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INTERNATIONAL JUDICIAL PRACTICE AND THE WRITTEN FORM REQUIREMENT FOR INTERNATIONAL ARBITRATION AGREEMENTS

Written and translated by Jing Wang[†]

I. INTRODUCTION

The requirement that international commercial arbitration agreements must be made in writing is well accepted in most countries and has become a uniform practice in international commercial arbitration law. This is due in large part to the widespread acceptance of the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[1] Article II (1) provides that "each Contracting State shall recognize an agreement in writing." The term "agreement in writing" is defined in Article II (2) of the Convention as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Since the New York Convention took effect, the legislatures of most jurisdictions have accepted the written form requirement, thereby excluding the validity of arbitration agreements made tacitly or orally. Generally, the international practitioners have followed suit, however, some reject the necessity of the written form requirement.

II. THE WRITTEN FORM REQUIREMENT FOR INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENTS

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires a valid arbitral agreement to include an arbitral clause in a contract or an independent arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. When the parties sign an agreement containing arbitral clauses, the written form requirement

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[1] Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 7 I.L.M. 1042 (1968) (codified at 9 U.S.C. § 201 et seq.) [hereinafter New York Convention] (this footnote did not appear in the original article).

is satisfied, thus alleviating the problems associated with oral or tacit arbitral agreements. When an agreement is made through exchange of letters or telegrams, the proposal and acceptance of arbitration are the basic elements of arbitration agreements. However, the exchange of letters or telegrams must also clarify that proposal and acceptance of an arbitral agreement has the effect of proving its existence.

The New York Convention differs from the Model Law of the United Nations International Trade Law Committee. The Model Law states:

> 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 telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defense.

However, as the Model Law precludes the application of other domestic laws, its written form requirement is in fact stricter than that of the New York Convention.

III. MISREADING OF THE NEW YORK CONVENTION

A. Misinterpretation of Article II (2) of the New York Convention

Misinterpretation of Article II (2) of the NYC occurs most often in American courts. The most frequently cited case is *Sphere Drake Insurance, PLC v. Marine Towing, Inc.*[2] *Sphere Drake* is about a marine insurance policy that included a clause for arbitration in London. The insurer was English and the insured was American. The insured vessel sank after the broker procured the policy, but before it was delivered to the insured. When the insured sued for coverage under the policy in a U.S. state court, the insurer removed the case to federal court, and then moved to stay and to compel arbitration. The district court found in favor of the English insurer. The insured appealed, claiming that he had never signed any insurance contract and there was no "agreement in writing" within the meaning of the New York Convention. The insured's argument was based on the usual meaning of the language used in the New York Convention, but was rejected by the Fifth Circuit. The court ruled that the phrase "signed by the parties or contained in an exchange of letters or telegrams" modified only the second

[2] Sphere Drake Ins., PLC v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994).

part of the "agreement in writing" definition. Thus, the court held that an "agreement in writing" included either: (1) an arbitral clause in a contract, or (2) an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

This conclusion was made without discussing the text or purpose of the Convention, and without any discussion of other Article II (2) cases, most notably *Sen Marc Inc. v. Tiger Petroleum Corp.*, where the court held that an arbitration term was not enforceable under the Convention because it was not in signed writing nor found in an exchange of letters.[3]

After *Sphere Drake*, other courts construed Article II (2) similarly. For example, in *Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd.*,[4] Kahn Lucas, a New York company, issued two purchase orders for finished garments to Lark International, a Hong Kong corporation that acts as an agent in Asia for U.S. clothing buyers. Both purchase orders contained arbitration clauses that read, "any controversy arising out of or relating to this order . . . shall be resolved by arbitration in the city of New York . . ." and "[t]he validity of this order and construction of the provisions hereof shall be determined in accordance with the laws of the State of New York." Lark International sub-contracted production of the goods, arranged for shipment to the United States, and inspected the goods prior to shipment. After the transaction was completed, Kahn Lucas claimed that some of the garments had defective coloring and sued for breach of contract.

