

THE EFFECT OF GRADUAL LIBERALISATION OF THE DEFINITION OF  
“AN AGREEMENT IN WRITING”

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by

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Introduction

- (1) The New York Convention (“the Convention”) is the single most important document in the field of international commercial arbitration because it provides for:
- a. The recognition and enforcement of foreign arbitral awards; and
  - b. The recognition of arbitral agreements.
- and because 142 of the 192 member States of the United Nations are parties to it.

- (2) In the context of the present paper, the important provisions of the New York Convention are Articles I(1), II(1) and (2), V(1)(a) and VII(1). These read as follows:

I(1):

*This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal ...*

II(1) and (2):

*1 Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

*2 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.*

V(1)(a):

*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof to the competent authority where the recognition and enforcement is sought, proof that:*

- (a) *the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;*

...

VII(1):

*The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.*

- (3) It is immediately obvious how important the meaning of the words “*agreement in writing*” in Article II is to the operation of the Convention. Where a party seeks recognition of an arbitration agreement, and a consequent stay of court proceedings under Article II, it must be able to show that the agreement is “*in writing*” within the meaning of the Article. Equally, the fact that a party can show that the arbitration agreement in reliance on which an award has been made against it was not an “*agreement in writing*” is a ground on which it can successfully oppose the recognition and enforcement of the award under Article V(1)(a).
- (4) What does the expression “*agreement in writing*” in Article II(1) of the Convention mean? How, to refer to the title of this paper, has the definition of that term been liberalised in the 50 years since the making of the Convention?
- (5) It is necessary, in answering these questions, to bear in mind that there are both direct and indirect influences at work. Among direct influences may be listed:
- a. Judicial interpretation of Article II of the Convention;
  - b. UNCITRAL’s Recommendation of 2006 regarding the application of Article II(2) of the Convention;
  - c. The interpretation and application of Article VII(1) of the Convention and UNCITRAL’s Recommendation of 2006 regarding its application.
- Among indirect influences may be listed:
- (i) The adoption in 1985 of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”);
  - (ii) The revision of the Model Law by UNCITRAL in 2006;

- (iii) The approach adopted in relation to matters of form in more recent UNCITRAL documents in the fields of international sale of goods and electronic commerce;
  - (iv) The adoption by different countries of more liberal provisions as to form.
- (6) It is also necessary to bear in mind that while all these influences may operate in a case the determination of which is not solely dependent on the Convention, it will only be the direct influences which will operate where the determination is solely dependant on the Convention.
- (7) In the balance of this paper, I:
- a. Say something about the direct and indirect influences to which I have referred;
  - b. Offer an analysis of the present position; and
  - c. Offer some conclusions.

The direct influences on the meaning of “agreement in writing” in Article II(1) of the Convention

(a) Judicial interpretation:

- (8) I say something about this influence in the Analysis section of this paper.

(b) UNCITRAL’s Recommendation of 2006 regarding the application of Article II(2) of the Convention

- (9) In 2006 UNCITRAL recommended that Article II(2) of the Convention be applied “*recognizing that the circumstances described therein are not exhaustive*”.

(c) The interpretation and application of Article VII(1) of the Convention and UNCITRAL’s Recommendation regarding its application

- (10) Article VII(2) of the Convention reads as follows:

*The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.*

- (11) There is no doubt that this provision broadens the grounds on which a party may rely in seeking recognition of an award in a country which has a more liberal definition of writing than is found in the Convention.
- (12) Can it be relied on at the stage of seeking a stay of court proceedings in reliance on the existence of an arbitration agreement?
- (13) The answer to that question appears to be provided by the further Recommendation made by UNCITRAL in 2006 that Article VII(1) of the New York Convention:
- “should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”*

The indirect influences on the meaning of “agreement in writing” both in Article II(1) of the Convention and generally

(a) The UNCITRAL Arbitration Rules

- (14) The UNCITRAL Arbitration Rules of 1976 took matters no further. Article I(1) provides:
- Where the parties to a contract have agreed in writing that disputes in relation to that contract should be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules ...*

