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Settlement of commercial disputes

Preparation of uniform provisions on written form for arbitration agreements

Note by the Secretariat

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Introduction

1. At its thirty-second session, in 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), 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.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and 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-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (ibid., para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., para. 108 (c)); 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 (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (ibid., para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (ibid., para. 107 (m)), the view was expressed that the 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.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the

work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration (see A/CN.9/WG.II/WP.113, paras. 13 and 14) and a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (ibid., para. 16). Consistent with a view expressed in the context of the thirty-fourth session of the Working Group (A/CN.9/487, para. 30), concern was expressed as to whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules available in written form could satisfy the written form requirement. It was stated that such a reference should not be taken as satisfying the form requirement since the written text being referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration (i.e. a text that would most often exist prior to the agreement and result from the action of persons that were not parties to the actual agreement to arbitrate). It was pointed out that, in most practical circumstances, it was the agreement of the parties to arbitrate that should be required to be made in a form that was apt to facilitate subsequent evidence of the intent of the parties. In response to that concern, it was generally felt that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable-right provision of article VII of the New York Convention. [7]

6. The present note has been prepared on the basis of the discussions in the Working Group with respect to the written form for arbitration agreements (A/CN.9/487, paras. 22-63). Part I deals with the issue of the possible addition to article 7 of the UNCITRAL Model Law on International Commercial Arbitration. Part II deals with the interpretation of the New York Convention.

7. Previous discussion regarding those two topics may be found in the following documents published by UNCITRAL:

- Report of the Commission on the work of its thirty-fourth session: A/56/17 (June-July 2000, paras. 309-315);
- Report of Working Group on the work of its thirty-fourth session: A/CN.9/487 (November 2001, paras. 22-63);
- Working Paper: A/CN.9/WG.II/WP.113 (October 2001);
- Report of Working Group on the work of its thirty-third session: A/CN.9/485 (November-December 2000, paras. 21-59);
- Working Paper: A/CN.9/WG.II/WP.110 (September 2000, paras. 10-51);
- Report of the Commission on the work of its thirty-third session: A/55/17 (June-July 2000, paras. 389-399);

- Report of Working Group on the work of its thirty-second session: A/CN.9/468 (March 2000, paras. 88-106);
- Working Paper: A/CN.9/WGII/WP.108/Add.1 (January 2000, paras. 1-40);
- Report of the Commission on the work of its thirty-second session: A/54/17 (May-June 1999, paras. 344-350);
- Note on possible future work in the area of international commercial arbitration: A/CN.9/460 (April 1999, paras. 20-31).

These documents may also be found on the UNCITRAL website (www.uncitral.org) under "Working Groups" and "Working Group on Arbitration".

I. Model legislative provisions on written form for the arbitration agreement

8. At its thirty-fourth session (June-July 2001), the Working Group considered a draft model legislative provision revising article 7 of the UNCITRAL Model Law on International Commercial Arbitration (set forth in document A/CN.9/WG.II/WP.113 at paragraphs 11-14). The considerations of the Working Group are reflected in document A/CN.9/487, paragraphs 22-41. Having concluded its considerations of the draft provision, the Working Group requested the Secretariat to prepare a revised draft provision, based on the discussion in the Working Group, for consideration at a future session (ibid., para. 18).

A. Revised text of the model legislative provision

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

Article 7. Definition and form of arbitration agreement

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

(2) The arbitration agreement shall be in writing. "Writing" 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.

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

(4) For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause or arbitration terms and conditions or

any arbitration rules referred to by the arbitration agreement are in writing, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

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

(6) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

[(7) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.]

B. Remarks on the revised text of the model legislative provision

Paragraph (1)

10. Paragraph (1) reproduces the unchanged text of paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration.

Paragraph (2)

Existing interpretations of the notion of "writing"

11. In the course of its deliberations at its thirty-fourth session, the Working Group decided that appropriate explanations should be given in the guide to enactment of the draft model legislative provision as to the intent that lay behind paragraph (2) not to conflict with existing interpretations given to the notion of "writing", in particular where a liberal interpretation might be given readily, through case law or otherwise, to the notion of "writing" under either the Model Law or the New York Convention. Clarification as to the preservation of existing interpretations of the notion of "writing" may be particularly important for those countries that would not adopt the revised version of article 7 of the Model Law, or during the transitional period before the enactment of that revised provision. (A/CN.9/487, paras. 25-26).

