

EUROPEAN CONVENTION ON  
INTERNATIONAL COMMERCIAL  
ARBITRATION OF 1961\*

COMMENTARY

*Dominique T. Hascher*\*\*

**Table of Contents**

PREAMBLE	507
ARTICLE I: SCOPE OF THE CONVENTION	507
A. Scope of Provisions in General	508
B. Connection of the Parties with Different Contracting States	508
C. International Trade Relationship	510
D. Seat of the Arbitration	511
E. Application of the Convention by Arbitrators	512
F. Retroactivity	513
G. Form of the Arbitration Agreement	513
1. Agreement in writing	513
2. Other Forms	515
ARTICLE II: RIGHT OF LEGAL PERSONS OF PUBLIC LAW TO RESORT TO ARBITRATION	516

---

\* *Note General Editor.* The court decisions and awards referred to in this Commentary are in the vast majority of cases published in the Yearbook; detailed references are given in the **List of European Convention Court Decisions and Arbitral Awards** published following this Commentary, pp. 549-562. Where materials have not been published in the Yearbook, a reference is given in the text of the Commentary.

The reference numbers for court decisions reported in the Yearbook refer to the sequential number assigned to the case in the reporting on the 1961 European Convention and/or the 1958 New York Convention (e.g., Germany no. 39/NYC25). In the majority of cases reported, the European Convention has been applied in combination with the New York Convention.

\*\* Presiding Judge (Court of Appeal, France).

COMMENTARY

ARTICLE III: RIGHT OF FOREIGN NATIONALS TO BE DESIGNATED AS ARBITRATORS	517
ARTICLE IV: ORGANIZATION OF THE ARBITRATION	518
A. Freedom of the Parties to Organize the Arbitration	520
B. Competent Authority to Assist in the Organization of the Arbitration	520
C. Competence of the President of the Chamber of Commerce (or of the Special Committee)	522
ARTICLE V: PLEA AS TO ARBITRAL JURISDICTION	523
ARTICLE VI: JURISDICTION OF COURTS OF LAW	526
A. Article VI(1): Plea as to Court Jurisdiction	527
B. Article VI(2): Law Applicable to the Arbitration Agreement	528
1. Determination of the applicable law	528
2. Questions governed by the applicable law	529
3. Arbitrability	530
C. Article VI(3): <i>Lis Pendens</i> Between Arbitral Tribunals and Courts	530
D. Article VI(4): Interim Measures	531
ARTICLE VII: APPLICABLE LAW	532
ARTICLE VIII: REASONS FOR THE AWARD	533
ARTICLE IX: SETTING ASIDE OF THE ARBITRAL AWARD (IN GENERAL)	534
A. Nature of the Award	535
B. Venue for Setting Aside	535
C. Four Grounds for Setting Aside	536
ARTICLE IX(1): GROUNDS FOR SETTING ASIDE	537
GROUND <i>a</i> : Invalidity of the Arbitration Agreement	538
1. Incapacity of a party	538
2. Law applicable to the arbitration agreement	538
Yearbook Comm. Arb'n XXXVI (2011)	505

COURT DECISIONS ON THE EUROPEAN CONVENTION 1961	
3. Formal validity	538
Ground <i>b</i> : Violation of Due Process	538
Ground <i>c</i> : Excess of Authority by Arbitrator	538
Ground <i>d</i> : Irregularity in the Composition of the Arbitral Authority or the Arbitral Procedure	539
ARTICLE IX(2): RELATIONSHIP WITH ARTICLE V(1)(e) OF THE NEW YORK CONVENTION	539
ARTICLE X: FINAL CLAUSES	540
A. Countries Which May Become Contracting Parties	541
B. Relationship with Other Treaties	541
1. Agreement Relating to Application of the European Convention, Paris 1962	542
2. Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific- Technical Cooperation, Moscow 1972	542
C. Reservation	542
ANNEX I: Composition and Procedure of the Special Committee Referred to in Article IV of the Convention	543
ANNEX II: Agreement Relating to Application of the European Convention on International Commercial Arbitration Referred to in Article X of the Convention	546

**The undersigned, duly authorized,**

**Convened under the auspices of the Economic Commission for  
Europe of the United Nations,**

**Having noted that on 10th June 1958 at the United Nations  
Conference on International Commercial Arbitration has been signed  
in New York a Convention on the Recognition and Enforcement of  
Foreign Arbitral Awards,**

COMMENTARY

**Desirous of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries,**

**Have agreed on the following provisions:**

PREAMBLE

1. The Convention's applicability to international commercial arbitration is announced in the title and preamble. Unlike the New York Convention, it was not the intention of the drafters of the Convention that its scope be universal. The Convention originated from consultations on East-West trade held within the Economic Commission for Europe; hence, the inclusion of "European" in the title. However, its application is not limited to arbitration between a Western and an Eastern European party (see Art. X below). The disintegration of the COMECON regulatory legal system should draw new attention to the Convention as laying down a set of rules providing for legal certainty in international arbitration with the former Socialist States

*Article I*

SCOPE OF THE CONVENTION

- (1) This Convention shall apply:**
  - (a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States;**
  - (b) to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above.**
  
- (2) For the purpose of this Convention,**
  - (a) the term "arbitration agreement" shall mean either an arbitral clause in a contract or an arbitration agreement, the**

**contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws;**

**(b) the term “arbitration” shall mean not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions;**

**(c) the term “seat” shall mean the place of the situation of the establishment that has made the arbitration agreement.**

#### A. SCOPE OF PROVISIONS IN GENERAL

2. Art. I(1) delimits the scope of the Convention by referring to the connection of the parties with different Contracting States (see B. below) and to the nature of the dispute submitted to arbitration (see C. below). It also states that the Convention deals with arbitration agreements with the above international elements, arbitral procedures based on such agreements and awards resulting therefrom. The German Supreme Court took the view that the Convention does not apply to a decision (*Iodo*) rendered in *arbitrato irrituale* (informal arbitration) (Germany no. E9/NYC25).

3. Art. I(2) explains the language used in paragraph 1. There are two types of arbitration agreements: an arbitration clause which deals with the settlement of future disputes; or a submission agreement which is an agreement concluded for the settlement of existing disputes. Art. I(2)(a) treats both kinds of agreements to arbitrate on an equal footing (Interim Award of 17 March 1982 of the former Arbitration Court of the GDR Chamber for Foreign Trade). It supersedes the provisions of domestic laws regarding the ineffectiveness of an arbitration clause. According to Art. I(2)(b), “arbitration” implies the settlement of a dispute by arbitrators, whether or not administered by a permanent arbitral institution (Italy no. E6/NYC54; Spain nos. E2/NYC3 and E7/NYC14).

#### B. CONNECTION OF THE PARTIES WITH DIFFERENT CONTRACTING STATES

4. Art. I(1)(a) requires that the parties should be connected with two or more different Contracting States (Austria no. E4; Germany nos. E10 and E11; Italy no. E19)).

#### COMMENTARY

5. This criterion of internationality must exist at the time of conclusion of the arbitration agreement. The Convention does not apply if parties come from different territorial units of the same Contracting State.

6. According to Art. I(1)(a), physical persons are connected to the country of their habitual place of residence and legal persons are connected with the country of their seat. Habitual residence should be regarded as a question of fact rather than as a legal concept such as domicile. Art. I(2)(c) provides a definition of “seat” that refers to an economic concept instead of a legal construction. The criterion is the place of business, not the place of incorporation or of registration (*siège social*) (Germany, Bundesgerichtshof, 20 March 1980<sup>1</sup> and Germany no. E8). As a consequence, Art. I(2)(c) has the effect of broadening the scope of the Convention by detaching its applicability from the legal status of the establishment that has concluded the arbitration agreement.

7. Nationality is not taken into consideration by Art. I. Therefore, the Convention applies to nationals of non-Contracting States who have their habitual place of residence or seat in different Contracting States (Italy no. E6/NYC54).

8. Several courts misinterpreted the Convention’s field of application by referring to the Convention in cases where only one of the parties was related to a Contracting State (see Italy nos. E3/NYC18 and E14/NYC94; Spain nos. E1/NYC2, E3/NYC6, E5/NYC11, E7/NYC14, E20 and E21; Russia no. 1) or where both parties were from the same Contracting State (see Italy nos. E4/NYC35 and no. E 17; Spain no. E14/NYC31). The Court of Appeal of Trieste correctly decided that the Convention was not applicable to an award rendered in a dispute between an Italian party and a Swiss party because Switzerland is not a Contracting State (Italy no. E8/NYC71). In the same sense: Court of First Instance of Brussels (Belgium no. E3/NYC7); Court of Appeal of Paris (France no. E1/NYC7); Court of Appeal of Düsseldorf (Germany no. E2/NYC8) and Court of Appeal of Venice (Italy no. E2/NYC16). On balance, however, the Convention, because it purports to encourage the settlement of international disputes by way of arbitration, could be invoked regardless of its field of application. The Swiss Federal Court thus declared that, although Switzerland is not a Contracting State, it would not be inappropriate to refer to the Geneva Convention where national laws lead to divergent solutions (Switzerland: *Provenda SA v. Alimenta SA*, Tribunal Fédéral, 12 September 1975).<sup>2</sup> Notwithstanding the connection of both parties with Italy only, the Italian

---

1. BGHZ 77, p. 32.

2. 101 ATF (1975) pp. 521-532.

Supreme Court referred to the Convention as a source of inspiration for the definition of international arbitration in Italian law (Italy no. E17). See also Supreme Court of Turkey, *Cie de Constructions Internationales v. DSI*, 10 March 1976.<sup>3</sup>

### C. INTERNATIONAL TRADE RELATIONSHIP

9. As indicated in the Convention's title, it presupposes a dispute that is international and commercial in nature. Art. I(2)(a) uses the expression "disputes arising from international trade".

10. There was general agreement among the drafters that an attempt to provide a uniform definition of the *commercial* character of the dispute would be exceedingly difficult owing to the variety of meanings and scope given by the various legal systems to this concept. The preparatory works indicate that for the purpose of Art. I(1)(a), the test should be whether the dispute submitted to arbitration is of a commercial nature, in accordance with the laws of all the countries with which the parties are related. Interpretation of the definition should therefore draw its source of inspiration from national sources.

11. The term *international* should be given the broadest meaning in order to cover any disputes where more than purely domestic matters are involved. The draft Convention used the expression "movement of goods and services or currencies across frontiers". This wording was, however, unduly restrictive of the international nature of the commercial matter in dispute. In one case, an arbitrator viewed a dispute concerning a lease escalation clause as falling within the ambit of the Convention, even though no economic exchange across borders was involved. The arbitrator noted that the lessee was an international organization which used the premises for carrying on its activities (ICC award no. 2091).<sup>4</sup> The criterion refers to the place of performance of the contractual obligations in different countries, independent of the place of delivery of the goods or of the place of payment of the contractual price (Italy no. E17).

12. The criterion "international trade" could be interpreted autonomously instead of by reference to the relevant national legal systems. An autonomous interpretation would expand the scope of application of the Convention and would be in line with a modern approach to international commercial arbitration in the light of the more recent work achieved in this field such as the UNCITRAL Model Law on International Commercial Arbitration.

---

3. Reported in *Rassegna dell'arb.* 1980, p. 187

4. Reported in *Rev. arb.* (1975) pp. 252-258, commentary by Ph. Fouchard pp. 258-267.

#### COMMENTARY

13. The criterion “international trade” does not require that the parties be considered under their own national law as commercial persons. The Court of Appeal of Lyon has applied the Convention in the context of a joint venture between a French company and an Italian citizen, although not a trader (France no. E4).

14. In one award the arbitrators interpreted the phrase “international trade” as an independent, self-contained concept for the purposes of the Convention, rejecting the contention of one party which argued that national law determines the commercial criterion laid down in Art. I(2)(a). Having qualified the contract as a joint venture agreement, the arbitral tribunal noted that this type of contract is frequently used in international commerce. In addition, the arbitrators observed that the transaction as a whole implied a movement of goods, services and currencies across borders. For these reasons, the arbitrators concluded, the transaction implicated the interests of international commerce within the meaning of Art. I(1)(a) (ad hoc award of 18 November 1983, *Benteler (F.R. Germany) v. Belgian State and S.A. ABC*). See also France no. E4.

