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Settlement of commercial disputes

Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation

Report of the Secretary-General

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[Chapter III of this document on conciliation is published in document A/CN.9/WG.II/WP.113/Add.1]

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Introduction

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("the New York Convention"). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. Following the opening speech given by the Secretary-General, speeches were made by participants in the diplomatic conference that had adopted the Convention and leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but not addressed in existing legislative or non-legislative texts on arbitration.[1]

2. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session. It requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.[2]

3. At its thirty-second session, in 1999, the Commission had before it the requested note, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460)[3]. Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) ('the UNCITRAL Model Law on Arbitration'), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to

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[1] *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects (*United Nations publication, Sales No. E.99.V.2).

[2] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), paragraph 235.

[3] The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day, New York, June 1998 (*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations publication, Sales No. E.99.V.2); the Congress of the International Council for Commercial Arbitration, Paris 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999); and other international conferences and forums such as the 1998 "Freshfields" lecture: Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, p. 211.

evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[4]

4. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on form should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the New York Convention[5].

5. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be requirement of written form for the arbitration agreement,[6] enforceability of interim measures of protection,[7] conciliation,[8] and possible enforceability of an award that had been set aside in the State of origin[9]. The Working Group on Arbitration (previously named Working Group on International Contract Practices) commenced its work at its thirty-second session in Vienna from 20 to 31 March 2000 (the report of that session is contained in document A/CN.9/468). It continued its work at its thirty-third session in Vienna from 20 November to 1 December 2000 (the report of that session is contained in document A/CN.9/485).

6. At its thirty-second session (March, 2000) the Working Group considered the possible preparation of harmonized texts on the written form of arbitration agreements, interim measures of protection, and conciliation. In addition, the Working Group exchanged preliminary views on other topics that might be taken up in the future (document A/CN.9/468, paragraphs 107-114).

7. The Commission, at its thirty-third session (New York, 12 June – 7 July 2000), commended the work of the Working Group accomplished so far and heard various observations to the effect that the work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. It noted that the Working Group had also identified a number of other topics, with various levels of priority, that had been suggested for possible future work (document A/CN.9/468, paragraphs 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them (A/55/17, paragraph 395). Several statements were made to the effect that, generally, 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

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[4] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paragraph 337.
[5] *Ibid*., paragraphs 337-376 and 380.
[6] *Ibid*., paragraphs 344-350.
[7] *Ibid*., paragraphs 371-373.
[8] *Ibid*., paragraphs 340-343.
[9] *Ibid*., paragraphs 374-375.

the Commission as potentially worthy of consideration, in addition to those that the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the New York Convention; and the power by the arbitral tribunal to award interest. It was noted with approval that, with respect to "on-line" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication), 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, a 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 (A/55/17, paragraph 396).

8. At its thirty-third session (November/December 2000) the Working Group discussed a draft interpretative instrument in respect of the writing requirement in article II(2) of the New York Convention and the preparation of harmonized texts on: the written form for arbitration agreements; interim measures of protection; and conciliation (on the basis of the report of the Secretary-General: documents A/CN.9.WG.II/WP.110 and A/CN.9/WG.II/WP.111). The considerations of the Working Group are reflected in document A/CN.9/485.

9. The Working Group also considered likely items for future work as being: court-ordered interim measures of protection in support of arbitration; scope of interim measures that may be ordered by arbitral tribunals; and validity of agreements to arbitrate (discussed in document A/CN.9/WG.II/WP.111). The Working Group supported future work being undertaken on all these topics and requested the Secretariat to prepare, for a future session of the Working Group, preliminary studies and proposals (see paragraphs 104 to 106 in document A/CN.9/485).

