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SETTLEMENT OF COMMERCIAL DISPUTES

Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement

Report of the Secretary General

Addendum

CONTENTS

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[Continuation of document A/CN.9/WG.II/WP.108]

III. REQUIREMENT OF WRITTEN FORM FOR ARBITRATION AGREEMENT

A. Introductory remarks

1. Many national laws require an arbitration agreement to be in writing for it to be enforceable. Such form requirements have been included also in international legislative texts on commercial arbitration.

2. Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) defines the writing requirement in the following way:

> "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

3. The European Convention on International Commercial Arbitration (Geneva, 1961), modeled on article II of the New York Convention, provides in article I(2):

> “2. For the purpose of this Convention,
> “(a) the term ‘arbitration agreement’ shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relation between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws”.

4. That substance of the form requirement has been incorporated also in the Inter-American Convention on International Commercial Arbitration (Panama, 1975), which provides in article 1:

> “An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.”

5. Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985) provides that:

> "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication 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 not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

6. If the parties have agreed to arbitrate, but the form the parties used for entering into the arbitration agreement does not meet the legislative requirement of form, a party may be able to object to the jurisdiction of the arbitral tribunal. A party may be able to raise that objection, for example: (a) when court proceedings are initiated and the respondent requests that the parties be referred to

arbitration, and the claimant in court proceedings counters that request with an assertion that the arbitration agreement is null and void (e.g. art. 8 of the UNCITRAL Model Law; art. III(3) of the New York Convention); (b) when the arbitral proceedings have commenced and a party in arbitral proceedings raises a plea that the arbitral tribunal does not have jurisdiction (e.g. art. 16(2) of the Model Law; art. V of the 1961 European Convention on International Commercial Arbitration); (c) when the award has been issued and a party applies for setting aside of the award (e.g. art. 34(2)(a)(i) together with art. 16(2) of the Model Law); (d) when a party applies for recognition or enforcement of the award and the respondent opposes the application (e.g. art. 36(1)(a)(i) together with art. 16(2) of the Model Law; art. V(1)(a) of the New York Convention).

7. It has been repeatedly pointed out by practitioners that there are a number of situations where the parties have agreed to arbitrate (and there is evidence in writing about the agreement), but where, nevertheless, the validity of the agreement is called into question because of the overly restrictive form requirement. The conclusion frequently drawn from those situations is that the definition of writing, as contained in the above-mentioned international legislative texts, is not in conformity with international contract practices and is detrimental to the legal certainty and predictability of commitments entered into in international trade.

8. Some national laws (as indicated in more detail below in paras. 29-32) have addressed the problem and broadened the definition of writing. While the problem of the outdated form requirement is thereby being dealt with, the fact that these laws contain different solutions creates other difficulties, caused by the disparity of laws. The Working Group may wish to consider that this disparity, which may grow in the future, increases the desirability of finding internationally harmonized solutions. Meanwhile, because the definition in international legislative texts as well as in many national laws has remained unchanged, undesirable consequences continue to arise. They are, for example, that parties may expect to be able to initiate arbitral proceedings, but their expectations are frustrated. Furthermore, courts, in order to reach results they consider appropriate under the circumstances, have to resort to expansive and even strained interpretations of the definition of writing. In addition, difficulties may arise when awards are rendered relying on laws providing a broader definition of writing but are brought for enforcement to a jurisdiction which has a narrower definition.

9. In light of the above, suggestions have been made that solutions should be sought which would, on the one hand, respect the notion that disputes may be settled by arbitration only if the parties have so agreed, and, on the other hand, validate legitimate contract practices and avoid problems and uncertainties in the practice of arbitration.

10. The following section B first considers typical fact situations in which the requirement that an arbitration agreement be “signed” by both parties or “contained in an exchange of letters” may cause problems and uncertainties. In the subsequent section C, which is related to the work of the Commission in the area of electronic commerce, the discussion is on how the requirement of writing is to be interpreted when the parties use electronic means of communication for agreeing to arbitrate.

