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**United Nations Commission  
on International Trade Law**Thirty-eighth session  
Vienna, 4-15 July 2005**Interim report on the survey relating to the legislative  
implementation of the 1958 New York Convention on the  
Recognition and Enforcement of Foreign Arbitral Awards****Note by the Secretariat****Introduction**

1. The Secretariat of UNCITRAL, in cooperation with Committee D of the International Bar Association, prepared a questionnaire calling upon State parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter referred to as the "New York Convention") to send replies and copies of their laws that deal with the recognition and enforcement of foreign arbitral awards (A/50/17, paras. 401-404).
2. This questionnaire arose out of a decision made by the Commission at its twenty-eighth session to undertake a survey with the aim of monitoring the implementation in national laws of the New York Convention.
3. The questionnaire was drafted with the aim of considering the procedural mechanisms various countries have put in place to make the New York Convention operative. The central issues, which were to be considered in analysing the responses to the survey, were:
  - How was the Convention incorporated into the national legal system so that its provisions had the force of law?
  - In implementing the New York Convention, have State parties added to the uniform provisions of the New York Convention?
  - If reservations were taken in implementation, did the implementation of these reservations add or broaden the reservations that are permitted under the New York Convention?



- In implementation, have State parties included additional requirements for the recognition and enforcement of arbitral awards that are not provided for in the New York Convention?
- 4. The project was not, however, to consider individual court decisions applying the New York Convention as this went beyond the purpose of the project.
- 5. While no firm decision was taken as to whether any proposal could develop from the project, a tentative proposal was made that a guide for legislators, possibly with a model act implementing the New York Convention, could be developed. At a minimum, such a survey could serve to increase awareness and create incentives for improving full implementation of the New York Convention.
- 6. The purpose of this brief interim report is to provide the Commission with an overview of issues raised by the replies received. As well, the interim report envisages additional questions that the Commission might request the secretariat to put to States in order obtain more comprehensive information regarding implementation practice. After considering this report, the Commission might wish to provide further guidance to the Secretariat on the information that the final report should contain taking account of the overall purpose envisaged for the report.
- 7. Noting that there are 135 State parties to the New York Convention, 75 replies to the questionnaire have been received.

### **A. Implementation of the New York Convention**

**Question 1. How did the New York Convention gain the force of law in your country, binding your courts to apply it?**

**1.1 Please specify whether the legislative action was limited to authorizing ratification or accession to the New York Convention, or whether that action included legislation implementing the New York Convention. (In case that the relevant action was not taken by the legislature but by another governmental body, please specify the action).**

- 8. Legislative action limited to authorizing ratification or accession to the New York Convention was taken in 23 States and took various forms. For instance, 5 States mentioned that the New York Convention gained the force of law by Presidential or Royal Decree. Of these, one stated that, following the signing of the New York Convention by the President and its approval by the Senate (which brought the New York Convention into force in accordance with that State's Constitution), a number of laws were amended to give effect to the New York Convention. Another State noted that the New York Convention gained the force of law by Royal Decree approving accession and that Decree contained a reproduction of the New York Convention. One State mentioned that the New York Convention gained the force of law through legislation permitting adherence to that Convention and, in that case, the law simply referred to the New York Convention.
- 9. The remaining 52 States indicated that the New York Convention only gained the force of law in their national legal system when legislation that gave effect to its provisions had been enacted. The implementing legislation took various forms ranging from legislation that merely referred to the New York Convention to legislation that reproduced or paraphrased its text (see below, questions 1.1.1 and 1.1.2).

**1.1.1 Does the implementing legislation incorporate the text of the New York Convention or merely refer to it?**

10. Forty-seven States replied that their implementing legislation incorporated the text of the New York Convention and 5 States replied that their implementing legislation merely referred to it. Legislation that incorporated the text of the New York Convention took various forms, including:

- Legislation amending the existing texts on arbitration, referring generally to international conventions in the field of arbitration rather than specifically to the New York Convention;
- Legislation that merely paraphrased the New York Convention's provisions or incorporated some provisions and paraphrased other provisions (see below, questions 1.1.2 and 1.1.3).

