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Settlement of commercial disputes

Possible future work in the field of settlement of commercial disputes

Note by the Secretariat

Contents

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Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.[1]

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("the Arbitration Model Law"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[2]

3. After concluding the discussion on its future work in the area of international commercial arbitration, the Commission entrusted the work to one of its working groups, which it established as Working Group II (Arbitration and Conciliation), and decided that the priority items for the Working Group should be conciliation,[3] requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the Arbitration Model Law and article II, paragraph (2), of the New York Convention ("the writing requirement"),[4] enforceability of interim measures of protection[5] and possible enforceability of an award that had been set aside in the State of origin.[6]

4. Work on the UNCITRAL Model Law on International Commercial Conciliation was completed by the Working Group at its thirty-fifth session in 2001, and work in relation to both the question of interim measures and the form requirement for arbitration agreements was completed at the forty-fourth session of the Working Group in 2006.

5. To facilitate discussions of the Commission on topics to be considered in priority by the Working Group, this note contains a list of topics, which were discussed at previous sessions of the Commission and suggestions made in the Working Group.

I. List of topics initially mentioned as possible future work

1. List of topics considered by the Commission

6. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered possible topics for future work.[7] The list of those topics, excluding conciliation and the requirement that an arbitration agreement be in writing was as follows:

(a) Arbitrability:[8] it was observed that uncertainties as to whether the subject matters of certain disputes are capable of settlement by arbitration caused problems in international commercial arbitration. To the extent that the issue should be considered, the purpose should not be to strive for uniformity, but to stimulate transparency of solutions on that question. Work might be geared, for example, towards formulating a uniform provision setting out three or four issues that were generally considered non-arbitrable and calling upon States to list any other issues that are regarded as non-arbitrable by the State. At the same time, concerns were expressed that any national listing of non-arbitrable issues might be inflexible and therefore counter-productive. It was said that the question of arbitrability was subject to constant development (including through case law) and that some States might find it undesirable to interfere with that development (see below, para. 13).

(b) Sovereign immunity:[9] support was expressed in favour of preparatory work by the Secretariat of that item on the basis that it was of significant practical importance. That matter was noted as causing uncertainty and, potentially, delay in a number of States (see below, para. 15).

(c) Consolidation of cases before arbitral tribunals:[10] it was pointed out that consolidation of arbitration cases into a single proceeding was not a novel issue and that it had practical significance in international arbitration, in particular where a number of interrelated contracts or a chain of contracts were entered into. It was also suggested that it might be useful for the Commission to prepare guidelines to assist parties in drafting arbitration agreements that envisaged consolidation of proceedings.

(d) Confidentiality of information in arbitral proceedings:[11] it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rule in respect of confidentiality.

(e) Raising claims for the purpose of set-off:[12] views were expressed that it was generally well accepted that an arbitral tribunal could only take-up a claim if that claim was covered by the arbitration agreement. It was decided that the consideration of the matter was therefore unlikely to be productive.

(f) Decisions by “truncated” arbitral tribunals:[13] it was felt that it would be inadvisable to attempt to legislate on this matter because it raised sensitive issues, had implications in the context of recognition and enforcement of an award made by a truncated tribunal, and acceptable solutions would be difficult to achieve.

(g) Liability of arbitrators:[14] it was said that there were many countries that did not have legislation on this matter, and it would be valuable if the Commission would provide model solutions. Another view was that, in light of different approaches in legal systems, the matter should not be considered by the

Commission because it was unlikely that a consensus could be achieved on a workable solution.

(h) Power of the arbitral tribunal to award interest:[15] it was noted that the power of an arbitral tribunal to award interest was a matter of great practical importance that arose often and potentially involved large amounts of money. It was suggested that providing guidance and model solutions would facilitate arbitration.

(i) Costs of arbitral proceedings:[16] it was widely considered that the question of various matters relating to the costs of arbitration was not urgent.

(j) Possible enforceability of an award that has been set aside in the State of origin:[17] the view was expressed that this issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[18] It was suggested, however, that that item involved a broader spectrum of issues, such as, the question of the discretionary power to enforce an award even where a ground for refusal existed (such as a minor procedural defect or a defect that did not influence the outcome of the arbitration).

2. Other topics mentioned

7. At its thirty-second session (Vienna, 17 May-4 June 1999), the following topics were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time:[19]

(a) Gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties.

