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Settlement of commercial disputes

Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

Note by the Secretariat

Contents

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") and article II, paragraph (2), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").[1] At its thirty-fourth session (Vienna, 25 June-13 July 2001), the Commission noted that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention.[2]

2. At its thirty-fifth session (New York, 17-28 June 2002), the Commission noted that the Working Group had discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention. The Commission noted that the Working Group could not, at that stage, reach a consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have time to consult on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention, as noted by the Commission at its thirty-fourth session.[3]

3. The Working Group considered the topic of the written form requirement contained in article II, paragraph (2), of the New York Convention and the preparation of an interpretative instrument at its thirty-second (Vienna, 20-31 March 2000),[4] thirty-third (Vienna, 20 November-1 December 2000),[5] thirty-fourth (New York, 21 May-1 June 2001),[6] thirty-sixth (New York, 4-8 March 2002),[7] and forty-fourth (New York, 23-27 January 2006)[8] sessions.

I. Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

4. The text of the draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention, as agreed by the Working Group at its forty-fourth session,[9] reads as follows:

> "*Declaration regarding 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 United Nations Commission on International Trade Law,*

"[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

"[2] *Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference 'considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes',

"[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Taking into account* article VII, paragraph (1), of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

"[9] *Considering* the wide use of electronic commerce,

"[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

"[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

"[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

"[13] *Recommends* that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,

"[14] *Recommends* 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."

II. Notes on the draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

5. The discussions in the Working Group initially focussed on article II, paragraph (2), of the New York Convention and on the various options available to deal with difficulties that had arisen in its interpretation. The Working Group was generally of the view that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form, and that the practice in some respects was no longer reflected by the position set forth in article II, paragraph (2) (and other international legislative texts modelled on that article), if interpreted narrowly.[10] The Working Group discussed possible alternative ways of achieving a broader interpretation of article II, paragraph (2).[11] These included a protocol amending the terms of article II, paragraph (2); adoption of a declaration, resolution or statement addressing the interpretation of the New York Convention and providing that, for the avoidance of doubt, article II, paragraph (2) was intended to cover certain situations or to have a certain effect; encouraging a liberal interpretation of the New York Convention by following the approach of some courts of interpreting article II, paragraph (2) in the light of the Arbitration Model Law;[12] and preparing practice guidelines or notes proposing that article 7 of the Arbitration Model Law could be used as an interpretation tool to clarify the application of article II, paragraph (2).[13]

6. The prevailing view was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of article II, paragraph (2) would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach.[14]

7. At its thirty-sixth session (New York, 4-8 March 2002), the Working Group discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention, in order to offer guidance on the interpretation and

application of the writing requirement contained in that article and to achieve a higher degree of uniformity. Article II, paragraph (2) has been the subject of different interpretations in State courts. In particular, what is meant by the term "signature", whether the signature requirement applies to both the arbitration clause in a contract as well as the arbitration agreement and what is required by an "exchange of letters or telegrams" are all matters on which there have been different and sometimes conflicting interpretations.[15] A/CN.9/WG.II/WP.139. The differing interpretations in State courts originated as well from the differences of expression between the five equally authentic texts of the New York Convention. Such differences were partly due to the fact that, for example, in the English version, the definition of "agreement in writing" (by using the word "includes") appeared to provide a non-exhaustive list of examples whereas some of the other equally authentic language versions appeared to provide an exhaustive list of elements of the definition.[16]

8. The draft declaration considered by the Working Group at its thirty-sixth session (New York, 4-8 March 2002) contained the recommendation or declaration that the definition of 'agreement in writing' in article II, paragraph (2), of the New York Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]".[17] Views were expressed in the Working Group that the draft legislative provisions revising article 7 of the Arbitration Model Law being considered by the Working Group differed significantly from article II, paragraph (2), of the New York Convention in that, for example, under the draft legislative provision, an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II, paragraph (2), of the New York Convention, as interpreted in many legal systems, it would not be so regarded.[18] Views were therefore expressed that it might not be appropriate to use an interpretative instrument to declare that article II, paragraph (2), of the New York Convention should be interpreted as having the meaning of the revised draft article 7 of the Arbitration Model Law. In considering the possibility of amending the Arbitration Model Law as a tool for interpreting article II, paragraph (2), of the New York Convention (without amending the New York Convention), the Working Group noted as well that national legislation might operate in the context of the more-favourable-law provision of article VII, paragraph (1), of the New York Convention.

