The Form of the Arbitration Agreement and the Fiction of Written Orality How Far Should We Go?

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'Arbitration agreement shall be in writing' – This simple rule, still contained in most national arbitration laws, international conventions and model instruments, haunted the international arbitral community for many years. Although the

Enforcement of Foreign Arbitral Awards of 1958 (hereinafter: the New York Convention, NYC), the first such modern instrument (and thus far the most successful) had already started this trend. By providing in Art. II that the member states will recognize 'agreements in writing', it included in the definition of 'writing' arbitral clauses or arbitration agreements 'contained in an exchange of letters and telegrams'. In such a way, even if there was no unique document signed by the lawful representatives of both parties, the agreement would be valid. At least in the case of telegrams, signatures were not only unnecessary; they were impossible, due to the limitations inherent in the form of the telegram itself.

The UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter: UNCITRAL Model Law, UML) went further in this direction. The 'exchange of letters or telegrams' clause was further extended to the exchange of telex (teleprinter) messages, a once popular but in the meantime, nearly extinct method of communication. More importantly, the clause acquired an open form – it referred to the 'other means of telecommunication which provide a record of the agreement'. Although the fax (telecopier) was not expressly mentioned in Art. 7, those who adopted the UML formula could firmly rely on the open-ended 'other means' wording. The same argument could subsequently be extended to other emerging means of communication, such as e-mail, although the 'record of the agreement' in the case of electronic messages would exist in a fairly volatile form. Perhaps more importantly, the very notion of record (translated into some languages, including Croatian, as 'proof') indicated a shift in focus from the written form as an essential requirement of the validity of the agreement ( ) to its evidentiary function ( ). This view was, however, not supported by doctrine in all countries – and it seems that in Croatian legal writing it was rejected.

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[1] Art. I(2 YC.

[2] It remaine , however, oubtful whether, in the case of an e change of letters, they have to be signe by the parties. he interpretation of this clause in Croatia was that this woul be necessary. A. G & S. ,

However, unlike critics from the ranks of theorists, some practitioners went further, anticipating (precipitating?) the change by their own decisions in concrete cases. In Europe, a good example may be found in

decided

by the Swiss Federal Court

The applicable law in this case was the New York Convention. It was indisputable that the arbitration clause, contained in the conditions of contract printed on the back of the bill of lading was signed – as customary – only by one party. Strictly construed, in such a case, the agreement to arbitrate was neither ‘a clause signed by the parties’ nor ‘an exchange of letters.’ However, the Swiss court in this case, referring heavily to the doctrinal writings (notably the works of ,

and) held

that this clause should be taken as valid. Almost is v.9tsm4:joz94BjstzRB4Bj lzRB4Bjannvz954BB4Bj zRU

The abovementioned decision of the Swiss court certainly displayed a masterpiece of legal argumentation. It also reinforced the perception of Switzerland as an . The only potentially disturbing fact about this decision may be summed up in the following question: the decision was favorable to arbitration – but was it correct? It was perhaps appropriate – but was it done in accordance with the law – at least the ?

Admittedly, the Swiss court was not alone in this venture. Even much earlier, courts in other jurisdictions – primarily in Common Law countries – started to adopt 'creative' and 'teleological' interpretations and give effect to arbitral clauses that were not signed by the parties. Arguably, the signature itself was not an essential part of the written form in those jurisdictions. However, the courts in these countries went even further, confirming the validity of arbitral clauses that were not at all done in the written form. A part of the explanation for such an attitude was found in a difference between English and some other authentic versions of the NYC: whereas Art. V (defining conditions for refusal of recognition of foreign awards) in French talks about circumstances under which recognition be refused, the English translation uses the term refuse. Consequently, English (speaking) courts understood that they were entitled to recognize and enforce an award conditions for recognition and enforcement were not met.

