."). For an exhaustive discussion on the principle of separability, with numerous reference to international conventions and international arbitration awards interpreting this doctrine, see SCHWEBEL, *supra* note 48, at 1-60; Pierre Mayer, *Les limites de la séparabilité de la clause compromissoire*, REVUE DE L'ARBITRAGE 359 (1998).

116. FOUCHARD, *supra* note 25, at 214.

117. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). In his opinion, Justice Fortas set the standard of enforcement of arbitration agreements for the years to come:

With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ

and by the Italian Corte di Cassazione.¹¹⁹ The concept of autonomy is strictly connected with the principle of *compétence-compétence* because, as pointed out by Professor Goldman, both theories purport to protect arbitration against the judicial control mechanism.¹²⁰ Without the principle of autonomy, the invalidity of the main contract declared by a court would also affect the validity of the arbitral clause. However, under this theory, the main contract and the arbitral clause are viewed as two separate contracts.¹²¹ Thus, the principle of autonomy combined with the principle of *compétence-compétence* enables the arbitrators to shield their authority from the dilatory techniques of the parties resorting to the courts to obstruct the

depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Id.

118. See *Hecht v. Busiman's*, Cass. 1e civ., July 4, 1972, reprinted in 99 JOURNAL DE DROIT INTERNATIONAL 843 (1972) (affirming strongly the principle of autonomy in French arbitration law). Yet, even before this decision, the principle of autonomy was already theorized by French legal authors. See, e.g., Frédéric-Edouard Klein, *Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international*, 50 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 499, 500-08 (1961).

119. See Cass., Sept. 17, 1947, n.1570, reprinted in GIORGIO BERNINI, ITALY-AD INFORMANDUM, INT'L HANDBOOK ON COMM. ARB. SUPPL. 17. (1994) (on file with author).

120. See Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, in INTERNATIONAL ARBITRATION: 60 YEARS OF ICC ARBITRATION, A LOOK AT THE FUTURE 257, 263 (1984) (“[I]t is still the case that the ‘Kompetenz-Kompetenz’ can appear as a second consequence of the autonomy of the arbitration agreement. In addition, it confers on the arbitrator the power to define the objective and the limits of his jurisdiction in the situation where these matters are the subject of a controversy between the parties, the validity of the main contract, or that of the arbitration agreement, not being challenged.”). On the relationship between *compétence-compétence* and separability, see SCHWEBEL, *supra* note 48, at 2-3; JEAN ROBERT & THOMAS CARBONNEAU, THE FRENCH LAW OF ARBITRATION 2-27 (Matthew Bender ed., 1983); SAMMARTANO, *supra* note 36, at 225. However, in the sense that the separability and autonomy are two distinct principles, see SAMUEL, *supra* note 46, at 184.

121. THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 20 (3d ed. 2002).

arbitration proceedings.¹²² Finally, it should be stressed that article 16 of the Model Law and article X of the Geneva Convention expressly incorporated the principle of autonomy, which is now a black letter rule in all the countries that adopted these multilateral arbitration instruments.¹²³

3. *Request of a Party*

Under article II(3) of the NYC, the courts cannot on their own motion declare to have no jurisdiction.¹²⁴ There needs to be a specific dismissal request raised by a party pursuant to an arbitration agreement.¹²⁵ The concept underlying this rule is that if a party takes part in the court proceedings without objection, that party accepts the jurisdiction of the court. The same rule is adopted by the Geneva Convention under article VI(1), which, unlike the NYC, also sets forth a time limit for the request. This provision states that:

A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence. . . .¹²⁶

A similar time limit can be found in article 8 of the ML, which states that the party should make the request “not later than when submitting his first statement on the substance of the dispute.”¹²⁷ Unfortunately, the NYC does not deal with the time issues and a court will have to resort to the applicable

122. See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137, 154 (1996) (“Separability and *compétence-compétence* can serve much of the same function, in that both notions create mechanisms to prevent a bad faith party from stopping the arbitral proceedings before they have begun.”).

123. UNCITRAL Model Law, *supra* note 50, art. 16; Geneva Convention, *supra* note 66, art. X.

124. On the application of article II(3) by the courts, see Abhishek M. Singhvi, *Article II(3) of the New York Convention and the Courts*, in IMPROVING THE EFFICIENCY, *supra* note 7, at 204-16.

125. New York Convention, *supra* note 5, art. II(3).

126. Geneva Convention, *supra* note 66, art. VI(1).

127. UNCITRAL Model law, *supra* note 50, art. 8.

procedural rules to determine when the party should file the request. This is an element of discrepancy, even though not one capable of having a major impact on the efficient use of arbitration agreements.

C. The Relationship Between Article II and the Applicable Municipal Laws

Municipal laws play an important role in effecting arbitration agreements and can sometimes jeopardize the purpose of the harmonized rule of article II of the NYC. Although this provision is a uniform rule, domestic law governs a number of issues not covered by article II. For instance, the question of arbitrability—whether the matter is capable of being settled by arbitration—is an issue intimately related to the laws and the policies of the forum where enforcement of the arbitration agreement or the award is sought.¹²⁸ Domestic statutes vary immensely as to the matters that can be decided by arbitration, because the legal tradition of each country determines that certain issues are within the exclusive domain of a state court.¹²⁹ Other issues, such as the capacity of the parties to enter into a valid arbitration agreement, are dealt with by the law applicable to the parties' consent.¹³⁰ This law is determined pursuant to the private international law rules of

128. Although arbitrability is one of the conditions for referral to arbitration, this topic is beyond the scope of this Article. For a discussion on arbitrability, see Antoine Kirry, *Arbitrability: Current Trends in Europe*, 12 *ARB. INT'L* 373 (1996); Eric A. Schwartz, *The Domain of Arbitration and Issues of Arbitrability: The View from the ICC*, 9 *ICSID REV. FOREIGN INV. L.J.* 17, 26 (1994) (on file with author); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT'L* 274, 290 (1986); Matthias Lehmann, Comment, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 *COLUM. J. TRANSNAT'L L.* 753 (2004).

129. See Bernard Hanotiau, *The Law Applicable to Arbitrability*, in *IMPROVING THE EFFICIENCY*, *supra* note 7, at 146; Bernard Hanotiau, *Objective Arbitrability, Its Limits, Its Problem Areas*, in *ASA SPECIAL SERIES NO. 6, OBJECTIVE ARBITRABILITY, ANTITRUST DISPUTES, INTELLECTUAL PROPERTY DISPUTES* 26 (Marc Blessing ed., 1994); JEAN-BAPTISTE RACINE, *L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC* (1999); ALDO BERLINGUER, *LA COMPROMETTIBILITÀ PER ARBITRI. STUDIO DI DIRITTO ITALIANO E COMPARATO. I. LA NOZIONE DI COMPROMETTIBILITÀ* (1999) (on file with author).

130. GIUDITTA CORDERO MOSS, *INTERNATIONAL COMMERCIAL ARBITRATION* 280 n.707 (1999).

the forum.¹³¹ To this extent, it is also relevant whether the parties are natural persons or states because, in the latter case, a different set of legal problems falling outside the scope of the NYC will arise.¹³² Thus, whenever a judge is asked to rule on the validity of an international arbitration agreement, the judge will have to make a number of private international law determinations before deciding the actual substantive matter. Before reviewing the validity of the agreement, the judge must first decide which law applies. Obviously, this method is not efficient with respect to arbitral clauses because the judge will be forced to allocate time and resources to identify different substantive laws that apply to the contract and the clause.

To complicate things, the enforcement of an arbitration agreement calls for the application of both substantive law and procedural law.¹³³ The two sets of applicable rules are often equally important given the twofold nature, contractual and procedural, of international arbitration clauses.¹³⁴ Thus, even if the substantive contractual law solution can be found outside of the domestic legal framework, several domestic procedural law issues will still come into play. This requires the courts to make an effort to apply international standards of review to these kinds of agreements while dealing with domestic procedural rules.

Needless to say, the described scenario may cause great trouble among the judge seized with the request to enforce or review an international agreement to arbitrate because the judge will have to check the validity of the arbitration agreement under different, potentially applicable, laws. This complex task can be summarized as follows:

131. *Id.*

132. For a discussion on the issue of state immunity in arbitration and its relationship with the NYC, see DI PIETRO & PLATTE, *supra* note 86, at 161.

133. See Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1 (2004).

134. For discussion on the nature of international arbitration and the different theories which have attempted to classify arbitration under juridical categories, see RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 77 (1985) (on file with author); REDFERN & HUNTER, *supra* note 21, at 11; MUSTILL & BOYDE, *supra* note 72, at 33; POUURET & BESSON, *supra* note 49, at 1; CHARLES JARROSSON, *LA NOTION D'ARBITRAGE* (1987) (on file with author).

Mandatory referral to arbitration	Arbitrability	Substantive validity	Capacity of the parties to conclude the arbitration agreement	Formal validity	Kompetenz-Kompetenz	Time limit for the parties' objection to the validity of the arbitration agreement
Article II NYC	Law of the forum	Law chosen by the parties or law applicable by virtue of the private international law rules of the forum	Law applicable to the parties by virtue of the private international law rules of the forum	Art. II(2) of the NYC and municipal laws dealing with formal requirements	Applicable arbitration law or arbitration rules (ICC Rules; LCIA; AAA)	Municipal procedural law

Although there is no doubt that the NYC imposes upon domestic courts a general uniform duty of referral to arbitration, this does not mean that the Convention deals uniformly with other issues arising out of the arbitration agreement. To complicate matters further, in some countries, for example, Italy, the domestic statutes or the private international law rules contain other provisions that govern the enforcement of arbitration agreements.¹³⁵ This suggests that a court could apply a different set of provisions to the enforcement and review the arbitration agreement, if the court is not satisfied that the agreement meets the requirements of article II of the NYC.

Needless to say, the coordination problem is hard to solve because there is a potential conflict between the uniform rule of article II and the domestic statutes, which sometimes also govern the enforcement of arbitration clauses.¹³⁶ Furthermore,

135. See Il Codice Civile Italiano, C.c. n. 218, art. 4 ¶ 2 (1995) (the Italian Private International Law).

136. For an analysis of domestic arbitration statutes dealing with the enforcement

whenever the NYC does not address a specific issue, the court faced with the task of assessing the validity of the agreement to arbitrate must resort to its own conflict of laws rules to determine the applicable law.

1. *The Importance of Letting the Arbitrators Decide First*

In theory, several different laws could apply to the arbitration agreement's terms, scope, and effects.¹³⁷ Yet, in practice, few judges will be able to allocate time to the understanding of this complex mechanism. Judicial review of the validity of an international arbitration clause is extremely technical, time consuming, and not very rewarding for a judge. Determining if the arbitration clause meets all the legal requirements and establishing which laws are relevant can be a frustrating task for a court that is not familiar with both the private international law methodology and the specific features of international arbitration.¹³⁸ The arbitrators are more accustomed to specific international arbitration tools, for example, the comparative law method or the conflict of laws theories, than any domestic court that regularly deals with purely domestic matters.¹³⁹ Therefore, municipal courts are less

of arbitration agreements, see LEW, *supra* note 8.

137. For a discussion of the different laws applicable to the arbitration agreement, see Jean-Francois Poudret, *Le droit applicable à la convention d'arbitrage*, in THE ARBITRATION AGREEMENT – ITS MULTIFOLD CRITICAL ASPECTS, ASA SPECIAL SERIES, NO. 8 23 (1994).

138. For similar types of considerations, see Arthur T. von Mehren, *International Commercial Arbitration and Conflict of Laws*, 3 AM. REV. INT'L ARB. 57 (1992).

139. See Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 131 (1998) (“[I]n international arbitration—much more than before domestic courts—cultural and legal diversity is at issue. Comparative law provides the means to do justice to all legal systems involved. This is exemplified, e.g., by the international arbitrators’ comparative approach to conflict of laws problems. International arbitrators very often apply the so-called ‘cumulative approach.’ Instead of referring to just one conflict of laws rule, they justify their choice of law decision with reference to all conflict of laws rules concerned (i.e., that of the seat of the arbitration and of the respective home countries of the parties).”). This also explains why the parties opted for arbitration to solve their international disputes. As one author pointed out, “By putting the substantive decisionmaking in the hands of private adjudicators, international arbitration avoids intrusions on national sovereignty and the indeterminacy of international comity that have led to the complicated mechanisms for domestic adjudication of international

likely to follow the correct analysis when dealing with issues not expressly governed by article II of the NYC. This explains why some courts simply refuse to apply the private international law rules¹⁴⁰ and choose to review the arbitration agreement under their own substantive law rules.¹⁴¹ This attitude jeopardizes the international nature of the treaty because it brings about a domestic interpretation of international arbitration concepts.

This suggests that the courts should have a further incentive to give leeway to the arbitrators from the outset of disputes because the arbitrators are better equipped to make private international law determinations.¹⁴² Allowing the arbitrators to decide first does not mean that the court will waive its power of control once and for all. In most countries a court still retains the power to second guess the arbitrators' decision on jurisdiction both (1) when the award is challenged before a court at the seat of arbitration¹⁴³ and (2) when the

disputes." Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 14 (2003).

140. For a discussion on the use of conflict of laws rules by American courts and their reluctance to apply foreign law, see Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1998-99); Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369 (2001).

141. Perhaps a justification to this issue can be found in the complexity and arbitrariness of the use of conflict of laws in U.S. case law. See William Tetley, Q.C., *A Canadian Looks at American Conflict of Laws Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299, 322 (1999) ("American conflicts theory, despite its incredible richness and creativity, has unfortunately failed to develop a systematic methodology whereby the various elements which must be taken into account in addressing a conflict of laws problem [especially one involving a choice of law] should be considered by judges or arbitrators. As a result, there is really no 'road map' to assist legal decision-makers in a conflicts case in knowing how to embark upon their choice of law analysis, and in what order the different concepts and principles (e.g. mandatory rules, renvoi, public policy, connecting factors, interests and policies) should be taken into account in formulating and rendering their decisions.").

142. See MARTIN HUNTER ET AL., *THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS 1-2* (1993) (suggesting that national courts are less desirable than arbitrators because (1) national judges may be untrained to deal with the foreign law governing the contract; (2) language and translation pose difficulties to courts; and (3) judicial proceedings are subject to public scrutiny).

143. See Park, *supra* note 122, at 629.

recognition of the award is challenged under article V of the NYC in the country where enforcement is sought.¹⁴⁴ The French approach essentially predicates the wait and see doctrine because it delays review until the final stage, when the arbitrators have already decided on the merits and the winning party seeks recognition of the award before a court.¹⁴⁵ This approach is probably the most liberal standard in the world. Unfortunately, wide discrepancies exist between the attitude of French courts and the courts of other Contracting States. A comparative survey of the relevant case law of France, the United States, and Italy may provide a useful benchmark of the different European and American interpretive trends on this matter. As will be pointed out, there is not only a sharp distinction between the European approach and the American approach, there is also no uniform approach within Europe itself.

IV. THE CASE LAW APPROACH

A. France

1. *The Duty of Referral Under the French Code of Civil Procedure*

Among the various NYC Contracting States, France is the country where courts have paid the greatest deference to the duty of referral to arbitration. Traditionally, French courts and legal scholars have been strong advocates of the principles of *compétence-compétence* and *favor arbitrati*.¹⁴⁶ French jurists have taken a distinctively creative approach to the interpretation and use of international commercial arbitration agreements.¹⁴⁷ Jurists tend to recognize the negative effects of

144. New York Convention, *supra* note 5, art. V.

145. See Park, *supra* note 122, at 150.

146. For a classic legal treatise that helped shape the bias of the French legal authors for the use of international arbitration, see PHILIPPE FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1965).

147. For a historical analysis of the important role of French courts in enforcing international commercial arbitration agreements in a way distinct from domestic arbitration agreements, see Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1051-52

the arbitration agreement to the fullest extent and do not hesitate to hold that the main feature of the arbitration agreement is to divest a municipal court of its competence.¹⁴⁸

A look at the domestic provisions dealing with the duty of referral to arbitration and the waiver of the courts' jurisdiction may illustrate the logic under which French judges operate when they are called upon to apply article II of the NYC.

The duty of referral to arbitration is found in French domestic arbitration law under article 1458 of the 1981 New Code of Civil Procedure (NCPC),¹⁴⁹ which provides that:

- [1] Where a dispute over which the arbitration tribunal has jurisdiction by virtue of an arbitration agreement is brought before a court of law of the State, the latter must decline jurisdiction.
- [2] If the arbitration tribunal has not yet taken jurisdiction, the court must also decline jurisdiction unless the arbitration agreement is obviously invalid.
- [3] In both cases, the court may not of its own motion raise its lack of jurisdiction.¹⁵⁰

This provision makes an interesting distinction between the

(1986) ("[T]his case law strongly suggests that various aspects of the legal regime applicable to domestic arbitrations do not apply to arbitrations which involve the interests of international commerce. The jurisprudence further intimates that certain rules and principles governing the regime applicable to international commercial arbitrations need not flow from rules and principles found in a national law.").

