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I. INTRODUCTION

With political and economic interdependence increasingly a factor in international relations, each State\(^1\) must reexamine its traditional legal notion of territorial jurisdiction. A State must respect, at least to a minimal degree, the legal norms of the States with which it has relations, either out of comity or in order to prevent retaliation.\(^2\) In this context, the principle of reciprocity has emerged in private international law. This Article analyzes the principle of reciprocity as applied in private international law and in the recognition and enforcement\(^3\) of foreign judgments as well as the principle of reciprocity as expressed in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention" or "Convention").\(^4\)

A. The principle of reciprocity in private international law

The principle of reciprocity is not unique to international law, nor is


\(^1\) A territory possessing sovereignty is usually called a "country," a "state" or a "nation." However, for the sake of simplicity, such a political entity will be referred to as a "State," in conformity with the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention].

\(^2\) P. Waer, Reciprocity as a Requirement for the Recognition and Enforcement of Foreign Judgments 36-37 (May 1987) (unpublished manuscript).

\(^3\) The difference between recognition and enforcement of foreign judgments or arbitral awards is somewhat clearer in the area of money judgments or awards than in the area of non-money judgments or awards. While the party who has won the suit or arbitration as a plaintiff normally asks for the enforcement of the judgment or award, the party who has won as a defendant may demand recognition of the judgment. However, this is not necessarily true as to non-money judgments or awards. In some cases, even a victorious plaintiff, for example in a divorce case, will request only the recognition of the judgment or award. See H. Steiner & D. Vagts, Transnational Legal Problems 4 (1986).

\(^4\) New York Convention, supra note 1.
it new as a general principle of domestic law. The basic notion of reciprocity underlies most legal relationships, such as the common law concept of consideration in contracts. The importance of the principle becomes more conspicuous in the international legal arena where cooperation between sovereign States is inevitably necessary and where, accordingly, a sovereign State should respect the decision-making powers of other States in order to avoid their unfavorable treatment of its own acts.

The first step in cooperation among sovereign States was the doctrine of comity. U.S. Supreme Court Justice Gray, delivering the opinion of the Court in *Hilton v. Guyot*, defined comity as

neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. . . . [I]t is the recognition which one nation allows within its territory to the legislative, the executive or the judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

To put it another way, since the laws of one State can have no inherent authority except within the territorial limit and jurisdiction of that State, the State can exercise extra-territorial power only with the consent of other States, taking into account common convenience and mutual necessities.

This principle may, however, also be applied in reverse. If one State refused to respect another State's laws, the latter would probably not observe the laws of the former since there would be no mutual convenience or regard. Consequently, any State that expects its subjects, acts and laws to be respected in other States should respect those of other States within its territories. Thus, reciprocity superseded comity as a more secure and trustworthy method for cooperation among sovereign States.

What then is the concept of reciprocity? Generally speaking, reciprocity describes the relationship between two States when one State of-

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6 See id. at 624.
7 159 U.S. 113 (1895).
8 Id. at 163-64.
fers the subjects of the other certain privileges on the condition that its subjects enjoy similar privileges in the other State. In the context of international law, however, reciprocity covers not only certain privileges given to subjects of other States, but also legislative, executive or judicial acts and customary laws.

B. The principle of reciprocity in the recognition and enforcement of foreign judgments.

Even now, many States, including West Germany and Japan, require the existence of reciprocity in recognizing and enforcing foreign judgments. For example, if a party seeks recognition or enforcement of a judgment rendered in State X in the court of State Y, which does not recognize or enforce the judgment pursuant to its domestic laws or practices, the court of State X could refuse to recognize or enforce a judgment rendered in State Y based on the principle of reciprocity. In practice, though, it is neither clear nor easy for a State to judge whether reciprocity exists between relevant States. When the court of State X in the aforementioned example is faced with a specific action, it must examine many details. These include 1) whether there have been any judgments in State Y which either enforced or refused to enforce a judgment rendered in State X; 2) whether conditions similar to the present case existed; 3) if not, whether one would expect State Y to enforce a judgment from State X under its domestic laws and practices; and 4) whether there is a reciprocity provision in State Y. However, despite these inconveniences and inefficiencies, many States have a unilateral reciprocity requirement.

C. The principle of reciprocity in the New York Convention

Four provisions of the New York Convention refer to the principle of reciprocity. First, article I states that "when signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the

13 BLACK'S LAW DICTIONARY 1142 (5th ed. 1979).
14 The history of the reciprocity rule as a requisite for the enforcement of foreign judgments is related in Lenhoff, Foreign Judgments, supra note 10, at 477-78. Although the U.S. Supreme Court required the existence of reciprocity in recognizing and enforcing foreign judgments in Hilton v. Guyot, 159 U.S. 113, it practically deprived this decision of binding force in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), which mandates that states' substantive laws be applied to diversity cases. Accordingly, each U.S. state must decide independently whether reciprocity is required in recognizing and enforcing foreign judgments. See also Comment, The Reciprocity Rule and Enforcement of Foreign Judgments, 16 COLUM. J. TRANSNAT'L L. 327, 328 (1977) [hereinafter Comment, Reciprocity Rule].
15 To survey each State's application of the reciprocity rule in recognizing and enforcing foreign judgments, see Martiny, Anerkennung Ausländischer Entscheidungen nach Autonomem Recht, in 3-1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 580 (1984).
Convention to the recognition and enforcement of awards made in the territory of another Contracting State.” This provision, being the only one that expressly uses the term reciprocity, is called the “reciprocity clause.” Second, article X, the “colonial clause,” implies the principle of reciprocity. This article applies the Convention to colonial territories which do not have the power to engage in international relations with other States. The effect of this provision is to apply the principle of reciprocity in colonial territories, but only if the principal States party to the Convention declare its extension to those territories. Third, article XI, the “federal clause,” applies to federal or non-unitary States which are composed of constituent states or provinces. This article provides that the federal government shall undertake the same obligations as a non-federal or unitary contracting State to the extent that those articles of the Convention are within the scope of the legislative jurisdiction of the federal authority. In this context, the principle of reciprocity underlies this provision. Finally, the “general reciprocity clause” provides that “a Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.” While the meanings of both article X and article XI are relatively clear, the interpretations of article I and article XIV are controversial.

The discussion that follows addresses the main areas of controversy in the law of reciprocity with regard to the recognition and enforcement of foreign arbitral awards. These areas are: 1) the nationality of the arbitral award (the premise in applying the principle of reciprocity); 2) the pros and cons of the reciprocity principle; and 3) the interpretations of article I and article XIV of the New York Convention.

II. THE NATIONALITY OF ARBITRAL AWARDS

The New York Convention, unlike the Geneva Convention on the Execution of Foreign Arbitral Awards, considers the nationality or citizenship of the party to arbitration irrelevant. The New York Convention applies only to foreign awards. The Convention defines foreign arbitral awards as awards either made in the territory of a State (“State Y”) other than the State where the recognition and enforcement of such awards are sought (“State X”) or not considered as domestic awards in State X.

16 New York Convention, supra note 1, art. I(3).
17 Id. art. XIV.
19 New York Convention, supra note 1, art. I(1).
In the former case, if several States are involved in the award or if no State considers itself relevant to the award, the question as to which State should be State Y arises. This question is important in connection with the application of the reciprocity rule under the New York Convention. For example, when State X has used the reciprocity reservation, it will not apply the Convention to awards made in the territory of a non-contracting State. Therefore, it is essential to ascertain which State is the State of origin of an award. The same is true for the application of article XIV of the Convention, since the court of State X must first determine against which contracting States it can avail itself of the Convention.

Looking back to article I(1) of the Convention, the first sentence, which is based on the territorial test, is usually called the first criterion, while the second sentence is generally called the second or additional criterion. The second criterion was added because certain civil law States insisted that an award made in these States under foreign law be regarded as a non-domestic award. The civil law States objected to the territorial test, which was supported by common law States such as the United States and the United Kingdom. As a compromise, the Convention included both criteria.

A. The first criterion

As previously mentioned, several questions arise in practice. A decision of the Dutch court is illustrative. The arbitration clause at issue provided that if the two arbitrators designated by the parties could not agree on the choice of the third arbitrator, the latter would be designated by the President of the Court of First Instance of Paris and the arbitrators would deposit their award within three months with the Court Reg-

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20 Such an award is called an "a-national award." See infra notes 40-75 and accompanying text.
21 New York Convention, supra note 1, art. I(1).
22 The question of which State should be State Y is also important in the setting aside of arbitral awards. Article V(1)(e) of the New York Convention, supra note 1, assumes that the court in whose State the award was made can set aside or suspend the award. Hence, it is very significant for a defeated party in arbitration to ascertain which State is the State of origin.
23 See supra note 16 and accompanying text. The territorial test considers awards made outside the territory of the State where recognition or enforcement is sought to be foreign awards.
24 A. VAN DEN BERG, supra note 18, at 22.
25 E.g. France, Germany and Italy.
26 U.N. Doc. E/CONF. 26/L. 42. In addition, Germany insisted that an award rendered anywhere under the German procedural law is a German award while Italy took the position that any award between Italians is domestic. See, G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 11, 14 (1958).
27 But this was not the result that either the common law or the civil law negotiators intended to obtain. See id. at 4.
istry of the Court of First Instance of Paris, where the interested party could request leave to enforce. However, the arbitration clause dictated that the hearings and the signing of the award would take place in Brussels, Belgium. When the petitioners requested the enforcement of the arbitral award which ordered the respondent to pay the petitioners BFR 2.3 million, the Dutch court decided that this arbitral award must be regarded as having been made in the territory of Belgium. The court rejected the respondent’s arguments that, considering the provisions in the arbitration clause, the award must be deemed to have been rendered in Paris, France, and ruled that since there was no provision in the arbitration agreement indicating any choice of law between the parties, the award was deemed to have been made in Belgium.  

