United Nations A/CN.9/485

General Assembly

Distr.: General
20 December 2000

Original: English

United Nations Commission on International Trade Law
Thirty-fourth session
Vienna, 25 June – 13 July 2001

Report of the Working Group on Arbitration on the work of its thirty-third session (Vienna, 20 November – 1 December 2000)

Contents

V.00-60407 (E)

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, 1958) ("New York Convention"). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The Secretary-General made the opening speech. In addition to speeches by participants in the diplomatic conference that had adopted the New York Convention, 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 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 ("Model Law on Arbitration"), 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.[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 the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take

[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), para. 235.

[3] The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day (*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.

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

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 conciliation,[6] requirement of written form for the arbitration agreement,[7] enforceability of interim measures of protection,[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).

6. The Working Group considered the possible preparation of harmonized texts on conciliation, interim measures of protection and the written form of arbitration agreements. On these three topics the Working Group made decisions, which the Secretariat was requested to use in preparing drafts for the current session of the Working Group. In addition, the Working Group exchanged preliminary views on other topics that might be taken up in the future (document A/CN.9/468, paras.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. The Commission 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, paras. 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them.

8. 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 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 (A/55/17, 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 (ibid., para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., 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 New York Convention (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). 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) (ibid., 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 (ibid., para. 107 (m)), a view was expressed that the issue was not expected to raise many problems

[5] *Ibid*., paras. 337-376 and 380.
[6] *Ibid*., paras. 340-343.
[7] *Ibid*., paras. 344-350.
[8] *Ibid*., paras. 371-373.
[9] *Ibid*., paras. 374-375.

and that the case law that gave rise to the issue should not be regarded as a trend.

9. The Working Group on Arbitration was composed of all States members of the Commission. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Bulgaria, Burkina Faso, Cameroon, China, Colombia, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

10. The session was attended by observers from the following States: Angola, Canada, Croatia, Czech Republic, Denmark, Ecuador, Greece, Indonesia, Israel, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Panama, Peru, Philippines, Republic of Korea, Saudi Arabia, Slovakia, Slovenia, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Arab Emirates and Uruguay.

11. The session was attended by observers from the following international organizations: United Nations Economic Commission for Europe (UNECE), Asian-African Legal Consultative Committee, NAFTA Article 2022 Advisory Committee, Permanent Court of Arbitration, Asser College Europe, Comité Maritime International, Gulf Cooperation Council Commercial Arbitration Centre, International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration, Lagos and The Chartered Institute of Arbitrators.

12. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Mr. Sani L. MOHAMMED (Nigeria).

13. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.109); report of the Secretary-General: Settlement of commercial disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation" (A/CN.9/WG.II/WP.110); and report of the Secretary-General: Possible future work: court ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate (A/CN.9/WG.II/WP.111).

14. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on: written form for arbitration agreements; interim measures of protection; and conciliation.
4. Other business.
5. Adoption of the report.

I. Deliberations and Decisions

15. The Working Group discussed agenda item 3 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 deliberations and conclusions of the Working Group with respect to that item are reflected below in Chapters

II to V.

16. With regard to requirement of written form for the arbitration agreement, the Working Group considered the 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 paras. 15-26) and a drafting group prepared a further revised draft for consideration by the Working Group. After a preliminary discussion of that draft, the Secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the next session, based on the discussion in the Working Group. The Working Group also discussed the preliminary draft interpretative instrument regarding article II(2) of the New York Convention (set forth in document A/CN.9/WG.II/WP.110 at paras. 27-51) and requested the Secretariat to prepare a revised draft of the instrument taking into account the discussion in the Working Group. The considerations are reflected below in paragraphs 21 to 77.

17. In respect of enforcement of interim measures of protection, the Working Group reviewed the model legislative provisions prepared by the Secretariat (set forth in document A/CN.9/WG.II/WP.110 at paras. 52-80) and, due to time constraints, postponed to the next session its consideration of subparagraph (vi) and possible additional provisions. The considerations are reflected below in paragraphs 78 to 103.

18. With regard to conciliation, the Working Group considered articles 1, 2, 5, 7, 8, 9 and 10 of the draft model legislative provisions (set forth in document A/CN.9/WG.II/WP.110 at paras.81-11) and requested the Secretariat to prepare revised drafts of those articles, taking into account the views expressed in the Working Group, for consideration at the next session. Articles 3, 4, 6, 11 and 12 were not considered due to lack of time. The considerations are reflected below in paragraphs 107 to 159.

