Written Form of the Arbitration Agreement
Towards a Revision of the UNICTRAL Model Law

Alan Uzelac*  

1. Written form provisions: history of success or history of failure?

It is widely held that the UNICTRAL Model Law on International Commercial Arbitration (hereinafter MLA) was a great success. It is certainly true that the past 20 years have confirmed the authority of UNICTRAL as the principal standard-setting body for international commercial arbitration, and insofar we speak about the history of success. The subject of this paper is the work of the UNICTRAL on the revision of Art. 7(2). This is the well-known provisions regarding the written form of the arbitration agreement that reads in full text as follows:

"The arbitration agreement shall be in writing. An agreement is in writing if it is evidenced in a document signed by the parties or in exchange of letters, telegrams or any means of electronic communication 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 clearly established and not denied by either party. The reference to a document containing an arbitration clause constitutes an arbitration agreement provided that the contact is in writing and the reference is such as to make that clause part of the contract.""
Speaking about the success of the MAI and the written form requirement, we may note a certain contradiction, perhaps a contradiction inherent in every success. Each success story assumes the end of the process, but the process never ends. As success of a document may be, there is always a room for improvement and this is precisely what is currently going on with the MAI. After 20 years of its existence, the Commission is engaged in attempts to revise and refine some of its provisions, inter alia regarding the provision that requires the arbitration agreement to be in writing. Notobe oblige the success obliges, and requires further successes. In this presentation, we will start with the question: whether the work of the UNCITRAL on the written requirement has been equally successful. At the end, we would like to make some predictions about the future results of the work of the UNCITRAL in this area, and the prospects of its future impact on the national legislation and the practice of international arbitration. The starting observation may be that the work on the revision of one single paragraph of the MAI until now looks as long as the production of the whole new Model Law. Let me start with a brief chronology of the attempts to revise the Art 7(2).

II. Some suggestions for revision of Art. 7(2) MAI

Exactly 40 years ago, in 1955, Neil Kaplan OC held his Geoff lecture in Hong Kong, asking "is the need for writing as expressed in MAI out of step with commercial practice?" 1

In a subsequent speech in Beijing, Kaplan argued for the revision of Art 7(2) and asked a frequently cited question:

"That a written clause is contained in a written or otherwise binding agreement should be necessary to be put in a signature article in a written version of the agreement. Contracts involving millions of dollars are executed in this way, and it is generally accepted that there is no special need for arbitration clauses to include a written form requirement, as required by Article 7(2)." 2

Even before that, in 1993, the provision of the Art 7(2) was criticized by one of the "founding fathers" of the Model Law itself - at the 1993 ICCA Conference in Bahrain, the then Secretary General of UNCITRAL Gerold Herrmann expressed his personal view that the writing requirement for the arbitration agreement is outdated, and that it has to be replaced with full freedom of form. 3 Herrmann repeated this position in his 1998 Freshfield lecture devoted to the various proposals for the new model legislation on international commercial arbitration. 4

Some other leading arbitration practitioners supported these views. One important endorsement of this position was expressed by Marc Blessing at the 1988 ICCA Conference in Paris, when he argued that the written requirement for the arbitration agreement has to be examined from an international standpoint, through the eyes of the business men and parties engaged in international business and trade. In this context, his conclusion was that the MAI provisions on written form (as well as provision of most national laws) are "harsh, inflexible and not geared to take into account the very particular circumstances." 5

III. Problems with written form: various factual situations

The problem areas to which these reputable arbitration practitioners pointed dealt with a number of factual situations and examples. Some of the most visible examples dealt with the various situations in which the parties disputed the validity of the arbitration clause due to lack of form. Of some situations related to cases where a partyfaculty or orally accepted a written purchase order that contained an arbitration clause, subsequently arguing that the arbitration clause is not valid since it was not contained in a document signed by the parties. Similarly, in some cases the main contract was agreed upon orally, but was subsequently confirmed in writing, expressly confirming the arbitration as well (written sales confirmations). Some of the situations dealt with the specific areas and methods of business, especially in the maritime context. For instance, the issue of written form of the arbitration agreement occurred often in relation to bills of lading or in cases where arbitration prevented the parties from using written forms. The latter cases include an orally concluded contract referring to written general conditions (e.g. maritime salvage contract concluded orally through radio with a reference to a form of salvage such as Lloyd's Open Form). Other situations related to certain brokers' notes, and other instruments or contracts transferring rights or obligations to non-signing third parties, e.g. transfer of contracts, stipulation pour autrui, implied [1] 6

