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Articles

When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*

Dr. Albert Jan van den Berg†

I. Introduction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958¹ (the New York Convention) applies to the recognition and enforcement of arbitral awards made in the territory of another State.² To this territorial criterion for a foreign arbitral award, there is added the following criterion:

It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.³

The later criterion of nondomestic arbitral awards was discussed by the U.S. Court of Appeals for the Second Circuit in the case *Bergesen v. Joseph Muller Corp.*⁴ The court held that

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1. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, (entered into force for the United States on December 29, 1970) [hereinafter cited as New York Convention]. The New York Convention is adhered to by 68 States at the time of writing this article (April 1985).

2. *Id.* at art. I(1). According to article I(3), when adhering to the New York Convention, a State may declare on the basis of reciprocity that it will apply the New York Convention to the recognition and enforcement of awards made only in the territory of another *Contracting State*. *Id.* at art. I(3). This so-called "reciprocity reservation" is made by two thirds of the *Contracting States*, including the United States.

3. *Id.* at art. I(1).

4. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983).

an award made in the State of New York between two foreign parties is to be considered as a nondomestic award within the meaning of the New York Convention and its implementing legislation.⁵

The decision of the court of appeals has been received favourably by commentators in the United States.⁶ The decision can indeed be regarded as a confirmation of the favourable attitude of the American courts towards international arbitration. It may be questioned, however, whether the court of appeals did not go too far in supporting international arbitration. Is an arbitral award made in the United States a nondomestic award within the meaning of the New York Convention for the simple reason that both parties are foreign?

The question what constitutes a nondomestic award within the meaning of the New York Convention is one of the most complicated issues posed by this Treaty. In the first two sections of this article, the facts of the *Bergesen* case and the judgment of the court of appeals will be summarized with the purpose of providing the factual and legal framework within which the question has arisen. The legislative history (*travaux préparatoires*) of the second criterion of the New York Convention's scope will be examined in a third section. This examination will be followed in the fourth section by a so-called "conventional interpretation" of the second criterion, which is based on the legislative history and the text of the New York Convention. The court of appeals' interpretation, which may be called "the expansive interpretation," will be discussed in the fifth section. The possible consequences for practice resulting from the expansive interpretation are investigated in the sixth section. The *Bergesen* case is not only troublesome for the question of what constitutes a nondomestic award. To complicate matters further, Muller also argued that the award in question could be considered a so-called "stateless award." The question of what constitutes a "stateless award," and whether such an award

5. *Id.* at 932. The implementing legislation may be found at Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1980).

6. See, e.g., Feldman, *An Award Made in New York Can Be a Foreign Arbitral Award*, 39 *ARB. J.* 14 (1984); Love, *Arbitration*, 15 *J. MAR. L. & COM.* 134 (1984); Phillips, *Recognition of Foreign Arbitral Awards: The Second Circuit Provides a Hospitable Forum*, 10 *BROOKLYN J. INT'L L.* 489 (1984).

comes within the New York Convention's purview is the subject of the seventh and last section of this article.

II. Facts

The facts of the case are relatively simple. Bergesen, a Norwegian shipowner, and Muller, a Swiss company, entered into three charter parties in 1969, 1970 and 1971. The 1969 and 1970 charter parties provided for the transportation of chemicals from the United States to Europe. The 1971 charter party concerned the transportation of propylene from the Netherlands to Puerto Rico. Each charter party contained an elaborate ad hoc arbitration clause, the pertinent part of which provided:

The arbitration shall take place in New York, New York, and shall be governed by the Laws of the State of New York, and the award when made by a majority of the arbitrators may be enforced in any court which shall have jurisdiction, and shall be final and binding on the parties anywhere in the world.

In 1972, after disputes had arisen in the course of performing the 1970 and 1971 charter parties, Bergesen made a demand for arbitration of its claims for demurrage as well as for shipping and port expenses. Muller denied liability and asserted counterclaims. In the award, rendered in New York City on December 14, 1978, the arbitrators found in favour of Bergesen and dismissed all but one of Muller's counterclaims. The net award to Bergesen was \$61,406.09 with costs and interest.

Bergesen started enforcement proceedings in Switzerland on the basis of the New York Convention.⁷ The Judge of the Court of First Instance of Zurich declared the award enforceable in summary proceedings. The Court of Appeal of the Canton of Zurich affirmed on December 8, 1980. Muller took recourse to the Swiss Federal Supreme Court, contending that the award had not become binding within the meaning of the New York Convention.⁸ To this end, Muller relied on a provision of the New

7. Summarized in 9 Y.B. COM. ARB. 437 (1984).

8. Article V(1)(e) of the New York Convention provides:

1. 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:

...

York Civil Practice Law and Rules (C.P.L.R.), according to which a court must confirm an award upon application by a party made within one year after its delivery to him, unless the award is vacated or modified.⁹ Muller argued that only after confirmation of the award by the New York court could the award become binding and enforceable under the New York Convention.

At this juncture it should be mentioned that the drafters of the Convention expressly abolished the requirement of leave for enforcement on an award in the country where the award is made. This requirement existed in practice under the New York Convention's predecessor, the Geneva Convention of 1927.¹⁰ The Geneva Convention provided that in order to obtain enforcement of an award made in another State, the award should be "final."¹¹ The word "final" was interpreted by a number of courts as requiring leave for enforcement in the country where the award was made. Considering this requirement too cumbersome for the international enforcement of arbitral awards, the drafters of the New York Convention substituted the word "binding" in place of the word "final."¹²

According to this well established principle of the New York Convention, which is unanimously confirmed by all courts in the Contracting States,¹³ no confirmation of the award by the New York court was needed for enforcement. Nevertheless,

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

9. Muller relied on section 7510 which reads: "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." N.Y. CIV. PRAC. LAW § 7510 (McKinney 1980).

10. Convention on the Execution of Foreign Arbitral Awards, Geneva, Sept. 26, 1927, 92 L.N.T.S. 302 (1929-1930). The United States has not adhered to this Convention.

11. *Id.* at art. I(d).

12. See generally A. J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, 333-37 (1981) (discussing the legislative history of the substitution of "binding" for "final") [hereinafter cited as VAN DEN BERG].

13. See *id.* at 337. See also A. J. van den Berg, *New York Convention 1958. Commentary Cases Reported in Volume X*, 10 Y.B. COM. ARB. 335, 394-96 (1985) and references given in cumulative index, *id.* at 396.

Bergesen's lawyers apparently did not wish to take any risk and filed a petition in the district court in New York on December 10, 1981, for confirmation of the award.¹⁴ It is here that dates become relevant. The C.P.L.R. of New York State requires that the petition be filed within *one* year after the arbitral award is made.¹⁵ In contrast, the legislation implementing the New York Convention in the United States provides for a period of limitation of *three* years after the arbitral award is made.¹⁶ The award was made on December 14, 1978. Consequently, the one year limitation period under the C.P.L.R. had expired. On the other hand, the time limit of three years under the implementing legislation had not (that is to say, only four days remained). Bergesen therefore based its petition on the implementing legislation.

14. By a Judgment of Feb. 26, 1982, Bundesgericht, Switzerland, reported in 9 Y.B. COM. ARB. 437 (1984), the Swiss Federal Supreme Court rejected Muller's recourse. The Swiss Federal Supreme Court confirmed that no confirmation of the award by the courts in New York was needed for enforcement under the Convention.

15. N.Y.CIV. PRAC. LAW § 7510 (McKinney 1980). The same applies to Chapter One of the Federal Arbitration Act, 9 U.S.C. § 9 (1982). Section 9 provides:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Id.

16. 9 U.S.C. § 207 (1982). Section 207 of the Federal Arbitration Act provides: Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Id.

The question which then arose before the district court and subsequently the court of appeals was whether enforcement of the award fell under the New York Convention and its implementing legislation.¹⁷ If the award did, it could be declared enforceable; if not, no enforcement could be granted. The award made in New York obviously did not qualify for the territorial criterion (that is, an arbitral award made in the territory of another State). But could it be considered as nondomestic, the second criterion of the Convention's field of application?