**1.1.2 If the text is incorporated, does the implementing legislation reproduce the text of the New York Convention or does it paraphrase it?**

11. Forty States reproduced the text of the New York Convention in full. Seven States paraphrased that text or imposed additional or special conditions. The Commission may wish to decide whether those should be explained in detail.

**1.1.3 In the event that the text of the New York Convention is paraphrased in the implementing legislation, what is the legal significance of the text of the New York Convention? For example, may, or must, the courts in your country rely on the text of the implementing legislation where it differs from the text appearing in the New York Convention?**

12. For most of the States that enacted implementing legislation, the New York Convention was referred to by the implementing legislation, or reproduced in full, without modification. Seven States, however, mentioned that they adopted implementing regulations, which differed on certain points from the text of the New York Convention (see below, question 1.1.7) and, in that case, indicated that the courts would be bound to give preference to the text of the legislation where it differed from the text of the New York Convention.

*Additional questions*

13. The Commission might wish to consider whether to request the secretariat to undertake a comparative analysis of the constitutional or other norms that apply to determining inconsistencies between domestic legislation and provisions of an international convention and the consequences of non-compliance of domestic legislation with international treaties.

**1.1.4 Does the text of the New York Convention, as implemented in your country, stand-alone or is it incorporated into a larger text (e.g., a code of civil procedure)?**

14. Twenty-five States replied that the legislation implementing the New York Convention was a stand-alone text and 26 States mentioned that it was part of a larger text, such as a Civil or Procedural Code, a Code of Private International Law or legislation implementing other international instruments relating to arbitration.

**1.1.5 If the implementing legislation is part of a broader legislative text, does this affect the practical implementation or interpretation of the New York Convention?**

15. Those States that replied that the implementing legislation was part of a broader legislative text indicated that that fact alone did not affect the practical implementation or interpretation of the New York Convention.

**1.1.6 Generally, what rules of interpretation would the courts apply in interpreting the New York Convention and/or the implementing legislation (*travaux préparatoires* of the New York Convention; court cases from other signatory countries?)**

16. In general, States indicated that a number of rules of interpretation would be applied by courts in the interpretation of the New York Convention. Only 5 States replied that they had so far not detected any form of interpretation, that the question was not applicable or provided no answer to this question.

17. States mentioned the following as potential sources of interpretation of the New York Convention:

- National judicial precedents and/or judicial precedents from other signatory states;
- The *travaux préparatoires* of the New York Convention, of the national implementing legislation and of the UNCITRAL Model Law on International Commercial Arbitration;
- The circumstances of the conclusion of the New York Convention, its purpose or its practical usage;
- The 1969 Vienna Convention on the Law of Treaties, the principles of private international law, or general procedural principles;
- The works of academic writers and opinions of the relevant ministries such as a Ministry of Justice or of legal research institutes.

***Follow-up***

18. The Commission may wish to decide whether the secretariat should provide a more detailed analysis on that question.

**1.1.7 In your view, does the method of implementation result in any substantial differences between the implementing legislation and the provisions of the New York Convention, and if so, in which respect? If feasible, please indicate the places where the implementing legislation is different from the text of the New York Convention.**

19. States replied that the method of implementation of the New York Convention did not impact upon the interpretation or practical application of the New York Convention.

20. The following differences between the New York Convention and implementing legislation were given:

- One State mentioned that it recently adopted implementing regulations which provided that foreign arbitral awards would be enforced only if the enforcing

country's diplomatic officer, in the place where the arbitration was held, certified that the party seeking enforcement was a national of a State party to the New York Convention;

- The courts of yet another State required a ten per cent registration fee for an enforcement action as though the dispute were going to be heard for the first time on the merits.