#### D. SEAT OF THE ARBITRATION

15. The Italian Supreme Court held that the Convention is applicable irrespective of whether or not the arbitration proceedings took place in a Contracting State. This, the Supreme Court stated, is because the special regime of the Convention must be deemed to be implicitly integrated into contracts entered into by parties from Contracting States (Italy no. E7/NYC57). Thus, in effect, one purpose of the Convention is to introduce among the Contracting States a set of uniform rules applicable to certain situations set forth in Art. I. The Convention is consequently binding upon the courts of the Contracting States on account of its incorporation in their legal orders regardless of the place of arbitration in a non-Contracting State (Spain no. E13; Russia no. E1). Clearly, the seat of the arbitration may be located in a Contracting State other than the country of any of the parties to the dispute (Spain nos. E15/NYC32 and E20). The above decision of the Italian Supreme Court (Italy no. E7/NYC 57), however, draws an inference that seems unwarranted. The statement that the seat of the arbitration is not a criterion for the Convention’s application holds true. However, the assertion that the Convention is operative when arbitration proceedings take place in a non-Contracting State fails to take into account the potential impact of the law of the seat. The framers of the Convention assumed, as a matter of course, that it would control arbitral proceedings taking place in Contracting States. In any event, it is therefore more prudent to conclude that

the Convention's applicability is not guaranteed when the seat of the arbitration is situated in a non-Contracting State. It should be noted that in one case, the French Supreme Court declined to apply the Convention even though all the conditions for its applicability were fulfilled. However, the decision was reached on purely procedural grounds and did not allude to the legal force of the Convention (France no. E3/NYC11).

#### E. APPLICATION OF THE CONVENTION BY ARBITRATORS

16. As many arbitrators apply the Convention, the question arises as to what extent they are subject to its provisions. Some awards have referred to the Convention because home countries of the parties are Contracting States (ICC awards nos. 2745,<sup>5</sup> 2762,<sup>6</sup> 2886<sup>7</sup> and 3540 as well as ICC awards nos. 6379, 6531 and 8938). Others have done so without regard to its ratification (ICC awards nos. 1689,<sup>8</sup> 2930 and 5485; and the ad hoc award of 1973, *BP v. Libya*). This picture may seem somewhat confusing. It is apparent that arbitrators should resort to the Convention when the conditions for its applicability are met because they are the addressees of most of its provisions. Conceivably, it can also be said in some measure to have a universal scope. In effect, with respect to the provisions relating to arbitration clauses (see Art. I(2)(a) below), the capacity of public entities to agree to arbitration (see Art. II below), the organization of proceedings (see Art. IV below), jurisdictional objections (see Art. V below), the law applicable to the merits (see Arts. VI(2) and VII below) and the motivation of awards (see Art. VIII below), arbitrators can find in the Convention a set of universally applicable rules that reflect a consensus within the international legal community as well as substantive provisions that appear reasonable in the light of the disputes issues. Although some provisions, such as those relating to the setting aside of awards (see Art. IX below), are not directly applicable by arbitrators, they may, nevertheless, still be referred to when considering the future enforceability of the award. In general, increased referral to the Convention by arbitrators could be recommended as a means of promoting more uniform solutions to the problems of international arbitration.

---

5. Reported in *Journal du Droit International (Clunet)* 1978, pp. 990-995 (reproduced in S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards 1974-1985*, pp. 326-331).

6. Reported in *Journal du Droit International (Clunet)* 1978, pp. 990-995 (reproduced in S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards 1974-1985*, pp. 326-331).

7. Reported in *Journal du Droit International (Clunet)* 1978, pp. 996-999 (reproduced in S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards 1974-1985*, pp. 332-335).

8. Reported in *Rev. arb.* 1972, p. 108.

## F. RETROACTIVITY

17. Although the Convention contains no provision regarding the retroactive application, the Spanish Supreme Court declared that it applied to awards made before the date of adherence by a Contracting State (Tribunal Supremo, 13 October 1983).<sup>9</sup>

## G. FORM OF THE ARBITRATION AGREEMENT

1. *Agreement in writing*

18. Although an agreement in writing is not mentioned in the text proper of Art. I(2)(a), a written form is implied. This view is supported by the fact that, during the development of the article, the word “written” was used to qualify the contract in which the arbitration clause is inserted.

19. The first part of Art. I(2)(a) is virtually identical to Art. II(2) of the New York Convention (see Consolidated Commentary Cases New York Convention in Yearbook XXVIII (2003), at Art. II(2); Spain nos. E15/NYC32, E16 and E22; ICC award no. 6379; Award of the Hamburg Friendly Arbitration of 29 December 1998) which it complements (Spain nos. E17/NYC34 and E18/NYC35). Accordingly, the European Convention validates an arbitration agreement either signed by the parties or contained in an exchange of letters, telegrams or telexes (Germany no. E10; Italy nos. E6/NYC54, E11/NYC84 and E10/NYC99; and Spain nos. E2/NYC3, E7/NYC14 and E9; ICC award no. 6379; awards of the Hamburg Commodity Exchange of 6 July 1983,<sup>10</sup> 19 December 1984,<sup>11</sup> 23 July 1985 and 7 December 1995).<sup>12</sup> One award regarded the sending of an invoice with a reference to the contract containing the arbitration clause which had not been returned as the completion of an exchange of letters (Award of the Hamburg Commodity Exchange of 12 September 1984).<sup>13</sup>

20. Another award held that the Terms of Reference signed by both parties in accordance with Art. 13(2) of the ICC Rules of Conciliation and Arbitration is a written document equivalent to a submission agreement within the terms of Art. I(2)(a) (ICC award no. 6531).

---

9. Revista de la Corte Española de Arbitraje, 1985, p. 207.

10. Reported in *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 48.

11. Reported in *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 51.

12. Reported in *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 52.

13. Reported in *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 49.

21. The Court of Appeal of Hamburg considered that the formal conditions of Art. I(2)(a) were not fulfilled when the General Conditions containing the arbitration clause appeared only on the broker's note. The Court pointed out that the contracts had not been signed by both parties but only by the buyer (Germany no. E5/NYC20). The Supreme Court of Spain held that an arbitration agreement is validly concluded when the buyer has received and amended the sales confirmation sent by the broker and referring to the seller's standard contract where the arbitration clause is included. The Supreme Court deduced that the buyer was aware of the arbitration clause in the standard contract and expressed agreement with the contractual clauses, such as the arbitration clause, which it did not modify (Spain no. E17/NYC34). The Spanish Supreme Court also decided that an arbitration clause in the sales confirmation sent to the buyer by the seller should be held valid because the buyer issued airway bills referring to the contract although it did not sign the confirmation (Spain no. E18/NYC35).

22. The text of Art. I(2)(a) departs in two places from the text of Art. II(2) of the New York Convention. First it specifies that only the contract which contains the arbitration clause, and not the arbitration clause itself, needs to be signed. However, the same interpretation prevails under the New York Convention (see Consolidated Commentary Cases New York Convention in Yearbook XXVIII).

23. Arts. 1341 and 1342 of the Italian Civil Code require that arbitration clauses in standard conditions or forms be specifically approved in writing. A separate signature for the arbitration clause is therefore needed. The Italian Supreme Court declared that the Convention is a *lex specialis* which overrules this requirement (Italy nos. E4/NYC35, E15/NYC114 and E18/NYC157).

24. Second, Art. I(2)(a) contemplates communication by teleprinter in addition to letters or telegrams (Italy no. E16 and Spain no. E6/NYC12). The Austrian Supreme Court referred to the provisions of Art. I(2)(a) to give a liberal interpretation to Art. II(2) of the New York Convention as including an exchange of telexes (Austria no. E1/NYC2; Switzerland no. NYC18; Italy no E16; Spain no E13/NYC30). The Madrid Court of Appeal declared that the European Convention more generally has a gap-filling function of the New York Convention (Spain NYC no. 66).

25. The language of Art. I(2)(a) should be construed broadly as comprising other modes of communications (e.g., telefaxes, electronic mail), provided that the transmission of messages evidences the concurrence of wills of the parties to arbitrate.

2. *Other forms*

26. Art. I(2)(a) establishes a requirement for the form of the arbitration agreement (Spain no. E5/NYC11) that takes precedence over the more stringent conditions of national laws. With a view to facilitating recognition of arbitration agreements, it does not, however, set a minimum requirement with respect to more liberal national laws; it yields to the more favorable provisions of domestic laws whenever any form other than the written one, such as an oral agreement (Germany no. E15/NYC69), is admitted “in relations between States whose laws do not require that an arbitration agreement be made in writing”. This language merits clarification. The draft convention referred to the laws applicable to the parties. During a Special Meeting of Plenipotentiaries, the text was amended to include not only the law of the States where the parties come from but also the States in which the arbitration agreement or award is enforced, or the State in which the competent Chamber of Commerce is situated (see Art. IV below). As adopted, the text unduly limits the scope of Art. I(2)(a) because acceptance of other forms is tied to the legal regime of States which may not be identified at the time of conclusion of the agreement, such as the State where the arbitration will take place or the State where enforcement may be requested. Similarity of forms is not required; the basic test for purposes of Art. I(2)(a) turns on whether each legal system involved permits the conclusion of an arbitration agreement in the form in question (Germany no. E15/NYC69).

27. In a case between a German buyer and an Italian seller involving an arbitration clause contained in the broker’s note, the Court of Appeal of Hamburg observed that, under German law, an arbitration clause need not be in writing in case of commercial transactions between merchants whereas the written form is mandatory under Italian law. The Court concluded accordingly that the conditions set forth in the second sentence of Art. I(2)(a) were not fulfilled because the signature of the Italian seller was lacking (Germany no. E5/NYC20; Italy no. E1/NYC5 and the award of the Hamburg Commodity Exchange of 12 September 1984).<sup>14</sup>

28. As a practical matter, the problem is, in most cases, that of an arbitration clause incorporated in external documents to which the contract refers more or less explicitly (Award of the International Court of Arbitration for Marine and Inland Navigation at Gydnia of 15 December 1978). In a case decided by the German Supreme Court, an arbitration clause was contained in the sales confirmation sent by the Austrian seller to the German buyer who remained silent. The Court found that the factors surrounding the conclusion and

---

14. Reported in *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 49.

execution of the contract pointed to German law and, by operation of Art. I(2)(a), upheld the formal validity of the arbitration clause solely on the basis of German law. The holding is at variance with Art. I(2)(a) because the formal conditions should have been examined under both laws concerned, to wit, Austrian and German law (Germany no E1/NYC7). The German Supreme Court also referred to Art. I(2)(a) in the context of the enforcement in Germany of an award made in Denmark (two Contracting States) and gave consideration to German law which does not impose formal requirements for the validity of an arbitration agreement concluded between merchants under Article VII of the New York Convention which allows for the application of a more-favorable-right provision than Article II of the New York Convention (Germany no. E13).

*Article II*

RIGHT OF LEGAL PERSONS OF PUBLIC LAW TO RESORT TO ARBITRATION

- (1) In the cases referred to in Article 1, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as “legal persons of public law” have the right to conclude valid arbitration agreements.**
- (2) On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.**

29. Art. II(1) validates both arbitration clauses and submission agreements entered into by “legal persons of public law” with a view to placing them on the same footing as legal persons of private law. Art. II(1) supersedes, in that respect, the law governing their status which is referred to as “the law applicable to them”. The expression “legal persons of public law” should be interpreted in a broad way as to comprise not only public corporations but also States and any public agencies. The scope of Art. II(1) is restricted to the international situations laid down in Art. I(1). Accordingly, legal persons of public law that do not have the capacity to arbitrate and that are within the jurisdiction of the same State cannot make use of Art. II(1) to submit to arbitration abroad, even if the legal relation between them is of a commercial nature.

30. In an interesting attempt to broaden the field of application of Art. II(1), one arbitrator treated an international organization as a legal person of public

## COMMENTARY

international law in line with the Convention (ICC award no. 2091).<sup>15</sup> In an ad hoc case, the arbitrators invoked the distinction between a State's governmental and commercial activities (*jure imperii* and *jure gestionis*). The arbitral tribunal declared that the underlying purpose of the transaction was irrelevant. It further noted that the State had availed itself of the ordinary machinery of contract. Turning to Art. II(1), the arbitrators ruled that the State could not invoke the provision in its own law prohibiting public persons to arbitrate (ad hoc award of 18 November 1983, *Benteler (F.R. Germany) v. Belgian State and S.A. ABC*). In an ICC case, the arbitral tribunal held that Art. II prevents a public entity from relying on its own law to challenge the validity of an arbitration clause to which it is a party (ICC award no. 6162).

31. The content of Art. II met strong opposition from Civil Law countries where public entities are, generally, prohibited from resorting to arbitration. To accommodate these States, which otherwise would have not ratified the Convention, a second paragraph providing for the possibility of a reservation was added to Art. II (see Art. X below).

### *Article III*

#### RIGHT OF FOREIGN NATIONALS TO BE DESIGNATED AS ARBITRATORS

#### **In arbitration covered by this Convention, foreign nationals may be designated as arbitrators.**

32. Art. III is intended to permit the choice of arbitrators which are not necessarily nationals of any State concerned in the arbitration proceedings. This language allows nationals of non-Contracting States to act as arbitrators (Italy no. E7/NYC57). It should be observed that arbitration rules which limit the selection of arbitrators to the persons included in the list approved by an arbitral institution are not affected by Art. III.