The court declined jurisdiction for the breach of contract suit, but held that it had the power to grant the plaintiff's motion to compel arbitration. Although Lark International did not dispute that it (1) received the purchase orders, (2) it failed to object to them, (3) it fulfilled the orders, or (4) that Kahn Lucas paid for the orders, Lark International nevertheless argued that there was no arbitration agreement because it never signed or replied to the orders. The court cited *Sphere Drake* in its decision, holding that "an arbitral clause in a contract is sufficient to implicate the Convention. That is, an 'agreement in writing' does not necessarily have to be either signed by the parties or contained in an exchange of letters or telegrams, as long as the Court is otherwise able to find 'an arbitral clause in a contract.'" Although the case was reversed on appeal,[5] the opinion reflected the desire of some courts to interpret the Convention freely.

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[3] Sen Marc Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879, 882-83 (S.D.N.Y. 1991).

[4] Kahn Lucas Lancaster Inc. v. Lark Int'l Ltd., 956 F. Supp. 1131 (S.D.N.Y. 1997), *rev'd*, 186 F.3d 210 (2nd Cir. 1999).

[5] *See id.*

The problem in *Sphere Drake*, *Kahn Lucas*, and their progeny[6] is not necessarily their conclusions, but rather the method used to draw these conclusions. The prime duty of a court is to find the facts and apply the governing law(s). In interpreting the legislation, both the plain meaning and the legislative intent should be respected. The plain meaning of the modifiers used in Article II (2) is clear; the modifiers should be applied equally to "arbitration clause in a contract" and "arbitration agreement." Thus, Article II (2) means that an "agreement in writing" shall include either: (1) an arbitral clause in a contract, signed by the parties or contained in an exchange of letters or telegrams or (2) an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Although "arbitration agreement" is closer to "signed by the parties or contained in an exchange of letters or telegrams" in sequence, it is counter-intuitive to construe that the latter refers exclusively to "arbitration agreement."[7]

In practice, special agreements resolving existing disputes by arbitration are very rare; the vast majority of arbitrations are based on arbitration clauses in contracts. The great majority of Article II (2) decisions in all signatory jurisdictions involve arbitration clauses. Merchants are more concerned with the transaction itself, not the designation of intricate dispute resolution schemes.[8] It would be absurd if the drafters intended to leave arbitral clauses in contracts subject to enforcement without any criteria. In *Kahn Lucas* the trial court held that if contract is made according to law and relevant conventions, the arbitration clause enclosed necessarily satisfies the valid written form that the Convention requires. This construction not only frustrates the drafters and signatories and puts the Convention on slippery grounds, but it also violates the Convention's purpose, which is to encourage the recognition and enforcement of international contracts, and to unify the standards by which arbitration agreements are observed and arbitral awards are enforced in the signatory countries.[9]

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[6] *See* Stony Brook Marine Transp. Corp. v. Wilton, 1997 A.M.C. 351 (E.D.N.Y. 1996), *available at* 1996 WL 913180; Borsack v. Chalk & Vermilion Fine Arts, Ltd., 974 F. Supp. 293 (S.D.N.Y. 1997).

[7] The English term "arbitration agreement" is not as accurate as its French counterpoint *compromis*. A better choice is "submission agreement."

[8] Some call this phenomenon "commercial irrelevance." *See* Jiangyu Wang, *The Battle of Form for International Commercial Contracts*, 8 CIV. & COM. L. REV. 613, 545-637 (1997).

[9] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

B. *Expansion of Article II (2) of the NYC*

Fortunately, deliberate misinterpretation of the Convention, as some U.S. courts have done, is not a common practice. Nevertheless, some courts feel restricted when deciding cases about the form of arbitration agreements and are inclined to try to expand the scope of Article II (2) of the Convention. *Compagnie de Navigation de Transports S.A. v. MSC Mediterranean Shipping Company S.A.*[10] is a typical Swiss case in which only the carrier signed the bill of lading. The Swiss trial court ruled that, in the absence of a signature by the shipper, the "agreement in writing" requirement was not satisfied and therefore there was no enforceable agreement to arbitrate. The Geneva appellate court overruled and found the shipper had manifested its intent by filling in the bill of lading. The Swiss Federal Tribunal went further in affirming the appellate court's decision, ruling that Article II (2) of the NYC should be interpreted and applied in light of the less restrictive requirements of both Article 7(2) of the UNCITRAL Model Law and Article 178 of the Swiss Private International Law Act. In other words, the Tribunal found a valid arbitration agreement by applying the principles of good faith. The shipper's conduct, in particular his filling out the form and returning it to the carrier reasonably conveyed his assent to the contract. This decision attracted much criticism because there is no requirement in Article II (2) that the exchange of letters or telegrams be signed. Therefore, the writing exchanges between the parties had satisfied the requirement of the Convention and the Swiss courts did not have to rely on other standards.