B. “Document signed” or “exchange of documents”

11. Several fact situations may be given as typical examples of where the parties have agreed on the content of a contract containing an arbitration agreement and where there is written evidence of the contract, but where, nevertheless, current law (as contained in international texts referred to above in paras. 2 to 5) may be construed as invalidating or calling into question the validity of the arbitration agreement. This will happen where (a) the parties have not signed a document containing the arbitration agreement (which regularly occurs when the parties are not at the same place when concluding the contract) and where (b) the procedure used by the parties for concluding the contract does not meet the test of "exchange of letters or telegrams" (art. II(2) of the New York Convention), if that test is interpreted literally.

12. These fact situations include the following:

(a) A contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other “exchange” in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of the contract text proposed by one party, which is not explicitly accepted in writing by the other party, but the other party refers in writing to that contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) Reference in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading which incorporate the terms of the underlying charterparty by reference;

(f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a “further” contract may have been concluded orally or in writing);

(h) A bill of lading containing an arbitration clause that is not signed by the shipper or the subsequent holder;

(i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*);

(j) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(k) Third party rights and obligations under arbitration agreements where the third party exercises subrogated rights;

(l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same;

(m) Where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the "group of companies" theory.[1]

13. Courts have reached disparate decisions in those situations, often reflective of their general attitude towards arbitration. In many cases, courts have been able to hold the parties to their agreement, in some cases by using creative interpretations to achieve that result. For example, some courts have adopted a construction of article II of the New York Convention according to which the expression "an arbitral clause in a contract" should be read separately from the expression "arbitration agreements, signed by the parties or contained in an exchange of letters or telegrams". By parsing the provision in two limbs, the courts were able to liberalize the requirements of article II to enforce arbitration clauses contained in contracts that were not signed by both parties or were not contained in an exchange of letters or telegrams.

14. Apart from differing and not widely accepted interpretations of article II, it has been noted that, under existing case law, an arbitration clause that is contained in a writing (e.g. in a contract offer or in a sales or purchase confirmation) will meet the form requirement of article II(2) of the New York Convention only if: (a) the writing is signed by both parties; (b) a duplicate of the writing is returned, whether signed or not; or (c) the writing is accepted by means of returning another written communication to the party who sent the first writing. It has been frequently observed that these requirements are too restrictive and no longer in accord with international trade practices. There have been various cases where arbitration agreements were denied effect in court proceedings because the facts of the case could not be brought within the confines of article II(2) of the Convention. Furthermore, it could be imagined that in many cases arbitration was not even attempted because of the narrowness of the definition.

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[1] The group of companies theory has been used to bring a parent company or a subsidiary under an arbitration agreement which has not been signed by it, but by other members of the group. The theory may be summarized as requiring (1) that the legally distinct company being brought under the arbitration agreement is part of a group of companies that constitutes one economic reality (*une réalité économique unique*), (2) that the company played an active role in the conclusion and performance of the contract and (3) that including the company under the arbitration agreement reflects the mutual intention of all parties to the proceedings. This concept has been applied in a number of arbitrations (e.g. those carried out under the auspices of the International Chamber of Commerce) and has met the approval of some courts.

15. The factual situations set out above in paragraph 12 may be viewed, on analysis, as deriving from different underlying issues. The situations (a) to (h) are those where the parties have entered into a contract containing an arbitration clause but the form of that clause does not meet the statutory requirement. To the extent these situations give rise to undesirable results they should be addressed by broadening the statutory form requirement.

16. The situations in (i) to (m) are different in that in those situations it may be assumed that the arbitration agreement has been validly entered into by one set of parties, and the question is whether that arbitration agreement has become binding on a third party who later becomes party to the contract or assumes certain rights and obligations arising out of the contract. Jurisdictions have taken different approaches to third party rights and to the devolution of rights and interests in contracts and may reach different results. For example, whilst some jurisdictions are moving towards an acceptance of the group of companies theory, others have rejected it. These differences, rooted in the law of contracts, suggest that, if situations referred to in (i) to (m) require a modification of legislative provisions, the solutions should not interfere with the law governing the transfer of contractual rights and obligations to third parties.

