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**United Nations Commission  
on International Trade Law**
**Forty-first session**

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**Report on the survey relating to the legislative  
implementation of the Convention on the Recognition and  
Enforcement of Foreign Arbitral Awards (New York, 1958)**
**Note by the Secretariat\***
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## I. Introduction

1. At its twenty-eighth session (Vienna, 2-26 May 1995), the Commission decided to undertake a survey with the aim of monitoring the implementation in national laws of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or the “Convention”) and of considering the procedural mechanisms that various States have put in place to make the Convention operative.<sup>1</sup> The Secretariat of UNCITRAL, in cooperation with the Arbitration Committee of the International Bar Association, prepared a questionnaire circulated to States parties to the Convention (“the Questionnaire”). A copy of the Questionnaire is attached hereto as Annex I.

2. The central issues, which were to be considered in analysing the responses to the Questionnaire, were as follows: (i) how was the New York Convention incorporated into the national legal system so that its provisions had the force of law? (ii) In implementing the New York Convention, have States parties added to the uniform provisions of the Convention? (iii) if reservations were taken in implementation, did the implementation of these reservations add or broaden the reservations that are permitted under the New York Convention? (iv) In implementation, have States parties included additional requirements for the recognition and enforcement of arbitral awards that are not provided for in the New York Convention?<sup>2</sup>

3. The purpose of the project, as approved by the Commission, was limited to monitoring the legislative implementation of the New York Convention, including identifying trends in court interpretation of the Convention. The project was not intended to consider individual court decisions applying the New York Convention as this went beyond its purpose.<sup>3</sup>

4. At the thirty-eighth session of the Commission (Vienna, 4-15 July 2005), a brief interim report (A/CN.9/585) based on replies sent by 75 States was presented by the Secretariat. The Commission welcomed the progress reflected in the interim report, noting that the general outline of replies received served to facilitate discussions as to the next steps to be taken and highlighted areas of uncertainty where more information could be sought from States or further studies could be undertaken. The Commission noted that the following questions might be addressed to States in order to obtain more comprehensive information regarding implementation practice: (i) what are the potentially negative impacts of the reservations upon the harmonizing effect of the New York Convention? (ii) How is article II implemented in legislation, and in particular how does the law determine whether an arbitration agreement qualifies for referral to arbitration under the New York Convention? (iii) What is the practice in each State regarding the application of article VII of the New York Convention? Further information on the content of domestic legislation that States considered as more favourable than the

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<sup>1</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404.

<sup>2</sup> *Ibid.*, para. 401.

<sup>3</sup> *Ibid.*, para. 402.

conditions established under the New York Convention would prove useful, namely in identifying possible trends in that field.<sup>4</sup>

5. At its fortieth session (Vienna, 25 June-12 July 2007), the Commission was informed that the Arbitration Committee of the International Bar Association had actively assisted the Secretariat in gathering information required to complete the report.<sup>5</sup> The Commission further noted that the Commission on Arbitration of the International Chamber of Commerce (ICC) had created a task force to examine the national rules of procedure for recognition and enforcement of foreign arbitral awards on a country-by-country basis, with the aim of issuing in 2008 a report on national rules of procedure for use by practitioners.<sup>6</sup> The Secretariat and the members of the task force of the Commission on Arbitration of the ICC noted that, although both questionnaires covered procedural implementation of the New York Convention, there was no duplication of work as the purpose of the projects were different. Both organizations agreed to cooperate and exchange information collected during the project implementation.

6. As of February 2008, 108 of the 142 States parties to the New York Convention had submitted responses to the Questionnaire. Annex II contains a list of States having replied to the Questionnaire and an indication of the date of receipt of the responses by the Secretariat. The Secretariat has prepared a compilation of the responses, as submitted by States. An example of such compilation relating to the question of time limitation for applying for recognition and enforcement of a Convention award is attached as an annex to document A/CN.9/656/Add.1. The Commission may wish to consider whether the compilation of responses by States should be made publicly available by the Secretariat on the UNCITRAL website. It should be noted that responses to the Questionnaire were provided by a number of States at the beginning of the project and might therefore be, in certain instances, outdated. Due to the fact that the method of collecting information did not allow for coordination, the compilation of replies revealed some divergences and inconsistencies in the manner in which questions were dealt with.

7. The report, which has been prepared on the basis of the responses to the Questionnaire is not exhaustive and seeks only to highlight the main trends that could be identified. It consists of a general part, which deals with the implementation and interpretation of the New York Convention, and one addendum, which deals with the requirements and procedures applicable to the enforcement of a Convention award. The additional questions which were identified by the Commission at its thirty-eighth session (see above, paragraph 4) are not covered in the report, as very few responses were received so far by the Secretariat.

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<sup>4</sup> *Ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 188-191.

<sup>5</sup> *Ibid.*, *Sixty-second session, Supplement No. 17* (A/62/17, part I), para. 207.