IV. Diverging opinions of courts in reported case law: two approaches

In the reported cases that deal with the in-writing requirement we can clearly separate two kinds of cases. One group of cases relates to the cases that have demonstrated an inclination to interpret broadly the writing requirement. Better, one could say that this first group of cases includes courts that have done everything possible to secure the validity of the agreement. In this pro-arbitration bias some of the courts did even more than that, employing — as Gerald Herrmann said — highly creative constructions (for instance, interpreting NYC to infer that the requirement of signed document relates only to a submission but not to an arbitral clause — so US Court of Appeal, Fifth Circuit). The other types of cases include the courts that have employed a stricter interpretation of the text, employing more grammatical analysis and plain reading of the legislative type, either in relation to NYC, or to domestic law based on the MAC.

Elaborating on these two types of approaches, we will not have an opportunity to present a plentitude of cases. First of all, there are not so many cases reported at all. If we take that a representative (although not yet finished) source of cases that relate to the application of the MAL to the UNCITRAL, Digests of cases, we may note that the Digest contains surprisingly little cases in respect to written form requirement. In fact, in respect to Art 7(2) the Digest is astonishingly uniform: it consists of very many Hong Kong cases, and practically none of the cases from the other jurisdictions (with the exception of two Canadian cases). On the other hand, the ICCA Yearbook and the commentary of the NYC are indefinitely richer in this respect, but they are related to the application of 1958 NYC and not directly the topic of this paper. Therefore, we will stick to two examples that may be indicative for the first and the second group of cases. They are intentionally picked up as the
cases that may run against some unfounded prejudices, e.g. the prejudice that the common-law jurisdictions are “liberal”, “progressive” and “pro-arbitration”, and that Continental jurisdictions are “conservative” and “formalist”.

Therefore, as the example of the first, in favor of arbitral approach, we would select a Swiss decision that is today over 10 years old, the decision in the case Compagnie de Navigation et Transports S.A v. MSC – Mediterranean Shipping Company (Swiss Federal Court). In this decision, the court dealt with the bill of lading that referred to an arbitration clause but was not signed by one of the parties. The court concluded that arbitration clause was valid although the shipper had not signed the bill of lading. The Court reasoned that, “due to the development of modern means of communication, the distinction between signed and unsigned documents is to be approached in a less strict manner”. In the same decision, the Swiss court also expressed the view that the NYC has to be interpreted dynamically, in the light of the more modern provisions of the MAL.

The second approach may be illustrated by a 1999 decision of the US Court of Appeals (Fifth Circuit) in the case Kuhn Lucas Lacoste v. Lark International. Here, the US Court decided that an arbitration clause contained in the Purchase Order that was not signed by one of the parties was not valid. In finding that, the court concluded that “both the construction of the original languages of the Convention and its drafting history showed that Art. II of the Convention required that the contract containing the arbitral clause be signed”. It is important to note that this decision, made on 29 July 1999, almost coincided with the session on the UNCITRAL Commission at which it was decided that the work on revision of the Art. 7(2) be commenced (actually, it comes two months later). Just to emphasize that this is not an isolated decision, and that only US courts make such decisions, we may mention one similar Norwegian decision from 1999 in which the court of appeal refused to recognize an arbitral award rendered in London because the exchange of e-mails, in the view of the court, did not satisfy the writing requirement of the New York Convention.”

V. The work of the UNCITRAL on the revision of writing requirement provisions

Such decisions (and the critical comments by the arbitration practitioner) were the background of the latest UNCITRAL efforts. A brief recapitulation: on 10 June 1998, in the same year when Herrmann held his Freshfield lecture and Blessing
held his speech at ICCA Conference, a special commemorative New York Convention Day was held in order to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. At this conference it was concluded that “the problems arising from the requirement that arbitration agreements by in writing form have often been described as difficult and frustrating.” Officials, especially the officials of the Act 7(2) of the 1961, put on the agenda of the UNCITRAL at the 32nd session of the Commission in 1996, when a Secretariat document on possible future work was debated. At this session, it was decided that requirement of written form for the arbitration agreement shall be one of the three items that would have to enjoy priority. A working group of the UNCITRAL commenced its deliberations on the form of the arbitration agreement in March 2000, by discussing a comprehensive study prepared by the Secretariat. Deliberations continued in November 2000, and May 2001. After a pause that was caused by discussions of the model provisions on conciliation, the working group continued its work in March 2002. From 2002 to 2003 the working group held several sessions discussing other issues, mainly the interim measures of protection. The work on the UNCITRAL on the writing requirement was resumed at the autumn session of the Working Group, in October 2005, but no final result was reached it was decided to postpone discussions until the 44th session in New York in January 2006. To sum up, after more than 10 years of initiatives, and more than 5 years of work, the UNCITRAL has not yet produced the text of the revised Art 7(2) of the 1961. Moreover, it has still not decided in which form will the revision of this provision of only one paragraph of the Model Law – be enacted. In the meantime, a whole new model law (on conciliation) was drafted, deliberated and finalized, at only three sessions of the Working Group. Does this mean that, within the grand success story of the Model Law, there still may be one small chapter that can be described as something less than success?