148. See MATTHIEU DE BOISSESON, *LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL* 516 (1990).

149. Book IV on arbitration was adopted by Decree No. 81-500 of May 12, 1981. The first four titles of Book IV include the provisions on domestic arbitration, articles 1442 to 1491 of the NCPC. The rules on international arbitration are laid down in Title V under articles 1492 to 1507. For discussion on the reform of French arbitration law, see Bernard Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 117 (Thomas Carbonneau ed., 1984); W. Lawrence Craig, William W. Park & Jan Paulsson, *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 13 *LAW & POL'Y INT'L BUS.* 727 (1981); Philippe Fouchard, *Le nouveau droit français de l'arbitrage*, 59 *REV. DR. INT. COMP.* 29 (1982) (on file with author).

150. NPCP, *supra* note 20, art. 1458.

stages at which the parties can raise claims disputing the validity of the arbitration agreement. It is important to stress the underlying rationale of this provision because it is the foundation of the legal analysis carried out by French courts when reviewing the validity of arbitration agreements. A main distinction can be drawn with respect to the stages in which a party can make a judicial motion on the validity of the arbitration agreement: Either (a) the arbitration proceedings have already started or (b) the arbitration proceedings have not yet started.¹⁵¹ This distinction is essential to identify the rationale of the standard of review to be exercised by the competent court.

In case (a), article 1458 imposes on the court a clear and direct duty of referral.¹⁵² If the arbitral tribunal has already been seized with the controversy, the French judge is encouraged to dismiss his competence without inquiring into the validity of the arbitration agreement.¹⁵³ In case (b), however, the provision enables a judge to conduct a more strict review, since the court shall retain jurisdiction if, but only if, the arbitration clause is manifestly null and void.

The reason for this distinction seems to be that case (a) represents the most dangerous situation for the parties to an arbitration proceeding because, as pointed out by the legal scholars,¹⁵⁴ there is a serious risk that a party acting in bad faith may attempt to obstruct the arbitration proceedings by requesting that a court grant a motion to stay arbitration or retain jurisdiction over the matter. This behavior inevitably forces the other party, who is already paying for the arbitration

151. For this distinction and a comment to its different implications, see JEAN ROBERT, *L'ARBITRAGE. DROIT INTERNE, DROIT INTERNATIONAL PRIVÉ* 102 (6th ed. 1993) ("Le texte entend en effet faire un sort particulier à deux situations différentes, selon qu'au moment où le litige sera porté devant la juridiction d'Etat, l'arbitre en aura été préalablement saisi, ou non. [The text distinguishes between litigation submitted before or after the beginning of the arbitration process.]").

152. See BOISSÉSON, *supra* note 148, at 83.

153. *Id.* (stating that in such a case the state judge must declare its lack of competence).

154. See FOUCHARD, *supra* note 25, at 411; BOISSÉSON, *supra* note 148, at 79-80; Barcelò, *supra* note 35, at 1125 (stating that the primary justification for the French approach is to prevent a party from obstructing or delaying arbitration).

costs, to resist in the competent court—most often located in a country other than where arbitration is taking place—and to incur unwanted delays. Eventually, especially in small claim arbitrations, this strategy may force the weaker party to settle the dispute to avoid additional expenses associated with litigation in another jurisdiction. In case (b), however, a court enjoys more discretion in assessing the validity of the clause because the arbitration proceedings have not been initiated and the parties have not started bearing the arbitration costs.

Further, it should be noted that the French Supreme Court (Cour de cassation), starting from the *Société Eurodif v. République Islamique d' Iran*¹⁵⁵ and *EuroDisney v. Eremco*¹⁵⁶ decisions, held that article 1458 is also applicable to international arbitration. In both cases the French Supreme Court did not analyze in depth the relationship between this provision and international arbitration, but it simply stated the principle without any further explanation.¹⁵⁷ Following the decision, Professor Fouchard confirmed that the provision, although included in the Code under the chapter on domestic arbitration, is drafted in such general terms to enable any French court to waive its jurisdiction in favor of an arbitral tribunal.¹⁵⁸

155. See Cour de cassation [Cass. 1^o civ.] [highest court of original jurisdiction], June 28, 1989, J.C.P., II, 20205, 111 clunet 598 [hereinafter *Société Eurodif*].

156. See Cour de cassation [Cass 2e civ.] [highest court of original jurisdiction], Jan. 17, 1996, in REV. ARB. 228 (1996) (on file with author).

157. See *id.*; see also *Société Eurodif*, *supra* note 155.

158. See Philippe Fouchard, Note, REV. ARB. 653 (1989), who points out that:

L'article 1458 est le texte qui règle les rapports entre la compétence judiciaire et la compétence arbitrale. La Cour de cassation affirme au passage, sans autre explication, qu'il est applicable aux arbitrages internationaux. Précision intéressante et digne d'approbation, bien que cet article figure dans le titre 1er du livre IV, c'est-à-dire parmi les dispositions visant l'arbitrage interne, et non dans le titre V, consacré spécialement à l'arbitrage international. En effet, d'une part, les dispositions de ce titre se bornent à poser les principes permettant de fixer les règles applicables à l'arbitrage (organisation, instance et sentence); sauf pour l'aide à la constitution du tribunal arbitral (article 1493, 2); elles ne concernent pas la compétence (ou l'incompétence) du juge français en présence d'une convention d'arbitrage. D'autre part, l'article 1458, dont c'est là l'objet

2. *The Relationship Between Article II of the New York Convention and Article 1458 of the French Code of Civil Procedure*

French courts still have to explore in detail the relationship between article 1458 of the NCPC and article II of the NYC and have not yet decided on a potential conflict between the two provisions. To the best of my knowledge, *Sysmode S.A.R.L.*¹⁵⁹ is the only case where the two provisions have been applied and interpreted together. In that case, the Court of Appeals of Paris held valid an arbitration agreement and referred the parties to arbitration under both article 1458 of the NCPC and article II of the NYC. However, a French legal commentator criticized this decision, stating that the court did not have to apply article II of the NYC because it could have reached the same result by applying article 1458.¹⁶⁰ Unfortunately, this type of criticism does not seem to suit the purpose of an international treaty like the NYC and fails to address the proper sphere of application of article II, which purports to harmonize the systems of referral to arbitration. Actually, to achieve a harmonized effect of international arbitration agreements worldwide, it is preferable for a court to enforce an arbitration agreement merely under

propre, est rédigé en termes assez généraux pour être appliqué à toute juridiction de l'Etat en présence de n'importe quelle convention d'arbitrage et en face de n'importe quel tribunal arbitral.

[Article 1458 of the French Civil Code Procedure regulates the relationship between the jurisdiction of the courts and the jurisdiction of the arbitration tribunal. The French "Cour de Cassation" considers, without further explanations that this article applies to international arbitration. However, this article is included in Title 1 which is simply about domestic arbitration, and not Title IV, which is about international arbitration. Title 1 states the rules of arbitration like organization and awards; except for the composition of the arbitral tribunal (Article 1493(2)); this title does not deal with the jurisdiction (or the absence of jurisdiction) of the French court when there is an arbitration agreement. Moreover, the first purpose of Article 1458 is to be written in general terms in order to be applied by all French courts, whatever the arbitration agreement and the arbitration tribunal.]

Id.

159. CA Paris, Dec. 8, 1988, REV. ARB. 150 (1990).

160. See Charles Jarrosson, *Note sous Cour d'Appel de Paris, 8 December 1988*, REV. ARB. 157 (1990) (on file with author).

article II. Recourse to domestic law provisions may in fact cause some interpretive concern and foster the judicial belief that domestic civil procedure can address even other international commercial arbitration issues. Additionally, article V(1)(a) of the NYC lists the invalidity of the agreement “referred to in article II” as a possible ground for denying enforcement.¹⁶¹ This language cannot be underestimated. It means that, at the stage of recognition and enforcement of the award, the court will scrutinize the arbitration agreement by following the requirements of article II, regardless of the domestic law provision applied at the referral stage. In other words, a court in country X may grant referral to arbitration pursuant to its own rules, but a court in country Y must still review the award based on the agreement under article II. Thus, for the internal consistency of the NYC domestic courts should review the arbitration agreement under the same provision, both at the stage of referral to arbitration and at the stage of enforcement of the award. Fortunately, the French Supreme Court correctly enforced international arbitration agreements under article II of the NYC in several decisions rendered in the so-called Bomar Oil saga.¹⁶²

3. *The Prima Facie Standard of Review*

It has been stressed that the most characteristic feature of the French judicial mode of interpretation is the *prima facie* standard of review of the arbitration agreement.¹⁶³ Under this

161. See New York Convention, *supra* note 5, art. V(1)(a).

162. The *Bomar Oil* dispute is the result of a troubled path, with a number of subsequent decisions rendered by the French Court of Appeals (both of Paris and Versailles) and by the French Supreme Court. For the chronological history of the dispute, see Cour d'appel [CA] [regional court of appeal] Paris, Jan. 20, 1987, REVUE DE L'ARBITRAGE 1987, 482; Cour de cassation [Cass.] [highest court of ordinary jurisdiction], Cass. 1e civ., Oct. 11, 1989, REVUE DE L'ARBITRAGE 1990, 134; Cour d'appel [CA] [regional court of appeal] Versailles, 1e ch., Jan. 23, 1991, REVUE DE L'ARBITRAGE 1991, 291; Cour de cassation [Cass.] [highest court of ordinary jurisdiction], Cass. 1e civ., Nov. 9, 1993, REVUE DE L'ARBITRAGE. 1994, 108. For a general comment on these decisions, see Boucobza, *supra* note 1 (on file with author).

163. See VÁRADY, *supra* note 54, at 87 (“French law takes a deferential attitude toward arbitration—in fact, one that seems even more deferential than the *Prima Paint* rule. The French approach turns on two basic considerations. First, if an arbitration tribunal has already been seised of the matter, a French court will refuse jurisdiction

standard, upon request of a party to refer the case to arbitration, a court will retain jurisdiction only if the agreement to arbitrate appears from the outset to be null or patently void, the so-called nullité manifeste.¹⁶⁴ Under the principle outlined by article 1458 of the NCPC, a French court will make a superficial inquiry into the validity of the clause and will let the arbitrators fully review the existence and validity of the clause.¹⁶⁵ This means that the court will most likely refrain from examining the merits and will only retain jurisdiction if the agreement appears to be manifestly null and void.¹⁶⁶ As pointed out by a French legal commentator, French courts uphold this type of liberal interpretation because it is in the best interest of the French legal system to prevent the parties from adopting dilatory techniques by filing lawsuits before the municipal courts. For instance, in 1994 the Court of Appeals of Paris was seized with a dispute over an arbitration agreement providing for arbitration in the United Kingdom, and was called upon to assess the

and leave validity and existence questions to the arbitrators. . . . If an arbitration tribunal has not been seised, then the second concept comes into play. The court will undertake a limited scrutiny of validity and existence questions and will retain jurisdiction only if the arbitration agreement is **manifestly** null. If the answer to these existence and validity questions is not manifestly in the negative, the court will refer the parties to arbitration.”).

164. For a comment to the concept of manifest nullity in French law, see BOISSÉSON, *supra* note 148, at 84-85 (stating that *manifeste* means evident, and, in a secondary meaning, serious; further, violations of public order make arbitration clauses patently null).

165. See Christian H. Petrus, *Spanish Perspectives on the Doctrines of Kompetenz-Kompetenz and Separability: A Comparative Analysis of Spain's 1988 Arbitration Act*, 11 AM. REV. INT'L ARB. 397, 407-08 (2000).

166. ROBERT, *supra* note 151, at 103 (“[Q]uant au pouvoir de la juridiction de droit commun tel que le lui confrère l'article 1458, al. 2 dans le cas particulier où le tribunal arbitral n'est pas encore saisi, le terme 'manifestement' oblige à l'interpréter restrictivement, pour le limiter à la constatation d'une nullité proprement dite telle que la ferait apparaître un examen extrinsèque de la convention. Ce ne serait pas le cas d'une caducité, dont l'appréciation obligerait, à l'inverse, à un examen intrinsèque de la même convention. [Article 1458(2) of the French Civil Code Procedure gives the ordinary court the power to hear a case, despite the existence of an arbitration agreement and before the convening of the arbitration tribunal, but the term 'obviously' used in the statute forces a restrictive interpretation. The power conferred to the ordinary court is limited to the observation, by an extrinsic examination, of the nullity of the convention. It would be different in case of caducity where the Court, on the contrary, would have to carry out an intrinsic examination of the convention.]”).

validity of the clause. In its well-known V 2000 decision the Court held that:

In the international legal order the arbitral clause is licit by its own nature, pursuant to a general principle of autonomy of the arbitration agreement. This is a substantive rule, which gives to the agreement a specific effectiveness, regardless of the law applicable to the contract in which the clause is embodied and of the parties to the contract, but under the limits of public international legal order. Thus, the mixed character of the main contract cannot make the agreement patently null, in the international field, since it is only up to the arbitrators to decide on their competence and on the validity and limits of their appointment. The arbitrators are competent to evaluate their own competence regarding the arbitrability of a dispute dealing with international public order. It has been pointed out that this power is not excluded by the mere fact that an imperative set of rules is applicable to the controversy and that the arbitrators are also empowered to apply the principles and the rules arising from such public order.¹⁶⁷

Thus, it appears from the language of this decision that the French courts have taken a strong pro-enforcement bias with respect to international arbitration agreements, with the only limits of manifest nullity or conflict with principles of international public order. French courts, however, enforce international arbitration agreements under the same standard that is used for domestic arbitration clauses. Due to the liberal interpretation of article 1458 of the NCPC, the French case law is inclined to give a lax reading of the article II requirements. This domestic standard of interpretation has also been used for international arbitration matters, and no autonomous standard exists in France for the interpretation of article II of the NYC.

167. See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 7, 1994, *REVUE DE L'ARBITRAGE* 1996, 245, note Jarrosson (on file with author).

B. The French Liberal Approach to the Issue of Substantive Validity

It is hard to find many French cases dealing with the application of the NYC to the validity of the arbitration agreement because the courts adopt a laissez-faire attitude. This normally prevents the courts from declaring the arbitration clauses null and void.¹⁶⁸ French courts have developed much of their legal analysis concerning the validity of international arbitration agreements through domestic arbitration cases.¹⁶⁹ Additionally, many decisions on the validity of the agreement are rendered at the stage of recognition and enforcement of an arbitral award rather than at the stage of referral to arbitration.¹⁷⁰ In fact, the standard of review is often used *ex post* to determine whether the arbitrators had jurisdiction to render a valid arbitration award because both article V(1)(a)¹⁷¹ of the NYC and article 1502¹⁷² of the French NCPC prohibit recognition of an arbitral award rendered abroad if the agreement to arbitrate was invalid.¹⁷³

168. See William W. Park, *Text and Context in International Dispute Resolution*, 15 B.U. Int'l L.J. 191, 202 (1997). Courts give a very high level of deference to arbitration and only declare arbitration clauses null and void if they are 'clearly' void (*manifestement nulle*). *Id.*

169. See John J. Barcelo, *Symposium: International Commercial Arbitration: Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND J. TRANSNAT'L L. 1115, 1124 (2003); Otto Sandrock, *To Continue Nationalizing or to De-Nationalize? That is Now the Question in International Arbitration*, 12 AM. REV. INT'L ARB. 301, 308 (2001); see also William Park, *REPORT: Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 151 (2002) (interpreting certain international agreements similar to domestic agreements).

170. See Sandrock, *supra* note 169, at 310.

171. Article V(1)(a) of the NYC provides that:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that . . . [] the parties to the agreement referred to in article II. . . .

New York Convention, *supra* note 5, art. V(1).

172. Article 1502 of the NCPC provides that "appeal against the decision which grants the recognition or enforcement of an award shall only be available in the following cases: 1. where the arbitrator has ruled upon the matter without any arbitration agreement or where this agreement is invalid or has expired." See *supra* note 149 and accompanying text (Article 1502).

173. See New York Convention, *supra* note 5, art. V(1); See *supra* note 149 and

As anticipated, the case law precedents on domestic arbitration issues may be useful to understand how French courts address the issue of validity under article II(3) of the NYC. French legal authors have elaborated an independent theory for the validity of arbitration agreements, which they have declared unbound from any national law.¹⁷⁴ This theory is very helpful because it is considered both applicable to domestic and international arbitration agreements, whether or not falling under the scope of the NYC.

