

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

Alan UZELAC*

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This paper deals with the history, background and course of recent attempts to adopt provisions that define formal requirements for the validity of arbitration agreements to the needs of contemporary international business. With the influence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and subsequent model legislation of the United Nation Commission on International Trade Law (UNCITRAL), the 'classic' written form requirement was already relaxed in many countries. However, even the relaxed provisions of these Acts proved insufficiently effective in many cases. On the other hand, efforts to reform them faced many serious difficulties and raised far-reaching questions. The author of this text critically examines the work of UNCITRAL and its Working Group on Arbitration and Conciliation in this area and evaluates the pertinent provisions of the new Croatian Law on Arbitration of 2001.

I. Introduction

'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 majority of observers would subscribe to the view that the arbitration agreement is not an insignificant part of international commercial contracts, the practice of international commerce has demonstrated that the same formal precaution that was intended to protect the parties from uncertainties, may in fact produce certain difficulties that could eventually render the will of the parties to submit their dispute to arbitration, ineffective or void.

Therefore, from the outset of efforts to harmonize standards of international commercial arbitration, the issue of the form of arbitration agreements was high on the agenda, resulting in many innovative approaches. All of them were the results of attempts to loosen the strict requirements inherent in the conservative legal definition of 'writing'. The New York Convention on the Recognition and

* Dr. Alan Uzelac, Secretary General of the Permanent Arbitration Court at the Croatian Chamber of Commerce; Associate Professor, University of Zagreb, Faculty of Law.

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'.¹ 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.²

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 *prima facie* exist in a fairly volatile form. Perhaps more importantly, the very notion of record (translated into some languages, including Croatian,³ as 'proof') indicated a shift in focus from the written form as an essential requirement of the validity of the agreement (*forma ad solemnitatem*) to its evidentiary function (*forma ad probationem*). This view was, however, not supported by doctrine in all countries – and it seems that in Croatian legal writing it was rejected.⁴

¹ See Art. II(2) NYC.

² It remained, however, doubtful whether, in the case of an exchange of letters, they have to be signed by the parties. The interpretation of this clause in Croatia was that this would be necessary. See A. GOLDŠTAJN & S. TRIVA, MEĐUNARODNA TRGOVAČKA ARBITRAŽA [INTERNATIONAL COMMERCIAL ARBITRATION] (Zagreb 1987), at 343, paragraph 10; commenting the translation of Art. I(2)(a) of the European Convention on International Commercial Arbitration (hereinafter: European Convention), the authors argued that both the 'conventional' arbitration clause or agreement and the letters exchanged should be signed, and that this is not necessary only in the case of such means of communication (as telegrams) where signature is not possible.

³ See Art. 470(2) of the Croatian Code of Civil Procedure (hereinafter: CCP) which translated the words 'record of the agreement' as 'written proof of the agreement'.

⁴ The most important Croatian and ex-Yugoslav commentary on arbitration argued that Art. 470 CCP had to be construed as *forma ad solemnitatem*. It criticized a different opinion expressed in N. PAK,

Another extension of the meaning of ‘writing’ was also added in 1985: an agreement in writing would also be considered to exist if there was ‘an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.’⁵ If this legal language is slightly simplified, it meant that a written agreement would exist even if there was no agreement at all, if objection as to the jurisdiction of the arbitrators was not raised in due time. This wording was in fact confusing, at least partially. ‘Exchange of statements’ in this case was something rather different from the ‘exchange of letters’, since the latter had to *contain the agreement*, whereas the statement ‘alleging the existence’ had to refer to a previous agreement (that was perhaps never validly concluded). Failure to object to the jurisdiction of the arbitral tribunal does not have, strictly speaking, anything to do with the *form* of the agreement. Failure of objection as a sufficient ground to validly conduct arbitration should have rather been incorporated in Art. 4 of the UML (‘Waiver of the right to object’), where it would fit systemically and conceptually. However, although it would have been more elegant and more consequential to put this clause elsewhere, it is precisely its (mis)placement which may have initiated the whole new line of thinking about the possibility of ‘unwritten agreements in writing’.