---

15. Reported in Rev. arb. 1975, pp. 252-258, commentary by Ph. Fouchard pp. 258-267.

*Article IV*

ORGANIZATION OF THE ARBITRATION

- (1) The parties to an arbitration agreement shall be free to submit their disputes:
  - (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution;
  - (b) to an *ad hoc* arbitral procedure; in this case, they shall be free *inter alia*:
    - (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
    - (ii) to determine the place of arbitration; and
    - (iii) to lay down the procedure to be followed by the arbitrators.
- (2) Where the parties have agreed to submit any disputes to an *ad hoc* arbitration, and where within thirty days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration. This paragraph shall also apply to the replacement of the arbitrator(s) appointed by one of the parties or by the President of the Chamber of Commerce above referred to.
- (3) Where the parties have agreed to submit any disputes to an *ad hoc* arbitration by one or more arbitrators and the arbitration agreement contains no indication regarding the organization of the arbitration, as mentioned in paragraph 1 of this article, the necessary steps shall be taken by the arbitrator(s) already appointed, unless the parties are able to agree thereon and without prejudice to the case referred to in paragraph 2 above. Where the parties cannot agree on the appointment of the sole arbitrator or where the arbitrators appointed cannot agree on the measures to be taken, the claimant shall apply for the necessary action, where the place of arbitration has been agreed

COMMENTARY

upon by the parties, at his option to the President of the Chamber of Commerce of the place of arbitration agreed upon or to the President of the competent Chamber of Commerce of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration. Where such a place has not been agreed upon, the claimant shall be entitled at his option to apply for the necessary action either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee whose composition and procedure are specified in the Annex to this Convention. Where the claimant fails to exercise the rights given to him under this paragraph the respondent or the arbitrator(s) shall be entitled to do so.

- (4) When seized of a request the President or the Special Committee shall be entitled as need be:
  - (a) to appoint the sole arbitrator, presiding arbitrator, umpire, or referee;
  - (b) to replace the arbitrator(s) appointed under any procedure other than that referred to in paragraph 2 above;
  - (c) to determine the place of arbitration, provided that the arbitrator(s) may fix another place of arbitration;
  - (d) to establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s), provided that the arbitrators have not established these rules themselves in the absence of any agreement thereon between the parties.
- (5) Where the parties have agreed to submit their disputes to a permanent arbitral institution without determining the institution in question and cannot agree thereon, the claimant may request the determination of such institution in conformity with the procedure referred to in paragraph 3 above.
- (6) Where the arbitration agreement does not specify the mode of arbitration (arbitration by a permanent arbitral institution or an *ad hoc* arbitration) to which the parties have agreed to submit their dispute, and where the parties cannot agree thereon, the claimant shall be entitled to have recourse in this case to the procedure referred to in paragraph 3 above to determine the question. The President of the competent

**Chamber of Commerce or the Special Committee shall be entitled either to refer the parties to a permanent arbitral institution or to request the parties to appoint their arbitrators within such time-limits as the President of the competent Chamber of Commerce or the Special Committee may have fixed and to agree within such time-limits on the necessary measures for the functioning of the arbitration. In the latter case, the provisions of paragraphs 2, 3 and 4 of this article shall apply.**

- (7) Where within a period of sixty days from the moment when he was requested to fulfil one of the functions set out in paragraphs 2, 3, 4, 5 and 6 of this Article, the President of the Chamber of Commerce designated by virtue of these paragraphs has not fulfilled one of these functions, the party requesting shall be entitled to ask the Special Committee to do so.**

A. FREEDOM OF THE PARTIES TO ORGANIZE THE ARBITRATION

33. Art. IV(1) gives parties the freedom to choose between institutional and ad hoc arbitration. Art. IV(1)(b) provides that parties have the liberty to select their arbitrators and the seat of arbitration and that arbitral proceedings are governed by the rules fixed by the parties. (Germany no. E7; Spain nos. E2/NYC3, E3/NYC6, E4/NYC7, E7/NYC14 and E9/NYC22; Tribunal Supremo, 13 October 1983).<sup>16</sup> As drafted, Art. IV(1) does not impose the choice of a national procedural law. See also France no. E4 and Belgium no. E5. If the parties to an ad hoc arbitration have not provided adequately for the measures mentioned in Art. IV(1)(b) necessary to get the arbitration under way or are unable to agree thereon, the appropriate decisions should be made by the appointed arbitrator(s) (Art. IV(3)).

B. COMPETENT AUTHORITY TO ASSIST IN THE ORGANIZATION OF THE ARBITRATION

34. Art. IV(2) to (7) establishes a procedural mechanism for setting in motion an arbitration notwithstanding an inoperative arbitration clause or the disagreement of the parties on the conduct of the arbitration (Italy no E19; Spain no. NYC66). (The Arbitration Rules of the Economic Commission for Europe, adopted in

---

16. Revista de la Corte Española de Arbitraje, 1985, p. 207.

#### COMMENTARY

January 1966 (E/ECE/625/Rev.1E/ECE/TRADE/81/Rev.1) further elaborate the issue of failure to agree on the arbitral procedure. See the ad hoc award of 11 November 1975).

35. Art. IV(2) and (3) provides that the measures required (see C. below) will be ordered by the President of the Chamber of Commerce at the defaulting party's or respondent's habitual place of residence or seat at the time of introduction of the notice of arbitration (a list of Chambers of Commerce is communicated by each Contracting Party to the Secretary General of the United Nations, see Art. X(6) below).

36. In order to avoid procedural jockeying by the litigants, Art. IV(3) gives the requesting party the option of applying for the necessary action to the President of the Chamber of Commerce of the place of arbitration, or, if such place has not been agreed upon, to the Special Committee whose composition and procedure are specified in the Annex to the Convention (reproduced at the end of this Commentary). As a last resort, competence of the Special Committee is also envisaged in Art. IV(7) whenever the President of the Chamber of Commerce has not acted as required by Art. IV(2) to (6) within sixty days of the request.

37. Art. IV(2), which is concerned with ad hoc arbitration, provides that one of the parties may apply to the President of the competent Chamber of Commerce to appoint (or replace) the arbitrator whom the other party failed to appoint within thirty days from the notification of the request for arbitration to the respondent (France no. E4). Art. IV(3) gives this right of recourse to the claimant or, if the latter remains inactive, to the respondent or arbitrator(s). The procedure under Art. IV(5) and (6) refers back to Art. IV(3).

38. This system reflects a careful compromise drawn up in the context of East-West relations. The Special Committee (two members and a chairman) is elected by the Chambers of Commerce of Western countries, referred to as States in which National Committees of the International Chamber of Commerce exist, and by former Socialist countries, designated as States in which there are no such National Committees (paragraphs 1 and 2). A rotating chairmanship ensures an impartial functioning of the Committee (paragraph 7). The Paris Agreement of 17 December 1962 Relating to Application of the European Convention therefore recognizes that Art. IV(2) to (7) is unnecessary when the parties to the arbitration all come from Western countries (see Art. X below).

39. In contrast to the lengthy negotiations which were necessary for the drafting of Art. IV and the Annex, few cases dealing with Art. IV, both involving East-West commerce, have been reported to the Economic Commission for Europe.

C. COMPETENCE OF THE PRESIDENT OF THE CHAMBER OF COMMERCE (OR OF THE SPECIAL COMMITTEE)

40. If the parties have given no indication of their preference for institutional or ad hoc arbitration, or have reached no agreement on that question (Art. IV(6)), or if the parties have chosen to refer their dispute to institutional arbitration without specifying or agreeing upon a particular arbitration institution (Art. IV(5)), the President of the competent Chamber of Commerce (or the Special Committee) will make this choice. The procedure provided in Article IV(5) for the determination of the competent arbitration institution permits to uphold the validity of an arbitration agreement which would otherwise be null and void under the applicable law for non-existence or ambiguous determination of the arbitral institution to which the dispute should be referred (Germany no E11).

41. When there is no agreement by the arbitrators on the necessary measures or by the parties on the appointment of the sole arbitrator, the President of the competent Chamber of Commerce (or the Special Committee) will decide the place of arbitration and the rules of procedure, if not settled by the arbitrator(s), either directly or indirectly by reference to the rules of an arbitration institution; replace the arbitrator(s) who have not been nominated pursuant to Art. IV(2) (see B. above); and appoint “the sole arbitrator, presiding arbitrator, umpire or referee”(Art. IV(3) and (4)). The report of the Special Meeting of Plenipotentiaries indicates that these terms should be given the following meaning: (i) a presiding arbitrator is an arbitrator who chairs an arbitral tribunal composed of an odd number of arbitrators, (ii) an umpire is an arbitrator who acts as sole arbitrator when the two arbitrators nominated by the parties disagree, (iii) a referee is an arbitrator who casts the decisive vote between the two appointed arbitrators, but is bound to adopt one of the opinions.

42. Art. IV(2) to (7) are suppletive provisions. The jurisdiction and powers which usually fall to the courts in assisting the arbitral process are performed by the President of the competent Chamber of Commerce or by the Special Committee. The decisions of the President of the competent Chamber of Commerce (or of the Special Committee) substitute only for the defective or missing elements in the arbitration clause. Thus, Art. IV(2) specifies that its provisions come into play subject to the method of appointment of arbitrators selected by the parties.

*Article V*

PLEA AS TO ARBITRAL JURISDICTION

- (1) The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral procedure. Where the delay in raising the plea is due to a cause which the arbitrator deems justified, the arbitrator shall declare the plea admissible.
- (2) Pleas to the jurisdiction referred to in paragraph 1 above that have not been raised during the time-limits there referred to, may not be entered either during a subsequent stage of the arbitral proceedings where they are pleas left to the sole discretion of the parties under the law applicable by the arbitrator, or during subsequent court proceedings concerning the substance or the enforcement of the award where such pleas are left to the discretion of the parties under the rule of conflict of the court seized of the substance of the dispute or the enforcement of the award. The arbitrator's decision on the delay in raising the plea, will, however, be subject to judicial control.
- (3) Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

43. The scope of Art. V has been limited primarily to cases where pleas are based on the invalidity of the arbitration agreement or an excess of authority. To begin with, when the arbitrator's jurisdiction is challenged because the arbitration agreement was non-existent, null and void or had lapsed, the plea must be raised

not later than the delivery of the statement of claim or defence relating to the substance of the dispute (award of the Hamburg Commodity Exchange of 23 July 1985).<sup>17</sup> Neither the drafting history nor the text of the Convention indicate how the phrase “non-existent or null and void or had lapsed” should be interpreted. The expression “non-existent” should be interpreted to cover cases in which the contract simply does not contain an arbitration clause or where the litigants are not subject to an arbitration agreement. The wording “null and void” may be understood to mean that the arbitration agreement is invalid right from its formation due to lack of consent or incapacity of the parties. The expression “had lapsed” would on the other hand denote a situation where the arbitration agreement, although not invalid *ab initio*, has ceased to operate because, for example, the same dispute has already been adjudicated or settled between the same parties or the arbitration agreement has been waived (see Art. VI(1) below).

44. The statement of defence mentioned in Art. V(1) refers to the first defence which is made in response to the statement of claim as opposed to any later defence made in the course of the arbitral proceedings.

45. Next, when the arbitrator’s jurisdiction is impugned on the grounds that he has exceeded his terms of reference, the plea must be raised as soon as the question over which the arbitrator allegedly has no jurisdiction arises. The words “terms of reference” allude to the mandate of the arbitral tribunal as defined by the parties and not to the scope of the arbitration clause.

46. The party which has failed to assert its objections within the prescribed time limits cannot contest the jurisdiction of the arbitrator either before the arbitral tribunal or the court (Germany nos. E7 and E25; Spain no. E3/NYC6). Discussion of the merits of the case without raising an objection of lack of jurisdiction cures a defective arbitration agreement and the objection can no longer be raised in the enforcement proceedings of the award (Austria nos. E4 and NYC22; Germany nos. E16 and E17). Such estoppel rule is intended to forestall disputes as to jurisdiction at a late stage. Note, however, that there is clear authority in the legislative history that the regime concerning pleas as to the jurisdiction of the arbitrator should not apply to the detriment of the party who could not present his case. The phrase “[t]he party which intends to raise a plea ...” excludes the application of the provision in case of *ex parte* proceedings. Moreover, the phrase “not later than the delivery of its statement of claim or defence” later in the same sentence also suggests that the defendant has appeared. These provisions should be combined with those of Art. V of the New York

---

17. Reported in *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 52.

#### COMMENTARY

Convention which makes no mention of the circumstances in which a party can be estopped from invoking the lack of jurisdiction of the arbitrator.

47. Some issues of jurisdiction cannot be waived by the parties. Such grounds for the arbitrators' lack of jurisdiction generally pertain to public policy. They may be either of a procedural nature, regarding the appointment or the constitution of the arbitral tribunal, or of a substantive character, for example, the incapacity of the parties to enter into an arbitration agreement or the non-arbitrability of the dispute. Art. V(1) and (2) are accordingly concerned with pleas that are "left to the sole discretion of the parties" (Art. V(2)). During the arbitral proceedings, the "law applicable by the arbitrator" to the matters at hand controls the issue. During judicial proceedings on the substance of the dispute or the enforcement of the award, the reference is to "the rule of conflict" of the court seized because, in contrast to the arbitral tribunals (see Art. VII below), courts remain bound by the private international rules of their legal system. The expression "subsequent court proceedings concerning the substance" addresses the situation in which the subject matter of the dispute, covered by an arbitration agreement, is submitted to a court (see Art. VI below). Conceivably, Art. V(2) does not extend to annulment proceedings because its language only mentions enforcement proceedings.