Possible legislative approaches

17. One possible means of solving the above-mentioned difficulties would be to modernize the New York Convention in respect of the form of the arbitration agreement. When the Commission discussed this issue, various views were expressed as to the means through which modernization of the New York Convention could be sought (A/54/17, paras. 344 and 347). One view was that the issues related to the form of the arbitration clause should be dealt with by way of an additional protocol to the New York Convention. It was explained that redrafting, or promoting uniform interpretation of, article II (2) could only be achieved with the required level of authority through treaty provisions similar in nature to those of the New York Convention. While support was expressed for that view, concern was expressed that any attempt to revise the New York Convention might jeopardize the excellent results reached over 40 years of international recognition and enforcement of foreign arbitral awards through worldwide acceptance of that Convention. In response to that concern, however, it was pointed out that the very success of the New York Convention and its establishment as a world standard should make it possible for UNCITRAL to undertake a limited overhaul of the text if such work was needed to adapt its provisions to changing business realities, and to maintain or restore its central status in the field of international commercial arbitration.

18. Another possibility might be to prepare a convention separate from the New York Convention to deal with those situations which arise outside the sphere of application of the New York Convention, including situations where the arbitration agreement fails to meet the form requirement established in article II. When the Commission discussed this possibility (A/54/17, para. 349), some support was expressed for it. Another view, however, was that experience indicated that the process of adopting and securing widespread ratification of a new convention could take many years, and that meanwhile there would be an undesirable lack of uniformity. It was also stated that the suggested approach might be particularly suitable to deal with a number of the above-mentioned specific fact situations that posed serious problems under the New York Convention. However, with respect to some of those situations (e.g. transfer of rights or obligations to non-signing third parties), it was widely felt that the issues at stake went to general questions regarding the substance and validity of the underlying transaction. Accordingly, doubts were expressed as to whether it would be desirable

and feasible to attempt to deal with those issues in the context of a set of provisions geared primarily to the form of the arbitration agreement.

19. A further possibility would be to rely on the UNCITRAL Model Law on International Commercial Arbitration as a tool for interpreting the New York Convention. Such a solution would improve the situation in that, for example, article 7(2) of the Model Law would be used to clarify the effect of a reference in a contract to a document containing an arbitration clause and to recognize the effect of using electronic means of telecommunication for the conclusion of an arbitration agreement. However, the requirement that the arbitration agreement be contained "in an exchange of" messages, which has caused difficulties in practice, would require amendments to the current text of the Model Law. Should the Model Law be amended, a range of possible approaches might be considered (see below, paras. 29-32).

20. In considering the possibility of amending the Model Law as a tool for interpreting article II(2) of the New York Convention (without amending the Convention), the Working Group may wish to consider also that national legislation may operate in the context of the more-favourable-law provision of article VII of the Convention. According to article VII(1),

> "1. The provisions of the present Convention shall not [...] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon".

21. Pursuant to this article, it may be considered that, if the law of the country where the award is to be enforced (or the law applicable to the arbitration agreement) contains a less stringent form requirement than the Convention, the interested party may rely on that national law. That understanding would be in line with the purpose of the Convention, which is to facilitate recognition and enforcement of foreign awards. That purpose is achieved by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while leaving to operate any national provisions that give special or more favourable rights to a party seeking to avail itself of an award.

22. It should be noted, however, that the acceptability of allowing less restrictive form requirements to operate through article VII(1) of the Convention would depend on whether article II(2) of the Convention is regarded as establishing a maximum requirement of form (thus leaving States free to adopt a less stringent requirement) or whether the Convention is interpreted as providing a unified form requirement with which arbitration agreements must comply with under the Convention. Furthermore, it should be noted, that according to some views, article VII(1) may be invoked to recognize more favourable national provisions on form only if the enforcement mechanism of the New York Convention is replaced by the national law on enforcement of foreign arbitral awards (whether provided by a statute or developed by case law). It is said that only if such a national enforcement regime exists, that regime can, through article VII(1), be used in lieu of the regime of the Convention. The Working Group may wish to discuss the validity and implications if these considerations. It may also wish to discuss whether these considerations relating to article VII should be taken into account in drafting possible amendments to the Model Law so as to establish a regime that will operate in harmony with the New York Convention.

