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## United Nations Commission on International Trade Law

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### Settlement of commercial disputes

#### Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“New York Convention”)

#### Compilation of comments by Governments

#### Note by the Secretariat

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\* The submission of this document was delayed because it contains comments received in response to a Note Verbale circulated on 4 March 2008.



## I. Introduction

1. The Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York (“the Recommendation”) was adopted by the Commission at its thirty-ninth session (19 June-7 July 2006).<sup>1</sup> That text recommended “that article II, paragraph 2, of the New York Convention be applied recognizing that the circumstances described therein are not exhaustive”; it recommended also “that article VII, paragraph 1, of the New York 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”.

2. At its thirty-ninth session, the Commission recalled that it had a mandate, as defined in its founding General Assembly resolution 2205 (XXI), *inter alia*, to promote “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”.<sup>2</sup> Therefore, issuing a recommendation that was persuasive rather than binding in nature, for the benefit of users of the treaty, including law-makers, arbitrators, judges and commercial parties, was within the mandate of the Commission. Such a recommendation was said to be appropriate and, in the circumstances, particularly desirable as it would encourage the development of rules favouring the validity of arbitration agreements in a wider variety of situations and encourage States to adopt the revised version of article 7 of the UNCITRAL Model Law on International Commercial Arbitration. The purpose of the Recommendation, in line with the Commission’s mandate, was to propose a harmonizing interpretation of certain provisions of the New York Convention, without interfering with the competence of the States parties to the New York Convention to issue binding declarations regarding the interpretation of that treaty.<sup>3</sup>

3. As decided by the Commission at its fortieth session (Vienna, 25 June-12 July 2007),<sup>4</sup> the Secretariat has circulated the Recommendation to States, and invited Governments to submit comments on the impact that the Recommendation may be expected to have in their jurisdiction in relation to the implementation of the New York Convention and the need to promote its uniform interpretation. The present document reproduces comments received from States parties to the New York Convention as of 5 May 2008. Those comments are in the form in which they were received by the Secretariat.

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<sup>1</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, annex II.

<sup>2</sup> General Assembly resolution 2205 (XXI), section II, paragraph 8 (d).

<sup>3</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 177-180.

<sup>4</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17, part I)*, para. 208.

## II. Comments received from Governments on the Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

### 1. Australia

[Original: English]  
[3 April 2008]

The Australian Government supports the Recommendation as a means to promote a uniform, flexible interpretation, in different jurisdictions, of the writing requirement for arbitration agreements in article II, paragraph (2) of the New York Convention. The Recommendation encourages the development of rules favouring the validity of arbitration agreements.

The New York Convention is implemented for Australia in the *International Arbitration Act 1974*. The writing requirement has been interpreted and applied in a flexible manner in Australia, consistent with the New York Convention itself and the intent of the Recommendation. This is demonstrated by the judgement of Justice Allsop in an important decision of the Full Federal Court of Australia, *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (at paragraphs 133 to 155, in particular).

### 2. Czech Republic

[Original: English]  
[28 April 2008]

The Czech Republic confirms the wide adoption of the Convention in the light of the Recommendation.

The Recommendation is in conformity with the Czech legislation – Act No. 216/1994 Sb. on Arbitral Proceedings and Enforcement of Arbitral Awards, particularly its section 3, paragraphs 1 and 2, which state as follows:

“Section 3

(1) The arbitration agreement shall be made in writing otherwise it shall be void. Arbitration agreement made by telegram, telex or electronic means enabling to provide a record of the agreement, i.e. catch the contents thereof, and to determine the persons, having entered into it, shall be deemed to be made in writing.

(2) If the arbitration agreement is inserted into (general) terms and conditions governing the main contract, covered by the said arbitration agreement, then the latter shall be deemed to be validly concluded, if the offer of the main contract including the arbitration agreement made in writing is accepted by the offeree in way of implication, casting no doubt as to its acceptance of the arbitration agreement.”