VI. The reasons for difficulties: the inherent problems of writing requirement in respect to arbitration agreement

There are several reasons why the UNCITRAL was experiencing difficulties in revising Art 7(2). Some of them are inherent in the current provisions containing the writing requirement, and some of them are external. Let us start with the internal or inherent problems of the writing requirement as expressed in the UNCITRAL Model Law and New York Convention.

The first problem – the inherent one – may be obvious from the already quoted factual examples and doctrinal criticisms. This is the tension that exists between the form requirements is respect to the main agreement, as opposed to the form requirement for agreements on dispute resolution mechanisms. In short, there is an obvious discrepancy between the provisions on the form of the main contract that is in normal course of business mostly not subject to strict or any formal requirements, and the formality necessary for the validity of the dispute resolution clauses. Only in positio it may be noted that this is not something that is peculiar to arbitration clauses, in many cases, it is required that all clauses of forum clauses, including the jurisdictional clauses that point to particular courts, be in writing. Another remark: the tension between the form requirements for the main contract and the arbitration clause is, in fact, the negative face of the severability doctrine. It is widely accepted that the main contract has an independent status from the arbitration clause – e.g. it could be found that the main contract is null and void, but that the arbitration clause contained in it survives and continues to be valid. However, in some of the mentioned cases, the situation is exactly the opposite: it could be found that the main contract is perfectly valid, but the operative, but that the arbitration clause contained in it is invalid, because it does not comply with the writing requirement. It is interesting to note that, while the first situation is indisputable, the second is constantly raising obstacles in arbitration circles.

The second inherent problem relates to the fact that there is still no universal consensus with regard to the full formalization in respect to arbitration agreements. Gerald Hartmann may be an avant-garde example of those who advocate the principle of consensus as set by the judges of liberty in respect to forms of arbitration agreement. Of course, it would be infinitely simpler if we could cut down the problem of the form of arbitration agreement to a binary common-sense.

We note that on the one hand this complicates the problem. If formal rules are relaxed only in respect to arbitration clauses, this may create apparent inconsistency of treatment in relation to other dispute resolution clauses, e.g. clauses providing jurisdiction of a particular national court.
dilemma: either we accept only agreements in writing, or we accept also other types of agreements, e.g., oral agreements. Had the question been formulated in such a way (writing or not writing; formality or informality; to be or not to be), the UNICTRAL would have not undergone all the trials and tribulations of endless discussions during 5 years of its work. Yet, during all of this time, the Working Group on Arbitration has constantly repeated the same refrain: writing requirement as it now stands is too rigid and inflexible but it is still not time to accept "pure oral" agreements as well.

So, the whole problem was largely contained in finding the appropriate definition of writing. Writing: yes! But what does writing mean? How should we define in-writing requirement as best to correspond to the requirements of modern life and contemporary business and trade? Here, another inherent problem of the writing requirement comes into play.

From the very beginning the observers have criticized the way in which both MAL and NYC define the writing requirement as unclear and inconsistent. As it was literally stressed in the documents of UNICTRAL, both texts are Art 7(2) MAL and 2(2) NYC - want to achieve more than they could apparently can. Namely, instead of dealing exclusively with the issue of form of the arbitration agreement, both documents - willingly or unwillingly - mix this problem with the substantives issues related to the agreement. The language of Art 7(2) or 2(2), insofar as it speaks about the "exchanging" of letters, telegrams etc., mixes the form of the agreement and the way the arbitration agreement comes about (i.e., its formation).