48. Art. V(1) nonetheless allows the arbitrator to admit the plea if the delay "is due to a cause which [he/she] deems justified". The arbitrator's decision of non-admissibility is, according to Art. V(2), reviewable by the court. If the court reaches the conclusion, contrary to that of the arbitrator, that the plea is admissible, its powers to decide on the question of jurisdiction are unfettered by the conditions imposed by Art. V(2). The German Supreme Court construed Art. V(2) as meaning that the court is only bound by the arbitrator's decision on the admissibility of the plea after a decision has been actually rendered on the admission of the jurisdictional objection. Otherwise, the arbitrator, by not deciding on the admissibility of a late plea because he/she found the plea groundless anyway, would frustrate the power of the courts to examine the timeliness of the plea. In consequence, admissibility must be decided by the court when the arbitrator has left the issue open (Germany no. E7).

49. Art. V(3) spells out the arbitrator's authority to investigate his own jurisdiction and to decide on the existence or validity of the arbitration agreement without staying the arbitral proceedings until a court has decided on these questions (see Belgium no. E1/NYC1; ICC awards nos. 2091 and 5485). The competence to decide upon his own competence serves the purpose of defeating dilatory tactics on the part of a recalcitrant party attempting to escape from an arbitration agreement by reason of its alleged invalidity.

50. Art. V(3) underscores that an arbitrator can proceed with the arbitration and need not cede jurisdiction to a court, even in the face of an argument that the contract containing the arbitration clause is void (see ICC award no. 5485). This does not mean that the Convention regulates the question of the autonomy (separability, severability) of the arbitration clause. As a matter of fact, this issue was never contemplated during the drafting of the Convention. It is submitted that the question of the autonomy of the arbitration clause, if not governed by a substantial rule of private international law, remains to be governed by the same law applicable to its existence and validity (see Art. VI(2)). In the light of what has been said regarding the universal applicability of the Convention (see above, E, Application of the Convention by Arbitrators), the arbitrators may apply analogously the conflict of laws rule provided for the courts in Art. VI to determine what this law should be. The arbitrator's decision on jurisdiction does not bind the State Courts inasmuch as it is subject to judicial review provided for by the *lex fori* (Germany no. E17). The expression "*lex fori*" in the introductory sentence of Art. V(3) includes not only judicial control licensed by national law but also by other international conventions to the extent that they form part of the *lex fori*.

*Article VI*

JURISDICTION OF COURTS OF LAW

- (1) A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance.**
- (2) In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions:
  - (a) under the law to which the parties have subjected their arbitration agreement;****

COMMENTARY

**(b) failing any indication thereon, under the law of the country in which the award is to be made;**

**(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute. The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.**

- (3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.**
- (4) A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.**

A. *Article VI(1)*

PLEA AS TO COURT JURISDICTION

51. The Convention does not contain a specific provision on the recognition of arbitration agreements because the drafters were of the view that the issue had already been resolved by Art. II(3) of the New York Convention of 1958.

52. Parties may prior to the initiation of the arbitration cancel the arbitration clause and refer the matter to a court. The waiver may be explicit or implicit and may be inferred from the attitude of the litigants when they have not objected to the court's lack of jurisdiction.

53. Art. VI(1) purports, therefore, to avoid the issue of the existence of an arbitration agreement being raised in the later stage of court proceedings. Its provisions give only a partial uniform solution. Contingent on whether the plea concerning the existence of the arbitration agreement is regarded as a question of procedure or substance on the basis of the forum's legal system, the plea must,

on pain of debarment, be entered by the respondent at the latest before or at the same time as the defence on the merits (Italy no. E14/NYC94; Spain no. E20; Ukraine no. E1). The Court of First Instance of Bassano del Grappa held that, notwithstanding the provisions of the Convention, the issue of jurisdiction should be considered according to the Italian Code of Civil Procedure by the court on its own motion (Italy no. E9/NYC75).

54. The drafters of the Convention initially contemplated the possibility to accord *res judicata* effect to the decisions of the judgment court on the validity or existence of an arbitration agreement. The draft article read as follows:

“Where the court seized of a question on which the parties have concluded an arbitration agreement is that of the country in which or under whose law the award is to be made, its decision regarding the validity of the arbitration agreement shall be treated as *res judicata* both by any arbitral tribunals or law courts subsequently seized of a question covered by the arbitration agreement concerned or by any law courts called upon to rule on the recognition and enforcement of arbitral awards made on the basis of the agreement on whose validity a decision has been given by the first court seized.”

However, it was finally decided that this matter should rather be dealt with in a Convention on the enforcement of awards or of foreign judgments than in a Convention on arbitration. The Spanish Supreme Court decided that even if the objection on jurisdiction had not been properly raised in accordance with Art. VI(1) before the court first seized, no conclusion could be automatically made as to the validity or existence of the arbitration agreement in the enforcement proceedings of the judgment when reviewing the jurisdiction of the court of origin (Spain no. E22).

B. *Article VI(2)*

LAW APPLICABLE TO THE ARBITRATION AGREEMENT

1. *Determination of the applicable law*

55. Art. VI(2) draws its inspiration from Art. V(1)(a) of the New York Convention. Its purpose is to set out uniform measures of private international law to determine the law governing the question of the existence or validity of an arbitration agreement when a court is seized of a dispute regarding which the parties have allegedly made an arbitration agreement (Germany no. E11).

56. The primary conflict rule is that of party autonomy. Accordingly, the law to which the arbitration agreement has been subjected by the parties controls the issue of validity (Spain no. E20). Absent a clear manifestation of intent, the alternative conflict rule points to the law of the country in which the award is to be made (Belgium no. E4; Spain nos. E22 and NYC68). The distinction between the substance of the dispute and the arbitral procedure would not support the point of view that the choice of law for the contract should be taken as an indication of the parties' tacit will regarding the law applicable to the arbitration agreement (Spain no. NYC68). In a case decided by the German Supreme Court, neither the main contract nor the arbitration clause had been subjected to an express choice of law. The German Supreme Court held that there was no need to look for a tacit choice of law. Instead, the German Supreme Court held that French law controlled the validity of the arbitration agreement because Paris had been selected as the place of making of the award (Bundesgerichtshof, 20 March 1980,<sup>18</sup> see also Belgium no. E3/NYC7). See, however, ICC award no. 6379.

57. The second alternative conflict rule relies on the conflict rule of the forum in situations where the parties have not made a choice of law and it is impossible to foresee in which country the award will be made (Spain no. E20). In fact, it is not infrequent that parties fail to state the law governing their arbitration agreement and leave the place of making of the award to the discretion of the arbitrators or of an arbitral institution. In conclusion, Art. VI(2) gives an incomplete uniform conflict rule which leads ultimately to the private international law rules of the forum.

## 2. *Questions governed by the applicable law*

58. Art. VI(2) provides that the law applicable to the arbitration agreement regulates the question of its existence or validity (Spain no. E22). The validity that is referred to in the context of Art. VI(2) is material validity as opposed to formal validity dealt with in Art. VI(2)(a). Art. VI(2) leaves the issue of capacity to the law applicable to the parties. This solution is derived from Art. V(1)(a) of the New York Convention.

59. The capacity of a natural person to agree to arbitration is subject to the law of nationality or domicile, that of a juridical person is subject to the law of the place of incorporation or business or of its seat (Germany no. E14; Spain no. E20; ICC award no. 6850). The authority of the officers of a legal entity to conclude an arbitration agreement should also be deemed covered by the wording of Art. VI(2).

---

18. BGHZ 77, p. 32.

3. *Arbitrability*

60. The plain language of the last sentence of Art. VI(2)(c) acknowledges that a court ought not to enforce an arbitration clause, whatever the law applicable to it, if the claim is non-arbitrable under the law of the forum (Belgium nos. E1/NYC1 and E2/NYC2; Germany no. E8 and Bundesgerichtshof, 20 March 1980).<sup>19</sup> The Court of Appeal of Monaco held that a prohibition to refer disputes to arbitration which must be communicated to the *Ministère public* does not apply to an arbitration agreement in an international trade contract (Monaco no. E1).

C. *Article VI(3)*

*LIS PENDENS* BETWEEN ARBITRAL TRIBUNALS AND COURTS

61. Art. VI(3) directs the courts, when asked to assume jurisdiction after commencement of the arbitration proceedings, to wait until the award is made (ICC award no. 2091;<sup>20</sup> Spain no. E12). The interpretation which emerges from the expression “where either party to an arbitration agreement has initiated arbitration proceedings” is that a stay of the court proceedings is not dependent on the forming of the arbitral tribunal. Otherwise, the respondent would have had an opportunity to appeal to a court instead of appointing an arbitrator. Quite surprisingly, the Court of Appeal of Barcelona interpreted Art. VI(3) a contrario and decided that arbitration proceedings commenced after court litigation on the same subject matter should be stayed pending adjudication by the State court (Spain no. E11). Art. VI(3) reserves the competence of the court for situations when there are “good and substantial reasons to the contrary”. This language seeks to ensure that the stipulations of Art. VI(3) will not come in conflict with Art. II(3) of the New York Convention which subjects a stay of court proceedings in favor of arbitration to conditions regarding the arbitration agreement. The words “good and substantial reasons” should be given a restrictive interpretation; if this were not the case, the rule which prevents the courts from encroaching on the arbitrator’s jurisdiction regarding the subject matter of the dispute or competence would become moot. For example, “good and substantial reasons” could mean the existence of *res judicata* or collateral estoppel precluding arbitration proceedings or of a pending litigation shortly awaiting a final decision.

---

19. BGHZ 77, p. 32.

20. Reported in *Rev. arb.* 1975, pp. 252-258, commentary by Ph. Fouchard pp. 258-267.

#### COMMENTARY

62. The jurisdiction of the court resumes after the award has been made. The idea behind Art. VI(3) is that the court which would have decided on the subject matter of the dispute or the validity of the arbitration agreement is the same one that controls the regularity of the award. When this is not the case, Art. VI(3) should be read to mean that jurisdiction passes to the court responsible for enforcing or setting aside the award.

#### D. *Article VI(4)*

#### INTERIM MEASURES

63. Art. VI(4) stipulates that a request for interim measures is compatible with an agreement to arbitrate (Italy no. E13/NYC91; ICC award no. 6709).<sup>21</sup> Paragraph 4 concerns more particularly the situation whereby the property in dispute or the assets of either party in respect of which a request for attachment or security is filed, are situated in a country other than that of the arbitral tribunal (Spain no. E10). The rationale for Art. VI(4) is that application to the court for assistance with interim measures does not mean that the party from whom the request emanates intends to forego arbitration (Spain no. E21).

64. In one case, a party had brought a suit for attachment of the defendant's property in the courts of a non-Contracting State. The arbitrator noted that both parties were related to different Contracting States and stated that, in accordance with Art. VI(4), an action for securing the claim could not be regarded as inconsistent with arbitration proceedings (ICC award no. 4415).<sup>22</sup>

65. The words "judicial authority" include both courts of law and executive authorities which have competence under the law of some countries to make provisional orders.

66. It should be noted that nothing in Art. VI(4) would prevent the arbitral tribunal from granting provisional measures.

---

21. Reported in *Journal du Droit International (Clunet)* 1992, pp. 998-1005 (reproduced in J-J Arnaldez, Y. Derains, D. Hascher, *Collection of ICC Arbitral Awards 1991-1995*, pp. 435-442).

22. Reported in *Journal du Droit International (Clunet)* 1984, pp. 952-957 (reproduced in S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards 1974-1985*, pp. 530-536).

*Article VII*

APPLICABLE LAW

- (1) The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.**
- (2) The arbitrators shall act as *amiables compositors* if the parties so decide and if they may do so under the law applicable to the arbitration.**

67. Art. VII(1) embodies the principle of party autonomy ( ICC awards nos. 6379 and 7047). Accordingly, parties are free to choose the law applicable to the substance of their dispute. They may select international or supranational rules (Award of 27 May 1980, Arbitration Court of the Chamber of Commerce and Industry of Czechoslovakia; ICC award no. 6379). The legislative history indicates that the drafters contemplated the possibility of an express as well as of an implied choice of law. When the parties have not designated the applicable law, the arbitrators must apply “the proper law under the rule of conflict that [they] deem applicable” (Award 38 of 1985 of the Moscow Commission; Award of the Hamburg Friendly Arbitration of 29 December 1998). Art. VII(1) is so worded as to bring out clearly that arbitrators are liberated from the choice of law regime of the arbitral forum. This solution conforms to the practice of international commercial arbitration (ICC awards nos. 1422,<sup>23</sup> 2745<sup>24</sup> and 2762,<sup>25</sup> 2886,<sup>26</sup> 2930, 3540, 8817 and 9771; ad hoc award of 1973, *BP v. Libya*). Selection of the seat of the arbitral tribunal is prompted either by considerations of neutrality, convenience for the litigants and arbitrators and the arbitration law of the place of arbitration, but in any event, without regard to the subject matter

---

23. S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards 1974-1985, pp. 185-189.

24. Reported in *Journal du Droit International (Clunet)* 1978, pp. 990-995 (reproduced in S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards 1974-1985, pp. 326-331).