(b) The UNCITRAL Model Law on International Commercial Arbitration (1985)

- (15) The UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) was adopted by UNCITRAL in 1985. It took the matter further by adopting an extended definition of “writing” in Article 7(1) and (2), which read as follows:
- 1 *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. 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.*

- (16) There are four possible ways, therefore, in which, under the Model Law (as opposed to the New York Convention) the requirement of writing may be satisfied:
- a. That the agreement “*is contained in a document signed by the parties*”;
  - b. That the agreement is “*contained ... in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement*”;
  - c. That the agreement 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 another*”;
  - d. That a contract in writing contains a reference “*to a document containing an arbitration clause ... and the reference is such as to make that clause part of the contract.*”
- (17) The UNCITRAL Model Law has been adopted in 51 countries as well as a number of other jurisdictions.

(c) The revision of the Model Law by UNCITRAL in 2006

- (18) In 2006 UNCITRAL revised the Model Law in a number of respects, including Article 7. The Model Law now contains two options for Article 7, as follows:

*Option I*

*Article 7. Definition and form of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

*(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.*

*(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*

*(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.*

*(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 any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*

*Option II*

*Article 7. Definition of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

*“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.*

- (19) According to the UNCITRAL website, four countries – New Zealand, Ireland, Peru and Slovenia – have adopted legislation based on the 2006 revision of the Model Law. Neither Ireland nor New Zealand has adopted this particular provision of the revision<sup>1</sup>. I have not been able to access the amendments to the Peruvian and Slovenian legislation.

(d) The Convention on Contracts for the International Sale of Goods (1980)

- (20) The United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention, was adopted in 1980. 71 of the 192 member States of the United Nations are parties to the Convention. Part II of the Convention (Articles 14-24) sets out the principles to be applied in determining whether a contract has been entered into. There is no requirement that a contract be in writing.

(e) The UNCITRAL Model Law on Electronic Commerce (1996)

- (21) The UNCITRAL Model Law on Electronic Commerce applies “to any kind of information in the form of a data message used in the context of commercial activities” (Article 1). Articles 6 and 7 of the Model Law deal with writing and signature respectively and read as follows:

Article 6:

- (1) *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 useable for subsequent reference.*
- (2) *Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.*
- (3) *The provisions of this article do not apply to the following:*  
[...]

Article 7:

- (1) *Where the law requires a signature of a person, that requirement is met in relation to a data message if:*

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<sup>1</sup> New Zealand’s Arbitration Act 1996 already permitted an oral arbitration agreement.

- (a) *A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and*
  - (b) *That method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.*
  - (2) *Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.*
  - (3) *The provisions of this article do not apply to the following: [...]*
- (22) The Model Law has been adopted in 24 countries (although, in the case of six of those countries, with the exception of Article 7) and in a number of British territories. In addition uniform legislation influenced by the Model Law and the principles on which it has been based has been prepared in the United States and Canada and enacted in a number of States in the former and a number of Provinces and Territories in the latter.

(f) The UNCITRAL Model Law on Electronic Signatures (2001)

- (23) The Model Law on Electronic Signatures applies “*where electronic signatures are used in the context of commercial activities*” (Article 1). The terms “*electronic signature*” and “*data message*” are defined in Article 2 as follows:

*For the purposes of this Law:*

- (a) *“Electronic signature” means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message*  
...
- (c) *“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, and acts either on its own behalf or on behalf of the person it represents.*

- (24) Article 6 provides:

- 1 *Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.*
- 2 *Paragraph 1 applies where the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.*
- 3 *An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:*

- (a) *The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;*
  - (b) *The signature creation data were, at the time of signing, under the control of the signatory and of no other person;*
  - (c) *Any alteration to the electronic signature, made after the time of signing, is detectable; and*
  - (d) *Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.*
- 4 *Paragraph 3 does not limit the ability of any person:*
- (a) *To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph 1, the reliability of an electronic signature; or*
  - (b) *To adduce evidence of the non-reliability of an electronic signature.*
- 5 *The provisions of this article do not apply to the following: [...]*

(25) Legislation based on the UNCITRAL Model Law on Electronic Signatures has been adopted in 5 countries.

