New York Convention

Commentary

von

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not fully reproduced in the reference)[304] and if terms and conditions drafted by professional associations or similar third persons which are publicly available are included by reference.[305] Reference to self-drafted general terms and conditions, which had not been transmitted, is not deemed to be sufficient, even if the arbitration clause contained therein is common in the respective business.[306]

142 The reasonable opportunity to take note of the general terms' and conditions' content is also denied if the general terms and conditions are drafted neither in the **language** of the contract nor in a global language[307] or if they are not sufficiently **transparent**[308].

143 The better reasons advocate that a reasonable opportunity to take note of the general terms' and conditions' content **does not form part of Article II(2)'s form requirement.**[309] Such opportunity aims to protect the party that did not introduce the general terms and conditions. It forms part of the rules on inclusion of general terms and conditions, as can be seen from the fact that this requirement normally equally applies to general terms and conditions other than arbitration agreements. The inclusion of general terms and conditions in the contract, however, is subject to the law governing the arbitration agreement rather than to the autonomous provisions of Article II(2) (para. 135). Article II(2) is concerned only with issues of form in order to provide evidence. This rationale requires an opportunity to take note just as little as it requires that all parties have read and understood an arbitration clause contained in a contract (paras 94 *et seq.*).

144 **(c) Reference in a Contract Under Option I Article 7(6) of the Model Law as Incorporated in Article II(2).** Option I Article 7(6) of the Model Law – to which recourse is to be taken for assessing Article II(2)'s unlisted options (paras 114 *et seq.*) – is significantly more liberal than Article II(2)'s listed options. In particular, the reference to the general terms and conditions in the contract (paras 137 *et seq.*) does not require written form itself (para. 123). The extent to which the other party needs to have the opportunity to take note of the general terms' and conditions' content is determined by the law governing the arbitration agreement rather than by Article II(2) itself (para. 143).

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[304] Switzerland: OG Basel-Land, XXI Y.B. Com. Arb. 685, 687 para. 6 (1996); *van den Berg,* pp. 220 *et seq.; Hausmann,* in: Reithmann/Martiny (eds), paras 6686, 6690; *Lindacher*, in: Festschrift Habscheid, pp. 167, 173; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 58; similarly Switzerland: BG, BGE 110 II 54 = XI Y.B. Com. Arb. 532, 534 paras 8 *et seq.* (1986).

[305] Italy: Cass., X Y.B. Com. Arb. 473, 475 para. 4 (1985); CA Venezia, VII Y.B. Com. Arb. 340, 341 para. 3 (1982); Switzerland: HG Zürich, XVIII Y.B. Com. Arb. 442, 443 paras 9 *et seq.* (1993); *Adolphsen*, in: MünchKommZPO, annex to sect. 1061, NYC, Art. II para. 19; *Hausmann,* in: Reithmann/Martiny (eds), para. 6692; *Lindacher*, in: Festschrift Habscheid, pp. 167, 171; *Schlosser,* para. 379.

[306] France: Cass., Rev. arb. 1990, 134, 138 *et seq.* = XV Y.B. Com. Arb. 447 paras 2 *et seq.* (1990); *Hausmann,* in: Reithmann/Martiny (eds), para. 6692.

[307] *Czernich,* Art. II para. 38; *Gildeggen,* pp. 81 *et seq.; Haas,* in: Weigand (ed.), Part 3, Art. II para. 45; *Hausmann,* in: Reithmann/Martiny (eds), para. 6690; for English-language terms in a German-language contract see Switzerland: HG Zürich, ZEuP 1994, 682, 684; dissenting Italy: Cass., XXII Y.B. Com. Arb. 715, 720 para. 11 (1997).

[308] *Hausmann,* in: Reithmann/Martiny (eds), para. 6690; *Lindacher*, in: Festschrift Habscheid, pp. 167, 173.

[309] Similarly *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 42.