10. The present document has been prepared on the basis of the discussions in the Working Group. It covers the three topics on the current agenda: the written form for arbitration agreements; enforcement of interim measures of protection; and model legislation on conciliation. The document has been issued in two parts: A/CN.9/WG.II/WP.113 on the first two topics and A/CN.9/WG.II/WP.113/Add.1 on conciliation. In considering the present document, the reader should refer in particular to the working paper on these topics (A/CN.9/WG.II/WP.110) that was prepared for the thirty-third session of the Working Group (November/December 2000), and the report of that session, contained in document A/CN.9/485. These documents may also be found on the UNCITRAL website (www.uncitral.org) under "Working Groups" and "Working Group on Arbitration".

I. Requirement of written form for the arbitration agreement

References to previous working papers and reports:

Note on possible future work: A/CN.9/460 (April 1999), paragraphs 20-31.
Report of the Commission: A/54/17 (May-June 1999), paragraphs 344-350;

Working Paper: A/CN.9/WGII/WP.108/Add.1 (January 2000), paragraphs 1-40;
Report of Working Group: A/CN.9/468 (March 2000), paragraphs 88-106;
Working Paper: A/CN.9/WG.II/WP.110 (September 2000), paragraphs 10-51;
Report of Working Group: A/CN.9/485 (November-December 2000), paragraphs 21-59.

A. Model legislative provisions on written form for the arbitration agreement

11. At its previous session (November/December 2000), the Working Group considered a draft model legislative provision revising article 7(2) of the Model Law on Arbitration (set forth in document A/CN.9/WG.II/WP.110 at paragraphs 15-26). The considerations of the Working Group are reflected in document A/CN.9/485, paragraphs 21-49. Having concluded its considerations of the draft provision, the Working Group requested an informal drafting group to prepare, on the basis of the considerations in the Working Group, a draft that would serve as a basis for subsequent discussions (A/CN.9/485, paragraph 50).

12. The drafting group was requested to prepare a short version and a long version, each of which would cover all of the circumstances referred to in paragraphs (2) and (3) of article 7 as set forth in paragraph 15 of document A/CN.9/WG.II/WP.110. The drafting group prepared not only a short version and a long version, but also a middle version. It was reported that each of those three versions was intended to be identical in substance but with varying degrees of detail. The text prepared by the drafting group (reproduced in document A/CN.9/485, paragraph 52) was as follows:

Article 7. Definition and form of arbitration agreement

Short Version

"(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. A writing includes any form accessible so as to be usable for subsequent reference.

(3) For the avoidance of doubt, in cases where under the applicable law or rules of law an arbitration agreement or contract can be concluded other than in writing, the writing requirement is met when an arbitration agreement or contract so concluded refers to written arbitration terms and conditions.

(4) Furthermore, an agreement is in writing if it is contained in an exchange of written statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement."

Middle Version

"(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

(3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement referred to in paragraph (1) can be concluded orally, by conduct or by other means not in writing, the writing requirement is met when the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties.

(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement."

Long Version

"(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

(3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement referred to in paragraph (1) can be concluded orally, by conduct or by other means not in writing, the writing requirement is met when the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties.

(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.

(7) Examples of circumstances that meet the requirement that an arbitration agreement be in writing as set forth in this article include, but are not limited to, the following illustrations: [Secretariat asked to prepare a text based on Working Group's discussions]."[10]

13. The Working Group briefly discussed the text prepared by the informal drafting group (that discussion is reflected in document A/CN.9/485, paragraphs 53-58). At the close of that discussion, the Secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the next session, based on the discussion in the Working

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[10] The examples may be the cases in draft article 7(3) reproduced in document A/CN.9/485, paragraph 23, as rewritten pursuant to the discussion in the Working Group (A/CN.9/485, paragraphs 24-44):

An arbitration agreement meets the requirement in paragraph (2) if *[A/CN.9/485, paragraphs 28 and 29]*:

(a) it is contained in a document agreed upon by the parties whether or not it is signed by the parties; *[A/CN.9/485, paragraph 30]*

(b) it is made by an exchange of written communications; *[A/CN.9/485, paragraph 30]*