Another pioneering interpretation of the Anglo-Saxon jurisprudence stated that the conditions of 'signed by the parties or contained in the exchange' relate only to a separate arbitration agreement and not to arbitral clause. Finally, another interpretation pointed to the use of the word in the English text of the NYC (in the phrase 'The term shall include…' in Art II(2) – indicating that 'the list of forms mentioned therein was not exhaustive and could be extended to cover a wider variety of circumstances.'

Not everyone was, however, in the mood to subscribe to this school of thought. Judges in other jurisdictions, operating under different circumstances and using different languages stuck to the 'conservative' and 'traditional' approach. In this

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[12] his was, the position e presse by the elegates of the Unite King om at the 32nd Session of the U C AL or ing Group on Arbitration in arch 2 . U ocument A C .9 4 8 p. 97 (footnote 3 . he elegates were Philip ovey (hea an Davi Simpson an oby Lan au (a visers .

[13] In the same sense U.S. Court of Appeals, Fifth Circuit, arch 23, 1994. 2 Y C A (199 , at 941.

[14] U C AL ocument A C .9 4 8, para. 97.

way, a difference between the ('liberals') and the traditionalists ('conservatives') began to emerge. Obviously, it was time for the core United Nations body for unification and harmonization of international trade law to act once again.

Admittedly, dissatisfaction by UNCITRAL with the requirements of 'conservative' written form is at least as old as the UNCITRAL Model Law itself. Namely, in the same year in which the UML was enacted, UNCITRAL considered a Secretariat report entitled 'Legal value of computer records'. One of the findings of the report was that, in fact, new technologies pose fewer problems than expected; rather, the more serious problem in respect of use of computers in international trade 'arose out of requirements that documents had to be signed or be in paper form'. Based on this finding, the Commission adopted a recommendation in 1985, proposing that member states, 'review legal requirements that certain trade transactions be in writing […] whether […] as condition of enforceability or validity' and 'to review legal requirements of a handwritten signature'.

Although UNCITRAL continued to work on other documents, (in particular on the Model Law on Electronic Commerce which was eventually accepted in 1996) the real discussion about the appropriateness of the provisions of its arbitral instruments on the form of an arbitration agreement started to emerge only on the occasion of the 40 anniversary of the NYC. The ICCA Conference in Paris and the New York Convention Day in New York both also raised the issue of the written form. The leading people of UNCITRAL also expressed in their public appearances ideas about the necessity for change.

[15] U C AL ocument A C .9 2 . also U C AL o el Law on lectronic Commerce with Gui e to nactment, ew Yor , 1999, at .

[16] 198 U C AL ecommen ation, en orse by the General Assembly of the U in resolution 4 71, para (of December 11, 198 .

[17] publication A A A : 4 Y A Y C CCA Series ol. 2,(1999 .

[18] A A Y C : P , U Pub. o. .99. .2(1999 .

[19] . Kaplan, A A , bi ., at 17 19.

[20] ost notably, G errmann, School of nternational Arbitration Freshfiel s Lecture elivere in Lon on on 1 ovember 1998.

The diagnosis of UNCITRAL was clear – the provision in Art. II(2) could be regarded as 'outdated' . Arbitral legislation needed to be 'conformed to current practice in international trade with regard to requirements of written form; [but] the practice [in international trade] in some respects was no longer reflected by the position set forth in Art. II(2) of the 1958 New York Convention (and other international legislative texts modeled on that article).'

Whereas feelings about the insufficiencies of the current texts were shared among arbitration specialists, attitudes about the best possible approach to improve the situation largely differed. It seemed that, in a way, the New York Convention, successful as it was, became hostage to its very success. Therefore, the debate in UNCITRAL and its Working Group on Arbitration and Conciliation (hereinafter: Working Group) displayed a range of various proposals. They resulted in a multitude of drafts, sometimes very different from each other. Before presenting some of them, we will try to outline two main lines of argument upon which, most of the contributions and proposals are rooted.