But what would have happened in this case if the applicable law agreed upon by both parties had been French law? The Court of First Instance of Zutphen did not answer this question because it was convinced on the facts that there was no agreement as to applicable law and that the award was rendered and signed in Brussels, Belgium, which was sufficient for application of the Bilateral Enforcement Treaty of 1925 between Belgium and the Netherlands. Some civil law States, such as France and Germany, consider an award rendered in another State to be domestic if the applicable law of the award is their own law, but the author believes that under their laws this test, based on the applicable law, must be ruled out at least in applying the first criterion of the New York Convention. In other words, to be true to the letter of the provision and to simplify the Convention’s application, the question of the applicable law should not be considered at all.

Another question may arise if the proceedings of arbitration are held in more than one State. For the sake of simplicity and predictability in the enforcement of arbitral awards, the phrase “made in the territory” should be interpreted as “main proceeding of which occurs in the territory.” Accordingly, if the important hearings or investigations are con-

29 As a matter of fact, in applying the New York Convention, it would not have made any difference whether the award was deemed to be made in Belgium or in France. Despite the Netherlands’ reciprocity reservation, the Convention would have been applied to either case, because both Belgium and France are contracting States of the Convention. However, since the petitioners changed the basis for the enforcement from the New York Convention to the Bilateral Enforcement Treaty between Belgium and the Netherlands of 1925, the court had to decide whether the award was deemed to have been given in Belgium. Id. at 402; see also van den Berg, New York Convention of 1958 Commentary Cases Reported in Volume VIII (1983), 8 Y.B. COM. ARB. (Int’l Council for Com. Arb.) 337 (1983) [hereinafter Commentary Volume VIII].

30 Netherlands, supra note 28, at 402.

31 Mr. van den Berg also is of the opinion that, for the applicability of the Convention, it is not necessary to determine which law is applicable to a foreign arbitral award. Commentary Volume VIII, supra note 29.

32 New York Convention, supra note 1, art. I(1).
ducted in more than one State, any one of those States should be deemed to have made the award. If the important hearing is held in State A while only the signing of the award by the arbitrators occurs in State B, the award should be regarded as being made in State A. This interpretation can also be applied where no arbitration law of any State is applicable to the award.  

### B. The second criterion

Though the second criterion was inserted into article I(1) of the New York Convention at the insistence of some States which take the view that parties can agree to arbitrate in one State under the arbitration law of another State, such an agreement is seldom used in practice because it is inconvenient for both parties to appoint arbitrators and set aside the award according to this agreement.  

Ironically, although the United States had originally objected to the inclusion of the second criterion, it was a U.S. court which expanded the applicability of the New York Convention by using this criterion. In the case, Bergesen, a Norwegian shipowner, won an arbitral award rendered in New York, ordering Joseph Muller Corporation (“Muller”), a Swiss company, to pay the former $61,406.09 with interest for demurrage and shipping expenses. While the enforcement proceeding in Switzerland regarding this award was being delayed, Bergesen brought an action to confirm the award in the Southern District of New York in order to avoid the expiration of the statute of limitation. Affirming the district court’s decision that confirmed the award, the Second Circuit ruled that the second criterion

denotes awards . . . made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. . . . Applying that purpose to this case involving two foreign entities leads to the conclusion that this award is not domestic [(though the award was made in the United States under the arbitration law of the United States)].

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33 See infra notes 71-75 and accompanying text.
37 Bergesen, 710 F.2d at 932. This decision is said to have strengthened New York City's potential to become a major center of international commercial arbitration. See Feldman, An Award Made in New York Can Be a Foreign Arbitral Award, 39-1 ARB. J. 14, 15 (1984).
Furthermore, in *Northrop Corp. v. Triad Financial Establishment*, the District Court for the Central District of California ruled that "although Northrop is a California corporation, . . . Triad Financial Establishment is a Liechtenstein establishment, and Triad International Marketing is a Liechtenstein corporation. Thus, it is possible that the subject arbitration is governed both by the [Federal] Arbitration Act and by the [New York] Convention."39

Can another State which has used the reciprocity reservation refuse to apply the New York Convention to such an award on the ground that U.S. courts do not regard the award as domestic? By stating that any State may, on the basis of reciprocity, declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State, article I(3) of the Convention confines the application of its reciprocity declaration to the territorial test. Hence, when applying the New York Convention, the State of enforcement may not take into account that the United States, the place where the award was rendered, regards the award as foreign.

C. The a-national award

The "a-national award" is usually defined as an award whose arbitration procedure was not governed by any national law, but by the agreement of the parties alone.40 It is also described as "[the award which,] for a variety of reasons, [is] not subject to review under any national law except that of the place in which the award is ultimately presented for enforcement."41 Such an award, sometimes called the "transnational award," the "Stateless award" or the "floating award," may arise, for example, where the parties to the arbitration agree only to the Arbitration Rules of the International Chamber of Commerce as the applicable law to the procedure,42 or where the arbitrators, faced with the difficulty of choosing an applicable national law, apply international

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39 Northrop, 593 F. Supp. at 934 n. 9.
customary law such as the *lex mercatoria*, or the general principles of international law. National courts can be called upon to pass judgment on such awards in three kinds of litigation. The first instance is where the party for whom the award was rendered in State Y requests the court of State X to enforce the award. In this case, the court must first decide whether the award is valid under article I(1) of the New York Convention and, if so, whether it falls within the scope of the first or second criterion. Moreover, if the court of State X believes that the award is within the first criterion and if State X has used the reciprocity reservation, the court must also consider whether State Y is a contracting State. The more complicated question arises when the court of State Y rules that it is not a State of origin of the award on the basis of non-application of its law.

The second instance is where the court of State Y itself is requested to enforce this award. While it is clear that the award does not fit the first criterion, it is disputable whether it comes under the second criterion.

The final and somewhat less complicated instance is where the party against whom the award was rendered files a suit in State Y to set aside the award pursuant to article V(1)(e) of the New York Convention. In this case, the court only has to decide whether the award can be regarded as having been rendered in State Y in spite of the non-application of State Y's law. When the court decides that neither the Convention nor the arbitration act of State Y applies, it will dismiss the suit for lack of jurisdiction.

Can the New York Convention be applied to the a-national award? Some scholars answer affirmatively on the basis of the second sentence of

43 The *lex mercatoria* is usually defined as "that system of laws which is adopted by all commercial nations, and constitutes a part of the law of the land. It is a part of the common law." BLACK'S LAW DICTIONARY, supra note 13, at 821. Moreover, Mr. Mann describes the idea of a new *lex mercatoria* as that which "comprises uniform law embodied in or derived from international conventions, trade usages, custom, and ideas of business fairness, efficacy or reasonableness." Mann, Private Arbitration and Public Policy, 4 CIV. JUST. Q. 257, 264 (1985).

44 Other examples of a-national awards include awards made in places like Belgium, where no review of arbitration between foreigners is provided without the parties' agreement, and awards made under the auspices of the International Center for the Settlement of Investment Disputes. See Park, supra note 41, at 664-65.

45 It is controversial whether the New York Convention applies to this proceeding. Many commentators take the view that the Convention is not applicable in the action for setting aside an award because, according to article I(1) of the Convention, the Convention only applies to the "recognition and enforcement of arbitral awards made in another contracting State." See Stalev, Arbitration to Adopt Long-term International Economic Contracts to Changed Circumstances, in NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS 199, 204 (P. Sanders ed. 1983); A. VAN DEN BERG, supra note 18, at 20-21. But see Fouchard, supra note 42, at 673.
article I(1) of the New York Convention. They argue that since this sentence extends the application of the Convention to "awards not considered as domestic awards in the State where their recognition and enforcement are sought," it is natural that the a-national award should fall within the scope of the Convention. Further, they urge that, according to the language of article V(1)(d) of the Convention that recognition and enforcement may be refused only if that party furnishes proof that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, the agreement between the parties need not be governed by a national arbitration law.

Another reason favoring the a-national award is that it is desirable to de-nationalize arbitration procedures. In other words, as a matter of principle, international arbitration should be liberated from the local peculiarity of a place of arbitration which is only chosen because of neutrality or convenience.

Other scholars, however, do not agree. Their first argument is that, considering the drafting history, the second sentence of articles I(1) was not intended to cover the enforcement of the a-national award, but rather the enforcement of an award made in a State under the arbitration law of another State. Furthermore, they argue, since articles V(1)(a) and (e) of the Convention clearly refer to "under the law of the country," the Convention requires that the award be governed by a national arbitration law. The third and more practical argument is that the a-national award would raise many questions in enforcement or setting aside of such an award. To put it another way, the a-national award, which should be distinguished from international arbitral awards such as non-domestic awards, cannot be supported by any judicial authority in setting aside or enforcing the award. Hence, it may be a "hazardous undertaking full of legal pitfalls."


47 Fouchard, supra note 42, at 673.

48 1 P. Schlosser, Das Recht der Privaten Internationalen Schiedsgerichtsbarkeit 420 (1975). The Dutch Supreme Court has affirmed this view. See Int'l Com. Arb., supra note 18, at V.35.1; see also A. van den Berg, supra note 18, at 42-43.

49 Paulsson, supra note 46, at 54-55.

50 Sanders, Consolidated Commentary Volumes V and VI, 6 Y.B. COM. ARB. (Int'l Council for Com. Arb.) 202, 205 (1981) [hereinafter Commentary Volumes V and VI]; van den Berg, supra note 40, at 421; A. van den Berg, supra note 18, at 30-32; Park, supra note 41, at 667.