Regardless of all these questions and possible uncertainties that arise out of them, many countries have (initially) followed the exact wording of Art. II(2) of the New York Convention and (subsequently) of Art. 7(2) of the UNCITRAL Model Law. Croatia (*i.e.* its predecessor, the SFRY) is a good example. When the Code of Civil Procedure was enacted in 1976, it contained in Art. 470 almost the same formula as the NYC (enriched by reference to telex, as in Art. I(2)(a) of the European Convention). After the UML was enacted, the first significant amendments to the CCP enacted in 1990 revised the text of Art. 470 and included a reference to ‘other means of communication’ and ‘exchange of statements of claim and defense’⁶. In

MEĐUNARODNO PRIVATNO PRAVO – PRAVNI POLOŽAJ STRANIH LICA I SPOLJNOTRGOVINSKA ARBITRAŽA [PRIVATE INTERNATIONAL LAW – LEGAL STATUS OF FOREIGNERS AND FOREIGN TRADE ARBITRATION], Part II (Belgrade 1986), at 153. See GOLDŠTAJN & TRIVA, *supra* note 2, at 138, paragraph 4. Similarly, it commented the requirement of written form in relation to Art. II(2) of the NYC expressly as the ‘substantial element of arbitration agreement (*ad substantiam*), so that it cannot be replaced by e.g. tacit acceptance of the written offer to conclude an arbitration agreement or by enforcement of the main contract by the parties or by a unilateral written confirmation of the orally concluded agreement (*sales and purchase confirmation letter*).’ *Ibid.*, at 322, paragraph 3.

⁵ See Art. 7(2) UML, second sentence *in fine*.

⁶ Changes to the CCP were enacted by a statute published in OFF. GAZ. SFRY 27/90 (see Art. 46).

hindsight, one could be puzzled by the fact that this was practically everything that was adopted into the CCP from the model provisions of the UML at that stage, although there might have been many more important areas for improvement and harmonization. However, this is also proof of a certain seductive quality of the norms on the form of the arbitration agreement in the UML – their appeal for the Yugoslav legislator was, apparently, so strong that it surpassed every other possible issue which was to be considered. Interestingly, the previous provision contained at the end of the same article was also retained. Namely, the one stating that ‘the existence of the arbitration agreement may be established only by documentation’⁷. What the exact meaning of this old clause was in the new context, whether this would be something similar, contrary, or different from the provision that the agreement would exist if there is a ‘record’ (‘written proof’) of it, remained unclear.

II. Practice and doctrine united – escaping ‘formalism’ (but how?)

At the end of the twentieth century, the situation in respect of the written form requirement for an arbitration agreement was ripe for change. A large majority of proponents of arbitration (as well as many users of arbitration services) were not satisfied with the ‘relaxed’ provisions on the written form of the arbitration agreement in the NYC and UML, considering it *not soft (relaxed) enough*. Evidently, the existing provision (especially with regard to the NYC, which was adopted by over 120 countries in the meantime) no longer reflected the needs and realities of international business, at least not in all cases. The question then was, what had to be done? The provisions of the NYC (heavily advocated as the ‘international standard’ in the area of arbitration) were already in force in the vast majority of developed countries and the list could be enlarged by those who adopted the respective provisions of the UNCITRAL Model Law. In response to this situation, proponents of the change were divided into two segments: those who were talking and those who were acting.

Many of those who were in favor of a further softening of the norms on form restricted their interventions to public and/or private criticism of the insufficiencies of the (inter)national standards of form, lamenting about their possible negative impact on the use of arbitration (and consequently, even, the damage to the national economy) and advocated change in this respect.⁸

⁷ Art. 470(4) (prior to the 1990 amendments: paragraph 3).

⁸ A representative Croatian example of such an attitude may be found in A. Bravar, *Some Aspects of Arbitration in Maritime Disputes*, 3 CROATIAN ARBITRATION YEARBOOK (1996), at 127 (claiming that

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 *Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A. (1995)* decided by the Swiss Federal Court.⁹

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 *Volken, Lalive/Poudret/Reymond, Bucher, Schlosser* and *Walter/Bosch/Brönnimann*) held that this clause should be taken as valid. Almost in an essayist manner, the court pointed to the development of the modern means of communication, to the diminishing of the role of writing and the rise of the role of non-signed documents, the needs of the international commerce etc.¹⁰ Taking all this into account, the Court ruled that the NYC should be read in light of the new social and legal circumstances and therefore be applied in a very broad sense. *Ergo*, though the text of the NYC does not refer to anything but the conventional written form plus the exchange of letters and telegrams, the Swiss Federal Court also in *obiter dicta* concluded that narrow enumeration should be interpreted in the light of the wide enumeration of the subsequent documents.¹¹ This idea, that the NYC should be read in light of the UML, was later heavily exploited in many international discussions on this topic.

the formal requirements for the arbitration agreement make arbitration in maritime cases in Croatia virtually impossible).

