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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

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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. Guatemala

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[9 June 2008]

I. The first recommendation adopted is that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, should be applied recognizing that the circumstances described in it are not exhaustive.

My views with reference to this recommendation are as follows:

1. One of the validity requirements of the arbitration agreement, whether an arbitration clause or a separate agreement, relates to the form, i.e. the agreement has to be "in writing".

2. The Arbitration Act of Guatemala, which reproduces almost literally the UNCITRAL Model law, regulates matters relating to the arbitration agreement in its article 10, whose paragraph (1) is broadly worded in stipulating that "[t]he agreement shall be understood to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams, telecopies or other means of telecommunication that provide a record of the agreement". It is thus clear that the agreement has to be made in writing or there has to be written record of the agreement.

3. The recommendation that the aforementioned paragraph be applied recognizing that the circumstances described in it are not exhaustive, i.e. that it could apply to other circumstances that are not expressly set out, has, I believe, arisen from the fact that most legislations have not made provision for "electronic mail". Therefore, the recommendation that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards "be applied recognizing that the circumstances described therein are not exhaustive" should be accepted provided that there is a record in writing.

4. That could be by means of electronic mail, since in this way such a record will in all cases be made.

II. The second recommendation is 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.

It should be noted that articles 46, 47 and 48 of Guatemala's Arbitration Act, which deal with the recognition and enforcement of awards, guarantee inter alia the right to due process and the right of defence.

I therefore consider this recommendation to be acceptable to our country since paragraph 1 of article VII of the New York Convention provides for the same guarantees in stipulating in its latter part the following: "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 treaties of the country where such award is sought to be relied upon".