III. The Court of Appeals

The district court answered the latter question in the affirmative. It construed the New York Convention as implemented in the United States, "to apply to arbitration awards involving foreign interests and rendered in the United States."¹⁸ Accordingly, it confirmed the award and entered judgment in Bergesen's favour.¹⁹ The district court relied in particular on the implementing legislation which provides:

17. The question was raised in some earlier court decisions in the United States. See *National Metal Converters, Inc. v. I/S Stavborg*, 500 F.2d 424 (2d Cir. 1974), summarized in 1 Y.B. COM. ARB. 201 (1976) (court did not apply the New York Convention to enforcement of an arbitral award, made in New York between U.S. and Norwegian party, but noted disagreement of commentators on the question); *Transmarine Seaways Corp. v. Marc Rich & Co., A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979) (application of New York Convention to enforcement of arbitral award made in New York between Liberian and Swiss party), *aff'd mem.*, 614 F.2d 1291 (2d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980), summarized in 6 Y. B. COM. ARB. 244 (1981); *Sumitomo Corp. v. Parakopi Compania Maritima, S.A.*, 477 F. Supp. 737, 738, 741 (S.D.N.Y. 1979) (action to compel arbitration agreed to take place in New York "in accordance with the rules of the United States Arbitration Act" between Japanese and Greek party, *held*, New York Convention applies as "had Congress also intended to exclude purely foreign transactions, it undoubtedly would have done so explicitly"), *aff'd*, 620 F.2d 286 (2d Cir. 1979), summarized in 6 Y. B. COM. ARB. 245 (1981); *Marc Rich & Co., A.G. v. Andros Compania Maritima, S.A.*, 579 F.2d 691, 699 (2d Cir. 1978), summarized in 7 Y.B. COM. ARB. 373, 374 (1982) (court found the question whether the New York Convention applied to the enforcement of an arbitral award made in New York between Swiss and Panamanian party "intriguing" but did not resolve it); *Diapulse Corporation of America v. Carba, Ltd.*, No. 78 Civ. 3263 (S.D.N.Y. June 28, 1979) (holding that where an arbitral award was made in New York between U.S. and Swiss party, the New York Convention does not apply to its enforcement as the award is not an "award not considered as domestic"), *remanded on other grounds*, 626 F.2d 1108 (2d Cir. 1980), summarized in 9 Y.B. COM. ARB. 461 (1984).

18. *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 650, 651 (S.D.N.Y. 1982).

19. *Id.*

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.²⁰

The court of appeals affirmed.²¹ It examined in some detail the legislative history of the New York Convention. The court found that the original proposal to apply the Convention only to awards made in another country was controversial because the New York Conference delegates were divided as to whether it defined adequately what constituted a foreign award. On the one side were the Common Law and East European countries which favoured the territorial criterion as embodied in the original proposal. On the other side were certain Civil Law countries, such as France and the Federal Republic of Germany, in which the nationality of an award was determined by the law governing the procedure. On the basis of the proposition of a Working Group, both criteria were included in a compromise solution.²²

The most important part of the court of appeals' reasoning can be considered the following:

The Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of "nondomestic" in conformity with its own national law. Omitting the definition made it easier for those states championing the territorial concept to ratify the Convention while at the same time making the Convention more palatable in those states which espoused the view that the nationality of the award was to be determined by the law governing the arbitral procedure. We adopt the view that awards

20. 9 U.S.C. § 202 (1982).

21. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983).

22. *Id.* at 930-32. See *infra* text accompanying notes 24-44.

“not considered as domestic” denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards, see *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n. 15 (1974). Applying that purpose to this case involving two foreign entities leads to the conclusion that this award is not domestic.²³

Regarding the implementing legislation, the court reasoned:

The legislative history of this provision [i.e., 9 U.S.C. § 202 (1980), quoted above] indicates that it was intended to ensure that “an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless it has a reasonable relation with a foreign state.” H.R. Rep. No. 91-181, 91st Cong., 2d Sess. 2 (1970), reprinted in 1970 U.S. CODE CONG. & AD. NEWS 3601, 3602. Inasmuch as it was apparently left to each state to define which awards were to be considered nondomestic, see *Pisar* at 18, Congress spelled out its definition of that concept in section 202. Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not.²⁴

IV. Legislative History

The New York Convention’s history is recorded in Summary Records of the Conference held at New York in May and June 1958, at which the Convention was born.²⁵ To determine what the Convention’s drafters may have intended by providing that the Convention also applies to nondomestic awards, the court of appeals relied on the reports of commentators.²⁶

23. *Bergesen*, 710 F.2d at 932 (citations omitted).

24. *Id.* at 933.

25. The Summary Records are reprinted in Part III of INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION (G. Gaja ed. 1985).

26. The commentators on which the court relied were: G. HAIGHT, CONVENTION ON

Before discussing the court of appeals' conclusions, however, it seems appropriate to examine the Summary Records themselves. The Draft of the Convention prepared by ECOSOC in 1955,²⁷ which formed the basis for the discussions at the New York Conference in May and June 1958, provided solely that the Convention was to apply to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which such awards are relied upon"²⁸ Thus, what constituted a "foreign arbitral award" was, according to ECOSOC, to be determined by a territorial criterion.

At the beginning of the New York Conference, a number of delegates objected to the territorial criterion. The Italian delegate observed on May 21, 1958:

[T]he Conference should reconsider the definition of the awards to which the Convention would apply. The mere fact that an award had been made in a country other than that in which it was sought to be relied upon was not enough to make it a foreign award from the point of view of the country of enforcement. The Conference should seek other criteria better suited to the purpose of the Convention, which was intended to facilitate the settlement of international commercial disputes.²⁹

The French delegate said on the same day: "The draft . . . tended to attach an exaggerated importance to the place where the award was rendered. Practice had shown that the place of pronouncement was often an insignificant factor, and the prominence given to it in the draft tended to obscure the strictly private nature of the arbitration operation."³⁰ On May 22, 1958, the

THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE, MAY/JUNE 1958 (1958); Contini, *International Commercial Arbitration — The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 A.J. COMP. L. 283 (1958); Pissar, *The United Nations Convention on Foreign Arbitral Awards*, 33 S. CAL. L. REV. 14 (1959); 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 (1961).

27. U.N. Doc. E/2704 and Corr. 1, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.A.1.1 (G. Gaja ed. 1985).

28. *Id.*, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.A.1.7 (G. Gaja ed. 1985).

29. U.N. Doc. E/CONF.26/SR.2, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.4 (G. Gaja ed. 1985).

30. U.N. Doc. E/CONF.26/SR.3, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.9 (G. Gaja ed. 1985).

German delegate observed:

If it was agreed that the place where the award was made should not be considered a determining factor — an opinion which he shared with the French representative — whether an award was to be regarded as national or foreign could be made dependent on the nationality of the parties, the subject of the dispute, or the rules of procedure applied. The last seemed to constitute the most appropriate determining factor. The nature, and hence the nationality, of an arbitral award would then be derived from the rules of procedure under which it had been made. Moreover, it should be noted that those rules depended to a large extent, at least in German law, on the will of the parties and, failing that, on the arbitral body itself; they were, however, governed to some extent by the procedure provided by the national legislation.³¹

On the same day Austria, Belgium, the Federal Republic of Germany, France, Italy, the Netherlands, Sweden and Switzerland submitted an amendment: "This Convention shall apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon."³²

The French delegate explained this so-called Eight-Power amendment as follows:

The place of the award was often fortuitous or artificial and, unlike the place of a court judgment, which was governed by unequivocal rules, might often prove difficult to determine. In certain extreme cases, for example when arbitral awards were agreed upon by correspondence between the arbitrators, it might prove quite impossible to determine it. Furthermore, as was shown by the ruling of the French Court of Cassation that an arbitration conducted under foreign law in Paris was not a French arbitration,³³ certain legal systems regarded the place where the award

31. U.N. Doc. E/CONF.26/SR.4, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.16 - III.C.17 (G. Gaja ed. 1985). Before the Commencement of the Conference, the German Government had already observed that the criterion for determining the nationality of the award should be the procedural municipal law under which the award was made. Annex I, U.N. Doc. E/2822, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.A.2.2-III.A.2.3 (G. Gaja ed. 1985).

32. U.N. Doc. E/CONF.26/L.6, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.B.1.2 (G. Gaja ed. 1985).

33. See P. FOUCHARD, *l'ARBITRAGE COMMERCIAL INTERNATIONAL* 323 *et seq.* (1961).

was made as only a secondary factor.³⁴

Delegates of Guatemala, Israel, the United Kingdom and the United States noted that the Eight-Power amendment raised the difficulty that in their countries, and especially in Common Law countries, the place of arbitration determined whether an award was a foreign award. They found the territorial criterion "fully satisfactory."³⁵

A number of delegates (Turkey, El Salvador, Argentina) also complained that the Eight-Power amendment left unanswered the question of what was not a domestic award. They understood it, in particular in view of the statements of the delegate from West Germany, to mean an award made in one country under the municipal procedural law of another country. The Italian delegate, who sponsored the Eight-Power amendment, recognized that the proposed amendment was incomplete.³⁶

On the following day of the Conference, May 23, 1958, the West German delegate repeated that the territorial criterion was not satisfactory. He gave an example:

Two German businessmen residing in the United Kingdom submitted a dispute to arbitration; for that purpose they selected an arbitral tribunal sitting in London which consisted of German nationals and which followed German procedure. If the territorial criterion alone was considered, there could be no doubt about the nationality of the award: it would be an English award. That solution, however, did not seem right: since the German law of procedure had been applied, German law regarded that award as German; in addition, such a solution would have the effect of seriously infringing the autonomy of the will of the parties, which should be respected.³⁷

The delegate of Colombia opposed the Eight-Power amendment by a statement which argued remarkably well the practical difficulties to which the criterion of nondomestic awards would

34. U.N. Doc. E/CONF.26/SR.5, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.28 (G. Gaja ed. 1985).

35. *See, e.g., id.*, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.28 (G. Gaja ed. 1985).