⁹ Decision of the Swiss Federal Court of January 16, 1995, ATF 121 II 38, cited in 13 ASA BULLETIN (1995), at 503.

¹⁰ From the decision: ‘*Il ne faut toutefois pas perdre de vue qu’avec le développement des moyens modernes de communication, les écrits non signés ont une importance et une diffusion toujours plus grande, que l’exigence de la signature se relativise fatalement en particulier en matière de commerce international et que le traitement différent réservé aux documents signés et non signés est remis en cause.*’ Ibid., at 510.

¹¹ ‘*Pour l’opinion majoritaire, la disposition précitée doit s’interpréter au regard de la loi modèle de la Commission des Nations-Unies sur le Droit Commercial International [...] dont les auteurs ont voulu ainsi adapter le régime de la Convention de New York aux besoins actuels, sans devoir le modifier.*’ Ibid., at 508.

The abovementioned decision of the Swiss court certainly displayed a masterpiece of legal argumentation. It also reinforced the perception of Switzerland as an *arbitration-friendly environment*. 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 *black letter law*?

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 *shall* be refused, the English translation uses the term *may* refuse. Consequently, English (speaking) courts understood that they were entitled to recognize and enforce an award *even if* conditions for recognition and enforcement were not met.¹²

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.¹³ Finally, another interpretation pointed to the use of the word *include* in the English text of the NYC (in the phrase ‘The term *‘agreement in writing’* 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.’¹⁴

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

¹² This was, *inter alia*, the position expressed by the delegates of the United Kingdom at the 32nd Session of the UNCITRAL Working Group on Arbitration in March 2000. See UN document A/CN.9/468 p. 97 (footnote 36). The delegates were Philip Bovey (head) and David Simpson and Toby Landau (advisers).

¹³ In the same sense *cf.* U.S. Court of Appeals, Fifth Circuit, March 23, 1994. See 20 YEARBOOK COMMERCIAL ARBITRATION (1995), at 941.

¹⁴ UNCITRAL document A/CN.9/468, para. 97.

way, a difference between the *avant-garde* ('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.

III. UNCITRAL in action: Facing the challenges of form

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'.¹⁵ Based on this finding, the Commission adopted a recommendation in 1985, proposing that member states, *inter alia*, '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'.¹⁶

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 40th anniversary of the NYC. The ICCA Conference in Paris¹⁷ and the New York Convention Day in New York¹⁸ both also raised the issue of the written form.¹⁹ The leading people of UNCITRAL also expressed in their public appearances ideas about the necessity for change.²⁰

¹⁵ UNCITRAL document A/CN.9/265. See also UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, New York, 1999, at 65.

¹⁶ 1985 UNCITRAL Recommendation, endorsed by the General Assembly of the UN in resolution 40/71, para 5(b) of December 11, 1985.

¹⁷ See publication IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, ICCA Series Vol. 2, (1999).

¹⁸ See ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, UN Pub. No. E.99.V.2 (1999).

¹⁹ E.g. N. Kaplan, *New developments on written form*, ENFORCING ARBITRATION AWARDS, *Ibid.*, at 17-19.

²⁰ Most notably, see G. Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?*, School of International Arbitration Freshfields Lecture delivered in London on 10 November 1998.

The diagnosis of UNCITRAL was clear – the provision in Art. II(2) could be regarded as ‘outdated’²¹. 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).’²²

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, *mutatis mutandis*, most of the contributions and proposals are rooted.²³

The first line of argument (which may be referred to as *the fear of legislative inertia*) 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 *the fear of judicial inertia*) argued that legal norms, although possessing an inherent portion of elasticity, cannot be so flexible as to cover any imaginable interpretation. Although

²¹ Report of the UNCITRAL 32nd session (17 May – 4 June 1999), A/54/17, at 42, paragraph 344.

²² UNCITRAL document A/CN.9/468, p. 88 (*Report of the Working Group on Arbitration on the work of its thirty-second session, Vienna, 20-31 March 2000*).