145 **(4) Referenced Documents Other than General Terms and Conditions. (a) Contract Addendum, Extension, Novation or Settlement.** Reference to documents containing arbitration agreements also occurs where no general terms and conditions are involved. One fact situation raised by the UNCITRAL Secretary-General is where the original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an **addendum** to the contract, an **extension** of the contract, a contract **novation** or a **settlement** agreement relating to the contract (such a "further" contract may have been concluded orally or in writing).[310]

146 A two-tiered test is to be applied to these fact situations: First, does the second agreement **require written form** under Article II(2) at all? This depends on the relation between the first agreement's arbitration clause and the subject matter of the second agreement (paras 88 *et seq.*). Second, if the second agreement needs to be in writing, does it **sufficiently reference** the first agreement's arbitration clause? The same rules apply here as for including general terms and conditions, *i.e.* the reference itself needs to be in writing under Article II(2)'s explicitly listed options (paras 137 *et seq.*)[311] while any reference suffices under Option I Article 7(6) of the Model Law as incorporated in the unlisted options of Article II(2) (para. 144).

147 **(b) Bill of Lading and Charter Party.** Arbitration agreements are common in the context of bills of lading. While some national arbitration laws provide for privileged inclusion of arbitration agreements in bills of lading,[312] any arbitration agreement needs to comply with Article II(2)'s **form prerequisites** in order to enjoy protection under the Convention. Recognition may, however, be facilitated by **superseding conventions.**[313]

148 If the **bill of lading contains an arbitration clause** or incorporates the terms of a charter party containing an arbitration clause by reference (paras 137 *et seq.*), Article II(2)'s form requirements need to be met. For meeting the requirements of party signatures or exchange of documents, the carrier's signature on the bill of lading does not suffice, even if tacitly accepted by the shipper.[314] The agreement will only be in writing under one of the listed options of Article II(2) if the shipper also signs the bill of lading or returns a confirmation.[315] However, Option I Article 7(6) of the Model Law as incorporated in Article II(2) (paras 114 *et seq.*) is already

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[310] Report of the Secretary-General, A/CN.9/WG.II/WP.108/Add.1, para. 12 (g) (p. 4).

[311] Dissenting US: Eres, N.V. v. NuStar Asphalt Refining, LLC, 2010 U.S. Dist. LEXIS 47691, *28 (S.D. Tex. 2010) = XXXV Y.B. Com. Arb. 540 para. 31 (2010).

[312] Example: sect. 1031(4) of the German Code of Civil Procedure.

[313] For the United Nations Convention on the Carriage of Goods by Sea of March 31, 1978 (1695 U.N.T.S. 3 (1999), the "Hamburg Rules"), see *Gildeggen,* pp. 74 *et seq.; Hausmann,* in: Reithmann/Martiny (eds), paras 6694, 6695; *Schlosser,* para. 384; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 60.

[314] Switzerland: BG, BGE 110 II 53, 54 *et seq.* = XI Y.B. Com. Arb. 532, 533 *et seq.* paras 4 *et seq.* (1986); *Haas,* in: Weigand (ed.), Part 3, Art. II para. 52; *Hausmann,* in: Reithmann/Martiny (eds), para. 6694; *Kessedjian,* Rev. arb. 1990, 134, 139; *Schlosser,* para. 384; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 60; dissenting Greece: CA Athens, XIV Y.B. Com. Arb. 634, 635 para. 2 (1989).

[315] France: Cass., Rev. arb. 1990, 617; *Epping,* pp. 65 *et seq.; Haas,* in: Weigand (ed.), Part 3, Art. II para. 50; *Hausmann,* in: Reithmann/Martiny (eds), para. 6694; *Kessedijan,* Rev. arb. 1990, 134, 139; *Schlosser,* para. 384; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 60; see also Italy: Cass., sez. un., XXVII Y.B. Com. Arb. 506, 508 para. 4 (2002); dissenting Switzerland: BG, BGE 121 III 38, 45 = XXI Y.B. Com. Arb. 690, 696 *et seq.* paras 10 *et seq.* (1996).

complied with under these circumstances if the arbitration agreement has been concluded under the law governing it (para. 144).

