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**United Nations Commission  
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**Settlement of commercial disputes****Preparation of a model legislative provision on written form for  
the arbitration agreement**

**Note by the Secretariat**

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## Introduction

1. At its thirty-fifth session (New York, 17-28 June 2002), the Commission noted that the Working Group had considered, at its thirty-sixth session (New York, 4-8 March 2002), a draft model legislative provision revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) and discussed a draft interpretative instrument regarding article II, paragraph (2), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>1</sup> (“the New York Convention”).<sup>2</sup> The Commission noted that the Working Group had not reached consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. The Commission was of the view that member and observer States participating in the Working Group’s deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions regarding the requirement of written form for the arbitration agreement.

2. At its thirty-seventh session (New York, 14-25 June 2004), the Commission noted that the Working Group had yet to complete its work in relation to the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the Model Law and article II, paragraph (2), of the New York Convention.<sup>3</sup> At its forty-second session (New York, 10-14 January 2005), the Working Group agreed that discussions on that matter would be resumed at its next two coming sessions, with a view to presenting a model legislative provision revising article 7 of the Model Law, for adoption by the Commission at its thirty-ninth session, in 2006 (A/CN.9/573, para. 98).

3. The present note has been prepared on the basis of the discussions in the Working Group held at its thirty-sixth session, with respect to the preparation of a model legislative provision on written form for the arbitration agreement, revising article 7 of the Model Law (A/CN.9/508, paras. 18-39).<sup>4</sup>

### **I. Draft text of model legislative provision on written form for the arbitration agreement, revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration**

4. The Working Group may wish to use the following revised text as a basis for its deliberations:

“Article 7. Definition and form of the arbitration agreement

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. ‘Writing’ means any form, including, without limitation, a data message, that provides a record of the arbitration agreement or is otherwise accessible so as to be useable for subsequent reference.

“(3) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) For the avoidance of doubt, the reference in a contract or a separate arbitration agreement to a writing containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing. In such a case, the writing containing the arbitration clause constitutes the arbitration agreement for the purposes of article 35.”

## **II. Remarks on the draft text of model legislative provision on written form for the arbitration agreement, revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration**

### *Paragraph (1)*

5. Paragraph (1) reproduces the unchanged text of article 7, paragraph (1), of the Model Law. The Working Group approved the substance of paragraph (1), noting that the provision itself was not controversial (A/CN.9/508, para. 20).

### *Paragraph (2)*

6. Drafting comments were essentially concerned with refining the provision to make it unambiguously clear that arbitration agreements could be validly concluded by means other than in the form of paper-based documents, for example, by electronic communications (A/CN.9/508, para. 21). A prevailing view held in the Working Group was that it was important to combine the traditional notion of “record” with the newer concept of “data message” (as defined in article 2 (a) of the UNCITRAL Model Law on Electronic Commerce) in order to clarify that records other than traditional paper documents were included among the acceptable forms of recording an arbitration agreement (A/CN.9/508, para. 23).

7. The Working Group also agreed that it was necessary to retain the qualifying phrase, “accessible so as to be usable for subsequent reference” (inspired from article 6, paragraph (1), of the UNCITRAL Model Law on Electronic Commerce) in order to set out the conditions whereby any message, including data messages, might meet writing requirements established by the law (A/CN.9/508, para. 24).

8. Paragraph (2) has been redrafted along the lines agreed to by the Working Group (A/CN.9/508, para. 25).

*Paragraph (3)*

9. Given that the term “data message” is used in paragraph (2), the Working Group agreed to retain that definition (A/CN.9/508, para. 26), which reproduces article 2 (a) of the UNCITRAL Model Law on Electronic Commerce.

*Paragraph (4) (formerly paragraph (5) of the draft model legislative provision contained in A/CN.9/508, para. 18)*

10. The Working Group agreed to retain paragraph (4) notwithstanding some reservations that it appeared to be misleading and already covered by articles 4 and 16 (2) of the Model Law (A/CN.9/508, paras. 32 and 33). It was said that draft paragraph (4) was needed, since the narrow scope of article 4 of the Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence thereof, by virtue of the exchange of statements of claim and defence (A/CN.9/508, para. 34).