The first line of argument (which may be referred to as) argued that the NYC was simply too successful to be tampered with. Even if the best possible text on the form of an arbitration agreement would be proposed, it could hardly be expected that slow diplomatic processes would produce wider acceptance of changes, even in the long term. Since it could be foreseen with certainty that not all of the countries would adopt the amendments to the NYC (at least not at the same time), the system of enforcement would cease to be uniform (and almost universal). A dual (or even triple) system of enforcement (members of old NYC; members of new NYC; others) would lead to a lack of transparency and the latter would lead to a lack of legal certainty. Therefore, change should be achieved through promotion of adequate (re)interpretation, guidelines and international instruments of a declaratory nature.

The opposite line of argument (which can be referred to as argued that legal norms, although possessing an inherent portion of elasticity, cannot be so flexible as to cover any imaginable interpretation. Although

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[21] Report of the U C AL 32nd session (17 ay 4 une 1999 , A 4 17, at 42, paragraph 344.

[22] U C AL ocument A C .9 4 8, p. 88(

[23] e woul not li e to attribute any of these two types of arguments to specific groups or persons. oth arguments are an i eal type e tracte partially from te ts an partially from actual iscussions in the U C AL or ing Group. he author of this te t has ha the privilege to participate as an observer in various sessions of the or ing Group since 1997.

almost every court in every country knows about 'teleological', 'systematical' or 'historical' interpretation, the level of acceptance of those vary. At least in those systems that adhere, on average, more to a interpretation of legal norms, the 'creative' approach of some courts would be viewed as a twisting of the legal rules, i.e. a misapplication of the law. This could also be seen as a usurpation of the legislative prerogatives because in democratic countries based on the rule of law and the doctrine of separation of powers, only legislators, and not judges can change the law. Even if we would disregard such objections, it would certainly be the case that no matter what a specific interpretative instrument may say, judges in some countries would be reluctant to interpret the words 'written agreement' as words that would also cover agreements concluded orally. The difference in the practice of various national courts would ultimately lead to uncertainty and a lack of uniform and harmonized rules. Therefore, change should be achieved through legislative activity and the explicit amendments to inadequate legal acts.

These two lines of thinking presented not only a practical problem that had to be solved, but also had a deeper background, one that could be traced to fundamental questions of legal theory and comparative law. Naturally, under such circumstances, the UNCITRAL Secretariat did not have an easy task. It did greatly assist the Commission and its Working Group by providing comparative data, collecting examples of the practical problems that may arise from the application of outdated provisions and offering alternative legislative and/or non-legislative approaches.

Analyzing the possible direction of substantive changes, the Secretariat of UNCITRAL reminded the experts about the legislative history of the UML. It contained, a proposal to include tacitly concluded arbitration agreements in Art. 7(2) and the specific issue of the bill of lading. These proposals were rejected in 1985 with the explanation that they raise 'difficult problems of

[24] Document A C .9 G. 1 8 A .1 of anuary 2 , 2 (

[25] he proposal ma e uring preparation was to inclu e the following paragraph:

interpretation.' However, in the meantime, various national jurisdictions enacted provisions broadening the definition included in the UNCITRAL Model Law. The Secretariat pointed to several such examples. Two slightly older examples were taken from the arbitral legislation of Switzerland and the Netherlands whereas the two more recent ones referred to new arbitration laws in Germany and England . The Swiss law spoke about the validity of the clauses 'if made by any other means of communication which permits it to be evidenced by a text'; the Dutch contained reference to 'an instrument in writing providing arbitration, [...] provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.' The German Arbitration Act of 1997 was more extensive. It set out conditions for the recognition of validity of tacitly concluded arbitration agreements and explicitly resolved the bill of lading issue. The most radical (or the most fiction-friendly) was the new English Arbitration Act of 1996, that provided not only for the validity of agreements that are 'made in writing (whether signed or not)', 'made by exchange of communication in writing' and 'evidenced in writing', but also stated that the parties that 'agreed otherwise than in writing by reference to terms which are in writing […] make agreement in writing.'