(c) it is contained in one party's written offer or counter-offer, provided that [to the extent permitted by law of usage] the contract has been concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party; *[A/CN.9/485, paragraphs 31-34]*

(d) it is contained in a [contract confirmation] [communication confirming the terms of the contract], provided that, to the extent permitted by law or usage, the terms of the confirmation have been accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or by a failure to object; *[A/CN.9/485, paragraphs 35-36]*

(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract; *[A/CN.9/485, paragraph 37]*

(f) it is contained in an exchange of statements [of claim and defence] [on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other; *[A/CN.9/485, paragraph 38]*

(g) a contract concluded [in any form][orally] refers to an [arbitration clause][or arbitration terms and conditions] provided that the reference is such as to make [that clause][those terms and conditions] part of the contract. *[A/CN.9/485, paragraphs 39-41]*

Group (document A/CN.9/485, paragraph 59). The following text has been prepared pursuant to that request:

Article 7. Definition and form of arbitration agreement

[*Unchanged paragraph (1) of the UNCITRAL Model Law on Arbitration:*]
(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. [For the avoidance of doubt], "writing" includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

(3) [For the avoidance of doubt, the writing requirement in paragraph (2) is met] [The arbitration agreement is in writing]

if the

[arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are] [the arbitration clause, whether signed or not, is]

in writing,

[variant 1:] **notwithstanding that the contract or the separate arbitration agreement has been concluded [other than in writing] [orally, by conduct or by other means not in writing]** *[variant 2:]* **irrespective of the form in which the parties have agreed to submit to arbitration.**

14. The Working Group may wish to add to the above text any of the provisions contained in draft paragraphs (4) and (5) ("short version"), paragraphs (4) to (6) ("middle version") or paragraphs (4) to (7) ("long version") reproduced above in paragraph 12.

B. Interpretative instrument regarding article II(2) of the New York Convention

15. The Working Group at its previous session (November/December 2000) discussed a preliminary draft interpretative instrument relating to article II(2) of the New York Convention. The draft and comments thereon were contained in document A/CN.9/WG.II/WP.110 at paragraph 48. The considerations in the Working Group are reflected in document A/CN.9/485 at paragraphs 60-77. The Working Group requested the Secretariat to prepare a revised draft taking into account the discussion in the Working Group (document A/CN.9/485, paragraph 76). While the Working Group took the view that guidance on interpretation of article II(2) of the New York Convention would be useful in achieving uniform interpretation that responded to the needs of international trade, the

Working Group decided that a declaration, resolution or statement addressing the interpretation of that Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach (A/CN.9/485, paragraph 60).

16. The preliminary draft interpretative instrument as contained in paragraph 61 of document A/CN.9/485, has been redrafted to reflect the considerations in the Working Group. The revised text is as follows:

> [Declaration][11] regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,
>
> *The United Nations Commission on International Trade Law,*
>
> [1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,
>
> [2] *Conscious* of the fact that the Commission includes[12] the principal economic and legal systems of the world, and developed and developing countries,
>
> [3] *Recalling* resolution 55/151 of the General Assembly of 12 December 2000 reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to co-ordinate legal activities in this field,[13]
>
> [4] *Conscious of* its mandate to further the progressive harmonization and unification of the law of international trade by, *inter alia*, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,
>
> [5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,
>
> [6] *Noting* that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, [and that those technologies in international commerce have developed along with the development of electronic commerce],[14]

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11 Discussion in the Working Group: paragraphs 66 and 69 of document A/CN.9/485.
12 Discussion in the Working Group: paragraph 72 of document A/CN.9/485.
13 Discussion in the Working Group: paragraph 73 of the document A/CN/.9/485.
14 Discussion in the Working Group: paragraph 74 of document A/CN.9/485.