<sup>6</sup> *Ibid.*

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## II. Implementation of the New York Convention

### A. Ratification of, or accession to, the New York Convention and its implementation in domestic legislation

8. The Questionnaire addressed the general question of how the New York Convention gained force of law in the Contracting States. States were invited to provide an indication whether the legislative action was limited to authorizing ratification of, or accession to, the Convention or whether it included adoption of legislation implementing the Convention. The Questionnaire contained a series of more detailed questions on the legal significance of the text of the Convention when States adopted a legislation implementing the Convention.

#### 1. Legislative actions

9. States provided information on the procedures at the national level, which were required in accordance with their Constitution before expressing consent to be bound internationally.<sup>7</sup> Constitutions prescribed a variety of procedures for authorizing the ratification of, or accession to, a treaty or a convention. Many States required, at the national level, both approval by the Executive and the Legislature, whereas, in some others, a “declaration of ratification” or “proclamation” by the head of State – such as the sovereign, presidium, president or prime minister – was sufficient.

10. States described how the Convention, once procedures at both the national and international levels were completed, gained force of law in their internal legal order. For a vast majority of States, the New York Convention was considered as “self-executing”, “directly applicable” and becoming a party to it put the Convention and all of its obligations in action. Most of those States mentioned that, in accordance with their Constitution, conventions “enjoy a hierarchy above laws”, “form an integral part of domestic law and prevail over any contrary provision of the law”, or that “they have force of law after their conclusion, ratification and publication according to the established procedures”.

11. For a number of other States, the adoption of an implementing legislation was required for the Convention to gain force of law in their internal legal order. As formulated in one response, “the text of the Convention has no legal significance. It is an international treaty and such treaties are not self-executing in the law but are seen as actions of the executive.” In many of those States, implementing legislation had been adopted, and such legislation took various forms, such as an “Arbitration Act, to which the Convention is attached as a schedule”, “the enactment of a special act on Foreign Arbitral Awards”, or the “enactment of a legislative decree”. One State mentioned that, “following the signing of the New York Convention by the President and its approval by the Senate, a number of laws were amended to give effect to the Convention”.

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<sup>7</sup> Enacting procedures at the national level should be differentiated from ratification at the international level, which indicates to the international community a State's commitment to undertake the obligations under a treaty.

12. The responses given by a few Contracting States showed that, although the Convention was duly ratified, it might be deprived of internal effect. One State, the legal system of which required implementing acts, reported that the Convention was ratified over forty years ago, but the Convention was not in force in that State as no legislative act had been adopted. In another response, it was indicated that the National Assembly did not enact legislation after the Convention entered into force in the State. The only text that had been issued was a notification to official bodies in the State that the State had become a party to the Convention. The legal value of that procedure was said to be unclear. Changes of varying scope might have been introduced in the implementing legislation, including only a partial adoption of the Convention. For instance, in one response, it was stated: "The Convention is not binding on the national courts apart from the sections that are replicated in the Act, which would be enforced by virtue of being national statutory law as opposed to being articles of the Convention."

13. By ratifying a convention, a State undertakes the legal obligations under the convention at the international level and should give effect to the convention domestically by enacting any legislation necessary to that effect. The Commission may wish to consider whether assistance should be provided to avoid uncertainty resulting from imperfect or partial implementation of the New York Convention.

## **2. Date of coming into force**

14. In accordance with the Vienna Convention on the Law of Treaties between States, once a treaty has entered into force, each State that has deposited its instrument of ratification or accession is bound by that treaty. The New York Convention entered into force on 7 June 1959. In accordance with article XII of the New York Convention, Contracting States became bound by the Convention upon its entry into force on 7 June 1959 or ninety days after the deposit of any subsequent instrument of ratification or accession. It could be observed that, in a number of instances, States reported a date of coming into force of the Convention that did not coincide with the date of coming into force as recorded by the United Nations Treaty Section in the listing of Multilateral Treaties.<sup>8</sup>

15. Formalities, such as publication in the State official gazette, or adoption of an implementing legislation may have occurred later than ninety days after deposit of the notice of ratification or accession (as prescribed in article XII, paragraph 2) and, as reported by States, may have delayed the coming into effect of the Convention internally. A few States reported that that matter was dealt with by their legislation. For instance, the act ratifying, or acceding to, the Convention, or subsequent legislation, contained a provision on whether the Convention applied retroactively or only prospectively to either arbitration agreements or arbitral awards. In certain cases, the implementing legislation contained a provision aimed at aligning the date of the coming into force of the implementing act with that of the Convention.

16. With respect to succession of States, it was indicated in one response that the successor State published the notification of succession in the State official gazette almost two years before it deposited its instrument of succession with the Secretary-General of the United Nations.

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<sup>8</sup> See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp> (last visited 5 June 2008).