19. The Working Group also considered the three topics set forth in document A/CN.9/WG.II/WP.111 dealing with possible future work on: court-ordered interim measures of protection in support of arbitration; scope of interim measures that may be ordered by arbitral tribunals; and validity of the agreement to arbitrate. The Working Group supported future work being undertaken on all topics and requested the Secretariat to prepare for a future session of the Working Group preliminary studies and proposals. The considerations are reflected below in paragraphs 104 to 106.

20. The next meeting of the Working Group is scheduled to be held from 21 May to 1 June, 2001 in New York.

II. Requirement of written form for the arbitration agreement

A. General remarks

21. The Working Group commenced its considerations by noting that the provisions on the form of arbitration agreements (as set out in particular in article II(2) of the New York Convention and article 7(2) of the Model Law on Arbitration) did not conform to current practices and expectations of the parties if they were interpreted narrowly. It was noted that, while national courts increasingly adopted a liberal interpretation of those provisions, views differed as to their proper interpretation. Those differences and the lack of uniformity of interpretation were a problem in international trade which reduced the predictability and certainty of international contractual commitments.

22. The Working Group recalled the decision taken at its thirty-second session that, in order to ensure a uniform interpretation of the form requirement that responded to the needs of

international trade, it was necessary to prepare a modification of article 7(2) of the Model Law on Arbitration with an accompanying guide to enactment and to formulate a declaration, resolution or statement addressing the interpretation of article II(2) of the New York Convention that would reflect a broad and liberal understanding of the form requirement. As to the substance of the model provisions and the interpretative instrument to be prepared, the Working Group, recalling its considerations at its previous session (A/CN.9/468, para. 99), confirmed the view that, for a valid arbitration agreement to be concluded, it had to be established that an agreement to arbitrate had been reached and that there existed some written evidence of the terms and conditions of that agreement.

B. Proposed text to revise article 7(2) of Model Law on Arbitration

23. The Working Group proceeded to consider a revision of article 7(2) of the Model Law on Arbitration as presented and commented upon in document A/CN.9/WG.II/WP.110, paragraphs 15 to 26. The draft text discussed by the Working Group was as follows:

"**Article 7. Definition and form of arbitration agreement**

[Unchanged paragraph (1) of the 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.

Draft paragraph (2) of article 7:

(2) The arbitration agreement shall be in writing. For the purposes of this Law, "writing" includes any form *[alternative 1:]* **provided that the [text] [content] of the arbitration agreement is accessible so as to be usable for subsequent reference, whether or not it is signed by the parties** *[alternative 2:]* **which [provides] [preserves] a record of the agreement, whether or not it is signed by the parties.**

(3) An arbitration agreement meets the requirement in paragraph (2) if:

(a) it is contained in a document established jointly by the parties;

(b) it is made by an exchange of written communications;

(c) it is contained in one party's written offer or counter-offer, provided that the contract has been [validly] concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party;

(d) it is contained in a contract confirmation, provided that the terms of the contract confirmation have been [validly] accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or, to the extent provided by law or usage, by a failure to object;

(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;

(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;

(g) [it is contained in a text to which reference is made in a contract concluded orally, provided that such conclusion of the contract is customary, [that arbitration agreements in such contracts are customary] and that the reference is such as to make that clause part of the contract.]

(4) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is

such as to make that clause part of the contract."

Paragraph (1)

24. The Working Group agreed to leave paragraph (1) unchanged.

Paragraph (2)

25. Some support was expressed for alternative 2 since it was concise and well understood and tested on account of being included in article 7(2) of the Model Law on Arbitration. However, the widely prevailing view was to prepare a provision based on alternative 1, which was modelled on articles 2(a) and 6(1) of the UNCITRAL Model Law on Electronic Commerce. The reasons for the view were: that the UNCITRAL Model Law on Electronic Commerce expressed the most recent view of the Commission on how to deal with issues of electronic commerce; that it was desirable to maintain as much as possible harmony between that Model Law and the Model Law on Arbitration; and that alternative 1 provided more guidance than alternative 2. Having taken that decision, there was no doubt in the Working Group that alternatives 1 and 2 were in substance based on the same policy and that, by adopting alternative 1, the Working Group did not intend to produce a result that would be different from the result obtained under alternative 2.

