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Settlement of commercial disputes

Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention")

Compilation of comments by Governments

Addendum*

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* The submission of this document was delayed because it contains comments received in response to a Note Verbale circulated on 4 March 2008.

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II. Comments received from Governments on the Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

1. Argentina

[Original: Spanish]
[13 May 2008]

The Argentine Government agrees that it is desirable to promote the uniform interpretation and application of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards in order to enhance legal security in the field of international trade.

Regarding the interpretation of article II, paragraph 2, of the New York Convention, it would be in the interests of the uniform application of the Convention for the circumstances described not to be considered exhaustive, other means being permitted to satisfy the requirement that the agreement be in writing, provided that the method used does not leave any interpretative doubts as to whether the parties to the transaction wished in fact to submit the difference in question to arbitration. In Argentina, the writing requirement can be met by an electronic document bearing a digital signature in line with the procedures set out in the legislation (article 1012 of the Civil Code and articles 6 and 12 of the Digital Signature Law, Law 25,506, adopted on 14 November 2001, and its Implementing Decree 2628 of 19 December 2002). The Argentine Government also considers that the possibility of using electronic media does not cover the hypothesis that the agreement to submit the differences to arbitration arises from an "international treaty", the conclusion of which is subject to the provisions of the 1969 Vienna Convention on the Law of Treaties.

With regard to the interpretation of article VII, paragraph 1, of the New York Convention, it is in conformity with the National Constitution of the Republic of Argentina and international public law that all parties wishing to have awards enforced under the auspices of this Convention may avail themselves of all the rights and guarantees provided for in local law under national legislation and/or international agreements to which the Republic of Argentina is party. This enjoyment of rights and guarantees must nevertheless take place in accordance with applicable national and international law, including the relevant provisions on precedence and interpretation.

Finally, Argentine legislation does not require the Judicial Power to interpret an arbitration agreement or any other arbitration matter "in favour of arbitration". Any interpretation of the New York Convention or other treaty on the matter must therefore be subject to the strict application of the provisions on the interpretation of international treaties.

2. Bahrain

[Original: English]
[19 May 2008]

In this regard, the Permanent Mission has the honour to confirm that the Government of the Kingdom of Bahrain agrees with the Recommendation after consultation with the competent authorities.

3. El Salvador

[Original: Spanish]
[23 May 2008]

Article II provides that an arbitration agreement between the contracting States shall be recognized subject to the sole formal requirement that the agreement be in writing. Paragraph 2 defines "agreement in writing" and stipulates that this must be a contract or an agreement signed by the parties contained in an exchange of letters or telegrams. In that connection, we believe it would be appropriate to broaden the definition to allow for the possibility that the agreement between the parties may be concluded by any means of communication that may become available, provided that it takes a form deserving full confidence, in the sense that what the parties have agreed remains recorded in writing, allowing the possibility of access to the agreement at a later date if required.

4. Latvia

[Original: English]
[9 May 2008]

Paragraph 1 of the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session (hereinafter – Recommendation) does not have an impact on the implementation and application of the Convention in Latvia.

Paragraph 1 of the Recommendation states that article II, paragraph 2, of the Convention should be applied recognizing that the circumstances described therein are not exhaustive. In accordance with national legislation of Latvia an arbitration court agreement shall be entered into in written form. Such agreement entered into by exchange of letters, faxes or telegrams or utilisation of other means of telecommunication so as to ensure that the intent of both parties to refer a dispute or a possible dispute for resolution to an arbitration court is recorded, shall also be considered an agreement in writing. Thus, the provisions of legislation in Latvia already comply with paragraph 1 of the Recommendation.

Similarly, paragraph 2 of the Recommendation does not affect the implementation and application of the Convention in Latvia. The respective paragraph provides that article VII, paragraph 1, of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

In accordance with national legislation of Latvia if an arbitration court agreement does not stipulate under the laws of what State the validity of such agreement is to be determined, the applicable law for the arbitration court agreement shall be determined in accordance with conflict of law norms. The conflict of law norms often indicates that the legislation of Latvia is applicable.