1. *The Hecht Decision*

The first landmark case to be discussed is the *Hecht v. Buisman*'s decision rendered by the French Supreme Court in 1972.¹⁷⁵ This case outlined the principle of autonomy of the arbitration agreement from the main contract.¹⁷⁶ In doing so, the French Supreme Court accomplished another important purpose: It laid down the principle of validity of the arbitration agreement.¹⁷⁷ The dispute concerned the validity of an arbitration clause contained in an international commercial agency contract.¹⁷⁸ The defendant claimed that the arbitration agreement was invalid under French law, which, at that time, prohibited arbitration agreements between merchants and nonmerchants.¹⁷⁹

In spite of this rule, the Paris Court of Appeals rejected the claim, and the French Supreme Court later affirmed. The decisions were mainly, albeit not exclusively, based on the

accompanying text (NCPC).

174. ROBERT & CARBONNEAU, *supra* note 120, at II: 2-10, 2-11.

175. *See* Cour de cassation [Cass. 1e civ.] [highest court of original jurisdiction], July 4, 1972, REVUE DE L'ARBITRAGE 1974, 89, note Philippe Fouchard.

176. *See* Filip D. Ly, *Commercial Law as a Refuge from Contract Law: A Comparative and Uniform Law Perspective*, 45 WAYNE L. REV. 1825, 1836 (2000).

177. *See id.*

178. *See id.*

179. Accordingly, one of the most distinct features of the French legal rules on arbitration is laid down in article 2061 of the NCPC, which provides that "[a]n arbitration clause is void if it is provided otherwise by law." *See supra* note 149 and accompanying text (article 2061 of the NCPC). Yet, it should be noted that this limitation only applies to agreements falling under the Civil Code because France also enacted a Commercial Code, which does not contain a similar provision.

principle of separability of the arbitration clause from the main contract.¹⁸⁰ In fact, the Supreme Court went so far as to hold that the arbitration agreement was valid on the basis of a principle of autonomy, without any reference to the law governing that agreement. Here, the concept of linking the validity of the agreement to a particular law disappears entirely.¹⁸¹ The French Supreme Court held in its decision that “in international arbitration the arbitration clause, whether it is entered into separately or it is included in the contract to which it relates, always enjoys full legal autonomy in respect of the same, except in exceptional cases which have not been pleaded in the dispute.”¹⁸²

At that time, the French case law began to conceive the absolute immunity of the effectuation of an arbitration agreement from any national law. However, in doing so, the court did not resort to a specific rule of private international law, but rather created an autonomous rule of interpretation. This principle was later reinstated in several decisions, which all essentially held that the principle of validity of an international arbitration agreement and the principle of *compétence-compétence*, under article 1458 of the NCPC, are substantive rules of French international arbitration law.¹⁸³ These rules shield the arbitration clause from any applicable national law and prevent a state judge from ruling on the merits of a dispute when there is evidence of a *prima facie* valid arbitration agreement.¹⁸⁴ Whenever article 1458 of the NCPC is applicable, the court has no jurisdiction to rule on the merits of a dispute unless the arbitration clause is manifestly null and void.¹⁸⁵

180. See Ly, *supra* note 176, at 1836.

181. See *id.*

182. For this translation, see SAMMARTANO, *supra* note 36, at 230.

183. See Barcelò, *supra* note 35, at 1124-25.

184. See *id.* at 1125.

185. See *id.* at 1124.

This principle can be easily found in the French case law and has been followed for three decades in the following landmark decisions:

- (a) Menicucci (Paris Court of Appeals, 1975);¹⁸⁶
- (b) Dalico (1993);¹⁸⁷
- (c) Bomar Oil (1993);¹⁸⁸ and
- (d) Jules Verne (Paris Court of Appeals, 2002).¹⁸⁹

The French legal authors and the courts consider the principle of independence of the arbitration agreement a consolidated doctrine of French arbitration law, and they all agree that this interpretation must be upheld to the fullest extent.¹⁹⁰ A consolidated attitude of this kind helped the international legal community in building confidence with the French jurisdictional system as a prime international arbitration venue. Hence, the parties who choose to arbitrate in France can reasonably rely on a sufficient amount of predictability in the outcomes of the courts seized with arbitrable matters. This ensures a good level of protection of the parties' agreements to arbitrate.

2. *The Dalico Decision*

The 1993 Dalico decision¹⁹¹ rendered by the French Supreme Court is probably the most radical of the French case law on international arbitration agreements. This ruling strongly reinforced the traditional French bias for the substantive validity of the arbitration agreement. Following the petition of

186. See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 13, 1975, 104 JOURNAL DE DROIT INTERNATIONAL 1977, 106, note Eric Loquin; reprinted in REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1976, 507, note Bruno Oppetit (sources on file with author).

187. See Cour de cassation [Cass.] [highest court of ordinary jurisdiction], Cass. 1e civ., Dec. 20, 1993, REVUE DE L'ARBITRAGE 1994, 116, note Hélène Gaudemet-Tallon; reprinted in REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1994, 663, note Pierre Mayer [hereinafter *Dalico*] (sources on file with author).

188. See *supra* note 162 and accompanying text.

189. See INTERNATIONAL DISPUTE RESOLUTION, RECENT DEVELOPMENTS IN INTERNATIONAL DISPUTE RESOLUTION AROUND THE WORLD 3 (Stephanie Marrie & Aloke Ray eds. 2004).

190. See Ly, *supra* note 176, at 1836.

191. See *Dalico*, *supra* note 187.

the City of Khoms El Mergeb, Lybia, the French Supreme Court was seized with the question of whether an arbitration agreement was valid under the applicable law of Lybia.¹⁹² The City of Khoms hired a Danish contractor, Dalico, to execute some construction works related to a water draining project.¹⁹³ Although the contract contained an arbitration agreement referring the parties to the ICC, when the dispute arose the Lybian party refused to arbitrate since it held that the arbitration agreement was null and void under the law of Lybia applicable to the main contract.¹⁹⁴ It argued that the nullity was due to a lack of signatures.¹⁹⁵ Nevertheless, Dalico initiated the arbitration proceedings and the arbitrators rendered three awards, which were later challenged by the Lybian party before the Paris Court of Appeals.¹⁹⁶ The French court, however, rejected the claims, and a petition was then filed before the French Supreme Court.¹⁹⁷ In quashing the petition, the French Supreme Court stated the following principle:

[B]y virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.¹⁹⁸

Thus, the decision is a significant explanation of the French courts' standard of review. This decision leads to three types of considerations. First, the standard of review laid down by the Court is not based on any applicable law but merely on the discretion of the French judge. In its interpretation of the parties' intention to arbitrate, the court will not resort to conflict

192. *Id.* at 116.

193. *Id.*

194. *Id.* at 117.

195. *Id.*

196. *Id.* at 118.

197. *Id.* at 117.

198. For the translation of this part of the *Dalico* decision, see FOUCHARD, *supra* note 25, at 230.

of laws rules and, thus, will not determine the law applicable to the arbitration agreement. The judge will simply make a decision based on the assessment of the parties' intentions and will reach its conclusions based on an autonomous principle of international commercial arbitration.¹⁹⁹ Second, assuming that this rationale is correct, there is no longer a need to distinguish between substantive validity and formal validity because it will be up to the judge, and not to the law, to establish the conditions under which the parties are bound by the agreement. Finally, it appears that with the Dalico decision the French Supreme Court affirmed the principle that a judge should first be concerned with the effects of the arbitration agreement rather than with a preliminary determination of its validity. Under this rationale, the French court acknowledged the existence of a presumption for the validity of arbitration agreements, which comes before any assessment of actual consent to arbitrate. Unfortunately, as one author correctly stressed, in the Dalico decision, the French Supreme Court did not give any guidelines on the rule of substantive validity.²⁰⁰

3. *The Bomar Oil Saga*

Notwithstanding the lack of such guidelines, some useful criteria were outlined in another important French Supreme Court decision rendered in the Bomar Oil saga.²⁰¹ This controversy dealt with the enforcement of an arbitration award and an arbitration agreement concluded by reference.²⁰² International merchants frequently include so-called arbitration agreements in their contracts by reference.²⁰³ Generally, these

199. See Sandrock, *supra* note 169, at 308.

200. See Cour de cassation [Cass.] [highest court of ordinary jurisdiction], Cass. 1e civ., Dec. 20, 1993, REVUE DE L'ARBITRAGE 1994, 116, 118, note Helene Gaudemet-Tallon.

201. See *supra* note 162 and accompanying text. For a summary of the cases, see FOUCHARD, *supra* note 25, at 274-77. For further comments to these important decisions, see Boucobza, *supra* note 1; Oppetit, *La clause arbitrale par référence*, REV. ARB. 551 (1990).

202. See *supra* note 162 and accompanying text.

203. For a comment on the notion of international arbitration agreements by reference, see Claude Reymond, *La clause arbitrale par référence*, in RECUEIL DES TRAVAUX SUISSE SUR L'ARBITRAGE INTERNATIONAL 85 (1984); François Poudret, *La*

clauses are printed in separate standard contract forms incorporated in the main contract.²⁰⁴ This practice is time saving because the parties simply make reference to the standard conditions without any need to attach them to each contract they conclude.²⁰⁵ The French Supreme Court first held in *Bomar I* that the arbitration agreement by reference was invalid under article II because it failed to meet the formalities required by the NYC.²⁰⁶ Later, in a second decision on the same matter (*Bomar II*), the French Supreme Court reversed its previous ruling and held instead that the agreement incorporated by reference was valid provided that two preconditions were met: The parties had knowledge of the standard conditions when concluding the contract, and the parties did not refuse to include the document in the contract.²⁰⁷ Thus, the Court found that the need to protect the parties' actual consent prevails over the need to comply with the formal requirements set forth by article II of the NYC. Similar to the *Dalico* case, the French Supreme Court pointed to the existence of a substantive rule of international arbitration (*règle matérielle de droit international de l'arbitrage*), which required the agreements to be enforced if the parties consented, regardless of any formal requirement set forth under the applicable law.²⁰⁸ Further, the Court pointed out that two other

clause arbitrale par référence selon la Convention de New York et l'art. 6 du Concordat sur l'arbitrage, in *RECUEIL DE TRAVAUX OFFERTS A M. GUY FLATTET* 523 (1985); Huber, *Arbitration Clause "by Reference,"* in *THE ARBITRATION AGREEMENT – ITS MULTIFOLD CRITICAL ASPECTS*, ASA SPECIAL SERIES, NO. 8 78-88 (1994); Boucobza, *supra* note 1.

204. See *UN Conference on ICC*, *supra* note 6, at I.B.3 (stating that "in international trade, arbitration agreements are often concluded by way of a reference in contracts to standard forms of contract which include an arbitration clause.").

205. On the frequent use in international trade of standard conditions generally incorporated by the main contract, see *Report on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice*, 1979 O.J. (C 59) 71 (Mar. 5, 1979) (prepared by Dr. Peter Schlosser, Council for the Comm. of Permanent Representatives of the Member States), available at http://ali.pitt.edu/1467/01/commercial_reports_schlosser_C_59_70.pdf.

206. See James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 *PEPP. DISP. RESOL. L.J.* 469, 542-43 (2004).

207. See *supra* note 162.

208. See *supra* note 162 and accompanying text.

key elements were taken into account in upholding the validity of an arbitration agreement: (a) the parties' knowledge of the existence of the clause, and (b) the existence of established business practices among the parties, which can lead to the presumption that the parties were aware of the clause.²⁰⁹ The main point for the Court was that actual consent to arbitrate could be presumed through an objective standard of review. In other words, in *Bomar* the Court outlined the principle that the parties could conclude the arbitration agreement by implicit consent or through their business practices if factual circumstances supported the presumption.

Yet, the absence of any reference to a national law or to a set of specific rules may cause interpretive dilemmas in many situations where a court does not possess sufficient factual elements to determine whether the parties had reached consent over the arbitration agreement. In spite of the favorable comments of French legal authors on the autonomy of the arbitration agreement from all laws, the French approach to substantive validity does not seem to offer definite parameters to the interpreter.²¹⁰ Although some legal authors have suggested that, in the absence of a specific applicable law, the validity of the arbitration agreement could still be reviewed under international public order,²¹¹ judges who are not familiar with the French legal theory are unlikely to follow this approach. Nevertheless, the French courts' deferential attitude to arbitration should constitute an international uniform standard of interpretation to be followed by all the NYC Contracting States. This argument rests on two main grounds. First, the rules of article 1458 of the NCPC have proven to be an effective mechanism that secures the positive and negative effects of the arbitration agreement. Second, the strong

209. See *supra* note 162 and accompanying text.

210. Many French authors have praised the position of French courts to the extent that the arbitration agreement has been considered independent from any national law. See BOISSÉSON, *supra* note 148, at 493; FOUCHARD, *supra* note 25, at 232; ROBERT, *supra* note 151, at 251 (1993). *But see* Poudret & Besson, *supra* note 49, at 149-50 (emphasizing the principle of *compétence-compétence*, which leads to autonomy of the procedural arbitration, is well-recognized on the surface, but in reality, deep divergences exist among countries).

211. See FOUCHARD, *supra* note 25, at 232.

presumption of validity of the arbitration clauses does not prevent the arbitrators from establishing whether the parties actually agreed to arbitrate. Under the French approach, the court can save time on a preliminary issue, that is, jurisdiction, but still remain free to review the issue at a later stage, that is, during the recognition and enforcement stage.

C. *The United States*

1. *The U.S. Supreme Court's Pro-Enforcement Bias*

International arbitration is an increasingly important topic in American courts.²¹² The United States implemented the NYC into Chapter 2 of the Federal Arbitration Act (FAA).²¹³ Section 205 of the FAA deals with the duty of referral and provides that:

[W]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States. . . .²¹⁴

Every year, American courts render several decisions on the duty of referral to arbitration. It should be pointed out from the outset that the U.S. federal courts and, notably, the Supreme Court, have taken an extremely favorable approach to the enforcement of arbitration agreements providing for arbitration

212. See, e.g., W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1 (1995); Alan Scott Rau, *The New York Convention in American Courts*, 7 Am. Rev. Int'l. Arb. 213 (1996).

213. 9 U.S.C. §§ 201-208 (2006). For a discussion concerning the future adoption of the NYC by the United States, see Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L. J. 1049, 1055-61 (1961). For discussion on the actual adoption of the NYC by the United States, see Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1 (1971); J. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 26 ARB. J. 65 (1971).

214. 9 U.S.C. § 205. This provision goes on to describe the procedure for removal in a very detailed fashion, which cannot be found in the French or the Italian implementing legislation.

abroad.²¹⁵ From a general policy perspective, the U.S. courts have not hesitated to express the view that the use of international arbitration should be encouraged, rather than hindered.²¹⁶ In *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, the Second Circuit observed that “[t]he goal of the Convention is to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions. . . .”²¹⁷

However, the *Scherk v. Alberto-Culver Co.*²¹⁸ decision of 1974 and the *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*²¹⁹ decision of 1985 are the most significant U.S. Supreme Court decisions on the federal policy favoring recourse to international arbitration. An analysis of these two landmark cases is necessary to establish the policy framework which underlies the enforcement of arbitration agreements in the United States. Both cases touch upon the matter of arbitrability, of securities issues (*Scherk*) and antitrust issues (*Mitsubishi*). In both cases, the issue was whether an arbitral tribunal seated abroad could properly adjudicate the claims.²²⁰

2. *The Scherk Decision*

In *Scherk*, an American manufacturer, Albert-Culver Company, purchased from a German citizen, Scherk, three inter-related business enterprises and their trademark rights.²²¹ The contract provided for arbitration of any disputes in Paris through the ICC arbitral body.²²² Contending that Scherk had fraudulently misrepresented his unencumbered ownership of the trademarks, Alberto-Culver brought suit in the federal district court in Illinois.²²³ Scherk filed a motion to stay the action

215. *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 250 (2d Cir. 1991).

216. *Id.*

217. *Id.*

218. 417 U.S. 506 (1974).

219. 473 U.S. 614 (1985).

220. *Mitsubishi*, 473 U.S. at 616; *Scherk*, 417 U.S. at 508-10.

221. *Scherk*, 417 U.S. at 508.