[7] *Noting also* that the use and acceptance of international commercial arbitration in international trade has been increasing and that, along with that development, expectations of participants in international trade as regards the form in which an arbitration agreement may be made have changed,

[8] *Noting further* article II(1) of the Convention, according to which "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration", and article II(2) of the Convention, according to which "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams",

[9] *Concerned about* differing interpretations of article II(2) of the Convention,[15]

[10] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, *inter alia*, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...",

[11] *Considering* that the purpose of the Convention, as expressed in the Final Act of the United Nations Conference on International Commercial Arbitration, of increasing the effectiveness of arbitration in the settlement of private law disputes requires that the interpretation of the Convention [reflect the needs of international commercial arbitration] [reflect changes in communication technologies and business practices],[16]

[12] *Being of the opinion* that in interpreting the Convention regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith,[17]

[13] *Taking into account* that subsequent international legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect evolving[18] methods of communication and business practices,

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15 Ibid.

16 Ibid.

17 Discussion in the Working Group: paragraph 71 of document A/CN.9/485 (the wording is modelled on article 7 of the United Nations Convention on Contracts for the International Sale of Goods (1980) and other texts such as article 3 of the UNCITRAL Model Law on Electronic Commerce (1996)).

18 Discussion in the Working Group: paragraph 72 of document A/CN.9/485.

[14] *Convinced* that uniformity in the interpretation of the term "agreement in writing" is necessary for enhancing[19] predictability in international commercial transactions,

[15] *Recommends* to Governments that the definition of "agreement in writing" contained in Article II(2) of the Convention should be interpreted to include […][20]

II. Model legislative provisions on the enforcement of interim measures of protection

17. At its previous session (November/December 2000), the Working Group considered two draft variants of provisions on the enforcement of interim measures of protection (document A/CN.9/WG.II/WP.110, paragraphs 55 and 57 and reproduced in document A/CN.9/485 at paragraph 79). The considerations in the Working Group are reflected in document A/CN.9/485, paragraphs 80 to 102. After discussing both variants, the Working Group decided to take variant 1 as a basis for its further discussions (A/CN.9/485, paragraph 81). Due to time constraints, the Working Group postponed consideration of several draft provisions in variant 1 and possible additional provisions contained in A/CN/.9/WG.II/WP.110, paragraphs 63 to 80 (A.CN.9/485, paragraph 103). The draft provisions presented below have been prepared pursuant to the considerations in the Working Group. In discussing these drafts, the Working Group may wish to consider and take decisions on "possible additional provisions" presented to the previous session of the Working Group in document A/CN/.9/WG.II/WP.110, paragraphs 63 to 80.

18. The draft provision presented below consists of current article 17 of the UNCITRAL Model Law on Arbitration as paragraph (1) with additions to accommodate views in the Working Group that the provision contain a definition of interim measures of protection (see paragraphs 82 and 83 in document A/CN.9/485) and perhaps additional provisions on *ex parte* interim measures (see paragraphs 91 to 94 in document A/CN.9/485).

Draft article 17. Power of arbitral tribunal to order interim measures[21]

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[19] Ibid.

[20] For the consideration in the Working Group of the relationship between the draft declaration and the proposed revision of article 7 of the UNCITRAL Model Law on Arbitration, see paragraph 70 of document A/CN.9/485.

[21] In view of the discussion in the Working Group regarding the need for examples to illustrate the definition of interim measures (A/CN.9/485, paragraph 82), it is suggested that examples of interim measures, as well as examples of orders not intended to be understood as interim measures, be explained in the guide to enactment. The elements for the relevant part of the guide might be the following: *Interim measures of protection are referred to by different expressions, including "conservatory measures" or "provisional measures". Characteristics of an interim measure are that the measures are given at the request of one party, made in the form of an order or an award and intended to be temporary, pending a final outcome of the arbitration. Objectives of an interim measure include the following: elimination of obstacles to the conduct of proceedings (e.g. by orders designed to prevent the destruction of evidence); prevention of loss or damage (e.g. an order to continue construction works despite the fact that the obligation to continue is at issue); preservation of the status quo (e.g. an order directing the beneficiary of an independent guarantee not to demand payment under the guarantee); and facilitation of enforcement of the award (e.g. an order requiring a party to provide security for costs or*