23. When the Commission considered the possibility of preparing model legislation with a view to superseding article II of the New York Convention by relying on article VII of the Convention (A/54/17, para. 348), it was suggested to establish (in addition to model legislation) guidelines or other non-binding material to be used by courts as guidance from the international community in the application of the New York Convention. It was also suggested that any model legislation that might be prepared with respect to the form of the arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods, which is designed to facilitate interpretation by reference to internationally accepted principles. Similar provisions were included in the UNCITRAL Model Law on Electronic Commerce[2] and the UNCITRAL Model Law on Cross-Border Insolvency.[3] Such a non-binding commentary formulated by the Commission along with the model legislative provision could speed up the process of harmonization of law and its interpretation.

Possible content of uniform provisions

24. In considering the content of uniform legislative provisions, one possible approach, in line with recent legislative developments in a number of countries, would be to include a list of instruments or factual situations where arbitration agreements would be validated despite the lack of an exchange of documents. Such a list might be formulated so as to encompass the use of instruments and situations listed above in paragraph 12. While such a specific approach has the advantage of providing a clear and specific solution to the identified problems, it runs the risk that the provisions would not cover all situations that should be covered and may not adequately address developing business needs and practice.

25. A somewhat broader solution would be to validate written arbitration agreements even if they were not entered into by an exchange of documents. Language might be considered along the lines of a proposal made during the preparation of article 7(2) of the Model Law. The proposed language was as follows:

> "However, an arbitration agreement also exists where one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner".[4]

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[2] Article 3:
"(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

[3] Article 8:
"In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

[4] Document A/CN.9/WG.II/WP.37, draft article 3, reproduced in the UNCITRAL Yearbook, vol. XIV: 1983, part two, III, B. 1.

While the proposal was at that time rejected "since it raised difficult problems of interpretation",[5] it may be considered that the idea underlying it remains valid.

26. During the preparation of the Model Law, in the written comments by Governments on the draft Model Law, a proposal was made (by Norway) in which it was observed that arbitration clauses are frequently found in bills of lading, which are usually not signed by the shipper. Nevertheless, it was said, such clauses are generally considered binding on the shipper and subsequent holders of the bill of lading. In order to clarify the status of such arbitration agreements a wording was proposed which addressed bills of lading as well as other written arbitration agreements signed by one party only. The proposal was to add to article 7 of the Model Law the following:

> "If a bill of lading or another document, signed by only one of the parties, gives sufficient evidence of a contract, an arbitration clause in the document, or a reference in the document to another document containing an arbitration clause, shall be considered to be an agreement in writing."[6]

27. The proposal was considered during the eighteenth session of the Commission in 1985, at which the Model Law was finalized.[7] While the proposal was ultimately not adopted, it was noted in the discussion that a substantial number of speakers had commented favourably on it.[8]

28. Various recently enacted national laws have provided for a wider definition than that included in the UNCITRAL Model Law. They are reproduced here as examples in order to stimulate discussion and possibly to be used as an inspiration in finding acceptable harmonized solutions.

29. In Switzerland, article 178 of the Federal Act of Private International Law takes a general approach:

> "1. As regards its form, the arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.
>
> "2. As regards its substance, the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law."

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5 Document A/CN.9/232, para. 45, reproduced in the UNCITRAL Yearbook, vol. XIV: 1983, part two, III, A.

6 Document A/CN.9/263 (Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration), comments on article 7, para. 5 (Norway), reproduced in the UNCITRAL Yearbook, vol. XVI: 1985, part two, I, A.

7 Summary records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration, 311th meeting, reproduced in the UNCITRAL Yearbook, vol. XVI: 1985, part three, II.

8 Ibid., para. 48.

30. In the Netherlands, article 1021 of the Arbitration Act 1986 provides:

> "The arbitration agreement shall be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party."

31. A somewhat more detailed approach has been taken by the German Arbitration Law of 1997; section 1031 provides:

> "(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.
>
> "(2) The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and - if no objection was raised in good time - the contents of such document are considered to be part of the contract in accordance with common usage.
>
> "(3) The reference in a contract complying with the form requirements of subsection 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.
>
> "(4) An arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party.
>
> "(5) Arbitration agreements to which a consumer is a party must be contained in a document which has been personally signed by the parties. No agreements other than those referring to the arbitral proceedings may be contained in such a document; this shall not apply in the case of a notarial certification. A consumer is a natural person who, in respect of the transaction in dispute, is acting for a purpose which can be regarded as being outside his trade or self-employed profession ('*gewerbliche oder selbständige berufliche Tätigkeit*').
>
> "(6) Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings."