26. As to the alternative words "text" and "content" in alternative 1, under one view the word "text" was to be preferred since it was more neutral (in that it did not imply the awareness of a party about the content of the terms of the agreement to arbitrate) and since it was more usual in legislative drafting. Under another view, however, the word "content" was preferable because it better expressed the idea of deformalization of the process of concluding an arbitration agreement and included electronic form. Recognizing that neither word was fully satisfactory, the Working Group explored various ideas. One was to replace the notion of text/content with the concept of "information", which was used in the UNCITRAL Model Law on Electronic Commerce. Another idea was to delete in alternative 1 the words "provided that the [text] [content] of the arbitration agreement is" A further idea was to leave in paragraph (2) its first sentence and to move the substance of the second sentence to paragraph (3) to read along the lines of "an arbitration agreement meets the requirement in paragraph (2) if it is in any form accessible so as to be usable for subsequent reference". An alternative idea of how to amalgamate the second sentence of paragraph (2) and paragraph (3) was to use the expression "any form which provides a record of the agreement [accessible for subsequent reference] whether or not signed by the parties". Those ideas of combining the second modified sentence of paragraph (2) with paragraph (3) were criticized. It was said that paragraph (2) defined the form of the arbitration agreement in general and therefore it did not fit in paragraph (3), which dealt with examples of specific types of contract practices. In addition, it was said that the notion of "record" (which did not imply an exchange of messages) did not adequately reflect the fact that arbitration agreements were often concluded by sending messages. The UNCITRAL Model Law on Electronic Commerce, in order to avoid that narrow meaning of "record", used in article 6 the concept of "data message", which was defined in article 2(a) of that Model Law as "information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy". It was said that those considerations and the terminology used by the UNCITRAL Model Law on Electronic Commerce spoke in favour of using the term "information". Yet another idea was to use the expression along the lines of "any form of communication which allows the arbitration agreement to be evidenced by an [electronic or other] record". After discussion, a consensus developed supporting the idea of avoiding the terms "text"and "content" altogether.

27. It was also suggested that the draft provision should be formulated in terms of "for the avoidance of doubt" so as to make it clear that the provision was not intended to modify article

7 of the Model Law on Arbitration but only to clarify it so as to reflect current practice and the interpretation given by many courts to the current wording of article 7 of that Model Law.

Paragraph (3)

28. The Working Group engaged in a general discussion as to the desirability of listing in paragraph (3) situations in which an arbitration agreement met the requirement of paragraph (2). According to one view, it was not desirable to list those situations since they might prove to be too limiting and may leave uncertain the situations that were not specifically mentioned. Therefore, it was preferable to retain in the model provision the general principle in paragraph (2) and to list situations intended to be covered in a guide to enactment. The opposing view was that, in order to harmonize the interpretations given to the current text of article II(2) of the New York Convention and 7(2) of the Model Law on Arbitration, it was desirable to provide more concrete guidance to judges and arbitrators and that, for that reason, the current concept of paragraph (3) was preferable.

29. Without resolving the approach to the structure and level of generality of paragraphs (2) and (3) at that stage of the discussion, the Working Group embarked on a consideration of the subparagraphs in paragraph (3) in order to take a position as to whether the situations dealt with therein should be covered by the model legislative provision to be drafted.

Subparagraphs (a) and (b)

30. It was noted that the situations dealt with in subparagraphs (a) and (b) were expressly covered by article 7(2) of the Model Law on Arbitration and there was no doubt that those situations should be encompassed in the model provision. It was agreed that in the situation dealt with in subparagraph (a) the signatures of the parties were not required; to make that clearer, a suggestion was made to state that expressly in subparagraph (a). The expression "document established jointly" was criticized as unclear in that it raised questions as to how a document was to be established and what were the implications of the term "joint". An alternative expression suggested was "document agreed upon".

Subparagraph (c)

31. It was agreed that where the contract was concluded tacitly in a manner described in subparagraph (c), an arbitration clause contained in that contract should be binding.

32. It was suggested to include in subparagraph (c) words along the lines of "to the extent permitted by law or usage" (which appeared in subparagraph (d)) in order to indicate that national laws provided conditions under which performance and a failure to object to a contract offer led to a valid contract and that those conditions and usages were not uniform.