17. Uncertainty as to the date at which the Convention becomes binding in a given State might be the source of potential difficulties for parties seeking to enforce their rights. In addition to being relevant for the recognition and enforcement of Convention awards in that particular State, that date may also be used as a point of reference from which another Contracting State acknowledged reciprocity. The Commission may wish to decide whether that matter would deserve further consideration.

## **B. Impact of the adoption of a legislation implementing the New York Convention**

### **1. Differences between the text of the New York Convention and the implementing legislation**

18. Where States adopted legislation implementing the New York Convention, the text of that legislation was reported in certain instances to differ from the text of the Convention. Those differences were changes of substance, additions, or omissions. A wide variety of replies was given to the question whether the original text of the Convention or the implementing legislation would prevail in case of conflict. The Commission may wish to discuss whether future work is needed in respect of some of the cases summarized below.

#### **(a) Prevalence of the Convention**

19. It was reported in some cases that the Convention prevailed over conflicting provisions of the implementing legislation. In one instance, it was mentioned that “the courts shall rely on the implementing legislation; however, if national laws would differ from the Convention, the provisions of the Convention would prevail over conflicting provisions of national law.”

#### **(b) Prevalence of implementing legislation**

20. Other States replied that the text of the implementing legislation would prevail over the text of the Convention. One State reported that the text of the Convention was reproduced unchanged in a schedule to the implementing legislation, while the implementing legislation contained provisions that varied the text of the Convention, and that the implementing legislation prevailed over the Convention. In other instances where the Convention had been implemented into national law by means of paraphrasing, a few States reported that the provisions of the national law applied instead of the Convention. In one response, it was reported that “it was assumed that the legislator intended to fulfil rather than break an international agreement so, in cases of doubt as to the meaning of the implementing legislation, the court will, if possible, resolve it in a manner which is consistent with the international agreement. However, where there is no real doubt as to meaning, the courts will give effect to that implementing legislation even if it is not in accordance with the international agreement.”

#### **(c) No indication of prevailing text**

21. It was reported by a few States that national legislation on arbitration had both a chapter on recognition and enforcement of foreign arbitral awards, which

reproduced with some changes the provisions of the Convention, and a schedule which contained the original version of the Convention. That legislation did not determine which text would be applied by courts. For instance, one State mentioned that “since the substantial provisions of the Convention are included in the Arbitration Act, the courts normally apply the provisions of national law. If necessary, the provisions of the Convention are also applicable.” In another instance, the law on arbitration gave effect to both the Convention and the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law on Arbitration”) and reproduced both texts in a schedule. That law did not provide an indication of which text would take precedence in its application (see below, paragraph 23).

## **2. Inclusion of the New York Convention in a larger text**

22. The way in which the Convention was adopted resulted in the text of the Convention standing alone or being included or integrated in a larger text. More than half of the States replied that the text of the Convention as implemented in the legislation stood alone. A vast majority of States which had incorporated it into a larger text, as, for instance in their civil or procedural code, private international law act, arbitration legislation or legislation implementing other international instruments, replied that the form of such incorporation did not affect the implementation or interpretation of the Convention. One State indicated that the method of implementing the Convention by paraphrasing it and including it in a broader legislation facilitated the implementation of the Convention.

23. A few States mentioned that they adopted legislation based on the UNCITRAL Model Law on Arbitration, which contained a chapter on recognition and enforcement of awards. It should be noted that the UNCITRAL Model Law on Arbitration distinguishes between “international” and “non-international” awards instead of relying on the distinction made in the Convention between “foreign” and “domestic” awards. The provisions of the UNCITRAL Model Law on Arbitration are relevant not only to foreign awards but to all awards rendered in the sphere of application of the legislation enacting the UNCITRAL Model Law on Arbitration. One State mentioned that, under its national legislation, there was a possibility that an application for enforcement be made under both the New York Convention and the provisions of the domestic arbitration legislation which enacted the UNCITRAL Model Law on Arbitration. In that case, the arbitration legislation provided that recognition and enforcement had to be sought under the Convention, and that the provisions of the arbitration legislation would not apply. In another instance, the law on arbitration gave effect to both the Convention and the UNCITRAL Model Law on Arbitration, without however indicating which text would apply. Under another approach, a State reported that in its arbitration law, the chapter of the UNCITRAL Model Law on Arbitration relating to recognition and enforcement of awards was replaced with the corresponding provisions of the New York Convention and the application of that chapter was limited to awards made in a Contracting State.

## **3. Evaluation by States of the impact of the method of implementation**

24. The Questionnaire inquired whether, in the view of the respondent, the method of implementation resulted in any substantial differences between the implementing legislation and the Convention and, if so, in which respect.