36. *Id.*, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.30 (G. Gaja ed. 1985).

37. U.N. Doc. E/CONF.26/SR.6, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.40 (G. Gaja ed. 1985).

lead. Although this statement is rather lengthy, it is worthwhile to quote the Summary Records extensively:

The field of application of the Convention raised a fundamental problem. As the Federal Republic of Germany pointed out in its general observations. . . , the best solution would be for the internal laws of countries to be standardized by the adoption of a uniform law. Otherwise it would be necessary to find a criterion whereby it would be possible to specify to which arbitral awards the Convention was applicable. It was, indeed, most important that each signatory State should know exactly what the other States were undertaking to do. It was for that reason that the Colombian delegation was not satisfied with the [E]ight-Power amendment The proposed criterion was much too vague. It was essential that an absolutely clear criterion, incapable of divergent interpretations, should be established. The Conference was called upon to draw up a Convention on the recognition and enforcement of certain so-called foreign awards, and the least it could do was to determine to which awards that Convention should be made applicable. In the case considered by the Federal Republic of Germany . . . , the same award could be regarded as a national award by two different States, but that situation really provided a weighty argument against the over-vague formula set out in the [E]ight-Power amendment. If the Conference adopted that amendment, the signatories of the future Convention would not know the exact scope of the field of application of the Convention.

. . . .

The territorial criterion embodied in article I of the draft Convention had been criticized. The representative of the Federal Republic of Germany had cited examples in which an award made in the territory of a State other than that in which it was relied upon would nevertheless have to be regarded as domestic. The representative of France had criticized the territorial criterion on the grounds that it might be difficult to specify the place of the award, when, for example, such an award was made by correspondence. That, however, was an exceptional case. The arbitrators were obliged to discuss the question, to hear the parties and to deliberate, all of which factors made it necessary for the arbitral tribunal to have a permanent place of meeting. Even in the exceptional case of an award being made by correspondence, the place of the award could be determined, just as was, in all legislative systems, the place where a contract was entered into by correspondence. He therefore saw no valid objection to article I of

the draft Convention. It was not perhaps perfect but it had the merit of providing a criterion and the obvious course seemed to be to entrust the task of improving it to a Working Group.³⁸

The delegates from Israel, Guatemala, Japan, Norway, Poland and the U.S.S.R. concurred in this criticism. The Conference then decided to refer the matter to a Working Group composed of delegates from Colombia, Czechoslovakia, France, the Federal Republic of Germany, India, Israel, Italy, Turkey, the U.S.S.R. and the United Kingdom.³⁹

The Working Group submitted its report on June 2, 1958.⁴⁰ In the report, the Working Group noted that, with respect to the scope of application of the Convention, the views of the Governments represented at the Conference fell mainly into two categories: (a) those favouring the principle of the place of arbitration, and (b) those favouring the principle of nationality of the arbitral award. "In an attempt to reconcile these divergent views" (no further explanation was given) the Working Party proposed a text, embodying both criteria, which is essentially the same as the present text of article I(1) of the Convention:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of disputes or differences between physical or legal persons. It shall also apply to arbitral awards not considered as domestic awards in the State where the recognition and enforcement are sought.⁴¹

The Working Group's proposal was subject to a summary discussion at the Plenary Session on June 3, 1958.⁴² The Yugoslavian delegate considered that the proposal "combined the territorial criterion with other criteria." The Japanese delegate

38. *Id.*, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.41-III.C.42 (G. Gaja ed. 1985).

39. U.N. Doc. E/CONF.26/SR.7, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.51 (G. Gaja ed. 1985).

40. U.N. Doc. E/CONF.26/L.42, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.B.4.1 (G. Gaja ed. 1985).

41. *Id.*, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.B.4.2 (G. Gaja ed. 1985).

42. U.N. Doc. E/CONF.26/SR.16, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.130 (G. Gaja ed. 1985).

stated that his country preferred the territorial criterion to any other connecting factor, but noted "with satisfaction that the proposed text would have the effect of extending the scope of the Convention." The Italian delegate confirmed that "the Working Group had wished to make the scope of the Convention broader," and did not even exclude "awards made abroad when they were regarded as domestic by the country in which enforcement was sought." The proposal of the Working Group was adopted by thirty-five votes to none with three abstentions.

When the final text of the New York Convention was reviewed for adoption on June 9, 1958, two amendments were made which have a bearing on the concept of a nondomestic award.⁴³ With respect to the arbitration agreement, the text provided that enforcement of the award could be refused if the arbitration agreement were invalid "under the law applicable to it." This was amended to read: "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."⁴⁴ An even more significant amendment was made in respect of the arbitral award: the text provided that enforcement of the award could be refused if the award had been set aside "in the country in which it was made." This was amended to read: "of the country in which, *or under the law of which*, that award was made."⁴⁵ The underscored amendments recognize the possibility that an arbitral award is governed by an arbitration law which is different from the law of the place of arbitration.⁴⁶

43. U.N. Doc. E/CONF.26/SR.23, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.207, III.C.213 (G. Gaja ed. 1985).

44. New York Convention, *supra* note 1, art. V(1)(a) (emphasis added).

45. New York Convention, *supra* note 1, art. V(1)(e) (emphasis added).

46. However, article V(1)(d) of the New York Convention remained unchanged. This provision reads:

1. 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:

. . . .

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

New York Convention, *supra* note 1, art. V(1)(d). For historical reasons, article V(1)(d), having been hotly debated, had become "untouchable." See generally VAN DEN BERG,

V. The Conventional Interpretation

A. *First Criterion Always Applies to an Award Made Abroad*

The court of appeals in *Bergesen v. Muller* stated that the New York Convention applies *in any case* to the recognition and enforcement of an arbitral award made in the territory of another State.⁴⁷ This observation conforms to the legislative history reviewed above. In fact, the compromise reached at the New York Conference was in favour of the territorialists. The nondomestic award laid down in the second criterion was intended as an extension of the New York Convention's field of application. This is also made clear in the text of the New York Convention itself. The second criterion provides: "It shall *also* apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."⁴⁸ In other words, the New York Convention always applies to the recognition and enforcement of an arbitral award made in another State (that the first criterion), whilst it may, in addition, apply to the recognition and enforcement of an arbitral award made in the State where the recognition and enforcement are sought if such an award is considered nondomestic (i.e., the second criterion). As a result, *the second criterion of the Convention's scope applies only to the recognition and enforcement of an arbitral award made in the territory of the state where recognition and enforcement are sought.*

supra note 12, at 322-25.

47. Muller also argued that the first reservation made by the United States in virtue of article I(3), New York Convention, *supra* note 1, i.e., that the United States shall apply the New York Convention to the enforcement of arbitral awards made in other *Contracting States* only, forecloses the application of the second criterion by U.S. courts. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). The court of appeals rejected this argument, stating simply that "the treaty language should be interpreted broadly to effectuate its recognition and enforcement purposes." *Id.* at 933. The court of appeals is indeed correct in holding that the use of the first reservation does not confine the New York Convention's applicability to the first criterion. The reciprocity idea underlying the first reservation is that a State wishes to enforce awards made in other *Contracting States* only because these States have expressed their willingness to enforce awards made in the own State by adhering to the New York Convention. The reciprocity idea underlying the first reservation can be deemed to apply by analogy to the second criterion. Accordingly, if the first reservation is used, the second criterion can be deemed to be limited to awards rendered in the own State under the arbitration law of another *Contracting State* only. See VAN DEN BERG, *supra* note 12, at 27.

48. New York Convention, *supra* note 1, art. I(1) (emphasis added).

When such an award is to be considered nondomestic according to what may be called the conventional interpretation will be discussed in Section D hereafter. Before entering into this discussion, a consequence of the fact that the first criterion always applies to an award made abroad should be mentioned in connection with the law implementing the Convention in the Federal Republic of Germany (see Section B below). Further, in order to appreciate the New York Convention's scope in relation to the nondomestic award, it is also necessary to make some observations regarding the distinction between recognition and enforcement on the one hand and setting aside on the other.