**1.2 If your country has made use of the first (reciprocity) reservation, or the second (commercial) reservation contained in article I(3), is this referred to or reflected in your implementing legislation, and if so, in which manner?**

*Reciprocity reservation*

21. The reciprocity reservation provides a restriction on the application of the New York Convention by allowing States that apply it to only recognize and enforce arbitral awards made in other Contracting States. Approximately two thirds of the Contracting States have made use of the reciprocity reservation.<sup>1</sup>

22. There was no uniformity in the manner in which the reciprocity reservation was reflected in the implementing legislation of the States, which adopted it. For a number of States, the reciprocity reservation was reflected either in the implementing legislation, legislation separate to that implementing the New York Convention or in the same executive order that published the implementing legislation of the New York Convention. Thirty-eight States indicated that they made use of the reciprocity reservation by including a definition in their implementing legislation providing that a foreign arbitral award was an arbitral award rendered in the territory of a State, which is a party to the New York Convention.

23. Nine States indicated that, while they had made use of the reciprocity reservation, that fact was not referred to or reflected in their implementing legislation or indeed elsewhere. Five States indicated that they had initially made use of the reciprocity reservation but had since withdrawn the reservation.

*Follow-up/Additional questions*

24. To understand the potentially negative impact of the reservations upon the harmonizing effect of the New York Convention, the Commission may wish to seek further information in respect of the following:

- Where States have either maintained or withdrawn the reciprocity reservation, what are the reasons for this?
- Where the reservation is not reflected in legislation or elsewhere, how does the reservation take effect and on what basis do courts refer to it?
- How is the reservation applied in practice (for example, how is a "Contracting State" identified)? Certain States, with common law tradition, mentioned that the inclusion of a given State in an official list is conclusive of the fact that such a State should be taken to be a "Contracting State", without clarifying whether such lists are exclusive or further explaining how, in practice,

<sup>1</sup> Information available on the website of UNCITRAL, <http://www.uncitral.org>.

reciprocity should be proven to the satisfaction of the courts of the State concerned.

*Commercial reservation*

25. The commercial reservation restricts the field of application of the New York Convention by permitting States to only provide recognition and enforcement of arbitral awards that pertain to differences arising out of legal relationships considered as commercial under the law of the State, which made the reservation. In the absence of such a reservation, arbitral awards arising out of non-commercial relationships would also be enforceable under the New York Convention. Approximately one-third of the Contracting States have made use of the commercial reservation.<sup>2</sup>

26. Although adopted by a large number of States, the commercial reservation has one apparently disunifying feature in that it leaves the determination of whether or not a controversy could be deemed “commercial” to the law of the State that made the reservation. In general, States did not specify in their replies whether the term “commercial” was expressly defined or which definition of “commercial” would be used in applying the reservation. There were however indications that, at least in States that adopted the UNCITRAL Model Law on International Commercial Arbitration, reference might be made to the indicative definition of “commercial” contained therein.<sup>3</sup> In addition, few States referred to national implementing legislation that defined the term “commercial”. It should be noted that the absence of a harmonized definition of the term “commercial” might lead to substantial differences in the scope of the reservation among the different legal systems, and could erode the uniform application of the New York Convention.

***Follow-up/Additional questions***

*Commercial reservation*

27. Similar questions as set out above in relation to the reciprocity reservation could usefully be put to States in the context of the commercial reservation. Additionally, the Commission may consider that the following additional questions be put to States:

- Is the term “commercial” defined in legislation implementing the New York Convention or in other legislation which could be specified or is reliance placed on other international instruments, such as the definition included in the UNCITRAL Model Law on International Commercial Arbitration?
- If the term is not defined, has the commercial reservation been applied in case law and, if so, what definition was applied?

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<sup>2</sup> Information available on the website of UNCITRAL, <http://www.uncitral.org>.

<sup>3</sup> The definition of the term “commercial” in the Model Law is the following: “*The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.*”

*Other reservations*

28. The questionnaire did not ask States whether other reservations not included in the New York Convention had nevertheless been applied by States. For example, in some cases, either by express legislation or practical application, issues such as the nationality of the parties, the place of arbitration, the location of one of the parties might affect the scope of application of the New York Convention.

