When is an Arbitration Agreement in Writing Valid under Article II(2) of the New York Convention of 1958?

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In many respects, Piet Sanders was a visionary. In June 1958, at the Conference in New York, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted. On that occasion, Sanders already foresaw difficulties that might arise. More than fifty years later, in this contribution it will be explored how one of those problems may be resolved.

The problem concerns the written form of the arbitration agreement. Article II(1) of the New York Convention requires the Contracting States to recognise an arbitration agreement in writing. Paragraph 2 of Article II defines the term 'agreement in writing' as 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. This definition can be divided into two alternatives:
First: an arbitration clause in a contract or a separate arbitration agreement, the contract or the separate arbitration agreement being signed by the parties.
Second: an arbitration clause in a contract or a separate arbitration agreement contained in an exchange of letters or telegrams.

The first alternative regarding Article II(2) requires that the contract including the arbitration clause or the separate arbitration agreement bear the signatures of the parties. The second alternative was added to make allowances for the practices in international trade at the time (i.e. in 1958). According to this alternative, it suffices that the contract including the arbitration clause or the separate arbitration agreement be contained in an exchange of letters or telegrams, without it being necessary that any of these documents be signed by the parties.

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Neither alternative, however, provides for the tacit acceptance of an arbitration agreement. Such acceptance happens quite often in practice. It is no wonder that Article II(2) ranks first amongst the Convention's provisions dealt with by courts in the Contracting States.

The history of Article II(2) confirms that the drafters of the New York Convention wished to exclude the oral or tacit acceptance of a written proposal to arbitrate. Piet Sanders, the Dutch delegate, had proposed to add to Article II(2): 'confirmation in writing by one of the parties [which is kept] without contestation by the other party'.[2] The New York Conference, however, was open to the objections of the English and the U.S.S.R. delegates to this proposal, and rejected it.[3] Although Piet Sanders' proposal concerned the case of a sales or purchase confirmation, the voting of the delegates indicates that they deemed only the written acceptance of a proposal to arbitrate sufficient for the written form of the arbitration agreement. *Hinc lacrimae.*

For a considerable period, there was no solution concerning the strict requirements of Article II(2) of the New York Convention. It was believed that the definition of what constitutes a written arbitration agreement given in Article II(2) could be deemed an internationally uniform rule that prevailed over any provisions of municipal law regarding the form of the arbitration agreement in those cases where the Convention was applicable. Accordingly, it was believed that the definition of Article II(2) prevailed over the otherwise applicable law that may impose stricter requirements on the formal validity of the arbitration agreement (e.g. certain domestic laws require that the arbitration clause be signed separately). In other words, it was thought that the Convention set an international *maximum* requirement for the formal validity of the arbitration agreement.

However, it has been increasingly questioned whether the text of Article II(2) also constitutes an international *minimum* requirement for the formal validity of the arbitration agreement in view of the demanding conditions resulting

2 UN DOC E/CONF.26/L.54, available at: www.newyorkconvention.org. The proposal was based on Article 2(2) of the Convention on Jurisdiction of the Selected Forum in the Case of International Sales of Goods, The Hague, 15 April 1958 (not entered into force), translation in *American Journal of Comparative Law*, 5, p. 653, which reads: 'When an oral sale includes designation of the forum, such designation is valid only if it has been expressed or confirmed by a declaration in writing by one of the parties or by a broker, without having been contested.'

3 UN DOC E/CONF.26/SR.22.

from its text. In particular, the requirement of an exchange in writing is felt to be no longer in conformity with international trade practices where contracts are frequently formed on the basis of tacit acceptance. The number of courts that either construe Article II(2) expansively - or even state that it is also allowed to rely on national law for determining compliance with the written form of the arbitration agreement - is growing.

There are various approaches to adapting the requirements of Article II(2) to accommodate current international trade practices.
First, it can be achieved by readily accepting that there was an exchange in writing. In this approach, a written acceptance of the contract containing the arbitration clause can be held to satisfy the exchange in writing requirement of Article II(2) if the party to which the contract is sent refers to that contract in subsequent correspondence, such as a letter, facsimile, email, letter of credit, invoice, and so on.
Second, Article II(2) can be interpreted in the light of Article 7 of the Uncitral Model Law on International Commercial Arbitration of 1985, providing:

> '(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (2) The arbitration agreement shall be in writing. 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 defense 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.'

This approach is followed in particular by the Swiss Supreme Court.[4] However, while Article 7(2) of the Model Law provides satisfactory answers in particular for the question concerning means of communication and arbitration clauses in standard conditions, it does not resolve the question as to whether

4 Switzerland no. 27 sub 9 reported in Yearbook Commercial Arbitration Vol. XXI pp. 690-698.

an arbitration clause contained in a contract that has been tacitly accepted by the other party can be considered to meet the written form requirement.