51 Commentary, Volumes V and VI, supra note 50, at 204; A. van den Berg, supra note 18, at 35-37.

52 Commentary, Volumes V and VI, supra note 50, at 205, 210; A. van den Berg, supra note 18, at 37.

53 Park, supra note 41, at 667.
The fluctuation of national courts' attitudes toward these various questions are well expressed by the controversy between Societe Europeenne d'Etudes et d'Enterprises ("SEEE") and Yugoslavia. In 1956, arbitrators in Vaud Canton, Switzerland, rendered a decision in favor of the French company, SEEE, against the State of Yugoslavia.\(^{54}\) In a motion by SEEE for the recognition of the award, however, the Vaud Cantonal Tribunal refused on the ground that the award was not a Swiss arbitral award within the meaning of article 516 of the Cantonal Code of Civil Procedure. Despite that adverse decision, SEEE requested the Dutch court for a leave to enforce the award.\(^{55}\) The Dutch Supreme Court overruled the decision of the Court of the Hague that the arbitral award could not be considered an arbitral award given in the territory of a contracting State.\(^{56}\) The Supreme Court, saying that "[n]either the text nor the history of the Convention gives an indication that the court should investigate the relationship between the award and the law of the country where it was made,"\(^{57}\) referred the case back to the Court of the Hague. The Court of the Hague again refused to enforce this award on the ground that the enforcement of the award would be contrary to Dutch public policy because the award did not conform to an international agreement between the French and Yugoslavian Governments.\(^{58}\) Although the Dutch Supreme Court affirmed the decision of the Court of the Hague, reasoning that the decision of the Vaud Cantonal Tribunal should be considered equivalent to the circumstances mentioned in article V(1)(e) of the New York Convention,\(^{59}\) its position on the a-national award did not change; in dictum, the court stated that "the circumstance that the decision was not recognized as an arbitral award within the meaning of article 516 of the Code of Civil Procedure of Canton Vaud did not necessarily imply that it could not be considered as an arbitral award within the meaning of article I of the New York Convention."\(^{60}\)

On the other hand, the French Supreme Court, in the action filed by SEEE against Yugoslavia for the enforcement of this award, affirmed the decision of the Court of Appeal of Rouen which had granted enforcement of the award.\(^{61}\)

Another split between national courts occurred in the dispute be-

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\(^{54}\) Int'l Com. Arb., supra note 18, at V.18.1.
\(^{55}\) Id.
\(^{56}\) New York Convention, supra note 1, art. I(1); Int'l Com. Arb., supra note 18, at V.18.1.
\(^{57}\) Int'l Com. Arb., supra note 18, at V.18.2.
\(^{58}\) Id.
\(^{59}\) Id. at V.18.3.
\(^{60}\) Id. at V.35.2.
\(^{61}\) Judgment of Nov. 18, 1986, Cass. civ. 1re, Fr., Judgment No. 747P, reprinted in 26 I.L.M. 377 (1986) (English translation). However, the validity of the a-national award was not disputed in this case.
between the General National Maritime Transport Company Libya ("Libya") and the Swedish company, Götaverken in both the First Chamber (Cour d'appel) of Paris and the Supreme Court of Sweden. The award, which ordered Libya to pay Götaverken, was rendered in Paris under the Arbitration Rules of the ICC of 1975. The Svea Court of Appeal in Stockholm granted enforcement of the award on the premise that this award fell within the scope of the New York Convention, and the Swedish Supreme Court affirmed the decision. On the other hand, the First Chamber of Paris dismissed the action of Libya to set aside the award because the court did not consider this award to be French, since the arbitral decision was not connected in any way with the French legal system.

The Austrian courts expressed their position toward the a-national award in Norsolar S.A. v. Pabalk Ticaret Ltd. Sirketi. Pabalk, the Turkish commercial representative, obtained an arbitral award which ordered Norsolar, the French principal, to pay Pabalk FFR 800,000 for unpaid and unearned commissions and damages. In rendering the award, the arbitrators stated that:

Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to put aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international lex mercatoria.

Norsolar, who wished to initiate proceedings to have the award set aside by an Austrian court, requested the Austrian Supreme Court to designate a competent court in Austria. Recognizing the need for legal protection by Austria under international conventions since the award had been made in Vienna, the Court designated a competent court in Austria. Hence, the Austrian attitude that the award belongs to Austria when the court is asked to enforce or set aside an a-national award made in its territory, though under non-national law, is different from that of

64 See Fouchard, supra note 42, at 670.
65 Sweden, supra note 63, at 239.
66 France, supra note 62, at 223. Such a position is also sustained in a decision of the French Supreme Court given May 5, 1987, involving a dispute between Iran and SBDI. The award was given in favor of SBDI, a U.S. company, under the ICC Rules in 1980. In a motion of Iran to set aside the award, the French Supreme Court has ruled that the award cannot be regarded as a French award. See Int'l Com. Arb., supra note 18, at V.272.1.
67 See Austria, 7 Y.B. COM. ARB. (Int'l Council for Com. Arb.) 312 (1982).
69 Austria, supra note 67, at 313-14.
the First Chamber of Paris in *Libya v. Götaverken*.70

As previously stated, the positions of the national courts toward the a-national award are inconsistent. The a-national award should be treated as falling under the New York Convention71 not only because, based on the law of autonomy,72 the parties from different States should be allowed to de-nationalize the arbitration procedure to avoid bias and inconvenience, but also because the use of arbitration can be facilitated by simple and consistent application of the New York Convention.

Accordingly, in the aforementioned example, State X should regard the a-national award rendered in the territory of State Y as being included in the first criterion regardless of its applicable law.73 Second, State Y, being requested to enforce the a-national award made in its own territory, should consider the award as a non-domestic award under the second criterion, even though the drafting history does not conform with such an interpretation. Third, State Y, being requested to set aside the a-national award, should first decide if the New York Convention applies to the proceeding to set aside awards.74 If the court of State Y ascertains that the Convention does not apply to this proceeding, it may dismiss the action to set aside the award.75

### III. PROS AND CONS OF THE PRINCIPLE OF RECIPROCITY

Before discussing the application of reciprocity in the New York Convention, it is appropriate to review the justifications for and objections to the reciprocity rule. As to the principle of reciprocity within the context of the New York Convention alone, the discussion is not animated. Hence, the following will briefly review the controversy over reciprocity in the enforcement and recognition of foreign judgments of international commercial arbitration proceedings.76

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70 On the other hand, Pabalk requested a leave for enforcing the award in France. Although the Court of First Instance granted it, the Court of Appeal of Paris has decided that its decision should be adjourned until the Court of Appeal of Vienna decides Pabalk’s appeal. *See Austria, supra* note 67, at 364.

71 Mr. Paulsson properly indicates that “a de-nationalized award may be accepted by the legal order of a State of enforcement, though it is independent of the legal order of its State of origin.” *Paulsson, supra* note 46, at 57.


74 *See supra* note 45.

75 *See France, supra* note 62, at 223.

76 Considering the fact that the characteristics of arbitration proceedings differ greatly from civil suits, such a controversy may not be entirely on point in the context of international commercial arbitration. However, to survey this controversy, though briefly, will help us to deduce a desirable interpretation of the reciprocity rule in the New York Convention. Readers interested in such a dispute on the principle of reciprocity in the recognition and enforcement of foreign judgments may
A. Pros

The first argument in favor of the principle of reciprocity is that it can protect the nationals of State X, the State where the enforcement of a foreign judgment or award is sought, not only against the bias of State Y, the State where a foreign judgment or award was made, but also against inconvenience. To explain this point in connection with international commercial arbitration, the following example may be useful:

A, a national of State X, signs a non-commercial contract with B, a national of State Y, with an arbitration clause providing for the place of arbitration either in State X or in State Y. When a dispute arises, unless the place of arbitration has been agreed upon, both A and B can file for an arbitration in State X or State Y. In this case, A might not want to file for an arbitration in State X, because, even if he or she wins, the award will be ineffective in State Y since the New York Convention cannot be applied in State Y because of the commercial reservation. B, however, can file for arbitration in State Y since the Convention can be applied to the award in State X. Hence, A suffers the disadvantage of having to select the forum in State Y despite inconvenience and a fear of bias in a foreign jurisdiction. State X, however, by using the principle of reciprocity, could restore the balance between the two States.

The second argument in favor of reciprocity is that the principle of reciprocity will encourage the court of State Y to defer to the award rendered in State X. In other words, by threatening State Y that its awards may not be enforced in State X, the principle of reciprocity can alter the legislative practices of State Y.

The third argument is that in view of equitability and mutuality in international relationships, the principle of reciprocity should be recognized in most civilized nations by the principles of international law.

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ref to Reese, The Status in This Country of Judgments Rendered Abroad, 50 COLUM. L. REV. 783, 790-93 (1950); Peterson, Foreign Country Judgments and the Second Restatement of Conflict of Law, 72 COLUM. L. REV. 220, 248-64 (1972); Comment, Reciprocity Rule, supra note 14, at 345-49; P. Waer, supra note 2, at 89-106.

77 Reese, supra note 76, at 793; Comment, Reciprocity Rule, supra note 14, at 337.

78 Comment, Reciprocity Rule, supra note 14, at 337.

79 Id. at 345. Professor Lenhoff calls this measure a psychological attempt. See Lenhoff, Foreign Judgments, supra note 10, at 466.

80 A striking example was the revision of the California Code of Civil Procedure in 1907, made to ensure that judgments made in California would be enforced in other States, particularly Germany. See P. Waer, supra note 2, at 99. In addition, the abolition of revision au fond of the French courts is said to be mainly due to the German application of reciprocity. See von Mehren & Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 HARV. L. REV. 1601, 1661 (1968).