25. Generally, the responses indicated that there were no differences between the implementing legislation and the Convention which was reproduced *verbatim*, or no significant differences. Where differences were identified, they were not categorized as “substantial”, and it was mentioned, for example, that the differences were “minor”; that there were “some” differences; that the text of the implementing legislation, although expressed differently, was “not contradictory” to the text of the Convention; that the textual differences would “not impair the application of the Convention”; that the implementing legislation was “not substantially stricter”; or “that the existence of an additional ground for refusal of enforcement or a problematic translation of “public policy” had not affected the [enforcement] of a Convention award”. In a few cases, where differences were reported, provisions were quoted that established the prevalence of the text of the Convention over any domestic legislation (see above, paragraph 19).

## **C. Reservations according to article I (3) of the New York Convention and additional declarations**

### **1. Reservations according to article I (3) of the New York Convention**

26. The reciprocity reservation provided a restriction on the application of the New York Convention by allowing States that applied it to recognize and enforce “awards made only in the territory of another Contracting State”. The commercial reservation restricted the field of application of the New York Convention by permitting States to limit the recognition and enforcement of arbitral awards that pertain “only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”. States that had made either the first (reciprocity) reservation or the second (commercial) reservation were asked whether this was referred to or otherwise reflected in their implementing legislation, and if so, in which manner.

27. The majority of responding States that made such reservations did so by means of a declaration at the time of ratifying, or acceding to, the Convention, using the same language as that formulated in the Convention. Several States withdrew either the reciprocity reservation or both reservations. In some cases, they did so in light of subsequent national legislation making the Convention generally applicable. The declarations, as well as any subsequent withdrawals are recorded by the United Nations Treaty Section in the listing of Multilateral Treaties.<sup>9</sup> The observations that follow rely on the declarations reproduced in that list.

28. Some responses revealed a degree of uncertainty as to the existence of reservations. Some States replied that they made use of either one or both reservations, without having made a declaration to that effect at the time of ratifying, or acceding to, the Convention. One State mentioned that, although it did not make the reciprocity reservation, the court could refuse enforcement if it was proven that the State where the award was made did not enforce foreign awards in similar cases. Further research showed that the formulation of the reciprocity

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<sup>9</sup> See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp> (last visited 5 June 2008).

reservation in declarations and in implementing legislation sometimes differed, leaving unanswered the question of which text would prevail in case of conflict.

29. A few States mentioned that they required a certification by a government agency to confirm that the State where the award was made was also a Contracting State. In one instance, it was reported that it was for the applicant to furnish proof that the State where the award was made was a Contracting State whereas in another instance, the court verified reciprocity *ex officio*, consulting a specialized government office for that purpose.

30. Concerning the commercial reservation, it might be noted that, in general, States did not specify in their replies whether the term “commercial” was expressly defined or which definition of “commercial” would be used in applying the reservation. There was indication that, at least in States that adopted the UNCITRAL Model Law on Arbitration, reference could be made to the definition of “commercial” contained therein.<sup>10</sup>

31. With respect to succession of States, varying practices could be noted. In one instance, the reservations made by the predecessor State were not repeated in the declaration of succession, but were still considered to be applicable in the successor State.

32. The question whether an award would be enforceable under the New York Convention or whether it might be hindered by a lack of reciprocity between the State where the award was made and the State where enforcement was requested constituted a central factor for parties to an arbitration agreement. The survey showed that the official information available did not fully reflect States’ practices in that area, and the Commission may wish to consider whether further work should be done in relation to that question.

## **2. Additional declarations as to the scope of application of the New York Convention**

33. The Questionnaire did not request States to report on additional reservations or declarations affecting the scope of application of the Convention. Research showed that several States made additional declarations specifying, for example, that the Convention was to be interpreted in accordance with the Constitution and national law, that the Convention would apply only to arbitral awards rendered after the date of entry into effect of the Convention, that the subject matter should be arbitrable or by specifying a particular subject matter that was not arbitrable.

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<sup>10</sup> The definition of the term “commercial” contained in the footnote to article 1 (1) of the UNCITRAL Model Law on Arbitration is the following: “The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture *and other* forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.”

### III. Interpretation and application of the New York Convention

#### A. Rules of interpretation

34. The Questionnaire requested that States elaborate on the rules of interpretation that courts would apply in interpreting the New York Convention and its implementing legislation, including any source used, such as *travaux préparatoires* and court cases from signatory States.

35. In general, States indicated that a number of rules of interpretation would be applied by courts. Also, States mentioned that distinct rules of interpretation were used depending on the instrument to be interpreted, i.e., the Convention or the implementing legislation. In a few instances, States replied that they had so far not detected any form of interpretation, or they provided no answer to that question. Some replies contained generic descriptions of interpretative principles, such as literal, historical, or reasonable interpretation; interpretation consistent with international law, ordinary meaning in context and in light of the treaty's object and purpose; analogy; usage; general principles of law; or equity.