"provides a record of the agreement or is otherwise accessible"

12. The text of draft paragraph (2) as considered by the Working Group at its previous session has been drafted on the basis of two recent UNCITRAL texts, the combination of which in a single provision may need to be further examined by the Working Group from the perspectives of substance and drafting. On the one hand, article 7(2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit provides that "An undertaking may be issued in any form which preserves a complete record of the text of the undertaking …". On the other hand,

article 6(1) of the UNCITRAL Model Law on Electronic Commerce provides that "Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference". That provision is inseparable form the definition of "data message" contained in article 2(a) of that instrument, which reads as follows: "'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy". The notion of "record" does not appear in the text of the UNCITRAL Model Law on Electronic Commerce but electronic records are clearly intended to be covered under the broadly defined notion of "data message". The only reason for combining in the draft provision the traditional notion of "record" with the more innovative notion of "data message" is thus apparently to make it abundantly clear that the traditional paper document is included among the acceptable forms of recording an arbitration agreement. That matter did not need to be dealt with in the UNCITRAL Model Law on Electronic Commerce and may need to be addressed in the draft revision of article 7 of the UNCITRAL Model Law on International Commercial Arbitration. However, in the absence of additional explanations, the notion of "record" may raise issues of translation in the various official languages and create difficulties in those legal systems where such notions as "record" or "business record" are not heavily relied upon in commercial law. Further clarification in the text might be needed, for example to indicate that the provision is intended to address "tangible" records.

13. To the extent that the text would use the notion of "record" to refer to a paper document recording the text or otherwise demonstrating the existence of the arbitration agreement, the conceptual distinction between "record" on the one hand and "data message" on the other hand would probably lead to the deletion of the word "otherwise". The guide to enactment might need to elaborate on the reasons for which, contrary to article 7(2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the draft provision does not refer to "a complete record of the text of the" agreement.

Paragraph (3)

"Data message"

14. To the extent the model provision intends to refer to the notion of "data message", it is submitted that it should reproduce the definition contained in article 2(a) of the UNCITRAL Model Law on Electronic Commerce. That is the purpose of paragraph (3).

Paragraph (4)

15. Paragraph (4) is based on the understanding reached by the Working Group at its thirty-third and thirty-fourth sessions that the model legislative provision should recognize the existence of various contract practices by which oral arbitration agreements may be concluded with reference to written terms of an agreement to arbitrate, and that in those cases the parties may have a legitimate expectation of a binding agreement to arbitrate (see A/CN.9/485, para. 40 and A/CN.9/487, para. 29).

16. The text of paragraph (4) reflects the reasoning reached by the Working Group at the end of its thirty-fourth session (see A/CN.9/487, paras. 29-32). The effect of

such a provision would be that the allegation of a party that an arbitration agreement had been concluded orally with reference to a pre-existing set of arbitration rules (presumably available in written form) or to procedures set out in the law applicable to the arbitration could result in the other party being drawn into arbitral proceedings irrespective of the absence of any evidence as to the existence and contents of the alleged arbitration agreement. The working Group may wish to further discuss the consequences of such a rule.