81 Hilton, 159 U.S. at 228; Lenhoff, Foreign Judgments, supra note 10, at 473; Comment, Reciprocity Rule, supra note 14, at 345.
B. Cons

The argument against the bias or inconvenience justification is that it holds true only to a limited extent. In other words, the principle of reciprocity does not always protect the nationals of State X, rather it may harm the interests of the nationals who win the action or arbitration. Furthermore, in the context of arbitration, this justification becomes less plausible. First of all, the New York Convention excludes the nationality of the disputing party from the conditions of application. So, in the above example, even if the award rendered in State Y is in favor of A, the reciprocity requirement would prevent the court of State X from applying the New York Convention to this award. Moreover, the parties, to avoid bias or inconvenience, frequently agree to designate a third State which is convenient to both parties or a State where an international arbitral institution is located as the place of arbitration. In fact, State X normally becomes the place of enforcement, regardless of the nationality of either party, merely because property of the defeated party is located there. For this reason, the first justification is greatly weakened in the area of international commercial arbitration.

The second justification, deference, also becomes less significant in the context of arbitration. Since many awards are made in a third State unrelated to both parties to the arbitration, the State to which the threat is given on the basis of reciprocity is often different from the State whose national must suffer an unpredictable loss. Hence, the psychological impact on State Y is not effective because the victim is not a national of State Y. Because of this inefficiency, some authors argue that reciprocity should be pursued not by the courts but by the government.

The mutuality justification, though it is the most plausible one, is also less persuasive in recognizing and enforcing foreign arbitral awards in light of the reasons discussed above.

Separated from these criticisms against the justifications, some authors emphasize the technical problems of applying the principle in practice. Specifically, when the court of State X, before applying the rule of reciprocity, investigates and evaluates the legislative and judicial practices of State Y, the investigation and evaluation may not only be difficult and costly but the findings may also be misleading. Besides, critics argue, the reciprocity rule may represent an unwise judicial intrusion into international and political relations.

As considered above, the principle of reciprocity can be justified the-
oretically to a limited degree. Furthermore, as far as international commercial arbitration is concerned, the principle almost entirely loses relevance. Hence, the application of the reciprocity rule in the New York Convention should be evaluated from this point of view.

IV. THE APPLICATION OF RECIPROCITY REQUIRED IN THE NEW YORK CONVENTION

A. The drafting history of the reciprocity provisions

To grasp the meaning of the reciprocity provisions, it is necessary to consider the drafting history.

1. Article I(3)

When the Committee on the Enforcement of International Arbitral Awards ("Drafting Committee") submitted its first draft on March 28, 1955, it reported on article I(3) as follows:

Having regard to the object of the draft Convention, the Committee thought it would not be desirable to establish a strict requirement of reciprocity. At the same time, the Committee was aware that the adoption of the solution proposed by the ICC would make the Convention unacceptable to States willing to adhere to it only on condition of reciprocity. Accordingly, the Committee adopted a formulation which would permit any contracting State to declare that it would apply the Convention only to arbitral awards rendered in the territory of another contracting State.86

At the meeting of the Economic Conference of the United Nations Economic and Social Council ("Conference"), Mr. Bakhtov, a delegate of the Soviet Union, wished to make this point clear by inserting "on the basis of reciprocity," at the end of the statement; his proposal was accepted by the other delegates.87 The Conference also decided that the Convention should contain a provision stipulating that no further reservations would be permissible, and left it to the Drafting Committee to prepare a text of this provision.88 In accordance with this decision, the draft of article I(3) was adopted on June 9, 1958 and remains in force today.89

2. Article XIV

Originally this provision was attached to article XI (article X of the

1955 draft) of the New York Convention, the "federal clause." But at the twenty-third meeting, Mr. Rognlien from Norway proposed to insert a general reciprocity clause. He argued that since the principle of reciprocity was not included in the second sentence of article I(3) nor in article X, a general reciprocity clause could remedy all those defects. This newly proposed article XIV was adopted by 13 votes to 5, with 16 abstentions, and article XI(2) was deleted to avoid redundancy. However, when adopting the Final Act, though the motion for reconsideration of article XIV was rejected, many delegates worried about practical difficulties and confusion to which this provision might lead. Even consenting delegates expressed the view that this provision should not serve as a precedent for any other conventions.

B. Interpretation of these provisions

1. Article I(3)

The second sentence of article I(3), the reciprocity reservation, has been used by approximately two-thirds of the contracting States. The general application of this reservation to an award does not seem difficult. In the aforementioned example, when State X has used the reciprocity reservation in ratifying or acceding to the New York Convention and State Y is also a contracting State, the New York Convention will be applied to this award. Conversely, if State Y is not a contracting State, State X will not apply the New York Convention to the award. Nonetheless, these awards will not be automatically unenforceable but may be enforced on another basis. On the other hand, if State X has not used the reciprocity reservation, it will apply the New York Convention to the award.

90 19 U.N. ESCOR Annex (Agenda Item 14), supra note 86, at 8.
92 Id. at III.C.220.
95 Id. at VI.3.
96 Some scholars are of the opinion that, on its face, article I(3) of the Convention applies to arbitral awards, not to agreements to arbitrate, while the extent of article XIV is not limited to arbitral awards. See Note, Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention, 23 VA J. INT'L L. 75, 80 n.16 (1982) [hereinafter Note, Enforcing Arbitration Agreements]. However, others take the opposite view on the ground that there is no reason to exclude arbitration agreements from article I(3). See Int'l Com. Arb., supra note 18, at I.A.4; P. SCHLOSSER, supra note 48, at 70; A. VAN DEN BERG, supra note 18, at 60.
97 See supra text accompanying note 78.
98 However, the national courts which consider the a-national award invalid would not apply the New York Convention to the award, though it was rendered in the territory of a contracting State. See supra notes 50-53 and accompanying text.
99 The award made in a non-contracting State may be enforced mainly pursuant to other treaties or domestic laws. See infra text accompanying notes 145-208.
York Convention to the award regardless of whether the award was rendered in the territory of another contracting State.\footnote{For example, the decision of the Court of Appeal (Corte di Appello) of Florence, Oct. 22, 1976. Int’l Com. Arb., supra note 18, at V.5.1. See also the Court of Cassation (Corte di Cassazione) of Italy, Feb. 27, 1970. Id. at V.5.1.}

Some authors believe that article I(3) allows a State to undermine the second criterion provided in the second sentence of article I(1). They argue that a State can, by invoking this reservation, rule out the applicability of the New York Convention to awards made in its territory under the law of another State.\footnote{Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 YALE L.J. 1049, 1061 (1961); Int’l Com. Arb., supra note 18, at I.A.4.5. They also think that the holding of the First Chamber of Paris in \textit{Libya v. Götaäwerken} is in the same line with their opinion. See France, \textit{supra} note 62.} They argue that the language of article I(3), stating that “any State may on the basis of reciprocity declare . . . awards made only in the territory of another contracting State” should be interpreted to mean that a State can limit its application of the Convention only to the first criterion.\footnote{Id. Focusing on the phrase “on the basis of reciprocity,” Mr. McMahon states that such an interpretation would also make it possible to think that State X which, like Germany or France, considers as foreign such a non-domestic award, may, by using this reservation, refuse to apply the Convention unless it believes that State Y will apply the Convention to an award given in State Y’s territory under the law of State X. See McMahon, Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States, 2 J. MAR. L. \\& COM. 735, 741 n.29 (1971).}

The opposite view is that the reciprocity reservation does not preclude the application of the Convention to a non-domestic award made in its territory under the laws of another “contracting” State.\footnote{Bredin, \textit{supra} note 72, at 1013; P. Schlosser, \textit{supra} note 48, at 66-67; A. Van den Berg, \textit{supra} note 18, at 26-27.} Proponents of this view urge that the idea of reciprocity be applied \textit{mutatis mutandis}\footnote{“With the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like.” Black’s Law Dictionary, \textit{supra} note 13, at 919.} to the second criterion.\footnote{A. Van den Berg, \textit{supra} note 18, at 27.}

Both views are difficult to reconcile with the drafting history and with the letter of article I(3) of the Convention. First, considering that the legislative intent of this provision was to make the Convention more readily acceptable to potential signatory States,\footnote{See \textit{supra} text accompanying note 86.} it is difficult to believe that the reservation precludes the applicability of the second criterion.\footnote{Mr. van den Berg also argues that, if the reservation is interpreted as excluding the applicability of the Convention to the second criterion, it cannot be explained why France and Germany, which insisted on adopting the second criterion, have used the reciprocity reservation. A. Van den Berg, \textit{supra} note 18, at 27.} Second, in light of the legislative history previously mentioned, it is unthinkable for the phrase “on the basis of reciprocity” to have any mean-
ing beyond a straightforward interpretation that a contracting State may refuse to apply the Convention to awards not made in the territory of another contracting State.\textsuperscript{108} As Mr. Haight properly relates, this phrase was inserted when it was not clear that the reservation with respect to awards considered to be domestic by internal law might be adopted, therefore no serious attempt was made to remove it.\textsuperscript{109} Moreover, the addition of article XIV, the "general reciprocity clause," makes this phrase meaningless.\textsuperscript{110} Furthermore, from a practical point of view, such an interpretation would make the application of the Convention more complex and restricted. On the other hand, the interpretation that by using the reservation, a State applies the Convention to a non-domestic award made only under the laws of a contracting State does not seem compatible with the letter of the provision, "any State may declare . . . awards made only in the territory."\textsuperscript{111} In my opinion, in conformity with not only the drafting history but the language of article I(3), a non-domestic award which comes under the second criterion must be excluded from the reciprocity reservation regardless of whether the applicable law is that of a contracting State.\textsuperscript{112}

2. Article XIV

No case to this date has explicitly invoked article XIV of the New York Convention,\textsuperscript{113} and the provision's interpretation is controversial.