149 If the bill of lading is **endorsed to a subsequent holder,** the endorser's signature does not perfect the written form as required by Article II(2)'s explicitly listed options.[316] The reason is that this second signature relates to the endorsement contract with the endorsee rather than to the arbitration clause concluded with the shipper.[317] Reference to Option I Article 7(6) of the Model Law (paras 114 *et seq.*) allows for recognition only if the arbitration agreement has validly been concluded and its contents are recorded (para. 144). However, if the bill of lading already contains an arbitration agreement in writing (para. 148), an endorsement valid under the national law governing it transfers the written arbitration agreement to the endorsee (para. 153).[318]

150 **(5) Third Parties Not Having Concluded the Arbitration Agreement. (a) Third Party Beneficiary.** Under most **national laws,** contracts can include arbitration clauses that are also valid for third party beneficiaries who have not become party to the contract. The rationale is that such a contract gives rise only to rights and not to duties of the third party. If that third party by definition only benefits from the contract, in the overall view it is not burdened if the enforcement of its rights is bound to arbitration.

151 While a third party beneficiary contract certainly meets the **"in writing"** requirement under Option I Article 7(3) of the Model Law as incorporated in Article II(2) (paras 114 *et seq.*), it is acknowledged that such a contract can also meet written form under the two listed options of Article II(2).[319] This view is supported by the fact that the third party beneficiary does not become party to the contract so that it neither needs to sign nor to exchange documents.

152 **(b) Legal Successor. National law** usually holds the legal successor bound by an arbitration clause to the same extent that the predecessor was bound, both in cases of universal succession (merger, death) and singular succession (assignment). This transfer takes place regardless of the successor's knowledge and intention. The main idea behind this view is that the dispute resolution mechanism becomes attached to the claim and cannot be divorced by unilaterally assigning the claim.

153 Contrary to the findings of some courts, the very reason to protect the arbitration agreement deserves attention for **recognition** of arbitration agreements under Article II(2) as well. It is therefore sufficient that the arbitration agreement had once been concluded in writing; later successions do not need to comply with

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[316] *Haas,* in: Weigand (ed.), Part 3, Art. II para. 52.

[317] Italy: Cass., sez. un., V Y.B. Com. Arb. 267, 268 para. 3 (1980); *Haas,* in: Weigand (ed.), Part 3, Art. II para. 52; an exception applies if the endorsement explicitly references the arbitration agreement (India: Vessel M.V. Baltic Confidence v. State Trading Corp. of India, XXVII Y.B. Com. Arb. 478, 480 paras 3 *et seq.* (2002); *Hausmann,* in: Reithmann/Martiny (eds), para. 6694).

[318] *Hausmann,* in: Reithmann/Martiny (eds), para. 6695; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 60.

[319] US: Borsack v. Chalk & Vermilion Fine Arts, Ltd., XXIII Y.B. Com. Arb. 1038, 1042 *et seq.* paras 13 *et seq.* (1998) (S.D.N.Y. 1997); Black & Veatch Int'l Co. v. Wartsila NSD North America, Inc., XXV Y.B. Com. Arb. 878, 881 para. 7 (2000) (D. Kan. 1998); *Hausmann,* in: Reithmann/Martiny (eds), para. 6685; see also US: Anthony Todd v. Steamship Mutual Underwriting Association (Bermuda) Ltd., 2011 U.S. Dist. LEXIS 38638, *28 (5th Cir. 2011) = XXXVI Y.B. Com. Arb. 370 para. 64 (2011).