32. A detailed approach has been taken in England, where Section 5 of the Arbitration Act 1996 provides:

> "[...]
> "(2) There is an agreement in writing-
> (a) if the agreement is made in writing (whether or not it is signed by the parties),
> (b) if the agreement is made by exchange of communications in writing, or
> (c) if the agreement is evidenced in writing.
>
> "(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

"(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

"(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

"(6) References in this Part to anything being written or in writing include its being recorded by any means."

A non-legislative approach

33. Bearing in mind the various considerations underlying the preparation of a treaty or model legislation, including the long process of the legislative implementation of any solution that may be agreed upon, the Working Group may wish to discuss the advisability of preparing a non-legislative text. When the Commission discussed the question of the degree to which the current statutory provisions are regarded as outdated (A/54/17, para. 344), the view was expressed that, in the majority of cases, parties had no difficulty in complying with the current form requirements for arbitration agreements. It was also said that those requirements compelled the parties to consider carefully the exclusion of court jurisdiction. Therefore, it was suggested that if any work should be undertaken, it should be limited to the formulation of a practice guide. However, while that view received some support, the Commission decided that future work was necessary with respect to matters arising in connection with article II(2) of the New York Convention, and that legislative work was among the options to be considered.

34. In light of those considerations, the Working Group may wish to discuss the advisability of preparing practice guidelines or notes to alert parties in international transactions that in certain factual circumstances (such as those referred to above in para. 12) form problems might arise that might adversely affect the application of the New York Convention with respect to recognition of agreements to arbitrate and enforcement of arbitral awards. Such guidelines might be useful, for example, to warn trade organizations that sponsor standard forms that those forms may not meet the written form requirements, and the guidelines might propose changes in wording or practices to avoid such difficulties. In addition, such guidelines or notes might be useful to parties and judges of national courts in analysing whether the written form requirement has or has not been met by various types of business conduct. The Working Group might consider whether such guidelines or notes could be useful to international business as an interim or separate solution, while consideration is being given to the more time-consuming and complex process of drafting and implementing legislative solutions.

C. Arbitration agreement "in writing" and electronic commerce

35. The question as to whether electronic commerce is an acceptable means of concluding valid arbitration agreements should pose no more problems than have been created by the increased use of telex and subsequently of telecopy or facsimile. The above-cited article 7(2) of the UNCITRAL Model Law expressly validates the use of any means of telecommunication "which provides a record

of the agreement", a wording which would cover telecopy or facsimile messages as well as most common uses of electronic mail or electronic data interchange (EDI) messaging.

36. As to the New York Convention, it is generally accepted that the expression in article II(2) "contained in an exchange of letters or telegrams" should be interpreted broadly to include other means of communication, particularly telex (to which facsimile could nowadays be added). The same teleological interpretation[9] could be extended to cover electronic commerce. Such an extension of article II to cover certain means of communication that were not contemplated at the time the Convention was drafted would be in line with the decision taken by the Commission when it adopted the UNCITRAL Model Law on Electronic Commerce with its Guide to Enactment in 1996. The Guide, which was drafted with the New York Convention and other international instruments in mind, provides that

> "the Model Law [on Electronic Commerce] may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved." (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 6).

37. The Working Group may wish to discuss whether the interpretation of article II(2) of the New York Convention as covering also contracts and arbitration agreements entered into in the context of electronic commerce (either by reference to article 7(2) of the UNCITRAL Model Law on Arbitration or to the UNCITRAL Model Law on Electronic Commerce) can count on wide international consensus and whether it should be recommended by the Commission as a workable solution.