Perhaps because of this lack of clarity in the very initial documents (starting with 1958 NYC), the points mentioned in the context of the MAL 7(2) often transgressed the formal issues. Many situations mentioned - stipulation pour assistant, group of contracts, binding third parties - in fact do not have anything to do with the form of the arbitration agreement. Yet, as the issue of form was open, it seems that many arbitrators practitioners understood this as invitation to solve a number of open problems of substantive contract law.

Even when focusing on Art 7(2) in its formal meaning, we may ask: "what form?"

A number of jurisdictions are familiar with the distinction of the written form as a condition to validity of the agreement (forma ad solutumamentum) and the written form as a means to ensure proof of the existence of the agreement only (forma ad probandum). Note, the text of Art 7(2) MAL is also ambiguous in this respect, as well as its understanding in various jurisdictions. For instance, the words "arbitration agreement shall be in writing" (and not "shall be evidenced in writing") as well as the words "continued in a document signed by the parties" (and not "evidenced in such a document") may indicate that the MAL had intended to provide "solvency" requirement - requirement for substantive validity of the agreement. On the other hand, the words "means... that provide a record of the agreement" could support the opposite conclusion (strengthened by the fact that the word "record" was into some languages translated as "proof").

Another aspect, connected to the combination of the wish to achieve a "revolutionary change" in treatment of arbitration agreements (words of some delegates at the 24th session of the Working Group on Arbitration) and the consensus that the words "arbitration agreement shall be in writing" have to be maintained, led to another interesting inconsistency. Namely, during the work of the UNICTRAL, it became increasingly clear that the new definition of writing is so broad that it would include oral agreements as well. This paradox was resolved by a hansom expression by Gerald Herman, who reminded us about the "lawyer's delight of a fictory" and compared the new understanding of in-writing requirement to formulas of some common law contracts: "for the purposes of this law, Easter Bunny means Santa Claus". Some definitions in the new proposals expressed (and supported in the UNICTRAL Working Group on Arbitration stretch far the pretension of the imagination of continental lawyers. Let us only take a look at one part of the proposal that was the basis for the 43rd session of the UNICTRAL Working Group on Arbitration in October 2005:

"An arbitration agreement shall be in writing. [... For the avoidance of doubt, the writing requirement is met [...] by providing the arbitrator with [...] an arbitration agreement has been concluded orally, by conduct or by other means not in writing." 24

In a brief summary, this new definition now says that the definition of an "agreement in writing" (for the avoidance of doubt) "includes a contract that is not concluded in writing". In other words, the contract is concluded in writing, if it is concluded orally, provided that it refers to arbitration agreement that is concluded wherever in the world in some textual form that can be later reproduced. 25

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24 The translation of the word "record" as "fictory" may be found in Art 6 para 2 of the Convention on Arbitration, as well from various draft of the optional rules (see Art 5 para 2 of the UNCITRAL rules);

25 See also A.C. 95/6 (WG/1995), at 4 (except from drafts para 2 and 5).

24 This word, e.g., leads us to conclude that a valid written agreement is concluded if one party orally agreed with the other to appoint an arbitrator that is appointed to some document that was drafted and signed only on the hard disk of a computer. Equally, that would lead to conclude that parties have concluded a written agreement if they really agreed on arbitration, but their communication was recorded by one side on a video or audio tape. Although we might even agree that in some of such cases it would be desirable not to invalidate such agreements, it isn't not to agree that this stiffer party for our customary legal understanding of what a "written agreement" is.
interpretation is not the only possible approach. Those who believe in spillover effec-
tive and the power of interpretation ("interpretationalists") are faced by those who
believe that norms should be observed as they read ("normativists"). We need not
to speak about different legal cultures at all; even in the same legal traditions the
views may be different, as some U.S. decisions on the written form demonstrate.
Therefore, the UNCTARL had—and still has—a difficult choice to make between
various strategies how to change the current situation and bring more uniformity
and more harmony into this field. Here is a short list of the possible strategies,
and all—or almost all—were discussed at the sessions of the Working Group for
Achumen.

Now, what will happen? The UNCTARL has still not completed its work, and it is
difficult to make any predictions. At the Working Group session in October 1995, a
radical alternative to the proposal based on the previous debates of the WG was pre-
sented by the Mexican delegation ("the Mexican proposal"). Under this proposal, the
written form requirement is today a formality that is no longer justified; the
formality that may frustrate the legitimate expectations of the parties. Therefore,
under the Mexican proposal, the written form requirement should be fully omitted
from the MAC, leaving the determination of the existence and content of the ar-
teraction agreement as a sheer problem of proof—in the same sense as this is the case
with the main contract. Thus, the proposal was essentially to delete every reference
to writing and replace the whole Art. 7 by only one simple provision:

"The arbitration agreement is an agreement by the parties to submit to arbitration of certain disputes which have arisen or which may arise between them in respect of a contractual or other relationship, whether principal or collateral, ..."