222. *Id.*

223. *Id.*

pending arbitration in Paris.²²⁴ Because the sale of one of the enterprises took the form of a stock transaction, Alberto-Culver contended that the dispute was not arbitrable, relying on *Wilko v. Swan*.²²⁵ *Wilko* involved a domestic contract for the sale of securities that was challenged for fraud.²²⁶ The Supreme Court held that the fraud claims could not be subject to arbitration because of the Securities Act of 1933.²²⁷ To distinguish this *Wilko* precedent, the Supreme Court in *Scherk* held that, in international business transactions, considerable uncertainty exists at the time when the arbitration agreement is formed regarding the law applicable to the resolution of the contract disputes.²²⁸ As a result, a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is considered an almost indispensable precondition to achieve “the orderliness and predictability essential to any international business transaction.”²²⁹ In addition, the Court underlined that its conclusion was confirmed by the then recent accession of the United States to the NYC.²³⁰ In the Court’s view, the goal of the NYC was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.²³¹ In reaching this conclusion, the Supreme Court made a famous statement, which is often cited as the eminent rationale of American pro-arbitration policy: “A parochial refusal by the courts of one country to enforce an international arbitration agreement would . . . frustrate these purposes.”²³²

This was probably the first U.S. Supreme Court decision after the United States implemented the NYC through the FAA

224. *Id.*

225. *See Wilko v. Swan*, 346 U.S. 427 (1953).

226. *Id.*

227. *Id.*

228. *See Scherk*, 417 U.S. at 515-16.

229. *See id.* at 516.

230. *Id.*

231. *Id.* at 520 n.15.

232. *Id.* at 516.

that expressly supported the enforcement of international arbitration agreements. It was also the first decision to set the general trend for the enforcement of international arbitration agreements in the U.S.

3. *The Mitsubishi Decision*

On October 31, 1979, Soler, a Puerto Rican corporation, entered into a distributor agreement with Chrysler for the sale of Mitsubishi-manufactured vehicles by Soler within a designated area, including metropolitan San Juan, Puerto Rico.²³³ On the same date, the parties entered into a sales agreement, which made reference to the distributor agreement, and provided for the direct sale of Mitsubishi products to Soler.²³⁴ The agreement governed the terms and conditions of such sales. Article VI of the sales agreement, labeled "Arbitration of Certain Matters," provided "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to articles 1-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."²³⁵

Although Soler initially did well in its business of selling Mitsubishi-manufactured vehicles, in 1981 market demand in the new car dropped.²³⁶ Soler ran into serious difficulties in meeting the minimum sales volume and asked for Mitsubishi's permission to ship a quantity of its vehicles for sale outside of Puerto Rico—to the continental United States and Latin America.²³⁷ Mitsubishi refused permission for any such diversion, citing a variety of reasons.²³⁸ Attempts to work out these difficulties failed.²³⁹ Mitsubishi eventually withheld

233. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616-17 (1985).

234. *Id.*

235. *Id.* (internal quotations omitted).

236. *Id.*

237. *Id.* at 617-18.

238. *Id.* at 618.

239. *Id.*

shipment of 966 vehicles, apparently representing orders placed for production in May, June, and July of 1981; Soler disclaimed responsibility for these orders in February 1982.²⁴⁰

On March 15, 1982, Mitsubishi petitioned the District Court in Puerto Rico for an order compelling arbitration under sections four and 201 of the FAA.²⁴¹ Mitsubishi alleged nonpayment of the 966 vehicles and other breaches of the sales agreement. Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association.²⁴² Before the District Court, Soler denied Mitsubishi's allegations and counterclaimed.²⁴³ Soler alleged numerous breaches by Mitsubishi of the sales agreement and asserted causes of action under the Sherman Act, the Federal Automobile Dealers' Day in Court Act, the Puerto Rico Competition Statute, and the Puerto Rico Dealers' Contract Act.²⁴⁴ The District Court ordered Mitsubishi and Soler to arbitrate each of the issues raised in the complaint and in all counterclaims except for the counterclaims concerning damages for defamation, discriminatory treatment, and the establishment of minimum sales volumes.²⁴⁵ With regard to the Federal antitrust issues, the District Court recognized that the Court of Appeals in *American Safety Equipment* had held that the rights conferred by antitrust laws were "of a character inappropriate for enforcement by arbitration," referring to the U.S. Supreme Court decision in *Wilko*.²⁴⁶ The District Court held, however, that the international character of the Mitsubishi-Soler agreement required enforcement of the agreement to arbitrate even as to the antitrust claims.²⁴⁷ In reaching this decision, the

240. *Id.*

241. *Id.*

242. *Id.* at 619.

243. *Id.*

244. *Id.* at 619-20.

245. *Id.* at 620-21 n.7.

246. *See American Safety Equip. Corp. v. J. P. McGuire & Co*, 391 F.2d 821, 825 (2d Cir. 1968) (citing *Wilko v. Swan*, 346 U.S. 427, 444 (1953)).

247. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 621 (1985).

Court mostly relied on Scherk.²⁴⁸

The U.S. Court of Appeals for the First Circuit affirmed in part and reversed in part. Finally, after endorsing the doctrine of American Safety, precluding arbitration of antitrust claims, the Court of Appeals concluded that neither Scherk nor the New York Convention required abandonment of that doctrine in the face of an international transaction.²⁴⁹ Accordingly, the Court of Appeals reversed the judgment of the District Court insofar as it had ordered submission of Soler's antitrust claims to arbitration. Upon Mitsubishi's petition, the U.S. Supreme Court granted certiorari "primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."²⁵⁰

The Supreme Court held that antitrust claims are arbitrable in an international context, even assuming that a contrary result would be forthcoming in a domestic context, and reversing in part the judgment of the Court of Appeals.²⁵¹ In its analysis, the Court concluded that international arbitrators are perfectly able to reach a decision on this matter without fearing that the rights of American citizens will not be sufficiently safeguarded if the arbitration proceedings are held abroad.²⁵² The Court heavily

248. *Id.* at 640 (citing and relying upon *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-520 (1974)).

249. *Id.* at 623.

250. *Id.* at 624.

251. *Id.* at 640 (Stevens, Brennan, and Marshall, J.J. dissenting; Powell, J., being absent).

252. The Supreme Court stated that:

For similar reasons, we also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly [footnote 18 omitted]. We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

Mitsubishi, 473 U.S. at 634.

relied upon *Scherk* and on *Bremen v. Zapata Offshore*,²⁵³ where the Court stated:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.²⁵⁴

However, in the last part of the *Mitsubishi* decision, the Court highlighted one of the most important points of its reasoning. It stated that:

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country'. Art. V(2)(b).²⁵⁵

Under this principle, the scrutiny over the parties' consent to arbitrate need not be overly pervasive at the stage of referral to arbitration because the Court will still have a last and final chance to review the award at the stage of recognition and enforcement.

As noted above, the NYC lists under Article V a number of grounds that the losing party may invoke to obstruct recognition and enforcement of an award. Among these, public policy is one ground stressed by the Supreme Court, and the invalidity of the arbitration agreement is another.²⁵⁶ By relying on the power of final scrutiny under article V, the Supreme Court decided to loosen the requirements for the enforcement of international

253. *See* *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

254. *Id.* at 9.

255. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (citing New York Convention, *supra* note 5, art. V(2)(b)).

256. *See* New York Convention, *supra* note 5, art. V.

arbitration agreements and to avoid imposing excessively stringent requirements on the referral to arbitration in Japan.

4. *The Preconditions for Referral Under the Ledee v. Ceramiche Ragno Doctrine*

In spite of the U.S. Supreme Court's genuinely favorable attitude to the enforcement of international arbitration agreements, the U.S. case law developed a complicated set of standards on the duty of referral to arbitration. The above-mentioned Supreme Court decisions mostly pertained to the issue of arbitrability—whether the subject matter is capable of being settled by arbitration—and did not address the issue of lack of consent to arbitrate. In those cases, the recalcitrant parties were mostly concerned about the lack of authority of the arbitral tribunal to decide on securities or antitrust matters, but they did not object to the validity of the agreement. Unlike the issue of arbitrability where courts seem to have followed a pro enforcement policy in the assessment of the parties' actual consent to arbitrate, the U.S. courts have often shown a much narrower attitude. There is a great deal of case law on consent to arbitrate, both in the domestic and in the international context. However, many domestic law issues are intertwined with international issues, and the standards created by the courts under a domestic legal framework inevitably influence the outcomes, even in international matters. Yet, unlike French case law, U.S. case law is much more deeply concerned with the existence of the true and actual intent of the parties to arbitrate. No prima facie standard or presumption of validity can be found in U.S. case law. Instead, most of the analysis carried out by the courts is based on general contract law principles. It is not uncommon to find in the American opinions a long reasoning on the common law contract doctrines underlying the parties' intent to arbitrate.

In this regard, U.S. courts have established a clear set of preconditions for the enforcement of international arbitration agreements, which are explicitly laid down in the 1982 First

Circuit case of *Ledee v. Ceramiche Ragno*.²⁵⁷ Here, the Court of Appeals held that:

A court presented with a request to refer a dispute to arbitration pursuant to Chapter Two of the Federal Arbitration Act performs a very limited inquiry. It must resolve four preliminary questions:

- (1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, [a]rticles II(1), II(2).
- (2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? Convention [a]rticles I(1), I(3); 9 U.S.C. § 206; Declaration of the United States upon accession, reprinted in 9 U.S.C.A. at 154 n. 29 (1982 Supp.).
- (3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, [a]rticles I(3); 9 U.S.C. § 202.
- (4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states? 9 U.S.C. § 202.

If the district court resolves those questions in the affirmative, as it properly did in this case, then it must order arbitration unless it finds the agreement 'null and void, inoperative or incapable of being performed'. Convention, [a]rticle II(3).²⁵⁸

Thus, in the Court's view, a number of preliminary conditions must be met before the arbitration agreement can be enforced. Most of these conditions, and notably those of points (2), (3), and (4) pertain to specific limitations included in U.S. law implementing the NYC. The first two limitations, points (2) and (3), are essentially related to the reservations provided by article I(3) of the NYC. These are the reciprocity reservation and the commercial reservation, respectively,²⁵⁹ which have been

257. See *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

258. *Id.*

259. For a discussion of these two reservations, see DI PIETRO & PLATTE, *supra* note 86, at 56-61 (stating the possibility to opt for these two reservations contributed to

adopted by almost two thirds of the more than 130 Contracting States to the NYC.²⁶⁰ The reciprocity reservation means that one country will apply the Convention only to the extent that the award has been rendered in another signatory country.²⁶¹ It is arguable, however, that the reciprocity reservation should also apply to arbitration agreements. The commercial reservation, instead, permits a state to apply the Convention only to “differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of the State making such declaration.”²⁶² Thus, what constitutes a commercial matter must be determined on a case by case basis rather than uniformly because the definition will vary from country to country.²⁶³ The third limitation, point (4), is a peculiar feature of the U.S. law that implements the NYC and deals with the parties’ nationality. This requirement is set forth by the FAA, which limits the application of the NYC by introducing a nationality condition.²⁶⁴ Section 202 of the FAA

the success of the Convention and to its high number of Contracting States).

260. Dispute Settlement: Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Status of Signatories, http://www.sice.oas.org/DISPUTE/comarb/uncitral.nysig_e.asp (last visited Apr. 9, 2006).

261. For discussion on the reciprocity reservation, see VAN DEN BERG, *supra* note 7, at 14 (“[T]he intention [of the drafters] was to provide that if a constituent state or province of a Contracting State was not bound to apply the Convention, other Contracting States were not bound to apply the Convention to awards made in such constituent state or province. The New York Conference decided then to upgrade this provision to a general reciprocity clause in view of the fact that no corresponding provisions were found in the commercial reservation of [a]rticle I(3).”).

262. New York Convention, *supra* note 5, art. I(3). For U.S. decisions dealing with the commercial reservation and the concept of commercial matter under article I(3), see *Francisco v. Stolt Achievement*, No. Civ.A. 00-3532, 2001 WL 290172 (E.D. La. Mar. 23, 2001) (holding that a seaman contract is a commercial relationship subject to the NYC); *Henry v. Murphy*, No. M-82, 2002 WL 24307 (S.D.N.Y. Jan. 8, 2002) (holding that a shareholders’ agreement is a commercial relationship for the purpose of the NYC); in *India*, Supreme Court of India, Feb. 10, 1994, YEARBOOK COMMERCIAL ARBITRATION 710-12 (1997) (holding that an agreement to render consultancy services is commercial in nature).

263. See *Indian Organic Chems v. Chemtex Fibres* (Bombay H.C. 1981), noted in YEARBOOK COMMERCIAL ARBITRATION 371-72 (1983) (interpreting the commercial reservation narrowly and emphasizing that a matter can be considered commercial only if a specific statutory provision deals with the subject of a particular legal relationship and defines it as commercial in nature).

264. 9 U.S.C. § 202.

states that:

An agreement or award . . . which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States.²⁶⁵

According to Professor van den Berg, this provision is in principle “incompatible with the New York Convention” because the sphere of application of the NYC is not limited by the nationality of the parties.²⁶⁶

D. The U.S. Judicial Scrutiny on the Validity of International Arbitration Agreements: The Applicable Provisions

1. Federal Law v. State Contract Law

The conditions laid down by *Ledee v. Ceramiche Ragno* have been followed by many other U.S. decisions²⁶⁷ and constitute a preliminary checklist for a court seized with the matter of referral to arbitration. Interestingly, even if these preliminary conditions are met, referral is not automatic. A following stage of scrutiny will be conducted; for instance, the court will have to determine whether the agreement is null and void, or incapable of being performed. This issue is quite controversial because the assessment of the substantive validity of the arbitration agreement is strongly influenced by contract law doctrines and, consequently, by domestic interpretive standards. This issue even more controversial when, in the interpretation of international arbitration agreements, American courts rely on Chapter 1 of the FAA, which deals exclusively with domestic arbitration.²⁶⁸ Although Section 2 of Chapter 1 deals with the

265. *Id.*

266. See VAN DEN BERG, *supra* note 7, at 17.

267. See, e.g., *Intertec Contracting A/S v. Turner Steiner Int'l, S.A.*, No. 98-CV-9116, 2000 WL 709004 (S.D.N.Y. May 31, 2000), *aff'd*, 6 F. App'x 61 (2d Cir. 2001) (applying these standards).

268. See generally Jennifer L. Pilla, Note, *Agreeing on Where to Disagree: Jain v. De Mere and International Arbitration Agreements*, 21 N.C.J. INT'L L. & COM. REG. 421 (distinguishing between the standard of enforcement of arbitration agreements under Chapters 1 and 2 of the FAA).

validity, revocability, and enforceability of agreements to arbitrate, it saves the applicability of equity. Section 2 of Chapter 1 of the FAA provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁶⁹

This is the so-called Savings Clause, which permits a court to deny enforcement of an arbitration agreement under equitable grounds and state contract law principles. Thus, the choice of the law applicable to the formation, validity, revocability, and enforceability of international arbitration agreements becomes crucial because, as pointed out by one author:

Although §2 of the FAA establishes a basic federal rule that arbitration agreements are enforceable, federal law does not govern all issues of formation, validity, and interpretation of domestic arbitration agreements. Rather, §2's savings clause has been interpreted, where domestic U.S. arbitration agreements are concerned, to incorporate or preserve generally applicable state contract law dealing with issues of contract formation, validity, and enforceability.²⁷⁰

The choice between federal and state law becomes crucial for the issue of referral to arbitration because the time allowed for the assessment of the validity of the arbitration agreement may vary according to the applicable law. It should be noted that U.S. Courts have not yet settled the question of whether federal law or state law should apply to the formation, validity, and revocability of arbitration agreements.²⁷¹ On the one hand, state

269. 9 U.S.C. § 2.

270. BORN, *supra* note 43, at 334-35.

271. *Id.* at 350 ("Nevertheless, there is still substantial debate about the respective

common law provides specific nullity grounds of contracts. The review of these grounds requires the court to conduct a deeper analysis of the agreement. However, it should be noted that even though the FAA does not explicitly refer to state law, the absence of a federal common law of contracts requires the courts to look to state law to determine grounds for revocation of an arbitration agreement.²⁷² In the interpretation of arbitration agreements, the relationship between federal law and state law is quite complex and not properly defined in the FAA.²⁷³ It follows that many of the difficulties in reaching a uniform standard of enforcement of international arbitration agreements in the United States are essentially due to the unresolved interpretive questions involving the FAA and state contract law. These unresolved matters also influence the decisions on international arbitration matters.²⁷⁴ Unfortunately, little has been done to protect agreements falling under article II from this complex legislative interplay, which involves choice of law issues as well as jurisdictional and procedural issues. In this regard, it is still not entirely clear whether the regulation of domestic arbitration is entirely preempted by the FAA.²⁷⁵

roles of state and federal law in determining the existence and validity of domestic arbitration agreements in the United States.”).