(g) The Convention on the Use of Electronic Communications in International Contracts (2005)

(26) The United Nations Convention on the Use of Electronic Communications in International Contracts has been signed by 15 member States of the United Nations but has not yet been ratified by any of them.

(27) The Convention applies “*to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States*” (Article 1). It does not apply to “*bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money*” (Article 2(2)).

(28) Articles 8(1) and 9 of the Convention contain the following relevant provisions:

Article 8(1):

*A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.*

Article 9:

1 *Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.*

2 *Where the law requires that a communication or a contract shall be in writing, and provides consequences for the absence of writing, that*

requirement is met by an electronic communication if the information contained therein is accessible so as to useable for subsequent reference.

- 3 Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of signature, the requirement is met in relation to an electronic communication if:
- (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and
  - (b) The method used is either:
    - (i) As reliable as appropriate for the purpose for which the electronic communication was generated and communicated, in the light of all the circumstances, including any relevant agreement; or
    - (ii) Proven in fact to have fulfilled the functions described in sub-paragraph (a) above, by itself or together with further evidence . ...

(h) Examples of the adoption by different countries of more liberal provisions as to form

(i) India

(29) Section 7 of the Arbitration and Conciliation Act 1996 provides:

- (1) In this Part, "arbitration agreement" means 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 the defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in –
  - (a) a document signed by the parties;
  - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement ;  
or
  - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make the arbitration clause part of the contract.

(30) This provision reflects the terms of the Model Law.

(ii) England and Wales

(31) Section 5 of the Arbitration Act 1996 provides

- (1) *The provisions of this Part apply only where the arbitration agreement is in writing ...*
- (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 and 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 agreement in writing to the effect alleged;*
- (6) *References in this Part to anything being written or in writing include being recorded by any means.*

(32) This provision is considerably wider than either the New York Convention or the Model Law.

(iii) New Zealand

(33) Article 7 of Schedule 1 to the Arbitration Act 1996 provides:

- (1) *An arbitration agreement may be made orally or in writing. Subject to Section 9, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
- (2) *A reference in a contract 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.*

(The reference in Article 7(1) to section 9 of the Act is irrelevant in the present context.)

(34) This provision is, so far as I am aware, the most liberal of all.

(iv) Singapore

- (35) Section 2(1) of the International Arbitration Act (Chapter 143A) provides:  
*“arbitration agreement” means an agreement in writing referred to in Article 7 of the Model Law and includes an agreement deemed or constituted under subsection (3) or (4)”*
- (36) Section 2(3) and (4) of the Act read as follows:  
*(3) Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.*  
*(4) A reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of lading.*
- (37) This provision specifically provides for the case of bills of lading, which are unlikely to be covered by the Convention provisions.

## Analysis

### (a) Introduction

- (38) The distinguishing feature of Article II of the New York Convention is that it requires an arbitration agreement to be “*in writing*”. The Article is quoted here again, for ease of reference:
- 1 Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
- 2 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.*
- (39) The requirement of writing is maintained in the Model Law as originally drafted, albeit with a wider definition of “*writing*”.
- (40) Questions have arisen as to:
- What constitutes “*writing*” for the purposes of Article II of the Convention;
  - What form the necessary signatures may take; and

- c. Whether the requirement adequately reflects the manner in which much international commerce is conducted
- (41) The question of what constitutes “*writing*” for the purpose of Article II of the Convention has two aspects:
- a. Whether “*writing*” is limited to the forms identified in Article II(2);
  - b. If not, what is covered by the term.
- (42) I now consider each of these questions

(b) Is “*writing*” limited to the forms identified in Article II(2) of the New York Convention?