B. The West German Implementing Law

The rule that the New York Convention is always applicable to the recognition and enforcement of an arbitral award made abroad applies even if the award made in the other country is considered domestic by the enforcing court. The West German law implementing the Convention confirms this:

- (1) If an arbitral award falling under the Convention is made in another Contracting State under German procedural law, then the request for the setting aside of this award can be made in the Federal Republic of Germany. The setting aside is governed by §§ 1041, 1043, 1045(1) and 1046 of the Code of Civil Procedure.
- (2) If the request for enforcement of an award within the meaning of paragraph (1) is refused by virtue of Article V of the Convention, then the award shall be set aside at the same time in case one of the grounds for setting aside set forth in § 1041 of the Code of Civil Procedure is present.⁴⁹

The provision quoted above caters to the situation where an arbitral award is made in another State. If such an award is made under German procedural law (that is German arbitration law), that award is considered domestic in West Germany. In conformity with the rule that under the Convention's first criterion the Convention always applies to an award made abroad, the German law provides that the aforementioned award, though being considered domestic, falls under the New York

49. Law of Mar. 15, 1961, § 2, Bundesgesetzblatt [BGBl] II, 121 (W. Ger.). There seems not to be any other implementing law which deals with the second criterion.

Convention. The German law also refers to the setting aside of such award, which reference needs to be explained in the following subsection.

C. *Distinction Between Enforcement and Setting Aside*

The above-mentioned German implementing law provides that an arbitral award made abroad under German procedural law can be set aside under the latter law. This raises the question about the role played by the setting aside of an award within the framework of the Convention.

As a general rule, whilst recognition and enforcement merely have a territorial effect, setting aside has, according to the Convention, an extra-territorial effect.

When a court recognizes and enforces an arbitral award, whether made within its territory or abroad, it accepts that the award has the same force and effect within its jurisdiction. The legal basis for recognition and enforcement for an arbitral award made within a court's jurisdiction is to be found in the arbitration law of that jurisdiction. For the recognition and enforcement of a foreign arbitral award, the legal basis is the New York Convention or, if it exists, municipal law regarding the recognition and enforcement of a foreign arbitral award.⁵⁰ The granting or refusal of recognition and enforcement is territorially limited to the court's jurisdiction. A foreign court is not bound by a granting or refusal of recognition and enforcement by a court of another country, because neither is listed in the Convention as a ground for which recognition or enforcement must be respectively granted or refused.⁵¹

Different rules apply, according to the New York Convention, to the setting aside (also called vacatur or annulment) of the arbitral award. First, the court of the country in which, or under the law of which, the award is made ("country of origin") is exclusively competent to entertain the action for setting aside the award. A foreign court may not entertain such an action. The Convention specifically refers to a setting aside by the court

50. See, e.g., ZIVILPROZESSORDNUNG [ZPO] art. 1044 (W. Ger.) (German Code of Civil Procedure). See generally Glossner, *National Report Federal Republic of Germany*, 4 Y.B. COM. ARB. 60, 79 (1979).

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

of the country of origin only.⁵² A foreign court may only refuse recognition and enforcement of an arbitral award within its jurisdiction if one or more of the grounds of refusal for recognition and enforcement are present.⁵³ Second, if the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision. In that case they must refuse recognition and enforcement of the award.⁵⁴

An example may clarify the above distinction between the recognition and enforcement of an arbitral award on the one hand, and the setting aside of an award on the other. An arbitral award made in France under French arbitration law can be set aside by a French court only. Foreign courts may merely refuse recognition and enforcement of that award within their jurisdiction, but not set it aside. However, if a Swiss court has refused recognition and enforcement of the French award, an Italian court is not bound by such refusal and may still grant recognition and enforcement. Such conflicting decisions are rare in practice. If the French courts have set aside the award, the Swiss and Italian courts must refuse the recognition and enforcement.

The West German law quoted above is concerned with an award made in another country under German procedural law. If the award is made under German procedural law, German courts consider the award to be domestic. West Germany therefore is the country "under the law of which" the award is made, in other words, the country of origin. The West German law rightly provides that the West German courts are competent to decide on the setting aside of the award.

D. Nondomestic is Determined by the Applicable Arbitration Law

We may now return to the question when an award is to be considered nondomestic under the New York Convention. As ex-

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

53. New York Convention, *supra* note 1, art. V(1)(e). It is a well established principle that the grounds of refusal for recognition and enforcement listed in article V of the New York Convention are exhaustive. See VAN DEN BERG, *supra* note 12, at 265.

54. New York Convention, *supra* note 1, art. V(1)(e). It should be noted that in the case where the arbitral award is refused recognition and enforcement in the country of origin, it is not always clear whether such refusal is a genuine refusal of recognition and enforcement or is in fact tantamount to a setting aside.

plained in (A) above, the second criterion of the Convention's scope applies only to an arbitral award made in the territory of the country where recognition and enforcement are sought.

The legislative history shows that its supporters considered an award as nondomestic if it is governed, on the basis of an agreement of the parties to this effect, by the arbitration law of another country. For example, parties may agree to arbitrate in France on the basis of West German arbitration law. French courts will consider the award as nondomestic and hence enforce the award under the Convention although it is made within their own territory. The above quoted West German implementing law confirms that whether an award is to be considered nondomestic depends on the arbitration law applicable to the arbitration as it refers to "an arbitral award . . . made in another Contracting State under German procedural law."⁵⁵ Although the text of the law is written for German awards made abroad, the reference to German municipal procedural law indicates that if an award is made within West Germany under a foreign procedural law, such award is to be considered as nondomestic in West Germany.

The foregoing interpretation can be called the conventional interpretation. This interpretation is not only based on the legislative history of the Convention but is also confirmed by the text of the Convention. The Convention refers to arbitral awards not only made in another country but also under the law of another country.⁵⁶ If the Convention's field of application consisted of arbitral awards made in another State only, there was no need to refer to awards made under the law of a country. This aspect will be discussed below.⁵⁷ It should also be noted that most commentators outside the United States have affirmed that the nondomestic arbitral award is an award made in the enforcing State under the arbitration law of another State.⁵⁸

In practice, however, parties rarely agree to arbitrate in one country under the arbitration law of another country. Such agreement is a rather hazardous undertaking because both the

55. Law of Mar. 15, 1961, § 2, BGBl II, 121 (W. Ger.).

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

57. See *infra* text accompanying note 80.

58. *E.g.*, K.H. SCHWAB, *SCHIEDSGERICHTSBARKEIT* 320 (3d ed. 1979).

country where the arbitration takes place and the country whose arbitration law is chosen should recognise the capacity to agree to arbitrate under the law of a country which is different from the country where the arbitration takes place. The law governing the arbitration determines which country's courts are competent to render assistance in the arbitration, for example the appointment of arbitrators. That law also determines which country's courts are competent to exercise control over the regularity of the arbitration and arbitral award, ordinarily carried out in an action for setting aside the award. If the parties agree to arbitrate in country A under the arbitration law of country B, it may happen that country A does not recognise the capacity to designate a foreign arbitration law. In such a case, the courts in country A will hold the award made within its territory to be domestic and consequently will hold themselves competent to entertain, for instance, the action for setting aside the award. But if, at the same time, country B allows arbitration abroad under its arbitration law, its courts will also consider the award to be domestic and may hold themselves equally competent to entertain an action for setting aside the award. This may end up in an undesirable situation where the courts of two countries decide on the setting aside of the award, with possible conflicting decisions. The reverse situation may be equally undesirable: if country A recognises the capacity, but country B does not allow arbitration abroad under its arbitration law, the setting aside cannot be sought in either country.

E. Place of Arbitration

It is submitted that there is also no need to agree to arbitrate in one country under the arbitration law of another country. The proper position is, and the delegates of the above referenced civil law countries seemed to have failed to appreciate this, that *the parties have the freedom to designate the applicable arbitration law by designating the place of arbitration.*

Some confusion continues to exist in the literature regarding the question of what should be understood by the place of arbitration.⁵⁹ A distinction must be made between the place of

59. See Mann, *Where is an Award "Made"?*, 1 *ARB. INT'L* 107 (1985).

arbitration in its legal sense and the place of arbitration in its physical sense. Normally, both senses coincide, but in international arbitration this is not necessarily so.

The place of arbitration in the legal sense (also called "seat of arbitration") means that the arbitration law of the country where the arbitration takes place governs the arbitration. The place of arbitration in this sense is determined by the parties in their arbitration agreement. For example, the parties may include a clause in their agreement stating: "The place of arbitration shall be X." The parties may also leave determination of the place of arbitration to a third party, which is usually the arbitration institution administering the arbitration under its arbitration rules, as referred to in the arbitration agreement. If neither the parties nor a third party has determined the place of arbitration, it can be determined by the arbitrators themselves. It is the place of arbitration in the legal sense which must be mentioned in the arbitral award as the place where the award is made. This reference almost invariably appears just above the arbitrators' signature in conjunction with the date of the award.