Article II(2)'s form requirements.[320] "Signed by the parties" is therefore to be read as "signed by the parties at the time of concluding the contract." The same reasoning applies to the transfer of the entire contract including rights and duties.[321]

154 In contrast, a **party joining a contract** which includes an arbitration clause is not exempt from the "in writing" requirement. Unlike in case of assignment (paras 152 *et seq.*), the arbitration clause will stay in force for the original parties to the contract and is therefore not in need of protection. It would not be reconcilable with Article II(2)'s form requirement for relevant extensions of a contract pre-existing between the parties (para. 89) to not require written form if a new party joins the contract. Moreover, if the contract had been concluded between three parties, the "in writing" requirement would have to be adhered to by all parties (para. 95). There is no reason to assess the subsequent accession differently. Thanks to the most liberal approach taken by Option I Article 7(3) of the Model Law (paras 117 *et seq.*), which *de facto* allows for accession without form requirements, the relevance of this issue will ultimately be limited.

155 **(c) Group of Companies.** The group of companies doctrine originates from French law (paras 252 *et seq.*). Since it treats the non-signatory company like an additional party to the arbitration agreement, the non-signatory needs to adhere to the "in writing" requirement just as an original additional party to the contract or a party subsequently joining the contract does (para. 154).[322]

156 **(6) Power of Attorney/Agency.** Form requirements for a power of attorney to conclude an arbitration agreement are not governed by Article II(2) but rather by the substantive law applicable under the ***lex fori's* conflict of law rules.**[323] These rules, however, may stipulate that the power of attorney shares the main contract's form requirement that again would be the written form prescribed under Article II(2).[324] A **broker** sending confirmations to both parties to the contract can

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[320] US: Basargin v. Shipowners' Mutual Protection and Indemnity Association, XXII Y.B. Com. Arb. 894, 896 para. 6 (1997) (D. Alaska 1995); *Haas,* in: Weigand (ed.), Part 3, Art. II para. 48; *Hausmann,* in: Reithmann/Martiny (eds), para. 6684; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 56; dissenting Italy: CA Salerno, XXI Y.B. Com. Arb. 576, 578 para. 5 (1996); Russia: Moscow District Court, XXIII Y.B. Com. Arb. 745, 748 para. 11 (1998).

[321] US: Technetronics Inc. v. Leybold AG, XIX Y.B. Com. Arb. 843, 848 para. 14 (1994) (E.D. Pa. 1993); *Haas,* in: Weigand (ed.), Part 3, Art. II para. 48; *Hausmann,* in: Reithmann/Martiny (eds), para. 6684; *Schlosser,* para. 373; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 56; dissenting Italy: Cass., sez. un., XI Y.B. Com. Arb. 518 (1986).

[322] *Poudret/Besson,* para. 258 (concerning Swiss law); *Poudret,* 22(2) ASA Bull. 394 *et seq.* (2004); dissenting *Haas,* in: Weigand (ed.), Part 3, Art. II para. 48 in connection with para. 87; *Hanotiau,* in: International Arbitration 2006: Back to Basics? (ICCA Congress Series No. 13 2007), pp. 341, 348 *et seq.;* ICCA Guide, p. 59; *Rubins*, in: Gaillard/Di Pietro (eds), pp. 449, 454 (understanding Article II(2) as non-exhaustive); *Sinclair,* in: Gaillard/Di Pietro (eds), pp. 381, 388.

[323] Austria: OGH, XXI Y.B. Com. Arb. 521, 523 para. 8 (1996); Italy: Cass., X Y.B. Com. Arb. 464, 465 para. 5 (1985); CA Napoli, VIII Y.B. Com. Arb. 380 para. 1 (1983); *Adolphsen,* in: MünchKommZPO, annex to sect. 1061, NYC, Art. II para. 16; *van den Berg,* p. 226; *Czernich,* Art. II para. 24; *Haas,* in: Weigand (ed.), Part 3, Art. II para. 40; *Hausmann,* in: Reithmann/Martiny (eds), para. 6696; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 45; *Schwab/Walter,* ch. 44 para. 19; dissenting (uniform law) Germany: LG Hamburg, RIW 1978, 124, 126 = III Y.B. Com. Arb. 274, 275 (1978); *Reiner,* in: 40 Years of NYC, pp. 82, 88 *et seq.;* see also (on the burden of proof for a sufficient power of attorney) Austria: OGH, XXXII Y.B. Com. Arb. 254, 257 *et seq.* (2007); leaving open the question Germany: LG Hamburg, XII Y.B. Com. Arb. 487, 488 para. 1 (1987).