17. In the course of its deliberations, the Working Group may also wish to take into consideration the concerns expressed by the Director of the General Legal Division of the United Nations Office of Legal Affairs in a letter to the Secretariat dated 23 May 2001. Those concerns are expressed on behalf of the United Nations as a potential party to arbitration proceedings. The following are excerpts from that letter:

> "5. By virtue of its immunity from legal process, the UN cannot be sued in court. However, pursuant to Article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations (the "General Convention"), the United Nations "shall make provisions for appropriate modes of settlement of *[inter alia]* disputes arising out of contracts of disputes of a private law character to which the UN is a party". […] Pursuant to this provision, it has been the practice of the UN to make provision in its commercial agreements (e.g., contract and lease agreements) for recourse to arbitration in the event of disputes that cannot be settled by direct negotiations or other amicable means (see A/C.5/49/65). With respect to disputes of a private law character that do not arise out of commercial agreements, except for particular situations in which other means of settling such disputes are provided, the practice of the Organization has been to submit such disputes to arbitration where they cannot be settled by these or other amicable means (see A/C.5/49/65). For such cases, the Organization enters into separate arbitration agreements. Both the arbitration clauses in contracts and the separate arbitration agreements provide that the arbitration proceedings are to be conducted under the UNCITRAL Arbitration Rules. Also, in both cases, the UN agrees to be bound by the award of the arbitral tribunal as the final adjudication of the dispute.
>
> "6. In essence, under the draft revision of Article 7(2) of the UNCITRAL Model Law, the requirement in the existing Article 7(2) that an arbitration agreement be "in writing" would be satisfied even where a contract containing an arbitration clause, or a separate arbitration agreement, were concluded other than in writing, for example, orally or by virtue of the "conduct" of a party, if the arbitration clause, arbitration terms and conditions, or arbitration rules referred to by the agreement, are in writing. Moreover, such a "writing" would include "non-traditional" forms, such as electronic or data messages.
>
> "7. The UN may be subjected to such arbitration, the results of which it accepts as binding, only to the extent that it has expressly agreed to do so. As noted above, agreements by the UN to submit to arbitration are contained in arbitration clauses contained in written contracts signed by the UN, or in written arbitration agreements signed by the UN. In both cases, the requirement of a written document signed by the UN ensures that the UN has agreed to submit to arbitration. Moreover, in its separate arbitration agreements, the UN typically includes various provisions to protect its legitimate interests, depending on the circumstances of the particular case, such as provisions clearly defining and circumscribing the issues to be adjudicated, provisions specifying that the arbitrators are to apply internationally accepted principles of international commercial law rather than the law of a particular national legal system, provisions regulating the scope of discovery that may be ordered by the arbitrators and provisions preserving the UN's privileges and immunities.
>
> "8. Under the text under consideration within the Working Group, the requirement of a "written" arbitration agreement would be met if an oral contract or agreement referred, for example, to written arbitration terms and conditions. This requirement would be satisfied even if there existed only partial written arbitration terms and conditions, i.e. terms and conditions dealing with some issues but not others that the UN would want to regulate the arbitration, such as those referred to above.

> "9. The writing requirement would also be satisfied merely by a reference in an oral contract or agreement to written arbitration rules. However, a reference to such rules, such as the UNCITRAL Arbitration Rules, would not cover other issues, such as those mentioned above, that the UN typically regulates in its arbitration agreements.
>
> "10. In addition, I point out that a provision of this nature would enable a claimant to convene an arbitral tribunal, which, pursuant to its "*compétence/compétence*", would have authority to decide is own jurisdiction. Under the contemplated provision, this would require a respondent to submit to complex evidentiary hearings which would be necessary in order for the arbitral tribunal to determine the existence of a contract or arbitration agreement by "conduct" or "orally" and, if it finds such a contract or agreement, the existence and content of a "written" arbitration clause, arbitration terms and conditions or arbitration rules. While, as noted above, a contract entered into by the UN must be in writing, we would be concerned that an arbitral tribunal thus convened might seek to establish that the UN had entered into an arbitration agreement orally or "by conduct". If it did, […] it might find that the UN is subject to arbitration proceedings on terms and conditions that do not deal with issues which the UN would have regulated in an arbitration agreement, and, thus, which do not fully protect its interests. The UN would not wish such issues to be left to be resolved by the Arbitral Tribunal itself. This is precisely why the UN regulates such issues in its arbitration agreements".

While the specific context of arbitration cases where the United Nations are a party does not need to be addressed in the draft provision, the general policy concerns underlying the above-mentioned letter may need to be addressed in the more general context of international commercial arbitration.