²³ We would not like to attribute any of these two types of arguments to specific groups or persons. Both arguments are an ideal type extracted partially from texts and partially from actual discussions in the UNCITRAL Working Group. The author of this text has had the privilege to participate as an observer in various sessions of the Working Group since 1997.

almost every court in every country knows about ‘teleological’, ‘systematical’ or ‘historical’ interpretation, the level of acceptance of those *broad interpretations* vary. At least in those systems that adhere, on average, more to a *narrow* 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.²⁴ It contained, *inter alia*, a proposal to include tacitly concluded arbitration agreements in Art. 7(2)²⁵ and the specific issue of the bill of lading.²⁶ These proposals were rejected in 1985 with the explanation that they raise ‘difficult problems of

²⁴ Document A/CN.9/WG.II.108/Add.1 of January 26, 2000 (*Possible uniform rules on certain issues concerning settlement of commercial disputes. Report of the Secretary General – Addendum*).

²⁵ The proposal made during preparation was to include the following paragraph: ‘*However, an arbitration agreement also exists where one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner.*’ Cf. document A/CN.9/WG.II/WP.37, draft article 3 (reproduced in: 14 UNCITRAL YEARBOOK (1983), Part Two, III, B.1.

²⁶ Proposal by Norway, document A/CN.9/263 (comments on the draft text of the Model Law); 16 UNCITRAL YEARBOOK (1985), part two, I, A.

interpretation.²⁷ 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 Switzerland²⁸ and the Netherlands²⁹ whereas the two more recent ones referred to new arbitration laws in Germany³⁰ and England³¹. 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 agreements³² 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.’³³

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’ heading³⁴. The list of situations, although not short, is valuable enough to be reproduced hereunder:

- (a) A contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other ‘exchange’ in writing in relation to the terms of the contract;

²⁷ See document A/CN.9/232, para. 45. Also published in: 14 UNCITRAL YEARBOOK (1983), part two, III.A.

²⁸ Art. 178 of the Federal Act on Private International Law.

²⁹ Art. 1021 of the Dutch Arbitration Act of 1986.

³⁰ Section 1031 of the German Arbitration Law of 1997 (contained in the Tenth Book of the German ZPO).

³¹ Section 5 of the English Arbitration Act of 1996.

³² ‘[...] if no objection was raised in good time [the agreement transmitted to the party is] considered to be part of the contract in accordance with common usage.’ Section 1031(2) German ZPO.

³³ Section 5(2) and (3).

³⁴ As it was stated in the document, these are the ‘fact situations ... where the parties have agreed on the content of a contract containing an arbitration agreement and where there is written evidence of the contract, but where, nevertheless, current law (as contained in international texts) ... may be construed as invalidating or calling into question the validity of the arbitration agreement’.

- (b) A contract containing an arbitration clause is formed on the basis of the contract text proposed by one party, which is not explicitly accepted in writing by the other party, but the other party refers in writing to that contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;
- (c) A contract is concluded through a broker who issues the text evidencing that the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;
- (d) Reference in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;
- (e) Bills of lading which incorporate the of the underlying charter party by reference;
- (f) A series of contracts entered into between the same parties in a course of dealing, when previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;
- (g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a 'further' contract may have been concluded orally or in writing);
- (h) A bill of lading containing an arbitration clause that is not signed by the shipper or the subsequent holder;
- (i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favor of a third party (*stipulation pour autrui*);
- (j) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;
- (k) Third party rights and obligations under arbitration agreements where the third party exercises subrogated rights;
- (l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same;
- (m) Where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the 'group of companies' theory.³⁵

An inquiry into possible legislative and non-legislative approaches to solve the problems caused by differing practice of the courts with respect to the abovementioned 'fact situations' produced the following list of possibilities:

- a change in the New York Convention by a protocol or other instrument that would have the form and the force of an international treaty;

³⁵ Document A/CN.9/WG.II/WP.108/Add. 1, para. 12.

- 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)³⁶, 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);³⁷
- adoption of non-binding instruments, such as guidelines, declarations and commentaries.

After long discussions at the 32nd, 33rd and 34th 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 *the fear of legislative inertia*). 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’,³⁸ its scope;
- b) drafting of an interpretative declaration that would recommend to interpret the NYC in light of the UML;³⁹ and

³⁶ Art. 7(1) reads: ‘The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon’.