First, as stated before, since the New York Convention does not assume the nationality of the party to the dispute as a condition for application, article XIV, like article I(3), has a different meaning than it does in the context of international law. For example, State X cannot refuse to enforce an arbitral award against its own citizen only because State Y, to which the winning party belongs, refused to enforce an arbitral award in a prior instance where the citizen of State X had prevailed.\textsuperscript{114} The concept of reciprocity used in the New York Convention is in accordance with that used in the enforcement of foreign judgments, in that reciproc-

\textsuperscript{109} G. Haight, supra note 26, at 19-20.
\textsuperscript{110} See id; see also A. Van Den Berg, supra note 18, at 14.
\textsuperscript{111} New York Convention, supra note 1, art. I(3).
\textsuperscript{112} According to this interpretation, the New York Convention can apply to the a-national award. See also Fouchard, supra note 42, at 673.
\textsuperscript{113} A. Van Den Berg, supra note 18, at 14.
ity has bearing on the acts of other national courts.\textsuperscript{115}

What then does article XIV mean? Does it mean that if State $Y$ had applied the New York Convention to the award made in State $X$, the latter may also apply the Convention to the award given in State $Y$ to the same extent as State $Y$? More specifically, this question may arise where State $Y$, which has used the commercial reservation, refuses to enforce an award on a non-commercial matter rendered in non-reserving State $X$. In addition, the problem surfaces where State $Y$ denies the request of enforcement of the award given in State $X$ on the ground of non-arbitrability or public policy, while State $X$ considers the subject matter as arbitrable or favorable to public policy.\textsuperscript{116} Can State $X$ then reciprocally refuse to enforce the awards on the same subject matters made in State $Y$ by using article XIV? The answers are divided.

C. The Different Opinions

Some commentators are of the opinion that the obligations of non-reserving States under the New York Convention are not affected by reservations or restrictive interpretations by other contracting States. In other words, they argue, a State which does not comply with an obligation under the Convention cannot exert the corresponding international right.\textsuperscript{117} The reasoning behind this argument is that it would be unreasonable to think that a non-reserving State may exclude the enforcement of the award on non-commercial matters made in the territory of a contracting but reserving State, while it remains under an obligation to recognize the award made on the same matters even in the territory of a non-contracting State.\textsuperscript{118} Furthermore, they argue, in the context of the commercial reservation, by presuming that if express language is used in one part of a statute, its omission from another part is deliberate, the reciprocity rule does not apply to the commercial reservation of the second sentence of article I(3) where the phrase "on the basis of reciprocity" is deleted.\textsuperscript{119} Another basis for the argument is the legislative history of this provision, which shows that article XIV was inserted only for the purpose of supplementing the second sentence of article I(3), article X and article XIII(2).\textsuperscript{120}

Other scholars, however, claim that article XIV gives States a defensive right to take advantage of another State's reservation and that the provision can also be applied to the case where the courts of other States

\textsuperscript{115} See supra text accompanying notes 14-15.

\textsuperscript{116} A. VAN DEN BERG, supra note 18, at 14-15.

\textsuperscript{117} Int'l Com. Arb., supra note 18, at I.A.4.

\textsuperscript{118} Id.


have given a restrictive interpretation to their obligation under the Convention, for example, under arbitrability and public policy.\textsuperscript{121} According to the jurists, the provision permits each national court to apply reciprocal treatment of foreign awards equivalent to the attitudes of other States.\textsuperscript{122}

D. The Precedents

Few precedents even implicitly dealing with interpretation of article XIV can be found. An outstanding case which appeared to answer the question in the negative was \textit{Fertilizer Corp. of India v. IDI Management, Inc.}.\textsuperscript{123} Fertilizer Corporation of India ("FCI") brought a petition for enforcement of an arbitral award rendered in its favor in India to the District Court for the Southern District of Ohio. IDI Management, Inc. ("IDI"), a U.S. company, asserted as one of its defenses that India would not have enforced the award had it been rendered in the United States in IDI's favor and that therefore reciprocity between India and the United States under the New York Convention was absent. Citing \textit{Indian Organic Chemicals, Ltd. v. Chemtex Fibres, Inc.}\textsuperscript{124} as an example, IDI further argued that India had defined the term "commercial" so narrowly that it excluded many or most legal relationships which would be considered "commercial" in the normal sense of the word. IDI also asserted that article XIV required the court to determine the extent to which India was applying the Convention and to react in a like manner.\textsuperscript{125} On the other hand, FCI contended that article XIV must be read literally, that is to say, the phrase "to the extent that it is itself bound to apply the Convention"\textsuperscript{126} may not be interpreted as "to the extent that it applies the Convention." For example, State $X$, which does not use the commercial reservation, may refuse to enforce an award on a non-commercial matter made in State $Y$, which does use the reservation. However, since the United States had invoked the reservation, the only thing required of the U.S. court was to determine whether the contract in question was commercial under the laws of the United States.\textsuperscript{127} In addition to reasoning

\begin{itemize}
  \item \textsuperscript{122} Quigley, \textit{supra} note 101, at 1075.
  \item \textsuperscript{123} 517 F. Supp. at 948-63.
  \item \textsuperscript{124} Indian Organic Chemicals, Ltd. v. Chemtex Fibres, Inc., 1978 A.I.R. (Bom.) 106.
  \item \textsuperscript{125} \textit{Fertilizer Corp. of India}, 517 F. Supp. at 952.
  \item \textsuperscript{126} \textit{New York Convention, supra} note 1, art. XIV.
  \item \textsuperscript{127} \textit{Fertilizer Corp. of India}, 517 F. Supp. at 952. FCI also asserted that, in view of the legislative history, article XIV does not apply at all to the commercial reservation. See \textit{id}. However, the history shows that article XIV was also intended to supplement the second sentence of article I(3), the commercial reservation. See \textit{supra} text accompany notes 90-92.
\end{itemize}
that the commercial reservation does not involve consideration of reciprocity on the ground mentioned above, the court, overruling the IDI's arguments, related:

[W]e are satisfied that the Indian courts are not engaged in a devious policy to subvert the Convention by denying non-Indians their just awards. . . . Moreover, FCI has cited other cases and arbitrations showing that Indian courts will enforce awards against Indian parties and that Indian parties do arbitrate outside of India.

Despite the fact that the court denied the application of article XIV to this case, the court apparently did not regard article XIV as entirely irrelevant to the reciprocity rule on restrictive interpretation of the commercial reservation. This implication grows clearer when the court states that "the [U.S.] courts should construe exceptions narrowly lest foreign courts use those holdings against application of the convention as a reason for refusing enforcement of awards made in the United States." On the other hand, the Spanish Supreme Court has ruled that article XIV can be applied broadly. In the proceeding for enforcement of an arbitral award rendered in England against a Spanish corporation, the Court stated, though in dictum, "only the principle of negative reciprocity as incorporated in article 953 of the Spanish Code of Civil Procedure can be invoked against the enforcement of a foreign arbitral award." New Zealand has taken a similar view. The New Zealand Arbitration (Foreign Agreement and Awards) Act of 1982, entitles the Governor-General to exclude such awards from enforcement. However, no such

128 See supra text accompanying note 119.
129 Fertilizer Corp. of India, 517 F. Supp. at 953. Because the court found there was some evidence that Indian courts have tried to comply with the New York Convention, the court did not have to decide whether article XIV also covers the case where the courts of a State of origin have given an abnormally restrictive interpretation to its obligations under the Convention. See id.; see also Note, Enforcing Arbitral Awards, supra note 96, at 82.
130 Fertilizer Corp. of India, 517 F. Supp. at 953.
131 Spain, 11 Y.B. COM. ARB. (Int'l Council for Com. Arb.) 523, 527-28 (1986); Commentary Volume XI, supra note 34, at 404.
132 Article 953 of the Spanish Code of Civil Procedure provides that "[n]o enforcement shall be granted if it concerns a State in which the courts do not enforce decisions given by Spanish tribunals." See Commentary Volume XI, supra note 34, at 527, n. 2.
133 [I]f . . . the treatment in respect of recognition and enforcement accorded by the courts of any [contracting State] to an award made in arbitration proceedings in New Zealand is substantially less favourable than that accorded by the courts in New Zealand to [an award of that State], the Governor-General may, by Order of Council, direct that no Convention award made in [the State] shall be enforceable . . . .

134 Id. at 27.
order has been made to date.\textsuperscript{135}

As many delegates to the Conference worried,\textsuperscript{136} article XIV has caused substantial confusion in its interpretation. Despite the fact that most of the grounds that might have justified the principle of reciprocity have lost their appeal,\textsuperscript{137} the existence of article XIV makes it difficult to interpret this provision as entirely meaningless. However, the author strongly believes that, in order to make the New York Convention effective, the application of article XIV should be restricted as much as possible. This goal may be achieved by focusing on the phrase "except to the extent that it is itself bound to apply."\textsuperscript{138} In other words, when the court of State $X$ applies article XIV to an award given in State $Y$, the former should consider not how the latter actually applies the Convention, but how, under its own laws and treaties, it is obliged to apply the Convention.\textsuperscript{139} More specifically, the court of State $X$ should consider how, under the laws, treaties and general practices of State $Y$, State $Y$'s court is expected to apply the Convention to an award given in State $X$, although there exists no specific precedent.\textsuperscript{140} Accordingly, State $X$, which has not used the commercial reservation, may refuse to enforce an award on a non-commercial matter given in State $Y$, which has used the reservation, on the basis of reciprocity, since State $Y$ is deemed to refuse to enforce an award of State $X$ on the same subject matter pursuant to the New York Convention. However, in denying the enforcement of the above-mentioned award on the ground that reciprocity does not exist as to the interpretation of public policy or arbitrability, the court of State $X$ should take into account State $Y$'s legislation, case laws and general practices.

