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Report of the Working Group on Arbitration on the work of its thirty-seventh session (Vienna, 7-11 October 2002)

Contents

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I. Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985, also referred to in this report as "the Model Law"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group II (Arbitration and Conciliation), and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement and

the issue of interim measures of protection and the preparation of a model law on conciliation.

5. At its thirty-fifth session, held in New York from 17-28 June 2002, the Commission took note with appreciation of the report of the Working Group on the work of its thirty-sixth session (A/CN.9/508). The Commission commended the Working Group for the progress accomplished so far regarding the issues under discussion, namely the requirement of the written form for the arbitration agreement and the issues of interim measures of protection. At the same session, the Commission also adopted the UNCITRAL Model Law on International Commercial Arbitration.

6. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119, para. 74) and that the secretariat had been requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. It was also noted that a revised draft of a new article prepared by the secretariat for addition to the Model Law regarding the issue of enforcement of interim measures of protection ordered by an arbitral tribunal (para. 83) would be considered by the Working Group at its thirty-seventh session (A/CN.9/508, para. 16).

7. The Working Group is composed of all States members of the Commission. These are:

> Argentina, Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Romania, Russian Federation, Rwanda, Sierra Leone, Singapore, Spain, Sudan, Sweden, Thailand, the Former Yugoslav Republic of Macedonia, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

8. The Working Group at its thirty-seventh session was attended by the following State members: Argentina, Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, Hungary, India, Italy, Japan, Lithuania, Mexico, Russian Federation, Rwanda, Singapore, Spain, Sudan, Sweden, Thailand, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

9. The session was attended by observers from the following States: Algeria, Australia, Croatia, Czech Republic, Denmark, Ecuador, Finland, Greece, Indonesia, Ireland, Lebanon, Peru, Philippines, Poland, Qatar, Republic of Korea, Slovakia, Slovenia, Switzerland, Turkey, Ukraine, Venezuela and Yemen.

10. The session was attended by observers from the following international organizations:

(a) **Intergovernmental organizations**: Hague Conference on Private International Law, League of Arab States, NAFTA Article 2022 Advisory Committee and the Permanent Court of Arbitration;

(b) **Non-governmental organizations invited by the Commission:** American Arbitration Association, Cairo Regional Centre for International Commercial Arbitration, *Centre d'Arbitrage et d'Expertise du Rwanda*, Chartered Institute of Arbitrators, Global Center for Dispute Resolution Research, International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA),

International Law Institute (ILI), London Court of International Arbitration (LCIA), Moot Alumni Association (MAA) and Lagos Regional Centre for International Commercial Arbitration.

11. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico)

Rapporteur: Mr. Prem Kumar MALHOTRA (India)

12. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.II/WP.120);

(b) Note by the Secretariat: Preparation of uniform provisions on interim measures of protection (A/CN.9/WG.II/WP.119);

(c) Proposal by the United States of America (A/CN.9/WG.II/WP.121).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on interim measures of protection.
4. Other business.
5. Adoption of the report.

II. Deliberations and decisions

14. The Working Group discussed agenda item 3 on the basis of the proposal by the United States of America (A/CN.9/WG.II/WP.121) and the document prepared by the Secretariat (A/CN.9/WG.II/WP.119). The deliberations and conclusions of the Working Group with respect to that item are reflected in Chapter III below.

III. Interim measures ordered by the arbitral tribunal

15. The Working Group recalled that at its thirty-sixth session it had commenced discussions on the power of a court or arbitral tribunal to order interim measures of protection (A/CN.9/508, paras. 51ff.) and had considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration (A/CN.9/WG.II/WP.119). Due to lack of time, the Working Group had not completed its deliberations on interim measures of protection ordered by an arbitral tribunal at that session. A decision was made that the Working Group would continue its deliberations on the basis of a proposal submitted by the United States of America (A/CN.9/WG.II/WP.121) setting out a revision of draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration, also having regard to the draft text previously prepared as contained in document A/CN.9/508 and document A/CN.9/WG.II/WP.119. The proposed text as considered by the Working Group (A/CN.9/WG.II/WP.21, also referred to in this report as "the proposal") was as follows:

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order another party to take interim measures of protection.

"(2) An interim measure of protection is any temporary measure, whether reflected in an interim award or otherwise, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to

"(a) maintain or restore the status quo pending determination of the dispute, in order to ensure or facilitate the effectiveness of an eventual award;

"(b) take action that would prevent, or refrain from taking action that would cause, current or imminent harm, in order to ensure or facilitate the effectiveness of an eventual award;

"(c) provide security for the enforcement of an eventual award, including an award of costs; or

"(d) preserve evidence that may be relevant and material to the resolution of the dispute.

"(3) The arbitral tribunal may order an interim measure of protection when the requesting party has demonstrated that

"(a) there is an urgent need for the measure;

"(b) irreparable harm will result if the measure is not ordered, and that harm substantially outweighs the harm that will result to the party opposing the measure if the measure is granted; and

"(c) there is a substantial possibility that the requesting party will succeed on the merits of the dispute.

"(4) (a) The arbitral tribunal may grant an interim measure of protection without notice to the party against whom the measure is directed or before the party against whom the measure is directed has had an opportunity to respond when, in addition to meeting the requirements of paragraph (3), the requesting party demonstrates that it is necessary to proceed in that manner in order to ensure that the measure is effective.

"(b) Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days, which period cannot be extended. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party against whom the measure is directed has been given notice and an opportunity to be heard.

"(c) Except to the extent that the arbitral tribunal has determined under paragraph (4)(a) that it is necessary to proceed without notice to the party against whom the interim measure of protection is directed in order to ensure that the measure is effective, that party shall be given notice of the measure and an opportunity to be heard at the earliest practicable time.

"(d) [A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all

circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met.]

"(5) The arbitral tribunal may require the requesting party to provide appropriate security as a condition to granting an interim measure of protection.

"(6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection.

"(7) The arbitral tribunal may modify or terminate an interim measure of protection at any time."

A. General remarks on interim measures ordered on an *ex parte* basis

16. The Working Group was invited to focus its attention on the most contentious issue of the power of an arbitral tribunal to order *ex parte* interim measures of protection as set forth in paragraph (4) of the proposal.

17. The Working Group recalled that at its thirty-sixth session diverging views were expressed as to whether, as a matter of general policy, it would be suitable for a revision of the Model Law to establish the possibility for interim measures to be ordered *ex parte* by an arbitral tribunal (A.CN.9/508, paras. 77-94). The Working Group recalled that a number of delegations had expressed the view that this power should be reserved for State courts. That view was reiterated. Other delegations felt that this power should be given to an arbitral tribunal provided that the *ex parte* order only applied for a limited time period. Other delegations took the view that, given the potential adverse impact of an *ex parte* order against the affected party, empowering an arbitral tribunal to issue such an order would be acceptable if strict conditions were imposed to ensure that the power was not subject to abuse. A widely shared view was that, even if *ex parte* measures were eventually dealt with in a revised version of article 17 of the Model Law, they should be so drafted as to indicate that *ex parte* measures should only be granted in exceptional circumstances.