36. A significant number of responses emphasized the fact that the Convention should be interpreted according to articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties,<sup>11</sup> either in combination with other rules of interpretation, or as the sole source of interpretation. Upon ratifying or acceding to the Convention, several States made a declaration that the Convention was to be interpreted in accordance with the principles of their Constitution. Another commonly mentioned source of rules were statutes and provisions on interpretation contained in the civil code or code of civil procedure. It was pointed out in several responses that a governmental or ministerial office might be consulted to provide interpretation of the Convention. Several States mentioned that the highest court issued interpretative guidelines for the Convention. In yet other replies, it was highlighted that guidance

<sup>11</sup> Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties read as follows:

“Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

“Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

was given as to whether the translation into the State's official language or one of the original languages of the Convention was to be referred to for interpretation.

37. A large number of responses indicated that court decisions, whether domestic or from other States parties, provided guidance for interpretation of the Convention. In few cases, guidance would only be sought from court decisions emanating from a specific foreign country, which was named in the reply. The weight given to such court decisions varied from "being considered", "drawing guidance", "being an additional element" or being of "persuasive value", and States clarified that such decisions did not have binding authority. Only a few States either did not mention court decisions or reported that they were not an interpretative tool.

38. It was stated in slightly fewer responses that reference could be made to the *travaux préparatoires* of the Convention as well as, in some cases, the *travaux préparatoires* of the implementing legislation and of the UNCITRAL Model Law on Arbitration. One State mentioned that the *travaux préparatoires* were referred to in numerous court decisions. Other States indicated that they could be "used as a tool to determine the exact meaning of the provisions of the Convention"; "taken account of when there was no precedent" or "used if necessary, or as a further means of interpretation when the textual approach left the meaning ambiguous or obscure or led to a manifestly absurd or unreasonable result". It was mentioned in a smaller number of responses that no reference could be made to the *travaux préparatoires*, without indicating any reason.

39. Other rules of interpretation mentioned included doctrine and statements of expert witnesses in court proceedings.

40. The Commission may wish to recall that, at its thirty-first session (New York, 1-12 June 1998), it was observed that the Convention had become an essential factor in the facilitation of international trade and that, besides the legislative enactment of the Convention, it would be useful for the Commission also to consider its interpretation. Such consideration, together with information to be prepared by the Secretariat for that purpose, would serve to promote the Convention and facilitate its use by practitioners. It was stressed that information on the interpretation of the Convention was not available in all of the official languages of the United Nations and that, therefore, the Commission was the appropriate body to prepare it.<sup>12</sup> The Commission may wish to consider whether future work needs to be carried out in that respect.

## **B. Scope of article II of the New York Convention**

41. The Questionnaire invited States to provide information on whether the implementing legislation elaborated on the scope of article II of the Convention and to specify which arbitration agreements qualified for referral to arbitration under the Convention. (e.g., international arbitration agreement, and/or agreement between nationals of different States).

42. For a vast majority of States, the implementing legislation did not specify which arbitration agreements qualified for referral to arbitration under the New York

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<sup>12</sup> *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 234.

Convention. Several responses repeated, using slightly differing terminology, the provisions of article II of the Convention. Further research indicated that in incorporating the Convention into their national arbitration act, legislators frequently introduced a section that regulated the enforcement of a foreign arbitral award, but did not include separate provisions on the enforcement of an arbitration agreement falling under the Convention. In many cases, a general provision was introduced for enforcement of the arbitration agreement, closely modelled on article II of the Convention, or on articles 7 and 8 of the UNCITRAL Model Law on Arbitration.

43. For those States that provided a definition of “arbitration agreement” for the purposes of the Convention, there appeared to be disparity in the approach of that question. The responses were not detailed enough to allow analysis of that matter and only a few illustrations might be given. For instance, one State reported that its implementing legislation specified that “an agreement or award arising out of such a relationship which is entirely between citizens of the [country] shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States”. It was indicated in a reply that the scope of article II of the Convention was not expressly delineated in the arbitration legislation, which only provided that “arbitration agreements include agreements relating to disputes over contracts or other civil law matters arising in relation to external trade and other international economic relations and also to disputes between undertakings and foreign investors and international associations and organizations established in the territory of the State, disputes among their members and disputes between these entities and other legal persons in the State”. One State reported that an arbitration agreement qualifying for referral under the New York Convention was “an arbitration agreement not governed by the law of that State”, without indicating how that determination would be made.

44. Several States mentioned that, when adopting a new arbitration law, the earlier implementing act which specified the scope of article II was repealed. The repealed definitions referred, in one instance, to any arbitration agreement “which is not a domestic arbitration agreement”. The new arbitration laws did not limit the scope of the provisions on the enforcement of arbitration agreement.

### **C. Article III of the New York Convention: fees, levies, taxes or duties for enforcing a Convention award**

45. The Convention provided in article III that each Contracting State should enforce Convention awards in accordance with the rules of procedure of that State and that “there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”. The current section deals with the question of the fees imposed by States on the recognition or enforcement of a Convention award, as compared to the fees imposed on the recognition or enforcement of domestic awards.