38. The Working Group, when it considers how legislation on modern means of communication influences the interpretation of article II(2) of the New York Convention, may wish to bear in mind the general issue of compatibility of electronic commerce with the legal regime established by a series of international conventions, governing different areas of trade, that contain mandatory requirements for the use of written documents. Repeated observations have been made that many treaties governing international trade do not satisfactorily accommodate the reality of electronic commerce and that under those treaties electronic messages remain potentially unacceptable as legal means of communication. An inventory of such treaties has been prepared by the United Nations Economic Commission for Europe (document Trade/WP.4/R.1096, 1994, as revised in 1999). In connection with that inventory, the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the United Nations Economic Commission for Europe

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[9] For example, the Swiss Federal Tribunal observed that "[article II(2)] must be interpreted in the light of [the Model Law], whose authors wished to adapt the legal regime of the New York Convention to current needs, without modifying [the actual Convention]". Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A. 16 January 1995, 1st civil division of Swiss Federal Tribunal; relevant excerpts in (1995) 13 Association suisse de l'arbitrage Bulletin pp. 503-511 at p. 508.

adopted the "Recommendation to UNCITRAL regarding implementing electronic equivalents to 'writing', 'signature' and 'document' in conventions and agreements relating to international trade".[10] In the Recommendation, the Centre,

> "*Being aware* of the need to avoid disadvantage to electronic commerce and support efforts to achieve global parity in law between manual and electronic commerce,
>
> "*Recommends* that UNCITRAL consider the actions necessary to ensure that references to 'writing', 'signature' and 'document' in conventions and agreements relating to international trade allow for electronic equivalents."

39. The Recommendation was noted by the Commission during its thirty-second session, together with some other issues in electronic commerce that might be put on the agenda (A/54/17, paras. 315-318). In connection with the Recommendation, support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce (ibid., para 316). It was decided that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group on Electronic Commerce would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine some or all of the possible items for future work, with a view to making more specific proposals for future work by the Commission (ibid., para 318). In the light of that, it is suggested that considerations of the Working Group on Arbitration concerning the treatment of electronic messages in the context of the New York Convention will be helpful to the Working Group on Electronic Commerce and the Commission when they consider and take decisions on the general issue of compatibility of electronic commerce with international conventions; it is further suggested that any decisions taken in the Working Group on Arbitration on this matter should be in line with decisions taken on the general issue by the Working Group on Electronic Commerce and the Commission.

40. Finally, the Working Group may wish to note that, assuming that electronic messages are to be treated as written messages in the context of article II of the New York Convention, some of the practices developing in electronic commerce (over the Internet or otherwise) may lead to difficulties that are connected with the requirement, discussed earlier, that an arbitration agreement be contained "in an exchange of" messages. Namely, it has been observed that electronic commerce may make it less likely for there to be an exchange of messages containing (or referring to) an arbitration agreement. The computerized connections between suppliers and buyers, which are being increasingly used, may lead to purchase orders being generated automatically (e.g. when the stocks of goods fall below a certain level). If these purchase orders are treated as "call-off" contracts that fall within an underlying agreement, no problem will arise since the arbitration agreement applicable to all the contracts will have been formed at the time of the underlying agreement, which will be regarded as performed whenever goods are shipped or services provided. If, however, these individual purchase orders are regarded on their facts as leading to a series of separate contracts, there may be no exchange of messages in relation to the arbitration agreement for each contract, with the consequent problems as set out above for any such contract. Such developments in electronic commerce may be

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[10] The Recommendation, dated 26 February 1999, published under the symbol TRADE/CEFACT/1999/CRP.7, was unanimously approved by the plenary of CEFACT (document TRADE/CEFACT/1999/19 of 14 June 1999, para. 60).

regarded as one more argument underscoring the desirability of preparing modern rules on the form of arbitration agreements.

IV. SUMMARY AND CONCLUSION

41. The present document has been prepared to facilitate discussions in the Working Group on future harmonized solutions in the area of conciliation, enforcement of interim measures of protection and written form for arbitration agreements, as decided by the Commission (see document A/CN.9/WG.II/WP.108, para. 9). On the basis of considerations and decisions of the Working Group, the Secretariat will prepare first drafts of uniform provisions with comments as appropriate for the thirty-third session of the Working Group, which, subject to approval by the Commission, will meet during the second half of 2000.

42. In addition to deliberating on topics discussed in this paper, the Working Group may wish, time permitting, to exchange views and information on other arbitration topics that were identified by the Commission as likely items of future work. Those topics are referred to in document A/CN.9/WG.II/WP.108, paragraph 6 and in paragraph 339 of the report of the Commission on the work of its thirty-second session (document A/54/17). With respect to those topics, the Commission left to the Working Group to decide on the time and manner of dealing with them.

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