- (43) As is obvious from reading Article II(2) (see paragraph 38 of this paper) the English version of the Convention provides, in Article II(2), that the term “*agreement in writing*” “*shall include ...*”. The French and Spanish texts, however, apparently state that the term “*shall mean*”<sup>2</sup>.
- (44) Whatever the position at the time the Convention was adopted, UNCITRAL in 2006, in the Recommendation referred to in paragraph 9 of this paper made it clear that the interpretation of Article II(2) of the Convention that should be applied was one which “*recogniz[es] that the circumstances described therein are not exhaustive*”. That means that the term “*agreement in writing*” in Article II(1) is wider than the examples given in Article II(2).
- (45) This approach to the question of what constitutes “*writing*” for the purposes of Article II of the Convention reflects both the majority of court decisions and the development of technology in the fifty years since the adoption of the Convention. As Toby Landau, QC, in his paper “*Requirement of a Written Form for an Arbitration Agreement: When “Written” means “Oral*”<sup>3</sup> delivered at the ICCA Congress in London in 2002, said:

... most modern courts accept that the reference to “*letters*” and “*telegrams*” must be interpreted in the light of developing technology. Indeed, a “*functional equivalence*” approach, as adopted by UNCITRAL in its Model Law on Electronic Commerce, appears to have received widespread support on the issue.

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<sup>2</sup> See, eg, Kucherepa: *Reviewing Trends and Proposals to Recognise Oral Agreements to Arbitrate in International Arbitration Law*, 16 *Am.Rev. Int'l Arb* 409 at 413.

<sup>3</sup> ICCA Congress Series No 11 “*International Commercial Arbitration: Important Contemporary Questions*” (2003), pp 19-81

However, as he and other commentators<sup>4</sup> point out, this purposive, practical, approach has not been universally accepted. For example, in 1999, the Halogaland Court of Appeal in Norway refused to recognise and enforce an award on the basis, in part, that an exchange of email messages did not satisfy the requirement of “*writing*”.

- (46) The provisions of the UNCITRAL Model Law on Electronic Commerce have already been noted (see paragraph 21 of this paper). Where the Model Law on Electronic Commerce has been adopted as part of the law which governs the validity of the arbitration agreement, as would be the case, for example, where the law governing the arbitration agreement was the law of Australia or Singapore, the possibility of a decision such as that of the Halogaland Court of Appeal just referred to would not arise.
- (47) Even if, contrary to what I have said in paragraphs 43-46 of this paper, Article II(2) of the Convention is to be interpreted in a manner which limits the permissible forms of “*writing*” to those identified in that paragraph, it is still necessary to consider the provisions of Article VII(1) of the Convention discussed in paragraphs 10-13 of this paper.

(c) If “*writing*” is not limited to the forms identified in Article II(2) of the New York Convention, what does the term cover?

- (48) If it is accepted that the “*writing*” required for the purposes of Article II(1) of the Convention is not limited to the forms of “*writing*” identified in Article II(2), the term must include any form of expression which constitutes, or creates, the necessary agreement “*to submit to arbitration all or any differences which may have arisen or which may arise between [the parties] ...*”, ie, the test should be one of functional equivalence.
- (49) In its original sense, the word “*writing*” referred only to handwriting. The very fact that Article II(2) recognises “*letters or telegrams*” as forms of “*writing*” is an indication that the meaning of the term is not static. There is no reason, once it is accepted that Article II(2) of the Convention is not an exhaustive definition of “*writing*”, why more modern forms of communication should not be accepted as satisfying the requirement. The acceptance of this argument is reflected in the 2006 UNCITRAL revisions of the Model Law (see paragraph 18 of this paper)

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<sup>4</sup> eg: Albert Jan van den Berg, in his paper “*New York Convention 1958: Refusals of Enforcement*” published in the ICC International Court of Arbitration Bulletin – Vol. 18/No.2-2007

(d) What form may any necessary signature take?

- (50) For the reasons which I have advanced in the last two subsections of this paper (paragraphs 43-49), I suggest that there can be no objection to the use of electronic signatures. Article 6 of the UNCITRAL Model Law on Electronic Signatures (see paragraph 24 of this paper) provides guidance, even if that Model Law has not yet been adopted into the relevant national law, as to the requirements (at least at the present stage of the development of communications) for a valid signature.