(b) Changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances.

(c) Freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association.

(d) Questions relating to the interpretation of legislative provisions such as those in article II (3) of the New York Convention (or article 8 (1) of the Arbitration Model Law), which in practice led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued.

(e) Questions relating to cases where a foreign court judgement was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked (i) the existence of an arbitration agreement, or (ii) the fact that an arbitration proceeding was pending, or (iii) the fact that an arbitral award had been issued in the same matter. Those instances were often not addressed by treaties dealing with recognition and enforcement of foreign court judgements. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgements, but the treaty itself did not allow recognition or enforcement to be refused on the ground

that the dispute dealt with by the judgement was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

3. Topics proposed by arbitration experts

8. A number of other topics concerning the New York Convention, proposed by arbitration experts at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the New York Convention, were raised for possible consideration by the Working Group at its thirty-second session (Vienna, 20-31 March 2000).[20] These included:

(a) The meaning and effect of a non-domestic award, that is an award not considered as a domestic award in the State where its recognition and enforcement was sought (article I (1), second sentence).

(b) Clarification of what constituted an arbitral award under the Convention. Did it cover, for example, awards on agreed terms; "Treaty awards"; a-national awards; award-like decisions in proceedings akin to arbitration, such as *arbitrato irrituale*.

(c) Determination of the law applicable to arbitrability under article II (1).

(d) Field of application of article II (3) concerning the enforcement of the arbitration agreement.

(e) Law applicable to agreements that might be "null and void, inoperative, or incapable of being performed" under article II (3).

(f) Compatibility of court-ordered interim measures with arbitration agreements falling under the Convention.

(g) Enforcement conditions and procedure referred to in article III, as implementing legislation showed diverging solutions.

(h) Period of limitation for enforcement of a Convention award where again implementing legislation showed a range of different periods.

(i) Residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V.

(j) Meaning and effect of the suspension of an arbitral award in the country of origin (article V (i)(e)).

(k) Meaning and effect of the more-favourable-law provision of article VII (1).

9. Recalling the discussion of increased use of electronic commerce and the question whether electronic messages complied with formal requirements for arbitration agreements, the Commission took note of suggestions that it would be useful to review the implications of "on-line" arbitrations, i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communications. It was also agreed that the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce on that matter (see below, paragraph 14).[21]

4. Conclusion by the Commission

10. When the Commission discussed its future work at its thirty-second session (Vienna, 17 May-4 June 1999), it left open the question of what form that future work might take. It was agreed that decisions on that matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).[22] At its thirty-third session (New York, 12 June-7 July 2000), the Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-law provision of article VII (1) of the 1958 New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention; and the power by the arbitral tribunal to award interest.[23]

II. Topics most recently mentioned as possible future work

11. The following topics were mentioned, either by the Commission or the Working Group, as possible future topics to be considered by the Working Group in priority.

1. UNCITRAL Arbitration Rules

12. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005), the Commission heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) could be considered for inclusion in future work.[24] Although reservations were expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority. It was suggested that, given the wide use of the UNCITRAL Arbitration Rules, any necessary revision would be of positive benefit to practitioners in international arbitration. The view was expressed that particular caution should be exercised in determining the scope of such a revision, which should be precisely defined in order to avoid undermining the stability of the reference offered by the UNCITRAL Arbitration Rules over 30 years of existence of that instrument. It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary. The view was also expressed that preliminary consideration of a possible revision of the Rules should not prevent the

Working Group from envisaging other possible topics for future work, such as the use of arbitration in corporate governance or the use of on-line dispute resolution mechanisms.

2. Arbitrability

13. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions, the Commission noted that priority consideration might be given to the issue of arbitrability of intra-corporate disputes and other issues relating to arbitrability, for example, arbitrability in the fields of immovable property, insolvency or unfair competition (see above, para. 6).[25]

3. On-line dispute resolution (ODR)

14. The Commission took note of a proposal that priority consideration might be given to the issues of on-line dispute resolution (see above, para. 9).[26]