9. At its forty-fourth session (New York, 23-27 January 2006), the Working Group proceeded to consider the text of a draft interpretative declaration on the interpretation of article VII, paragraph (1), of the New York Convention. That approach was considered as encouraging the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encouraging States to adopt the revised version of article 7 of the Arbitration Model Law and pro-enforcement laws.[19] At that session, the Working Group agreed to include in the draft declaration provisions clarifying the meaning of article II, paragraph (2), of the New York Convention.[20]

10. It should be noted that the acceptability of allowing less restrictive form requirements to operate through article VII, paragraph (1), of the New York Convention would depend on whether article II, paragraph (2), of the New York Convention was regarded as establishing a requirement of form from which States

may depart when their national law on the form requirement is more favourable (thus leaving States free to adopt less stringent requirements) or whether the New York Convention was interpreted as providing a unified form requirement which arbitration agreements must comply with under the New York Convention. Courts, in many States, have established a clear position as to the circumstances in which article VII, paragraph (1) might be applied to uphold arbitration agreements where the form requirement set out in article II, paragraph (2) would otherwise not be met. The advantage of applying article VII, paragraph (1) would be to avoid the application of article II, paragraph (2) and, as States would enact more favourable provisions on the form requirement for arbitration agreements, would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations. Encouraging the wide adoption by States of article 7, paragraph (2), of the Arbitration Model Law, as proposed to be revised, could provide a useful means of achieving greater uniformity as to the form requirement. A declaration encouraging the application of more favourable legislation would have the added advantage of overcoming the requirement in article IV of the New York Convention regarding the presentation of an original of the arbitration agreement or a certified true copy. The Working Group had already proposed the deletion of that requirement from article 35, paragraph (2), of the Arbitration Model Law.[21]

11. The Commission might also wish to discuss the extent to which these considerations relating to article VII, paragraph (1), of the New York Convention might have an impact on future work regarding the Arbitration Model Law. Certain provisions of the Arbitration Model Law, which mirror the text of the New York Convention, such as for example, articles 7 and 35, paragraph (2), are proposed to be amended, so as to create more liberal rules, consistent with modern practice. The Commission might wish to discuss the extent to which the Arbitration Model Law might become the instrument through which the enforcement regime would be modernised. An alternative would be to further the modernization efforts by preparing an international binding instrument on international commercial arbitration, which would consist in developing the principles of the Arbitration Model Law into a convention, still allowing the existing instruments to operate in harmony.

12. When the Commission considered the possibility of preparing model legislation with a view to superseding article II, paragraph (2), of the New York Convention by relying on article VII, paragraph (1), of the New York Convention, it was suggested to establish (in addition to model legislation) guidelines or other non-binding material to be used by courts as guidance from the international community in the application of the New York Convention. It was said that such a non-binding commentary formulated by the Commission could speed up the process of harmonization of law and its interpretation.[22] The Commission might wish to provide further guidance on that matter.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 344-350 and para. 380.

[2] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 313.

[3] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 183.

[4] A/CN.9/468, paras. 88-106.

[5] A/CN.9/485, paras. 60-77.

[6] A/CN.9/487, paras. 42-63.

[7] A/CN.9/508, paras. 40-50.

[8] A/CN.9/592, paras. 82-88.

[9] Ibid., and annex III to A/CN.9/592.

[10] A/CN.9/468, para. 88.

[11] A/CN.9/468, paras. 88-99.

[12] A/CN.9/WG.II/WP.108/Add.1, para. 36 and footnote 9.

[13] A/CN.9/WG.II/WP.108/Add.1, paras. 33 and 34.

[14] A/CN.9/468, paras. 88-99.

[15] A/CN.9/WG.II/WP.139.

[16] A/CN./9/592, para. 87.

[17] A/CN.9/508, paras. 40-50.

[18] A/CN.9/508, para. 45.

[19] A/CN.9/592, paras. 85-86.

[20] Ibid., para. 88.

[21] A/CN.9/592, paras. 76-80.

[22] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 348, and A/CN.9/WG.II/WP.108/Add.1, para. 34.