46. A significant number of responses indicated that there was no fee for such a procedure. Where fees were imposed by States on the recognition or enforcement of

a Convention award, such fees fell roughly into two categories, flat fees and fees based on the amount awarded which were often subject to a minimum or a maximum amount. The fees for leave to enforce varied from four-tenths of a per cent to five per cent of the amounts claimed under the award, with most ranging between one half of a per cent and three per cent. The fees for enforcement ranged between two and a half per cent and seven per cent of the amounts claimed. It was indicated, in one response, that when the pecuniary value of the award could not be determined, the fee was fixed as a lump sum.

47. In general, States indicated that the fees were levied irrespective of the success of the application. A significant number of responses, however, did not provide information on that question.

48. The responses to the Questionnaire generally confirmed that Contracting States had not imposed more onerous conditions or higher fees or charges for the recognition or enforcement of Convention awards compared to domestic awards. Exceptions to that principle were, however, indicated in a few responses. In one case, the court fee was based on a percentage of the value of the award and the fee imposed on foreign awards was double the fee imposed on domestic awards. Several States mentioned that, unlike foreign awards, domestic awards did not require exequatur and therefore the fees could not be compared. On a practical note, it was observed that although the official fees were the same, the costs for an international award would be higher because of the requirement to provide a certified translation of the documents accompanying the application. According to one response, administrative fees were the same, but an additional proportional fee was imposed only for the enforcement of foreign awards, thus constituting a difference. Conversely, in two other cases, a fee was imposed on the enforcement of domestic awards, but not of foreign awards.

## **D. Article IV of the New York Convention**

### **1. Article IV (1): “duly authenticated” and “duly certified copy”**

49. The Questionnaire invited States to provide information on whether any legislative provisions, rules of court or regulations stated the conditions under which the requirement in article IV (1) of the Convention that an applicant supply “the duly authenticated original award or a duly certified copy thereof” would be fulfilled.

#### *“Duly authenticated”*

50. A number of responses indicated that the “duly authenticated original award” had to be submitted but provided no further information as to the applicable law or officials who were empowered to authenticate the document. A significant number of States indicated that the legislation implementing the Convention or the arbitration legislation did not refer to “authentication” and, in certain cases, dealt only with the requirement of providing the “original award”.

51. Several States replied that their own legalization procedure would apply whereas others required compliance with the legalization procedure of the law of the State where the award was made. One response stated that the award was to be authenticated by an entity of the State where the award was made, and a diplomatic

official of the State where the award was to be enforced should confirm the power of such entity to authenticate the award.

52. In several responses, reference was made to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Hague Apostille Convention), suggesting that the legalization could therefore be accomplished by an Apostille attached to the document by the competent authority in the State where the award was made.<sup>13</sup>

53. The implementing legislation of several States retained a more flexible standard for authentication by requiring that the authentication be provided “to the satisfaction of the court”.

54. Responses showed that the authentication could be done by the Consul of the State where enforcement was sought, or where the award was made, a court of the State where the award was made or, officials authorized by the law of the State where the award was made. A few replies mentioned that the award might be authenticated by the arbitrator, an official of a permanent arbitral tribunal, or in the case of an award rendered in an ad hoc arbitration, by a notary public.

*“Duly Certified Copy”*

55. The responses regarding the requirement that the copy of the award (and the original arbitration agreement) be duly certified largely mirrored those regarding authentication, with the exception that, in some cases “authentication” was understood to mean that the copy was authenticated, for example, by the use of the phrase, “a duly authenticated copy”. One State described the situation as follows: “the law provides that for the purposes of recognition and enforcement of foreign arbitral award, the original of the arbitral award or properly certified true copy of the award, shall accompany the application. Therefore, such requirement as duly authenticated arbitral award is not included in national legislation. However, when the court has certain doubts as to the content or authenticity of award, the national law provides that the court may request additional information from the arbitrators or from permanent arbitral bodies. Such possibility to request additional information includes also possibility to verify the original awards or copies thereof produced before the court where recognition and enforcement is sought”.

## **2. Article IV (2): translation of the arbitration agreement and the award**

56. Under the Convention, the translation of arbitration agreement and the award should be certified by an official or a sworn translator, or by a diplomatic or consular agent. Unlike the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, there was no indication given of the nationality of these persons as it “was too cumbersome and it could give rise to unnecessary difficulties”.<sup>14</sup> The

<sup>13</sup> Article 2 of the Convention defines legalization as follows: “Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.”

<sup>14</sup> UN DOC E/2704-E/AC.42/4/Rev.1, para. 56.

Questionnaire invited States to provide information on the question whether a translation of the arbitral award and the arbitration agreement were always required.