18. The Working Group heard a presentation on the history and content of the proposal. It was noted that the proposal took the approach that the arbitral tribunal should be granted the authority to issue an *ex parte* interim measure of protection on a provisional basis and for a limited period. It was stated that there were at least two situations where it would be justified for an arbitral tribunal to order interim measures of protection on an *ex parte* basis, notwithstanding the fundamental principle of due process and equality of parties in arbitration. The first such situation was where a party applying for the interim measure in a case where it was urgently needed was prepared to provide notice to the other party but, for practical reasons, had not yet been able to give effective notice. The second, and more difficult, circumstance was where a party seeking the interim measures of protection contended it was necessary to withhold notice in order to ensure that the interim measure would be effective or that the other party would not frustrate the measure. It was said that the fundamental question of policy to be decided at the outset was

whether the authority to order interim measures of protection on an *ex parte* basis should be granted to arbitral tribunals in addition to courts.

19. In support of giving such power to arbitral tribunals it was said that if the Working Group agreed that a necessary component of an arbitral tribunal's ability to resolve disputes included the power to order interim measures generally, then it would necessarily follow that an arbitral tribunal should have the discretion to do so on an *ex parte* basis where circumstances so required. It was suggested that the main argument against granting such power was the concern for the possible abuse of such a power. It was noted that the risk of abuse applied equally whether the *ex parte* interim measures of protection were sought from a court or from an arbitral tribunal. It was recognized that the power to order *ex parte* interim measures of protection would need to work in tandem with the enforcement provisions yet to be considered by the Working Group. Given that the enforcement regime set out in the proposal envisaged that a national court would be permitted to examine the circumstances of the granting of the *ex parte* order, in some cases a party would have to successfully mislead both an arbitral tribunal and a court for there to be abuse of the measure. It was said that this risk was reduced by the fact that the potential review by a national court provided an appropriate and effective safeguard against abuse. Also, it was stated that the order of an arbitral tribunal could not directly affect third parties and that the party seeking the interim measures of protection could be placed under an obligation to provide security to safeguard against harm to the party against whom the measure was made. It was pointed out that there was some evidence, albeit anecdotal, that the judiciary in some States was in favour of providing arbitral tribunals with the power to address interim measures of protection. However, it was also pointed out that, in certain legal systems, an interim measure rendered on an *ex parte* basis would be regarded as a procedural decision that could not be enforced by State courts.

20. More specifically, it was explained that the general authority to grant *ex parte* interim measures of protection in paragraph 4(a) of the proposal included safeguards against potential abuse. Paragraph 4(b) provided that the *ex parte* interim measures of protection would be effective only for a maximum of twenty days and paragraph 4(c) provided that notice of the measure and an opportunity to be heard should be given to the responding party at the earliest practicable time. Further, paragraph 4(d) set out the obligation of the party seeking the measure to inform the tribunal of all circumstances that were relevant and material to the determination.

21. A number of reservations were expressed in respect of the proposal. First, it was said that such a power could potentially undermine the fundamental principle of agreement of parties upon which arbitration was based. It was suggested that allowing an arbitral tribunal to order *ex parte* interim measures of protection was contrary to the whole principle of arbitration which was based on the consensus of two parties permitting one or more persons to decide their dispute. It was said that conferring such a power on an arbitral tribunal would run counter to party expectations that arbitration respected party equality and the expectation that the powers of an arbitral tribunal were limited. In this respect, it was said that consensus between the parties and confidence in the arbitrators were fundamental to arbitration as a dispute settlement method. As such, it was said that parallels between national courts and private arbitral tribunals were not appropriate in the context of *ex parte* interim measures of protection. It was noted that the text as

originally drafted referred to a "likelihood of the applicant for the measure succeeding on the merits" (A/CN.9/508, para. 51) whilst the proposal provided in paragraph 3(c) that there be "a substantial possibility that the requesting party will succeed on the merits" (A/CN.9/WG.II/WP.121). It was suggested that the original draft risked inviting the arbitral tribunal to prejudge the case in its examination of the merits and that the language of the proposal increased this risk. It was noted that this could undermine confidence in the arbitral process and create a misleading perception regarding the impartiality of an arbitral tribunal. A suggestion was made to delete paragraph 3(c) to avoid this problem. Contrary views were expressed, and deletion was objected to on the grounds that such a requirement was generally well established in existing law governing the issuance of *ex parte* interim measures by State courts, and also amounted to an additional safeguard.

22. A suggestion was made that the power of the arbitral tribunal to order *ex parte* interim measures should only apply when the parties had expressly agreed to its application, for example in the arbitration agreement, in a set of arbitration rules, or through a determination of the national law that would govern the arbitration. There was some support for that suggestion. However, it was recalled that a similar suggestion had been objected to at the previous session of the Working Group on the grounds that "it was unrealistic to imagine that parties would agree on such a procedural rule either before or after the dispute had arisen" (A/CN.9/508, para. 78). It was pointed out that, particularly where one of the parties to the arbitration was a State or State entity, it might be difficult to elicit such express agreement. However, it was pointed out that a State party to a transaction with a private party might wish to be able to seek protective interim measures. As an alternative to the view that *ex parte* interim measures of protection should only be permitted if expressly agreed to by the parties, some delegations suggested that the power to order such measures should be subject to an opting out by the parties. In this respect it was suggested that it should be clarified that paragraph (1) of the proposal, which provided that the power to order interim measures of protection was subject to contrary agreement by the parties, should also apply to the power to order *ex parte* interim measures of protection in paragraph (4) of the proposal.

23. Additional concerns were expressed regarding the suitability of allowing a private arbitral tribunal to order *ex parte* interim measures. It was stated that determining appropriate safeguards against abuse was a complex matter that could take years to refine. In that respect, it was pointed out that the proposal did not provide that the applicant for the *ex parte* interim measures of protection should systematically provide a cross-undertaking to pay compensation to the respondent in the event that the *ex parte* measure was found to be unjustified. It was stated that, in such circumstances, some jurisdictions must allow a party to seek compensation from the arbitrator who ordered the measure. It was pointed out that this issue fell outside the scope of an arbitration law. A second concern was that the proposal did not make it clear whether such compensation for damages would be a matter arbitrable before the same tribunal. A third concern was that the proposal failed to recognize the possibility that third parties, although not party to the arbitration, could be affected by the *ex parte* measure.