*Paragraph (5) (formerly paragraph (6) of the draft model legislative provision contained in A/CN.9/508, para. 18)*

11. It is recalled that one of the main purposes of a revision of article 7 of the Model Law is to recognize the formal validity of arbitration agreements that come into existence in certain factual situations as to which courts or commentators have differing views on whether the form requirement set forth in the current text of article 7, paragraph (2), of the Model Law was met. The Working Group agreed that a purely oral arbitration agreement should not be regarded as formally valid under the Model Law (A/CN.9/508, para. 27). However, it was also agreed that, as a matter of general policy, the reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement (ibid.). Examples were given of situations where such a reference in an oral contract to a set of arbitration rules should be accepted as expressing sufficiently the existence and contents of the arbitration agreement, particularly when the set of rules includes a model arbitration clause (ibid.). To accommodate the objection that the mere reference in an oral contract to a set of arbitration rules should not always be regarded as sufficient to meet the written form requirement, since a set of procedural rules should not be regarded, in and of itself, as equivalent to a contractual document containing an arbitration clause (ibid.), the Working Group agreed to the insertion of a proviso, the effect of which is to rely on domestic or other applicable law to determine whether the reference is such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

12. In that context, the Working Group agreed to delete paragraph (4) of the draft model legislative provision contained in A/CN.9/508, para. 18, and to redraft paragraph (5) so as to better reflect the above-mentioned general policy (A/CN.9/508, para. 31).

13. It is recalled that the Working Group agreed to delete paragraph (7) of the draft model legislative provision contained in A/CN.9/508, para. 18, and, instead, include

an extra sentence at the end of paragraph (5) in order to clarify that the writing referred to under paragraph (5), containing the arbitration clause, constitutes the arbitration agreement for the purposes of article 35 of the Model Law. It was stated as well that this sentence was consistent with the New York Convention (A/CN.9/508, para. 39).

### Notes

<sup>1</sup> United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>2</sup> *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17 (A/57/17)*, para. 183.

<sup>3</sup> *Ibid.*, *Fifty-ninth session, Supplement No. 17 (A/59/17)*, para. 59.

<sup>4</sup> Previous discussions regarding that topic may be found in the following documents published by UNCITRAL:

- Report of the Commission on the work of its thirty-seventh session (New York, 14-25 June 2004): *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 17, A/59/17*, para. 59;
- Report of the Commission on the work of its thirty-fifth session (New York, 17-28 June 2002): *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17, A/57/17*, paras. 182-183;
- Report of Working Group on the work of its thirty-sixth session (New York, 4-8 March 2002): A/CN.9/508, paras. 18-39;
- Working paper: A/CN.9/WG.II/WP.118 (February 2002, paras. 8-24);
- Report of the Commission on the work of its thirty-fourth session (Vienna, 25 June-13 July 2001): *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 17, A/56/17*, paras. 312-313;
- Report of Working Group on the work of its thirty-fourth session (New York, 21 May-1 June 2001): A/CN.9/487, paras. 22-41;
- Working paper: A/CN.9/WG.II/WP.113 (March 2001);
- Report of Working Group on the work of its thirty-third session (Vienna, 20 November-1 December 2000): A/CN.9/485, paras. 21-59;
- Working paper: A/CN.9/WG.II/WP.110 (September 2000, paras. 10-26);
- Report of the Commission on the work of its thirty-third session (New York, 12 June-7 July 2000): *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 17, A/55/17*, paras. 389-399;
- Report of Working Group on the work of its thirty-second session (Vienna, 20-31 March 2000): A/CN.9/468, paras. 88-106;
- Working paper: A/CN.9/WG.II/WP.108/Add.1 (January 2000, paras. 1-40);
- Report of the Commission on the work of its thirty-second session (17 May-4 June 1999): *Official Records of the General Assembly, Fifty-fourth session, Supplement No. 17, A/54/17*, paras. 344-350;
- Note on possible future work in the area of international commercial arbitration: A/CN.9/460 (April 1999, paras. 20-31).

These documents may also be found on the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)) under “Working Groups” and “Working Group on Arbitration”.