The place of arbitration in the physical sense connotes the place or places where the hearing is held, where the arbitrators administer evidence, and where the arbitrators deliberate and sign the award. These meetings may occur at any place where it is appropriate, under the circumstances of the case, or which is convenient to the parties and the arbitrators.

Therefore, it may happen, for instance, that the place of arbitration in the legal sense is Stockholm, but that the hearings are held in Cairo and New York and that the arbitrators sign the award at their respective domiciles in other countries. In such a case, the award will merely mention that it is "made" in Stockholm. Such mention is in turn sufficient for determining whether arbitral awards are "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought,"⁶⁰ the first criterion of the Convention's field of application. It should be observed that the question of where the award was "made" has not given rise to any difficulty in any of the more than 250 court decisions in which the New York Convention has been applied to date, as reported in the *Yearbook*

60. New York Convention, *supra* note 1, art. I(1).

Commercial Arbitration, Volumes I (1976) - X (1985).

VI. The Expansive Interpretation by the Court of Appeals

A. *The Court of Appeals' Interpretation*

If the foregoing interpretation, based on the legislative history and text of the Convention, is applied to the *Bergesen v. Muller* case, the conclusion must be that the award was not a nondomestic award within the meaning of the New York Convention. The arbitration clause provided expressly that "the arbitration . . . shall be governed by the Laws of the State of New York . . ." The reference to the laws of the state of New York must be deemed a reference to New York state arbitration law. Even if this reference is construed as a reference to the law applicable to the substance, that is, the law to be applied by the arbitrators to the merits of the dispute, the *Bergesen v. Muller* arbitration was not governed by the arbitration law of another Contracting State because there was no indication that the parties expressly or implicitly agreed to a foreign arbitration law.

The court of appeals, therefore, went beyond the legislative history and text of the Convention. If the second criterion of nondomestic awards is read in isolation, a court can be deemed to be free to do so because the text gives a court a discretionary power: the Convention can be applied to an arbitral award if a court "considers" it nondomestic.⁶¹ The reason the court of appeals preferred the "broader construction" was that "it is more in line with the intended purpose of the treaty."⁶² The court described the purpose as being "to encourage the recognition and enforcement of international arbitration awards."⁶³ It referred in this respect to the famous decision of the U.S. Supreme Court in *Scherk v. Alberto Culver Co.*⁶⁴ One cannot but approve this rea-

61. VAN DEN BERG, *supra* note 12, at 25-27.

62. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983).

63. *Id.*

64. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974). In *Scherk*, the Supreme Court observed:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, 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.

son. Whether the "broader construction" can be based on a reading of the second criterion in isolation, however, needs further examination.

The court of appeals interpreted awards "not considered as domestic" to be awards which are "made within the legal framework of another country." It gave as examples of "the legal framework of another country," awards which are "pronounced in accordance with foreign law" or which involve "parties domiciled or having their principal place of business outside the enforcing jurisdiction."⁶⁵ The reference by the court of appeals to "the legal framework of another country" is at first sight somewhat puzzling. The examples given by the court of awards "pronounced in accordance with foreign law" is equally mystifying. Does the foreign law mean the law applicable to the arbitration or the law applicable to the substance, or both? What the court presumably had in mind was that the award involved some foreign contact. Such contact could be either the law applicable to the arbitration or the law applicable to the substance. Neither contact was present in the *Bergesen v. Muller* case. As observed before, the arbitration clause referred to New York state law.

B. *The Parties' Nationality*

What really motivated the court of appeals to hold the award to be nondomestic was the foreign nationality of both parties involved (Norwegian and Swiss). This consideration is not in accordance with the New York Convention, as far as the first criterion for its field of application is concerned. The Convention's scope does not depend on the nationality of the parties. Such a condition was imposed by the Geneva Convention of 1927, the New York Convention's predecessor, which required that the parties be subject to the jurisdiction of different Contracting States.⁶⁶ The expression "subject to the jurisdiction" of a State had caused uncertainty, as some courts interpreted it as referring to nationality, while others construed it as domicile.⁶⁷

Id. at 520 n.15.

65. *Bergesen*, 710 F.2d at 932.

66. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, art. I, 92 L.N.T.S. 302 (1929-1930).

67. See generally VAN DEN BERG, *supra* note 12, at 15-17.

Consequently, the nationality requirement was left out of the New York Convention. The New York Convention, therefore, applies in theory to the enforcement of an arbitral award made in another country between two nationals of the enforcing State. The Italian Supreme Court, for example, has recognised this rule and held that it supersedes the principle of Italian law that two Italians are not allowed to arbitrate abroad.⁶⁸

As far as the first criterion (awards made abroad) is concerned, the foreign nationality of the parties is not a condition for the New York Convention's applicability. But can the foreign nationality of the parties trigger the applicability of the second criterion (that is, nondomestic awards made within the enforcing State)? The second criterion read in isolation would permit a court to do so because, as observed before, it gives a court discretionary power whether or not to regard an award as nondomestic. Although according to the conventional interpretation, a nondomestic award is an award made in the enforcing State under the arbitration law of another State, a court may go further and regard an award nondomestic because of the foreign nationality of the parties regardless of the applicable arbitration law. Such an expansive interpretation is apparently adopted by the court of appeals in *Bergesen v. Muller*.

C. *The U.S. Implementing Legislation*

The court of appeals obviously came to this broader construction on the basis of the legislation implementing the New York Convention in the United States. The court referred to the provision by which the New York Convention should not apply to an agreement or award arising out of a legal relationship exclusively between citizens of the United States, unless that relationship has some reasonable relation with one or more foreign States.⁶⁹ The court then stated that Congress spelled out its definition of nondomestic awards in the just mentioned provision.

When examining the legislative history of the implementing legislation, it appears that its drafters were not concerned with a definition of a nondomestic award within the meaning of the

68. Judgment of Dec. 13, 1971, Courte di Cassazione, Italy, No. 3620, *summarized in* 1 Y.B. COM. ARB. 190 (1976).

69. 9 U.S.C. § 202 (1982) (set forth in full *supra* in text accompanying note 20).

Convention. Their concern was:

[W]e were faced with the problem that section 1 of the [Federal Arbitration] Act, which defines commerce, specifically includes both interstate and foreign commerce, while the implementation of the Convention should be concerned only with foreign commerce. Consequently, it was necessary to modify the definition of commerce to make it quite clear that arbitration arising out of relationships in interstate commerce remains under the original Arbitration Act and is excluded from the operation of the proposed chapter 2.

To achieve this result we have included in section 202 the requirement that any case concerning an agreement or award solely between U.S. citizens is excluded unless there is some important foreign element involved. . . .⁷⁰

In other words, the drafters were concerned about a delineation of the ambit of Chapter One and Chapter Two of the Federal Arbitration Act. The legislative history nowhere suggests that the provision was intended to be a definition of nondomestic awards.

The core of the problem seems to be that, in an arbitration between two aliens within the United States, it is often difficult, if not impossible, for these parties to obtain jurisdiction in the federal courts under Chapter One of the Federal Arbitration Act with regard to matters connected with the arbitration. Chapter One does not create an independent basis for federal jurisdiction.⁷¹ Two aliens cannot satisfy the requirement of diversity jurisdiction which requires that at least one of the parties be a citizen of the United States.⁷² The implementing legislation, Chapter Two of the Federal Arbitration Act, has cured this unsatisfactory situation. It provides for original jurisdiction of the federal courts in an "action or proceeding falling under the Convention."⁷³ The diversity requirement does not apply in this

70. S. REP. NO. 702, 91st Cong., 2d Sess. 6 (1970) (statement of Mr. R.D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law).

71. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959), cert. granted, 362 U.S. 909 (1960), dismissed pursuant to stipulation, 364 U.S. 801 (1960).

72. 28 U.S.C. § 1332 (1980).

73. 9 U.S.C. § 203 (1982). Section 203 of the Federal Arbitration Act provides: An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United

case. Although the court of appeals did not explicitly mention the problems caused by Chapter One for two foreign parties arbitrating within the United States, it did indeed refer to the provision in Chapter Two, creating original jurisdiction, in support of its view that awards rendered in the United States may qualify for enforcement under the Convention.⁷⁴

Viewed within this perspective, the interpretation by the court of appeals makes the United States a more hospitable forum for foreign parties intending to arbitrate within the United States. They can now be assured that the ensuing award can be enforced in the federal courts. However, the legal basis is scant. Neither the text nor the legislative history of the Convention indicate that recognition and enforcement of an award made between two foreign parties under the arbitration law of the country in which recognition and enforcement are sought should be deemed to fall under the Convention. The same applies to the legislative history of the U.S. implementing legislation. Even the provision relating to the original jurisdiction of the federal courts in the implementing legislation cannot be deemed to constitute an indication to this effect. That provision can be invoked only if the award falls under the Convention. In fact, a legal basis can be found only if the text of the second criterion is read in isolation. As mentioned, that text gives courts in Contracting States a discretionary power to consider awards made within their jurisdiction as nondomestic. But can the text of the second criterion be read in isolation?