24. In support of the proposal to confer a power on arbitral tribunals to order interim measures of protection on an *ex parte* basis, it was said that providing such a power would make an important contribution to the development of international

arbitration that would make it more effective as a method of dispute settlement. It was stated that whilst traditionally the right to issue *ex parte* interim measures of protection was restricted to national courts, there was a trend in a number of national laws to confer such a power on arbitral tribunals. In addition to the safeguards already included in the proposal, it was suggested that there should be a mandatory requirement that security be given by the party applying for the *ex parte* order to cover possible damages resulting from the measure. It was also suggested that there should be a separate obligation imposed upon the party applying for an *ex parte* measure to provide compensation in the event that the measure was later shown to have been unjustified.

25. A widely supported view was that provisions on *ex parte* interim measures could only be included in article 17 if appropriate safeguards were established. Discussion proceeded on that basis. Some delegations indicated that the proposal might become acceptable if the safeguards were further refined, for example by providing for prompt *inter partes* consideration of the matter by the arbitral tribunal as soon as any objection was raised by the other party. In that respect objections were raised against establishing a blanket time limit of twenty days. It was stated that such a provision might be misread as establishing a rule for the duration of the *ex parte* measure rather than an outside limit and that, in the commercial world, twenty days could be unduly burdensome, or that in some jurisdictions, twenty days would not provide sufficient time to bring the matter before a national court. It was suggested that a better approach would be to state that the *ex parte* measure should only be effective for a limited time adjusted according to the circumstances of the case. However, it was said that a mere reference to a reasonable period of time would be too vague. It was suggested that the provision should clarify that a respondent affected by the *ex parte* measure should not have to wait twenty days before it could challenge it, but that such a challenge could be heard at any time after the decision granting the measure. In addition, it was suggested that the tribunal that ordered the measure should be under an obligation to hear the party challenging the measure on short notice, for example within 48 hours of such a challenge.

26. In response to the concerns expressed, it was pointed out that the draft could be revised to confirm that the power to order *ex parte* interim measures of protection was subject to contrary agreement by the parties. It was also pointed out that the reference in proposed draft paragraph 3(c) to "a substantial possibility" of success on the merits of the dispute was intended to provide more neutral language than the original reference to "substantial likelihood" so as to guard against the risk that an arbitral tribunal might consider itself invited to prejudge the case in its examination on the merits while deciding on *ex parte* measures. It was agreed that whilst the language should be revised to further guard against prejudgement, the arbitral tribunal would nevertheless be required to undertake some analysis of the merits of the dispute in determining whether to grant *ex parte* interim measures of protection.

27. There was wide agreement in the Working Group that, by strengthening and increasing the safeguards, a provision on *ex parte* interim measures of protection might be more acceptable. In this respect, it was suggested that conditions beyond those listed in paragraph (3) should be fulfilled in seeking an *ex parte* measure.

B. Paragraph (4)(a)

28. The Working Group proceeded with a detailed discussion of paragraph 4(a). Whilst a number of delegations continued to oppose the inclusion of the power of tribunals to grant *ex parte* interim measures of protection, the Working Group nevertheless agreed to continue its examination of the proposal. In addition, questions were raised as to the status of the proposal given that the Working Group had at its thirty-sixth session, revised text on this issue which varied in some significant ways from the proposal under consideration. These questions were noted by the Working Group but it was suggested that a detailed examination of the proposal would be appropriate to develop views on the question of *ex parte* measures. The Working Group heard that the intention of the proposal had been to take into account the views expressed at its thirty-sixth session.

29. Three issues were raised in respect of paragraph 4(a). First, the manner in which the parties could avoid the application of paragraph (4) altogether by way of an opting-in or an opting-out clause. Second, whether the requirements in paragraph (3) of the proposal should also apply in the case of *ex parte* measures. It was suggested that each of the conditions that were required to be demonstrated in respect of *inter partes* interim measures of protection should also be required to be demonstrated in *ex parte* cases. For example, a suggestion had been made that the requirement in paragraph 3(c) that there be a "substantial possibility of success on the merits" amounted to prejudging the dispute and thus should not be a condition for an *ex parte* measure. In response, it was said that paragraph 3(c) was intended to be the threshold required for obtaining interim measures of protection, and that any risk regarding prejudgement could be cured through drafting, for example, through the use of language such as requiring a prima facie case. It was further suggested that the need for urgency set out in paragraph 3(a) of the proposal was not needed for the general test for *inter partes* interim measures of protection, but it should be a necessary requirement for *ex parte* measures, where the urgency made notice to the other party impracticable. Wide support was expressed for that suggestion.

30. The third issue raised with respect to paragraph 4(a) was which additional requirements were necessary where *ex parte* relief was sought. In addition to those conditions listed in paragraph 3(c) for *inter partes* interim measures of protection, it was suggested that five additional conditions should be required in the case of *ex parte* measures. First, there should be a mandatory requirement that security should be put up by the party requesting the measure to compensate the respondent if the measure was later found to have been unjustified. Second, there should be a duty to compensate the party against whom the measure was taken on a strict liability basis for loss resulting from a measure wrongfully granted. In respect of this second proposed condition it was noted that it would be important that the issue of that liability be arbitrable before the same tribunal that granted the original measure. A problem was noted in respect of this second proposed condition being, whether the tribunal would have the jurisdiction to resolve an issue of compensation for loss due to an *ex parte* measure, particularly in the case where no such jurisdiction might be implied from a general arbitration agreement or where the arbitration agreement was narrowly drafted. A third proposed condition was that the party seeking the *ex parte* measure should be able to demonstrate the non-existence of any other legal remedy and that this was a remedy of last resort. Fourth, although not specifically a condition, it was suggested that paragraph 4(a) should open with words along the

lines of "in exceptional circumstances" to emphasize the exceptional nature of *ex parte* measures. Finally, it was also said that principles of reasonableness and proportionality should apply in the case of *ex parte* measures.

31. After discussion, the Working Group agreed that a revised text should be prepared taking note of the views and concerns expressed in the Working Group. In particular, the revised text should include a provision recognizing the parties' freedom of contract by allowing them to contract out of a provision giving a tribunal the power to grant an *ex parte* interim measure of protection. The revised text should also recognize that the conditions that applied to *inter partes* measures as set out in paragraph 3 of the proposal should also apply to *ex parte* measures but that the requirement in paragraph 3(c) of "a substantial possibility" of success on the merits, should be softened by using more neutral language. Also the revised draft should ensure that the requirement that the party seeking the measure give security be mandatory and that the requesting party be considered strictly liable for damages caused to the responding party by an unjustified measure. Such strict liability should be the subject of further determination by the same tribunal.