Paragraph (5)

18. Paragraph (5) reproduces language contained in the current text of article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration. It was adopted unchanged by the Working Group at its thirty-fourth session (A/CN.9/487, para. 36).

Paragraph (6)

19. The text of paragraph (6) was adopted in substance by the Working Group at its thirty-fourth (ibid., para. 37) and thirty-third (A/CN.9/485, para. 42) sessions. It has been slightly reworded so as to refer to any "text containing an arbitration clause" and not to restrict the scope of the paragraph to cases where the reference would be to an "arbitration clause" not contained in the contract.

Paragraph (7)

20. The Working Group decided that paragraph (7) should be placed between square brackets until further discussion had taken place as to whether the substance of the provision should be included in article 7 or in an amendment to article 35. The Secretariat was requested to study the implications of a possible revision of article 35 for continuation of the discussion by the Working Group (ibid., para. 40).

21. It should be noted that article 35(2) of the Model Law mirrors article IV of the New York Convention. Any deviation from the existing text of article 35 would therefore require additional work towards amending the New York Convention or providing means to secure a uniform yet innovative interpretation of article IV of the New York Convention.

22. More fundamentally, the question raised by the form requirements that may be imposed at the level of recognition and enforcement of an award refer back to the

central issue raised by the proposed text of paragraph (4). If the purpose of paragraph (4) is simply to facilitate the use of modern means of communication in the context of international commercial arbitration and to alleviate the burden resulting from the requirement that an arbitration agreement be in the form of an original document, it is probably possible to deal with the entire issue of form within a revised version of article 7 of the Model Law. To address the issue of the "original arbitration agreement" under article 35, the revised text of article 7 would probably need to establish additional rules as to how the functional equivalent of an "original" document may be provided in an electronic environment. Articles 7 and 8 of the UNCITRAL Model Law on Electronic Commerce may provide useful guidance as to how such additional rules might be drafted.

23. However, if the purpose of paragraph (4) is to establish that evidence as to the existence and substance of the arbitration agreement could be replaced by a mere reference to terms and conditions of the arbitral procedure as set out in a set of arbitration rules or a law on arbitration, with no further written evidence being produced as to the existence or contents of the agreement, it is doubtful that such a fundamental change could be introduced without a complete overhaul of article 35 of the Model Law.

Examples of circumstances where the writing requirement is met

24. The previous version of the draft text considered by the Working Group contained an additional paragraph that read as follows: "(7) Examples of circumstances that meet the requirement that an arbitration agreement be in writing as set forth in this article include, but are not limited to, the following illustrations: *[Secretariat asked to prepare a text based on Working Group's discussions]*." At its thirty-fourth session, the Working Group decided that such illustrations played a useful role and should be retained for educational purposes. However, they should not appear in the text of article 7 but might be taken into consideration when preparing the guide to enactment or any explanatory material that might accompany the model legislative provision. The Working Group might wish to further discuss the practical examples that might be given as illustrations in the guide to enactment.

II. Interpretative instrument regarding article II(2) of the New York Convention

A. Revised text of the interpretative instrument

25. The Working Group at its thirty-fourth session discussed a preliminary draft interpretative instrument relating to article II(2) of the New York Convention and requested the Secretariat to prepare a revised draft of the instrument, taking into account the discussion in the Working Group, for consideration at a future session (A/CN.9/487, para. 18).

26. The text of the draft declaration adopted by the Working Group as contained in the report of its thirty-fourth session (A/CN.9/487, para. 63) reads as follows:

> ***"Declaration regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958***
>
> ***"The United Nations Commission on International Trade Law,***
>
> **"[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,**
>
> **"[2] *Conscious* of the fact that the Commission comprises the principal economic and legal systems of the world, and developed and developing countries,**
>
> **"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,**
>
> **"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting 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,**
>
> **"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,**
>
> **"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference 'considers**

that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...',

"[7] *Concerned about* differing interpretations of article II(2) of the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Desirous of* promoting uniform interpretation of the Convention in the light of the development of new communication technologies and of electronic commerce,