[Unchanged text of article 17:] **(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.**

(2) An interim measure of protection is any temporary measure [,whether it is established in the form of an arbitral award or in another form,][22] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. [The arbitral tribunal may, in order to ensure that any such measure is effective, grant the measure without notice to the party against whom the measure is directed for a period not to exceed [30] days; such a measure may be extended after that party has been given notice and an opportunity to respond.][23]

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an order aimed at preventing the transfer of assets to a foreign jurisdiction or the dissipation of assets). Not included among interim measures are decisions that relate to the conduct of arbitral proceedings in general, such as: an order that a party produce a particular piece of evidence; an order that a party deposit an amount as an advance for the costs of the arbitration; or an order designed to maintain confidentiality of information relating to the arbitration. Also not included are decisions that are part of, or that will be factored into, the final decision on the dispute submitted to arbitration (e.g. decisions relating to the jurisdiction of the arbitral tribunal, the costs of arbitration, and the law applicable to the substance of the dispute). Moreover, the concept of interim measures would exclude orders issued under the procedures used in some jurisdictions according to which the arbitral tribunal directs a party to make an "interim payment" or "interim partial payment" to the other party to the extent it is beyond doubt that the amount of the interim payment is due and that such payment is to be merged into the final award.

[22] The wording "whether it is established in the form of an arbitral award or in another form" reflects the discussion of the Working Group (document A/CN.9/485 at paragraph 83) which acknowledged that, in practice, arbitrators use a variety of forms and names in issuing interim measures of protection.

[23] The draft provision in square brackets has been included to stimulate discussion in the Working Group about the desirability of recognising the possibility of issuing an interim measure of protection without giving immediate notice thereof to the party ordered to comply with the measure (such measures are often referred to as *ex parte* measures: see also paragraph 91-94 of document A/CN.9/485). The draft provision is intended to recognize not only that the arbitral tribunal may issue an *ex parte* measure, but also that the court may issue an *ex parte* order for the enforcement of that measure provided that this is done before the expiry of the [30] day period. If a provision based on such a policy would be acceptable, paragraph 1(iii) of the "New article: Enforcement of interim measures of protection" would have to be adjusted to allow for the postponement of notice to the party against whom the measure is made until the expiry of the [30] day period or until the court has issued an order for the enforcement of the measure, whichever occurs first.

New article. Enforcement of interim measures of protection[24]

(1) Upon the application to the competent court by [the arbitral tribunal or by] the interested party made with the approval of the arbitral tribunal,[25] **an interim measure of protection referred to in article 17 shall be enforced, irrespective of the country in which it was made, except that the court may at its discretion refuse enforcement if:**

(a) The party against whom the measure is invoked furnishes proof that:[26]

(i) Application for the same or similar interim measure has been made to a court in this State, whether or not the court has taken a decision on the application;[27] **or**

(ii) *[Variant 1]* **The arbitration agreement referred to in article 7 is not valid** *[Variant 2]* **The arbitration agreement referred to in article 7 appears 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];**[28] **or**

(iii) 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 or was otherwise unable to present its case with respect to the interim measure, [in which case

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[24] The Working Group may wish to consider where the draft provision on enforcement of interim measures might be placed. One possibility is to include it in the UNCITRAL Model Law on International Commercial Arbitration under a new chapter VI *bis*, as article 33 *bis*.

[25] The guide to enactment will clarify that the approval of the arbitral tribunal may be given in the order itself, at the time the order is given or subsequently.

[26] For a discussion of this subparagraph in the Working Group, see document A/CN.9/485, paragraphs 84 and 85.