Uncitral amended Article 7 of the Model Law in 2006. The first option of Article 7 is headed 'Definition and form of arbitration agreement' and reads:

> '(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (2) The arbitration agreement shall be in writing.
> (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
> (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
> (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
> (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.'

The first option mentioned above indeed resolves the issue of tacit acceptance. The issue remains, however, that the text of Article II(2) requires a signed contract or an exchange in writing.
The second option drafted by Uncitral in 2006 dispenses with the requirement of the written form altogether. Under this option, Article 7 is headed 'Definition and form of arbitration agreement' and reads:

> '"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.'

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Obviously, the second option is not helpful for interpreting Article II(2), since the option would be to the effect that Article II(2) is no longer to be applied. Moreover, it would also run counter to Article IV(1)(b), which requires submission of a copy of the arbitration agreement as part of the application for enforcement of a Convention award.

Third, Article II(2) can be interpreted expansively to allow other written forms of arbitration agreements. This interpretation can be based on the words 'shall include' in the English text of the Convention, meaning 'shall include, but not be limited to'. Under this interpretation, a tacit acceptance of a contract containing an arbitration clause can be accepted, provided that the clause is contained in a written contract or other form of writing. It is to be noted, however, that the five other equally authentic texts of the Convention do not seem to contain words equivalent to 'shall include'.[5]

Fourth, a party can rely on Article VII(1), according to which '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' (referred to as the 'more-favourable-right-provision'). It may be that the law or the treaties of the country where the award is sought to be relied upon impose conditions as to the form of the arbitration agreement that are less strict than Article II(2) of the Convention. However, reliance on the more-favourable-right-provision presupposes that the forum has domestic law (including possibly case law) or treaties concerning the enforcement of foreign or international arbitral awards, as is made clear by the reference in Article VII(1) to 'any right (...) to avail himself of an arbitral award (...) allowed by the law or treaties of the country where such award is sought to be relied upon'. This is the approach taken by the German Supreme Court.[6] A problem with the fourth approach is that such law (and less so treaties) is not always available. Moreover, if a court states that it is applying the Convention except for the formal validity of the arbitration agreement to which it applies domestic law by virtue of Article VII(1) of the Convention, it does not seem from the technical point of view that it is applying the Convention. It relies instead on domestic case law on enforcement of foreign arbitral awards modelled after the Convention excluding Article II(2). Furthermore, application of the more-favourable-right-provision to adapt the requirements of Article II(2) to accommodate current international trade practices would appear to be a dis-

5 French text: '*On entend par "convention écrite"* (...)' Spanish text: '*La expresión "acuerdo por escrito" denotará* (...)'

6 Germany no. 42 sub 5 reported in Yearbook Commercial Arbitration Vol. XX pp. 666-670.

cretionary exercise, depending on the court before which, and the case law of the country in which, enforcement is sought.
Fifth, a court may use its discretionary power to grant enforcement, notwithstanding the presence of a ground for refusal of enforcement. Such residual power may be applied in circumstances such as waiver and estoppels. If such circumstances are not present, the fifth approach is unlikely to be available.
Sixth, at the level of enforcement of an arbitral award, the requirements of Article II(2) may be held not to be applicable. This is the view of the Italian Supreme Court. A problem with this approach is that Article V(1)(*a*) specifically mentions 'the agreement referred to in article II' (the same words appear in Article IV[1][*b*]). Furthermore, the sixth approach would seem to create an imbalance in the sense that it cannot be applied at the level of enforcement of the arbitration agreement under Article II(3), which refers to 'an agreement within the meaning of this article'. This imbalance would not necessarily arise under the fourth and fifth approach, which can be applied *mutatis mutandis* to the enforcement of the arbitration agreement under Article II(3).

Uncitral issued a 'Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the [New York Convention]' in 2006,[7] reading:

> '1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;
> 2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.'

The first recommendation corresponds to the third solution mentioned above. This solution is based on the English text of Article II(2). It would seem not to be fully in accord with the equally authentic other texts of Article II(2) of the Convention, and in particular the French and Spanish text. Therefore, it will be interesting to see whether the courts in the Contracting States will rely on

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Uncitral's first recommendation. Insofar as it could be researched, no court appears to have followed the recommendation.

None of the six approaches or Uncitral's Recommendations are adequate for resolving fully the issue of when an arbitration agreement meets the written form as required by the text of Article II(2) of the New York Convention. In practice, it is a serious problem that could have been avoided if Piet Sanders' visionary proposal had been adopted at the New York Conference in June 1958. As the matter stands now, an amendment of the New York Convention would seem to be the only effective solution.[8]

8 See my Hypothetical Draft Convention of 2008, available at http://www.newyorkconvention.org/draft-convention.