³⁷ The special problem in this regard is contained in the fact that, although some interpreters sought to understand the more-favorable clause in the sense that it allows combining NYC recognition and enforcement mechanism with the less stringent requirements of the national law, many observers read and interpreted such a provision in the sense that NYC would, in such cases, not be applicable altogether, but it would be ‘replaced by the national law on enforcement of foreign arbitral awards (whether provided by a statute or developed by case law).’ See WP.108/Add 1, para. 22.

³⁸ A/CN.9/468 para. 99.

- c) production of non-binding instruments (a guide 'explaining the background and purpose of the proposed model provision'⁴⁰).

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.'⁴¹

The first concrete proposals were produced in the paper prepared in September 2000 for the 33rd session of the Working Group.⁴² The version that was submitted for discussion suggested that Art. 7(2) be replaced by three paragraphs:

- (2) The arbitration agreement shall be in writing. For the purposes of this Law, 'writing' includes any form

[alternative 1:] provided that the [text] [content] of the arbitration agreement is accessible so as to be usable for subsequent reference, whether or not it is signed by the parties

[alternative 2:] which [provides] [preserves] a record of the agreement, whether or not it is signed by the parties.

- (3) An arbitration agreement meets the requirement in paragraph (2) if:
- (a) it is contained in a document established jointly by the parties;
 - (b) it is made by an exchange of written communications;
 - (c) it is contained in one party's written offer or counter-offer, provided that the contract has been [validly] concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party;

³⁹ As expressed in the Report: '...adoption of a declaration, resolution or statement addressing the interpretation of the Convention and providing that, for the avoidance of doubt, article II(2) of the Convention was intended to cover certain situations or to have a certain effect'. Document A/CN.9/468 para. 93.

⁴⁰ Ibid., at 99.

⁴¹ Ibid., at 97.

⁴² The document A/CN/WG.II/WP.110 entitled 'Possible uniform rules on certain issues concerning settlement of commercial disputes: written form of arbitration agreement, interim measures of protection, conciliation.'

- (d) it is contained in a contract confirmation, provided that the terms of the contract confirmation have been [validly] accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or, to the extent provided by law or usage, by a failure to object;
 - (e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract;
 - (f) it is contained in an exchange of statements [of claim and defense] [on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other;
 - (g) [it is contained in a text to which reference is made in a contract concluded orally, provided that such conclusion of the contract is customary, [that arbitration agreements in such contracts are customary] and that the reference is such as to make that clause part of the contract.]
- (4) The reference in a contract to a text 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.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’⁴⁴ – 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 See document A/CN/WG.II/WP.110, para. 15.

⁴⁴ A statement of Toby Landau cited by Herrmann (*supra* note 20, at 5), also referring in note 14 to Chiasson, *A Precipice Avoided: Judicial Stays and Party Autonomy in International Arbitration*, 54 THE ADVOCATE 63 (1996), at 70.

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 *italics* indicates parts missing in the short version, and **bold represents** parts missing in the middle version):

- (2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, *including electronic, optical or other data messages*.
- (3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement *referred to in paragraph (1)* can be concluded *orally, by conduct or by other means not in writing*⁴⁵, the writing requirement is met when *the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties*⁴⁶.
- (4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.
- (5) *The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.*⁴⁷
- (6) For purposes of Article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.
- (7) **Examples of circumstances that meet the requirement that an arbitration agreement be in writing as set forth in this article include, but are not limited to, the following illustrations: [Secretariat asked to prepare a text based on Working Group's discussions].**⁴⁸

The new proposal, instead of solving problems, contributed to the creation of new ones. Its crucial part was paragraph (3) that attempted to combine apparently irreconcilable positions – to reply to wishes of the delegates who wanted to present this new provision only as an interpretative means⁴⁹ and to change significantly the wording of Art. 7(2) (thereby achieving something that was much more than a mere interpretation). Therefore, the words 'for the avoidance of doubt' were the principal place of dispute – whilst some insisted on them, others noted that it 'was

⁴⁵ Short version only: 'other than in writing'.

⁴⁶ Short version only: 'when an arbitration agreement or contract so concluded refers to written arbitration terms and conditions.'

⁴⁷ Short version: deleted.

⁴⁸ Short and middle version: deleted.