(e) Does the requirement of “writing” adequately reflect the manner in which much international commerce is conducted?

- (51) It is advisable to set out Article II(1) and (2) of the Convention again at this point:

*II(1) and (2):*

*1 Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of the defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

*2 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.*

- (52) That the scope of the Article is very narrow was recognised by UNCITRAL and reflected in the terms of the Model Law, Article 7(2) of which reads as follows:

*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.*

- (53) Even this extended definition is narrow. Except for the addition of:
- a. “... telex ... or other means of communication which provide a record of the agreement” ;
  - b. “an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by another”;

- c. “[a] reference in a contract to a document containing an arbitration clause ... [where] ... the contract is in writing and the reference is such as to make that clause part of the contract”;

the definition is no wider than that in the Convention.

- (54) A survey of the literature<sup>5</sup> shows many situations in which the requirement of “writing” does not adequately reflect the manner in which much international commerce is conducted, with the result that there are many cases in which, although a binding contract is entered into between the parties, the arbitration clause which is included in the contract is not valid under Article II of the Convention or, even, under Article 7 of the Model Law.
- (55) Toby Landau, QC, in the paper already referred to (see paragraph 45 of this paper) identified a number of situations in which the requirement in Article II(2) of the New York Convention for an “exchange” of documents could not or might not be satisfied:
- a. Where there was a written offer accepted by performance, conduct, tacitly or orally;
  - b. Where there was an oral offer accepted in writing;
  - c. Where an arbitration clause was incorporated by reference;
  - d. Where there were documents but they were neither signed nor exchanged;
  - e. The case of negotiable instruments;
  - f. Where the contract was concluded through an intermediary or by a company.
- (56) So long as the requirement of writing and, more particularly, of “exchange”, is retained in the New York Convention, these situations will continue to exist.
- (57) This is why the 2006 revision of the Model Law contains Option 2 quoted in paragraph 18 of this paper.
- (58) Should something be done about this deficiency in the New York Convention? A number of leading arbitrators and authors have argued that it should, although they do not necessarily agree on the precise nature of the change

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<sup>5</sup> eg, Kaplan: *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice* (1996) 12 *Arbitration International* 27; Herrmann: *Does the World Need Additional Uniform Legislation on Arbitration* (1999) 15 *Arbitration International* 211 at 217; Landau: *The Requirement of a Written Form for an Arbitration Agreement : When “Written” means “Oral”*(ICCA Congress Series No 11 *International Arbitration: Important Contemporary Questions* (2003), pp 19-81; Lew et al: *Comparative International Commercial Arbitration* (2003) paras 7-8 to 7-10; van den Berg: *New York Convention of 1958: Refusals of Enforcement*, ICC International Court of Arbitration Bulletin – Vol. 18/No.2-2007

which should be made<sup>6</sup>. Lew et al put it most forcefully in paragraphs 7-8 to 7-10 of their text:

- 7-8 *Form requirements sometimes do not always reflect business practice. While in certain areas of trade parties often rely on oral agreements, strict form requirements can defeat an agreement to arbitration, the existence of which is beyond doubt. It has been criticised correctly that the parties can orally agree a multi-million dollar contract which will be considered to be valid but for the arbitration clause. The arbitration agreement would be invalid irrespective of whether it can be established that the parties actually agreed on arbitration. A party can enforce the substantive provisions of a contract while being able to walk away from the agreement to arbitration concluded at the same time.*
- 7-9 *There is no justification to submit arbitration agreements to stricter form requirements than other contractual provisions. Arbitration is no longer considered a dangerous waiver of substantial rights. In fact the selection of arbitration is not an exclusion of the national forum but rather the natural forum for international disputes. Form requirements do not necessarily promote legal certainty; they are often the source of additional disputes. For these reasons the writing requirement in most national laws and under the New York Convention have been liberally interpreted.*
- 7-10 *This all supports the complete abolition of the “in writing” requirement or at least the submission of the issue of formal validity to a substantive rule of international arbitration . ...*