32. A number of delegations volunteered to prepare a revised draft of paragraph (4)(a). The Working Group suspended its deliberations regarding paragraph (4) until such a new draft paragraph (4)(a) could be considered (for continuation of the discussion, see paras. 53-69 below).

33. With respect to subparagraphs (b) to (d), the Working Group took note of the following suggestions: (1) that the draft provisions should clarify the time when the running of the twenty-day period commenced; (2) that the provisions on *ex parte* measures should mention the continuing obligation of the party seeking the measure to give full and frank disclosure to the tribunal; (3) that the responding party should have an opportunity to challenge the measure within a short time frame; and (4) that further consideration should be given to the possibility of lifting the measure where a responding party provided sufficient security.

C. Paragraph (1)

34. It was observed that paragraph (1) as redrafted in document A/CN.9/121 was in line with the text previously discussed by the Working Group (A/CN.9/508, paras. 51-54). The Working Group found the substance of the redrafted paragraph generally acceptable. As a matter of drafting, the view was expressed that the words "order another party to take interim measures of protection" might unduly limit the scope of the provision. It was suggested that those words should be replaced by "grant interim measures of protection". The Working Group took note of that suggestion.

D. Paragraph (2)

35. It was explained that paragraph (2) as redrafted in document A/CN.9/121 was intended to reflect the discussion at the previous session of the Working Group (A/CN.9/508, paras. 51 and 64-76).

36. The reference to the notion of "interim award" was questioned as contrary to the view that had prevailed at the previous session of the Working Group not to qualify the award as "partial" or "interim" (see A/CN.9/508, para. 66). Doubts were also expressed with respect to the notion of an interim measure being "reflected" in an award. It was suggested that wording previously considered by the Working Group along the lines of "An interim measure of protection is any temporary measure, whether in the form of an award or in another form" was preferable. That suggestion was generally accepted.

37. The discussion focused on subparagraph (c). The view was expressed that subparagraph (c), while it was based on the approach previously taken by the Working Group ("a measure providing a preliminary means of securing or facilitating the enforcement of the award": see A/CN.9/508, para. 74), extended considerably and possibly unduly the scope of the provision. In particular, the reference to "an award of costs" was criticized on the grounds that it could be misinterpreted as allowing an order for security for costs to be made not only against a claimant or counter-claimant but also against a defendant, which would run counter to established principles of law in a number of countries. It was stated in response that deposits for costs might be requested from any party, for example under article 41 of the UNCITRAL Arbitration Rules. However, it was further objected that a clear distinction should be made between (1) the question as to which party would ultimately bear the costs of the arbitration proceedings; (2) the question as to which party could be required to make deposits for costs, for example under article 41 of the UNCITRAL Arbitration Rules; and (3) the question as to which party should supply a guarantee for costs, for example under article 25.2 of the Arbitration Rules of the London Court of International Arbitration (LCIA Arbitration Rules). It was stated that, while deposits for costs were normally required from both parties to ensure that the arbitral tribunal was in funds to conduct the proceedings, the idea of a guarantee for costs being required was often associated with the claim being apparently frivolous. Such a guarantee could only be required from the claimant and should in no case be imposed on the defendant, who should be under no obligation to provide a guarantee simply to defend itself. A widely shared view was that the provision should not deal in general terms with the costs of arbitration but limit itself to securing the enforcement of the award. Considerable support was expressed for the deletion of the words "including an award for costs". It was pointed out that under Article 38 of the UNCITRAL Arbitration Rules, and various other rules, an award may include costs. After discussion, the Working Group decided to replace the entire text of subparagraph (c) by wording along the lines of "provide a preliminary means of securing assets out of which an award may be satisfied".

38. At the close of the discussion, it was recalled that, at its previous session, the Working Group had agreed that it should be made abundantly clear that the list of provisional measures provided in the various subparagraphs was intended to be non-exhaustive (A/CN.9/508, para. 71). It was pointed out that, as redrafted, the list

contained in paragraph (2) was exhaustive. It was explained in response that, as redrafted, paragraph (2) no longer provided a list of the individual interim measures that could be granted by a tribunal. Instead, the revised provision mentioned "any temporary measure", thus offering an open-ended formulation. In addition, the provision listed the various purposes for which a provisional measure could be granted. To the extent that all such purposes were covered by the revised list, it was no longer necessary to make the list non-exhaustive. While that explanation was generally accepted, the Working Group decided to consult further before making a final decision as to whether all conceivable grounds for which an interim measure of protection might need to be granted were covered by the current formulation. It was agreed that the discussion in that regard would be reopened at a future session.

E. Paragraph (3)

39. It was explained that paragraph (3) as redrafted in document A/CN.9/121 was intended to reflect the discussion at the previous session of the Working Group (A/CN.9/508, paras. 51 and 55-58).

40. A concern was expressed that the word "demonstrated" in the opening words of the paragraph might connote a high standard of proof. It was recalled that a similar debate had taken place at the previous session of the Working Group and that the verbs "show", "prove" and "establish" had been suggested together with the verb "demonstrate", without the Working Group making a decision in that regard (A/CN.9/508, para. 58). The Working Group decided that all those verbs should be retained in square brackets for continuation of the discussion at a later stage.

41. General support was expressed for the deletion of subparagraph (a) from paragraph (3) and its relocation in paragraph (4). It was agreed that the urgency of the need for the measure should not be a general feature of interim measures of protection but rather that it should be made a specific requirement for granting an interim measure *ex parte*.

42. With respect to subparagraph (b), it was suggested that, as a matter of drafting, the words "the party opposing the measure" should be replaced by the words "the party affected by the measure". Another drafting suggestion was that the words "and that harm" should be replaced by the words "and such harm". General support was expressed in favour of those suggestions. A view was expressed that the words "irreparable harm" might lend themselves to confusion with the words "current or imminent harm" in subparagraph (b) of paragraph (2), thus creating the risk that the criteria set forth in paragraph (3) might be read as applying only to those measures granted for the purposes of subparagraph (b) of paragraph (2). The Working Group took note of the view.

43. With respect to subparagraph (c), it was generally agreed that the words "there is a substantial possibility" could easily be misinterpreted as requiring the tribunal to make a prejudgement on the merits of the case. It was agreed that the provision should make it abundantly clear that the determination to be made under subparagraph (c) should be limited to a determination regarding the seriousness of the case without in any way prejudicing the findings to be made by the tribunal at a later stage. It was suggested that wording along the lines of "there is a reasonable prospect that the requesting party will succeed on the merits, provided that any

determination on this issue shall not prejudice any subsequent determination by the tribunal" might better reflect the threshold function of the provision. Support was expressed in favour of that suggestion.