272. See Park, *supra* note 122, at 1282.

273. See Charles Davant IV, Note, *The Constitution in Exile Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law under the Federal Arbitration Act*, 51 DUKE L.J. 521, 524 (2001) (“[J]urisprudence in this area is difficult for lawyers to understand [as] judges tend to follow precedents that were themselves wrongly decided, and that courts are persuaded to compel parties to arbitrate for policy reasons.”); Barbara Ann Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 83-84 (1985) (discussing the problems that arise when a statute directly conflicts with the FAA causing difficult preemption analysis); see generally Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004) (outlining the process concerning the FAA’s preemption over state law).

274. See BORN, *supra* note 43, at 332 (“Unfortunately, the FAA’s goal of making arbitration agreements readily enforceable in U.S. courts is complicated in international transactions by jurisdictional and choice of law uncertainties. Overlapping provisions of the New York and Inter-American Conventions, the second and third chapters of the FAA, the first (‘domestic’) chapter of the FAA, and state law can all bear upon the enforceability of an international arbitration agreement in U.S. courts. Likewise, important issues of interpretation and procedure under the FAA remain unresolved, often leaving U.S. practitioners and courts without clear guidance.”).

275. See *id.*

Obviously, this causes a number of interpretive concerns in the case of international arbitration because, assuming that U.S. law will apply, the courts may still wonder whether state contract law defenses, not provided under the FAA, can be invoked against the validity of international arbitration agreements falling under article II(3). The absence of a general framework for international arbitration has been severely criticized by a legal commentator, who suggests that the FAA should be reformed to include a special chapter dealing solely with international arbitration proceedings.²⁷⁶

2. *The Federalist Approach*

Although many U.S. decisions²⁷⁷ point in the direction of federalism and support the view that federal law, not state law, should apply to the enforceability of arbitration agreements in federal courts, other decisions express doubts that arbitration agreements falling under the NYC should be governed only by federal law. A short overview of U.S. case law may clarify the issue.

During the 1980s, the Supreme Court rendered a series of

276. See Park, *supra* note 122, at 1248-49 ("The United States remains a victim of a self-inflicted competitive disadvantage imposed by its single legal framework for arbitration. The spillover of domestic precedents into international cases will inevitably chill selection of U.S. cities for arbitration (with fewer fees to arbitrators and counsel) by foreign parties understandably hoping to avoid excessive judicial interference. The FAA should be amended to provide a separate framework for international arbitration that would contain default rules limiting judicial review of awards to the narrowest grounds. In addition, parties might be given appropriate options to select greater judicial scrutiny. Such reform would keep courts away from arbitration except to support the process by enforcing agreements and awards and supplying interim measures in aid of arbitration. Reform could be accomplished either through tinkering with the existing Chapters 2 and 3 of the FAA or by adding a new chapter which would cover all international proceedings in the United States, regardless of whether they fit within these two treaties. The latter approach, casting a wide net, might be the preferred avenue, since it could help limit misguided judicial inventions to fill either real or perceived gaps in the coverage of international arbitration.").

277. For a Second Circuit decision which ruled for the applicability of federal common law to the enforcement of international arbitration agreements, see *Enron v. Smith Cogeneration Int'l*, 198 F.3d 88 (2d Cir. 1999). "When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable." *Id.* at 96.

decisions that expressly required the enforcement of arbitration agreements under Federal Law. The *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*²⁷⁸ decision is a good benchmark to evaluate this approach. There, the Court stated that:

Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.²⁷⁹

The Court further noted that the interpretation of arbitration agreements was governed by federal law:

[C]ourts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.²⁸⁰

Under this rationale, the Court declared that federal law imposed a pro-arbitration rule of interpretation, requiring that “doubts about the scope of an arbitration clause” be resolved in favor of arbitration.²⁸¹

In *Southland Corp. v. Keating*, the Supreme Court considered the preemptive effect of the FAA.²⁸² *Southland* presented the question of whether a California state court was obliged by the FAA to permit the arbitration of a dispute, notwithstanding a California statute specifically rendering such

278. 460 U.S. 1 (1983).

279. *Id.* at 24.

280. *Id.* at 24-25.

281. *Id.*

282. 465 U.S. 1 (1984).

disputes nonarbitrable.²⁸³ The Court held that the FAA preempted California law, stated that “[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”²⁸⁴

The Supreme Court also reaffirmed the pro-arbitration federal rule earlier expressed in the *Mitsubishi* decision.²⁸⁵ Thus, until the mid-1980s, there was little doubt that U.S. courts should review arbitration agreements under federal law. Thus, it was understood that state law had a limited application to arbitration matters governed by the FAA.²⁸⁶

3. *The State Contract Law Approach: The First Options Standard of Review*

The U.S. Supreme Court’s federal pro-arbitration bias remained unchallenged until 1987. At that time, the Supreme Court partially changed its interpretation of arbitration agreements and opened the way to a new doctrine based on state contract law. In *Perry v. Thomas*,²⁸⁷ the U.S. Supreme Court held that state contract law applies to the validity, enforceability, and revocability of arbitration agreements, and is not preempted by the FAA:

[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts

283. *Id.* at 3.

284. *Id.* at 16.

285. *Id.* at 10.

286. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1378 (1985) (“[T]he [Federal Arbitration] Act became a more effective vehicle for the vindication of the federal policy freeing parties to make binding contracts for arbitration. The Court required the state courts to apply the FAA and expanded the federal role in providing the relevant rules of law. After the Trilogy, states are no longer free to vitiate the arbitration choice because of a public policy preference for other forms of dispute resolution. Accordingly, the substantive law in several states is going to change. The remaining role of state law in FAA cases is uncertain. At most, state law will provide neutral rules of contract formation and enforcement addressed only to the arbitration clause. Yet even in this area the Court has indicated that state-law rules will be examined in light of the federal policy favoring arbitration.”).

287. 482 U.S. 483 (1987).

generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.²⁸⁸

Even though Professor Gary Born argued that Perry does not necessarily prevent the creation of a body of federal substantive law rules applicable to the interpretation of arbitration agreements, this decision has certainly encouraged lower courts to rely on state contract law.²⁸⁹ This principle was strongly reasserted in 1995 by the Supreme Court in the *First Options of Chicago v. Kaplan* ruling.²⁹⁰ This very controversial²⁹¹ case discussed the allocation of powers between courts and arbitrators, and the applicability of state law for the purpose of reviewing the issue of arbitrability, for instance, the assessment of the parties' consent to arbitrate.²⁹²

288. *See id.* at 492 n.9.

289. BORN, *supra* note 43, at 352 ("Note that the *Perry* dicta indicates only what state law rules are *not* preempted by §2's express terms; the *Perry* dicta arguably does not preclude the development of federal common law rules to govern the formation of arbitration agreements. Nevertheless, as discussed below, subsequent Supreme Court decisions have interpreted *Perry* as leaving issues of formation and validity of domestic arbitration agreements to generally-applicable state law.").

290. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995) (holding arbitration agreements should be enforced according to their terms and the intentions of other parties, just like any other contract); *see also* *Kaplan v. First Options of Chicago, Inc.* 19 F.3d 1503 (3d Cir. 1994) (stating the facts of the case as argued before the Court of Appeals).

291. For critical comments to this decision, see Natasha Wyss, Comment, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351 (1997) (criticizing *First Options*); William Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996) (discussing the problems arising from dicta in *First Options*); Joshua R. Welsh, Comment, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 MARQ. L. REV. 581 (2002) (stating the *First Options* holding enforces an arbitration agreement to which neither party has agreed); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 870-872 (2003) (addressing the limitations of *First Options* and the questions it has created); *but see* Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287 (1999) (supporting the *First Options* decision); Stephen C. Bennett, *The Developing American Approach to Arbitrability*, 58 DISP. RESOL. J. 8 (2003) (noting the *First Options* decision is in line with the rest of the world's view on the enforcement of arbitration agreements).

292. *First Options*, 19 F.3d at 1503-23.

The case dealt with several related disputes between First Options of Chicago, Inc. (First Options), a firm that clears stock trades, and Manuel Kaplan, his wife, and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared.²⁹³ In 1989, after entering into an agreement with First Options, MKI lost \$1.5 million.²⁹⁴ First Options then took control of and liquidated certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency.²⁹⁵ When its demands went unsatisfied, First Options sought arbitration by a panel of the Philadelphia Stock Exchange.²⁹⁶ Because there was no agreement to arbitrate in the workout document that MKI signed, Kaplan argued that the dispute was not arbitrable and filed written objections to that effect.²⁹⁷ The arbitrators decided that they had the power to rule on the merits of the parties' dispute and did so in favor of First Options.²⁹⁸ The Kaplans then asked the District Court to vacate the arbitration award, and First Options requested its confirmation.²⁹⁹ The court confirmed the award.³⁰⁰ Nonetheless, on appeal, the Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable, and it reversed the District Court's confirmation of the award against them.³⁰¹ The Court of Appeals reasoned that the Kaplans never personally signed a document containing the arbitration agreement, and the arbitral tribunal did not have jurisdiction over Kaplan as MKI's alter ego.³⁰²

The Supreme Court granted certiorari to consider two questions regarding the standards that the Court of Appeals used to review the determination that the Kaplans' dispute with

293. *Id.* at 1506.

294. *Id.* at 1507.

295. *Id.*

296. *Id.*

297. *Id.* at 1508.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 1505.

302. *Id.* at 1508.

First Options was arbitrable.³⁰³ First Options asked the Court to decide whether courts, in “reviewing the arbitrators’ decision on arbitrability,” should “apply a de novo standard of review or the more deferential standard applied to arbitrators’ decisions on the merits . . . when the objecting party submitted the issue to the arbitrators for decision.”³⁰⁴ In reaching its decision through a dense reasoning, the Supreme Court, following the precedent of *Moses*, touched upon the issue of state law, and, most importantly, set a new standard for the courts seized with the interpretation of the parties’ consent to arbitrate.³⁰⁵

We agree with First Options, therefore, that a court must defer to an arbitrator’s arbitrability decision when the parties submitted that matter to arbitration. Nevertheless, that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard of review question requires a word about how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration. And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here. When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts . . . The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.³⁰⁶

It appears from this excerpt of the Court’s reasoning that the First Options rule requires a judge to take a two-step approach to the issue of validity of an arbitration agreement. Not only must the Court determine whether the parties’ agreed to arbitrate, but the Court must also determine whether the parties actually agreed to let the arbitrators decide their controversy from an objective and impartial standpoint. To this

303. *First Options*, 514 U.S. at 941.

304. *Id.* (internal quotations omitted).

305. *Id.* at 944.

306. *Id.* at 943-44.

extent, as Professor Barcelò pointed out, under First Options “issues of the existence, validity, and scope of the arbitration agreement are all ‘arbitrability’ questions—presumptively for courts”.³⁰⁷ Needless to say, this standard of review is fiercely criticized because it is excessively burdensome and can cause a lower court to presume that the clause is invalid. This intrusive attitude of the court into the parties’ intent may ultimately hinder the effectiveness of arbitration agreements.³⁰⁸ It is even suggested that First Options may eventually cause the separability rule of *Prima Paint* to disappear from U.S. case law.³⁰⁹ Further, the First Options rule leaves the courts with too much discretion to determine whether the case should be referred to arbitration. Unfortunately, in the last five years, several courts, particularly state courts, have begun to take a harder look at arbitration agreements and their enforcement. Several courts have refused the enforcement of arbitration clauses under unconscionability grounds. It has been observed that:

307. Barcelò, *supra* note 35, at 1121.

308. See Karamanian, *supra* note 104, at 20 (“Over the past decade, certain courts have crafted an exception to removal of Convention cases from state to federal court based on an ever-expanding concept of waiver and an equally ill-defined reliance on state laws and state regulatory schemes. These principles are being invoked not only for jurisdictional purposes but also to undermine arbitration.”).

309. For a contrary view, see Reuben, *supra* note 291, at 870-72 (suggesting that separability should no longer be adopted by the U.S. legal system and should disappear).

As we have seen, separability is not compelled by the traditional rules of statutory interpretation, the legislative history of the FAA, nor the substantive law of contracts. Rather, as Professor Rau has observed, separability is merely a judicial policy choice that is “made largely on the basis of functional considerations.” As Professor Ian MacNeil has also argued, this judicial policy choice could have gone the other way: “Nothing would have prevented the Court in *Prima Paint* from holding that the making of an arbitration clause is in issue whenever the making of the agreement containing it is in issue.” With the benefit of nearly thirty-five years of experience with separability, the rise of the “new arbitration,” and the Court’s own apparent movement toward actual consent to arbitrability, the Court should revisit that policy choice and restore the policy choice made by Congress in 1925 by repudiating separability, returning to the courts all arbitrability questions, as defined in *Howsam*, that are not “clearly and unmistakably” given to arbitrators by the parties.

Id. at 878-79.

The phenomenon accelerated in the late 1990s. The California Supreme Court's *Armendariz* decision³¹⁰ is probably the most prominent example of this emerging body of law. During the past five years, courts—particularly state courts—appear far more willing to strike down an arbitration agreement or limit its enforcement on the ground that the arbitration agreement is unfair as a matter of the applicable state's general contract law.³¹¹

This mode of interpretation is at odds with the very permissive French *prima facie* standard of review, which seems to entail the contrary argument: There is a presumption that the parties have agreed to arbitrate. The French courts do not require a judge to look at whether the parties had actually consented to arbitration because it is thought to be one of the arbitrators' tasks under the *compétence-compétence* principle. In *First Options*, the Supreme Court unanimously requested that, before referring the parties to arbitration, the judge must be convinced that “clear and unmistakable” intent to arbitrate exists.³¹² Henceforth, the main difference between the French standard and the American standard can be synthesized as follows: The French *prima facie* standard of review, implied consent, is equivalent to the American *First Options* rule, evidence of actual consent. Although the French and American

310. *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 688-94 (Cal. 2000) (holding that the arbitration provision requiring the employee, but not the employer, to arbitrate was unconscionable due to lack of mutuality).

311. Jeffrey W. Stempel, *Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis As a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 762-63 (2004) (“[C]ourts and commentators differ over the degree to which a court may consult extra-textual sources of information in determining what was meant by the language, whether an outcome would be absurd, and what boundaries of public policy exist. More controversial is the propriety of courts policing a contract on the basis of unconscionability. Although all jurisdictions appear to recognize the concept, which is in theory universal, judges differ a great deal in their willingness to invoke the unconscionability concept to modify, strike down, or refuse enforcement of a contract term. Arbitration clauses, like other contract terms, are subject to the divergent landscape of unconscionability, perhaps more so in that arbitration agreements may be viewed as more ‘procedural’ than ‘substantive’ and hence, less likely to be the source of the type of social ill that justifies judicial interference with contract through the unconscionability doctrine.”).

312. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995).

standards have very little in common with each other, they were both conceived primarily in a domestic context.

An outstanding issue is the determination of which law the U.S. courts should apply to determine whether an agreement to arbitrate is null and void under article II(3). Even though U.S. courts have not adopted state contract law to determine this issue, it still seems quite unlikely that courts will not follow the strong rule affirmed by First Options. Clearly, this result is not desirable because it would serve a much better purpose to have a single federal set of rules governing formation, validity, and revocability of international arbitration agreements, which are special types of contracts that have little to do with other contracts governed by state contract law. Nonetheless, until the United States adopts a uniform set of rules expressly designed to govern international arbitration matters, there will always be a risk that courts will apply state contract law. Additionally, it is not sufficient to merely claim that federal law should govern these matters if, in reality, there are no governing federal contract law rules. At this point, however, the question is not whether state or federal contract laws should govern the arbitration agreement, but rather whether the U.S. courts should enjoy such a wide discretion in assessing the validity of an arbitration agreement that falls under the NYC. Certainly, it would be preferable to take a last-resort approach to the review of arbitration agreements falling under the Convention and to strongly limit the substantive scrutiny on the validity of the clause. Yet, one must regret that the attitude of U.S. courts is presently heading in the opposite direction.³¹³

313. See Karamanian, *supra* note 104, at 62 (“Article II of the Convention contemplates a streamlined approach to enforcing the agreement to arbitrate: if the parties have a written agreement to arbitrate covering the dispute at issue, a court must order arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. Implementation of article II in the United States, however, has not been completely systematic or smooth. Unless the parties ‘clearly and unmistakably provide otherwise’ the courts, not the arbitrators, decide whether the parties agreed to arbitrate their dispute. Even after the arbitration concludes, courts can decide independently whether the arbitration agreement authorized the arbitrators to hear the dispute. As a result, U.S. courts routinely resolve an array of issues relating to the threshold question of whether the parties even have an agreement to arbitrate enforceable under the Convention.”).