⁴⁹ As some observers noted, such a text would *ex post facto* approve the *praeter legem* interpretation of the courts of these countries as the (only) right reading.

unusual in a number of legal systems' and not needed.⁵⁰ 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 *procedural law* that should, as a rule, always be applied as a mandatory rule of the *lex fori*, while the applicable rules for the form of the contract were regarded to be a matter of *substantial law* (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.⁵¹ 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) The arbitration agreement shall be in writing. [For the avoidance of doubt], 'writing' includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

(3) [For the avoidance of doubt, the writing requirement in paragraph (2) is met] [The arbitration agreement is in writing] if the [arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are] [the arbitration clause, whether signed or not, is] in writing, [*variant 1:*] notwithstanding that the contract or the separate arbitration agreement has been concluded [other than in writing] [orally, by conduct or by other means not in writing]

[*variant 2:*] irrespective of the form in which the parties have agreed to submit to arbitration.

In the new proposal, reference to applicable law was abandoned but the option of having the 'for the avoidance of doubt' clause was retained in brackets, even twice. The first occurrence of these words in paragraph. (2) was deleted during the 34th Session of the Working Group⁵² but the second one, in paragraph (3) was retained, 'to reflect that the wording was included to confirm existing interpretations of the writing requirement under that article rather than to create a new legal regime.'⁵³

⁵⁰ See document A/CN.9/485 para. 57.

⁵¹ Document A/CN.9/WG.II/WP.113, para. 14.

⁵² Document A/CN.9/487 (*Report of the 34th session*, New York, May 21 – June 1, 2001) para. 26.

⁵³ *Ibid.*, at 31.

In addition to all these changes to the text of the model provisions, the 34th 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 draft, there was general agreement expressed in the Working Group that an oral reference to a written arbitration clause expressing an agreement to arbitrate should be regarded as meeting the written form requirement.⁵⁴

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 legal fiction* – 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.'⁵⁵ 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 paper⁵⁶, still not finished. At the 34th 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'⁵⁷ it also issued more skeptical statements, in particular with regard to the 'English approach' and the *fiction of written orality*:

Consistent with a view expressed in the context of the thirty-fourth session of the Working Group [...] concern was expressed as to whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules available in written form could satisfy the written form requirement. It was stated that such a reference should not be taken as satisfying the form requirement since the written text being referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration (i.e. a text that would most often exist prior to the agreement and result from the action of persons that were not parties to the actual agreement to arbitrate). It was pointed out that, in most practical

⁵⁴ Ibid., at 30.

⁵⁵ Ibid., at 32.

⁵⁶ This paper was finally revised and completed in November 2001.

⁵⁷ Report of the UNCITRAL on its thirty-fourth session (25 June -13 July 2001), document A/56/17 paragraph 312.

circumstances, it was the agreement of the parties to arbitrate that should be required to be made in the form that was apt to facilitate subsequent evidence of the intent of the parties.⁵⁸

The Working Group was therefore required to examine further the meaning and effect of the more-favorable-right provision; however, the continuation of its work is scheduled for 2002, after the completion of the work on another document, the model legislative provisions on conciliation.

IV. New Croatian Arbitration Law: 'conservative' or 'realistic'?

The deliberations in UNCITRAL and its Working Group were closely followed during the preparatory stage of the new Croatian arbitral legislation. Already in a relatively early drafting stage, members of the drafting group felt that it was necessary to have provisions on the requirement of written form that would go a step further than the 1985 Model Law provisions.⁵⁹ A very natural option was to use the deliberations and conclusions of the Working Group and, if possible, anticipate the solutions that would later be adopted as a proposed way of harmonization.

However, when the Croatian Law on Arbitration was finally adopted in 2001,⁶⁰ the provision of its Art. 6 was not exactly the one deliberated in the final stages of the work of the Working Group. The adopted version of the written form requirement was closest to the version discussed in the UNCITRAL Working Group in November 2000, or – in the terms of national legislation – to the provision of the Section 1031 of the German Arbitration Law of 1997. Art. 6 in its final form has the following text:

Arbitration agreement - definition, form and applicable law

- (1) An arbitration agreement is an agreement of the parties to submit to arbitration all or certain disputes which have arisen or which may arise in the future between them in respect of a defined legal relationship of a contractual or non-contractual nature. An arbitration agreement may be concluded in the form of an arbitration clause in a contract or in the form of a separate arbitration agreement.
- (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in documents signed by the parties or in an exchange of letters, telex, faxes, telegrams or other means of telecommunication which provide a record of the agreement, whether signed by the parties or not.

⁵⁸ Ibid., para. 313.