44. The Secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of the provision.

F. Paragraph (5)

45. In the context of the discussion of paragraph (5), a suggestion was made regarding the structure of the article. It was pointed out that, to the extent that paragraphs (5), (6) and (7) were intended to apply to interim measures in general and not only to those measures that might be granted *ex parte* under paragraph (4), paragraphs (5) to (7) should be relocated before paragraph (4). The Working Group generally found that suggested restructuring to be reasonable.

46. Against the background of the generally accepted view that, in respect of *ex parte* measures, security should be mandatory, the Working Group discussed the interplay between paragraph (5) and paragraph (4). A concern was expressed that, as currently drafted, paragraph (5) might create a possibility to avoid supplying mandatory security under paragraph (4), since paragraph (4) was based on the idea that in respect of *inter partes* measures, the requirement for security should be within the discretion of the arbitral tribunal. To alleviate that concern, it was suggested that paragraph (5) should be made subject to paragraph (4). Another suggestion was that paragraph (5) and the relevant provision intended for addition in paragraph (4) might be merged into a single paragraph. The Working Group took note of those suggestions.

47. A suggestion was made that paragraph (5) should create the possibility for the party affected by an interim measure (whether granted *ex parte* or *inter partes*) to obtain the lifting of the interim measure against payment of an adequate counter-security. The following wording was suggested for inclusion in paragraph (5): "The party against whom an interim measure is directed may opt to provide an equivalent security when appropriate, provided that this substitution does not imply a substantial modification of the purpose for which the interim measure was granted". That suggestion did not appear to receive sufficient support in the Working Group. The Working Group was reminded that paragraph (7) gave the tribunal broad discretion to modify or terminate interim measures of protection at any time so that the suggestion with respect to counter-security might in fact be dealt with under that paragraph.

48. A suggestion was made that the words "the requesting party" should be changed to "any party" in paragraph (5) for reasons of consistency with the language used in article 17 of the Model Law. In response it was said that the general principle should be that the requesting party should be required to provide security for the interim measure. It was suggested that the words "the requesting party or any other party, except the party against whom the interim measure is being granted" should be used. However, it was observed that, even if the words "any party" were used, the text of paragraph (5) would still refer to security being provided "as a condition to granting an interim measure of protection", thus avoiding any risk that the security would be required from the defendant. In support

of the proposal to include the term "any party", it was said that this would provide the tribunal with a discretion that would accommodate certain situations in multiparty arbitration, for example the situation where there were numerous claimants, each of whom would benefit from the interim measure, but the request for interim measures was made by only one claimant having no assets. In that situation, the tribunal would have the discretion to request security from the other claimants. In addition, the reference to "any party" could accommodate the situation where a party provided counter-security. The Working Group expressed preference for using the words "the requesting party and any other party".

G. Paragraph (6)

49. A suggestion was made that, if it were agreed to include the term "or any other party" in paragraph (5), then this phrase should also be added to paragraph (6). The view was expressed that this could however invite additional argument between the parties. A suggestion was made that whilst there was a duty to inform the arbitral tribunal of any material changes in the circumstances affecting the granting of the interim measure, there was no sanction if this duty was breached. In response it was agreed that this matter could adequately be dealt with under paragraph (7). On that basis, no decision was made to change the text of paragraph (6).

H. Paragraph (7)

50. Some support was expressed for the draft provision on the ground that it was drafted in general terms and did not overregulate the matter. A question was raised whether the provision was also intended to include an interim measure of protection that had previously been enforced by a court. Further questions were raised whether the provision should be amended to clarify that the arbitral tribunal would have the power to modify or terminate an interim measure of protection either upon its own motion or upon request by any other party. It was said that if the arbitral tribunal could act upon its own motion, it might need to be further clarified that the tribunal would be required to inform the requesting party of its modification or termination of the measure.

51. Further, it was said that it was not clear whether the power to modify or terminate an interim measure should only be recognized when the conditions for granting an interim measure were no longer met or whether the tribunal should have full discretion in this regard. Some opposition was expressed to allowing the arbitral tribunal to act without a request by the parties and without hearing from the parties. In this respect it was recalled that in the event that a modification or termination of a measure caused damage to a party, it was not clear who would be liable for such damages. For this reason it was said that the discretion to modify or terminate a measure should be subject to a request by the parties. Some opposition was expressed on the basis that it appeared to complicate the matter as it was not clear whether such a request would need to be made by one or all parties. A suggestion was also made that the power to modify or terminate a measure should be limited to situations where there had been a change in the circumstances.

52. Taking account of the above discussion the following text was proposed for addition at the end of paragraph (7): "upon application by any party or of its own motion, after hearing from the parties". However, it was suggested that the discretion to modify or terminate an interim measure should not be limited. It was observed that, given the extraordinary nature of such measures, if a tribunal had the power to grant such measures then it should also have the power to modify or terminate them. It was further said that, given that the intention in paragraph (7) appeared to be to also cover *ex parte* measures, the circumstances in which the arbitrator might wish to terminate or change could occur during the *ex parte* period and that therefore the requirement to inform parties could frustrate the measure. It was suggested that further consideration might be necessary to examine whether a distinction should be made depending upon whether the interim measure was *inter partes* or *ex parte,* in which case a separate provision might need to be prepared to deal with *ex parte* measures. No decision was made to change the text of paragraph (7).

I. Paragraph (4)(a) (continued)

53. With a view to facilitating continuation of the discussion on paragraph (4), a number of delegations prepared a revised draft for consideration by the Working Group. The revised draft was aimed at reflecting the views and concerns expressed in the context of the earlier discussion of paragraph (4)(a) (see above, paras. 28-32). The Working Group resumed its deliberations on paragraph (4)(a) based on the following draft text (hereinafter "paragraph (4)(a) redraft"):

"(4)(a) Unless otherwise agreed, the arbitral tribunal may grant an interim measure of protection without notice to the party against whom the measure is directed or before the party against whom the measure is directed has had an opportunity to respond provided that:

"(i) the requesting party demonstrates that it is necessary to proceed without notice, [in order to ensure that the measure is effective] [because the measure would be defeated if notice is given]; and

"(ii) there is an urgent need for the measure; and

"(iii) irreparable harm will result if the measure is not ordered, and that such harm substantially outweighs the harm that will result to the party affected by the measure if the measure is granted; and

"(iv) there is a [substantial possibility] [reasonable prospect] that the requesting party will succeed on the merits], [provided that any determination on this issue shall not prejudice any subsequent determinations by the Tribunal]; and

"(v) the requesting party shall be [strictly] liable for any costs and losses caused by the measure to the party against whom it is directed [in light of the final disposition of the claims on the merits]; and

"(vi) the requesting party provides [a guarantee] [a cross-indemnity itself secured in such manner as the arbitral tribunal considers appropriate] [security in such form as the arbitral tribunal may determine], [for any costs and losses

that the party against whom the measure is directed may suffer in complying with the order] [for any costs and losses pursuant to subparagraph (v) above]

"Additional paragraph

"The arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to subparagraphs (v) and (vi) above".