33. It was suggested to delete the word "validly" because it was unnecessary or because it raised factual and legal issues that were not related to the form requirement and because it might give rise to unnecessary argument. After discussion, it was decided to delete that word and it was suggested to add a qualification along the lines of "to the extent permitted by law or usage".

34. Observations were made that the draft provision attempted to deal with both the form required for a valid arbitration agreement and with the issue of whether substantive requirements for the conclusion of the contract and the arbitration agreement were met. It was generally considered that the purpose of the provision was to resolve the issue of form and that the provision should refrain to the extent possible from touching upon the question of the substantive requirements for the validity of agreements.

Subparagraph (d)

35. In response to questions, it was explained that the concept of contract confirmation referred to a situation in which the parties negotiated a contract orally, whereupon one of the parties communicated in writing to the other party the terms of the contract and those terms became binding on the parties if the written terms were not objected to. By relying on that concept it was possible under some legal systems that a contract term contained in a contract confirmation became binding even if the contract confirmation was not in all details the same as the terms agreed upon orally. It was observed that the concept of contract confirmation was not known in many legal systems, that it was ambiguous as regards the fact situations covered and that, if it was to be included in the model provision, it should be clarified. It was suggested that, to the extent that such conclusion of a contract was possible under some national laws, there should be no objection in principle against considering an arbitration clause contained in a contract confirmation as valid. Replacing the term "contract confirmation" by the expression "a communication confirming the terms of the contract" was proposed.

36. As to the expression "law or usage", the relationship between the two notions was found to be unclear. Also unclear was said to be the way in which the usage was to be demonstrated. It was therefore suggested that the reference to "usage" should be deleted. Without taking a decision on whether to retain those expressions, the Working Group considered that, if the reference to the applicable law (or usage) be retained in subparagraph (d), it should also be included in subparagraph (c).

Subparagraph (e)

37. It was agreed that the situation where the written communication containing an arbitration agreement was issued only by a third party (such as a broker) should lead to a valid arbitration agreement and should be covered by the model provision.

Subparagraph (f)

38. Agreement was expressed with the broad policy underlying subparagraph (f). As to the alternative wordings in square brackets, one view favoured the words "statements on the substance of the dispute" because they recognized that allegations of the existence of an arbitration agreement may be contained not only in a statement of claim and defence but also in other procedural submissions such as a notice of arbitration. The opposing view favoured the words "statements of claim and defence". It was said that an arbitration agreement should be deemed to have been concluded only where it could reasonably be expected that the addressee of a procedural submission could be expected to carefully review it and reply to it; and that such an expectation existed with respect to statements of claim and defence but not necessarily with respect to other procedural submissions.

Subparagraph (g)

39. Views were expressed that to recognize an oral reference to a text containing an arbitration clause as an arbitration agreement in writing (as provided in subparagraph (g)) would be excessive because the nexus between the reference and the written terms of the arbitration agreement was too tenuous. Therefore it was suggested that the subparagraph should be deleted.

40. However, the widely prevailing view was that the model legislative provision should recognize the existence of various contract practices in accordance with which oral arbitration agreements were concluded with reference to written terms of an agreement to arbitrate and that in those cases the parties had a legitimate expectation of a binding agreement to arbitrate. On the basis of that view, broad support was expressed for the concept of subparagraph (g).

41. A suggestion was made to make the operation of the provision conditional upon whether the oral form of conclusion of an arbitration agreement was customary in international trade, in much the same manner as with respect to clauses for the prorogation of jurisdiction in article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968). However, the widely prevailing view was that references to "customary" in the draft provision should be deleted. It was considered that the reply to the question of what was customary was uncertain, invited argument and went against the trend of deformalizing arbitration agreements. Furthermore, requirements that the oral conclusion of certain types of contracts be customary or that arbitration agreements in certain types of contracts be customary had more to do with substantive conditions for finding that an agreement to arbitrate had been reached than with its form; since it was desirable that the model provision limit itself to issues of form and not deal with substantive conditions for the validity of arbitration agreements, the question of what was customary and how agreement between the parties was reached fell outside the model provision. To the extent the guide to enactment would clarify that any such conditions regarding custom were governed by the law outside the model provision, it was suggested that the guide should recommend to States that it was not necessary for the law to include such conditions.