Currently Latvia is not a party to any treaty, which along with the above mentioned Convention would address matters of arbitration court agreements or arbitral awards. Though if Latvia was a party to such an agreement, the law of Latvia would not prohibit referring to provisions of such a treaty.

5. Netherlands

[Original: English]
[6 May 2008]

The Netherlands accept the Recommendation regarding article II, paragraph 2 and article VII, paragraph 1 of the 1958 New York Convention. The Netherlands have no further comments to make.

6. Paraguay

[Original: Spanish]
[21 May 2008]

Proposed modification with regard to article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, hereinafter referred to as the "New York Convention of 1958".

The article states:

"Article II … 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

The United Nations Commission on International Trade Law (UNCITRAL) is proposing that the article be applied recognizing that the circumstances described therein are not exhaustive in terms of what is considered to be a "written agreement".

Opinion

Pursuant to article II, paragraph 2, the agreement in writing refers to an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

The suggested modification aims to allow for a broader interpretation of the terms arbitral clause and arbitration agreement, agreements which are invariably in writing.

Pursuant to article 10 of Law No. 1879 of the Republic of Paraguay on Arbitration and Mediation, arbitration agreements must be in writing. If this formal requirement is not met, the arbitration agreement is rendered null and void pursuant

to article 357 of the Civil Code, under which the agreement is a legal act which does not comply with the formal requirements stipulated by the law.

As matters related to the nullity of legal acts are matters of public policy, these provisions must be taken into account, as otherwise the arbitral award could be unenforceable pursuant to the provisions of article V, paragraph 2 (b), of the New York Convention of 1958.

In line with the above, we would agree to the proposed modification on condition that it is clear that the circumstances described in the modification must refer to agreements in writing. This may be obvious considering that the paragraph refers to "agreements in writing".

Proposed modification with regard to article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, hereinafter referred to as the "New York Convention of 1958".

This article states:

> "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

The recommended modification is that the article should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

Opinion

In our opinion, the modification should refer not to the arbitration agreement but to the protection of the rights that the interested party may rely upon to ensure the validity of the award for enforcement purposes. In that case, the recommendation would be consistent with the provisions of article VII of the New York Convention of 1958 on the enforcement of arbitral awards.

We suggest the following modification: "It is recommended that article VII, paragraph 1, of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where the arbitration award is sought to be relied upon, to seek recognition of the validity of such an award".

7. Spain

[Original: Spanish]
[8 May 2008]

With reference to the deliberations conducted by the United Nations Commission on International Trade Law at its fortieth session, held in Vienna from 25 June to 12 July 2007, in the context of which the Commission advocated

the circulation to States of the Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, the Secretariat invited the Government of Spain to submit any comments that it wished to make on the impact that the Recommendation might be expected to have in its jurisdiction in relation to the implementation of the Convention and the need to promote its uniform interpretation.

Article II (2) of the New York Convention establishes two requirements, signature and exchange of documents, as factors that can meet the writing requirement. [1] Both have been interpreted differently by the courts in various countries. According to the strictest application, only agreements signed by both parties or contained in an exchange (submission of offer and written acceptance) are valid arbitration agreements under the New York Convention. Consequently, agreements initially in writing that are contained, for example, in contracts which are accepted by deeds of execution would not constitute valid arbitration agreements under the Convention, nor would agreements concluded by means of communication other than letters or telegrams, although there have been few such judicial rulings. Under this strict interpretation, it is understood that the form requirements are established solely and exclusively by the New York Convention and that its stipulations therefore prevail over any other statutory provisions concerning the form of agreement, whether those provisions are more rigorous or less rigorous, and with no possibility of the use of such provisions as criteria for interpreting the Convention.