Chapeau of paragraph (4)(a) redraft

54. As a matter of drafting, it was suggested that after the opening phrase "Unless otherwise agreed", the phrase "by the parties" should be included. Another suggestion was that the word "and" should be deleted after each subparagraph of paragraph (4)(a) redraft, except for the penultimate subparagraph. No objection was made to those suggestions.

55. Regarding substance, the view was expressed that the chapeau of paragraph (4)(a) redraft raised an anomaly since it referred not only to the situation where an interim measure of protection was sought without notice but also where notice was given but the responding party had not had the opportunity to respond, yet subparagraph (4)(a)(i) did not appear to encompass the second situation.

Paragraph (4)(a)(i) and (ii) redraft

56. It was noted that, as redrafted, the provision required that the requesting party "demonstrate" that it was necessary to proceed without notice. It was suggested that, to allay concerns regarding the standard of proof to be met, subparagraph (i) should be redrafted as follows: "the tribunal is satisfied that it is necessary to proceed on an *ex parte* basis". Some support was expressed for this approach. However, it was recalled that, at its previous session, the Working Group had agreed to consider expressions such as "establish", "demonstrate" or "show", which were considered as preferable alternatives to requiring "proof" of the necessity to proceed without notice (A/CN.9/508, para. 55). The Working Group agreed that all of the above suggestions should be reflected in the revised draft to be prepared by the Secretariat for continuation of the discussion at a later stage.

57. In respect of the two bracketed alternatives in paragraph (4)(a)(i) redraft, support for the first alternative text was expressed on the basis that it established a broad standard and that the language was consistent with other provisions. A suggestion based on the first alternative text was that using the words "necessarily ineffective" might be more appropriate. Overall preference was expressed for a formulation based on the second bracketed alternative. However, concern was expressed over the use of the word "defeated", which might be appropriately replaced by the word "frustrated".

58. It was submitted that paragraph (4)(a)(i) redraft could be deleted in its entirety since the notion of urgency in paragraph (4)(a)(ii) redraft was a sufficient basis upon which the tribunal could act. However, it was argued that both the need for urgency in paragraph (4)(a)(ii) redraft and the principle of avoiding the frustration of the measure in paragraph (4)(a)(i) redraft should be required for an *ex parte* measure. Broad support was expressed for the inclusion of both these elements. It was noted that merely requiring urgency of the measure would not properly indicate why the application must be made *ex parte*. It was said that subparagraph (i)

expressed the real reason for an *ex parte* request, namely that providing notice would thwart the entire purpose of the measure.

59. In light of the comments made, it was suggested that the chapeau and subparagraphs (i) and (ii) of paragraph (4)(a) redraft should be revised as follows:

> "(4)(a) Unless otherwise agreed by the parties, the arbitral tribunal may grant an interim measure of protection without notice to the party against whom the measure is directed or before the party against whom the measure is directed has had an opportunity to respond when the requesting party shows that it is necessary to proceed in that manner in order to ensure that the [measure is effective] [purpose of the measure is not frustrated before the order is granted], provided that:
>
> (i) there is an urgent need for the measure; and".

60. A widely shared view was that the first part of the newly revised chapeau appropriately dealt with a genuine *ex parte* situation, namely when an arbitral tribunal decided to grant the measure without notice to the other party. However, the words "or before the party against whom the measure is directed has had an opportunity to respond" was not a genuine *ex parte* scenario, since in that case, notice had already been provided to the responding party. It was suggested that the chapeau should only deal with the circumstance where it was appropriate to proceed without notice. It was said that if the Working Group intended to cover the second scenario, further thought should be given to the structure of the paragraph. It was acknowledged that the phrase "or before the party against whom the measure is directed has had an opportunity to respond" was intended to cover the situation where notice had been given to the responding party but that it either did not have time or was unable to respond or that it did not want to respond and could thereby frustrate the granting of an interim measure. Support was expressed for the view that that situation was in fact adequately covered by the words "may grant an interim measure of protection without notice to the party against whom the measure is directed" as well as by the rules on default. It was agreed that the words "or before the party against whom the measure is directed has had an opportunity to respond" should be deleted on the assumption that the text sufficiently covered the situation where notice was given but the responding party either could not or had not responded to that notice.

61. Whilst some support was expressed for the first bracketed text in the revised chapeau ("[measure is effective]"), strong preference was expressed for the second bracketed text ("[the purpose of the measure is not frustrated before the order is granted]") on the ground that it more appropriately addressed the condition that should be satisfied in the granting of an *ex parte* measure.

Paragraph (4)(a)(iii) redraft

62. It was agreed that subparagraph (iii) should be deleted on the basis that it was adequately covered by paragraph (3)(c) because the subparagraph set out conditions that should apply to both *inter partes* and *ex parte* measures. The Working Group was reminded that reference to meeting the requirements of paragraph (3) should be added to the chapeau in the paragraph (4)(a) redraft.

63. A proposal that the chapeau be redrafted using conditional language, such as, "if the arbitral tribunal grants an interim measure of protection" to more closely reflect the exceptional situation wherein an interim measure would be sought *ex parte*, did not receive support.

Paragraph (4)(a)(iv) redraft

64. The Working Group considered the two bracketed texts appearing in subparagraph (iv), i.e. "[substantial possibility]" or "[reasonable prospect]" that the requesting party will succeed on the merits. Whilst some support was expressed for each of these alternative texts, the prevailing view was that neither text adequately addressed the concerns expressed earlier (see paragraph 26, above) that these words appeared to invite the arbitral tribunal to prejudge the dispute at a time which might be very early in the arbitral proceedings, and could thus compromise the neutrality of the arbitrators or the perception of that neutrality by the parties. It was suggested that the Working Group should consider text that would guard against frivolous claims for *ex parte* measures being made, but that would not require the arbitral tribunal to make a judgement on the merits. One proposal to achieve this was that the subparagraph simply require the arbitral tribunal to decide, in the light of all the available facts, that an interim measure of protection was appropriate. An alternative proposal was that the subparagraph be revised to state that "there is a reasonable possibility that the requesting party will succeed on the merits provided that any determination in this connection shall not affect any subsequent determinations by the arbitral tribunal". A further proposal was that more neutral and objective language could be used, employing illustrative examples, which would not require prejudgement, along the lines of "that there be a substantial issue for determination". It was further suggested that the opening phrase of the subparagraph read "there is at least a reasonable possibility" rather than "there is a reasonable possibility" and also that the language "will succeed on the merits" be replaced by "may succeed on the merits". After discussion, it was suggested that the text be revised to read as follows: "there is a reasonable possibility that the requesting party may succeed on the merits, provided that any determination in this connection shall not affect any subsequent determinations by the arbitral tribunal." The Secretariat was requested to prepare the revised text as a new paragraph (3)(b) to follow the renumbering due to the fact that paragraph (3)(a) had been subsumed into paragraph 4(a).