Paragraph (4) (and its relation to paragraph (3)(g))

42. Agreement was expressed with the concept of paragraph (4). It was noted that paragraphs (3)(g) and (4) dealt with two similar situations, the difference being that in paragraph (3)(g) the reference to the written terms of an agreement to arbitrate (or to a writing containing those written terms) was oral whereas in paragraph (4) the reference was required to be in writing. Having adopted the substance of paragraph (3)(g) and paragraph (4), suggestions were made to merge the two provisions along the following lines: the reference in a contract concluded in any form to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

43. By way of a reservation to those suggestions, it was observed that paragraph (4) stated a general principle (applicable when the parties concluded a contract in writing), which merely clarified the writing requirement in article 7(2) of the Model Law on Arbitration, whereas paragraph (3)(g) referred to a particular situation (such as a marine salvage contract) where the parties, in concluding a binding oral contract, referred orally to a text that contained an arbitration clause; thus, it was said, by merging the two provisions, the particular situation dealt with in paragraph (3)(g) became a principle applicable generally. In the light of that observation, it was suggested that the two provisions should be kept separate.

44. The widely prevailing view, however, was that the purpose of adopting the substance of paragraph (3)(g) was to deal with a broad spectrum of contract practices where the parties orally referred to written terms of an agreement to arbitrate (either directly or indirectly by referring to writings containing such written terms) and that therefore the two provisions should be merged.

1. Related issues

45. Having concluded consideration of the draft provision, the Working Group discussed cases described in paragraph 17 of document A/CN.9/WG.II/WP.110 which were not covered by the draft model provision as it was taking shape in the discussion. The purpose of the discussion was to assess whether with respect to those cases any action by the Working Group was called for.

46. The situations considered were those described in subparagraphs (f) and (g) of paragraph 17:

> "(f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;
>
> (g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a "further" contract may have been concluded orally or in writing);"

47. Observations were made that, in the situations described in subparagraphs (f) and (g) of paragraph 17 of document A/CN.9/WG.II/WP.110 the courts had sought solutions by interpreting the original contract and the subsequent agreements and establishing whether the parties intended that some terms in the original contract, including the arbitration agreement, were to be carried over into the subsequent or related agreement. However, the general assessment of the Working Group was that the outcome in those situations depended on the facts of each case and the interpretation of the will of the parties and that a general legislative solution was not feasible. Nevertheless, it was suggested that it might be useful to include in a guide to enactment a statement to the effect that the circumstances of the case, usages, practices and the expectations of the parties should be taken into account in interpreting particular cases and discerning the will of the parties. It was also noted that the liberalization of the form requirement as contemplated by the Working Group would help resolve some of the uncertainties arising in those cases.

48. The Working Group then turned to the situations described in subparagraphs (i) and (l) of paragraph 17:

> "(i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*);
>
> . . .
>
> (l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same. "

49. In that connection the Working Group also considered the situation where a bill of lading was assigned to a subsequent holder and the question was whether that holder became bound by the arbitration clause contained in the bill of lading. It was noted that in many States the passing of contractual rights and obligations from one party to another in principle also meant that the arbitration agreement covering those rights and obligations passed. Nevertheless, it was said that a narrow reading of a provision such as article II(2) of the New York Convention could be an obstacle to the principle that the arbitration agreement should follow the contract of which it forms part. Some support was expressed in favour of formulating a model legislative provision that would deal in a general way with those cases (see para. 23 in doc. A/CN.9/WG.II/WP.110). The Working Group, however, was hesitant and decided to consider the matter at a later stage.

2. Preparation of a draft on the basis of considerations in the Working Group

50. Having concluded its consideration of the draft provision as presented by the Secretariat, the Working Group requested an informal drafting group composed of interested delegates to prepare, on the basis of the considerations in the Working Group, a draft that would serve as a basis for subsequent discussions.

51. 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. It was reported that eight States and one non-governmental organization participated in the work of the drafting group. 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.