The UNCITRAL Secretariat also attempted to collect and systematize the possible problematic situations ('fact situations') that occurred in discussions under the 'form or arbitration agreement' heading . The list of situations, although not short, is valuable enough to be reproduced hereadpuaH05 sa3p24:j3z54x'p9IB4:xpB9:4xBU4FFF;piF9:4xBU4n a

(b A contract containing an arbitration clause is forme on the basis of the contract te t propose by one party, which is not e plicitly accepte in writing by the other party, but the other party refers in writing to that contract in subse uent correspon ence, invoice or letter of cre it by mentioning, for e ample, its ate or contract number;

(c A contract is conclu e through a bro er who issues the te t evi encing that the parties have agree upon, inclu ing the arbitration clause, without there being any irect written communications between the parties;

(eference in an oral agreement to a written set of terms, which may be in stan ar form, that contain an arbitration agreement;

(e ills of la ing which incorporate the of the un erlying charter party by reference;

(f A series of contracts entere into between the same parties in a course of ealing, when previous contracts have inclu e vali arbitration agreements but the contract in uestion has not been evi ence by a signe writing or there has been no e change of writings for the contract;

(g he original contract contains a vali ly conclu e arbitration clause, but there is no arbitration clause in an a en um to the contract, an e tension of the contract, a contract

- elaboration of a separate convention that would deal with situations not covered by the New York Convention;
- to promote and recommend the use of the UNCITRAL Model Law as a tool for the interpretation of the New York Convention;
- to encourage the 'liberal' interpretation by the courts (based on various grounds, as already expressed in the reports on the practice of various jurisdictions);
- adoption of amendments (and/or interpretative instruments) in respect of Art. 7(2) of the UML;
- reinforcement of the 'more-favorable-law' provision in Art. 7(1) , in particular by emphasizing that national legislators may adopt recognition and enforcement provisions for the arbitral awards that are more favorable than those in Art. II(2);
- adoption of non-binding instruments, such as guidelines, declarations and commentaries.

After long discussions at the 32 , 33 and 34 sessions of the Working Group in 2000 and 2001, the result was, as always, a certain compromise. It must be stressed that the compromise decision in respect of the form of the approach was strongly influenced by the 'judicial optimists' (i.e. those who advocated). Such a view was promoted mostly (although not exclusively) by delegations from Common Law countries. Afraid of directly amending the NYC, the Commission finally made a hybrid decision, composed of three limbs:

a) revision of the Art. 7(2) of the UML – but not by its formal amendment; instead, there should be a model legislative provision clarifying, 'for avoidance of doubt', its scope;

b) drafting of an interpretative declaration that would recommend to interpret the NYC in light of the UML; and

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[36] Art. 7(1 rea s: he provisions of the present Convention shall not eprive any intereste party of any right he may have to avail himself of an arbitral awar in the manner an to the e tent allowe by the law or the treaties of the country where such awar is sought to be relie upon .

[37] he special problem in this regar is containe in the fact that, although some interpreters sought to un erstan the more favorable clause in the sense that it allows combining YC recognition an enforcement mechanism with the less stringent re uirements of the national law, many observers rea an interprete such a provision in the sense that YC woul , in such cases, not be applicable altogether, but it woul be replace by the national law on enforcement of foreign arbitral awar s (whether provi e by a statute or evelope by case law . P.1 8 A 1. para. 22.

[38] A C .9 4 8 para. 99.

c) production of non-binding instruments (a guide 'explaining the background and purpose of the proposed model provision').

In this paper we would like to leave aside these debates on the form of the work (though they are extremely interesting) and focus on the essence of the proposed changes, i.e. on the text(s) of the 'possible uniform provisions' (the draft proposals, as referred to by UNCITRAL).