57. The great majority of the responses indicated that the implementing legislation followed the language of the Convention, without indicating whether the official, sworn translator or diplomatic or consular agent certifying the translation should be from the country where the award was relied upon, or where it was made. In one case, the certification that the translation was correct was said to be sufficient according to the law of that State and further indicated that if the certificate was obtained from a State other than the State where the enforcement was sought, it should bear the seal of its Consulate in the State where the award was made. In another instance, it was reported that the translation was to be made by a sworn translator of the country where enforcement of the award was sought.

### **3. Ability to cure a defect**

58. The Questionnaire also inquired whether it was possible to cure any defect in the documents submitted at the time of the application. That question intended to clarify whether the applicant could subsequently provide the duly authenticated original of the award and the arbitration agreement or certified copies thereof or a translation of the documents, if it had failed to do so at the time of the application.

59. A large majority of the responses to the Questionnaire stated that it was possible to cure defects in the documents submitted at the time of the application. Further research revealed that at least one State specifically regulated that question by including a provision in the arbitration law stating that “the denial of a request (...) for the recognition or enforcement of a foreign arbitral award based on formal flaws does not impede the interested party from renewing the request, once such flaws are properly corrected.” Some responses stated that there was no specific regulation on that matter or omitted to answer the question. A few responses indicated that it would not be possible to cure a defect in the documents submitted.

60. The survey showed that the requirements specified in article IV were understood and interpreted in a variety of ways. The Commission may wish to consider whether assistance should be provided to avoid uncertainty resulting from such disparity.



## Annex I

### IBA – UNCITRAL Questionnaire

#### Implementation of the New York Convention

*Note:* Please provide copies of all relevant laws and regulations that relate to the implementation of the Convention in your country, in original language and, if possible, translations into English, French or Spanish. Whenever appropriate, please answer the questions below by referring to those laws and regulations.

#### A. Implementation of the Convention

1. How did the Convention gain the force of law in your country, binding your courts to apply it?

.....

1.1 Please specify whether the legislative action was limited to authorizing ratification or accession to the Convention, or whether that action included legislation implementing the Convention. (In case that the relevant action was not taken by the legislature but by another governmental body, please specify the action).

.....

1.1.1 Does the implementing legislation incorporate the text of the Convention or merely refer to it?

.....

1.1.2 If the text is incorporated, does the implementing legislation reproduce the text of the Convention or does it paraphrase it?

.....

1.1.3 In the event that the text of the Convention is paraphrased in the implementing legislation, what is the legal significance of the text of the Convention? For example, may, or must, the courts in your country rely on the text of the implementing legislation where it differs from the text appearing in the Convention?

.....

1.1.4 Does the text of the Convention, as implemented in your country, stand alone or is it incorporated into a larger text (e.g., a code of civil procedure)?

.....

1.1.5 If the implementing legislation is part of a broader legislative text, does this affect the practical implementation or interpretation of the Convention?

.....

1.1.6 Generally, what rules of interpretation would the courts apply in interpreting the Convention and/or the implementing legislation (*travaux préparatoires* of the Convention; court cases from other signatory countries)?

.....  
1.1.7 In your view, does the method of implementation result in any substantial differences between the implementing legislation and the provisions of the Convention, and if so, in which respect? If feasible, please indicate the places where the implementing legislation is different from the text of the Convention.  
.....

1.2 If your country has made use of the first (reciprocity) reservation, or the second (commercial) reservation contained in article I(3), is this referred to or reflected in your implementing legislation, and if so, in which manner?  
.....

1.3 Does your implementing legislation define the scope of article II of the Convention, and, for example, specify which arbitration agreements qualify for the referral to arbitration under the Convention. (e.g., international arbitration agreement, and/or agreement between nationals of different States)?  
.....

1.4 Have any procedural requirements or conditions for enforcement been established by a court decision? If so, please indicate the cases.  
.....

**B. Court or Authority Competent to Decide on Recognition and Enforcement**

2. Which court or authority is competent to decide on a request for enforcement? Is it one particular court or authority for the entire country or is it one type of court or authority? What criteria determine the competence of the court or authority?  
.....

**C. Procedural Rules**

3. Please describe the procedures or requirements applicable to a request for enforcement of a Convention award. Is the applicant required to present anything else than the arbitral award and the arbitration agreement as provided in article IV of the Convention?  
.....

3.1 Are there any legislative provisions, rules of court, or regulations, detailing the procedure applicable to the enforcement of a Convention award? (see articles III and IV of the Convention). (For example, is it stated what “duly authenticated” means in article IV, which requires the applicant to supply “the duly authenticated award or a duly certified copy thereof”?)  
.....

3.2 What are the fees, levies, taxes or duties that are to be paid in connection with the application for enforcement of a Convention award, and on which bases are they

calculated? Please specify whether any such payment is to be made irrespective of the success of the application or only for an act granting the enforcement of the award.

.....

3.2.1 In comparison, what are the fees, levies, taxes, or duties applicable to the request for enforcement of an award made in your country or of an award otherwise considered as domestic in your country?