Another method to restrict the application of article XIV is to impose on the defendant the burden of proof that there exists no reciprocity between the relevant States.\textsuperscript{141} In other words, since "reciprocity is a matter of defense, which the party who seeks to avoid the burden of the foreign judgment must plead,"\textsuperscript{142} if the defendant fails to offer any evidence regarding reciprocity, the court should presume that reciprocity

\textsuperscript{135} Id.

\textsuperscript{136} See supra text accompanying note 93.

\textsuperscript{137} See supra text accompanying notes 76-85.

\textsuperscript{138} New York Convention, supra note 1, art. XIV.

\textsuperscript{139} See also FCI's argument in Fertilizer Corp. of India, 517 F. Supp. at 952-53; Note, Enforcing Arbitration Agreements, supra note 96, at 81.

\textsuperscript{140} See infra text accompanying notes 205, 206, 214.

\textsuperscript{141} Comment, Reciprocity Rule, supra note 14, at 337.

exists and grant enforcement.

E. The principle of reciprocity in practice

The attitudes of States toward the application of reciprocity are varied. The following will survey the arbitration laws and judicial practices of the United States, France, the Federal Republic of Germany, the Netherlands and the Republic of Korea with regard to the New York Convention.

1. The United States

The United States has invoked both the reciprocity reservation and the commercial reservation. As a result, the New York Convention does not apply to foreign arbitral awards rendered in a non-contracting State. In such a case, if the award is within the scope of other multilateral or bilateral treaties, the award may be enforced in the same manner as domestic awards, pursuant to the Federal Arbitration Act ("FAA") or state laws. The award, confirmed by a competent court under article 9 of the FAA, shall have the same force and effect as a judgment in a civil action and may be enforced as if it had been ren-

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143 Comment, Reciprocity Rule, supra note 14, at 337. Many jurisdictions in the United States have adopted this method. See, e.g., IIT v. Lam (In re Colorado Corp.), 531 F.2d 463, 469 (10th Cir. 1976); Kessler v. Armstrong Cork Co., 158 F. 744, 748 (2d Cir. 1907).

144 The New York Convention, unlike the Geneva Convention, generally imposes the burden of proof on parties attacking awards. See New York Convention, supra note 1, art. 5. See also Kim Hong Gyu, 22 Oe-Guk-Jung-Jae-Pan-Jung-Eu Seung-In-Jip Jul-Cha (Factors and Procedure of the Recognition and Enforcement of Foreign Arbitral Awards) 19 (1980).

145 New York Convention, supra note 1.

146 For example, in Splosna Plovba of Piran v. Aglerak Steamship Corp., 381 F. Supp. 1368 (S.D.N.Y. 1974), the court held that the New York Convention was inapplicable since the United Kingdom was not a contracting State.


148 The most important bilateral treaties of the United States in this respect are Treaties of Friendship, Commerce and Navigation with a number of other States. Since these treaties, based on the notion that one party's nationals should not suffer discrimination in the other party's territory, apply to the arbitration between both States' nationals regardless of where the arbitration takes place, they might cover arbitration proceedings that the New York Convention does not. See Note, Enforcing Arbitration Agreements, supra note 96, at 85-86; McClendon, Enforcement of Foreign Arbitral Awards in the United States, 4 Nw. J. Int'l L. & Bus. 58, 70 (1982).


dered in such an action. Some decisions which belong to this sphere have not required reciprocity as a condition for enforcement, but U.S. courts have tended to limit their review of foreign arbitral awards to only those cases where clear evidence of impropriety in the award has been presented or where the arbitrators manifestly disregarded the applicable law.

On the other hand, if the award is made in the territory of another contracting State (i.e., where the reciprocity required by article I(3) exists) the New York Convention will be applied pursuant to articles 201 through 208 of the FAA, which incorporated the Convention in 1970. It is important to discuss here the extent to which the United States would apply the reciprocity rule expressed in article XIV of the Convention. Unfortunately, the examination of only a few precedents would not provide a clear picture of U.S. interpretation of article XIV. However, since the national policy of the United States is favorable to international commercial arbitration, in general the courts of the United States will interpret article XIV of the Convention narrowly so that other States cannot avail themselves of this interpretation in refusing to enforce awards rendered in the United States.

2. France

France has also invoked both the reciprocity reservation and the commercial reservation. Hence, France will not apply the New York Convention to awards given in the territory of non-contracting States. Accordingly, such awards, if not within the reach of other conventions, must be regulated by the newly supplemented French Code of

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152 Holtzmann, supra note 147, at 31.
154 See supra notes 113-30 and accompanying text.
156 The ruling in FCI is in accordance with such a national policy. See supra notes 119-39 and accompanying text. In addition, it is noteworthy that the Uniform Foreign Money-Judgments Recognition Act which was approved in 1962 by the National Conference of Commissioners on Uniform State Laws and adopted as of 1982 by 12 states, 13 U.L.Ann. 417 (Master ed. 1980), rejects reciprocity as a factor to be considered in recognizing foreign judgments. See H. STEINER & D. VAGTS, supra note 3, at 64.
Civil Procedure ("French CCP")\textsuperscript{159} in order to be enforced. Under article 1498 of the French CCP, arbitral awards shall be recognized and enforced in France if their existence is proven by the party relying thereon and if such recognition is not manifestly contrary to international public policy.

On the other hand, when awards are either rendered in the territory of other contracting States or, if rendered in France, issued in an international arbitration, the New York Convention applies.

The interesting aspect, however, is that the party seeking the enforcement of a foreign arbitral award falling under the New York Convention may prefer not to invoke the Convention, but to make use of the new French CCP.\textsuperscript{160} Such a procedure is advantageous because, since the 1981 decree supplementing the French CCP was based on the concept of the contractual nature of arbitration, a foreign court's decision annulling or suspending an award, even in a State of origin, poses no legal impediment in enforcing the award in France.\textsuperscript{161} In other words, while article 5, paragraph 1(e) of the Convention allows the court of enforcement to refuse to enforce the award set aside or suspended by a competent authority of the State of origin, the French court's decision which, on the condition mentioned above, granted an \textit{exequatur} (leave of enforcement) to the arbitral award given in other States can be appealed only under specified grounds of article 1502 of the French CCP. This excludes the ground that the award has been set aside or suspended in a State of origin. Furthermore, an order to enforce an arbitral award rendered in France in international arbitral proceedings may not be appealed in any manner under article 1504.

Looking at the application of the reciprocity rule in the New York Convention, the extent to which France applies article XIV in enforcing arbitral awards given in other States is uncertain due to a lack of precedent. But since France no longer imposes the \textit{revision au fond} or reciprocity requirement in the process of enforcement of foreign judgments,\textsuperscript{162} and since France will maintain the balance in enforcing foreign arbitral awards under the New York Convention against those to be enforced under the French CCP, the French courts are not likely to

\textsuperscript{159} By Decree no. 81,500, dated May 12, 1981, Book 3 and 4 were introduced into the French Code of Civil Procedure. Book 4 comprises 6 titles, from article 1442 to article 1507, providing for arbitration. Among them, Title 6 applies to the recognition and enforcement of awards rendered abroad or in international matters, in addition to the means of recourse against those awards. Derains, \textit{supra} note 158, at 1.

\textsuperscript{160} \textit{Id.} at 24.


apply the principle of reciprocity in article XIV of the Convention in a broad manner.\textsuperscript{163}

3. The Federal Republic of Germany

The Federal Republic of Germany ("Germany") ratified the New York Convention on June 30, 1961, having invoked only the reciprocity reservation.\textsuperscript{164} Accordingly, the New York Convention is not applicable to awards made in non-contracting States.\textsuperscript{165} Such awards, however, may be enforced in the same manner as domestic awards\textsuperscript{166} unless they are within the scope of other conventions.\textsuperscript{167} In this case, pursuant to article 1042a of the German Code of Civil Procedure,\textsuperscript{168} if the grounds for setting aside the award are specified in article 1041, paragraph 1, the court will order a full trial, including an oral hearing, unless an immediate refusal of the application appears to be justified. Hence, there is no room for reciprocity even if the award is made in other States.

On the other hand, article XIV does have some bearing on awards given in other contracting States\textsuperscript{169} which fall within the scope of the New York Convention. Although there is no directly relevant precedent, the position of the German courts may be inferred from the courts' decisions on the enforcement of foreign judgments. Since the decision of the Federal Supreme Court (Bundesgerichtshof) of Sept. 30, 1964,\textsuperscript{170} the German court has applied the reciprocity rule to foreign judgments less strictly than it previously had.\textsuperscript{171} This less strict reciprocity rule, the "partial reciprocity" rule, means that stricter requirements on certain points can be compensated by more lenient requirements on other

\textsuperscript{163} Even as early as 1914 when the French courts applied revision au fond in enforcing foreign judgments, the Cour de Cassation, in Salles v. Hale et Cie, held that foreign arbitral awards are not subject to revision au fond. See von Mehren, supra note 161, at 1055.

\textsuperscript{164} Int'l Com. Arb., supra note 18, at VI.3, VI.4.