The starting point in the formation of the uniform provisions was that they must 'comply with two considerations underlying the form requirements for the arbitration agreement: (a) that there was sufficient evidence of the mutual will to arbitrate and thus to exclude court jurisdiction and (b) that there was some writing in respect of arbitration and thus the parties were on notice (or were warned) that they were excluding court jurisdiction.'

(it is containe in a contract confirmation, provi e that the terms of the contract confirmation have been vali ly accepte by the other party, either e pressly by e press reference to the confirmation or its terms or, to the e tent provi e by law or usage, by a failure to ob ect;

(e it is containe in a written communication by a thir party to both parties an the content of the communication is consi ere to be part of the contract;

(f it is containe in an e change of statements of claim an efense on the substance of the ispute in which the e istence of an agreement is allege by one party an not enie by the other;

(g it is containe in a te t to which reference is ma e in a contract conclu e orally, provi e that such conclusion of the contract is customary, that arbitration agreements in such contracts are customary an that the reference is such as to ma e that clause part of the contract.

(4 he reference in a contract to a te t containing an arbitration clause constitutes an arbitration agreement provi e that the contract is in writing an the reference is such as to ma e that clause part of the contract.[43]

This relatively long and casuistically formulated version (rooted in the previously outlined 'fact situations'), introduced in the first paragraph (in two alternatives and many sub-versions) basically the idea that written form is required only as a means of evidence ('record', 'text usable for subsequent reference') and that, for that purpose, signatures of the parties/representatives are not necessary. The second part (paragraph 3) attempted to list permissible instances that could be viewed as 'formal' enough to meet the 'writing' requirement, starting with the 'conventional' written form (a single document produced by both parties), and – in a certain gradation – going through exchange of communications, tacit acceptance of written offers, and express and tacit acceptance of written confirmations of (orally or otherwise) concluded arbitration agreements (with a special case of failure to object in the arbitration itself). Finally, the bracketed paragraph 3(g) contained an 'English' rule that (to quote some experts) 'defines writing as including oral agreements' – but with an important requirement, i.e. that the making of such (arbitration) agreements is part of the usages of trade.

The Secretariat proposal, despite its length, was consistent with previous discussion; it was also rather logical and consistent. However, after lengthy discussions at the November 2000 Session, the Working Group engaged an informal drafting group that, in an attempt to sum up the results of the

43

considerations of the delegates, actually produced a considerably different proposal or, to be precise, three proposals ('short', 'middle' and 'long' version). In order to save space we have quoted only the long version (whereas indicates parts missing in the short version, and **bold represents** parts missing in the middle version):

unusual in a number of legal systems' and not needed. The second problem was also the (apparently completely misplaced) reference to the applicable law that would or would not allow 'a contract or arbitration agreement' to be concluded orally. Namely, the drafters overlooked that the source of the problem lied in the fact that many laws contain different applicable rules with regard to 'contracts' and 'arbitration agreements'. Moreover, the form of an arbitration agreement was in many countries viewed as a matter of that should, as a rule, always be applied as a mandatory rule of the while the applicable rules for the form of the contract were regarded to be a matter of (and in many cases dispositive in nature).

Therefore, it should not be surprising that UNCITRAL initiated its discussions in 2001 with deliberations of yet another proposal. The new proposal, as in the previous texts, maintained that paragraph 1 remain unchanged. However, the most important parts – paragraphs 2 and 3 that had to replace the current paragraph 2 of the UML – read as follows:

> (2 he arbitration agreement shall be in writing. For the avoi ance of oubt , writing inclu es any form that provi es a recor of the agreement or is otherwise accessible so as to be usable for subse uent reference, inclu ing electronic, optical or other ata messages.
>
> (3 For the avoi ance of oubt, the writing re uirement in paragraph (2 is met he arbitration agreement is in writing if the arbitration clause or arbitration terms an con itions or any arbitration rules referre to by the arbitration agreement are the

ing : Y : : Y : Y ora7 A vllyZ nbon uc7 A vt e Zbyore7 A vr 1 mZ Y ve7 A va7 A vn: v sZ Z: vbZ:n