**1.3 Does your implementing legislation define the scope of article II of the New York Convention, and, for example, specify which arbitration agreements qualify for referral to arbitration under the New York Convention (e.g., international arbitration agreement, and/or agreement between nationals of different States)?**

29. Replies showed that the definition of what States considered to be an “arbitration agreement” qualifying for referral to arbitration under the New York Convention was generally found in a separate law on commercial arbitration and that the implementing legislation did not specify which arbitration agreements qualified for referral to arbitration under the New York Convention. There appeared to be disparity in determining which arbitration agreements qualify for the referral to arbitration under the New York Convention.

*Additional questions*

30. The Commission might wish to consider whether it would be helpful to obtain from States more information on how article II is implemented in legislation, and in particular on the law that determines whether an arbitration agreement qualifies for referral to arbitration under the New York Convention.

**1.4 Have any procedural requirements or conditions for enforcement been established by a court decision? If so, please indicate the cases.**

31. States did not report court decisions on procedural requirements relating to enforcement.

**B. Court or authority competent to decide on recognition and enforcement**

**Question 2. Which court or authority is competent to decide on a request for enforcement? Is it one particular court or authority for the entire country or is it one type of court or authority? What criteria determine the competence of the court or authority?**

32. The replies reflected a great variety of situations; nine States replied there was no specific court competent to decide on a request for enforcement of an arbitral award, nor specific procedural regulation for that type of request, whereas, in the other States, a specific court was competent to decide on enforcement of foreign arbitral awards. In 25 States, the court appointed for examining a request for enforcement was a higher level court (being either a Court of Appeal or High Court) and in forty-one States, it was the court of first instance which was competent on that matter.

***Follow-up***

33. The Commission might wish to decide whether more details should be provided on the question of determining the court or authority that is competent to decide on recognition and enforcement, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**C. Procedural rules**

***Question 3.*** Please describe the procedures or requirements applicable to a request for enforcement of a Convention award. Is the applicant required to present anything else than the arbitral award and the arbitration agreement as provided in article IV of the New York Convention?

34. In 48 States, the conditions required to be satisfied in requesting enforcement were limited to those set forth in article IV of the New York Convention.

35. Four States indicated that additional requirements applied, such as that the application for enforcement of an arbitral award should also contain:

- Details on the mode of enforcement sought, the name and address of the applicant and the defendant, and of their representatives, details relating to the claim, the arbitral award and the arbitration agreement;
- Documentation showing that the arbitral award was enforceable in the relevant foreign country;
- A court certificate to the effect that the respondent had been properly notified of the place and date of arbitral proceedings, and a certificate attesting that the parties expressed no objection to the composition of the arbitration body where it was not stated in the arbitral award itself.

***Additional questions***

36. Twenty-seven States reported that general principles of civil procedure applied, without clarifying whether that implied that additional conditions would be requested. The Commission may wish to seek further clarifications on this question and on what general principles of civil procedure apply in relation to article IV of the New York Convention.

**3.1 Are there any legislative provisions, rules of court, or regulations, detailing the procedure applicable to the enforcement of a Convention award? (See articles III and IV of the New York Convention). (For example, is it stated what “duly authenticated” means in article IV, which requires the applicant to supply “the duly authenticated award or a duly certified copy thereof”?)**

37. States replied that either the general procedural rules relating to applications for enforcement of arbitral awards applied, *mutatis mutandis*, to applications for enforcement of foreign arbitral awards or that there were no legislative provisions on that matter. As article IV does not define the law according to which authentication and certification should take place, that question has given rise to diverging interpretation by State courts, as either the law of the State where the



arbitral award was made or the law of the State where the enforcement of the arbitral award was sought could apply.