[324] *Van den Berg,* p. 223; *Hausmann,* in: Reithmann/Martiny (eds), para. 6696.

have a power of attorney for both parties. Article II(2)'s exchange of document requirement is then met if each party returns a confirmation to the broker.[325]

c) Remedying the Lack of Form by Failure to Object

157 Article II(2) does not provide for any means of curing an arbitration agreement's lack of form, *i.e.* for a remedy that eliminates the lack of form (para. 51).[326] However, the prohibition of *venire contra,* which is enshrined in the Convention itself, can preclude a party from relying on a lack of form if such reliance contradicted that party's previous conduct (para. 53).[327] In other fact situations, including those in which only procedural efficiency is at stake, the party may be precluded from reliance on the lack of form under the recognition court's *lex fori* (para. 54).[328]

2. Subject Matter Capable of Settlement by Arbitration

158 An arbitration agreement is only to be recognized under Article II(1) if it concerns "a subject matter capable of settlement by arbitration." This capability describes the subject matter's **arbitrability** that also serves as a ground for denial of recognition and enforcement under Article V(2)(a) and is explained there in detail (Art. V paras 418 *et seq.*).

159 While Article V(2)(a) explicitly designates the law of the enforcement country as applicable to arbitrability, Article II(1) is silent on the **governing law.** Accordingly, nearly every conceivable position as to which law governs arbitrability has been taken:[329] the Convention itself by way of uniform law,[330] the law governing the arbitration agreement (para. 42),[331] the *lex fori,*[332] both the law governing the

[325] Germany: LG Hamburg, II Y.B. Com. Arb. 235 (1977); *Adolphsen,* in: MünchKommZPO, annex to sect. 1061, NYC, Art. II para. 15; *Haas,* in: Weigand (ed.), Part 3, Art. II para. 37; *Hausmann,* in: Reithmann/Martiny (eds), para. 6696; dissenting Germany: OLG Köln, IPRax 1993, 399, 400 = XXI Y.B. Com. Arb. 535, 536 *et seq.* para. 3 (1996).

[326] Dissenting (cure under domestic law) Greece: CA Athens, XIV Y.B. Com. Arb. 638 paras 1 *et seq.* (1989).

[327] Dissenting Italy: Cass., sez. un., XX Y.B. Com. Arb. 739, 741 para. 4 (1995).

[328] US: Slaney v. International Amateur Athletic Federation, 244 F.3d 580, 591 para. 4 (7th Cir. 2001) = XXVI Y.B. Com. Arb. 1091, 1098 *et seq.* para. 12 (2001).

[329] For an overview, see *Hanotiau,* (1996) 12 Arb. Int'l 391, 398 *et seq.*

[330] US: Meadows Indemnity Co. Ltd. v. Baccala & Shoop Insurance Services, Inc., 760 F. Supp. 1036, 1041 *et seq.* (E.D.N.Y. 1991) = XVII Y.B. Com. Arb. 686, 690 *et seq.* paras 7 *et seq.* (1992); in favor of uniform law limits on the *lex fori Born/Koepp,* in: Festschrift Schlosser, pp. 59, 72 *et seq.*

[331] Belgium: CA Bruxelles, XIV Y.B. Com. Arb. 618, 619 paras 3 *et seq.* (1989); Tribunal de Commerce de Bruxelles, Rev. arb. 1995, 311, 315 *et seq.; Hanotiau,* Rev. arb. 1995, 317, 322 *et seq.*