In addition to all these changes to the text of the model provisions, the 34 Session in New York expressed for the first time a clear general agreement with the 'English' approach – the approach that recognizes oral agreements as those meeting the written form requirement:

> In reviewing the raft, there was general agreement e presse in the or ing Group that an oral reference to a written arbitration clause e pressing an agreement to arbitrate shoul be regar e as meeting the written form re uirement.[34]

This (provisional?) consensus raised, however, an interesting discussion about the nature of the norm contained in paragraph. (3). Several delegates of UNCITRAL Working Group noted that this paragraph in fact creates a fiction that declares an oral agreement to be made in written form. Words of warning were also raised: '[C]reating such a fiction was an unorthodox drafting technique which might make it more difficult to convince legislative bodies that they should enact the new provision.' However, it seems that at the current stage of deliberation the Working Group endorsed such fiction of 'written orality' and continued to work on the draft based on the proposed wording of paragraph. (3), ending with variant 1 that was regarded to be more suitable.

The work of the UNCITRAL Working Group on arbitration on the requirement of written form was, at time of publication of this paper , still not finished. At the 34 Session of the Commission held in Vienna from June 25 to July 13, 2001, the Commission expressed a somewhat sobering opinion about the activities of its Working Group in this area. Whilst the Commission 'took note with appreciation' and 'commended the Working Group for the progress accomplished' it also issued more skeptical statements, in particular with regard to the 'English approach' and the :

> Consistent with a view e presse in the conte t of the thirty fourth session of the or ing Group concern was e presse as to whether a mere reference to arbitration terms an con itions or to a stan ar set of arbitration rules available in written form coul satisfy the written form re uirement. It was state that such a reference shoul not be ta en as satisfying the form re uirement since the written te t being referre to was not the actual agreement to arbitrate but rather a set of proce ural rules for carrying out the arbitration (i.e. a te t that woul most often e ist prior to the agreement an result from the action of persons that were not parties to the actual agreement to arbitrate . It was pointe out that, in most practical

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[34] Ibi ., at 3 .

[35] Ibi ., at 32.

[36] his paper was finally revise an complete in ovember 2 1.

[37] eport of the U C I AL on its thirty fourth session (2 une 13 uly 2 1 , ocument A 17 paragraph 312.

circumstances, it was the agreement of the parties to arbitrate that shoul be re uire to be

(3 It is consi ere that an arbitration agreement shall be eeme to be conclu e in writing if:

1 it is containe in one party s written offer, or if a thir party transmitte to both parties such an offer, provi e that against such offer no ob ection was timely raise , an such failure to ob ect, accor ing to usages in transactions, may be consi ere to constitute acceptance of the offer,

2 after an orally conclu e arbitration agreement, a party communicates to the other a written communication, referring to the arbitration agreement conclu e earlier orally, an the other party fails to ob ect timely, an such failure, accor ing to usages in transactions, may be consi ere to constitute acceptance of the offer.

(4 he reference in a contract to a ocument containing an arbitration clause (general terms of a contract, te t of other agreement or similar constitutes an arbitration agreement provi e that the reference is such as to ma e that clause part of the contract.

(An arbitration agreement may also be conclu e by the issuance of a bill of la ing, if the bill of la ing contains an e press reference to an arbitration clause in a charter party.

(otwithstan ing the provisions of Arts. 1 of this Law, if a ispute has arisen or coul arise out of a consumer contract, the arbitration agreement must be containe in a separate ocument signe by both parties. In such a ocument no agreements may be containe other than those referring to the arbitral procee ings, e cept if the ocument was rawn up by a notary public.