25. Reported in *Journal du Droit International (Clunet)* 1978, pp. 990-995 (reproduced in S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards 1974-1985, pp. 326-331).

26. Reported in *Journal du Droit International (Clunet)* 1978, pp. 996-999 (reproduced in S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards 1974-1985, pp. 332-335).

## COMMENTARY

of the dispute submitted to arbitration. Arbitrators should select choice of law rules that are consistent with the dispute and yield a sensible result. In this regard, arbitrators are given complete freedom and may look to conflict rules that are not supplied by a specific national system of private international law or resort to a cumulative application of the conflict rules involved in the litigation. In addition, they may look at international instruments, such as the Rome I Regulation of 17 June 2008 on the Law Applicable to Contractual Obligations (1980 Rome Convention, see ICC awards nos. 8817 and 9771) or the Inter-American Convention on the Law Applicable to International Contracts of 17 March 1994.

68. The last sentence of Art. VII(1) underscores that the arbitrators should take account of the terms of the contract and trade usages whether or not the parties have chosen the applicable law. In light of this proviso, the term “applicable law” should receive the broadest possible interpretation, covering the contract, commercial practice and the national law. A progressive interpretation of the Convention in line with arbitration practice nowadays should allow the application by the arbitrators of the *lex mercatoria* and of principles of international law as well as the UNIDROIT Principles of International Commercial Contracts (ICC award no. 8817).

69. Consideration is given to the question of amiable composition in paragraph 2. According to its text, arbitrators can act as amiable compositeurs, i.e., base their decision on principles of equity, if they are instructed by the parties and empowered by the law applicable to the arbitration to do so.

70. Art. VII of the Convention has inspired, inter alia, similar provisions in the UNCITRAL Model Law. Many arbitrators have made reference to it, even in those cases where the Convention would not have been applicable (ICC awards nos. 1422, 2930, 9771).

### *Article VIII*

#### REASONS FOR THE AWARD

**The parties shall be presumed to have agreed that reasons shall be given for the award unless they**

- (a) either expressly declare that reasons shall not be given; or**
- (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there**

**has not been a hearing then before the making of the award,  
that reasons be given.**

71. Art. VIII establishes the presumption that parties wish a reasoned award. This presumption can be rebutted if parties have agreed, explicitly or implicitly, that reasons need not be stated. Art. VIII(b) declares that an agreement is implicit when litigants have accepted an arbitral procedure under which it is customary not to motivate, unless one of them requests the arbitral tribunal to give reasons before the end of the hearing, or if there is no hearing, before the making of the award (see Italy nos. E3/NYC18, E5/NYC51 and E7/NYC57; Spain no. E3/NYC6 and Tribunal Supremo, 13 October 1983;<sup>27</sup> see also Switzerland, *Provenda S.A. v. Alimenta S.A.*, Tribunal Fédéral, 12 December 1975).<sup>28</sup>

72. There is a discrepancy between the English and the French texts of Art. VIII(b) regarding the form of the request to the arbitral tribunal. The latter reads “*les parties ou l’une d’elles ne demandent pas expressément avant la fin de l’audience*”. This latter wording that, unlike the English text, requires an express request should be held to control because Art. VIII purports to lay down unequivocal assumptions evidencing the parties’ intent.

*Article IX*

SETTING ASIDE OF THE ARBITRAL AWARD (IN GENERAL)

73. The European Convention is not an international instrument on the recognition and enforcement of arbitral awards. The Convention neither provides for, nor guarantees, the enforcement of awards (Germany nos. NYC127 and NYC128; Spain no. E16). This issue must be addressed by another international Convention or by domestic law. The Court of Appeal of Rouen acknowledged that the Convention does not regulate the conditions under which an award may be enforced (France no. E2/NYC8). In the same sense: Court of First Instance of Hamburg (Germany no. E6/NYC21). Conversely, the Court of Appeal of Cologne erred in relying on Art. IX(1)(b) to refuse enforcement of an award that had not been set aside in its country of origin. (Germany no.

---

27. *Revista de la Corte Española de Arbitraje*, 1985, p. 207.

28. 101 ATF (1975) pp. 521-532.

## COMMENTARY

E3/NYC14, see also Spain nos. E2/NYC3 and E8/NYC21 and award of 18 July 1986 of the Arbitral Tribunal of the Hamburg Commodity Exchange).<sup>29</sup>

74. Art. IX simply limits the effect of the setting aside of the award in one Contracting State in respect of the recognition and enforcement in another Contracting State (Austria no. E3; Belgium no. E1/NYC1). It favors the enforcement of awards notwithstanding annulment in the country where they were made for any other count than those listed at Art. IX(1) (France no. E5). Conversely, annulment on one of the grounds provided for in Art. IX(1) is an obstacle to enforcement if the award (Spain no. E16). It remains that enforcement may always be denied on a different ground or even on the same ground as the one unsuccessfully raised in the annulment proceeding (Spain no. E16).

75. The heading: “Setting aside of the arbitral award” contrasts therefore with the purpose and content of the Article. This wording was formulated for an earlier draft of Art. IX where the issue was that of making uniform amongst the Contracting States the various grounds for which an award may be set aside with international effects in other jurisdictions. Art. IX does not envisage setting aside of the award (France no. E5) nor does it concern the suspension of enforcement proceedings pending a request for setting the award aside (France nos. E5 and E6).

76. It would be in keeping with the spirit of Art. IX to extend its scope to all judicial controls which reverse or modify awards in order not to restrict setting aside to the limited technical concept of annulment.

77. The introductory provisions of Art. IX require three conditions for the setting aside of an award in the country of origin to constitute a refusal of enforcement in another Contracting State.

### A. NATURE OF THE AWARD

78. The award must be “covered by [the] Convention”, which means that it lies within the scope of Art. I.

### B. VENUE FOR SETTING ASIDE

79. The setting aside must have taken place in one of two Contracting States: either that where the award was made or that under the law of which it was made

---

29. Reported in *Yearbook XVI* (1991) pp. 13-15; *Straatmann Rechtsprechung kaufmännischer Schiedsgerichte* 4, B1, no. 54.

(Austria no. E3). Therefore, Art. IX leaves open the possibility of contradictory decisions. As a result, the award may be set aside in the country where it was rendered whilst considered valid in the country under the law of which it was made. Note that Art. IX is inapplicable when enforcement is requested in the country of origin. During the drafting of Art. IX, a proposal to indicate that the law under which the award has been made means the law governing the arbitration proceedings was rejected because of the drafters' desire to follow the text of Art. V of the New York Convention as closely as possible. Art. IX does not apply when the setting aside proceedings took place in a non-Contracting State (Russia no. E1).

### C. FOUR GROUNDS FOR SETTING ASIDE

80. The award must have been set aside on one of the four grounds enumerated in Art. IX(1)(a)-(d) (Austria nos. E2 and E3; France no. E5). These are modelled on the grounds for which an award may be refused enforcement under Art. V(1)(a)-(d) of the New York Convention.

81. Art. IX(1) omits the provisions of Art. V(2) of the New York Convention that address public policy and arbitrability (Austria nos. E3 and E4). They were deleted because public policy considerations at large arise whenever an award offends the laws of the enforcement country. To require that the arbitrators ensure observance of the public policy of the country of origin when enforcement is not sought there impairs the international currency of the award without reason. Incidentally, Art. IX does not reach the denial of enforcement of an award for violating the public policy of the enforcement country. The enforcement court thus carries an autonomous review of the public policy objection, independent of annulment proceedings (Austria no. E4).

82. Ground (e) of Art. V(1) of the New York Convention has not been reproduced in the text of Art. IX since setting aside is itself the subject matter of Art. IX. Under Art. V(1)(e) of the New York Convention, an award may be denied enforcement when it has been set aside in the country of origin or under the law of which the award was rendered. The circumstances under which this may occur outnumber by far the grounds for refusal of enforcement set out in Art. V(1)(a)-(d) of the New York Convention because the treatment by national laws of the question of annulment varies considerably. At one end of the spectrum, there is the review of an arbitral award on the merits on the grounds of a mistaken interpretation of fact and law, and at the other end of the spectrum, there is the absence of judicial review for setting aside. This undesirable result is precisely what Art. IX purports to avoid. Art. IX preserves the international

## COMMENTARY

effectiveness of an award which has been annulled in its country of origin on any ground, including a violation of public policy, other than those provided by Art. IX(1)(a)-(d) (Austria nos. E2, E3 and E4; France no. E5; Italy nos. E3/NYC18 and E7/NYC57). Hence, an award remains enforceable notwithstanding its becoming a nullity on other grounds in the country where it was made. In light of the above, the enforcing judge will not accord preclusive effects to a prior foreign decision setting aside (annulling) an award decided on grounds other than the ones listed in Art. IX(1).

### *Article IX(1)*

#### GROUND FOR SETTING ASIDE

- (1) The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which or under the law of which, the award has been made and for one of the following reasons:**
  - (a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or**
  - (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or**
  - (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;**
  - (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, with the provisions of Article IV of this Convention.**

83. It should be noted that the grounds for setting aside listed in Art. IX(1) are common to most systems of judicial review of awards at the seat of arbitration. Other grounds would be likely to reflect public policy considerations of the country of origin; such considerations are at any rate excluded by Art. IX.

GROUND *a*: INVALIDITY OF THE ARBITRATION AGREEMENT

1. *Incapacity of a party*  
See Art. II and Art. VI(2) sub 2: “Questions governed by the applicable law” (Germany no. E18).
2. *Law applicable to the arbitration agreement*  
See Art. VI(2) (Belgium no. E3/NYC7, Germany no. E 25, ICC award no. 5730).
3. *Formal validity*  
See Art. I(2)(a).

GROUND *b*: VIOLATION OF DUE PROCESS

84. Art. IX(1)(b) covers cases in which the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case because he was not informed of the various procedural steps (see Spain nos. E2/NYC3 and E8/NYC21, and Tribunal Supremo, 13 October 1983;<sup>30</sup> see also, Court of Appeal of Cologne, 10 June 1976 with respect to non-disclosure of the names of arbitrators, Germany no. E3/NYC14; award of the Hamburg Friendly Arbitration of 29 December 1998).

GROUND *c*: EXCESS OF AUTHORITY BY ARBITRATOR

85. Ground *c* deals with situations where the arbitrator has ruled upon questions which were not within his terms of reference or within the scope of the arbitration agreement. Ground *c*, however, does not contemplate the opposite case where the arbitrator has made an incomplete award, in which case enforcement should not be denied.

---

30. Revista de la Corte Española de Arbitraje, 1985, p. 207.

## COMMENTARY

86. Art. IX(1)(c) goes on to provide that when the decisions within the arbitrator's jurisdiction can be severed from the decisions beyond that jurisdiction, the "part of the award which contains decisions on matters submitted to arbitration need not be set aside". This language needs to be interpreted because the setting aside of an award, whether partial or not, falls outside the adjudicatory powers of the enforcing judge. The wording of Art. IX(1)(c) reflects the original purpose of Art. IX of providing a uniform rule for the cases in which an award may become a nullity with international effects. The fact is that the expression "need not be set aside" should have been subsequently rephrased "may be recognized and enforced" in order to make clear that Art. IX(1)(c) simply means that the part of an award which has not been annulled may be enforced.

### GROUND *d*: IRREGULARITY IN THE COMPOSITION OF THE ARBITRAL AUTHORITY OR THE ARBITRAL PROCEDURE

87. Ground *d* concerns cases where the arbitration has not been conducted in accordance with the agreement of the parties (Germany no. E18), or failing agreement, with Art. IV of the Convention which must be deemed to be incorporated in the arbitration law of the place of arbitration. The language of ground *d* recognizes the freedom granted to the parties by Art. IV(1) to organize the arbitral proceedings.

88. Strict parallelism with the text of Art. V(1)(d) of the New York Convention which subsidiarily refers to violation of the law of the country where the arbitration took place has not been maintained. Non-observance of all the requirements of the law of the country where the arbitration took place would have frustrated the goal of Art. IX of limiting the international effects of the annulment of an award.

### *Article IX(2)*

### RELATIONSHIP WITH ARTICLE V(1)(e) OF THE NEW YORK CONVENTION

- (2) In relations between Contracting States that are also Parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New**

**York Convention solely to the cases of setting aside set out under paragraph 1 above.**

89. Art. IX(2) addresses the relationship between paragraph 1 and the corresponding provision of Art. V(1)(e) of the New York Convention when States are Parties to both instruments (Austria nos. E2, E3 and E4; Germany no. E18; Italy no. E12/NYC82). According to paragraph 2, the scope of Art. V(1)(e) is limited to those cases of setting aside enumerated in Art. IX(1)(a)-(d). This language is self explanatory in the light of Art. IX(1) (Austria nos. E3 and E4, France no. E2/NYC8).