52. The text prepared by the drafting group 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]."

53. It was noted that the purpose of the draft provision was to clarify that the requirement of writing was met if the arbitration terms and conditions (as distinguished from the acts constituting the agreement of the parties to arbitrate) were in writing even if the contract of which the arbitration agreement was a part or the arbitration agreement itself was concluded, to the extent permitted under the applicable law or rules of law, in any form other than writing, including orally or by conduct. It was also noted that (except as to paragraph (4), which had served a specific purpose in the context of an arbitration proceeding) the purpose of the draft model provision was to deal with issues of form and not with the substantive issues of how contracts and agreements to arbitrate were entered into. It was noted that those provisions covered all of the circumstances referred to in paragraphs (2) and (3), except those that the

Working Group had not approved.

54. Some support was expressed for the level of detail in the middle version. However, the Working Group did not engage in a full consideration of the preferable version or combination of versions or examples of circumstances that met the requirements set forth in the draft provision or the question whether the model provision should include such examples as envisaged in paragraph (7) of the long version.

55. It was observed that the situation dealt with in paragraph (5) in the middle and long versions was covered by paragraph (3); it was explained that it was included in the draft because its substance was contained in article 7 of the Model Law on Arbitration and its exclusion might raise questions as to the implications of such exclusion.

56. As to draft paragraph (2), it was suggested that, as much as possible, the wording in the UNCITRAL Model Law on Electronic Commerce should be followed.

57. Views were expressed that the drafting of paragraph (3) was unclear. In addition, it was suggested that the expression "for the avoidance of doubt" was unusual in a number of legal systems, that it was not needed and that it might be included in the guide to enactment. It was explained that the expression was included in the draft to make clear that the text was not intended to modify the existing requirements of article 7 of the Model Law on Arbitration (or article II of the New York Convention) but only to clarify those requirements. As to the expression "applicable law or rules of law", it was suggested that, while the distinction between "law" and "rules of law" was properly made with respect to the law governing the substance of the dispute (e.g. in article 28 of the Model Law on Arbitration), it was doubtful whether the distinction was appropriate in the context of the provision on the form in which a contract or an agreement to arbitrate might be concluded.

58. A suggestion was made to delete draft paragraph (5) in the middle and long versions as unnecessary. Another suggestion was that the model provision should refer to usages and possibly also to the course of dealing between the parties, in the same manner as in article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968).

59. The Secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the next session, based on the discussion in the Working Group.

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

A. General remarks

60. It was recalled that, at its previous session, the Working Group had discussed variations in the interpretation by domestic courts of the writing requirement of article II(2) of the New York Convention. At that time, the prevailing view was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of countries would take a significant number of years and in the interim create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of the article would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would

reflect a broad understanding of the form requirement could be further studied to determine the optimal approach. Those views, acknowledging the difficulties attendant upon amendment of the New York Convention or the development of a protocol and in support of some form of interpretative instrument, were generally reiterated at the current session of the Working Group, (see also A/CN.9/468, paras.88 to 99).

61. The text of the preliminary draft interpretative instrument as considered by the Working Group was as follows: [10]

> "[Recommendation] 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 is composed with due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries,
>
> [3] "*Conscious also 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, technologies in international commerce have developed along with the development of electronic commerce,
>
> [4] "*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,
>
> [5] "*Noting* that according to article II(1) of the Convention "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 noting further that pursuant to article II(2) of the Convention "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,
>
> [6] "*Noting also* 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 he use and acceptance of international commercial arbitration in international trade has been increasing,
>
> [7] "*Noting further* that the use and acceptance of international commercial arbitration in international trade has been increasing,
>
> [8] *"Recalling* that the Conference of Plenipotentiaries which prepared and opened the

[10] Paragraph numbering has been added for ease of reference to the text previously reproduced in A/CN.9/WG.II/WP.110.

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 . . . ,

[9] *"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 changes in communication technologies and business practices,

[10] "*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 new methods of communication and business practices,

[11] "*Convinced* that uniformity in the interpretation of the term 'agreement in writing' is necessary for advancing predictability in international commercial transactions,

[12] "*Recommends* to Governments that the definition of 'agreement in writing' contained in Article II(2) of the Convention should be interpreted to include [. . .] *[It is suggested that the operative part of the text to be inserted at this point should be substantially modelled on the revised text of article 7(2) of the Model Law on International Commercial Arbitration as discussed above at paras 23 to-27.]*"