D. The New York Convention's Scope Regarding the Referral to Arbitration

Before answering the latter question, another argument of the court of appeals should be discussed. That argument runs as follows: "It would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute [Chapter Two of the Federal Arbitration Act],

States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Id.

74. *Bergesen*, 710 F.2d at 933.

but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose."⁷⁵

The court referred to a provision in the implementing legislation according to which a U.S. court may direct that arbitration be held at any place provided for in the arbitration agreement "whether that place is within or without the United States."⁷⁶ That provision requires some explanation. The Convention not only provides for the enforcement of foreign arbitral awards but also for the referral to arbitration:

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.⁷⁷

The difficulty is that the Convention does not give a definition as to which arbitration agreements fall under the above quoted provision. At the New York Conference in 1958, the question of the New York Convention's scope in respect of the arbitration agreement was not discussed at all. This omission is due to the last-minute insertion of the provision into the Convention.

A number of courts in the Contracting States and some of the implementing acts have solved the omission by interpreting the provision by analogy to the Convention's definition for its scope in respect of arbitral awards. Accordingly, the provision can be deemed to be applicable to an agreement providing for arbitration in another State. Two other categories of arbitration agreements pose more problems: an agreement providing for arbitration within the State in which it is invoked and one failing to indicate the place of arbitration. It is clear that the provision should not apply to purely domestic arbitration agreements. Possible conditions for the application of the provision in these

75. *Id.*

76. 9 U.S.C. § 206 (1982). Section 206 of the Federal Arbitration Act provides: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement." *Id.*

77. New York Convention, *supra* note 1, art. II(3).

two cases can be (a) foreign nationality of at least one of the parties, or (b) an international or foreign element connected with the contract to which the arbitration agreement relates.⁷⁸ Reliance on these conditions is justified by the aforementioned purpose of the Convention.

The U.S. implementing legislation is one of the laws which can be deemed to compensate for the omission. In essence it implies that an arbitration agreement can be enforced under the Convention if at least one of the parties is non-American, irrespective of whether the place of arbitration is within or without the United States. It also implies that enforcement of an arbitration agreement between two U.S. citizens can take place under the Convention, if the underlying transaction has some reasonable relation with one or more foreign States.⁷⁹

E. Second Criterion Cannot Be Read in Isolation

The enforcement of the arbitration *agreement* under the New York Convention is one thing, the enforcement of an arbitral *award*, however, is quite another. The difference lies in the fact that the Convention's scope is not defined at all with respect to the arbitration agreement while the Convention does so in respect of the arbitral award. In view of the Convention's silence with respect to the arbitration agreement, an expansive interpretation, on the basis of conditions such as the foreign nationality of the parties, is justified by relying on the Convention's purpose. Regarding the arbitral award, the Convention does state that it applies to an arbitral award made in another State. The Convention's application to the nondomestic award appears to be possible only if the award is made in the enforcing State under the arbitration law of another country. An

78. See generally VAN DEN BERG, *supra* note 12, at 56-71 (discussing which arbitration agreements are within the scope of article II(3) of the New York Convention).

79. Fuller Company v. Compagnie des Bauxites de Guinee, 421 F. Supp. 938, 941 (W.D. Pa. 1976). In determining whether the court had jurisdiction to compel arbitration under 9 U.S.C. §§ 201-208, the court stated that the jurisdictional requirements would be met if "any one" of the four conditions mentioned in § 202 were met, *viz.*: (1) the agreement involves property located abroad, (2) the agreement envisages performance abroad, (3) the agreement envisages enforcement abroad, or (4) the agreement has some other reasonable relation with one or more foreign States. See also VAN DEN BERG, *supra* note 12, at 67-69.

interpretation expanding the nondomestic awards to an award made in the enforcing State between foreign nationals under the State's own arbitration law does not fit into the other provisions of the Convention. Considering these provisions, it does not seem correct to interpret the second criterion in isolation. The provisions relating to the grounds for refusal of enforcement of an arbitral award are obviously written for arbitral awards made in another State or under the arbitration law of another State. This becomes particularly evident when considering the ground that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."⁸⁰ The expansive interpretation by the court of appeals can be maintained only if the word "country" in this provision is stretched to include the country in which the award is made (that is the United States). It is submitted that such interpretation is contrary to the clear meaning of the Convention's text.

The result can indeed be that a court is obliged to refer parties to arbitration within its jurisdiction pursuant to the Convention, but that enforcement of the ensuing award cannot be based on the Convention if such enforcement is sought in the same jurisdiction. This result is not so anomalous as it may appear at first sight. The Convention is an instrument which supports two aspects of international arbitration only. All other aspects are governed by the applicable arbitration law. Moreover, as will be explained below, enforcement of an award under domestic law will usually be easier than enforcement under the Convention. Furthermore, if enforcement of the arbitration agreement under the Convention would be more difficult than enforcement under domestic law (for instance, because the arbitration agreement does not comply with the formal requirements of the Convention), a party can still rely on domestic law by virtue of the Convention's more-favourable-right-provision. That provision, drafted for the enforcement of the arbitral award, can be deemed to apply by analogy to the enforcement of the arbitration agreement.⁸¹

The expansive interpretation given by the court of appeals

80. New York Convention, *supra* note 1, art. V(1)(e). *See also id.* at art. V(1)(a).

81. *See VAN DEN BERG, supra* note 12, at 86-87.

to the second criterion of the Convention's field of application is understandable in view of the fact that the implementing legislation defines without distinction the enforcement of the arbitration agreement and arbitral award in the same provision.⁸² The provision is, in fact, inserted to prevent two U.S. citizens arbitrating outside the United States in respect of a purely domestic (U.S.) affair. The reservation included in the U.S. implementing legislation is inspired by the Uniform Commercial Code, according to which parties may designate the law of another state or of a foreign country as governing their transaction only if the transaction bears a reasonable relation with that state or country.⁸³ However, considering the foregoing, the provision seems to be incompatible with the Convention as far as the arbitral award is concerned. As mentioned, the Convention does not impose the nationality of the parties as a requirement for its applicability to the arbitral award and does not limit its scope to international commerce.⁸⁴ The Convention allows, in theory, two nationals of the same nationality to arbitrate abroad on a domestic transaction. Parties may wish to do so when the arbitration law of their country is unfavourable or when the country in question does not have arbitration institutions for adequate administration of arbitration (neither situation applies to the United States in general). This situation must be distinguished from the situation where parties of the same nationality arbitrate abroad with the purpose of evading mandatory law (for example tax laws). In such a case, enforcement may be refused under the public policy provisions of the Convention.⁸⁵

VII. Consequences of the Expansive Interpretation

A. *Enforcement of an Arbitral Award in the United States More Cumbersome*

If the expansive interpretation is followed, enforcement of an arbitral award containing a foreign element and made in the United States, may become more difficult. Enforcement of an

82. 9 U.S.C. § 202 (1982) (set forth in full in *supra* text accompanying note 20).

83. U.C.C. § 1-105(1) (1977). See, S. REP. No. 702, 91st Cong., 2d Sess. 6 (1970).

84. See VAN DEN BERG, *supra* note 12, at 17-18.

85. New York Convention, *supra* note 1, art. V(2)(b).

award falling under Chapter One of the Federal Arbitration Act is almost automatic.⁸⁶ Objections to an award must be raised through an action for setting aside the award. The same applies to the arbitration laws of most of the constituent states of the United States.⁸⁷ In contrast, enforcement of an award under Chapter Two of the Federal Arbitration Act and the Convention can be resisted on a number of grounds.⁸⁸ Many of these grounds for refusal of enforcement correspond in essence to the grounds for setting aside under Chapter One of the Federal Arbitration Act⁸⁹ and most of the arbitration laws of constituent states.⁹⁰

One is then faced with the rather undesirable situation where the same award may be subject to resistance by a losing party on the basis of similar grounds in two different procedures. First, in proceedings initiated by the winning party aiming at the enforcement of the award under Chapter Two of the Federal Arbitration Act and the Convention, the losing party can invoke all grounds for refusal of enforcement listed in the Convention. Second, in proceedings initiated by the losing party aiming at the setting aside of the award under Chapter One of the Federal Arbitration Act or under state arbitration law, the losing party can assert grounds for setting aside the award which are similar to the Convention's grounds for refusal of recognition and enforcement.

