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Settlement of commercial disputes

Preparation of uniform provisions on written form for arbitration agreements

Proposal by the Mexican Delegation

Note by the Secretariat

In preparation for the forty-third session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to proceed with its review of a revised draft article 7 of the UNCITRAL Model Law on International Commercial Arbitration (see the report of the forty-second session, A/CN.9/573, para. 98), the Government of Mexico, on 15 February 2005, submitted the text of a proposed revised version of article 7 for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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Annex

Proposal by the Government of Mexico regarding written form for arbitration agreements, to be submitted to the UNCITRAL Working Group on Commercial Arbitration

I. Introduction

I.1. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) requires arbitration agreements to be in writing.

I.2. Written form is required for a number of purposes:

(i) For the validity of the arbitration agreement (New York Convention, article II (1) and (2);

(ii) To request a court before which an action has been brought relating to a dispute forming the subject of an arbitration agreement to refer the parties to arbitration (New York Convention, article II(3)); and

(iii) To comply with the essential requirement that the arbitration agreement be supplied when application is made to a court or competent authority for recognition and enforcement of an award (New York Convention, article IV(1)).

I.3. Articles 7, 8(1) and 35 of the UNCITRAL Model Law on International Commercial Arbitration (MAL) contain provisions similar to those of the New York Convention. They differ only in that the MAL gives a broader definition of what is meant by "in writing".

I.4. UNCITRAL has identified various contemporary practices that do not correspond to the literal definition of "writing" either in the New York Convention or in the MAL (see A/CN.9/WG.II/WP.108/Add.1)

I.5. In addition to the above, the practice exists whereby arbitration agreements are concluded by electronic means.

I.6. Some courts have interpreted the New York Convention and the MAL flexibly, holding such cases that the written form requirement has been met. Others—apparently a minority—have ruled to the contrary.

I.7. UNCITRAL tasked the Working Group on Arbitration with examining the possibility of resolving the problems created by these practices, which give rise to uncertainty. The literal application of the New York Convention and the MAL may, because of a formality, frustrate the legitimate expectations of the parties.

I.8. The view prevailing within the Working Group is that it is not recommendable to make any amendment to the New York Convention, since this would create more problems than benefits:

(i) Uncertainty would arise regarding agreements in which there is doubt as to whether the written form requirement has been met;

(ii) It would take a great deal of time to incorporate the amendment and even longer for countries to ratify or accede to it (there are currently 134 parties to the New York Convention).

I.9. The Working Group prepared a draft declaration calling upon courts and authorities to interpret the New York Convention flexibly (A/CN.9/487, paragraph 63).

I.10. The Working Group drafted an amendment to article 7 of the MAL (A/CN.9/487, paragraphs 22-41).

I.11. However, there is a widely held view in the Working Group that neither draft is satisfactory. The interpretative declaration of the New York Convention is not considered to have binding force. As regards the MAL, some believe that the draft definition takes the written form into consideration, which it plainly does not.

I.12. The Working Group suspended its deliberations in order to complete the UNCITRAL Model Law on International Commercial Conciliation and the draft provisions relating to interim measures in arbitration. The Working Group is expected to re-examine the question of written form at its next session, provisionally scheduled for October 2005 in Vienna.

II. Reasons for the proposal

II.1. Arbitration is now more widely accepted than when the New York Convention and the MAL were negotiated. The written form requirement is for many a formality that is no longer justified. This formality may frustrate the legitimate expectations of the other parties. The form of the arbitration agreement is more restrictive than the freedom of form in commercial contracts; a contract involving a transaction worth a hundred million dollars may be concluded verbally, but the arbitration agreement relating to that contract must be in writing. There are some countries in which the arbitration agreement is no longer required to be in writing.[1] In others, the definition is so broad that the requirement has practically disappeared.[2]

II.2. Consequently, the Government of Mexico proposes that the written form requirement for arbitration agreements be omitted from the MAL. If this amendment were adopted, the question of the conclusion of the arbitration agreement and its content would become a problem of proof.

II.3. The problem of the legal validity of the arbitration agreement would disappear in countries adopting the amendment to the MAL. With regard to recognition and enforcement, since there would be no requirement to submit the arbitration agreement, by application of the principle of most favourable regime as provided for in article VII of the New York Convention the problem in that Convention would be resolved.

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[1] For example, in France, Belgium, Sweden, Switzerland, the Netherlands and Italy, the written form requirement has been dropped, since no formal requirement is established for the arbitration agreement.

[2] For example, in England, "in writing" covers verbal agreements (see *Zambia Steel v. James Clark*, Court of Appeal [1986], 2 Lloyd's Rep. 225, followed by *Abdullah M. Fahem v. Mareb Yemen Insurance and Tomen*, Queen's Bench Reports [1997] 2 Lloyd's Rep. 738, Yearbook of Commercial Arbitration, 1998, p. 789).

III. Proposal

A. Article 7. Definition of arbitration agreement[3]

It is proposed that the references to written form be omitted. The article would read as follows:

> "An 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.]"[4]

B. Article 35. Recognition and enforcement

It is proposed that article 35(2) be amended to omit the requirement to supply the arbitration agreement. The proposed text would read as follows:

> "(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a certified copy thereof. If the award is not made in Spanish, the party relying on it shall supply a translation thereof into such language done by an official expert."

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[3] The proposed text replaces the draft of article 7 considered by the Working Group (A/CN.9/508).

[4] The second sentence is proposed within square brackets as it may prove unnecessary since the first sentence provides that the arbitration agreement may cover disputes that have arisen or that may arise between the parties. The distinction between "arbitration clause" and "arbitration agreement" is no longer relevant.