⁵⁹ A brief account of the history of the deliberations of the working group in this respect is presented in A. Uzelac, *Forma arbitražnog sporazuma ili kako se riješiti aveti papirnatih pismenosti? [The Form of an Arbitration Agreement or How to Get Rid of the Paper Chase]*, 40 PRAVO U GOSPODARSTVU (2001), Issue 2, at 113-142. Some parts of that work are incorporated in this paper.

⁶⁰ Law on Arbitration came into force on October 19, 2001. It was published in OFF. GAZ. 88/2001.

- (3) It is considered that an arbitration agreement shall be deemed to be concluded in writing if:
- 1) it is contained in one party's written offer, or if a third party transmitted to both parties such an offer, provided that against such offer no objection was timely raised, and such failure to object, according to usages in transactions, may be considered to constitute acceptance of the offer,
 - 2) after an orally concluded arbitration agreement, a party communicates to the other a written communication, referring to the arbitration agreement concluded earlier orally, and the other party fails to object timely, and such failure, according to usages in transactions, may be considered to constitute acceptance of the offer.
- (4) The reference in a contract to a document containing an arbitration clause (general terms of a contract, text of other agreement or similar) constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.
- (5) An arbitration agreement may also be concluded by the issuance of a bill of lading, if the bill of lading contains an express reference to an arbitration clause in a charter party.
- (6) Notwithstanding the provisions of Arts. 1-5 of this Law, if a dispute has arisen or could arise out of a consumer contract, the arbitration agreement must be contained in a separate document signed by both parties. In such a document no agreements may be contained other than those referring to the arbitral proceedings, except if the document was drawn up by a notary public.
- (7) The law applicable to the validity of an arbitration agreement *ratione materiae* is the law designated by the parties. If the parties failed to designate such applicable law, the applicable law will be the law applicable to the substance of the dispute or the law of the Republic of Croatia.
- (8) An arbitration agreement shall be deemed to be valid if the claimant files the statement of claim to arbitration and the respondent fails to object to the jurisdiction of the arbitral tribunal at the latest in his statement of defense in which he raised issues related to the substance of the dispute.

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 *and* 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 *written form*. Therefore, it is not required to ‘*allege the existence of the agreement*’ 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 *both* the respondent failed to object *and* 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 2000.⁶¹ 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 *did* raise more problems was the issue of signatures. As already noted,⁶² the Croatian law so far interpreted the words of UML (inserted in Art. 470 of the CCP) in the sense that signatures *were* required and constitutive for validity.⁶³ 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 *as if there were* ‘classic’ or ‘traditional’ writing. The intention was to cover ‘fact situations’ of tacit acceptance and written confirmations of orally concluded contracts that were generally regarded – both in national discussions and in the deliberations of the

⁶¹ Proposal presented in WP.110; *cf. supra* at 95 (note 43 and the text above it).

⁶² *See supra*, at 85 (note 6 and the text above it).

⁶³ In the practice of the PAC-CCC this was interpreted in the same way. Therefore, in several cases where contracts containing arbitral clauses were not signed (or if they were not signed by the CEOs, or, even, if they were signed illegibly) the arbitrators declared that they did not have jurisdiction to decide the case because of the lack of a valid arbitration agreement.

UNCITRAL – to be enough certain to be recognized by arbitral legislation as valid agreements.⁶⁴

The provisions of paragraph (5) and paragraph (6) were also inserted with the intention to deal with practical issues. The first case – bill of lading – occurred often in practice, and was discussed earlier. The second norm – limitations in the case of consumer contracts – was adopted from the German Arbitration Law.⁶⁵ Although Croatian law does not as yet have very extensive legislation regarding consumer protection, it was felt that, in light of far-reaching liberalization of arbitration in national disputes, one should prevent ‘imposed’ and possibly unfair arbitration clauses in the relations of parties of quite unequal position and experience. Therefore, very strict formal requirements are needed for arbitration clauses in consumer contracts where ‘warning function of the written form’ has much more sense and meaning than in customary commercial contracts.

Finally, the provision of paragraph (7) address a completely different issue – the law applicable to *substantive* validity of arbitration agreements. This does not have anything to do with the *form* of the arbitration agreement; perhaps, the same conclusions as the one from the paragraph (7) may be drawn from general conflict of law rules and from Art. 27 of the same Law on Arbitration. However, as evident by some confusion in certain discussions in UNCITRAL⁶⁶, it was useful to insert an explicit provision in this article (and appropriately change its title) in order to avoid confusion between formal and substantive validity of the arbitration agreement.