[27] For the discussion of subparagraph (i), see paragraph 86 of document A/CN.9/485. The draft provision is intended to cover situations where a request for the same or similar measure is pending with the court, where the request has been denied by the court and where the court has granted the same or similar interim measure. It may be noted, however, that a previous denial of a request by the court would not necessarily lead to the conclusion that the arbitral tribunal's measure was unwarranted and that the court should refuse its enforcement (e.g. when the circumstances have changed after the earlier court decision). Also the existence of an earlier measure by the court may not warrant the refusal of enforcement of a measure ordered subsequently by the arbitral tribunal (e.g. if the measure by the arbitral tribunal refers to a different part of the claim or can be regarded as an additional measure necessary because of changed circumstances). It appears that the principle of discretion, expressed in the chapeau of the draft provision, is appropriate to allow the court to take those circumstances into account, as appropriate.

[28] For the discussion of subparagraph (ii) in the Working Group, see paragraphs 87 and 88 of document A/CN.9/485. It was considered in the Working Group that it should be understood (either from the provision or from the guide to enactment) that the court should not go beyond a *prima facie* assessment of the validity of the arbitration agreement, thus leaving the full examination of the validity of the arbitration agreement to the arbitral tribunal (paragraph 88 of document A/CN.9/485).

the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal];[29]or

(iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal;[30] or

(b) The court finds that:

(i) Such a measure is incompatible with the powers conferred upon the court by its procedural laws,[31] 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."[32]

(2) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure.[33]

(3) In reformulating the measure under paragraph (1)(b)(i), the court shall not modify the substance of the interim measure.[34]

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[29] For the discussion of subparagraph (iii) in the Working Group, see paragraphs 89 to 94 of document A/CN.9/485. Subparagraph (iii) is not intended to prevent the arbitral tribunal from issuing *ex parte* interim measures; it merely requires that, by the time the request for enforcement is made to the court, the party to whom the measure is directed should have been heard by the arbitral tribunal. The wording between square brackets, by adding the discretion to suspend enforcement proceedings, emphasizes the idea that the court, faced with a measure with respect to which the affected party ought to have been heard, should not itself hear the arguments regarding the measure and evaluate its merits, but should rather leave that to the arbitral tribunal. The guide to enactment may clarify that a refusal by the court to enforce a measure on the ground set out in subparagraph (iii) does not prevent the arbitral tribunal from hearing the parties on the measure and issuing an *inter partes* measure which would be capable of enforcement by the court.

[30] For the discussion of subparagraph (iv), see paragraphs 95 and 96 of document A/CN.9/485. The requirement (in the chapeau of the article) that the arbitral tribunal should approve the application for enforcement would advance the policy underlying subparagraph (iv). In order to stimulate discussion in the Working Group as to whether that policy should be further advanced, a new draft paragraph (2) has been included.

[31] For discussion in the Working Group, see paragraph 101 of document A/CN.9/485.

[32] Subparagraph (ii) was not discussed at the last Working Group, due to time constraints (see document A/CN.9/485 at paragraph 103).

[33] For discussion in the Working Group, see document A/CN.9/485, paragraphs 95 and 96.

[34] Draft paragraph (3) has been included to reflect the discussion in paragraphs 100 and 101 of document A/CN.9/485 and also reflects the considerations in document A/CN.9/WG.II/WP.110 paragraphs 71 and 72. A further clarification concerning the possible reformulation of a measure may be included in the guide to enactment.

(4) Paragraph (1)(a)(iii) does not apply 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.[35]

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***The conditions set forth in this paragraph are intended to set maximum standards. It would not be contrary to the harmonization to be achieved if a State retained less onerous conditions.[36]**

[Chapter III of this document on conciliation is published in document A/CN.9/WG.II/WP.113/Add.1]

35 See document A/CN.9/485, paragraphs 91 to 93.

36 This footnote has been drafted pursuant to the suggestion, reflected in document A/CN.9/485, paragraph 85, that, to the extent that a single regime could not be agreed upon, in particular if a national law provided a more favourable regime, a footnote, along the lines of the footnote to article 35(2) of the Model Law on Arbitration could be included.