In this way the jurisdiction of the Czech Republic encouraged enforcement of awards in the greatest number of cases as possible through article VII (1) of the

Convention allowing the application of given national provisions that provide more favourable conditions to a party seeking to enforce an award.

### 3. Germany

[Original: English]  
[28 April 2008]

There are no objections to this Recommendation as it complies with the principles of the UNCITRAL Model Arbitration Law, which have been implemented in the 10th book of the German Civil Process Order (ZPO). Impacts on German domestic law are therefore not expected, and this Recommendation is welcomed in practice.

Article II, paragraph 2 of the Convention describes the written form of arbitration agreements which, according to number one of the Recommendation, shall not be regarded as final. The Recommendation intends to accept the transmission of electronic documents as written agreements. This has a practical reason as electronic transmissions have proven to be more reliable than a transfer via postal services. Also, this interpretation does not contravene German law as paragraph 1029 ZPO does not provide for any special form for arbitration agreements.

Article VII, paragraph 1 contains a competitive clause to other treaties under international law. It shall guarantee that a party to an arbitral procedure is able to assert the arbitration award according to domestic law or according to any other treaty under international law. Number two of the Recommendation stipulates that this regulation will also relate to the validity of an arbitration agreement. Regarding the wording of the Convention, this provision only refers to arbitration awards. However, it seems consistent to extend the competitive clause to arbitration agreements in which the parties are subject to the arbitral procedure.

### 4. Iran (Islamic Republic of)

[Original: English]  
[30 April 2008]

1. The United Nations Commission on International Trade Law (UNCITRAL) recommended that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive.

2. According to the Iranian Law on International Commercial Arbitration (enacted on 17 September 1997); an "Arbitration agreement" is "an agreement between two parties to submit to arbitration all or certain disputes which have arisen or which may arise in respect of a specific legal relationship whether contractual or not. Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement." (Article 1 (c) of the Law). Furthermore, article 7 of the aforementioned Iranian Law provides that "The arbitration agreement shall be contained in a document signed by the parties, or in an exchange of letters, telex, telegrams or other means of communication, which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and is not de facto denied by

another. The reference in a written contract to a document containing an arbitration clause constitutes an independent arbitration agreement.”

3. The Islamic Republic of Iran is accordingly of the view that although the Iranian law recognizes that the arbitration agreement may be concluded in different manners and forms, it needs to be proved by sufficient and clear evidence that a valid and binding agreement is in fact concluded between the parties to refer to arbitration. This being said, we believe that the sweeping language of the proposed article II, paragraph 2 of the New York Convention needs to be qualified to indicate that the arbitration agreement must be proved to have been properly concluded. To this end, it should be reaffirmed that the circumstances described in article II, paragraph 2, of the Convention are not exhaustive, “to the extent that they are supported by convincing evidences, indicating the existence of such agreement” This is based on the notion that there must be sufficient proof of the parties’ mutual agreement to arbitrate.

4. On article VII, paragraph 1, of the New York Convention, the Islamic Republic of Iran believes that the amended language of this paragraph which focuses on the arbitration agreement rather than the arbitral award, to receive favourable treatment available under the domestic laws or the treaties of the country where the recognition is sought, is more consistent with the provisions of article II, paragraph 2 of the Convention. We support the proposed amendment as it removes the ambiguity of the language of that paragraph.

## 5. Malaysia

[Original: English]  
[30 April 2008]

The Government of Malaysia understands that the Recommendation regarding the interpretation of article II, paragraph 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (“Convention”) adopted by the United Nations Commission on International Trade Law on 7 July 2006 as its 39th session was made with a view to clarify that the circumstances described in article II, paragraph 2 are not exhaustive and to ensure a uniform interpretation of said article.

As regards the Recommendation on the interpretation of article VII, paragraph 1 of the Convention, the Government of Malaysia understands that it was made with a view to give effect to the interpretation of article II, paragraph 2 of the Convention. In this context, the Recommendation on the interpretation of article VII, paragraph 1 of the Convention also provides for greater clarity.