"[9] *Convinced* that uniformity in the interpretation of the term "agreement in writing" is necessary for enhancing certainty in international commercial transactions,

"[10] *Considering* that in interpreting the Convention regard is to be had to its international origin and to the need to promote uniformity in its application,

"[11] *Taking into account* subsequent international legal instruments, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce,"

B. Remarks on the revised text of the interpretative instrument

Operative provision

27. Should the Working group pursue with the preparation of an interpretative instrument relating to article II(2) of the New York Convention, an operative provision would need to be added at the end of the instrument, based on the approach taken in the revised text of article 7 of the Model Law. The operative provision might read along the following lines:

> **"[12] [*Recommends*] [*Declares*] that the definition of 'agreement in writing' contained in article II(2) of the Convention should be interpreted to include [**wording inspired from the revised text of article 7 of the UNCITRAL Model Law on International Commercial Arbitration**]".**

Preservation of existing interpretations of article II of the New York Convention

28. In the course of its thirty-fourth session, the Working Group heard concerns that it was necessary to avoid any implication that the declaration was seeking to impose a new interpretation of the New York Convention (A/CN.9/487, para. 60). Those concerns were reminiscent of a view expressed in the context of the discussion regarding the revision of article 7 of the UNCITRAL Model Law on International Commercial Arbitration, according to which the use of the words "for the avoidance of doubt" was essential to make it clear that the substantial rule embodied in the draft model legislative provision was not intended to alter any

liberal interpretation that might be given readily, through case law or otherwise, to the notion of "writing" under either the Model Law or the New York Convention (A/CN.9/487, para. 25). The Working Group may wish to discuss whether that point (which in the context of a revision of the Model Law could appropriately be dealt with in the guide to enactment) should be dealt with in a new recital for possible inclusion in the draft declaration.

29. However, depending on the contents of the revised version of article 7 of the Model Law, in particular paragraph (4), further discussion may be required as to whether the technique of a declaration encouraging interpretation of article II(2) of the New York Convention by reference to article 7 of the Model Law is an appropriate way of promoting uniform interpretation of the Convention. At the thirty-fourth session of the Working Group, the view was expressed that, to the extent that the declaration was intended to promote an interpretation of article II(2) of the New York Convention in line with the revised draft article 7 of the Model Law, it would be regarded in a number of countries as bringing forward an innovative or revolutionary interpretation of the form requirement under article II(2) of the New York Convention (A/CN.9/487, para. 61). In a significant number of countries, such a "revolutionary" interpretation might be regarded as an unwelcome development.

30. There was general agreement within the Working Group that the effect of the declaration would not be binding on the Governments, national judiciaries or arbitrators to whom it was addressed. It was acknowledged that the text merely reflected a considered conviction or view of the Commission, which was suggested for consideration by persons engaged in interpreting article II(2), in particular judges and arbitrators (ibid.). However, the Working group may wish to further discuss whether a controversial declaration in respect of a such a successful and consensual instrument as the New York Convention would be apt to promote its uniform interpretation. The Working Group may wish to consider possible alternatives to the interpretative instrument as currently drafted.

Possible alternatives to the draft interpretative instrument

31. As one possible alternative, the Working Group may wish to give further consideration to the possibility of promoting a liberal approach to the form requirements contained in the New York Convention through the more-favourable-law provision of article VII of the Convention. As noted in paragraphs 20-22 of document A/CN.9/WG.II/WP.108/Add.1,

> "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),
>
> > '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'.

> "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.
>
> "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.".

32. A second alternative that may require further consideration would be to prepare a protocol to the New York Convention. In that respect, it may be recalled that paragraph 17 of document A/CN.9/WG.II/WP.108/Add.1 read as follows:

> "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".

33. In the context of that second alternative, the Working Group may wish to consider whether it would wish to recommend preparing a protocol restricted to revising article II and probably also article IV of the New York Convention.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[2] Ibid., paras. 340-343.

[3] Ibid., paras. 344-350.

[4] Ibid., paras. 371-373.

[5] Ibid., paras. 374 and 375.

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

[7] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 313.