*E. Italy**1. Referral to Arbitration in the Italian Legal System*

Italy is the last country to be analyzed. Italian courts take a unique approach to the enforcement of international arbitration agreements, which stands in stark contrast to the case law of France and the United States. For many years Italian courts have been strongly criticized for their overly formalistic interpretation of international arbitration agreements.³¹⁴ The Italian judges were known for their obsessive scrutiny of the written requirement of the arbitration agreement under article II of the NYC. They have previously nullified agreements due to a lack of specific signature, under articles 1341 and 1342 of the Italian Civil Code, which dealt only with domestic arbitration clauses contained in standard forms.³¹⁵ This practice created considerable confusion among the interpreters and was strongly inconsistent with the rationale underlying article II of the NYC, which is to encourage and promote international business and not to prevent recourse to it. The negative attitude of Italian courts hindered the practice of international arbitration in Italy and ended up favoring the Italian recalcitrant parties. In fact, under an overzealous formalist interpretation of the requirements set forth by article II(2) of the NYC, the Italian courts would not bind the parties by an agreement to arbitrate.

314. See VAN DEN BERG, *supra* note 7, at 174 (strongly criticizing the interpretation given by the Italian courts to article II(2) of the NYC). “The majority of the Italian courts, and especially the Italian Supreme Court have denied for a long time that [a]rticle II(2) of the Convention prevails over domestic law.” *Id.*; see also RICCARDO LUZZATTO, LA CORTE DI CASSAZIONE E LA ‘FORMA’ DELLA CLAUSOLA COMPROMISSORIA PER ARBITRATO ESTERO: FORZA DI UNA TRADIZIONE ED EQUIVOCI DI UNA MASSIMA, RASSEGNA DELL’ARBITRATO 157-66 (1976) (on file with author).

315. See, e.g., Cass., sez. un., 13 Dec. 1971, n.3620, YEARBOOK COMMERCIAL ARBITRATION 190 (1976) (listing decisions where the Italian Supreme Court ruled that articles 1341 and 1342 prevail over the uniform provision of article II(2) of the NYC); Cass., sez. un., 25 May 1976, n.1877, YEARBOOK COMMERCIAL ARBITRATION 278 (1978) (“The Court interpreted [a]rt. II(2) as requiring a specific agreement to submit to arbitration ‘signed by the parties or contained in an exchange of letters or telegrams.’ Because such a ‘specific agreement’ could not be found in an arbitration clause printed on the contract-form and signed by the parties, the Court upheld the jurisdiction of the Italian courts and declared the arbitration clause to be without effect.”) (sources on file with author).

Due to this strict interpretation, the foreign party could hardly ever obtain the enforcement of an arbitration agreement in Italian courts and successfully waive Italian jurisdiction. Thus, it was forced to incur substantial loss in everlasting litigation efforts. In the last decade, following the 1994 reform of the Italian law on arbitration with law number 25 of 1994,³¹⁶ the standards of review have been considerably relaxed and Articles 1341 and 1342 are no longer considered applicable to agreements falling under article II(2) of the NYC.³¹⁷ Yet, the Italian doctrines on the enforcement of international arbitration agreements remain stricter than in many other NYC Contracting States. This is mainly the consequence of a strong influence of Italian domestic legal theory on the judges seized with international arbitration cases. Suffice it to say that Italian law distinguishes between two types of formal rules: so-called *ad substantiam* and *ad probationem*, which even Italian lawyers

316. The Italian arbitration reform was enacted on January 5, 1994 by Act No. 25. For a commentary on the Italian arbitration law, with a focus on its new international arbitration provisions, see Mauro Rubino Sammartano, *New International Arbitration Legislation in Italy*, 11 J.INT'L ARB. 77 (1994); Giorgio Bernini, *Italy-Ad Informandum*, INT'L. HANDBOOK ON COMM. ARB. SUPPL. 17 et seq. (1994); Piero Bernardini, *L'arbitrage en Italie après la recente réforme*, REVUE DE L'ARBITRAGE 479 et seq. (1994); Giorgio Gaja, *L'arbitrato in materia internazionale tra la l. n. 25/1994 e la riforma del diritto internazionale privato*, RIVISTA DELL'ARBITRATO 487 et seq. (1996); Riccardo Luzzatto, *L'arbitrato internazionale e i lodi stranieri nella nuova disciplina legislativa italiana*, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 257 (1994) (sources on file with author). Further, it should be noted that a new arbitration law was recently enacted on February 2, 2006 by Act No. 2 ("New Act"). The readers should note that this Article does not purport to assess the impact of the New Act on future judicial decisions on the NYC. For the purpose of this analysis, the Author has exclusively taken into account the body of Italian case law existing as of the date hereof. To the best of the Author's knowledge, the New Act has not yet been applied by Italian courts in connection with the NYC and other international arbitration issues. The readers should note that the interpretation of the New Act is beyond the scope of this Article.

317. For recent decisions finally stating that Articles 1341 and 1342 are not applicable and that article II(2) of the NYC prevails, see Cass. (I), sez. un., 22 May 1995, n.5601, YEARBOOK COMMERCIAL ARBITRATION 611 (1996) (holding Article 1341 approval is not necessary where the arbitration clause meets the New York convention requirements when the contract is concluded in Italy); Corte app. Milan, 5 February 1999, RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 327 (1999) (on file with author); Cass., 2 marzo 1996, n.1649, YEARBOOK COMMERCIAL ARBITRATION 734 (1997) (recognizing the validity of arbitration agreements included in unsigned standard conditions, or arbitration agreement by reference).

have difficulty understanding.³¹⁸

In the absence of any specific implementation provision in the Italian Code of Civil Procedure, referral to arbitration is dealt with by article II of the NYC. Further, the waiver of Italian jurisdiction in favor of foreign arbitration proceedings can also be achieved under the Italian Conflict of Laws Rules, which do not provide any guidance and simply states that “[t]he Italian jurisdiction can be waived by agreement providing for . . . a foreign arbitration if the waiver is proved in writing and the dispute deals with rights capable of being settled.”³¹⁹

Not surprisingly, then, the Italian case law on referral to arbitration has always looked at the uniform provision of article II(2) of the NYC and has not yet taken the conflict of laws approach.

2. *The Strict Standard of Review of Italian Courts: Form Over Substance*

It has already been pointed out that Italian courts used to require that the parties specifically approve in writing their arbitration clauses under the Italian Civil Code, even in the context of international arbitration where no such requirement exists under article II(2) of the NYC. Although Italian courts no longer apply articles 1341³²⁰ and 1342³²¹ of the Civil Code to

318. See GIUSEPPE FRANCHI, LA CONVENZIONE ARBITRALE SECONDO LE CONVENZIONI INTERNAZIONALI, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 325 (1985); see also Federico Carpi, *Elena Zuconi Galli Fonseca, Art. 807*, in ARBITRATO 100 (Federico Carpi ed., 2001) (discussing the current writing requirements for domestic arbitration agreements, which touches upon the distinction between the formal rules *ad substantiam* and *ad validitatem*) (sources on file with author).

319. Il Codice Civile Italiano, C.c., n. 218, art. 4, ¶ 2 (1995).

320. Article 1341 of the Italian Civil Code provides that:

1. The standard conditions prepared in advance by one of the parties are effective as to the other if at the time of the conclusion of the contract the latter knew of them or should have known of them by using ordinary diligence.
2. In any case conditions are ineffective unless specifically approved in writing, which establish, in favour of him who has prepared them in advance, limitations on liability . . . arbitral clauses or clauses by which the competence of the judicial authority is derogated from.

Il Codice Civile Italiano, C.c., n. 262, art. 1341 (1995).

321. Article 1342 of the Italian Civil Code provides that:

international arbitration agreements, this does not mean that the case law has adopted a deferential approach to arbitration proceedings taking place outside of Italy. To the contrary, Italian courts often retain their jurisdiction under a formal and literal interpretation of article II.³²²

This approach is, of course, at odds with the liberal *prima facie* standard adopted by French courts and yet has nothing in common with the U.S. style of reviewing arbitration agreements. Unlike U.S. courts, the Italian courts' attitude has little to do with an assessment of the parties' actual consent to arbitrate or with the application of contract law theories.

There are virtually no decisions in the Italian case law discussing at length the law applicable to the arbitration agreement and the interpretation of the null and void condition of article II(3). When dealing with the NYC, Italian courts tend to focus on formalities and stress that the parties must fully and strictly comply with the written requirement of article II(2) of the NYC. This approach is often at odds with the original purpose of the parties' agreement and the Convention itself. In Italy, courts are not inclined to take a doctrinal approach to the issue of substantive validity of arbitration agreements and much of their concern rests on whether or not both parties expressly and unequivocally agreed in writing to arbitrate.

At the outset, this approach may seem more predictable because, one can argue, the mere fulfillment of the NYC's

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1. In those contracts concluded by means of signing models or forms which are prepared in advance in order to regulate certain contractual relations in a uniform manner, the clauses added to the model or form prevail over those of the model or form in case the latter are incompatible with the former, even if the latter have not be cancelled.
 2. In addition, the provisions of the second paragraph of the preceding [a]rticle are applicable.

Il Codice Civile Italiano, C.c., n. 262, art. 1342 (1995).

322. See Cass., 18 April 2003, n.6349 (unpublished) ("It might appear strange that the review on the validity, operativeness, and applicability of the arbitration clause, although a substantive matter of controversy, must be conducted at a preliminary stage, before the assessment of the Italian jurisdiction. However, it is the convention's provision (art. II) to require the judge seized to verify, absolutely before hand, the existence of the arbitrators' competence, according to the procedural mechanism chosen by the judge.") With this decision the Italian Supreme Court plainly denied the existence of the principle of *kompetenz-kompetenz* in Italy!

writing requirements is simple and will suffice to trigger an automatic enforcement of the arbitration agreement in Italy. Yet, at a second look, it becomes evident that the nitpicking approach of Italian courts requires the parties to familiarize themselves with black letter concepts of Italian law, especially the concept of agreement in writing. In many cases, what a common law judge may consider to be an agreement in writing may not at all be considered in writing by an Italian judge. Moreover, the formal approach of Italian courts fails to consider the more or less sophisticated nature of the contracts and agreements involved. Formal analysis seems to prevail in every case, even when the parties are experienced businessmen who habitually draft arbitration clauses.³²³ Often, meeting the formal requirements imposed by the narrow reading of article II may prove very costly. There is a serious risk that the international business community will simply refuse to abide by these standards and choose to exclude Italy as a potential venue for

323. Cass., 28 October 1993, n. 10704, YEARBOOK COMMERCIAL ARBITRATION 739 (1995) (describing the formal approach of the Italian Supreme Court in interpreting arbitration clauses) (on file with author). An example of sophisticated business people drafting arbitration clauses is a case involving two large corporations operating in the business of manufacturing and supplying refrigerators. Finncold supplied refrigerating units to Robobar for the manufacture of refrigerators for European and U.S. hotels. The purchase confirmations sent by Robobar contained a clause reading “[a]ny dispute arising out of this order shall be exclusively referred to arbitration by a person to be appointed by the President of the Law Society.” *Id.* (translated from Italian). The Court held that:

The argument that [Finncold] agreed to the clause ex [a]rt. 1327 Italian Civil Code, by performing under the contract provided in writing by [Robobar], does not take into account two insurmountable obstacles: (a) that [a]rt. 1327 cannot apply where the written form is required (*see* Supreme Court, 2 November 1959, n. 3234) and (b) that all argument linking the form of the arbitral clause to the form of the contract in which it is contained is at odds with the principle of the autonomy of the arbitration agreement in respect to the contract in which it is contained. According to this principle, the agreement to arbitrate contained in an arbitral clause in a contract is an independent agreement; its validity and efficacy must be ascertained independently of the validity and efficacy of the contract. Petitioner’s argument that it would be contrary to good faith to contest the validity of the arbitral clause after having performed under the contract in which that clause is contained must be denied, since the formal requirement cannot be derogated from.”

Id.

their international arbitration proceedings. The analysis of one Italian Supreme Court decision on this matter may help clarify this concern and cast some light on the recent developments on the interpretation and enforcement of international arbitration agreements in Italy.

3. *The Strange Case of Krauss Maffei v. Bristol Myers Squibb*

In *Krauss Maffei Verfahrenstechnik GmbH et al. v. Bristol Myers Squibb*, the Plenary Session of the Italian Supreme Court ruled on the validity of an arbitration agreement, which purported to waive Italian jurisdiction and refer the parties to arbitration in Bern, Switzerland.³²⁴ The agreement had thus been concluded. By a sales confirmation letter, Bristol Myers Squibb (Bristol) accepted an offer made by Krauss Maffei Verfahrenstechnik GmbH et al. (Krauss) for filtering and drying equipment to be used in the manufacturing of antibiotics. Krauss's offer provided that German law applied and that disputes would be submitted to arbitration at the Chamber of Arbitration in Bern, Switzerland; Bristol's confirmation did not refer to these contractual provisions. The Krauss technicians installed the equipment at Bristol's plant in Latina, Italy. Later, the equipment proved to be defective, and Bristol formally requested Krauss to return the sales price. On December 12, 1994, Bristol commenced an action against Krauss before the Latina Court of First Instance, seeking payment of the sales price. Krauss objected to the jurisdiction of the Italian court based on the arbitration agreement between the parties. Later, Krauss filed a petition before the Italian Supreme Court, requesting a preliminary decision on jurisdiction, so called *regolamento di giurisdizione*.³²⁵

The Italian Supreme Court (Corte di Cassazione) held that

324. Cass., sez. un., 10 March 2000, n. 58, XXVI YEARBOOK COMMERCIAL ARBITRATION 816 (2001); see Pierluigi Simone, *Problemi relativi alla giurisdizione del giudice italiano e al collegamento tra questa e il luogo di adempimento dell'obbligazione contrattuale*, GIUSTIZIA CIVILE 3209-20 (2000) (commenting on this decision) (sources on file with author.).

325. *Id.*

the parties did not conclude a valid arbitration agreement.³²⁶ In reaching the decision, the Court explained its rationale as follows:

On the premise that according to Art. II of the New York Convention (and to Art. I(2) of the European Convention) an arbitral clause for foreign arbitration is valid when it is contained in a document signed by the contracting parties or in an exchange of letters or telegrams (Supreme Court, sez. un., 28 oct. 1993, n.10704 Foro It. I 1995, I, 942), jurisprudence has made clear that it is not necessary that the arbitral clause be separately approved or in writing; rather, such clause is valid when it is contained in a document signed by (both) contracting parties (Supreme Court, sez. Un., 16 nov. 1992, n.12268 Foro It. I 1992, under Arbitration n.88), which evidences the unambiguous intention of both parties to refer disputes concerning the performance of their contract to foreign arbitrators (Supreme Court, sez. Un., 20 nov. 1992, n.12385, Foro It. I 1994, under Arbitration n.87). Jurisprudence also held that referring a dispute to foreign arbitrators means derogating from the jurisdiction of the courts; hence, an arbitral clause must indicate the subject matter of future disputes in a clear and unequivocal manner and, if there is a doubt as to the scope of the clause, a restrictive interpretation must be preferred, which affirms the jurisdiction of the courts (Supreme Court, sez. Un., 28 July 1998, n.7398, Foro It. I 1998, under Arbitrato n.68). Once it is clear that the parties must sign the arbitral clause and that their unequivocal intention to refer the dispute to arbitrators must appear unambiguously, it follows that an arbitral clause is not valid when it is contained, as in the present case, only in the documents drawn up and signed by the foreign seller, and it does not appear in the document signed by the Italian buyer, by which the buyer accepted the seller's offer without any reference to the arbitral clause.³²⁷

It appears very clearly that, in Krauss, the Italian Supreme

326. *Id.*

327. *Id.*

Court gave an extremely narrow reading to the formal requirements of article II. The Court was mostly concerned by the existence of two elements: (1) the parties' signature in all the documents, which contained the arbitration agreement and (2) an express reference to the arbitration agreement in the written acceptance of the offeree. In the absence of these elements, the Italian Supreme Court held the arbitration agreement to be unenforceable; thus, it opted for a restrictive interpretation.