[332] Belgium: Cass., XXXI Y.B. Com. Arb. 587, 591 para. 6 and 593 *et seq.* paras 11 *et seq.* (2006); Tribunal de Commerce de Bruxelles, XXV Y.B. Com. Arb. 673, 675 para. 5 (2000); Switzerland: Kantonsgericht Zug, GVP 2006, 179, 183; US: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 (1985) = XI Y.B. Com. Arb. 555, 565 paras 23 *et seq.* (1986); *Adolphsen,* in: MünchKommZPO, annex to sect. 1061, NYC, Art. II para. 11; *Arfazadeh,* (2001) 17 Arb. Int'l 73, 80 *et seq.; van den Berg,* pp. 152 *et seq.; Haas,* in: Weigand (ed.), Part 3, Art. II para. 58; *Hausmann,* in: Reithmann/Martiny (eds), para. 6742; *Hanotiau,* in: 40 Years of NYC, pp. 146, 167; ICCA Guide, pp. 63 *et seq.; Schlosser,* para. 299; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 43; *Schramm/Geisinger/Pinsolle,* in: Kronke/Nacimiento/Otto/Port (eds), pp. 72 *et seq.; Schwab/Walter,* ch. 44 para. 1.

arbitration agreement and the *lex fori,*[333] the *lex arbitri*[334] or the domestic law to be determined under the *lex fori's* conflict of law rules.[335]

160 As a first step, Article V(2)(a) needs to be applied analogously so that arbitrability is to be determined under the ***lex fori*** in the pre-award stage as well. The reason for this is twofold: First, applying the *lex fori* safeguards consistency in the pre- and the post-award stage.[336] It would not be sensible to enforce an arbitration agreement even though a subsequent award would not enjoy protection under Article V(2)(a). Second, the rationale behind Article V(2)(a)'s stipulation to have the arbitrability governed by the *lex fori* lies in that State's public interest (Art. V para. 421). If a State decides to withhold specific matters from arbitration and to have them exclusively decided by the state courts, this rationale must apply equally in regard to arbitration agreements and to arbitral awards.

161 As a second step, the subject matter covered by the arbitration agreement also needs to be arbitrable under the **law governing the arbitration agreement** (para. 42). An arbitration agreement is **invalid** to the extent that the subject matters covered lack arbitrability, which invokes the law governing the arbitration agreement according to Article V(1)(a).[337] This position is challenged by the argument that Article II distinguishes between the subject matter's arbitrability in paragraph 1 and the agreement's validity in paragraph 3 (Art. V para. 426). According to that view, arbitrability as a jurisdictional requirement therefore cannot invalidate the arbitration agreement as a contractual requirement (Art. V para. 426). This distinction, however, ignores that the arbitral tribunal's jurisdiction is entirely of contractual origin. It is true that differences seem to exist between non-arbitrability and other grounds for invalidity.[338] Lack of arbitrability, however, results in the very same effects as other grounds for invalidity do, *i.e.* in a lack of valid submission to arbitration, and therefore cannot be classified differently.[339] Article II's distinction between invalidity and lack of arbitrability does not preclude this argument. This is established by the difference in the burdens of proof for lack of arbitrability and other grounds for invalidity (*cf.* paras 288 *et seq.*), which justifies the explicit wording to that effect in Article II(1).

162 Applying the law governing the arbitration agreement cumulatively to the arbitrability of the subject matter is also not opposed by **considerations of practicability.** It has been countered that a court is less suitable for deciding on the

[333] *Bernardini*, in: Gaillard/Di Pietro (eds), pp. 503, 516 *et seq.; Bertheau,* pp. 38 *et seq.; Brotóns,* Recueil des Cours, Vol. 184 (1984-I), pp. 123, 243; *Gamauf,* ZfRV 2000, 41, 47; *v. Hülsen,* p. 138; *Nolting,* IPRax 1987, 349, 352; *Schmidt-Ahrendts/Höttler,* SchiedsVZ 2011, 267, 276; *Voit,* in: Musielak (ed.), sect. 1030 para. 10.

