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Settlement of commercial disputes

Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention")

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* The submission of this document was delayed because it contains comments received in response to a note verbale circulated on 4 March 2008.

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II. Comments received from Governments on the Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

1. Algeria

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Preliminary remarks

1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, was ratified with reservations by Algeria under Decree No. 88-233 dated 5 November 1988, published in the Official Gazette of 23 November 1988.

2. International arbitration is currently governed by Order No. 66-154 of 8 June 1966, as amended and supplemented by Book V, Title II, of Law No. 08-09 of 25 February 2008, enacting the Code of Civil and Administrative Procedure, with effect from its entry into force. That instrument contains specific provisions concerning international arbitration which deal, inter alia, with the international arbitration agreement, its method of execution and validity and the enforcement of arbitral awards.

Comments and observations

Regarding the first recommendation:

The purpose of this recommendation, which relates to the application of article II, paragraph 2, of the Convention, is to secure recognition that the circumstances described in that provision are not exhaustive.

The provision is worded as follows: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.

The circumstances referred to in the article are a contract, an agreement or an exchange of letters or telegrams.

Such a wording implies that the drafters of the Convention did not have to give a restrictive enumeration. It indicates rather that the contracting parties have to state their intention in writing irrespective of the form of correspondence.

From a practical perspective, the circumstances referred to in article II, paragraph 2, of the Convention cannot be regarded under Algerian law as being restrictively enumerated since article 1040 of the Code of Civil and Administrative Procedure lays down, with regard to form, that “the arbitration agreement shall, on pain of invalidation, be effected in writing or by any other means of communication that provide a written record of its existence”.

The phrase “or by any other means of communication” encompasses any means of communication in writing, including modern procedures such as telecopy, electronic mail, electronic signature, etc. That wording would even allow the

inclusion, in anticipation of future technological advances, of other means of communication that are not currently known.

In conclusion, the circumstances indicated in article II, paragraph 2, of the Convention cannot be regarded under Algerian law as an exhaustive or restrictive list of means of communication.

Regarding the second recommendation:

This recommendation is concerned with article VII, paragraph 2, of the Convention, which reads as follows: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the contracting States nor 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".

It should be noted that this provision of the Convention (paragraph 2 of article VII) lacks clarity as to its meaning.

However, according to the letter of this provision and by reference to the general principles accepted in the matter, the contracting State is evidently bound by multilateral or bilateral agreements which it has entered into and which will remain valid unless and until they are terminated.

The contracting State thus retains the right to avail itself of an arbitral award in accordance with the law, treaties or agreements in connection with which that award is sought to be relied upon.