\textsuperscript{165} F.R. Germany, 2 Y.B. COM. ARB. (Int'l Council for Com. Arb.) 233 (1977). In this case the court refused to apply the Convention to the award given in the United Kingdom, which at that time had not acceded to the Convention.


\textsuperscript{167} Germany is party to the Geneva Protocol, the Geneva Convention, the European Convention and the Washington Convention as well as many bilateral treaties. Glossner, Federal Republic of Germany, in 1 International Handbook on Commercial Arbitration 20 (1984).

\textsuperscript{168} ZPO § 1042a; see also O. Glossner, supra note 166, at 46.

\textsuperscript{169} The Court of Appeal of Cologne (Oberlandesgericht Köln), ruled on June 10, 1976 that, though a State of origin was not a party to the Convention when the arbitral award was rendered, the Convention is applicable if the State has become a party when the claimant starts proceedings for obtaining leave to enforce the award. Int'l Com. Arb., supra note 18, at V.105.1.

\textsuperscript{170} Judgment of Sept. 30, 1964, Bundesgerichtshof, W. Ger., 42 BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 194.

\textsuperscript{171} P. Waer, supra note 2, at 57.
points. Nonetheless, this reciprocity requirement still remains an obstacle to the enforcement of foreign judgments. It may be inferred that the German courts do not apply article XIV of the New York Convention to foreign arbitral awards in a more strict manner than they apply the reciprocity rule to foreign judgments.

4. The Netherlands

On December 1, 1986, the Netherlands adopted an extremely modern Arbitration Act, which has been codified as articles 1020 to 1076 in Book Four of the Dutch Code of Civil Procedure ("the Dutch CCP"). Among them, Title 2, composed of articles 1074 to 1076, is devoted to arbitration outside the Netherlands. These provisions distinguish between the recognition and enforcement of foreign awards under treaties, which is provided for in article 1075, and the recognition and enforcement of foreign awards outside the scope of treaties, which is provided for in article 1076. The Netherlands, which ratified the New York Convention on April 24, 1964, has used only the reciprocity reservation. Accordingly, it does not apply the Convention to awards rendered in non-contracting States. If such awards are outside the scope of any convention to which the Netherlands is a party, those awards are to be regulated by article 1076 of the Dutch CCP. In this case, neither the existence of reciprocity nor of documents evidencing the enforceability of the arbitral award in the State of origin is required. Article 1076, paragraph 1 provides only six grounds on which the enforcement of foreign awards can be denied, and these grounds are approximately the same.

172 Id.
173 Id. at 65.
174 The relevant portion of the Dutch Code of Civil Procedure is reproduced in English in van den Berg, The Netherlands, in 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, Annex I (Supp. 7 Apr. 1987) [hereinafter van den Berg, The Netherlands].
175 Although the new French Arbitration Act of 1981 influenced the new Dutch Arbitration Act, the latter is distinguished from the former in that the latter is solely based on a territorial principle. In detail, while the French law attempts to separate international arbitration from domestic arbitration by the character (for example, art. 1492 of the French Arbitration Act), Title I of the Dutch Act, which covers domestic arbitration, applies to any arbitration taking place in the Netherlands, regardless of the party's nationality. See Sanders, The New Dutch Arbitration Act, 14 N. KY. L. REV. 41, 42-43 (1987).
176 Int'l Com. Arb., supra note 18, at VI.3.
177 The Netherlands is also party to the Geneva Protocol, the Geneva Convention and the Washington Convention as well as many bilateral conventions. See van den Berg, supra note 174, at 34-35.
178 van den Berg, The Netherlands, supra note 174, Annex I at 35.
179 In the Netherlands, the enforcement of foreign awards can be denied when the party against whom recognition and enforcement is sought, asserts and proves that;
(A)(a) A valid arbitration agreement is lacking under the law applicable thereto.
as those found in article V of the New York Convention.\textsuperscript{180}

On the other hand, though the Convention is applied to awards rendered in a contracting State, the extent to which article XIV of the Convention is to be applied still remains unsettled. At this point, if the Netherlands is a State where enforcement of the award is sought, the strict interpretation of article XIV may become meaningless. More specifically, if the courts apply article XIV of the Convention in a strict manner, the party to whom the award was made would prefer to invoke the Dutch CCP, which does not impose a reciprocity requirement, rather than the Convention.\textsuperscript{181} Article 1076, paragraph 1 of the Dutch CCP provides, as a condition for application of this provision, that “if an applicable treaty allows a party to rely upon the law of the State in which recognition or enforcement is sought, . . . [an arbitral award’s] enforcement may be sought in the Netherlands” and article VII(1) of the New York Convention, stipulates that “the provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the State where such award is sought to be relied upon,” thus allowing parties to invoke domestic laws. In addition, the grounds listed in article 1076, paragraph 1 of the Dutch CCP do not seem more onerous than the literal reading of those in article V of the Convention. Therefore, it is likely that the Dutch courts will interpret article XIV of the Convention so narrowly as to make it insignificant.\textsuperscript{182}

5. The Republic of Korea

The Republic of Korea ("Korea") acceded to the New York Con-

\begin{itemize}
\item (A)(b) The arbitral tribunal is constituted in violation of the rules applicable thereto.
\item (A)(c) The arbitral tribunal has not complied with its mandate.
\item (A)(d) The arbitral award is still open to an appeal to a second arbitral instance or to a court in the country in which the award is made.
\item (A)(e) The arbitral award has been set aside by a competent authority of the country in which that award was made.
\item (B) [When the court finds that] the recognition or enforcement would be contrary to public policy.
\end{itemize}

\textit{Id.} at 35-36.

\textsuperscript{180} See New York Convention, \textit{supra} note 1, art. V. However, the New York Convention lists one more ground which states that the subject matter of the difference cannot be settled by arbitration under the law of the state of enforcement. \textit{Id.} art. V, 2a.

\textsuperscript{181} Sanders, \textit{supra} note 175, at 60-61.

\textsuperscript{182} This inference is also true of the French courts. See \textit{supra} notes 159-161 and accompanying text.
vention on February 8, 1973, having invoked both the reciprocity reservation and the commercial reservation.\(^{183}\) The New York Convention was incorporated into the law of Korea as treaty law number 471.\(^{184}\) Hence, the Convention applies preferentially to an award made in a contracting State of the New York Convention, and the Korean Arbitration Act\(^{185}\) can be applied to supplement the Convention.\(^{186}\)

A foreign arbitral award not made in a contracting State of the New York Convention or outside the scope of other conventions\(^{187}\) may also be recognized and enforced pursuant to domestic laws, in particular the Korean Code of Civil Procedure ("Korean CCP")\(^{188}\) and the Korean Arbitration Act.\(^{189}\) Under article 12 of the Korean Arbitration Act, an arbitral award shall have the same effect as a final\(^{190}\) judgment by the court, i.e., the award binds the parties. While domestic awards, as a next step, can be enforced by a grant of *exequatur*, normally given by the clerk of the court,\(^{191}\) foreign arbitral awards are regulated by article 203 and articles 476 to 477 of the Korean CCP. For final foreign judgments to be valid, article 203 requires:

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\(^{183}\) Int'l Com. Arb., *supra* note 18, at VI.3, VI.5.

\(^{184}\) The Korean Ministry of Foreign Affairs, 3 Cho-Yak-Gyp (Collection of Treaties) 289 (1976). Mr. van den Berg wonders if implementing legislation for treaties is required in Korea. van den Berg, *Enforcement of Awards*, in *A CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION AND TRANSNATIONAL LITIGATION* 21 (1986). In Korea, pursuant to article 6 of the Korean Constitution, "[t]reaties duly concluded and promulgated in accordance with the Constitution . . . shall have the same effect as that of the domestic law" automatically and without implementing legislation if the treaty is self-executing. HUN BuP (Constitution) art. 6, § 1 (Korea), reprinted in *1 LAWS OF THE REPUBLIC OF KOREA I-2* (4th ed. 1984 & Supp. 1987).


\(^{186}\) Judgment of Apr. 12, 1984, Seoul Civil District Court, case no. 83 ga-hap 7051, Ha-Gup-Sim-Pan-Gyul-Gyp (Collection of Decisions in Lower Courts) 105 (1985) [hereinafter "COLLECTION-LOWER COURTS"].

\(^{187}\) Korea is party to the Korean-American Commercial Treaty. *See* Liew Song Kun, *supra* note 185, Annex 1 at 21.


\(^{190}\) The meaning of "final" is that no ordinary means of appeal to a higher court is available because of either expiration of the period for appeal or because a judgment of the Supreme Court is in question. *KOREAN CODE OF CIVIL PROCEDURE*, supra note 188, art. 471. *See also* the Seoul High Court, Jan. 28, 1983, case no. 82 na 1126, the Korean Ministry of Court Administration, COLLECTION-LOWER COURTS 87, 90 (1984); Choe Kong Woong, *Recognition and Enforcement of Foreign Judgments*, in *INTRODUCTION OF THE LAW AND LEGAL SYSTEM OF KOREA* 1154 (1983).

\(^{191}\) *KOREAN CODE OF CIVIL PROCEDURE*, *supra* note 188, arts. 478-80. Under certain circumstances, however, it shall be rendered by a judge. *Id.* art. 482.
1) That the jurisdiction of the court which made the judgment be acceptable to the laws or treaties of Korea,
2) That, if the losing defendant is a national of Korea, he (she) must have received service of the summons or order necessary for the commencement of the action, other than by publication or have responded to the action without being served,
3) That the foreign judgment is compatible with good morals and the public order of Korea,
4) That reciprocity is guaranteed.