90. The other parts of Art. V(1)(e) relating to the binding force and to suspension of the award are not affected by Art. IX. It is submitted that it would not be in conformity with the spirit of Art. IX to refuse enforcement of an award when suspension has been ordered on the basis of a ground for setting aside having no international effect within the meaning of Art. IX(1).

*Article X*

FINAL CLAUSES

- (1) This Convention is open for signature or accession by countries members of the Economic Commission for Europe and countries admitted to the Commission in a consultative capacity under paragraph 8 of the Commission's terms of reference.**
- (2) Such countries as may participate in certain activities of the Economic Commission for Europe in accordance with paragraph 11 of the Commission's terms of reference may become Contracting Parties to this Convention by acceding thereto after its entry into force.**  
**(...)**
- (6) When signing, ratifying or acceding to this Convention, the contracting Parties shall communicate to the Secretary-General of the United Nations a list of the Chambers of Commerce or other institutions in their country who will exercise the functions conferred by virtue of Article IV of this Convention on Presidents of the competent Chambers of Commerce.**

COMMENTARY

- (7) **The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States.**  
(...)
- (11) **The Secretary-General of the United Nations shall notify the countries referred to in paragraph 1, and the countries which have become Contracting Parties under paragraph 2 above, of (a) declarations made under Article II, paragraph 2**  
(...)

[The other paragraphs of Art. X dealing with signature ratification or accession, coming into force, denunciation, termination and notification to the Secretary-General of the United Nations pertain to the law of treaties and are not reproduced here].

A. COUNTRIES WHICH MAY BECOME CONTRACTING PARTIES

91. Art. X(1) and (2) enumerate the States which may become Contracting Parties. These provisions are traditional in Conventions concluded under the auspices of the Economic Commission for Europe. Their effect is that all European countries that are not UN members and, given the worldwide interest of the Convention, all UN members that are not ECE members may also join the Convention. The Madrid Court of Appeal noted that although non-European States have become Party to the Convention, the scope of application of the Convention had been historically limited to facilitating arbitration between Western and Eastern enterprises during the Cold War (Spain no. NYC66).

92. The former Republics of the Soviet Union (except the Baltic States) and the new Central and Eastern European States have as a rule become Contracting Parties to the Convention upon a notification of succession (Austria no. E3).

B. RELATIONSHIP WITH OTHER TREATIES

93. Art. X(7) provides that the provisions of the Convention shall not affect the validity of other agreements relating to arbitration entered into by Contracting States (see Austria no. E4, Germany no. E5/NYC20). This compatibility proviso is merely a rule of comity towards other international agreements. With the exception of the German Supreme Court which interpreted the relationship between the Convention and the New York Convention or a bilateral Agreement in terms of conflict of treaties (Germany nos. E1/NYC7, E12/NYC12 and

## COURT DECISIONS ON THE EUROPEAN CONVENTION 1961

E4/NYC17), courts have dealt with the interrelation between both instruments in terms of complementarity in view of giving maximum efficacy to the provisions of the Convention (Austria no E4; France no. E2/NYC8; Italy no. E3/NYC18. See A.J. van den Berg, *The New York Arbitration Convention of 1958* (Kluwer, Deventer 1981) pp. 92-98). The Court of Appeal of Munich decided that the more favorable right provision of Article VII of the New York Convention allows for the application of the 1961 European Convention (Germany no. E21/NYC126).

94. The Convention's field of application has been affected between some Contracting States by two subsequent international Conventions.

### 1. *Agreement Relating to Application of the European Convention, Paris 1962*

95. The Agreement Relating to Application of the European Convention done at Paris on 17 December 1962 declares by joint application of Arts. 1 and 2(1) that there is no basis for applying Art. IV(2)-(7) when both parties come from member States of the Council of Europe. Art. IV of the Convention purported to regulate the difficulties of setting up arbitration tribunals in East-West trade. In these circumstances, each litigant, it was thought, may have been reluctant to accept the courts and arbitration facilities of the other party because of the different legal, political and economic environments in East-West relations. Instead, the Agreement states in Art. 1 that any difficulty with regard to the organization of an arbitration shall be submitted to the normally competent authority, i.e., the courts. (Belgium no. E5 and Luxembourg no. E1). The application of the Agreement was overlooked by the Court of Appeal of Lyon which decided on the basis of Art. IV(2) that the Italian party that had addressed itself for the appointment of an arbitration for the defaulting French party to the court of the place of arbitration should have instead requested such appointment from the President of the Chamber of Commerce of the seat of the defaulting party (France no. E4).

### 2. *Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, Moscow 1972*

96. Not applicable.

## C. RESERVATION

97. With the exception of declarations regarding the limitation of the capacity of legal persons of public law to resort to arbitration (see Art. II above), the final clauses make no allowance for other reservations. Only Belgium has declared

## COMMENTARY

pursuant to Art. II(2) that solely the State may engage in arbitration (ad hoc award of 18 November 1983, *Benteler (F.R. Germany) v. Belgium and S.A. ABC*). The Benelux countries also declared in the Final Act that they remain free not to apply the Convention in whole or in part in their mutual relations.

## ANNEX I

### COMPOSITION AND PROCEDURE OF THE SPECIAL COMMITTEE REFERRED TO IN ARTICLE IV OF THE CONVENTION

- (1) The Special Committee referred to in Article IV of the Convention shall consist of two regular members and a Chairman. One of the regular members shall be elected by the Chambers of Commerce or other institutions designated, under Article X, paragraph 6, of the Convention, by States in which at the time when the Convention is open to signature National Committees of the International Chamber of Commerce exist, and which at the time of the election are parties to the Convention. The other member shall be elected by the Chambers of Commerce or other institutions designated, under Article X, paragraph 6, of the Convention, by States in which at the time when the Convention is open to signature no National Committees of the International Chamber of Commerce exist and which at the time of the election are parties to the Convention.
- (2) The persons who are to act as Chairman of the Special Committee pursuant to paragraph 7 of this Annex shall also be elected in like manner by the Chambers of Commerce or other institutions referred to in paragraph 1 of this Annex.
- (3) The Chambers of Commerce or other institutions referred to in paragraph 1 of this Annex shall elect alternates at the same time and in the same manner as they elect the Chairman and other regular members, in case of the temporary inability of the Chairman or regular members to act. In the event of the permanent inability to act or of the resignation of a Chairman or of a regular member, then the alternate elected to replace him shall become, as the case may be, the Chairman or regular member, and the group of Chambers of Commerce or other

**institutions which had elected the alternate who has become Chairman or regular member shall elect another alternate.**

- (4) The first elections to the Committee shall be held within ninety days from the date of the deposit of the fifth instrument of ratification or accession. Chambers of Commerce and other institutions designated by Signatory States who are not yet parties to the Convention shall also be entitled to take part in these elections. If however it should not be possible to hold elections within the prescribed period, the entry into force of paragraphs 3 to 7 of Article IV of the Convention shall be postponed until elections are held as provided for above.**
- (5) Subject to the provisions of paragraph 7 below, the members of the Special Committee shall be elected for a term of four years. New elections shall be held within the first six months of the fourth year following the previous elections. Nevertheless, if a new procedure for the election of the members of the Special Committee has not produced results, the members previously elected shall continue to exercise their functions until the election of new members.**

[Paragraph 6 which concerns communication to the Secretary-General of the United Nations of the results of the elections to the Special Committee is not reproduced here.]

- (7) The persons elected to the office of Chairman shall exercise their functions in rotation, each during a period of two years. The question which of these two persons shall act as Chairman during the first two-year period after the entry into force of the Convention shall be decided by the drawing of lots. The office of Chairman shall thereafter be vested, for each successive two-year period, in the person elected Chairman by the group of countries other than that by which the Chairman exercising his functions during the immediately preceding two-year period was elected.**
- (8) The reference to the Special Committee of one of the requests referred to in paragraphs 3 to 7 of the aforesaid Article IV shall be addressed to the Executive Secretary of the Economic Commission for Europe. The Executive Secretary shall in the first instance lay the request before the member of the Special**

COMMENTARY

Committee elected by the group of countries other than that by which the Chairman holding office at the time of the introduction of the request was elected. The proposal of the member applied to in the first instance shall be communicated by the Executive Secretary to the other member of the Committee and, if that other member agrees to this proposal, it shall be deemed to be the Committee's ruling and shall be communicated as such by the Executive Secretary to the person who made the request.

- (9) If the two members of the Special Committee applied to by the Executive Secretary are unable to agree on a ruling by correspondence, the Executive Secretary of the Economic Commission for Europe shall convene a meeting of the said Committee at Geneva in an attempt to secure a unanimous decision on the request. In the absence of unanimity, the Committee's decision shall be given by majority vote and shall be communicated by the Executive Secretary to the person who made the request.
- (10) The expenses connected with the Special Committee's action shall be advanced by the person requesting such action but shall be considered as costs in the cause.

ANNEX II

AGREEMENT RELATING TO  
APPLICATION OF THE EUROPEAN CONVENTION ON  
INTERNATIONAL COMMERCIAL ARBITRATION REFERRED TO  
IN ARTICLE X OF THE CONVENTION\*

The signatory governments of the member States of the Council of Europe,

Considering that a European Convention on International Commercial Arbitration was opened for signature at Geneva on 21st April 1961;

Considering, however, that certain measures relating to the organisation of the arbitration, provided for in Article IV of the Convention, are not to be recommended except in the case of disputes between physical or legal persons having, on the one hand, their habitual place of residence or seat in Contracting States where, according to the terms of the Annex to the Convention, there exist National Committees of the International Chamber of Commerce, and, on the other, in States where no such committees exist;

Considering that under the terms of paragraph 7 of Article X of the said Convention the provisions of that Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by States which are Parties thereto;

---

\* Source: Council of Europe, European Treaty Series No. 42 – International Commercial Arbitration, 17.XII.1962.

*List of Signatories*

Austria	28 Feb.	1964
Belgium	9 Oct.	1975
Denmark	16 Jan.	1973
France	30 Nov.	1966
Germany	19 Oct.	1964
Italy	10 May	1976
Luxembourg	1 April	1982
Moldova, Republic of	4 Feb.	1998

COMMENTARY

**Without prejudice to the intervention of a Convention relating to a uniform law on arbitration now being drawn up within the Council of Europe,**

**Have agreed as follows:**

*Article 1*

**In relations between physical or legal persons whose habitual residence or seat is in States Parties to the present Agreement, paragraphs 2 to 7 of Article IV of the European Convention on International Commercial Arbitration, opened for signature at Geneva on 21st April 1961, are replaced by the following provision:**

**“If the arbitral Agreement contains no indication regarding the measures referred to in paragraph 1 of Article IV of the European Convention on International Commercial Arbitration as a whole, or some of these measures, any difficulties arising with regard to the constitution or functioning of the arbitral tribunal shall be submitted to the decision of the competent authority at the request of the party instituting proceedings.”**

*Article 2*

- (1) This Agreement shall be open for signature by the member States of the Council of Europe. It shall be ratified or accepted. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.**
- (2) Subject to the provisions of Article 4, this Agreement shall come into force thirty days after the date of deposit of the second instrument of ratification or acceptance.**
- (3) Subject to the provisions of Article 4, in respect of any signatory government ratifying or accepting it subsequently, the Agreement shall come into force thirty days after the date of deposit of its instrument of ratification or acceptance.**

*Article 3*

- (1) After the entry into force of this Agreement, the Committee of Ministers of the Council of Europe may invite any State which is not a member of the Council and in which there exists a**

**National Committee of the International Chamber of Commerce to accede to this Agreement.**

- (2) Accession shall be effected by the deposit with the Secretary General of the Council of Europe of an instrument of accession, which shall take effect, subject to the provisions of Article 4, thirty days after the date of its deposit.

*Article 4*

The entry into force of this Agreement in respect of any State after ratification, acceptance or accession in accordance with the terms of Articles 2 and 3 shall be conditional upon the entry into force of the European Convention on International Commercial Arbitration in respect of that State.

*Article 5*

Any Contracting Party may, in so far as it is concerned, denounce this Agreement by giving notice to the Secretary General of the Council of Europe. Denunciation shall take effect six months after the date of receipt by the Secretary General of the Council of such notification.

*Article 6*

The Secretary General of the Council of Europe shall notify member States of the Council and the government of any State which has acceded to this Agreement of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or accession;
- (c) any date of entry into force;
- (d) any notification received in pursuance of the provisions of Article 5.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Agreement.

Done at Paris, this 17th day of December 1962, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory and acceding governments.