***Additional questions***

38. The Commission might wish to decide whether more details should be provided on that matter, and whether the secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**3.2 What are the fees, levies, taxes or duties that are to be paid in connection with the application for enforcement of a Convention award, and on which bases are they calculated? Please specify whether any such payment is to be made irrespective of the success of the application or only for an act granting the enforcement of the award.**

39. At the diplomatic conference which concluded the New York Convention, a proposal that it provide for national treatment for foreign arbitral awards (i.e. that the rules of procedure for the enforcement of a foreign arbitral award should be identical to those governing the enforcement of a domestic arbitral award) was rejected. The majority of delegates to the Conference argued that, in their countries, the rules of procedure that governed the enforcement of domestic arbitral awards differed from the procedures governing foreign arbitral awards and unifying the rules of procedure for the recognition or enforcement of foreign arbitral awards would unduly interfere with differing national laws on procedure.<sup>4</sup> Instead, the formula of not imposing “substantially more onerous conditions” on the recognition or enforcement of foreign arbitral awards than imposed for domestic arbitral awards, was adopted.

40. In 18 States, no fees were provided for in respect of the recognition and enforcement of foreign arbitral awards.

41. In 55 States, which required payment of fees, these fees were payable regardless of the success of the application. These fees ranged from ordinary court and filing fees, such as for an application for leave to enforce the arbitral award, endorsement of the accompanying affidavit, the issuance of originating summons and the sealing of a writ of execution.<sup>5</sup>

<sup>4</sup> See the *travaux préparatoires* of the New York Convention, document referenced UN DOC E/CONF.26/SR.11 (available on the website of UNCITRAL, <http://www.uncitral.org>).

<sup>5</sup> The fees for application for enforcement, and the basis on which they were calculated, had been reported to be either:

- A fixed sum that applied irrespective of the amount of the award;
- A fixed fee imposed regardless of the success of the application, in addition to a further fee (equivalent to 3 per cent of the amount of the arbitral award), payable once execution is granted and the creditor proceeds to execution;
- A standard court fee with an additional fee payable in certain cases depending on the mode of enforcement sought and the stage of enforcement reached;
- A filing fee calculated based on the amount claimed in the arbitral award;
- A court fee applied in the amount of one-fourth of a proportional fee calculated on the value of the subject matter in dispute and a stamp duty might apply if the enforcement resulted in the same effect as civil actions that were subject to a stamp duty;

42. In general, fees were reported to be payable on actual enforcement of the arbitral award.
43. One State mentioned that this matter was not yet determined.

**3.2.1 In comparison, what are the fees, levies, taxes, or duties applicable to the request for enforcement of an award made in your country or of an award otherwise considered as domestic in your country?**

44. The results of the survey showed that States had not imposed higher fees or charges for the recognition and enforcement of foreign arbitral awards than were imposed on the recognition or enforcement of arbitral awards rendered under their own law.
45. In certain States, which imposed fees, levies, taxes or duties in respect of a request for enforcement of a foreign arbitral award, these were the same as those imposed in respect of the enforcement of an arbitral award made in their country or otherwise considered a domestic arbitral award.
46. In other States, in which no fee was payable in respect of recognition and enforcement of a foreign arbitral award, no fee was payable in respect of a domestic arbitral award either. In one State, the fee relating to the execution rather than application for recognition and enforcement applied whether the arbitral award was foreign or domestic. In another State, the ordinary filing fee was the same regardless of whether the arbitral award was foreign or domestic.
47. However, in a number of States, the answer was less clear-cut or some disparity existed. For instance, in one case, the reply stated that it was difficult to compare the fees imposed in respect of the enforcement of domestic as opposed to foreign arbitral awards as fees that applied to each varied depending on the case, its nature, circumstances and merits.
48. In at least 2 States, fees imposed on enforcement of domestic arbitral awards were higher than those imposed on enforcement of foreign arbitral awards. However, in one State, enforcement of the domestic arbitral award attracted lower fees for submission of an affidavit than applied in respect of enforcement of foreign arbitral awards. In another State, while fees were the same, it was noted that foreigners would in some cases have to provide security when claiming a property right. In another State, although the administrative fees collected did not differ as between foreign and domestic arbitral awards, a proportional fee that applied in respect of foreign arbitral awards did not apply to domestic arbitral awards because the procedure as to enforcement of domestic arbitral awards differed from the one applicable to foreign arbitral awards.

