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

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It has long been recognized that formal requirements regarding arbitration agreements, as they are defined in the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration, need harmonization with the contemporary commercial practices. In year 2000 the Working Group on Arbitration of the UNCITRAL started to debate a possible revision of the Art. 7. of the 1985 UNCITRAL Model Law. In 2005, this work was still not finished. This paper explores the roots of the initiative to revise written form requirements, presents cases and problem areas, and suggests reasons why this initiative has so far failed to overcome all impediments and achieved consensus.

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

It is widely held that the UNCITRAL Model Law on International Commercial Arbitration (hereinafter MAL) was a great success. It is certainly true that the past 20 years have confirmed the authority of UNCITRAL 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 UNCITRAL 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 contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

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This paper is based on the speech presented at the conference "Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG) and 20 Years UNCITRAL Model Law on International Commercial Arbitration" organized jointly by the International Arbitral Centre of the Austrian Federal Economic Chamber and the UNCITRAL (Vienna, March 15-18, 2005). In some parts of this paper, the author reports about the work of the UNCITRAL Working Group on Arbitration in which he participated as Croatian national delegate. However, the views expressed in this paper are personal, and should not be attributed to the UNCITRAL or any other organization.

Speaking about the success of the MAL 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 successful a document may be, there is always a room for improvement – and this is precisely what is currently going on with the MAL. After 20 years of its enactment, 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. *Noblesse 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 writing 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 MAL until now lasts 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) MAL

Exactly 10 years ago, in 1995, Neil Kaplan QC held his Goff lecture in Hong Kong, asking "is the need for writing as expressed in MAL 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:

> "If an arbitration clause is contained within an otherwise binding agreement why should it be necessary to be able to point to a signature or to a written record of the agreement? Contracts involving millions of dollars are created in this way and it is permissible to ask what is so special about the arbitration clause to require it to comply with 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 1998 ICCA Conference in Paris, when he argued that in-writing requirement for the arbitration agreement has to be examined from an international standpoint, through the eyes of the businessmen and parties engaged in international business and trade. In this context, his conclusion was that the MAL 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. One of such situations related to cases where a party tacitly 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 when urgency prevented the parties from using written form. 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 mentioned 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*, implicit

[1] Kaplan, N., "Is the Need For Writing as Expressed in the Ney York Convention and the Model Law Out of Step with Commercial Practice", 12 Arbitration International 27 (1996), pp. 44-45.

[2] Kaplan, N., "The Model Law in Hong Kong", in: CIETAC/ICCA Papers on International Commercial Arbitration (Arbitration Research Institute China Chamber of International Commerce, 1997), 495 at p. 510.

[3] Herrmann, G. "The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts", in ICCA Congress Series No. 6 (ICCA Bahrain Conference 1993), p. 41 at pp. 45-46.

[4] "Does the World Need Additional Uniform Legislation on Arbitration?" - The 1998 Freshfields Lecture, Arbitration International, Vol. 15 No. 3 (1999), pp. 211-236.

[5] Blessing, M., "The Law Applicable to the Arbitration Clause", ICCA Congress series no. 9 (ICCA Paris Conference 1999), pp. 168-188.

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extension of the application of the arbitration agreement to persons who were not expressly parties thereto and similar. All these factual situations were depicted as quite usual trade and business techniques in which arbitration is also customary. Yet, in concrete cases, courts often found that the arbitration agreements concluded in such factual situations do not comply with the formal requirements. If arbitration was already concluded by a decision on the merits, the consequences were, of course, disastrous - setting aside or refusal of enforcement of the award.

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 include courts that have done everything possible to save the validity of the agreement. In this pro-arbitration bias some of the courts did even more than that, employing – as Gerold Herrmann said "highly creative constructions" (for instance, interpreting NYC insofar that the requirement of signed document relates only to a submission but not to an arbitral clauses – so US Court of Appeal, Fifth Circuit).[6] 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 texts, either in relation to NYC, or to domestic law based on the MAL.

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 is the UNCITRAL Digest of cases[7], 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

[6] Herrmann, op. cit. (footnote 3), p. 46.

[7] See DRAFT DIGEST ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, a document officially presented at the RIZ/DIS/UNCITRAL Conference in Cologne (March 3-4, 2005) expected to be published soon by UNCITRAL at http://www.uncitral.org/uncitral/en/case_law/digests.html.