# LIST OF EUROPEAN CONVENTION COURT DECISIONS AND ARBITRAL AWARDS\*

## I. COURT DECISIONS

### **AUSTRIA**

6 March 1964

E1. (NYC Austria no. 2)

Oberster Gerichtshof, 17 November 1971 (*Seller PA.G. v. Buyer V*) Yearbook I (1976) p. 182 (Austria no. E1)

E2. Oberster Gerichtshof, 20 October 1993 (*A v. B*) Yearbook XX (1995) pp. 1051-1056 (Austria no. E2)

E3. Oberster Gerichtshof, 20 October 1993 and 23 February 1998 (*Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*) Yearbook XXIV (1999) pp. 919-927 (Austria no. E3)

E4. (NYC Austria 13)

Oberster Gerichtshof, 26 January 2005 (*Parties not indicated*) Yearbook XXX (2005) pp. 421-436 (Austria no. E4)

### **BELGIUM**

9 October 1975

E1. (NYC Belgium no. 1)

Cour d'Appel, Liège, 12 May 1977 (*Audi-NSU Union A.G. v. SA Adelin Petit & Cie*) Yearbook IV (1979) pp. 254-257 (Belgium no. E1)

---

\* This List contains all court decisions and awards applying the European Convention 1961 reported in the Yearbook since its inception. Court decisions (reported separately in Part V–B (Court Decisions on the European Convention 1961) since 1988) are numbered sequentially. When a decision is reported in Part V–A of the Yearbook (Court Decisions on the New York Convention 1958) but also deals with the European Convention, the sequential Part V–A number is also reported. Awards are not numbered.

COURT DECISIONS ON THE EUROPEAN CONVENTION 1961

E2. (NYC Belgium no. 2)

Cour de Cassation (1st Chamber), 28 June 1979 (*Audi-NSU Union AG v. SA Adelin Petit & Cie*) Yearbook V (1980) pp. 257-259 (Belgium no. E2)

E3. (NYC Belgium no. 7)

Tribunal de Première Instance, Brussels, 6 December 1988 (*Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (SONATRACH) v. Ford, Bacon and Davis Incorporated*) Yearbook XV (1990) pp. 370-377 (Belgium no. E3)

E4. Hof van Beroep, Brussels, 15 October 1992 (*Haegens Bouw v. NV Theuma Deurenindustrie*) Yearbook XVIII (1993) pp. 612-615 (Belgium no. E4)

E5. Rechtbank van Koophandel, Kortrijk, 1 October 1993 (*Société Lorraine de Matériel Radio-Électrique (SLORA) v. NV Barco Electronic et al.*) Yearbook XX (1995) pp. 1057-1060 (Belgium no. E5)

**FRANCE**

16 December 1966

E1. (NYC France no. 7)

Cour de Cassation, 9 October 1984 and Cour d'Appel, Paris, 19 November 1982 (*Pabalk Ticaret Ltd Sirketi v. Norsolor SA*) Yearbook XI (1986) pp. 484-491 (France no. E1)

E2. (NYC France no. 8)

Cour d'Appel, Rouen, 13 November 1984 (*Société Européenne d'Etudes et d'Entreprises (SEEE) by its liquidator Mme. Y. Cleja v. Socialist Federal Republic of Yugoslavia; International Bank for Reconstruction and Development (the World Bank) and the French State*) Yearbook XI (1986) pp. 491-499 (France no. E2)

E3. (NYC France no. 11)

Cour de Cassation, 25 February 1986 (*Confex v. Dahan*) Yearbook XII (1987) pp. 484-485 (France no. E3)

E4. Cour d'Appel, Lyon, 4 July 1991 (*SA France-Embryon v. Renato Argonauta*) Yearbook XIX (1994) pp. 859-862 (France no. E4)

LIST OF COURT DECISIONS AND ARBITRAL AWARDS

E5. Cour d'Appel, Paris, 31 May 2001 (*UNI-KOD sarl v. Ouralkali*) Yearbook XXVI (2001) pp. 1136-1140 (France no. E5)

E6. Cour de Cassation, 30 March 2004 (*S.a.r.l. UNI-KOD v. Ouralkali*) Yearbook XXX (2005) pp. 1200-1203 (France no. E6)

**GERMANY**

Ratification: 27 October 1964

E1. (NYC Germany no. 7)  
Bundesgerichtshof, 25 May 1970 (*Seller v. Buyer*) Yearbook II (1977) p. 237 (Germany no. E1)

E2. (NYC Germany no. 8)  
Oberlandesgericht, Düsseldorf, 8 November 1971 (*Seller v. Buyer*) Yearbook II (1977) pp. 237-238 (Germany no. E2)

E3. (NYC Germany no. 14)  
Oberlandesgericht, Cologne, 10 June 1976 (*Buyer v. Seller*) Yearbook IV (1979) pp. 258-260 (Germany no. E3)

E4. (NYC Germany no. 17)  
Bundesgerichtshof, 9 March 1978 (*Seller v. Buyer*) Yearbook IV (1979) pp. 264-266 (Germany no. E4)

E5. (NYC Germany no. 20)  
Oberlandesgericht, Hamburg, 22 September 1978 (*Company from Italy v. Firm from FR Germany*) Yearbook V (1980) pp. 262-264 (Germany no. E5)

E6. (NYC Germany no. 21)  
Landgericht, Hamburg, 24 April 1979 (*Company from the Netherlands v. Firm from FR Germany*) Yearbook V (1980) pp. 264-265 (Germany no. E6)

E7. Bundesgerichtshof, 2 December 1982 (*Wünsche Handelsgesellschaft v. S. Maria srl*) Yearbook XV (1990) pp. 660-666 (Germany no. E7)

COURT DECISIONS ON THE EUROPEAN CONVENTION 1961

E8. Oberlandesgericht, Frankfurt am Main, 24 September 1985 (*Polish foreign trade State enterprise v. German manufacturer*) Yearbook XV (1990) pp. 666-670 (Germany no. E8)

E9. (NYC Germany no. 25)  
Bundesgerichtshof, 8 October 1981 (*Comitas, Mutuamar, Levante v. Schwarzmeer und Ostsee Versicherungs AG (SOVAG)*) Yearbook VIII (1983) pp. 366-370 (Germany no. E9)

E10. Oberlandesgericht, Cologne, 18 May 1992 (*French seller v. German buyer*) Yearbook XIX (1994) pp. 856-858 (Germany no. E10)

E11. Hanseatisches Oberlandesgericht, Hamburg, 15 November 1995 (*German party v. Austrian GmbH*) Yearbook XXI (1996) pp. 845-849 (Germany no. E11)

E12. (NYC Germany no. 12)  
Bundesgerichtshof, 12 February 1976 (*Firm from Romania v. Firm from FR Germany*) Yearbook II (1977) pp. 242-243 (Germany no. E12)

E13. (NYC Germany no. 44)  
44. Oberlandesgericht, Cologne, 16 December 1992 (*Seller v. Buyer*) Yearbook XXI (1996) pp. 535-541 (Germany no. E13)

E14. Bundesgerichtshof, 23 April 1998 (*Buyer v. Seller*) Yearbook XXIV (1999) pp. 928-934 (Germany no. E14)

E15. (NYC Germany no. 69)  
Bayerisches Oberstes Landesgericht, 12 December 2002 (*Parties not indicated*) Yearbook XXIX (2004) pp. 761-766 (Germany no. E15)

E16. (NYC Germany no. 82)  
Bayerisches Oberstes Landesgericht, 23 September 2004 (*Parties not indicated*) Yearbook XXX (2005) pp. 568-573 (Germany no. E16)

E17. (NYC Germany no. 85)  
Oberlandesgericht, Schleswig, 30 March 2000 (*Parties not indicated*) Yearbook XXXI (2006) pp. 652-662 (Germany no. E17)

LIST OF COURT DECISIONS AND ARBITRAL AWARDS

- E18. (NYC Germany no. 110)  
Oberlandesgericht, Dresden, 31 January 2007 (*Supplier v. State enterprise*)  
Yearbook XXXIII (2008) pp. 510-516 (Germany no. E18)
- E19. (NYC Germany no. 117)  
Oberlandesgericht, Munich, 15 March 2006 (*Manufacturer v. Supplier, in liquidation*)  
Yearbook XXXIV (2009) pp. 499-503 (Germany no. E19)
- E20. (NYC Germany no. 118)  
Bundesgerichtshof, 21 May 2007 (*Supplier v. State enterprise*)  
Yearbook XXXIV (2009) pp. 504-509 (Germany no. E20)
- E21. (NYC Germany no. 126)  
Oberlandesgericht, Munich, 19 January 2009 (*Parties not indicated*)  
Yearbook XXXV (2010) p. 362 (Germany no. E21)
- E22. (NYC Germany no. 127)  
Oberlandesgericht, Munich, 27 February 2009 (*Parties not indicated*)  
Yearbook XXXV (2010) p. 365 (Germany no. E22)
- E23. (NYC Germany no. 128)  
Oberlandesgericht, Munich, 11 May 2009 (*Parties not indicated*)  
Yearbook XXXV (2010) p. 367 (Germany no. E23)
- E24. (NYC Germany no. 130)  
Oberlandesgericht, Munich, 22 June 2009 (*Parties not indicated*)  
Yearbook XXXV (2010) p. 371 (Germany no. E24)
- E25. Oberlandesgericht, Dresden, 18 February 2009 (*Czech Principal v. German Sales Agent*)  
Yearbook XXXV (2010) pp. 582-584 (Germany no. E25)
- E26. (NYC Germany no. 136)  
Oberlandesgericht, Munich, 23 November 2009 and Bundesgerichtshof, 16 December 2010 (*French seller v. German buyer*)  
Yearbook XXXVI (2011) pp. 273-276 (Germany no. E26)

**ITALY**

Ratification: 3 August 1970

E1. (NYC Italy no. 5)

Corte di Cassazione, 13 December 1971, no. 3620 (*Ditta Augusto Miserocchi v. SpA Paolo Agnesi*) Yearbook I (1976) pp. 190-191 (Italy no. E1)

E2. (NYC Italy no. 16)

Corte di Appello, Venice, 21 May 1976 (*SA Pando Compañia Naviera v. sas FILMO*) Yearbook III (1978) pp. 277-278 (Italy no. E2)

E3. (NYC Italy no. 18)

Corte di Appello, Florence, 22 October 1976 (*SA Tradax Export v. SpA Carapelli*) Yearbook III (1978) pp. 279-281 (Italy no. E3)

E4. (NYC Italy no. 35)

Corte di Cassazione, 18 May 1978, no. 2392 (*Atlas General Timbers SpA v. Agenzia Concordia Line SpA*) Yearbook V (1980) pp. 267-268 (Italy no. E4)

E5. (NYC Italy no. 51)

Corte di Appello, Genoa, 2 May 1980 (*Efxinos Shipping Co. Ltd v. Rawi Shipping Lines Ltd*) Yearbook VIII (1983) pp. 381-383 (Italy no. E5)

E6. (NYC Italy no. 54)

Corte di Appello, Ancona, 8 June 1981 (*H. & H. Hackenberg v. Nino Pizza*) Yearbook VIII (1983) pp. 389-390 (Italy no. E6)

E7. (NYC Italy no. 57)

Corte di Cassazione, 8 February 1982, no. 722 (*Fratelli Damiano snc v. August Tropfer & Co.*) Yearbook IX (1984) pp. 418-421 (Italy no. E7)

E8. (NYC Italy no. 71)

Corte di Appello, Trieste, 2 July 1982 (*Jassica SA v. Ditta Polojaz*) Yearbook X (1985) pp. 462-464 (Italy no. E8)

E9. (NYC Italy no. 75)

Tribunale, Bassano del Grappa, 23 May 1983 (*RIL snc v. Ditta Metalexport*) Yearbook X (1985) pp. 469-470 (Italy no. E9)

LIST OF COURT DECISIONS AND ARBITRAL AWARDS

- E10. (NYC Italy no. 99)  
Corte di Appello, Bari, 28 October 1983 (*H. & H. Hackenberg v. Ventrella Guido Francesco e Figli snc*) Yearbook XIV (1989) pp. 680-682 (Italy no. E10)
- E11. (NYC Italy no. 84)  
Corte di Cassazione, 10 January 1984, no. 174 (*Holtz & Willemsen GmbH v. P., D. and L. Farchioni*) Yearbook XI (1986) pp. 513-514 (Italy no. E11)
- E12. (NYC Italy no. 82)  
Corte di Appello, Milan, 16 March 1984 (*Arenco-BMD Maschinenfabrik GmbH v. Società Ceramica Italiana Pozzi-Richard Ginori SpA*) Yearbook XI (1986) pp. 511-512 (Italy no. E12)
- E13. (NYC Italy no. 91)  
Pretura, Verona, 22 April 1985 (*Pama Industrie SpA v. Shultz Steel Company and Banca Nazionale del Lavoro*) Yearbook XII (1987) pp. 494-496 (Italy no. E13)
- E14. (NYC Italy no. 94)  
Corte di Cassazione, 16 October 1985, no. 5071 (*SpA Cifuindus v. OFAG – Ofenbau und Feuerungstechnik AG*) Yearbook XIII (1988) pp. 504-509 (Italy no. E14)
- E15. (NYC Italy no. 114)  
Corte di Cassazione, 8 August 1990, no. 7995 (*Vento & C snc v. E. D. & F. Man (Coffee) Limited*) Yearbook XVII (1992) pp. 545-550 (Italy no. E15)
- E16. Corte di Cassazione, 15 October 1992, no. 11261 (*Agrò di Reolfi Piera & C snc v. Ro Koproduct oour Produktiva*) Yearbook XX (1995) pp. 1061-1066 (Italy no. E16)
- E17. Corte di Cassazione, 13 October 2000, no. 13648 (*Il Nuovo Castoro v. Ministry of Foreign Affairs (Italy)*) Yearbook XXVI (2001) pp. 1141-1148 (Italy no. E17)
- E18. (NYC Italy no. 157)  
Corte di Cassazione, Sezioni Unite, 10 March 2000, no. 58/SU (*Krauss Maffei Verfahrenstechnik GmbH et al. v. Bristol Myers Squibb*) Yearbook XXVI (2001) pp. 816-822 (Italy no. E18)