.....

3.3 May an applicant subsequently cure any defect in the documents submitted at the time of the application for enforcement of a Convention award?

.....

3.4 Should a translation of the arbitration agreement and arbitral award always be provided by the applicant, even if the court can be deemed to be fully familiar with the foreign language in which these documents are expressed?

.....

3.5 Is there a limited time period for applying for recognition and enforcement of a Convention award? Which is the period? Please clarify whether the period is the same for any award or Convention award or does the period depend on the type of claim incorporated in the award?

.....

3.6 Please describe the procedures that the party against whom enforcement is sought can use to raise objections against the request for enforcement with a view to preventing enforcement.

.....

3.7 Please describe the procedures and competent court for any appeal or other possible recourse against a decision refusing to enforce an award.

.....

3.8 Please describe the procedures and competent court for any appeal or other possible recourse against a leave for enforcement.

.....

3.8.1 Does the lodging of the appeal or other recourse suspend automatically the enforcement of the award? Or may, upon request, suspension be ordered by the court or authority?

.....

**D. Comments**

Do you have any additional comments with regard to the rules governing the implementation of the Convention in your country?

.....

## Annex II

## List of States having replied to the Questionnaire

<i>Country</i>	<i>Date received</i>	<i>Country</i>	<i>Date received</i>
Albania	16/01/2008	Indonesia	25/08/2007
Algeria	03/04/1996	Iran (Islamic Republic of)	06/02/2008
Argentina	27/01/1997	Ireland	15/01/1998
Armenia	13/02/2008	Israel	31/07/1996
Australia	13/05/1999	Italy	23/01/1996
Austria	23/04/1996	Jamaica	19/01/1996
Bahrain	28/01/1997	Japan	19/01/1996
Barbados	25/09/2007	Jordan	17/03/2004
Belarus	15/02/1996	Kazakhstan	16/01/1998
Belgium	12/09/1997	Kenya	29/10/2007
Bolivia	05/02/1998	Kuwait	16/02/1996
Botswana	09/11/2007	Kyrgyzstan	11/08/1997
Brazil	18/09/2007	Lao People's Democratic Republic	10/12/2007
Brunei Darussalam	05/12/1997	Latvia	22/03/2004
Bulgaria	14/11/2007	Lebanon	08/06/2004
Cambodia	04/12/2007	Lithuania	05/12/1995
Canada	12/06/2002	Luxembourg	16/10/1997
Chile	23/12/1998	Macedonia (former Yugoslav Republic of)	31/10/2007
China	16/09/1996	Madagascar	12/06/1996
Colombia	14/01/1997	Malaysia	25/02/2004
Costa Rica	18/09/2007	Malta	09/02/2004
Croatia	10/05/1996	Mauritius	14/07/1997- 19/12/2007
Cuba	15/01/1996	Mexico	18/01/1996
Cyprus	02/11/2007	Monaco	02/11/1998
Czech Republic	25/11/1996	Mongolia	15/04/2004
Denmark	09/09/1996	Morocco	18/10/1996
Dominica	03/11/1998	Mozambique	05/09/2007
Ecuador	27/05/1997	Nepal	11/12/2007
Egypt	19/12/1997	New Zealand	14/01/1998
Estonia	22/10/2007	Nigeria	25/08/2007
Finland	24/01/1996	Norway	22/01/1996
France	29/01/1996	Oman	28/01/2004
Georgia	09/11/2007	Paraguay	05/06/1998
Germany	17/09/1998	Peru	16/02/1996
Ghana	01/01/1996	Philippines	28/10/1998
Greece	02/07/1997	Poland	23/05/1996
Guatemala	06/09/2007	Portugal	02/09/2007
Honduras	05/10/2007	Republic of Korea	27/02/1996
Holy See	29/02/1996	Romania	26/11/2007
Hungary	02/03/2004	Russian Federation	28/04/1998
India	14/05/1997		

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<i>Country</i>	<i>Date received</i>
San Marino	19/10/2000
Saudi Arabia	23/05/1996
Serbia	19/02/2004
Singapore	08/01/1996
Slovakia	08/02/1996
Slovenia	11/02/2004
South Africa	-
Spain	12/01/1996
Sri Lanka	09/11/1998
Sweden	08/01/1996
Switzerland	30/04/1996
Syrian Arab Republic	05/02/2008
Tanzania (United Republic of)	26/11/2007
Thailand	17/04/1996
Trinidad and Tobago	07/09/2007
Tunisia	09/02/1996
Turkey	17/01/1996
Uganda	05/03/2004
Ukraine	17/03/1999
United Kingdom of Great Britain and Northern Ireland	21/03/1997
United States of America	03/12/2007
Uruguay	05/09/2007
Uzbekistan	23/04/2002
Venezuela	19/01/1996
Viet Nam	09/04/1996
Zambia	09/11/2007
Zimbabwe	19/06/1997

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