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 favorem arbitratii* approach, we would select a Swiss decisions that is today over 10 years old, the decision in the case *Compagnie de Navigation et Transports SA v. MSC – Mediterranean Shipping Company* (Swiss Federal Court).[8] 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 *Kahn Lucas Lancaster 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.[9]

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

Such decisions (and the critical comments by the arbitration practitioners) 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

[8] Relevant excerpts in (1995) 13 ASA BULLETIN, pp. 503-511, at p. 508; see also 121 ARRÊTS DU TRIBUNAL FÉDÉRAL (1995), pp. 38-46; as well as http://www.kluwerarbitration.com.

[9] Halogaland Court of Appeal, decision of Aug. 19. 1999.

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.[10] At this conference it was concluded that "the problems arising from the requirement that arbitration agreements be in written form have often been described as difficult and frustrating". Officially, the revision of the Art 7(2) of the MAL was put on the agenda of the UNCITRAL at the 32nd session of the Commission in 1999, when a Secretariat document on possible future work was debated.[11] At this session, it was decided that requirement of written form for the arbitration agreement will 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.[12] Deliberations continued in November 2000,[13] and May 2001.[14] After a pause that was caused by discussions of the model provisions on conciliation, the working group continued its work in March 2002.[15] From 2002 to 2005 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 still not produced the text of the revised Art 7(2) of the MAL. 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?

[10] See PROCEEDINGS OF THE NEW YORK CONVENTION DAY COLLOQUIUM, "Enforcing arbitration awards under the New York Convention: experience and prospects", New York, May 1999.

[11] Possible future work in the area of international commercial arbitration. Note by the Secretariat, A/CN.9/460, 6 April 1999.

[12] Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement. Report of the Secretary General – Addendum, A/CN.9/WG.II/WP.108/Add.1.

[13] See Report of the Working Group on Arbitration, 33rd session, A/CN.9/485.

[14] See Report of the Working Group on Arbitration, 34th session, A/CN.9/487.

[15] See Report of the Working Group on Arbitration, 36th session, A/CN.9/508.

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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 in 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 passim* it may be noted that this is not something that is peculiar to arbitration clauses – in many laws, it is required that all choice of forum clauses, including the jurisdictional clauses that point to particular courts, be in writing.[16]

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 fate 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 and 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 concerns in arbitration circles.

The second inherent problem relates to the fact that there is still no universal consensus with regard to full deformalization in respect to arbitration agreements. Gerold Herrmann may be an avant-garde example of those who advocate the principle of consensualism, or – as he says – the statute of liberty in respect to form of arbitration agreement. Of course, life would be indefinitely simpler if we could cut down the problem of the form of arbitration agreement to a binary common-sense

[16] We note that only because 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 UNCITRAL 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 that would 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 finally stressed in the documents of UNCITRAL, both texts – Art 7(2) MAL and II (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 *substantive issues* related to the agreement. The language of Art 7(2) or II (2), insofar as it speaks about the "exchange" (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 autrui*, 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 opened, it seems that many arbitration 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 "which form"? A number of jurisdictions are familiar with the distinction of the written form as a condition to validity of the agreement (*forma ad solemnitatem*) and the written form as a means to ensure proof of the existence of the agreement only (*forma ad probationem*). Now, 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 "***contained*** in a document signed by the parties etc." (and not "***evidenced*** in such a document) may indicate that the MAL had intended

to provide "solemnity" 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")[17].

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 34th 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 UNCITRAL, it became increasingly clear that the new definition of writing is so broad that it would include *oral agreements* as well. This paradox was best described by a humorous expression by Gerold Herrman, who reminded us about the "lawyer's delight of a fiction" 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*".[18] Some definitions in the new proposals expressed (and supported) in the UNCITRAL Working Group on Arbitration stretch pretty far 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 UNCITRAL Working Group on Arbitration in October 2005:

> "Arbitration agreement shall be **in writing.** [...] For the avoidance of doubt, the writing requirement is met [...] notwithstanding that the [...] arbitration agreement has been concluded **orally**, by conduct or by other means **not in writing**." [19]

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 contained wherever in the world in some textual form that can be later reproduced.[20]

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17 The translation of the word "record" as "*dokaz*" (proof) may be found in Art 6 para 2 of the Croatian Law on Arbitration, but also in Croatian (and former Yugoslav) law previously in force – see Art 470 para 2 of the CCP (now derogated by LA).