***Additional questions***

49. The Commission might wish to decide whether more details should be provided on the question of, inter alia, fees payable in respect of enforcement of

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- A stamp duty payable either as a fixed amount calculated as 0.5 per cent of the amount of the claim or being imposed on the originating summons, the affidavit in support of the application and the order granting leave and the judgement;
  - A fee of 2 per cent of the value of the dispute and, if not ascertainable, then a fixed amount would be payable.

foreign arbitral awards, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**3.3 May an applicant subsequently cure any defect in the documents submitted at the time of the application for enforcement of a Convention award?**

50. There was a disparity in the answers given to this question.

51. In 12 States, the defect might be cured without any conditions being imposed. In 22 States, no specific rules existed on this point and general rules applicable to civil law procedure applied. At least one State referred to the fact that the UNCITRAL Model Law on International Commercial Arbitration applied in this respect. For 11 States, the domestic law did not provide for such a possibility or this question was unsettled and there was no legislation or practice in the area.

52. In 7 States, an applicant might subsequently cure defects in documents submitted for the application for enforcement but various conditions and limitations applied, as follows.

53. Concerning the time limitation, States provided in the implementing legislation that:

- Procedural rules permitted parties to cure any defect in the documents submitted at the time of the application for enforcement of a foreign arbitral award;
- Courts, after undertaking a preliminary examination of the application and detecting errors, would give the applicant a limited time within which to rectify the defects and, if this was not done within the given time-limit, then the court would dismiss the application; or
- If formal requirements were not met, the applicant was given one week to rectify the document.

54. Concerning the other conditions that were imposed on the nature of the defect, which could be cured, the following possibilities were reported in the replies:

- The right to cure defects was limited to situations where a court requested an applicant to explain defects in the documents, requiring all parties to be notified of the intention to correct such defects and no objection was made in relation thereto;
- An applicant might cure defects but there were exceptions in the case of enforcement on immovables;
- An applicant might cure defects provided they were only “formal” defects, defects of a procedural nature or clerical mistakes in court documents;
- Only the application for enforcement might be cured, and not other documents submitted in relation thereto;
- An applicant might request the court hearing the request for enforcement to cure any defect in the documents submitted, with the agreement and knowledge of the other party.

**3.4 Should a translation of the arbitration agreement and arbitral award always be provided by the applicant, even if the court can be deemed to be fully familiar with the foreign language in which these documents are expressed?**

55. It was reported that, either:

- A translation of both the arbitration agreement and the arbitral award was required by law in all cases, and regardless of whether a court could be deemed to be fully familiar with the foreign language in which the documents were expressed; or
- These documents should, as a rule, be translated but the court had a discretion to make an exception to this rule if the court and all relevant parties understood the foreign language in question.

**3.5 Is there a limited time period for applying for recognition and enforcement of a Convention award? Which is the period? Please clarify whether the period is the same for any award or Convention award or does the period depend on the type of claim incorporated in the award?**

56. The implementing legislation of the States varied from no limitation for applying to court for recognition and enforcement of arbitral awards although, in at least one of these States, the response noted that the application should be made within a reasonable time as determined according to the circumstances of the case, to time limits varying from 1 month<sup>6</sup> to 30 years, with various conditions applying. In a large majority of States, the ordinary limitation period applied. Notwithstanding that the New York Convention does not specify a time period during which recognition and enforcement should be sought, a short period could be understood as undermining the stated purpose of the New York Convention to facilitate such recognition and enforcement.

57. No State reported that the period depended on the type of claim incorporated in the arbitral award. However, one State reported that the limitation period depended on whether the request was made against a natural or a legal person (the time limit was one year for natural persons and 6 months for legal persons).

***Additional questions***

58. The Commission might wish to decide whether more details should be provided on that matter, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**3.6 Please describe the procedures that the party against whom enforcement is sought can use to raise objections against the request for enforcement with a view to preventing enforcement?**

59. The legislation of various States required that the party raising objections must provide evidence of any circumstances provided for in article V of the New York

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<sup>6</sup> The State in which the time limit of one month applies mentioned as well that that provision had not been interpreted by courts as yet.