It may be argued that the doctrine of collateral estoppel controls this situation and that a losing party is estopped from challenging the award in the second procedure if he has already asserted these grounds in a first procedure. However, an action for the enforcement is essentially different from an action for

86. See 9 U.S.C. § 9 (1982) (set forth in full in *supra* note 15); Feldman is of the opinion that "the legal regime applicable to domestic arbitration in many states party to the New York Convention is significantly less liberal than the regime applicable to the enforcement of 'foreign' arbitral awards". Feldman, *An Award Made in New York Can Be a Foreign Arbitral Award*, 39 *ARB. J.* 14, 18-19 (1984). A review of the 59 National Reports sub 10 ("Enforcement") in the *YEARBOOK COMMERCIAL ARBITRATION* (1976-1985) does not support Mr. Feldman's supposition as far as the enforcement of domestic awards is concerned.

87. See UNIF. ARBITRATION ACT § 11, 7 U.L.A. 133 (1956).

88. New York Convention, *supra* note 1, art. V.

89. See 9 U.S.C. § 10 (1982).

90. See UNIF. ARBITRATION ACT § 12, 7 U.L.A. 140 (1956).

the setting aside of the award. As mentioned before, this distinction is clearly made by the Convention itself. In addition, the grounds for refusal of enforcement under the Convention are not identical to, but only similar (in most cases) to the grounds for setting aside under federal and state arbitration law.

B. Arbitration Agreement in Writing

The Convention requires that the arbitration agreement be in writing. This requirement is defined in the Convention as "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."⁹¹

The Convention's requirement of a writing is more stringent than that of the Federal Arbitration Act and the arbitration laws of most of the constituent states of the United States. It means that if the underlying arbitration agreement does not comply with the requirement of the Convention, enforcement pursuant to Chapter Two of the Federal Arbitration Act and the Convention must be refused if the award has a foreign element, while a comparable award can be enforced under Chapter One of the Federal Arbitration Act or state law if it is purely domestic, notwithstanding the fact that both awards are made inside the United States.

C. More-Favourable-Right-Provision

If the expansive interpretation is maintained, the problems described above can be solved by relying on the more-favourable-right-provision of the Convention:

The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.⁹²

This provision gives a party the freedom to base his request for enforcement on the domestic law concerning the enforcement

91. New York Convention, *supra* note 1, art. II(2).

92. New York Convention, *supra* note 1, art. VII(1). See generally VAN DEN BERG, *supra* note 12, at 82-86.

of the foreign awards. For an award rendered in the United States which is considered nondomestic, it would mean that the enforcement can be based on Chapter One of the Federal Arbitration Act or the arbitration law of the state in which enforcement is sought. If these bases are not sound, the enforcement may be based on the case law under which foreign awards are enforced outside a multilateral or bilateral treaty in the United States.⁹³

The above scheme is not only cumbersome, it may also create problems for enforcement abroad as will be demonstrated in the following subsection.

D. Problems for Foreign Courts

The expansive interpretation may cause problems for foreign courts. The Federal Supreme Court of the Federal Republic of Germany already doubted, in connection with the request for enforcement of an arbitral award rendered in New York State in an arbitration between Swiss and German parties, whether the United States has unilaterally enlarged the New York Convention's field of application.⁹⁴ In this case, the arbitration agreement did not comply with the requirements of the Convention.⁹⁵ In light of the more-favourable-right-provision of the Convention,⁹⁶ the enforcement was then based on German domestic law concerning the enforcement of foreign arbitral awards.⁹⁷ Under that law, the validity of the arbitration agreement was to be determined under the law of the place of rendition. The German Supreme Court referred, in this respect, to the opinion of a German commentator that the United States has unilaterally enlarged the Convention's field of application to the effect that the Convention applies to all arbitration agreements and arbitral awards which are considered commercial and which do not concern relationships that are entirely between citizens of the

93. *Gilbert v. Burnstine*, 225 N.Y. 348, 174 N.E. 706 (1931). See G. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 45:02 (Rev. Ed. 1985).

94. Judgment of May 10, 1984, Bundesgerichtshof in Strafsachen, W. Ger. (1984), summarized in 10 Y.B. COM. ARB. 427 (1985).

95. New York Convention, *supra* note 1, art. II(2).

96. New York Convention, *supra* note 1, art. VII(1) (quoted in *supra* text accompanying note 85).

97. See ZPO art. 1044 (W. Ger.).

United States.⁹⁸ The German Supreme Court did not decide this issue for reasons which are not relevant here.

The opinion of the German commentator can be deemed to correspond to the expansive interpretation by the court of appeals in *Bergesen v. Muller*. If *Bergesen* were followed, there could be extraordinary consequences to the enforcement abroad of an arbitral award made in the United States between two foreign parties, which is based on an arbitration agreement complying with U.S. federal or state law but not complying with the Convention.

In the United States, the award made between two foreign parties falls, according to the *Bergesen* doctrine, under Chapter Two of the Federal Arbitration Act and the Convention. As the arbitration agreement does not comply with the Convention's requirements, enforcement cannot take place pursuant to the Convention. However, enforcement may, by virtue of the Convention's more-favourable-right-provision, be based on Chapter One of the Federal Arbitration Act or state arbitration law.

In a foreign country, enforcement of the award made between two non-U.S. parties in the United States falls also under the Convention. However, as the arbitration agreement does not comply with the Convention's requirements, enforcement can again not take place pursuant to the Convention. If the country in question has a domestic law under which foreign awards can be enforced (thus, independently of the Convention), the enforcement can, by virtue of the Convention's more-favourable-right-provision, be based on that domestic law. If that domestic law refers for the validity of the arbitration agreement to the law applicable to the arbitration (usually the arbitration law of the place of rendition of the arbitral award, in the *Bergesen* case, the United States), the validity of the arbitration agreement is, according to the *Bergesen* doctrine, governed by Chapter Two of the Federal Arbitration Act and the Convention. In other words, the invocation of the Convention's more-favourable-right-provision before the foreign court in this case does not help anything because the *Bergesen* doctrine would again lead to the Convention's applicability.

98. P. SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT (No. 73, 1975).

A solution for this complicated situation may be to invoke the more-favourable-right-provision of the Convention "in second degree." First, the more-favourable-right-provision is invoked before the foreign court for reliance on the domestic law of that court concerning the enforcement of foreign arbitral awards. That domestic law points to U.S. law which in turn, according to the *Bergesen* doctrine, points to the Convention. The more-favourable-right-provision of the Convention then could be invoked for the second time for reliance on Chapter One of the Federal Arbitration Act or state arbitration law which may contain requirements for the validity of the arbitration agreement which are less stringent than the Convention.

It is submitted that such complicated and confusing schemes should be avoided. The expansive interpretation by the court of appeals in *Bergesen* appears to have been developed with the purpose of being able to rely on the three-year limitation period of Chapter Two of the Federal Arbitration Act for the enforcement of arbitral awards rather than the one-year limitation period of Chapter One of that Act.

The irony of the *Bergesen* case is that legally the enforcement by the U.S. courts was unnecessary for enforcement of the award in Switzerland.⁹⁹ In fact, the Swiss Supreme Court confirmed by a judgment dated February 26, 1982, that no enforcement of the award by the courts in New York was needed for enforcement of the *Bergesen* award under the Convention in Switzerland. It is surprising that the Swiss judgment was not mentioned in the decision of the district court (dated October 7, 1982) and that of the court of appeals (dated June 17, 1983).

VIII. Stateless Awards

A. *Muller's Argument*

Muller also argued before the court of appeals that the second criterion of nondomestic awards covers awards which Muller called "stateless awards," and that the award in question failed to qualify as such. Muller defined the stateless award as one "rendered in the territory where enforcement is sought but con-

99. See *supra* notes 7-12 and accompanying text.

sidered unenforceable because of some foreign component."¹⁰⁰ The court of appeals found this argument unpersuasive: "[S]ince some countries favouring the provision [i.e., the second criterion] desired it so as to preclude the enforcement of certain awards rendered abroad, not to enhance enforcement of awards rendered domestically."¹⁰¹

This reasoning of the court is not entirely clear. Either the court understood Muller's argument incorrectly or Muller presented his argument badly. Muller presumably referred to a third category of awards. It can be questioned whether this category falls under the Convention and, especially, under the second criterion of nondomestic awards.

B. Concept of Stateless Awards

Until now two types of awards have been discussed here, (1) an arbitral award governed by the arbitration law of the place of arbitration (most cases), and (2) an arbitral award governed, on the basis of an agreement between the parties, by the arbitration law of a country other than the place of arbitration (rather theoretical, corresponding to the second criterion). Some authors identify a third category, which Muller apparently had in mind: an arbitral award not governed by any arbitration law at all, but solely by an agreement of the parties.¹⁰² Various names are invented for this category of awards: a-national, supra-national, trans-national, expatriate, denationalized or floating awards. The attractiveness of an arbitration and award detached from the ambit of any national arbitration law, is that domestically influenced particularities of a national arbitration law are in principle eliminated. The parties are free to organize the arbitration themselves or to authorize the arbitrators to do so, as they deem fit. The arbitration can take place anywhere, as the place of arbitration would not entail the applicability of the arbitration law of the country concerned.

100. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983).

101. *Id.*

102. See generally P. FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1961); VAN DEN BERG, *supra* note 12, at 28-43; Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983); and Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

However, the legal status of denationalized arbitration is uncertain. If the arbitration agreement does not provide, in sufficient detail, the constitution of the arbitral tribunal and the arbitral procedure, difficulties will arise as no recourse can be had to a national arbitration law. Furthermore, arbitration, international as it may be, needs at least a supporting judicial authority (*autoritre d'appui*), which failing an international authority competent in this respect, is necessarily the court of some country. The judicial support may, for example, be needed for the challenge of an arbitrator. Supervision by a judicial authority over at least the validity of the arbitration agreement and the fundamental rules of due process must also be ensured. Such supervision is carried out in the action for setting aside the award, or a similar action. It is a generally accepted principle that the courts of the country under the arbitration law of which the arbitration takes or took place are the competent judicial authority in relation to the foregoing matter. Such competence would be excluded in the case of denationalized arbitration.¹⁰³ There are few international arbitrations where parties have agreed to a denationalized arbitration. There exist appalling examples of the difficulties encountered in enforcing arbitral awards resulting from denationalized arbitration.¹⁰⁴

It should be noted at this point that for a long time it was thought that arbitration under the Rules of the International Chamber of Commerce ("ICC") was denationalized. This belief induced the Court of Appeal of Paris to decide, in 1980, that an ICC award made in Paris between a Swedish shipyard and a Libyan state-owned corporation was not governed by French ar-

103. Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53, 59 (1983), wonders whether a setting aside in the country of origin should have an effect *erga omnes*. This effect is given in article V(1)(e) of the New York Convention, according to which enforcement of an award may be refused if it is set aside in the country of origin. It is, in my opinion, undesirable to exclude this ground for refusal of enforcement. See VAN DEN BERG, *supra* note 12, at 355-57.

104. See, e.g., SSEE v. Yugoslavia, (1956), reprinted in JOURNAL DU DROIT INTERNATIONAL 1075 (1959) (English and French versions of the arbitration award). An overview of the various proceedings is given in VAN DEN BERG, *supra* note 12, 41-43. Thirty (!) years after the date of rendition, the parties are still litigating on the validity of the award. The latest score was in favour of SSEE: The French Cour d'appel of Rouen declared the award enforceable on November 13, 1984 (not yet published; case No. 982/82).

bitration law.¹⁰⁵ The court, therefore, dismissed the action for setting aside the award. Subsequent to this decision, two developments occurred. First, in 1981, France adopted a new arbitration law specifically applicable to international arbitrations.¹⁰⁶ According to this law, awards rendered in an international arbitration in France can be subject to an action for setting aside before the French courts. Second, the ICC issued a new commentary on its Rules, in which it is expressly stated that "the mandatory rules of national law applicable to international arbitrations in the country where the arbitration takes place must anyway be observed, even if other rules of procedure are chosen by the parties or by the arbitrator."¹⁰⁷

A denationalized arbitration must be distinguished from an arbitration which is internationalized within the limits imposed by a national arbitration law. Such internationalization can be achieved referring to arbitration rules geared to international arbitration, such as the ICC Rules or the UNCITRAL Arbitration Rules.¹⁰⁸ The limits imposed by a national arbitration law are those provisions which are mandatory. It is, therefore, important in international arbitrations to designate a place of arbitration in a country which has a liberal arbitration law.

C. *New York Convention Not Applicable to Stateless Awards*

After the foregoing explanation as to what constitutes a stateless award, it is appropriate to return to the argument made by Muller before the court of appeals. The court of appeals rightly rejected Muller's argument that the second criterion covers stateless awards, although the court's reasoning is somewhat confusing. The New York Convention must be deemed to apply to arbitral awards which are governed by a national arbitration

105. Judgment of Feb. 21, 1980, Cour d'appel, Paris, *reprinted in* 6 Y.B. COM. ARB. 221 (1981).

106. Decree No. 81-500, dated May 12, 1981, 1981 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, 1398-1406 (codified at CODE DE PROCÉDURE CIVILE arts. 1492-1507), *reprinted in* 7 Y.B. COM. ARB. 271 (1983) (English translation).

107. GUIDE TO ICC ARBITRATION, PUB. NO. 382, 39 (1983).

108. UNCITRAL, Report of Ninth Session, [1976] 7 Y.B. COMM'N INT'L TRADE L. 22, U.N. Doc. A/CN.9/SER.A/1976, *reprinted in* 2 Y.B. COM. ARB. 161 (Int'l Council for Com. Arb. 1977). *See Sanders, Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172 (1977).

law only. This principle applies to both the first and second criteria of the Convention's field of application. It is true that the text of the Convention, as far as its field of application is concerned, does not require that the award be governed by a national arbitration law. However, if the Convention's scope is read in conjunction with the Convention's other provisions, it becomes evident that this requirement is implied. Enforcement of an award may be rejected if the respondent can prove that the arbitration agreement is invalid "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."¹⁰⁹ Enforcement of an award may also be refused if the respondent can prove that the award has been set aside by a court of "the country in which, or under the *law* of which, that award was made."¹¹⁰ Although another basis for refusal of enforcement, which concerns irregularities in the composition of the arbitral tribunal and the arbitral procedure, refers in the first place to the agreement of the parties on these matters, and failing such agreement, to the law of the place of arbitration,¹¹¹ this provision cannot be deemed to alter the principle that the Convention can apply to arbitral awards which are governed by an arbitration law only.¹¹²

The New York Convention not being a basis for enforcement of stateless awards, the only realistic approach to giving this category of awards a sufficient legal backing is an appropriate international convention. Such a treaty exists for investment disputes: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,¹¹³ (Washington Convention) made in Washington, March 18, 1965. This Convention provides for a self-sufficient system of truly international arbitration which is solely governed by the provisions of the Convention and the rules and regulations issued thereunder. There is no other international convention comparable to the

109. New York Convention, *supra* note 1, art. V(1)(a) (emphasis added).

110. New York Convention, *supra* note 1, art. V(1)(e) (emphasis added).

111. New York Convention, *supra* note 1, art. V(1)(d) (set forth in full in *supra* note 46).

112. *Accord Sanders, Consolidated Commentary Volumes V and VI*, 6 Y.B. COM. ARB. 202, 205 (1981).

113. Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

Washington Convention. Specifically, the New York Convention regulates two aspects of international arbitration only: the enforcement of the arbitration agreement and that of the arbitral award. All other aspects are by necessity governed by some national arbitration law, which, as explained before, is normally the arbitration law of the place of arbitration.

IX. Conclusion

The New York Convention applies in the first place to arbitral awards which are made in the territory of another Contracting State. Along with the territorial criterion, the Convention provides that it also applies to the enforcement of arbitral awards which are not considered domestic awards. According to a so-called conventional interpretation which is based on the legislative history and text of the Convention, nondomestic awards are awards which are made in the enforcing State but which are, by agreement of the parties, governed by the arbitration law of another State. The second criterion was added at the instigation of certain civil law countries when the Convention was drafted in 1958. It is virtually never used in practice, as parties choose the law applicable to their arbitration by designating the place of arbitration. Exercising the capacity to choose an arbitration law which is different from that of the place of arbitration can lead to inextricable legal complications. Consequently, the first criterion of the Convention's scope seems to be the only relevant one for practice. In addition, neither the first nor the second criterion can be deemed to apply to stateless awards, which are awards not based on any arbitration law.

The court of appeals in *Bergesen v. Muller* expanded the conventional interpretation of nondomestic awards to any arbitral award between two foreign entities made in the United States, regardless of whether it is governed by federal or state arbitration law. This means that enforcement of such an arbitral award is governed by the New York Convention rather than Chapter One of the Federal Arbitration Act or state law. The expansive interpretation seemingly favours international arbitration in the United States. It may cater to those cases where two foreigners arbitrating in the United States cannot obtain jurisdiction in the U.S. courts under Chapter One of the Federal Arbitration Act. This interpretation, however, poses a number of

problems. The Convention imposes requirements for the written form of the arbitration agreement which are more demanding than the U.S. federal law and most of the state laws. Furthermore, it may give losing parties an extra possibility to stave off the day of reckoning. Under U.S. federal law and most of the state laws enforcement of an arbitral award is relatively simple. In contrast, under the Convention, enforcement of an award can be resisted on a number of grounds. In addition, the expansive interpretation may cause problems for enforcement abroad of arbitral awards with a foreign element made in the United States. The legal framework of international commercial arbitration is fairly complicated. The expansive interpretation has regrettably not contributed to its simplification.