Although the Mexican proposal was in October 2005 not accepted by the Work-
ning Group, it received unexpectedly broad support by some delegations. In a way,
some support that was given to it may be attributed to the broad dissatisfaction
with the current "official" proposal, which is rather complex, cumbersome and
artificial. Our impression was that such support (and the proposal itself) had a
certain "protest" character, requiring the next draft that would be clearer, simpler
and more straightforward.

21 Of course, the method of using factors as tools to produce equal law—without changing the law
is not very frequently widely accepted in all legal systems. The presence of factors is a tem-
perate in every system. By changing a "tool" meaning of it and its effectiveness, a
farmerly expression gradually wants to reconcile something radically different from its original
meaning—i.e., in the case with "writing" requirement. Yet, one of the most "straightforward"
concepts of legislative change is to assume that the change is happening, to describe clearly its
purpose and to adopt it within given decisions ("canonical"). In particular, using factors as a tool
for harmonious legislation around the globe may be problematical, as this concept could be
correctly difficult to "sell" to a number of jurisdictions.

22 See the English Arbitration Act 1996, s. 3(3): "Where parties agree otherwise than in writing by
reference to terms which are to be written, they may make an agreement in writing".
VIII. Conclusion: prospects for future adoptions of new rules

It is hard to predict the future of the project or revision of the MAL provisions on the written form of the arbitration agreement. We do not have a crystal ball to see what will happen. But, we have the words of the Prophet — namely the opinion of Gerold Herrmann expressed in 1988. According to his predictions — and they now seem to be more probable than ever — there will be no change of the NYC. However, the MAL shall undergo revisions — most likely in the form of some new chapters, or of an UNICTRAL Model Law Supplement. As to the NYC, the most promising strategy seems to be the moderate one. Without change of the Art II (2) and without more intellectual gymnastics with the reinterpretation of this provision, one may attempt to use Art VII of the Convention (most favorable clause) in order to apply more relaxed provision of the national law. However, in this case, the national law should also contain a full set of enforcement provisions that will replace the system of the NYC entirely.

The final question of this paper relates to the prospects of future adoptions. At the current stage of work of the UNICTRAL Working Group, it seems that the Group will adopt a set of rather innovative and far-reaching norms, which might include "a fiction of written form" — as we called it in one of our previous papers. As already stated, the new rule that is currently being considered requires that arbitration agreement be in writing, but defines writing in the way that every oral agreement that is referring to an arbitration clause that exists in a written form (or even in any other form, e.g. as a recorded electronic information) will be considered to satisfy the condition of "writing."

How probable is it that such new provisions, if ever finally endorsed by the Commission, are going to be accepted by the states (in particular, the states that have already adopted the Model Law)?

A number of countries have already adopted rules that go beyond the current text of Arts 7(2) MAL. The list of such countries includes Switzerland, Netherlands, Germany, Singapore, New Zealand, England, Greece, Mexico and Croatia. However, the law in these countries is still very far from the proposed text of the new Art 7(2) — and very far from the proposed method of introducing "fiction of writing," perhaps with the exception of English law. Are all these countries going to make another step and change their laws in order to accept an even more avant-garde approach of the new model provisions? I would submit that this is not quite probable, and that it is even less probable if the UNICTRAL accepts a formula that is not perfectly clear, simple and understandable. Certainly, we may have serious doubts whether the current "Bugs Bunny" fictitious formula (with a rather complex and hardly readable text) satisfies these requirements.

There is also another factor: now, in many of the states, the arbitration legislation regulates equally international and national arbitration. This may make adoption of the new rules even more difficult, especially because many laws still provide rather underdeveloped requirements for enforcing autonomy jurisdiction clauses that protract jurisdiction to national courts. At a certain point, the contrast between such rules and extremely relaxed rules in respect to form of arbitration agreements may become too sharp to be acceptable.

All these challenges will face the Working Group when it is going to resume its discussions on the written form provisions. The task is not easy, but on earlier occasions the UNICTRAL Law proven that it is able to find wisdom and prudence to complete hard assignments.