B. Binding character

62. At the outset of the discussion, the Working Group exchanged views with regard to the binding nature of the draft interpretative instrument. Concerns were expressed that, since under the Convention on the Law of Treaties (Vienna, 1969) an interpretative instrument issued by a body other than the States parties to the New York Convention would not be considered legally authoritative, such an instrument would have no binding legal effect in international law and was therefore unlikely to be followed by those charged with interpretation of the New York Convention. It was observed that the fact that an interpretative instrument of the type proposed would be non-binding made it questionable whether such an instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention. In support of that view it was observed by way of analogy that the declaration by the Hague Conference interpreting certain aspects of the Convention on the law applicable to the international sales of goods (The Hague, 1955) had had little practical effect; it was noted however that that declaration was of a different nature to the proposed instrument as it was directed to legislators, informing them that they could act to protect consumers, but if they chose not to act there would be no effect on the existing legal regime.

63. In addition to the difficulties associated with the non-binding nature of such an instrument, it was suggested that it might be difficult to ensure that those responsible for implementing the instrument by interpreting the New York Convention were made adequately aware of its existence and, since the instrument only provided guidance to interpretation, the desired interpretation could only be encouraged, not compelled. A further difficulty noted was the existence of a body of case law interpreting article II of the New York Convention which differed from the interpretation likely to be set forth in the instrument, although there was also a body of case law consistent with that interpretation.

64. In response to those concerns, considerable support was expressed for the view that

while the instrument might not be legally binding, the issuance of such a document by a multinational, representative, authoritative body such as the Commission or the United Nations General Assembly was nevertheless likely to have a wide influence on how the New York Convention was to be interpreted. Reference was made to other non-binding instruments in the field of international commercial arbitration, such as the UNCITRAL Arbitration Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings, which had proven to be of considerable influence. It was also noted that such an instrument would provide an expert interpretation which would be very useful to practitioners seeking to persuade courts as to the interpretation of the New York Convention.

C. Form of interpretative instrument

65. In considering the form that a possible interpretative instrument should take, it was observed that a critical distinction should be made between modification of an existing text and clarification of its interpretation. The view was expressed that a modification of the New York Convention might imply that the text could not be understood to encompass a liberal interpretation. A clarification, on the other hand, would imply that there were differing possible interpretations and that "for avoidance of doubt" the text should be interpreted broadly in a particular manner. Furthermore, it was suggested that if an interpretative instrument did not purport to modify or amend a multilateral instrument (which, even if it were possible within the terms of that international instrument, would require legislation), but merely suggested a particular interpretation, the question of form might be of less importance. Support was expressed for formulating an instrument in terms of a clarification issued "for the avoidance of doubt."

66. On the question of whether the instrument should be a declaration or recommendation, there was general support for a declaration on interpretation. The view was expressed that an instrument in the form of a recommendation might raise problems of deciding to which party it should be addressed. It was observed, for example, that the instrument might be addressed to States or to Governments, but that, typically, neither was directly responsible for the interpretation of such an instrument, which were matters for consideration by courts and judges. It was also suggested that a recommendation to States to adopt a particular interpretation would be of little effect unless it also included an indication of the steps States might wish to take in order to achieve that interpretation.

67. It was also suggested that it could be addressed to legislators, although it was acknowledged that that might be appropriate only where what was sought was modification of the law, such as that proposed for article 7 of the Model Law on Arbitration, rather than a broader interpretation within the existing terms of the New York Convention. It was noted that the Commission had previously addressed recommendations to legislators such as in the 1985 Recommendation on the Legal Value of Computer Records (reproduced in the United Nations Commission on International Trade Law Yearbook, vol. XVI: 1985, paras. 354-360) and in paragraph 5 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.[11]

[11] "Furthermore, at an international level, the Model Law [on Electronic Commerce] may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved."

68. A further possibility was to address the instrument directly to the courts and judges responsible for the interpretation of the New York Convention. Reservations were expressed as to whether courts would follow such a non-binding recommendation, although it was noted that an interpretative declaration could be seen in some legal systems as the functional equivalent of "doctrine" or case-law. Another suggestion as to the form of the instrument was that it should not address any particular party and simply set out an understanding as to interpretation or statement by consensus which could be "by way of clarification". Some concern was expressed that that possibility might be limited by the perceived relationship between the desired understanding and the existing terms of the New York Convention and that it might not be followed in some countries simply because it was not addressed to those responsible for interpretation of the New York Convention.