There are deep-seated reasons for the wide range of verdicts. One reason is the ignorance of general hierarchy of law theory. Another is deliberate misreading of the Convention. In the background are the social and economic drives to consummate a more uniform international commercial arbitration law. In my view, the aberrant interpretation of language on which there is a nearly unanimous view reveals at least two defects of the Convention itself in addition to the respective reasons of the "trouble-makers."

First, the New York Convention is not precise enough. Although Article II (2) of the Convention sets a strict and definite requirement for the form of arbitration agreements and makes such form a prerequisite for recognition and enforcement of arbitration agreements, this requirement

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[10] Compagnie de Navigation de Transports S.A. v. MSC Mediterranean Shipping Co. S.A., ATF 121 III 38 (Fed. Trib. 1995) (Switz.), *reported in* 3 ASS'N OF SWISS ARB. BULL. 503 (1995).

refers only to the form, not the effectiveness of the agreement itself. For example, the Convention does not preclude the use of other domestic arbitration laws. Article VII (l) provides:

> 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.

This statement, which simply declares coherence between the Convention and domestic laws, leaves a loophole that is more permissive about the form of arbitral agreements than the Convention. Thus, U.S. courts first cite the convention and then ignore it by applying federal or state law to enforce arbitration agreements, regardless of whether such federal law or state law is consistent with the Convention standard.[11]

Second, the strict written form requirement that the Convention requires has not kept pace with current international commercial practice. When the Convention was drafted in 1958, communication technology was considered only to the extent of permitting letters and telegrams to satisfy the written form requirement, and little space was left for filling the gap of progress in technology. With recent progress in technology and commercial activities, more and more businessmen choose to carry on their transactions through less traditional measures that are inconsistent with the strict meaning of Article II (2), such as telex, facsimile, and e-mail. Objectively speaking, there is some logic to the following rationale found in *Compagnie*:

> [O]ne must not however lose sight of the fact that, with the development of modern means of communication, unsigned writings play an increasingly significant and widespread role, and the requirement of a significance is becoming critically less central in particular in international commerce, and the distinct treatment accorded signed and unsigned writings is being put into question.[12]

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[11] 13 MEALEY'S INT'L ARBITRATION REPORT 31 (May 1998).

[12] *Compagnie*, 3 ASS'N OF SWISS ARB. BULL. 510-11.

IV. FURTHER THOUGHTS

Despite the variety of opinions, there is not much controversy over the written form requirement for arbitration agreements.[13] However, if we do not simply immerse ourselves in the plain words of the Convention and we review recent judicial practice on this matter, we will find that the issue is complex, especially with respect to how the written form requirement of arbitration agreements is being challenged by the new commercial customs and technologies. Both international and domestic legislation have explored this subject since the Convention came into effect. For example, the UNCITRAL Model Law enacted in 1985 recognized the validity of arbitration agreements that appear by means of "telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defense . . . ." In addition, Article 1021 of the 1986 Holland Arbitration Act states that "a writing document regulating arbitration or standards of arbitration is sufficient to constitute written form, only if this document is accepted by the other party or the representative of the other party." Likewise, the English Arbitration Act 1986 provides that such agreements may be proven by a variety of means. Like it or not, the written form requirement the Convention sets for international commercial arbitration agreements has begun to waver. It is likely that in the future, arbitration agreements formed orally or tacitly will be enforced as they are in the ordinary commercial transactions. The New York Convention does not currently provide for such agreements, and it is not possible to prevent courts from making broad interpretations about the form of arbitration agreements before the Convention's definition of an enforceable arbitration agreement is amended. Therefore, Chinese arbitration committees and judicial organs should pay more attention to international judicial practice when hearing or deciding arbitration cases.

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[13] *See generally* JAKIE YANG, INT'L COM. ARB. 121 (Chinese University of Political Science and Law 1997).