Paragraph (4)(a)(v) redraft

65. It was observed that subparagraph (v) provided an additional safeguard for the responding party for costs and losses arising from an *ex parte* measure. Such a safeguard would operate following the final decision on the merits of the case. It was recalled that the liability of the requesting party for an *inter partes* interim measure of protection was agreed not to be covered by the provision as this would be left to other law. A widely shared view was that it was more logical to refer to "damages and costs" than to "costs and losses". It was suggested that the reference to "costs" should be clarified so as to cover "costs of arbitration caused by the interim measure". Concern was expressed as to any draft which suggested that costs and losses arising from an *ex parte* interim measure should depend on the final outcome of the dispute. It was said that the question whether a requesting party should be liable for such losses or damages should be a question left to the

discretion of the arbitral tribunal but disassociated from the final decision on the merits of the case. In this respect it was said that, even if a requesting party ultimately received an award in its favour in the arbitration, it might still be liable for losses or damages in respect of an *ex parte* interim measure of protection that was found to be unjustified. It was suggested that to ensure flexibility and a broad discretion for the arbitral tribunal, words such as "to the extent appropriate, taking into account all of the circumstances of the case, including the final disposition of the claim on the merits" should be considered for a future revision of the provision. Alternatively, it was suggested that the revision should take account of the approach taken in paragraph 17.1.3 of the Draft Fundamental Principles and Rules of Transnational Civil Procedure prepared by the American Law Institute and UNIDROIT, as reflected in paragraph 69 of document A/CN.9/WG.II/WP.119.

66. It was suggested that, given that the notion of "strict liability" was a term of art that was not understood in all jurisdictions, and in the interests of creating a flexible provision, the term "strictly" should be deleted from the provision. Another suggestion was that the verb "shall" be replaced by "may". Whilst the first suggestion was found to be generally acceptable, the Working Group agreed to retain the verb "shall". The Working Group was reminded that the purpose of the provision should be borne in mind in any redraft. It was said that the provision should be assessed against the objective to impose liability on a requesting party for damages caused by an *ex parte* measure where that measure was found to be unjustified. It was said that further thought might need to be given to determining what the trigger for liability was, namely whether the provision was intended to cover the situation where the requesting party had acted negligently or fraudulently, or whether it also covered the situation where an arbitral tribunal had acted in error.

67. It was agreed that the words "to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claim on the merits" should be included in square brackets in a future revision of the provision for continuation of the discussion.

Paragraph (4)(a)(vi) redraft

68. Questions were raised regarding the different shades of meaning attached to the words "guarantee", "cross-indemnity" and "security", which were offered as alternatives in paragraph (4)(a)(vi) redraft. While support was expressed for retaining the word "guarantee", it was observed that the word "security" had been used in article 17 of the Model Law and translated as "guarantee" in certain language versions. A widely shared view was that the new provision should not unnecessarily deviate from the language used in the Model Law. Preference was expressed for wording along the following lines: "security in such form as the arbitral tribunal considers appropriate".

69. With respect to the words "costs and losses" a widely shared view was that subparagraph (vi) should mirror the language used in subparagraph (v). It was pointed out that both provisions should make it clear that they dealt only with those costs of the arbitration related to the interim measure and with those damages suffered in complying with the interim measure. Overall preference was expressed for using language in subparagraph (vi) along the lines of: "for any damages and any costs of the arbitration referred to in subparagraph (v) above".

Additional paragraph

70. A suggestion was made that the words "For the avoidance of doubt" should be inserted at the beginning of the proposed additional subparagraph. While some support was expressed for that suggestion, it was pointed out that such wording was generally inappropriate in a legislative text. In addition, it was pointed out that in many countries, the effect of the subparagraph would not be to dispel a doubt but to create jurisdiction for the arbitral tribunal beyond the confines of the jurisdiction conferred upon the arbitral tribunal by the parties in the arbitration agreement. A decision was made to introduce the words "For the avoidance of doubt" in square brackets as the opening words of the additional paragraph for continuation of the discussion at a future session.

71. The view was expressed that in formulating a provision extending the jurisdiction of the arbitral tribunal in connection with interim measures of protection ordered on an *ex parte* basis, the Working Group should avoid suggesting that such a provision should be interpreted *a contrario* in the context of those interim measures that were ordered *inter partes*.

72. While it was generally agreed that the cross-reference to subparagraph (v) was appropriate, a question was raised as to whether a cross-reference to subparagraph (vi) was necessary. It was pointed out that paragraph (5) already conferred jurisdiction upon the arbitral tribunal regarding the issues of securities. The working group took note of that point. The cross-references to both subparagraphs (v) and (vi) were placed between square brackets for continuation of the discussion at a future session.

J. Paragraph (4)(b)

73. The Working Group proceeded to consider para. (4)(b) as it appeared in document A/CN.9/WG.II/WP.121. It was recalled that concerns had been expressed earlier (see paragraph 25 above) that a reference to a period of time, such as twenty days, could become a default rule rather than a maximum period during which the respondent should have an opportunity to be heard. Earlier objections to the establishment of a fixed period were reiterated. It was pointed out that as currently drafted the provision might not avoid a situation where the interim measure could in practice be prolonged through a new application for a measure of the same kind after expiry of the twenty-day period. A widely shared view was that the purpose of the paragraph was to provide a rebalancing of the arbitral procedure following the granting of an *ex parte* measure by providing the responding party with an opportunity to be heard and have that measure reviewed as soon as possible. Concern was expressed that, as currently drafted, paragraph (4)(b) did not achieve that purpose as it concentrated on restricting the duration of the *ex parte* measure to twenty days. It was stated that the objective of restoring the balance of the arbitral procedure was dealt with under paragraph (c). In that connection, it was generally felt that the order of paragraphs (b) and (c) could be reversed. The Secretariat was invited to bear the above discussion in mind when preparing a revised draft of the provision. A request was also made to clarify whether paragraph (4)(b) related solely to *ex parte* interim measures, or to all interim measures, because this paragraph contained a general reference to paragraph (1).

K. Paragraph (4)(c)

74. Based on earlier comments (see above, para. 33) the Working Group proceeded to consider a newly redrafted version of subparagraph (c) as follows: "The party against whom the interim measure is directed shall be given notice of the measure and an opportunity to be heard as soon as it is no longer necessary to proceed on an *ex parte* basis in order to ensure that the measure is effective."