- (59) Landau, in his paper just referred to (see paragraphs 45 and 55 of this paper) was aware of the countervailing arguments. At page 42 of the paper he wrote:

*Upon a proper analysis, the written form requirement is extremely difficult to justify at all, as a matter of policy as well as practice. Equally, however, there are a number of compelling reasons why the New York Convention should not be amended ... The fact that these two propositions are inconsistent reflects the complexity of this topic. ...*

- (60) Professor Boo has put the countervailing arguments well in a paper entitled “*The Writing Requirement In Contemporary Practice – Is there really a need for change?*” presented at the 11<sup>th</sup> IBA International Arbitration Day and the United Nations New York Convention Day, “*The New York Convention 50 Years*” conference in February this year, when he wrote:

*There are probably good and sound reasons that should the 2006 MAL Amendment be eventually adopted in many states, perhaps the Convention should also be aligned to reflect this trend. It would then provide consistency and harmony.*

*One should, however, bear in mind that the MAL is crafted primarily for the purpose of regulating the conduct of arbitrations at the seat of the arbitration.*

*The objective of the NY Convention on the other hand is to facilitate the enforcement of an arbitration agreement and arbitral awards which have been made in another jurisdiction. The NY Convention does not purport to cloth the*

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<sup>6</sup> See for example the texts and papers referred to in footnote 5 to this paper.

*court where enforcement is sought with any role akin to a supervisory court in the seat of arbitration. A court could only exercise powers under the Convention if there is an action pending in that court which is commenced in breach of an arbitration agreement and where an award made in another jurisdiction is sought to be enforced in the court. The current writing requirement under Art II requires the court to consider such applications only if there is in existence an arbitration agreement in “writing”.*

*A broadening of the definition of “writing” in the Convention in the manner proposed in the 2006 MAL Amendment or a removal of the writing requirement, could directly involve the enforcement court in exercising their functions under the Convention to have to ascertain the existence of the agreement like that of trial courts, such as the taking of evidence from witnesses including the person whose words or conduct could be said to amount to an agreement or the person who recorded the audio/video/digital agreement. It could lead to a much greatly [sic] role for courts acting under the Convention.*

*Theoretically, each time an agreement or the award is sought to be enforced, any enforcement court faced with the application is effectively empowered to conduct a full trial to ascertain the existence of the arbitration agreement. On the basis that it is empowered to consider the existence of an arbitration agreement purely as an evidential issue, the court could be said to have been extended to investigate whether there is consent to arbitrate even if a written document existed. If each enforcement court chooses to do “what is right in its own eyes” one can anticipate that an area of greater judicial diversity and inconsistency of application and interpretation than is currently experienced, would loom. There are too many good reasons why the court of the seat of arbitration as the primary court should be the only supervisory court over arbitrations instead of the courts of the different places of enforcement. The enhancement of the powers of the enforcement court could undermine the role of the court at the seat of arbitration, slow down the arbitral process, prolong the process of enforcement, and fuel endless litigations in multiple jurisdictions. Such a scenario should obviously be avoided.*

*In contemplating a change in the writing requirement, whether by way of an amending protocol, or a new draft convention, it may be not unwise to first pause and reflect the points made above before joining the general clamour for change.*

*Vivat, Crescat, Floreat New York Convention 1958!*

- (61) Professor van den Berg, who was the author of the seminal study on the New York Convention, presented a proposal at the recent ICCA Conference in Dublin for the adoption of what he called a ‘*Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*’. This contained no requirements as to the form of the arbitration agreement.

## Conclusion

- (62) It can thus be seen that while the definition of “*writing*” has been substantially revised over the years since the adoption of the New York Convention, the other elements of Article II(2) of the Convention have not, and cannot, so easily be liberalised. Significant changes would be needed; and, as already noted, there is not complete agreement as to the form that those changes should take. As with every aspect of life, however, there will be change.
- (63) In the meantime, the New York Convention will certainly live, undoubtedly attract more parties to it, and flourish. Professor Boo’s expression of hope will, I think, be rewarded, whatever is done in relation to amending the Convention.

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