Convention. A State reported that the grounds for raising objections against the request for enforcement largely reflected those found in the New York Convention, with case law recognizing that a court had residual discretion to refuse enforcement on grounds other than those enumerated in the New York Convention.

60. Various procedures had been described by States:

- General principles of civil procedure applied in this respect;
- In most of the States, the party objecting had to be heard by the court within a defined time period (varying, depending on the States, between 8 to 45 days);
- A party would have the same time limit as that set for the summons for replying to the application in order to make submissions and the court might set a time limit to hear evidence;
- The party against whom enforcement was sought became, by force of law, a participant in the proceeding and there was an obligation that both parties be notified of the date of the hearing and be given the right to be heard, including the right of the party against whom the enforcement was sought to submit any motion with a view to preventing the enforcement of an arbitral award;
- An order giving leave to enforce an arbitral award was normally granted *ex parte* and had to be served upon the debtor, who might, within 14 days, apply to set aside the order; the arbitral award might be enforced against the debtor as any other judgement if, during this period, no application to set aside the order was made or any such application was refused;
- In one State, there was no procedure specified for a party to raise objections although the relevant legislation allowed a court to refuse enforcement and, in another State, this question was not addressed.

#### *Additional questions*

61. To fully understand the procedures that the party against whom enforcement is sought can use to raise objections against the request for enforcement with a view to preventing enforcement, the Commission may wish to decide whether further questions should be added to the questionnaire, or dealt with in a further study, as follows:

- What is the practice in each State regarding the application of article VII of the New York Convention? As a matter of fact, only one State mentioned that it systematically applied the more favourable provisions of its own legislation instead of the provisions of the New York Convention, as expressly allowed under article VII of the New York Convention. Further information on the content of domestic legislation that States considered as more favourable than the conditions established under the New York Convention would prove extremely useful, namely in identifying possible trends in that field. On the other hand, it would be useful to gather information on the grounds, other than those enumerated in the New York Convention, on the basis of which enforcement may be refused;
- Concerning the grounds for refusing enforcement defined under article V of the New York Convention, the question arises of how States interpret the term “public policy” referred to under article V(2)(b) of the New York Convention;

- States mentioned that the New York Convention shall be interpreted in accordance with the Constitution; it may be helpful to obtain information on the constitutional principles that States deem applicable in relation to the interpretation of the New York Convention and its implementing legislation.

**3.7 Please describe the procedures and competent court for any appeal or other possible recourse against a decision refusing to enforce an award.**

62. In 44 States, recourse against a decision refusing to enforce an arbitral award was possible and such recourse was not available in only 5 States. The plaintiff could utilize the same appeal procedure as is applicable to ordinary civil litigation against a judgement refusing to grant enforcement of an arbitral award. The procedures varied with regard to a number of issues, including the competent court reviewing the matter and the time in which parties may lodge an appeal.

*Additional questions*

63. The Commission might wish to decide whether more details should be provided on that matter, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

**3.8 Please describe the procedures and competent court for any appeal or other possible recourse against a leave for enforcement.**

64. An appeal or other recourse against leave for enforcement was possible in 66 States and 15 of those States mentioned that the ordinary civil procedure provisions applied. The procedures vary with regard to questions such as the competent court reviewing the matter, or the time in which parties may lodge an appeal. Eight States replied that their legislation did not provide for recourse against leave for enforcement.

**3.8.1 Does the lodging of the appeal or other recourse suspend automatically the enforcement of the award? Or may, upon request, suspension be ordered by the court or authority?**

65. There was no uniform solution to this question. Sixty-three States provided that recourse against leave for enforcement was possible. Twenty-six States mentioned that the lodging of the recourse automatically suspended the enforcement of the arbitral award. In 38 States, there was no automatic suspension provided, but in a great majority of those States, suspension could be ordered by a competent court upon request. In 2 federal States, both of these possibilities in relation to suspension were provided for, depending on the place and type of matter. In one State, there was no provision as to the effect of a judgement; one State did not provide an answer.