[334] *Berger/Kellerhals,* para. 183; *Poudret/Besson,* para. 336.

[335] *Contini,* 8 Am. J. Comp. L. 283, 296 (1959).

[336] *Van den Berg,* p. 152; *Hausmann,* in: Reithmann/Martiny (eds), para. 6743.

[337] Italy: CA Genova, XXI Y.B. Com. Arb. 594, 599 *et seq.* para. 13 (1996); Switzerland: BG, 11(1) ASA Bull. 58, 62 *et seq.* (1993) = XX Y.B. Com. Arb. 766, 767 para. 1 (1995); *Bernardini*, in: Gaillard/Di Pietro (eds), pp. 503, 504; *Bernardini,* in: 40 Years of NYC, pp. 197, 198; Denkschrift der Bundesregierung, BT-Drucks. 3/2160, p. 24.

[338] The arbitration agreement is void only in regard to the matter lacking arbitrability while it remains in force for arbitrable matters (Art. V para. 425) which, however, can also be the effect of other grounds for invalidity which affect only a part of the arbitration agreement.

[339] This applies at least to what the Convention considers as "validity" in terms of Article II(3).

arbitrability under the law of another country.[340] However, the explicit stipulation in Article V(1)(a) obliges the court to apply the law governing the arbitration agreement to its validity. This will often be a foreign law. It cannot be less suitable for the court to apply foreign law on arbitrability than on other grounds for invalidity. It has also been argued that the law of the place of arbitration that usually governs the arbitration agreement has little in common with the subject matter in dispute, since it is often chosen for reasons of neutrality.[341] While the latter holds true, in the standard cases the parties have chosen the law by determining the place of arbitration and need to stick to that choice.[342] The mere fact that a foreign court is reviewing the arbitration agreement cannot validate an agreement which is invalid under the law applicable to it.[343]

163 Overall, whether the subject matter of the arbitration agreement is capable of settlement by arbitration is to be determined cumulatively under the *lex fori* (Article V(2)(a)) and under the law to which the parties have subjected the arbitration agreement or, failing any indication thereon, under the law of the country where the award was made (Article V(1)(a)). To that extent, Article II(1) is a uniform conflict of law rule.[344]

3. The Arbitration Agreement's Validity

164 A systematic reading of Article II(1) and (3) seems to imply that the arbitration agreement's validity does not serve as a **prerequisite for recognition** under Article II(1); in fact its invalidity seems to be of importance only as an objection against such an agreement's invocation before state courts before which the dispute is brought. If that reading were correct, any Contracting State would be obliged to recognize an invalid arbitration agreement outside the scope of Article II(3). An obligation to, *e.g.,* lend the State's powers to assist arbitral proceedings (para. 184) even where no valid arbitration agreement is present would, however, seem quite far-reaching and difficult to reconcile with Article II(3)'s restriction to valid arbitration agreements, which for the post-award phase resumes in Article V(1)(a). The better reasons therefore speak in favor of the view that Article II(3) only confirms a general prerequisite for recognition under Article II. The States are free to recognize invalid arbitration agreements,[345] but Article II does not mandate such recognition. The same holds true for arbitration agreements not capable of being performed.