18 Herrmann, *ibid.*

19 See A/CN.9/WG.II/WP.136, at 4 (excerpts from draft paras 2 and 5).

20 This would, e.g. lead us to conclude that a valid *written* agreement is concluded if one party orally agreed with the other to apply the arbitration clause that is contained in some document that was drafted and saved only on the hard disk of its computer. Equally, that would lead us to conclude that parties have concluded a written agreement if they orally agreed on arbitration, but their conversation 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 is hard not to agree that this stretches pretty far our customary legal understanding of what a "written agreement" is.

VII. The relationship between the MAL and the NYC: what should be the strategy of change?

But, so far the fictions were the least problem in the UNCITRAL Working Group, because its members seemingly very readily accepted this fictional approach as a quite normal method to legislate legal concepts.[21] Partly, this may be attributed to the strong influence of UK delegation, which was relying on the very similar fictional approach from English law.[22] One even more difficult and so far unresolved problem (that was also the main reason why fictional approach was preferred to a straightforward one) arises from the interplay between the 1958 New York Convention and the 1985 MAL.

Let us return to our initial question about successes and failures. If the success of the UNCITRAL Model law was seriously hampering the efforts of the UNCITRAL to revise it, isn't it true that the even more successful older brother, the NYC, may be much more serious obstacle? Could the efforts to achieve progress fall as a victim of the most successful UNCITRAL instrument?

As we see, the most part of the work of the UNCITRAL WG in the past five years was concentrated on the revision of the MAL 7(2). However, we may be tempted to ask what is going to be achieved, even if the MAL is going to be changed in the near future. As we can see, there is very little case law on the form of arbitration agreement under MAL-inspired national legislation reported in the Digest, so the real problems concern the application of the II (2) of the NYC. Even if the MAL will be changed, the NYC will remain the same. Only those countries that will adopt new rules of the MAL on written form will be able to profit, and even such countries will profit only for future cases. Of course, one may hope that the new text of the MAL would affect the interpretation of the NYC in the same manner in which the Swiss Federal Court came to conclusion that the Convention has to be interpreted in the light of the current standards as expressed in the Model Law. However, the optimistic faith in ability of bending the text of the norm by creative

[21] Of course, the method of using fictions as tools to change existent law without changing the labels is not very familiar widely accepted in all legal systems. The purpose of fictions is to attempt a smooth transition. By changing a "real" meaning of a word to its fictitious opposition, a particular expression gradually starts to connote something radically different from its original meaning – as is the case with "writing" requirement. Yet, one of the more "straightforward" concepts of legislative change is to admit that the change is happening, to describe clearly its purpose and to adopt it without a fictitious "camouflage". In particular, using fiction as a tool for harmonizing legislation around the globe may be problematical, as this concept would be extremely difficult to "sell" to a number of jursdiction.

[22] See the English Arbitration Act 1996, s. 5(3): "Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing".

interpretation is not the only possible approach. Those who believe in spill-over effect 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 UNCITRAL 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 Arbitration.

Now, what will happen? The UNCITRAL 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 presented by the Mexican delegation ("the Mexican proposal").[23] 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.[24] Therefore, under the Mexican proposal, the written form requirement should be fully omitted from the MAL, leaving the determination of the existence and content of the arbitration 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:

> "An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[25]

Although the Mexican proposal was in October 2005 not accepted by the Working 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.

[23] See A/CN.9/WG.II/WP.137 - Settlement of commercial disputes - Preparation of uniform provisions on written form for arbitration agreements - Proposal by the Mexican Delegation.

[24] Ibid, at II.1.

[25] Ibid, at III.A.

VIII. Conclusion: prospects for future adoptions of new rules

It is hard to predict the future of the project on 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 1998. 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 UNCITRAL 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 UNCITRAL 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 orality" – as we called it in one of our previous papers.[26] 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 Art 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 UNCITRAL accepts a formula that is not

[26] Uzelac, "The Form of Arbitration Agreement and the Fiction of Written Orality. How Far Should We Go?", CROAT. ARB. YEARB. 8(2001), pp. 83-107.

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 conservative requirement of written form for customary jurisdiction clauses that prorogate 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 UNCITRAL has proven that it is able to find wisdom and prudence to complete hard assignments.