Needless to say, this approach frustrates the usefulness of an arbitration agreement in an international contract. In fact, it is very unlikely that business people will ever meet the formal requirements construed by the Italian Supreme Court because economic efficiency always drives them to believe that a general written acceptance of the entire contract embodying an arbitration agreement would suffice to make the clause binding. Legal commentators agree with this view and hold that an express reference to the arbitration agreement in the document of acceptance is unnecessary, provided that the acceptance makes reference to the container contract as a whole.³²⁸ Thus, even though the courts no longer require an express signature under articles 1341 and 1342 of the Italian Civil Code, the formal requirements continue to prevail over a substantive analysis of the parties' true consent to arbitrate. Due to this

328. See VAN DEN BERG, *supra* note 7, at 199 ("The acceptance in writing by whatever means need not be directed specifically to the arbitral clause in the contract; the acceptance of the contract as a whole fulfils the exchange requirement of [a]rticle II(2). If it were otherwise, it would mean that in all cases of a contract including an arbitral clause concluded by correspondence, the arbitral clause should be specifically approved in writing. It is obvious that this was never the intent of the drafters of the Convention, who actually wished to enlarge the possibilities of agreeing to arbitration in the international context by adding the second alternative."); see also Franco Bonelli, *La forma della clausola compromissoria per arbitrato estero*, in RASSEGNA DELL'ARBITRATO 145 (1983); Fabio Bortolotti, *Manuale di diritto commerciale internazionale*, in VOL. I DIRITTO DEI CONTRATTI INTERNAZIONALI 508 (2d ed. 2001); DIETF Ltd. c. RF AG, *Oberlandesgericht Basel-Land* (July 5, 1994), in XXI YEARBOOK COMMERCIAL ARBITRATION 685 (1997); *Bobbie Brooks v. Lanificio Walter Banci*, Corte app., Oct. 8, 1977, in RASSEGNA DELL'ARBITRATO 161 (1978). In *Bobbie Brooks*, the court held that the arbitration agreement had been concluded by means of the seller's acceptance of a purchase order, which incorporated the arbitral clause. There, the seller simply made reference to the number of the order forms to express its consent. *Id.* (sources on file with author).

rigid and parochial approach, in almost all the Italian cases on the NYC, the assessment of the validity of the arbitration agreement never goes beyond the scrutiny of the formal requirements under article II. Unless a new methodology is followed in interpreting agreements to arbitrate, it is very unlikely that the Italian courts will spontaneously move to an evaluation of the parties' real intention to arbitrate.

V. SECURING THE EFFECTS OF ARBITRATION AGREEMENTS
UNDER THE NYC: THE PROPOSED HARMONIZED SOLUTION

A. *A Comparison of the Different Standards of Enforcement:
Advantages and Shortcomings*

The analysis of the case law from three of the more than 130 Contracting States of the NYC suggests that judges have very conflicting views on the enforcement of international arbitration agreements. Interestingly enough, even in two fairly similar European legal systems, France and Italy, the judicial scrutiny is completely different. Whereas French courts are extremely deferential, Italian courts have proved far more severe in their scrutiny, through the imposition of strict formal requirements. In spite of a much-proclaimed general favorable attitude to international arbitration, American courts often apply common law contract theories to the validity of the arbitration agreement and often create a burden to a speedy referral to arbitration.

There is no doubt that the parties' consent is a key issue and the starting point in determining whether an international arbitration agreement should be enforced.³²⁹ Actually, even though the language of article II of the NYC does not expressly refer to the parties' intent, the language of paragraph 3, "unless the agreement is null and void, or incapable of being performed," implies that consent must exist as a condition precedent to referral.³³⁰ American courts have paid the greatest attention to the parties' consent because they carefully scrutinize this issue

329. See SAMUEL, *supra* note 46, at 96 ("[I]n the realm of consensual arbitration, the existence of both parties' consent to submit the dispute to arbitration is clearly a necessity.").

330. See New York Convention, *supra* note 5, art. II(3).

before upholding the validity of an agreement to arbitrate.³³¹ Unlike American courts, French courts chose to adopt an implied consent standard, which leads the French courts to refer the parties to arbitration after a quick *prima facie* review.³³² Italian courts, on the other hand, do not focus on the parties' consent but, rather, stress the importance of the formalities that must be met at the time of conclusion of the contract.³³³ All these diverging views come with advantages and shortcomings.

1. *Summary of the U.S. Approach*

The U.S. approach calls for more domestic contract law theories than are necessary. Courts often start their analysis with domestic contract law, but this method fails to take into account that international business people who included an arbitration agreement in their contract cannot be expected to operate under state contract law doctrines. If the contract is an international one, it is likely that the parties relied on a different legal framework to express their consent to arbitrate and did not intend for the state contract law of the forum to govern their choice to arbitrate. The U.S. courts should use the conflict of laws method to determine which substantive law applies to the issue of consent to arbitrate. In many cases, this would lead them to determine the validity of the clause in accordance with an applicable set of foreign rules. Yet, U.S. courts have been extremely reluctant to apply foreign law in their scrutiny of international arbitration agreements; as one can easily infer this concept from the Mitsubishi case, where Swiss law, the law chosen by the parties, was plainly disregarded. The U.S. approach, however, has the advantage of thoroughly assessing the parties' consent because the judges look at the structure of the agreement to arbitrate, as they would do with any other contract. This method reduces the risk that the parties will be dragged into arbitration without having consented to it.

331. *See supra* subparts IV.C–IV.D.

332. *See supra* subparts IV.A–IV.B.

333. *See supra* subpart IV.E.

2. *Summary of the French Approach*

The French approach is by far the most liberal, but it might lead a party to arbitrate against that party's will. In France, the courts are not very concerned with providing guidelines on the interpretation of international arbitration agreements. French courts attempt to shield the arbitration agreements from any possible claim of invalidity, regardless of the applicable law. Thus, international business people can be sure that a French court will most likely enforce their agreement to arbitrate. In France, a court may "decline jurisdiction even though doubts remain about the validity of the arbitration agreement."³³⁴

3. *Summary of the Italian Approach*

Finally, in the Italian approach, courts tend to disregard the agreements that do not specifically conform with the Italian wording of article II of the NYC. This approach suggests that referral to arbitration and the effects of international arbitration agreements in Italy are somewhat unpredictable because the parties can never be too sure that they have met the writing requirements as construed by the Italian Supreme Court. Two main reasons contribute to this conclusion: (1) consent to arbitrate is not the main concern of the courts, and (2) the courts virtually never get to the point of applying contract law theories to the formation of the arbitration agreement falling under article II of the NYC because, once a court is satisfied that the writing requirement is fulfilled, it will not inquire any further into the consent issue.

To sum up, the following standards have been found to apply as a requirement for the effectuation of arbitration agreements in these three jurisdictions:

334. See SAMUEL, *supra* note 46, at 191.

France	United States	Italy
Implied consent = Prima facie review	Actual consent = Contractual review	Specific consent = Written/formal review
<u>Advantages:</u> <ul style="list-style-type: none"> • Speedy recourse to arbitration 	<u>Advantages:</u> <ul style="list-style-type: none"> • Thorough inquiry of the parties intent to arbitrate 	<u>Advantages:</u> <ul style="list-style-type: none"> • Predictable outcome from courts if formal requirements are met
<u>Shortcomings:</u> <ul style="list-style-type: none"> • Superficial assessment of the parties' consent to arbitrate • Risk to compel arbitration without consent 	<u>Shortcomings:</u> <ul style="list-style-type: none"> • Lengthy review of arbitral clauses before referral • High chances that jurisdiction will be retained 	<u>Shortcomings:</u> <ul style="list-style-type: none"> • Formal requirements too demanding for international business practitioners • Complex interpretation of formal requirements

B. The French Prima Facie Standard of Review as the Best Harmonized Solution

1. The Obstacles to an Amendment of Article II of the New York Convention

The analysis of the case law applying and interpreting the NYC in France, Italy, and the United States has shown that the judges read arbitration clauses under different standards, which can hardly be reconciled by means of a harmonized interpretation of the NYC. Indeed, it would be very hard, if not impossible, to change such a radically diverging approach to article II arbitration clauses because the judges have long taken different paths, and so far no one has really tried to prevent them from doing so. Unlike other uniform law treaties, for example, the 1980 U.N. Convention on the International Sale of

Goods (CISG), about which several scholars³³⁵ have stressed the importance of reaching a uniform interpretation by using different interpretive instruments, few authors have thought to do the same with the NYC.³³⁶ If the CISG is so widely known and applied today, it is because everyone can easily access its resources, such as case law and scholarly materials, in free online databases.³³⁷ Unfortunately, few discussions about the

335. See, e.g., Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183 (1994) (arguing that an autonomous interpretation of Uniform Sales Law independent from a domestic legal system or domestic interpretation promotes uniformity in application and increases international commercial trade); Franco Ferrari, *Uniform Law of International Sales: Issues of Applicability and Private International Law*, 15 J.L. & COM. 159 (1995) (criticizing the Italian Court for not applying the 1980 Uniform Law on International Sales for international transactions even though there was a choice of law provision included); Franco Ferrari, *The Relationship between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021 (1996) (arguing that the CISG and the UCC cannot be interpreted analogously because the CISG must be interpreted under an international context, and autonomously and not via a domestic context like the UCC); Harry Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in 1980 UNIFORM SALES LAW, OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES 169 (F. Ferrari ed., 2003) (on file with author); Helen Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1 (1993) (analyzing the various methods of interpreting article 4(a) of the CISG and finding that the best method is a combination of international and domestic interpretations designed to protect the interests of the jurisdiction); John H. Honnold, *Process of Unification of Commercial Law: Goals of Unification*, reprinted in UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY, NEW YORK 18-22 MAY 1992 PROCEEDINGS, U.N. Doc. A/CN.9/SER.D/1, U.N. Sales No. E.94.V.14 (on file with author).

336. See RENÉ DAVID, L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL 191-99 (1982) (advocating the need for a uniform interpretation of the New York Convention, and underlining the importance of establishing a uniform law for international arbitration and of abolishing the procedural distinctions among the different arbitration concepts existing in the various Contracting States: "il s'est efforcé d'obtenir une entente entre les différents pays quant aux conditions dans lesquelles le conventions d'arbitrage seraient dotées d'efficacité, les procédures arbitrales menées, les sentences rendues. [Countries should agree on efficient arbitration agreements, on proceedings, and on the type of awards.]") (on file with author); see also VAN DEN BERG, *supra* note 7.

337. There are several online databases that collect and publish excerpts or full text court decisions on the CISG. To name a few: (1) the Pace Law School Institute of International Commercial Law database featuring the Queen Mary College of London translation program is available at <http://www.cisg.law.pace.edu/cisg/text/database.html>; (2) the Unilex database edited by Professor Michael Joachim Bonell of the University of

importance of NYC case law exist, and there are virtually no free online databases containing the Convention's materials. Many legal authors have been far more concerned about removing the obstacles to an efficient use of international arbitration than achieving a harmonized use of the international arbitration treaties.³³⁸ Further, in the case of arbitration, the confidentiality of the proceedings is also an impediment to the publication of awards, which further restricts the availability of interpretive sources.³³⁹

Nevertheless, both from a doctrinal and a practical perspective, it still seems preferable to strive for a harmonized interpretation of article II of the NYC. Unfortunately, this task is hindered by the nature of arbitration agreements, which are very peculiar contracts that can never be considered a mere contract. In fact, the specific features of the arbitration agreement, which entail both substantive and procedural effects, make it impossible to apply a uniform set of rules to its enforcement, formation, validity, revocation, and termination that could suit the needs of both common law and civil law jurisdictions. Clearly, the present system of the NYC is not equipped to deal with many of these issues, and it would be even

Rome is available at <http://www.unilex.info>; and (3) the UNCITRAL database featuring the CLOUT system is available at <http://www.uncitral.org/english/clout/index.htm>; Also, see Camilla Basch Andersen, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, 10 PACE INT'L L. REV. 403, 406-08 (1998) (commenting on the role and use of online case law databases and its importance for the development of a uniform interpretation of the CISG).

338. See Harold S. Crowter & Anthony G.V. Tobin, *Ensuring that Arbitration Remains a Preferred Option for International Dispute Resolution- Some Practical Considerations*, 19 J. INT'L ARB. 301 (2002) ("If the conduct of arbitrations is not efficient, even expeditious, arbitration may fall into disfavor as the preferred forum for the resolution of international commercial disputes."). No mention was made of the uniform interpretation of the NYC.

339. See Christopher Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration*, 20 J. INT'L ARB. 23, 25 (2003) ("The most obvious source of data on international commercial arbitration is the institutions that administer arbitration proceedings. International arbitration institutions number in the dozens, with one located in virtually every major trading city. Because of the administrative services these institutions provide to parties, they have access to substantial amounts of information about the arbitral process. But because of the confidentiality of arbitration proceedings, most of that information is unavailable to practitioners and academics.").

harder to envisage a new set of provisions dealing expressly with arbitration agreements. In this regard, it must be pointed out that there is an ongoing discussion at UNCITRAL on the possible ways of amending article II, and different proposals have been made.³⁴⁰ Among these discussions, which also include a legislative revision of the text of the NYC, UNCITRAL seems to prefer the adoption of an interpretive instrument of article II(2), which, at the present time, has yet to be prepared.³⁴¹ However, the usefulness of an interpretive instrument is questionable because it will not have binding force on the national judges, and it will take a great deal of time and effort to make the courts familiar with it.³⁴² Moreover, an amendment of the NYC does not seem to be possible, mainly because it would take years to get the revised version of the NYC ratified by the many Contracting States of the Convention. Actually, as the former Secretary General of UNCITRAL sarcastically pointed

340. The debate was triggered at the New York Convention celebration day held in New York by UNCITRAL on the fortieth anniversary of the Convention, on June 10, 1958. See New York Convention Day, June 10, 1958, *Enforcing Arbitration Awards under the New York Convention – Experience and Prospects*, U.N. Sales No. E.99.V.2 (1958), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYC-Day-e.pdf>; U.N. Comm. On Int'l Trade Law, Working Group on Arbitration, *Settlement of Commercial Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation*, ¶¶ 27-57, U.N. Doc. A/CN/WG.II/WP.110 (Sept. 22, 2000); U.N. Comm. On Int'l Trade Law, Working Group II (Arbitration and Conciliation), *Settlement of Commercial Disputes, Preparation of Uniform Provisions on Written Form for Arbitration Agreements*, ¶¶ 25-33, U.N. Doc. A/CN.9/WG.II/WP.118 (Feb. 6, 2002), [hereinafter Working Group II]. For the most recent update on such debate and for an accurate summary of how the State courts have interpreted the written form requirements of article II(2), see U.N. Doc. A/CN/WG.II/WP.139 (Jan. 23-27, 2006); Albert Jan van den Berg, *The 1958 New York Arbitration Convention Revisited*, in ASA [Swiss Arbitration Association] SPECIAL SERIES No. 15 130 (2001) (discussing the possible amendments of the text of the NYC and its intended effects) (on file with author); see also *Possible Future Work in the Area of International Commercial Arbitration: a Note by the Secretariat of UNCITRAL*, ARB. DISP. RES. L. J. 283 (2000) [hereinafter *Possible Future Work*] (on file with author).

341. See Working Group II, *supra* note 341 (interpreting article II(2) of the NYC).

342. See *Possible Future Work*, *supra* note 341 (“The solution of relying on a possibly amended version of the Model Law as a tool for interpreting article II(2) of the New York Convention (without amending or revising that Convention) might not bring about a sufficient level of certainty and uniformity, particularly as regards oral agreements, which courts would, in all likelihood, be reluctant to accept in a number of countries.”) (on file with author).

out, the world probably does not need more legislation on international arbitration.³⁴³

2. *The Advantages of the French Interpretive Method*

For the reasons discussed above, the French solution should be carefully taken into consideration to harmonize the interpretation of the duty of referral of article II. The French method has the advantage of facilitating a fast recourse to arbitration in a number of situations where the parties would otherwise be required to go through a lengthy judicial review of the arbitration agreement. In countries like Italy, a decision on the objection to arbitrate may take a very long time because the Supreme Court rules an average of once every four years after the first petition was filed. The French system of review is the best example of a clear, deferential approach to the parties' intention to arbitrate.³⁴⁴ This has the advantage of predictability. The main disadvantage of the French approach is that it forces the parties to arbitrate even in dubious situations where consent was not expressed in an objective, clear, and unconditional way. This is why distinguished legal scholars have stressed the need to keep some sort of border control that will prevent the parties from going to arbitration against their wishes.³⁴⁵ At this point, one can only agree with Professor Reisman, who argued:

343. See Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, 15 *ARB. INT'L* 216, 236 (1999).

344. See Thomas Carbonneau, *The Ballad of Transborder Arbitration*, 56 *U. MIAMI L. REV.* 773, 807 (2002) ("A laissez-faire state policy in conjunction with universal contract law principles and the codification of basic regulatory principles through international instruments constitute the legal foundation for the process of ICA [International Commercial Arbitration]. These elements coincide with the development of 'a-national' arbitration and the law-making function of international arbitrators. The autonomy of the contracting parties is so strong as a controlling proposition that some national courts permit the parties to agree to their own standard of judicial review for awards.").