## COURT DECISIONS ON THE EUROPEAN CONVENTION 1961

E19. Tribunale, Turin, 4 December 2007 (*G & C, S.p.A. v. Gersan Elektrik Tic. ve San. A.Ş.*) Yearbook XXXIV (2009) pp. 1216-1218 (Italy no. E19)

### LUXEMBOURG

Accession: 26 March 1982

E1. President, Tribunal d'arrondissement de Luxembourg, 7 June 1993 (*Parties not indicated*) Yearbook XX (1995) p. 1067 (Luxembourg no. E1)

### MONACO

[*Monaco is not a party to the 1961 European Convention.*]

E1. (NYC Monaco no. 1)  
Tribunal de Première Instance, 27 November 1986 and Cour d'Appel, 30 May 1989 (*Parties not indicated*) Yearbook XXVI (2001) pp. 823-826 (Monaco no. E1)

### RUSSIAN FEDERATION

Ratification: 27 June 1962

E1. Presidium of the Supreme Arbitrazh Court of the Russian Federation, Moscow, 30 March 2004 (*Stoilensky Gorno-obogatitelny Combinat v. Interconstruction Project Management S.A., et al.*) Yearbook XXX (2005) pp. 1204-1207 (Russian Federation no. E1)

E2. (NYC Russian Federation no. 23)  
Federal Arbitrazh Court, Central District, 2 September 2003 and Presidium of the Supreme Arbitrazh Court of the Russian Federation, 30 March 2004 (*OAO Stoilensky GOK v. Mabetex Project Engineering S.A., et al. and Interconstruction Project Management S.A. v. OAO Stoilensky GOK*) Yearbook XXXIV (2009) pp. 736-744 (Russian Federation no. E2)

E3. (NYC Russian Federation no. 24)  
Federal Arbitrazh Court, Northwestern District, 25 July 2007 (*Collective Fishing Farm Krasnoye Znanya v. White Arctic Marine Resources Ltd.*) Yearbook XXXIV (2009) pp. 745-749 (Russian Federation no. E3)

LIST OF COURT DECISIONS AND ARBITRAL AWARDS

E4. (NYC Russian Federation no. 33)  
*Arbitrazh Court, Kemerovo Oblast, 20 July 2011 (Ciments Français v. Sibirskiy Cement)* Yearbook XXXVI (2011) pp. 325-328 (Russian Federation no. E4)

**SPAIN**

Ratification: 12 May 1975

E1. (NYC Spain no. 2)  
Tribunal Supremo, 8 October 1981 (*SA X v. Y*) Yearbook VIII (1983) pp. 406-407 (Spain no. E1)

E2. (NYC Spain no. 3)  
Tribunal Supremo, 24 March 1982 (*Cominco France SA v. Soquiber S.L.*) Yearbook VIII (1983) pp. 408-409 (Spain no. E2)

E3. (NYC Spain no. 6)  
Tribunal Supremo, 14 January 1983 (*X SA v. Y*) Yearbook XI (1986) pp. 523-525 (Spain no. E3)

E4. (NYC Spain no. 7)  
Tribunal Supremo, 17 June 1983 (*Ludmila C. Shipping Co. Ltd v. Maderas G.L. SA*) Yearbook XI (1986) pp. 525-526 (Spain no. E4)

E5. (NYC Spain no. 11)  
Tribunal Supremo, 22 December 1983 (*Fletamentos Maritimos SA v. Star Dispatch Shipping*) Yearbook XI (1986) p. 531 (Spain no. E5)

E6. (NYC Spain no. 12)  
Tribunal Supremo, 30 January 1986 (*SA X v. Y*) Yearbook XIII (1988) pp. 512-513 (Spain no. E6)

E7. (NYC Spain no. 14)  
Tribunal Supremo, 13 July 1982 (*Billerud Uddeholm Aktiebolag v. R. Cervigón Guerra*) Yearbook XIV (1989) pp. 699-700 (Spain no. E7)

E8. (NYC Spain no. 21)  
Tribunal Supremo, 7 October 1986 (*T.H. v. Juan Antonio Dominguez*) Yearbook XIV (1989) pp. 708-709 (Spain no. E8)

COURT DECISIONS ON THE EUROPEAN CONVENTION 1961

E9. Audiencia Provincial, Cadiz, 12 June 1991 (*Bahia Industrial SA v. Eintacar-Eimar SA*) Yearbook XVII (1993) pp. 616-618 (Spain no. E9)

E10. (NYC Spain no. 26)  
Tribunal Supremo, 21 January 1989 (*Ferre Marítima Española SA v. T. Baglantzis and others*) Yearbook XXI (1996) pp. 673-675 (Spain no. E10)

E11. Audiencia Provincial, Barcelona, 22 January 1991 (*Domingo Torm Colóm and Saltor SA v. Mecánicas y Automatismos SA*) Yearbook XX (1995) pp. 1068-1073 (Spain no. E11)

E12. (NYC Spain no. 30)  
Tribunal Supremo, 18 February 1993 (*Black Sea Shipping Co. v. Novo Viaje SA*) Yearbook XXII (1997) pp. 785-788 (Spain no. E12)

E13. (NYC Spain no. 30bis)  
Tribunal Supremo, 14 July 1998 (*Thyssen Haniel Logistic International GmbH v. Barna Consignataria SL*) Yearbook XXVI (2001) pp. 851-853 (Spain no. E13)

E14. (NYC Spain no. 31)  
Tribunal Supremo, 6 October 1998 (*Delta Cereales España SL v. Barredo Hermanos SA*) Yearbook XXVI (2001) pp. 854-857 (Spain no. E14)

E15. (NYC Spain no. 32)  
Tribunal Supremo, 20 February 2001 (*Consmaremma – Consorzio tra i produttori agricoli Società cooperativa a responsabilità limitata v. Hermanos Escot Madrid, SA*) Yearbook XXVI (2001) pp. 858-862 (Spain no. E15)

E16. (NYC Spain no. 33)  
Tribunal Supremo, 16 April 1996 (*Actival Internacional SA v. Conservas El Pilar SA*) Yearbook XXVII (2002) pp. 528-532 (Spain no. E16)

E17. (NYC Spain no. 34)  
Tribunal Supremo, 17 February 1998 (*Unión de Cooperativas Agrícolas Epis-Centre v. La Palentina SA*) Yearbook XXVII (2002) pp. 533-539 (Spain no. E17)

E18. (NYC Spain no. 35)  
Tribunal Supremo, 5 May 1998 (*ETS Louis Zanatta v. Pillanet*) Yearbook XXVII (2002) pp. 540-542 (Spain no. E18)

LIST OF COURT DECISIONS AND ARBITRAL AWARDS

E19. (NYC Spain no. 36)  
Tribunal Supremo, 26 May 1998 (*Parties not indicated*) Yearbook XXVII (2002)  
pp. 543-545 (Spain no. E19)

E20. (NYC Spain no. 44)  
Tribunal Supremo, 23 July 2001 (*Kern Electrónica, S.A. v. Goldstar Company Limited*) Yearbook XXXI (2006) pp. 825-833 (Spain no. E20)

E21. (NYC Spain no. 54)  
Tribunal Supremo, Civil Chamber, 8 October 2002 (*Scandlines, AB, et al. v. Ferrys del Mediterráneo, S.L.*) Yearbook XXXII (2007) pp. 555-566 (Spain no. E21)

E22. (NYC Spain no. 63)  
Tribunal Supremo, First Civil Chamber, 17 May 2007 (*Cerámicas Casao, S.A. v. I.A.G. Impianti Automazione Gestione srl*) Yearbook XXXIII (2008) pp. 698-702  
(Spain no. E22)

E23. (NYC Spain no. 65)  
Juzgado de Primera Instancia no. 3, Rubí, 11 June 2007 (*Pavan s.r.l. v. Leng d'Or, SA*) Yearbook XXXV (2010) pp. 444-447 (Spain no. E23)

E24. (NYC Spain no. 66)  
Audiencia Provincial, Madrid, 1 April 2009 (*Cadena de Tiendas Venezolanas SA – Cativen v. GMR Asesores SL, et al.*) Yearbook XXXV (2010) pp. 448-449 (Spain no. E24)

E25. (NYC Spain no. 68)  
Audiencia Provincial, Barcelona, 29 April 2009 (*Licensing Projects SL v. Pirelli & C. SpA*) Yearbook XXXV (2010) pp. 452-453 (Spain no. E25)

**UKRAINE**

Ratification: 18 March 1963

E1. Commercial Court, City of Kiev, 30 January 2003 (*Closed Joint Stock Company X v. Company Y, et al.*) Yearbook XXXII (2007) pp. 1010-1012 (Ukraine no. E1)

II. ARBITRAL AWARDS

**A. Ad Hoc Awards**

Award of 10 October 1973 (*British Petroleum Company (Libya) Ltd. et al. v. Government of the Libyan Arab Republic*) Yearbook V (1980) pp. 143-161

Award of 11 November 1975 (*German seller v. Italian buyer*) Yearbook II (1977) pp. 148-149

Preliminary Award of 14 January 1982 (*Elf Aquitaine Iran v. National Iranian Oil Company*) Yearbook XI (1986) pp. 97-105

Interim Award of 18 November 1983 (*Dipl. Ing. Erick Benteler KG and Helmut Benteler KG v. Belgian State and S.A. ABC*) Yearbook X (1985) pp. 37-38

**B. International Institutions**

*International Chamber of Commerce*

Case no. 3540 of 1980 (*French enterprise v. Yugoslav subcontractor*) Yearbook VII (1982) pp. 124-134

Case no. 2930 of 1982 (*Yugoslav enterprises v. Swiss company*) Yearbook IX (1984) pp. 105-108

Case no. 5485 of 1987 (*Bermudian company v. Spanish company*) Yearbook XIV (1989) pp. 156-173

Case no. 6162 of 1990 (*Consultant v. Egyptian local authority*) Yearbook XVII (1992) pp. 153-163

Case no. 6379 of 1990 (*Principal v. Distributor*) Yearbook XVII (1992) pp. 212-220

Case no. 6531 of 1991 (*Seller v. Buyer*) Yearbook XVII (1992) pp. 221-225

#### LIST OF COURT DECISIONS AND ARBITRAL AWARDS

Case no. 6850 of 1992 (*Manufacturer Y SA v. Distributor X GmbH*) Yearbook XXIII (1998) pp. 37-41

Case no. 7920 of 1993 (*Distributor v. Manufacturer*) Yearbook XXIII (1998) pp. 80-85

Case no. 7047 of 1994 (*Consultant v. State agency et al.*) Yearbook XXI (1996) pp. 79-98

Case no. 8817 of 1997 (*J v. X*) Yearbook XXV (2000) pp. 355-367

Case no. 9771 of 2001 (*Commodities trading company v. Shipping company D*) Yearbook XXIX (2004) pp. 46-65

#### C. National Institutions

- Arbitration Court of the Chamber of Commerce and Industry of Czechoslovakia  
Award of 27 May 1980, file no. RSP. 192/78 (*Austrian buyer v. Czechoslovak foreign trade company*) Yearbook XI (1986) pp. 114-115
- German Democratic Republic Chamber for Foreign Trade Arbitration Court  
Interim Award of 17 March 1982 (*Yugoslav company v. PDR Korea company*) Yearbook VIII (1983) pp. 128-132
- Hamburg Commodity Exchange  
– Award of 18 July 1986, case no. 1/1986 (*FR German buyer v. Greek seller*) Yearbook XVI (1991) pp. 13-15  
– Award of 7 December 1995 (*German Buyer v. Czech Seller*) Yearbook XXII (1997) pp. 55-56
- Hamburg Friendly Arbitration  
Award of 29 December 1998 (*Buyer v. Czech seller*) Yearbook XXIV (1999) pp. 13-22
- International Court of Arbitration for Marine and Inland Navigation at Gdynia, Poland

COURT DECISIONS ON THE EUROPEAN CONVENTION 1961

Award of 15 December 1978 (*FR German shipowner v. Swedish consignee*)  
Yearbook X (1985) pp. 89-92

- Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry  
Award no. 38 of 1985 (*Soviet Danube Steamship Company v. FR German firm, charterer of cruise vessel*) Yearbook XIII (1988) pp. 143-146