V. ‘For the avoidance of doubt’: Concluding notes

The issue of the requirement of written form of the arbitration agreement is, no doubt, an interesting practical matter. The validity of many arbitration agreements depends on the legal norms that determine it, and on the interpretation of courts applying these norms. Whether such norms are more narrowly or more broadly written and/or construed may even affect the overall use and popularity of arbitration – it may stimulate or discourage its use under various circumstances.

⁶⁴ The text of this paragraph leans on the draft UNCITRAL proposal of November 2000 – paragraph (3)(c, d, e) – *see supra* at 95.

⁶⁵ Section 1031(5) ZPO.

⁶⁶ *See supra* at 85.

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’⁶⁷. 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.’⁶⁸

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 *revolutionary change*⁶⁹, whilst pretending that nothing is really happening. It is certainly true that the

⁶⁷ For this statement see Herrmann, *supra* note 20, at 4 (quoting Yves Fortier).

⁶⁸ Cf. N. Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARBITRATION INTERNATIONAL (1996); N. Kaplan, *The Model Law in Hong Kong*, CIETAC/ICCA PAPERS ON INTERNATIONAL COMMERCIAL ARBITRATION (1997) 495 at 510.

⁶⁹ These words were expressly uttered by some delegates at 34th Working Group session in New York.

courts in many jurisdictions have already started to soften the strict requirements of norms, such as Art. II(2) NYC. In some cases, they have obviously interpreted the law to the extent that it would no longer be viewed as 'interpretation' in many countries – e.g. 'interpreting' the law to the effect that oral agreements would be sufficient to meet requirements of written form. Such courts cannot be blamed for errors; their decisions may meet the interests of justice, and may be compatible with the overall methods of interpretation and with the perception of written form in the jurisdiction in which they were made. However, it is very questionable whether such practice can be a reliable ground for harmonization at the global level. Moreover, if 'for the avoidance of doubt' all doubt would be removed in an international document that, in fact, the 'interpretation' of written form as the one including 'fiction of written orality' (i.e. oral agreements referring to written rules of arbitration) was the right one, then the inevitable opposite conclusion should be that all the other courts that have interpreted 'writing' as writing, and 'oral' as oral, were wrong. This conclusion would surely not be the right one, not because it would be bad for arbitration, but because it would not be good for law as such. Sometimes, progress can be achieved only if we are ready to admit that we want to achieve it. Otherwise, 'undercover progress' may easily turn to be regress in some fields.

Another set of difficulties was not previously studied in detail. It arises out of the growing asymmetry in the treatment of various jurisdictional agreements. Namely, whilst arbitration legislation witnessed continuous softening of formal requirements for arbitration agreements, national legislation that usually also provides norms for the form of agreements on, e.g. jurisdiction of a court or other body that would otherwise not be competent (*prorogation clauses*), remained unchanged. The gradual reduction of strict formal requirements of written form for arbitral agreements create ever greater differences in treatment that could easily turn out to be causes of disharmony and tension. Croatian law may be a good example: the CCP⁷⁰ and the CLA⁷¹ provide the same formal condition of conventional ('conservative') written form for the validity of agreements on territorial jurisdiction (within the national jurisdiction) and the agreements on

⁷⁰ Art. 70(3).

⁷¹ Art. 49(1) CLA in connection with Art. 70(3) CCP. As this Article no longer contains any express reference to the form of agreement, the commentators argue that Art. 70(3) CCP has to be applied per analogy. However, it is also argued that one should be 'liberal' and 'flexible' and take into account the norms on the written form of arbitration agreement. See M. DIKA, G. KNEŽEVIĆ & S. STOJANOVIĆ, KOMENTAR ZAKONA O MEĐUNARODNOM PRIVATNOM I PROCESNOM PRAVU [COMMENTARY TO THE CONFLICT OF LAWS ACT], (Belgrade 1991), at 182 (para 19-23).

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 *ad hoc* arbitral tribunal than to agree that the court in Zagreb will be competent *in lieu* 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 situations' that require clarification and uniform treatment in international business practice has already been achieved. We believe therefore that the

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 – *the truth is in the small things*.

Author:
Dr. Alan Uzelac
Permanent Arbitration Court
Croatian Chamber of Commerce
Rooseveltovej trg 2
HR-10000 Zagreb
Croatia