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Inclusion of a reference to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the draft convention on the use of electronic communications in international contracts

Note by the Secretariat

1. 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 “writing requirement” contained in article 7 (2) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) and article II (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”). In respect of the New York Convention, the Commission was informed that the Working Group would be invited to consider whether the New York Convention should be included in a list of international instruments to which the draft convention on the use of electronic communications in international contracts (“the draft convention”), currently being prepared by Working Group IV (Electronic Commerce) would apply.¹
2. The Working Group on Arbitration is asked to consider whether or not the New York Convention should be listed under article 19 of the draft convention in the interests of achieving some progress towards the objective of uniform interpretation of the written form requirement contained in article II (2) of the New York Convention. A full text of the draft convention is reproduced in document A/CN.9/WG.IV/WP.110.
3. The draft convention applies to the exchange of electronic communications relating to the formation or performance of a contract between parties whose places

* The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.



of business are in different States and either, those States are Contracting States, the rules of private international law lead to the application of the law of a Contracting State, or the parties have agreed that the draft convention applies (draft article 1). The draft convention currently contains a provision intended to clarify that electronic communications may also be used in connection with the formation or performance of contracts that are subject to certain UNCITRAL Conventions (draft article 19). The reference to the New York Convention appears in square brackets in article 19 of the draft convention because neither the Working Group on Arbitration, nor the Working Group on Electronic Commerce have had an opportunity to consider that matter.

4. It will be recalled that the Working Group, at its thirty-second, thirty-third, thirty-fourth and thirty-sixth sessions, considered a draft model legislative provision revising article 7 (2) of the Model Law² and a draft interpretative instrument regarding article II (2) of the New York Convention.³

5. According to the revised draft of article 7 (2) of the UNCITRAL Model Law (contained in A/CN.9/508, paragraph 18), “‘writing’ includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference”. The revised draft defines “data message” as “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”. That definition of “data message” is consistent with the definition contained in the draft convention (paragraph 4 (c) of the draft convention).

6. The draft interpretative instrument regarding article II (2) of the New York Convention provides that “the definition of ‘agreement in writing’ contained in article II (2) of the New York Convention should be interpreted to include [wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration]” (A/CN.9/508, para. 18). The Working Group will recall that it has not yet reached any consensus as to the effectiveness of an interpretative declaration to address the practical problems and existing disharmony in the application of article II (2) of the New York Convention given that a declaration would have no binding effect in international law (A/CN.9/508, paras. 42-50).

7. The most important aspect of the draft convention is to provide legal recognition to electronic communications. Any requirement under law that a contract be in writing will be met by an electronic communication “if the information contained therein is accessible so as to be usable for subsequent reference” (draft article 8). This language reflects the approach adopted in the revised draft of article 7 (2) of the UNCITRAL Model Law (see paragraph 5, above).

8. The provision of the draft convention listing the international instruments to which the draft convention could apply currently reads as follows:

“Article 19 [Y]. Communications exchanged under other international conventions

Except as otherwise stated in a declaration made in accordance with paragraph 3 of this article, [each Contracting State declares that it shall apply the provisions of this Convention][the provisions of this Convention shall

apply] to the use of electronic communications in connection with the [negotiation][formation] or performance of a contract [or agreement] to which any of the following international conventions, to which the State is or may become a Contracting State, apply...”.

Currently, the following conventions are listed thereunder:

[Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)]

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991)

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

9. Article 19 of the draft convention is intended to clarify the relationship between the rules contained in the draft convention and the rules contained in other international conventions. It is not the purpose of draft article 19 to amend any international convention (for further information regarding article 19 of the draft convention, see footnote 55 in A/CN.9/WG.IV/WP.110). The draft convention appears to apply only to the interpretation of the definition of the written form of an arbitration agreement, and a reference in the draft convention to the New York Convention should not be understood as addressing the broad range of issues arising in respect of on-line arbitrations (i.e. arbitrations in which significant parts or even all of the arbitral proceedings were conducted by using electronic means of communication). The Working Group will recall that the Commission already decided that the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce on this matter, which will be dealt with separately.⁴

10. If the reference to the New York Convention is maintained in the draft convention, it may also be necessary to include a provision on electronic equivalents to “original” documents since article IV, paragraph (1) (b) of the New York Convention requires that the party seeking recognition and enforcement of a foreign arbitral award must supply, inter alia, an original or a duly authenticated copy of the arbitration agreement. To address that matter, article 9 of the draft convention contains two paragraphs, as follows:

“[4. Where the law requires that a contract or any other communication should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

[(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

[(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

[5. For the purposes of paragraph 4 (a):

[(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

[(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.]”

11. Article 9 of the draft convention refers to the definition of “a contract or any other communication to be presented or retained in its original form”, and the word “communication” is defined, under article 4 of the draft convention, as meaning “any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the [negotiation][formation] or performance of a contract”. Therefore, the definition of “original” appears to apply only to the requirement for an original arbitration agreement under article IV, paragraph (1) (b) of the New York Convention and not to the requirement for an original arbitral award under article IV, paragraph (1) (a) of the New York Convention.

12. The inclusion of a reference to the New York Convention under article 19 of the draft convention would provide a uniform definition of “writing”, a definition that is more consistent with developing technological practices in international commercial arbitration, and thereby would contribute positively to uniformity in the interpretation and application of article II (2) of the New York Convention. It would also provide a solution to the requirement under article IV, paragraph 1 (b) of the New York Convention that an original agreement be supplied.

13. However, similarly to an amending protocol, it would create two groups of States parties, those that had adhered to the New York Convention in its original form only and those who, in addition, had adhered to the draft convention.¹ At least, in so far as States that were party to both the New York Convention and the draft convention, the New York Convention would be read as subject to the latter convention.

¹ Article 30 of the Vienna Convention on the Law of Treaties which represents customary international law provides in part in respect of the application of successive treaties relating to the same subject-matter that:

“3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

“4. When the parties to the later treaty do not include all the parties to the earlier one:

“(a) As between States parties to both treaties the same rule applies as in paragraph 3;

“(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

14. In discussing this matter, the Working Group should be aware of the progress accomplished in respect of the draft convention and that the Working Group on Electronic Commerce (Working Group IV) intends to complete its work on the draft convention to enable its review and approval at the forthcoming session of the Commission (to be held in Vienna, from 4 to 22 July 2005).

Notes

- ¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 59.
- ² With respect to the draft model legislative provision revising article 7, paragraph 2, see A/CN.9/468, paras. 88-99; A/CN.9/485, paras. 21-59; A/CN.9/487, paras. 22-41; A/CN.9/508, paras. 18-39.
- ³ With respect to the draft interpretative instrument regarding article II, paragraph 2 of the 1958 New York Convention, see A/CN.9/485, paras. 60-77; A/CN.9/487, paras. 42-63; A/CN.9/508, paras. 40-50.
- ⁴ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396.
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