When the foreign judgments or awards valid under article 203 are to be enforced in Korea, they must be adjudged to be legal by a judgment for enforcement from a competent Korean court, pursuant to article 476, paragraph 1 of the Korean CCP. In this proceeding, if the judgment or award rendered by a foreign court or tribunal is not certified to be final, the court shall dismiss the request for enforcement. Otherwise the court must grant the request without reviewing the case on the merits, i.e., without revision au fond.

On the other hand, when a foreign arbitral award made in a State that is a party to the New York Convention is sought to be enforced in Korea, article XIV of the Convention may be invoked as a challenge against the enforcement of the award. Although there has been no case in which article XIV was invoked and disputed, the position of the Korean courts toward the reciprocity rule can be inferred through their application of article 203, paragraph 4 of the Korean CCP in enforcing foreign judgments. In 1971, in a case where the recognition of a decree of divorce given in Nevada was sought in Korea, the Supreme Court of Korea dismissed the request, holding that there was no guarantee that...

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192 Under the Korean Code of Civil Procedure, adjudications by a judge, according to the degree of review of the substance of the case, are classified as judgment, decision or order.
193 See KOREAN CODE OF CIVIL PROCEDURE, supra note 188, article 477, paragraph 2-1. Professor Liew Song Kun is of the opinion that, in a proceeding for enforcement of an award to which the New York Convention is not applied, an exequatur is needed from the State of origin of the award because article 477, paragraph 2-1 should be interpreted as “certified to be final and enforceable in the State of origin.” See Liew Song Kun, supra note 185, Annex 1 at 22. But this author cannot agree with this opinion not only because it is inappropriate to interpret the word “final” so narrowly (see supra note 190), but because the requirement of double-exequatur is not desirable. Therefore, this author believes that it is sufficient for the plaintiff to submit to the court as proof, (1) the duly authenticated original award or a duly certified copy thereof and (2) the original agreement or a duly certified copy thereof, as provided by article IV of the New York Convention; see also Choe Kong Woong, Oe-guk-pan-gyul-eu-Seung-in-gwa-Jip-haeng (Recognition and Enforcement of Foreign Judgments), KUK-JE-So-SONG (International Litigation) 405, 406 (1988).
194 KOREAN CODE OF CIVIL PROCEDURE, supra note 188, art. 477, para. 2.
195 Id. art. 477, para. 1.
196 The Seoul High Court has ruled that “in deciding whether reciprocity exists, the nationality of the party should not be considered.” Judgment of Mar. 9, 1988, Seoul High Court case no. 87 na 2251. This decision is reproduced in Choe Kong Woong, supra note 193, at 428-14-16.
197 Judgment of Oct. 22, 1971, Supreme Court of Korea, case no. 71 da 1393, 19(3) DAE-BUP-
the United States would recognize similar judgments or decrees made in other States. The Court defined "reciprocity is guaranteed" to mean that "the foreign State, under its treaties or domestic laws, recognizes the judgment rendered in Korea without reviewing it on the merits on the same as or on more favorable conditions than listed in article 203 of the Korean CCP." Since this judgment, however, many authors have insisted that because the United States' attitude toward reciprocity has grown more lenient, this holding must be reversed. Following this rationale, the Seoul Civil District Court granted the recognition of a foreign decree rendered in Massachusetts, ruling that "there exists a guarantee of reciprocity between Korea and the United States, for the holding of Hilton v. Guyot and Section ninety-nine of Restatement of the Law, Second, Conflicts of Laws (1971) are compatible with the effect of articles 203, 476, and 477 of the Korean CCP." This judgment became final. Eventually, in its judgment of April 14, 1987, the Supreme Court changed its hostile attitude toward U.S. judgments. The respondent in this case obtained a divorce decree from the Supreme Court of Tompkins County in New York State, which granted her the right to raise their child and ordered the petitioner to pay alimony and child support. Against the petitioner's action of divorce in Korea, the respondent filed a counterclaim which had the same cause of action as the New York court's decree. The Supreme Court of Korea held, without mentioning reciprocity, that the court below should have examined the validity of the New York decree and whether the counterclaim should be dismissed because of res judicata.

A similar change has evolved in connection with Japan. In 1983, the Seoul High Court dismissed a request for enforcement of a foreign judgment made in Japan, holding that the fact that article 200 of the Japanese Code of Civil Procedure is the same as article 203 of the Korean CCP is not sufficient to establish that Japan guarantees reciprocity. In 1985, however, the Seoul High Court granted the enforcement

WON-PAN-RYE-GYP (Collection of the Supreme Court's Decisions) 47-48 (1972) [hereinafter COLLECTION-THE SUPREME COURT].

198 Id.
199 Id. at 48.
201 Judgment of Sept. 12, 1984, Seoul Civil District Court case no. 84 ga-hap 344, COLLECTION-LOWER COURTS 343 (1985).
203 Id. at 47.
204 See the Seoul High Court, supra note 190, at 90.
of a foreign judgment given in Japan, holding that:

[R]eciprocity is guaranteed not only when Japan, pursuant [to] its treaties and laws, has recognized and enforced judgments given in Korea on the same as or on more favorable conditions than Korea without reviewing the case on the merits, but also when the Japanese courts are expected practically to recognize our judgments, even though there exists no case to have done so specifically in Japan.\(^\text{205}\)

Furthermore, the court related, "there are provisions analogous to article 203 of the Korean CCP in the Japanese Code of Civil Procedure and practices deferring to foreign judgments leniently."\(^\text{206}\)

In line with the aforementioned judgment of 1985, the Seoul High Court also granted enforcement of a German judgment on the ground that the conditions for enforcing foreign judgments listed in article 328 of the German CCP are analogous to those listed in article 203 of the Korean CCP and that Germany does not demand reciprocity with regard to foreign judgments other than property rights.\(^\text{207}\)

On the other hand, the Supreme Court has ruled that "there exists no reciprocity between Korea and Australia since, under the common law of the latter, its courts are deemed to review the merits of the case."\(^\text{208}\)

As considered above, the Korean courts tend to examine the guarantee of reciprocity with foreign States not so much on the basis of specific precedents in those States as on the basis of the probability that those States would enforce judgments given in the Korean courts, which is inferred from provisions in the treaties and laws of those States. Thus, in applying article XIV of the New York Convention to a specific foreign arbitral award, the Korean courts are likely to examine the provisions or general practices of a State of origin, even in the absence of direct precedent.

V. CONCLUSION

In international relations, each sovereign State strives to secure its own interests or prerogatives and those of its nationals overseas, at least to the same degree that the State accords protection to other States or their nationals. Accordingly, it is natural that, in view of the equality of sovereign States, a State should grant the enforcement of foreign judicial


\(^{206}\) Id.

\(^{207}\) Judgment of Aug. 20, 1985, Seoul High Court, case no. 84 na 3733. This decision is reproduced in Choe Kong Woong, \textit{supra} note 193, at 428-2, 428-3.

acts in its territory only on the condition that its judicial acts also are granted authority outside the State by other sovereign States. To achieve this goal, the principle of reciprocity may be the most effective and appropriate method by which inhospitable States are warned or coaxed to behave more amicably. This general trend has naturally been pursued in the area of the recognition and enforcement of foreign arbitral awards and therefore, for practical reasons, the Drafting Committee of the New York Convention inserted the reciprocity clause. As discussed in detail, however, the reciprocity rule is not necessarily effective or appropriate in the arena of international commercial arbitration. Rather, the rule may reduce the applicability of the New York Convention because of retaliation among States.

Although the application of article I(3) of the Convention will become less difficult as more States become parties, the Convention may be applied even more predictably and positively by excluding the applicable-law test from the scope of the reciprocity reservation. In other words, by applying the reciprocity rule to an award made in another State, the State of enforcement should inquire only if the award was given in the territory of another contracting State, regardless of which law was applied to the award. Furthermore, regardless of whether the applicable law is that of a contracting State, the reciprocity rule of article I(3) should not be applied to an award which is considered as non-domestic because it was made under the law of another State.

Article XIV should not be totally ignored and excluded in considering the commercial reservation, arbitrability or public policy in applying the New York Convention. However, to encourage and facilitate the use of international commercial arbitration, the interpretation of the provision should be as narrow as possible. In other words, the parties should be able to anticipate the probability of enforcement of the award in other States before agreeing to submit their dispute to arbitration.

Therefore, as the first step, the burden to prove the lack of reciprocity between the State of origin and the State of enforcement should be on the party attacking the award. Accordingly, if the party attacking the award cannot prove the lack of reciprocity, the court of enforcement should assume that reciprocity is guaranteed in the former State. As the next step, the existence of reciprocity should be judged according to the law, treaties or general practices of the State of origin, even if no specific precedent exists in that State. In light of this, although the State of enforcement cannot avoid applying the reciprocity rule to the com-

209 See supra note 86 and accompanying text.
210 See supra notes 76-85 and accompanying text.
211 A. VAN DEN BERG, supra note 18, at 13.
212 See supra text accompanying note 112.
213 See supra text accompanying notes 141-44.
mercial reservation of the State of origin, the State of enforcement should judge the probability that an award given in its territory on the same subject matter may be enforced in the State where the award in question was made.214

Moreover, in some countries, such as France or the Netherlands,215 the result in the enforcement of foreign arbitral awards is the same under both the New York Convention and domestic law. Hence the national courts need not make efforts to deprive the award of the applicability of the Convention by interpreting article XIV strictly.

In sum, in order to ensure the significance and success of international commercial arbitration, national courts should interpret narrowly the principle of reciprocity in the New York Convention. For if each sovereign State applies the reciprocity rule more leniently, this principle will, by its own nature, become less important in international commercial arbitration.

214 See supra text accompanying notes 139-40.
215 See supra text accompanying notes 157-63 and 174-82.