4. Sovereign immunity

15. On the question of sovereign immunity, the Working Group noted at its forty-fourth session (New York, 23-27 January 2006) that, in December 2004, the General Assembly adopted the Jurisdictional Immunities Convention (see resolution A/RES/59/38). The Working Group was invited to consider whether, taking account of the application of that Convention to the immunity of a State and its property from the jurisdiction of the courts of another State, the question of immunity was a matter that needed to be addressed in the context of arbitration from the perspective of an agreement by the State to participate in arbitration and the enforcement of arbitral awards against a State. Concern was expressed that the topic of sovereign immunity should be limited to the point of enforcement and that work on that topic in the area of arbitration could create confusion. Nonetheless, support was expressed for work to be undertaken on that topic, particularly noting that there was growing case law where States that participated in investment arbitrations failed to comply with arbitral awards. It was also cautioned that the topic of sovereign immunity raised questions of public policy, which did not easily lend itself to harmonisation (see above, para. 6).[27]

5. Other topics

16. Another possible topic suggested for consideration to the Working Group at its forty-fourth session (New York, 23-27 January 2006) was the revision of article 27 of the Arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence in an arbitration but allowed the court to execute that request “within its competence and according to its rules on taking evidence”. It was suggested that article 27 could be revised to oblige a court to render such assistance.[28]

17. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration by appropriately amending the Arbitration Model Law. It was observed that those injunctions were impacting negatively on international arbitration and increased both the cost and complexity thereof.

18. In addition, it was suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations. Whilst the Working Group agreed that an arbitral tribunal had no jurisdiction to bind parties that were not party to the arbitration agreement, it noted that that matter was of particular importance in the context of granting of preliminary orders. It was highlighted that there had been developments, for example, in a case involving investment arbitration where standing had been given to third parties that might be affected by a decision of the arbitral tribunal. The Working Group agreed that these matters could be considered as items for future work by the Working Group.[29]

19. A broader suggestion was made that UNCITRAL should not confine itself to a piecemeal approach to individual issues but work instead on the preparation of an international binding instrument on international commercial arbitration, bearing in mind previous instruments such as the 1961 European Convention on International Commercial Arbitration and other similar texts. It was suggested that work on such a project should not seek to revise arbitration regimes that worked well in practice such as the New York Convention. While interest was expressed in such a larger project, the Working Group was cautioned not to include in its work programme unnecessarily time-consuming projects, and to focus on issues of practical interest to the arbitration community.[30]

Notes

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[2] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[3] Ibid., paras. 340-343 and para. 380.

[4] Ibid., paras. 344-350 and para. 380.

[5] Ibid., paras. 371-373 and para. 380.

[6] Ibid., paras. 374-376 and para. 380.

[7] Ibid., paras 340-380; A/CN.9/WG.II/WP.108, para. 6; A/CN.9/468, para. 107.

[8] A/CN.9/460, paras. 32-34 and *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 351-353.

[9] Ibid., paras. 35-50 and ibid., paras. 354-355.

[10] Ibid., paras. 51-61 and ibid., paras. 356-357.

[11] Ibid., paras. 62-71 and ibid., paras. 358-359.

[12] Ibid., paras. 72-79 and ibid., paras. 360-361.

[13] Ibid., paras. 80-91 and ibid., paras. 362-363.

[14] Ibid., paras. 92-100 and ibid., paras. 364-366.

[15] Ibid., paras. 101-106 and ibid., paras. 367-369.

[16] Ibid., paras. 107-114 and ibid., para. 370.

[17] Ibid., paras. 128-144 and ibid., paras. 374-376.

[18] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[19] Ibid., *Fifty-fourth session, Supplement No. 17* (A/54/17), para. 339; A/CN.9/468, para. 108.

[20] A/CN.9/468, para. 109.

[21] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396; A/CN.9/468, para 113.

[22] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 338.

[23] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[24] Ibid., *Fifty-eighth Session, Supplement No. 17 (A/58/17), para. 204; ibid., Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; ibid., Sixtieth Session, Supplement No. 17 (A/60/17), para. 178; A/CN.9/573, para. 100; A/CN.9/592, paras. 90 and 93.

[25] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204; *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; Sixtieth Session, Supplement No. 17 (A/60/17), para. 178; A/CN.9/573, para. 100, A/CN.9/592, paras. 90.

[26] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; *Sixtieth Session, Supplement No. 17* (A/60/17), para. 178; A/CN.9/573, para. 100; A/CN.9/592, para. 90.

[27] A/CN.9/592, paras. 90 and 92.

[28] A/CN.9/592, para. 94.

[29] A/CN.9/592, para. 94.

[30] A/CN.9/592, para. 91.