(7 he law applicable to the vali ity of an arbitration agreement is the law esignate by the parties. If the parties faile to esignate such applicable law, the applicable law will be the law applicable to the substance of the ispute or the law of the Republic of Croatia.

(8 An arbitration agreement shall be eeme to be vali if the claimant files the statement of claim to arbitration an the respon ent fails to ob ect to the uris iction of the arbitral tribunal at the latest in his statement of efense in which he raise issues relate to the substance of the ispute.

The approach of the new Croatian arbitration law may be viewed as a rather ‘evolutionary’ one.

Some parts of the provision in Art. 6 are taken from the present wording of Art. 7 of the UNCITRAL Model Law (part already contained in previous Croatian law). Paragraph (1) corresponds in its entirety to paragraph 1 of Art. 7; paragraph (4) (conclusion of the agreement by reference) only supplements by examples the third sentence of paragraph (2).

Some other provisions build upon the present wording but go a step further. For example, paragraph (8) refers to the possibility to conduct arbitration in the case of failure to object to the existence and validity of the arbitration agreement, similarly to Art. 7(2) UML. However, although the situation described is the same, it is not treated in the same way. This case is not mixed amongst other types of written form, but rather separated to emphasize its hybrid nature: the failure to object timely (and engagement in substantive arguments) does amount to waiver of the right to object may be viewed as tacit agreement to submit the present dispute

to arbitration. A very practical consequence of this treatment is that failure to object is no longer viewed under the heading of . Therefore, it is not required to ' by the claimant. Such a requirement could, in some cases, invite the claimant to allege the existence of something that does not exist (i.e. encourage him to lie). However, irrespective of whether this is right or not, the present wording provides a solution for a situation that often raised problems in the past – namely, the situation in which the respondent failed to object the claimant failed to allege the existence of a valid agreement.

In the same way, paragraph (2) contains part of the wording of Art. 7(2) UML, arranged and supplemented partly in the way proposed in the UNCITRAL draft of November 2000. Admittedly, the text refers again to 'exchange' and provides a non-exhaustive list of the means of telecommunication, this time expressly extended to fax messages. The legislator has not (yet) accepted the 'progressive' and forward-looking formulas such as the one of 'data messages' or 'accessible for subsequent messages', since the so-far almost customary formula of 'means of telecommunication that provide record' raised the least problems in practice and turned out to be well-accepted. In return, the issue that raise more problems was the issue of signatures. As already noted, the Croatian law so far interpreted the words of UML (inserted in Art. 470 of the CCP) in the sense that signatures required and constitutive for validity. Therefore, the addition of the words 'whether or not signed by the parties' does present a considerable change.

A very important extension of the formally valid arbitration agreements may be found in the paragraph (3). Its beginning ('it is considered that an agreement is in writing, if […]') does leave open for discussion whether the essence of this paragraph is a presumption or a fiction. However, this is, in practical terms, not important at all: the two situations described in this paragraph are considered to be instances of formally valid agreements, equally 'classic' or 'traditional' writing. The intention was to cover 'fact situations' of tacit

UNCITRAL – to be enough certain to be recognized by arbitral legislation as valid agreements.

The provisions of paragraph (5) and paragraph (6) were also inserted with the

However, the issue of written form is also more than that. As discussions in UNCITRAL and its Working Group clearly demonstrated, attempts to produce model legislation in this area encounter broader questions and broader problems. Ultimately, such attempts had to deal with the way legal norms are drafted and interpreted in various legal systems and families of legal systems; the role attributed to courts in such systems; the drafting techniques and the issues of consistency of the approaches with regard to arbitration and other methods of dispute resolution. This was definitely not an easy task.

The debates in UNCITRAL and its Working Group were imbued with good intentions to, once again, extend the formal limits and encourage the use of arbitration. In more and more countries arbitration is no longer regarded as an exception, but – at least with regard to certain types of disputes – 'the only game in town' . More and more observers raise rhetorical questions in the sense of Kaplan's what is so special about arbitration agreement that partners in a business transaction may conclude a valid multimillion deal by shaking hands, but when they want to agree on arbitration, they have to find a pen and paper.'