345. See VARADY, *supra* note 54, at 89 ("It always has—and still is—very important to allow and to facilitate arbitration, when one of the parties really want it; and to disallow arbitration, when one of the parties never really wanted it, when the expressed intention of the parties did not reach a minimum coherence, or when the parties did not really establish an operative structure for decision making.").

[I]n the intersecting interests in efficiency and minimization of national judicial interference in international arbitration one must strike an exceedingly fine balance between arbitral autonomy and a minimum competence for national judicial review. Too much autonomy for the arbitrators creates a situation of moral hazard. . . . But too much national judicial review will transfer real decision power from the arbitration tribunal, selected by the parties in order to be non-national and neutral, to a national court whose party neutrality may be considered less.³⁴⁶

In striking this difficult balance, however, the interpreter cannot be confined to the mere preliminary stage of court referral to arbitration, but may look at the other stages of the arbitration process where a court has the power to review the effects triggered by the arbitral clause. In doing so, one will discover that the gate keeping function of the courts is not limited to the first stage, referral to arbitration (hereinafter stage A), but that they can second-guess the validity of the arbitration agreement at other stages as well. Namely, the courts will have another word on the validity of the arbitration agreement when the arbitral award is challenged before the domestic court of the place of arbitration (hereinafter stage B). This second stage, which falls outside of the scope of the NYC, actually constitutes a further form of control to be taken into account *ex ante*. Finally, in the third stage, courts are likely to exercise their scrutiny when they are seized with a request for recognition and enforcement of the award (hereinafter stage C). This is a final stage where the award can be rejected and therefore not enforced in a specific country, even though a party may still attempt to enforce it elsewhere.

As to stage B, under several municipal arbitration statutes, a court can nullify an award rendered by the arbitrators because they lacked jurisdiction or because the agreement to arbitrate was invalid. Further, as to stage C, under article V(1)(a) of the NYC, a court can refuse recognition of the award if the arbitration agreement does not comply with the requirements of article II or the parties who entered into the agreement were

346. See REISMAN, *supra* note 34, at 113.

under some form of incapacity under the law applicable to them.

Further, in striking the balance, one must consider that the refusal of a court to uphold the validity of an arbitral clause constitutes a final decision in the sense that the arbitrators will not even have a first chance to decide the matter. On the other hand, a decision of the arbitrators on the validity of the arbitration agreement can always be subject to several forms of control, in both stages B and C. The lack of harmonization of the standards of enforcement just described leads to one straightforward conclusion: The parties to an international contract cannot predict whether a court will enforce an agreement to arbitrate and under which standards it will happen. In this respect, the French standard seems to be the most predictable because the courts take a clear position as on the issue of effecting the clause. Aside from the fact that it is hard to establish the literal meaning of manifest nullity, it appears that the French Supreme Court's fundamental tenet is to avoid wasting the courts' time and energy at stage A because the control function can still be exercised at a later stage. Essentially, this position is also shared by the U.S. Supreme Court in *Mitsubishi*, which stated:

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country'. . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.³⁴⁷

In essence, the parties' consent to arbitrate is adequately safeguarded at stages B and C, and control at stage A becomes

347. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (internal citations omitted).

unnecessary. This is why the advantages of the French approach outweigh its shortcomings—it is not too concerned with a strict interpretation of the parties' intent to arbitrate at the preliminary stage of the arbitral process.

C. The Suggested Interpretive Solution: Judicial Review of Arbitration Agreements at the Final Stage Only

In analyzing these three different stages, it seems that only in stage A does the court have the power to say the last word on the arbitration agreement. In fact, when a court refuses to give effect to the agreement to arbitrate, this means that the clause is null or ineffective—no positive and negative effects can be achieved. The parties will no longer be bound by their obligation to arbitrate, and the court will retain jurisdiction. At this point, the arbitrators can say little about the dispute because there will be no arbitration at all.

In stages B and C, instead, the courts have respectively a power to nullify the award and to refuse recognition and enforcement, but in both cases this power is not final. This means that the court of one state is not bound by the decision to nullify or refuse recognition of the award in another state. Under this rationale, it seems that stage A constitutes the only irreversible kind of scrutiny that a court can exercise over an agreement to arbitrate.

One must also consider that stages A, B, and C might even take place in three different jurisdictions.³⁴⁸ This may cause the parties to face three potentially divergent types of scrutiny of their agreement to arbitrate under the standards adopted by the municipal courts of each country involved.

This raises the question of the usefulness of a system of

348. An example may clarify the possible scenario. Stage A may take place in a country where the recalcitrant party has objected to the existence of a valid arbitration agreement. If stage A is passed and the domestic court has given leeway to arbitration in a foreign country by waiving its jurisdiction, an award will be rendered. However, the losing party will have the power to request the court of the country where the award is rendered to nullify it. At this point, the winning party will still have a chance to request recognition and enforcement of an award in a country where the losing party has assets. Therefore, in this hypothetical situation, three different jurisdictions will be involved with the review of an arbitral clause.

control of arbitration agreements at the preliminary stage A, that is, article II(3) of the NYC, if the courts will still exercise an additional power of scrutiny at two further stages. This is why the French standard of review seems to be a more efficient use of arbitration agreements, which are in all other cases excessively burdened by judicial second-guessing and second-looks.

Yet, to avoid the predictable criticism³⁴⁹ that will arise from a proposed worldwide adoption of the French *prima facie* standard, one should also think about counterbalancing measures. In this respect, a different and new interpretation of the control system of the NYC could help achieve this balance.

The interpretation of the NYC outlined in this paper suggests that, with the exception of France, courts tend to interfere with the effectiveness of the arbitral clause from the outset (stage A), to protect the parties' consent to arbitrate. Yet, if courts were to adopt the *prima facie* standard in other Contracting States, parties would not be left unattended and without control because the judges would still retain their power of review in stages B and C. Should this prove insufficient to further safeguard the actual consent to arbitrate, it is suggested that courts could adopt a broader interpretation of their power of review under article V(1) of the NYC and begin to raise the ground of invalidity of the arbitral clause on their own motion, the so-called review *ex officio*. Under Article V(1)(a), in fact, a court has the power to assess the validity of an arbitral agreement only at the request of one party.

The system constitutes a guarantee equivalent to that of article II(3) because, at both stages, the court will scrutinize the agreement only at the request of one party. Nevertheless, one could offset the elimination of control at stage A through an extensive application of article IV of the NYC. As a precondition

349. See, e.g., BERGER, *supra* note 9, at 329-30; Dimolitsa, *supra* note 43, at 234-35; POUURET & BESSON, *supra* note 49, at 443 (criticizing Prof. Van den Berg's proposal to interpret the null and void exemption of article II as manifest nullity); see VAN DEN BERG, *supra* note 7, at 155). These authors have pointed out that the mode of interpretation derived from Article 1458 finds no support in the intention of the NYC's drafters, who actually rejected the proposal to introduce the principle of manifest nullity of arbitral clauses in the convention. According to this critical interpretation, a court cannot interpret article II(3) as requiring a mere *prima facie* exam of the arbitration clause.

for obtaining recognition and enforcement of an award, Article IV requires a party to produce before the competent court an arbitral agreement that conforms to article II. The submission of this document implicates that a court has a power of review of the arbitral clause on its own motion, before the proceedings can continue. In the interest of efficiency, it would not be inconceivable for the court to review the arbitration agreement automatically, even without the request of a party. This type of interpretation would not be contrary to the scope of the NYC and to the meaning of Article V(1)(a) because it would not impose a serious burden on the party seeking to obtain recognition and enforcement. Submitting an agreement that conforms to article II is a mandatory prerequisite under Article IV anyway, and it is hard to understand why a court should be prevented from exercising an automatic scrutiny at that point instead of waiting for a party to raise the objection. Finally, the review of the validity of the arbitration agreement makes more sense at the recognition and enforcement stage (stage C) than it does at the start of arbitration (stage A). From the perspective of public legal order, it is essential to safeguard a legal system from recognizing foreign arbitration awards rather than from preventing the parties to arbitrate abroad.

VI. CONCLUSIONS

Almost five decades have passed since the adoption of the NYC, and the suspicion surrounding the use of international arbitration is no longer justified. Arbitration has become a common, not an exceptional, way of resolving international disputes, and, more often than not, even unsophisticated business people have recourse to it on a routine basis.³⁵⁰ This is

350. See Craig, *supra* note 212, at 2. ("By the mid-1980s, at least, it had become recognized that arbitration was the normal way of settlement of international commercial disputes. This observation will not surprise anyone familiar with modern complex international transactions and the contracts that govern them. The inclusion of an arbitration clause to govern future disputes has become a routine step, and drafters are required to have a working knowledge of the various international arbitration institutions and options. Still, it is necessary to ask how we have come to this state of affairs. The answer to this question reveals that the rise of international commercial arbitration as a matter of routine is surprisingly recent. The growth of international commercial arbitration is largely a post-World War II phenomenon, fueled by the

why the parties no longer need to be safeguarded from the dangers of arbitration, either at home or in a foreign country. Now more than ever, the international legal community needs to rely on an efficient effectuation of arbitration clauses. Indeed, it is vital for the development of international trade to submit international disputes to skilled adjudicators, who are confident in different legal cultures and able to conduct hearings in several languages. The effectiveness of international arbitration agreements is not fully secured under the present system of the NYC, but a reform of the text will probably not solve the problem. A mere amendment of the NYC's text will not suffice, and, in any event, such amendment will not come into existence anytime soon because of the difficulty of such task.³⁵¹ There is a long path towards the development of a harmonized legal culture of international arbitration,³⁵² both in academia and in legal practice. International arbitration experts and arbitral institutions should become more aware of the importance of national judges in the application of an international instrument like the NYC. International organizations, like UNCITRAL and the main arbitral institutions—ICC, LCIA, and AAA—should continue in their efforts to strengthen their ties with domestic judges who regularly deal with international arbitration issues.

explosive growth of international trade and commerce and foreign investment in both developing and developed countries.”); see also Klaus P. Berger, *Party Autonomy in International Economic Arbitration: A Reappraisal*, 4 AM. REV. INT'L ARB. 1, 7 (1993) (on file with author).

351. See Hermann, *Arbitration Agreement*, supra note 1 (enumerating this prediction); see Albert Jan van den Berg, *Some Practical Questions Concerning the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, in UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY, supra note 336, at 212-13 (United Nations ed., 1995) (stating that the amendment to the text of the NYC has the disadvantage that “it will take a long time before a sufficiently large number of States have become a party to it. In the interval, uncertainty will exist as to which regime applies”) (on file with author).

352. See William K. Slate II, *The Culture Connection in International Commercial Arbitration*, 59 DISP. RESOL. J. 1, 13 (2004) (addressing the importance of developing a common legal culture for international commercial arbitration); Richard A. Epstein, *The Empirical and Theoretical Underpinnings of the Law Merchant: Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004); Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 310 (2004).

The judges should be encouraged to participate in seminars and conferences dealing with these matters and to render their opinions concerning the status of the application of the NYC in their respective countries. Judges should be aware of the legal solutions reached by other colleagues in different Contracting States. This is a crucial point because knowledge of NYC case precedents can help unskilled judicial officials gain confidence in the application of this instrument and solve interpretive issues. This effort has already been commenced in the field of international sales law, where a group of legal experts—working under the auspices of UNCITRAL—accomplished the remarkable task of creating a digest of the decisions applying the CISG.³⁵³ The Digest is currently accessible online on the UNCITRAL website and is soon to be translated in the five United Nations' official languages. The group of uniform commercial law experts that drafted the Digest edited and summarized more than one thousand decisions on the CISG with the purpose of divulging and bringing to the attention of legal practitioners, judges, and scholars the different case law interpretations worldwide.³⁵⁴ This new system of interpretation

353. See Report of the United Nations Commission on International Trade Law on its 35th Session, Supp. No. 17, ¶ 243, U.N. Doc. A/57/17 (June 17-28, 2002) (discussing the UNCITRAL proposal).

354. See Report of the United Nations Commission on International Trade Law on its Thirty-seventh Session, *Introduction to the Digest of Case Law on the United Nations Sales Convention*, ¶¶ 17-18, U.N. Doc. A/CN.9/562 (June 9, 2004) (“The Digest presents the information in a format based on chapters corresponding to CISG articles. Each chapter contains a synopsis of the relevant case law, highlighting common views and reporting any divergent approach. The Digest is meant to reflect the evolution of case law and, therefore, updates will be periodically released in the form of individual chapters that will replace the previous ones. While the CLOUT system reports cases only in the form of abstracts, the present Digest makes reference also to the full text of the decision whenever this is useful to illustrate the point. The Digest is the result of the cooperation between the national correspondents and the UNCITRAL Secretariat. It also greatly benefited from the contribution of Professor Franco Ferrari of the Università degli Studi di Verona, Facoltà di Giurisprudenza; Professor Harry Flechtner of the University of Pittsburgh School of Law; Professor Ulrich Magnus of the Universität Hamburg, Fachbereich Rechtswissenschaft; Professor Peter Winship of the Southern Methodist University School of Law; and Professor Claude Witz, Lehrstuhl für französisches Zivilrecht, Universität des Saarlandes, who prepared its first draft.”); see also FRANCO FERRARI, HARRY FLECHTNER & RONALD BRAND, *THE DRAFT UNCITRAL DIGEST AND BEYOND - CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES*

for international uniform commercial law treaties is a highly recommended methodology, even for the NYC, because it enables judges and arbitrators of different countries to read judicial decisions in English and take into consideration the views of other jurists seized with the interpretation of the same international instruments.³⁵⁵ The legal commentators often point out that the knowledge of foreign case law is the most effective, albeit not the only, way to reach a uniform interpretation of international conventions throughout the world.³⁵⁶ Although a collection of case law cannot by itself guarantee a correct legal interpretation, it certainly can help the interpreter decide which

CONVENTION (2003) (commenting on the UNCITRAL Digest project and reviewing the decisions published therein) (on file with author).

355. See Fritz Enderlein, *Uniform Law and Its Application by Judges and Arbitrators*, in INTERNATIONAL UNIFORM LAW IN PRACTICE 329 (Unidroit ed., 1988) (discussing the role of judges and arbitrators for the uniform interpretation of international treaties) (on file with author).

356. See Michael Joachim Bonell, *Non-legislative Means of Harmonization*, in UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY, *supra* note 336. (“[T]he most effective way to reach this objective is to have regard to the way in which the single convention or uniform law is interpreted in the other countries. In other words, a judge or arbitrator who is seized of a question of interpretation concerning a specific uniform law text should always take into consideration the solutions elaborated in other contracting States.”); Franco Ferrari, *CISG Case Law: A New Challenge for the Interpreters?*, 17 J. L. & COM. 245, 260-61 (1998) (“In my opinion, which, I have to admit, has changed since the CISG case law has begun to arise, foreign case law should always be considered as having merely persuasive value. This result is, in essence, what article 7(1) of the CISG imposes when it provides that ‘regard is to be had . . . to the need to promote uniformity in its application.’ Foreign case law should be used as a source from which to draw either arguments or counterarguments. Thus, it can be helpful in solving a specific problem. Consequently, an arbitral award could have more influence on a specific solution than a decision of a supreme court of a country whose judges are not accustomed to dealing with international issues in general, and the CISG in particular. Similarly, a court decision of a Non-Contracting State could be more influential than that of a Contracting State. Furthermore, the *obiter dicta* to be found in one decision could impact the outcome of a specific case more than the *rationes decidendi* of other court decisions. But independently of which position one takes, either the one just suggested, foreign case law as a mere aid, or any other one, each conceivable position will require that foreign case law be known and understood. Therefore, as we celebrate the tenth anniversary of the CISG coming into force, we should also celebrate all of the efforts undertaken to promote the aforementioned knowledge. Ten years from now, the reasons for this will be even more evident than they are today.”); Elizabeth H. Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT’L L. 263, 283 (1986).

legal solution may best suit his case. In this respect, it is clear from the outset that such interpretations are not binding international case law, but will simply be persuasive tools that can corroborate legal analysis at its best. Hopefully, then, a similar instrument will soon be drafted by UNCITRAL on the NYC's case law. This will accelerate the debate on the preferred judicial interpretive trends concerning, not only the arbitration agreements, but also all the other relevant NYC interpretive issues. The role of UNCITRAL is extremely important because this organization is the "true nerve centre of a system leading to harmonization on many crucial subjects of international trade law."³⁵⁷ At the present time, however, this project has not yet been accomplished and the interpretative doubts on the effectiveness of arbitration agreements in the different Contracting States will persist. Uncertainty reigns at the stage of the enforcement of the arbitration agreement and, probably, the best way for a judge to deal with an unknown object is to stay out of its way.

357. See Bernini, *Voices of International Practice*, in UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY, *supra* note 336, at 226.