165 In analogy to Article V(1)(a), the arbitration agreement's validity is governed by the law to which the parties have subjected the arbitration agreement or, failing any indication thereon, by the law of the country where the award will be made (paras 228 *et seq.*). The distinction between the conclusion of the arbitration agreement and its validity is irrelevant for the applicable law (paras 42 *et seq.*) but relevant for the burden of proof. Here, Article II(3)'s allocation (*cf.* paras 288 *et seq.*) must be employed likewise for other measures of recognition. The validity of

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[340] *Van den Berg,* p. 153.
[341] *Haas,* in: Weigand (ed.), Part 3, Art. II para. 56.
[342] *Voit,* in: Musielak (ed.), sect. 1030 para. 10.
[343] *Voit,* in: Musielak (ed.), sect. 1030 para. 10.
[344] *Haas,* in: Weigand (ed.), Part 3, Art. II paras 55 *et seq.*
[345] *Cf.* references in *Wolff,* 19 Am. Rev. Int'l Arb. 145, 165 *et seq.* (2008).

the parties' agreement comprises grounds such as unconscionability, malicious deceit, etc.[346]

166 As an **exception,** the law governing the validity of the arbitration agreement does not apply within the scope of Article II's uniform law requirements. This holds particularly true for **form requirements** that are conclusively governed by Article II(1) and (2) (para. 76). This provision also ousts regulations under domestic law which have the same purpose as Article II's "in writing" requirement.[347] Domestic law provisions on the inclusion of general terms and conditions will usually not aim to preserve evidence for the submission to arbitration, but rather to limit its user's power. Contrary to the opinions of some courts and authors, they will therefore not be ousted by Article II (para. 135). The law governing the validity of the arbitration agreement also does not extend to matters with a **separate jurisdictional basis** like, again, form (paras 73 *et seq.*) or arbitrability (paras 158 *et seq.*).

167 The law governing the arbitration agreement's validity likewise determines the legal **consequences of invalidity.** This applies to the questions as to whether a lack of consent in the main contract also affects the arbitration clause contained therein or whether such a clause is understood as a separate agreement to this effect (doctrine of **separability**).[348] It also governs the question as to whether or not the invalidity of parts of an arbitration agreement taints the entire arbitration agreement.[349]

4. European Convention

a) Relation Between the New York Convention and the European Convention

168 While the New York Convention comprises an explicit provision on the recognition of arbitration agreements in its Article II, the term "arbitration agreement" as defined in Article I(2)(a) of the European Convention is a condition precedent for the European Convention's ambit under its Article I(1)(a) (Art. VII para. 78). The European Convention does, however, contain a tacit **obligation to recognize arbitration agreements** that meet the requirements of its Article I(2)(a).[350] Since Article X(7) of the European Convention leaves the validity of the New York Convention unaffected, recognition of an arbitration agreement which falls under both conventions can generally be sought under either one (Art. VII para. 82).[351]

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[346] *Haas,* in: Weigand (ed.), Part 3, Art. II paras 70 *et seq.; Hausmann,* in: Reithmann/Martiny (eds), para. 6631.

[347] *Adolphsen,* in: MünchKommZPO, annex to sect. 1061, NYC, Art. II para. 17; *Gildeggen,* p. 141; *Hausmann,* in: Reithmann/Martiny (eds), para. 6631; *Schwab/Walter,* ch. 44 para. 9.

[348] Bermuda: Sojuznefteexport v. Joc Oil Ltd., XV Y.B. Com. Arb. 384, 403 *et seq.* paras 28 *et seq.* (1990); *Haas,* in: Weigand (ed.), Part 3, Art. II para. 73; *Hausmann,* in: Reithmann/Martiny (eds), para. 6632; differently *van den Berg,* p. 146 *(lex fori).*

[349] France: CA Paris, Rev. arb. 1990, 863, 865 *et seq.; Haas,* in: Weigand (ed.), Part 3, Art. II para. 75; *Hausmann,* in: Reithmann/Martiny (eds), para. 6632; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 42.

[350] *Gildeggen,* p. 100; *Hausmann,* in: Reithmann/Martiny (eds), para. 6699; *Schlosser,* in: Stein/Jonas (eds), annex to sect. 1061 para. 170.

[351] *Haas,* in: Weigand (ed.), Part 3, Art. II para. 100; *Hausmann,* in: Reithmann/Martiny (eds), para. 6705; *Wackenhuth,* ZZP 99 (1986), 445, 450 *et seq.*