Perhaps, in the foreseeable future, it will be time to lift altogether the burden of formal requirements imposed on arbitration agreements and enact a 'statute of liberty'. There may be good reasons to argue that, at least in certain areas and under certain conditions, the form of arbitration clauses must be treated in the same way as the form of the main contracts in which they are contained.

However, it seems that the time is not yet ripe to undertake this courageous step. For now, we have to ask ourselves what is the 'second best' approach? One approach represented by one of the recent directions in the attempts of the UNCITRAL Working Group on Arbitration and Conciliation, was to achieve almost the same results as a 'statute of liberty', but still claiming that we stick to the old notion of 'written form'. This is, certainly, a noble ambition and could be perfectly suitable, only if it were possible. However, it is not, at least not without the far-reaching difficulties that may prove to be fatal for the project.

One set of difficulties arises from the effort to produce a [69] whilst pretending that nothing is really happening. It is certainly true that the

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[67] For this statement errmann, note 2 , at 4(uoting Yves Fortier .

[68] . Kaplan, , 12 A (199 ; . Kaplan, C AC CCA P C A (1997 49 at 1 .

[69] hese wor s were e pressly uttere by some elegates at 34th or ing Group session in ew Yor .

jurisdiction of foreign courts (in disputes with foreign parties). In spite of favorable attitude towards arbitration, one may be tempted to ask why would an agreement between a Croatian and Hungarian party on the jurisdiction of the Arbitral Center in Vienna be in so many aspects privileged in relation to the same agreement on the jurisdiction of the Commercial Court in the same city? National judges may also be tempted to ask why is it much easier (less formal) to agree, in a national dispute, on the jurisdiction of the arbitral tribunal than to agree that the court in Zagreb will be competent of the court in Split? Respecting all the possible statements on arbitration as the standard method of dispute settlement, it is still difficult to find an appropriate explanation for such disparity. To be fair, the parties in dispute are the only ones who can evaluate, freely and without prejudice, what forum is the most convenient for the settlement of their dispute – and they may logically expect the same, or essentially the same, conditions imposed on their choice.

Last but not least, it should be carefully examined what is the aim of the liberalization of formal requirements for arbitration agreements, and can it be achieved by unique regulation for all cases. Certainly, in the area of international commercial arbitration, the arguments for a more relaxed treatment of arbitration agreements are more convincing but even in such cases there may be instances where stricter (or even more relaxed) rules are needed. Consumer contracts may be an example of situations where more caution – and more form – is needed whilst at the other end of the scale are often mentioned Lloyd's forms of salvage concluded under emergency circumstances. The area for a differentiated treatment would become even broader if arbitration legislation conceives arbitration on a larger scale. Commercial arbitration (let alone international commercial arbitration) is important and by far the most developed area of arbitration but in the end it is only the tip of an iceberg compared with the whole scope of possible disputes about dispositive rights of the parties. If the aim is only the development of the practice of international commercial arbitration, perhaps we could live with complete deformalization of arbitration agreements. However, if we have the intention to develop an arbitration culture and support alternative dispute resolution in all suitable areas, we should take into consideration a much broader landscape – and elaborate inevitably differentiated rules for different situations.

We consider therefore that, for the time being, the case-oriented approach (like the one prepared for the discussion of the UNCITRAL Working Group in November 2000) is the right one. It will be very difficult to formulate an acceptable general uniform rule on 'written orality' which will be able to obtain international consensus. On the other hand, it seems that consensus on the relevant 'fact

casuistic approach of the new German or new Croatian Arbitration Law in relation to the form of the arbitration agreement, is the right one. Rather than accept, ‘for the avoidance of doubt’, the Utopian fictions of the ‘written orality’, we should accept a simple fact of life, that – sometimes –