75. Various views were expressed regarding the substance of the proposal. One view was that the words "an opportunity to be heard", should be replaced by a reference to the "right" of the party to be heard in order to make it clear that an arbitral tribunal having issued an *ex parte* measure of protection should stand ready to be activated on short notice by the affected party. Another view was that the reference to the measure being "effective" might need to be reviewed to take into account earlier deliberations regarding paragraph 4(a)(i) (see above, paras. 56-61). Yet another view was that the provision should specify a time frame within which the arbitral tribunal should hear the party affected by the interim measure. The following wording was suggested for inclusion in paragraph 4(c): "that party shall be given notice of the measure and [an opportunity] [the right] to be hear by the arbitral tribunal [as soon as it is no longer necessary to proceed on an *ex parte* basis in order to ensure that the measure is effective] [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances]". The Secretariat was invited to consider the above discussion when redrafting the provision. It was suggested that future consideration should be given to determining whether paragraph 4(c) should apply only in the context of interim measures ordered on an *ex parte* basis or more generally to all types of interim measures.

L. Paragraph (4)(d)

76. The Working Group proceeded to consider paragraph (4)(d) as contained in document A/CN.9/WG.II/WP.121. The view was expressed that, as currently drafted, this paragraph did not serve any purpose and should be deleted. In that connection, the view was expressed that it would be essential for the provision to provide a time limit within which the party requesting an interim measure should disclose a change in circumstances to the arbitral tribunal. Another view was that the provision should impose a sanction for failure to perform the obligation set forth in paragraph (4)(d). It was further suggested that a future redraft of the provision should establish a clear link between the obligation to disclose change in circumstances and the liability regime applicable to the party requesting the interim measure. The Secretariat was requested to bear the above suggestions in mind when preparing a revised provision for continuation of the discussion at the next session.

IV. Interim measures ordered by courts

77. The Working Group heard a brief exchange of views on the possible treatment of interim measures of protection ordered by state courts in the context of the revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119). Support was expressed for the general principle that the rules governing court-ordered measures should parallel as much as possible the rules applicable to interim measures ordered by the arbitral tribunal. However, it was widely felt that it would be overly ambitious to attempt to harmonize, by way of an international instrument the rules applicable to interim measures of protection ordered by courts in support of arbitration. By way of illustration, it was stated that it would be extremely difficult to reconcile rules regarding interim measures ordered by a state court in support of an arbitration with the principle applicable in some jurisdictions that the jurisdiction of courts to decide on interim measures was conditional upon the existence of proceedings on the merits of the case pending before the same court. It was agreed that the discussion would need to be continued at a future session.

V. Recognition and enforcement of interim measures

78. The Working Group had a brief discussion on the issue of recognition and enforcement of interim measures based on the text contained in the Note by the Secretariat (A/CN.9/WG.II/WP.119). That text read as follows:

"Enforcement of interim measures of protection

"(1) Upon an application by an interested party, made with the approval of the arbitral tribunal, the competent court shall refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if: *

(a) party against whom the measure is invoked furnishes proof that:

(i) *[Variant 1]* The arbitration agreement referred to in article 7 is not valid. *[Variant 2]* The arbitration agreement referred to in article 7 appears to not be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement] to be decided by the arbitral tribunal in accordance with article 16 of this Law];

(ii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

(iii) The party against whom the interim measure is invoked was unable to present its case with respect to the interim measure [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

(iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal.

(b) The court finds that:

(i) The measure requested is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or

(ii) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

"(2) Upon application by an interested party, made with the approval of the arbitral tribunal, the competent court may, in its discretion, refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if the party against whom the measure is invoked furnishes proof that application for the same or similar interim measure has been made to a court in this State, regardless of whether the court has taken a decision on the application.

"(3) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure.

"(4) In reformulating the measure under paragraph (1)(b)(i), the court shall not modify the substance of the interim measure.

"(5) Paragraph (1)(a)(iii) does not apply.

[Variant 1] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period.

[Variant 2] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.

[Variant 3] if the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17(2), the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the measure is invoked."

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* The conditions set forth in this article are intended to limit the number of circumstances in which the court must refuse to enforce interim measures. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement must be refused.

79. With a view to providing a simpler version of a possible provision on recognition and enforcement of interim measures, the following text was proposed by one delegation:

"(1) Interim measures of protection issued and in effect in accordance with article 17, irrespective of the country in which they were issued, and whether reflected in an interim award or otherwise, shall be recognized as binding

and, upon application in writing to the competent court, be enforced subject to the provisions of articles 35 and 36, except as otherwise provided in this article. Any determination made on any ground set forth in Article 36 in ruling on such an application shall be effective only for purposes of that application.

"(2)(a) Recognition or enforcement of interim measures of protection shall not be refused on the ground that the party against whom the measures are directed did not have notice of the proceedings on the request for the interim measures or an opportunity to be heard if

(i) the arbitral tribunal has determined that it is necessary to proceed in that manner in order to ensure that the measure is effective, and

(ii) the court makes the same determination.

(b) The court may condition the continued recognition or enforcement of an interim measure issued without notice or an opportunity to be heard on any conditions of notice or hearing that it may prescribe.

"(3) A court may reformulate the interim measure to the extent necessary to conform the measure to its procedural law, provided that the court does not modify the substance of the interim measure.

"(4) While an application for recognition or enforcement of an interim measure is pending, or an order recognizing or enforcing the interim measures is in effect, the party who is seeking or has obtained enforcement of an interim measure shall promptly inform the court of any modification, suspension, or termination of that measure."

80. It was explained by its proponents that this proposal was based on the following five principles: (1) the legal framework for enforcement of interim measures should be similar to that existing for the enforcement of arbitral awards; (2) the decision regarding the enforcement of an interim measure should have no binding effect on the subsequent process in the arbitration; (3) where an *ex parte* measure has been issued, the courts should have full opportunity to verify that it was appropriate to issue such a measure; (4) parties should be under no obligation to obtain permission from the arbitral tribunal before they could seek enforcement of the interim measure before a court; and (5) in cases where an application for enforcement was made before several courts, those courts should be free to evaluate the best way to proceed. At the close of the discussion it was pointed out that it would be essential for the Working Group to make a decision regarding the form in which an interim measure could be issued. In particular, it should be decided whether an interim measure was issued in the form of an arbitral award or in the form of a procedural order. It was decided that the discussion would be continued at a future session on the basis of both proposed texts.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[2] Ibid., paras. 340-343.

[3] Ibid., paras. 344-350.

[4] Ibid., paras. 371-373.

[5] Ibid., paras. 374 and 375.

[6] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.