The Government of Malaysia further understands that both Recommendations may be of assistance to the national courts in interpreting the requirement for an “agreement in writing” in a more liberal manner and in cases where any interested parties are seeking recognition of the validity of any arbitration agreements. Hence, on the basis of the understanding as aforesaid, both Recommendations are acceptable to the Government of Malaysia.

## 6. Republic of Korea

[Original: English]  
[30 April 2008]

The Republic of Korea believes that the Recommendation has only proposed guidelines to the States Parties regarding the interpretation of the New York Convention and would not be legally binding on the Republic of Korea. As the Recommendation is not an amendment of or supplement to the Convention, it would not have any binding effect on the Republic of Korea regarding the implementation of the Convention or the promotion of its uniform interpretation.

The Korea Arbitration Act of the Republic of Korea, a State Party to the New York Convention, has very similar provisions to the Convention with regards to an “agreement in writing.” The 1985 UNCITRAL Model Law on International Commercial Arbitration has not yet been reflected in the Korean Act.

Regarding the need to ease the requirements for an agreement in writing, if necessary, it would be possible to reflect the draft of the 1985 UNCITRAL Model Law on International Commercial Arbitration in the Republic of Korea Arbitration Act after further national debate.

## 7. Serbia

[Original: English]  
[15 April 2008]

The Act on Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted on 1 October 1981 by the Assembly of the Socialist Federative Republic of Yugoslavia and published in the “Official Journal of the SFRY, International Treaties”, no. 11/81 of 9 October 1981. The former Yugoslavia acceded to the New York Convention on 26 February 1982. The New York Convention is in force in the Republic of Serbia as of 12 March 2001 on the basis of Notification of Succession to the former Socialist Federal Republic of Yugoslavia sent by this Government to the Secretary-General.

The former Yugoslavia has made a reciprocity reservation under article I (3) of the New York Convention and has declared the “commercial relationships” reservation under article I (3) of the New York Convention.

The national source of arbitration law in Serbia is the Arbitration Act enacted on 25 May 2006 (“Official Journal of the Republic of Serbia”, No. 46/2006). The Act is strongly influenced by the UNCITRAL Model Law on International Commercial Arbitration (1985), but contains some different and additional provisions. The 2006 revisions of the Model Law have not been included.

Under the Arbitration Act (2006), reciprocity is no longer required for recognition or enforcement of foreign arbitral awards. Furthermore, awards rendered both in commercial and non-commercial matters can be recognized, pursuant to the recognition and enforcement provisions of the Act (articles 64-68).

Serbia enacted the Electronic Signature Act on 29 December 2004 (“Sl. glasnik RS”, br.135/2004).

The provisions of the Arbitration Act on form of the Arbitration Agreement are more flexible and more favourable to enforcement than the provisions of article II paragraph (2) of the New York Convention. The interested parties may avail themselves of the statutory provisions and it may be expected that the courts would apply the statutory rules.

The courts have not taken notice of the Recommendation, since it has not been translated in the Serbian language as of yet (the translation is being prepared by the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade, and is expected to be published this year).

Nevertheless, there is a decision by the High Commercial Court in Belgrade confirming the judgment of the lower commercial court, which enforced an arbitration agreement providing for arbitration in Paris, France, referring to the provisions of the Arbitration Act, rather than article II of the New York Convention (Decision of the High Commercial Court No. Pz. 9058/2006 dated 22 March 2007 – excerpts published in: *Sudska praksa trgovinskih sudova – Bilten br. 2/2007*). Although the form requirement was not at issue in this case, the decision may serve as an indicator that the courts will probably interpret article VII of the Convention so that it applies also to recognition of arbitration agreements and not only to recognition of arbitral awards, i.e., that the courts will allow the parties to avail themselves of the more favourable provisions of the Arbitration Act.

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