THE WRITING REQUIREMENT—IS THERE REALLY A NEED FOR CHANGE?

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Art II(2) of the New York Convention 1958 ('the Convention') defines 'agreement in writing' to include 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

ARCHAIC TERMINOLOGY

Some criticisms have been levelled at the archaic language used in Art II, in particular at the terms 'letter and telegrams', suggesting that modern means of electronic communications may fall outside the scope of 'writing' in the Convention. With respect, the word 'letter' is wide enough to cover any written message from one party to another. Emails, email attachments, web postings, EDI are actually the means by which the written message is communicated or transmitted. By referring to 'telegrams' more than 50 years ago, the drafters of the Convention had contemplated the use of other more efficient communications than the postal delivery service. While an update of nomenclature in Art II is desirable, it is not one that deserves any serious intellectual debate.

WHAT CONSTITUTES 'WRITING'?

The existence of an arbitration agreement defines the power of the courts to grant enforcement of the arbitration agreement either by ordering a stay or refusing to exercise its jurisdiction over the subject matter or the parties. Over the last 50 years, courts of Convention countries gave the requirement for 'writing' many different shades of interpretation.

Calls by leading international arbitrators for the abolishment of the requirement for writing or a more liberal interpretation of the term 'in writing' have grown in recent years. It has been suggested that 'actions speak louder than words' and that 'form should not prevail over substance'.

The 2006 Amendment to the UNCITRAL Model Law on International Commercial Arbitration Amendment ('2006 MAL Amendment') [see UN Document A/6/17] testifies to the persuasive power of these arguments. The next target then appears to be Art II of the Convention. While arbitrators would be keen to see a more liberal approach, it is only wise to consider some alternative views for retaining the 'writing requirement' in the Convention.

There are at least three questions that require consideration before change should be made to liberalise it or to do away with the requirement all together viz. What is the underlying rationale for 'writing' in the first place? Is it logical to maintain a different 'writing' standard for arbitration agreement and the underlying commercial contract? Would a change invite or avert more litigation for the users?

THE UNDERLYING RATIONALE FOR THE REQUIREMENT WRITING

Best evidence of consent

A written arbitration agreement represents the best evidence that an agreement to arbitrate is made. If parties are willing to commit their intention into a written form they must be held to it. An agreement to arbitrate in writing captures the genuine consent of the parties. It distinguishes the conclusion of the arbitration agreement from underlying commercial transaction and also ensures that no agreement to arbitrate is reached unwittingly by any party.

Right of access to court

The requirement for writing is also dictated by the principle that access to the court of justice is so fundamental a right that no person ought to be deprived of it unless he has specifically consented to do so.

For all the desirable factors and advantages that can be said of arbitration, none could be said to justify a displacement or derogation of this right from any party without its consent. Any doubt as to any voluntary surrender of this right must necessarily be given to the party who is resisting the arbitration in favour of court jurisdiction.

LOGIC AND THE SEPARABILITY DOCTRINE

It has been argued that whereas a contract for millions of dollars could be entered into orally yet the arbitration clause which is ancillary to it must be 'in writing'. The suggestion is of course that an arbitration agreement must be treated like that of any other contract. This argument is both attractive and logical and is not one that could be simply ignored.

Proponents of this argument ignore the concept of kompetenz–

kompetenz which neutered the argument of logic that 'nothing can come out of nothing' and the corollary doctrine of separability. If the doctrine of separability is to remain applicable to international arbitrations it should logically apply both ways viz. to treating an arbitration agreement as a separate agreement and to permit the tribunal to apply different tests to the two agreements. To do otherwise may reflect a selective and inconsistent application of the doctrine and betray a certain element of embedded self–interest in promoters of international arbitration.

The real issue is not whether an arbitration agreement must always be in writing but whether the Convention ought to take cognizance only of agreements satisfying the writing requirements. An arbitration which fails to satisfy the writing requirement is still enforceable in many jurisdictions albeit outside the Convention regime.

COURTS OF THE SEAT AND PLACES OF ENFORCEMENT HAVE DIFFERENT ROLES

The 2006 MAL Amendment signals a move from the strict requirement that the arbitration agreement must be 'in writing' to one that is effectively 'evidenced in writing'. Writing is now defined to include a recording of the agreement 'in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.' So writing now means more than words, but would include audio records, videos or films such that if you nodded in response to a suggestion for arbitration, and if that be recorded, the agreement is considered to be 'in writing' for the purposes of the MAL. The second option that was proposed in the 2006 MAL Amendment is a total removal of the writing requirement.

This expanded meaning of 'writing' could give rise to more possible ambiguous scenarios. Some examples include:

- Oral proposal to arbitrate by one party, not objected to by the other and recorded in a letter/ email/ facsimile (oral + silence + letter)
- Oral proposal to arbitrate by one party, assented to by conduct of the other and recorded in a letter/ email/ facsimile (oral + positive conduct + letter)
- Oral proposal to arbitrate by one party, accepted orally but not recorded in any letter/ email/ facsimile (oral + oral + no letter)
- Oral proposal to arbitrate by one party, accepted orally and recorded in a taped conversation/ video (oral + oral + audio/video record)
- Proposal to arbitrate by conduct, and agreed to orally by the other and recorded in a letter/ email/ facsimile (conduct + positive oral + letter)
- Proposal to arbitrate by conduct, assented to by conduct but not recorded in any letter/ email/ facsimile (both positive conduct + no letter)
- Proposal to arbitrate by conduct, assented to by conduct and recorded in a letter/email/ facsimile (both positive conduct + letter)
- Proposal to arbitrate by conduct, assented to by conduct and recorded in video or photograph (both positive conduct + video/ photograph)

The MAL is crafted primarily for the purpose of regulating the conduct of arbitrations at the seat of the arbitration. The objective of the NY Convention on the other hand is to facilitate the enforcement of an arbitration agreement and arbitral awards which have been made in another jurisdiction.

A removal of or broadening of the definition of 'writing' in the Convention in the manner as proposed in the 2006 MAL Amendment could mean that each time an agreement or an award is sought to be enforced, the enforcement court faced with the application is empowered to conduct a full trial to consider the existence of an arbitration agreement purely as an evidential issue. If each enforcement court chooses to do 'what is right in its own eyes', an era of greater judicial diversity and inconsistency of application and interpretation than what is currently experienced would soon loom.

CALL FOR REFLECTION

In contemplating a change in the writing requirement, whether by way of an amending protocol or a new draft convention, it may be wise to first pause and reflect on the points made above before joining the popular clamour for change.

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