The strict interpretation has been surpassed in various ways, although particularly noteworthy is the application of article VII (1) of the New York Convention, on which the UNCITRAL interpretative Recommendation also has a bearing. Article VII (1), which is known as the most-favourable-provision clause, makes it possible not to apply national provisions on enforcement that are more rigorous than those set out in the Convention and at the same time allows more favourable national provisions to continue to apply. By extending this criterion to the form requirements governing arbitration, it would accordingly be permitted to apply more flexible provisions of national law, with primacy over article II (2) of the Convention. The application of article VII of the Convention obviously clashes with the stricter interpretation of article II (2) since, according to that interpretation, article II (2) establishes a uniform rule of formal validity, which thus prevails over national form requirements.

Faced with that dismal picture of legal uncertainty surrounding the interpretation of the New York Convention, UNCITRAL adopted the Recommendation regarding its interpretation, which is aimed primarily at the courts and is of particular importance in achieving a uniform interpretation of the Convention, especially in certain jurisdictions. UNCITRAL accordingly:

> “1. Recommends that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

[1] The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

"2. Recommends also that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be replied upon, to seek recognition of the validity of such an arbitration agreement."

The Arbitration Act currently in force in Spain (Law No. 60/2003 of 23 December) is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 and, as stated in the preface to that Act, its drafting additionally took into account UNCITRAL's work on revising the Model Law, which was being carried out at that time and was finally completed in 2006, in relation to two issues: the arbitration agreement and interim measures. Although article 9 of the Arbitration Act, which deals with arbitration agreements, embodies the principle of written form for the agreement, that is done for evidentiary purposes and not for reasons of formal validity, and, as such, it is modelled on option I of article 7 of the Model Law, as amended in 2006.

In Spain, the courts of first instance generally have jurisdiction regarding the enforcement of foreign awards following the revision of the 2003 Arbitration Act, which removed such powers from the Supreme Court. While the Recommendation does not affect the exercise of jurisdiction of the courts, it could be endorsed by reason of the authority from which it emanates. It is nevertheless true that Spanish courts have interpreted the New York Convention flexibly and in accordance with the principle of favor arbitralis or the presumption favourable to the recognition of awards, which is derived from articles IV and V of the Convention.[2] Accordingly, article II (2) of the Convention has been interpreted in such a flexible manner, in line with the UNCITRAL Recommendation and in accordance with an interpretative criterion based on the will of the parties to conclude the arbitration agreement.[3] Similarly, article II (2) of the Convention has been interpreted in the light of the principle of maximum efficacy contained in article VII (1) and it is thus recognized that article VII also applies to article II (2).[4] It is therefore to be expected that judicial rulings will follow an interpretation such as that recommended by UNCITRAL.[5]

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[2] See legal grounds concerning the existence of this presumption: Supreme Court decision, 5 May 1998 (Law Report 4296); Supreme Court decision, 20 July 2004 (Law Report 5817), and Barcelona Provincial Court judgment, 29 March 2006 (Law Report 226821).

[3] Barcelona Provincial Court judgment, 29 March 2006 (Law Report 226821), and Madrid Provincial Court decision, 11 June 2007 (Law Report 336734).

[4] Supreme Court judgment, 14 November 2007 (Law Report 20008/16).

[5] Also, article 46.2 of the Arbitration Act lays down that: "[t]he enforcement of foreign awards shall be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, without prejudice to the provisions of other international agreements that are more favourable to the granting thereof, and shall follow the procedure established in civil procedural law for the enforcement of judgments rendered by foreign courts."

8. Turkey

[Original: English]
[21 May 2008]

With the adoption of the Law on International Arbitration No. 4686 of 21 June 2001, allowing the use of new means of communication for the conclusion of an arbitration agreement, Turkey's legislation is in conformity with the UNCITRAL Recommendation of 7 July 2006, regarding the interpretation of article II paragraph 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, on 10 June 1958.

The second paragraph of the said Recommendation relating to article VII, paragraph 1 seems consistent with the aim of the Convention to encourage enforcement of awards in the greatest number of cases as possible.

Turkey welcomes this Recommendation and believes that it will contribute significantly to the uniform interpretation of the Convention.