*Additional questions*

66. The Commission might wish to decide whether more details should be provided on that matter, and whether the Secretariat may undertake complementary studies, based on the replies to the questionnaire as well as on other sources of information.

## **D. Comment**

### **Do you have any additional comments with regard to the rules governing the implementation of the New York Convention in your country?**

67. Very few States made comments. Three States mentioned that the New York Convention had not been applied yet in their country, and one State mentioned that the recent reforms of the field of civil procedures might impact the application of the New York Convention in the future. One State highlighted that its domestic legislation on the conditions for recognition and enforcement of arbitral awards was more liberal than the New York Convention, and therefore that domestic legislation, and not the New York Convention, was applied to the recognition and enforcement of arbitral awards, in accordance with article VII of the New York Convention.

### **Conclusion**

68. The brief overview above provides a general outline of replies received regarding the implementation of the New York Convention and serves to facilitate discussions as to the next steps.

69. On the first question of incorporation of the New York Convention into the national legal systems, States in general considered that the method of incorporation was neutral as to the implementation of the New York Convention. However, the survey highlighted various areas of uncertainty:

- Certain States have a constitutional system under which an international convention becomes effective only after enactment of implementing legislation; in some of these States, such legislation has not been enacted in respect of the New York Convention; for those States which have not incorporated the New York Convention through implementing legislation, there is a risk that its application by judges might not be acknowledged;
- For States, that have enacted legislation paraphrasing the New York Convention, the discrepancies between the texts is a source of potential obstacles to achieving uniformity in interpretation and application of the New York Convention. On this last point, however, the survey showed that very few States paraphrased the text of the New York Convention in their implementing legislation.

70. On the question of reservations, the survey made it clear that discrepancies in implementation concerning the commercial reservation might come from the fact that the New York Convention does not provide a definition of the term “commercial”. As well, the commercial reservation might give rise to conflict of laws issues, as this provision does not specify if the word “commercial” should be interpreted by referring to the law of the State where the arbitral award was rendered or the law of the State where the party is seeking to enforce the arbitral award.

71. As to the important question of whether State parties to the New York Convention have included additional requirements in their implementing legislation for the recognition and enforcement of arbitral awards that were not provided for in the New York Convention, it was noted that the application of domestic rules of procedures to matters on which the New York Convention was silent could give rise to diverging solutions to questions such as the requirements applicable to a request

for enforcement, fees, levies, taxes or duties to be paid in connection with such an application, correction of defects in the applications, the time-period for applying for recognition and enforcement, and the procedures and competent courts for recourse against a decision refusing to enforce an arbitral award.

72. It should be noted as well that certain countries have adopted a more liberal approach to the recognition and enforcement of foreign arbitral awards, as compared to the conditions set forth by the New York Convention, and therefore, additional study on the application by States of article VII of the New York Convention would be necessary to complement that survey.

73. The Commission might wish to consider requesting the Secretariat to seek further information from States or carry out further studies in order to enable it to prepare a more comprehensive report on the legislation implementing the New York Convention. To achieve that, the following approach is submitted to the Commission for consideration and discussion:

- It might be advisable to recommend that each State appoint a national expert who could provide more detailed information on the issues raised, in particular focusing on additional procedural requirements included by some States and issues of transparency of the requirements for recognition and enforcement of a foreign arbitral award;
  - The questionnaire might need to be complemented by additional questions or studies, relating to: rules determining the hierarchy between international instruments and domestic laws (see question 1, particularly 1.1.7) the commercial and reciprocity reservations (see question 1.2), the form of the arbitration agreement (see question 1.3), information relating to procedural aspects of recognition and enforcement (see question 2); or to additional requirements or more liberal provisions for the recognition and enforcement of foreign arbitral awards included by States in their legislation (see questions 2, 3, 3.1, 3.2.1, 3.5, 3.6, 3.7 and 3.8.1);
  - The Commission might wish to consider whether the approach taken in preparing the interim report, including the style of presentation and the level of detail, is appropriate or whether it should include as well, for instance, more indications including naming States.
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