69. After discussion, the Working Group noted that although there was broad support for the form of an interpretative declaration and for the Commission to be the body to issue that interpretative declaration, no common view had been reached as to whether the interpretative declaration should be directed to any particular body, such as legislatures or courts.

D. Relationship to revision of article 7 of the Model Law on Arbitration

70. In the course of discussing the form of the instrument, it became clear to the Working Group that the relationship between the proposed instrument and the amendment of article 7 of the Model Law on Arbitration needed to be considered. It was acknowledged that while promoting adoption of an amendment of article 7 of the Model Law on Arbitration would be an effective means of achieving a broad interpretation of the form requirement, although only in countries adopting the Model Law on Arbitration, it could not address the issue of the New York Convention. It was observed that pursuing the interpretative instrument and the amendment to the Model Law on Arbitration at the same time would likely prove a more effective means of achieving of the desired objective. A concern was expressed that basing the operative text of an interpretative declaration on the proposed draft revision of article 7 of the Model Law on Arbitration might be thought by some to go beyond the scope of the written form specified in article II(2) of the New York Convention and in that regard it was suggested that the Working Group would need to consider whether the amendment that the Working Group would decide upon for article 7 of the Model Law on Arbitration should be included in exactly the same form in the interpretative instrument.

E. General remarks on content

71. The view was expressed that the interpretative declaration should include explicit statements to the effect that article II(2) should be broadly interpreted and the basis for that interpretation; that technology had advanced since the New York Convention was drafted in 1958, and that subsequent instruments recognized other forms of writing, particularly in the area of electronic commerce. It was suggested that the operative part of the text (paragraph 12) should be explicitly phrased in terms of a statement of consensus, in order to lessen any potential misunderstanding that the declaration reflected a change, rather than a clarification, of existing interpretations. It was further noted that it would be useful to include within the body of the declaration a justification along the lines of article 3 of the UNCITRAL Model Law on Electronic Commerce.[12]

F. Paragraph-by-paragraph comments

72. A number of changes of a drafting nature were suggested: the phrase "is composed with due regard to the adequate representation of" should be deleted from paragraph 2 on the basis that it did not accurately reflect the manner in which the Commission was composed and the word "includes" used instead; the word "new" in paragraph 10 should be replaced with "evolving"; the term "advancing" in paragraph 11 should be replaced with a term such as "enhancing" or "achieving".

73. The suggestion was made that additional explanatory text be added to the preambular clauses to amplify on the history of the New York Convention, in particular its relationship to the General Assembly, and to support the authority of the Commission as the appropriate body to issue the interpretative declaration. In that regard, it was noted that reference might be made to the Commission as the "core legal body within the United Nations system in the field of international trade law" (resolution 54/103 of 17 January 2000), as well as to the fact that the Commission was composed with due regard to equitable geographical distribution which resulted in adequate representation of the world's various geographic regions and its principal economic and legal systems.

74. As a more logical presentation of the drafting and subsequent history of the New York Convention and its application in practice, it was suggested that paragraphs 6 and 7 might be placed before paragraph 5. Another view expressed was that paragraphs 6 and 7 should be deleted because they implied a change both in communications technology and in interpretation from the original intent of article II(2) and might not support the idea of a clarification of the interpretation. On the other hand, it was stated that since the changes proposed might not be thought by some observers to be accommodated within the existing language, the interpretative declaration should indicate reasons as to why it was necessary that the interpretation of the New York Convention should be adapted to reflect recent technological developments. It was also noted that since the problem sought to be addressed was not one of lack of uniformity of interpretation, paragraph 8 should also be omitted. A compromise view suggested was that the draft incorporate words to the effect that the declaration was prepared in response to the "differing interpretations which have occurred in light of changes in communications methods and business forms . . .". It was noted, however,

[12] Article 3 states:

"(1) In the interpretation of this Law, 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.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

that while it was clear that communication technologies had advanced since the New York Convention was drafted, it was less clear that business practices had changed fundamentally. Rather it was suggested that interpretation of business practices had changed, for example in terms of what might be required to conclude a valid arbitration agreement. Accordingly, it was proposed that references to changing business practices be deleted from the draft interpretative declaration. After discussion, no final decision was reached on that point.

75. In respect of paragraph 10 it was observed that the reference to changing circumstances might cast doubt on the broad interpretation of article II(2) that was currently employed in some jurisdictions and that the paragraph should, accordingly, be deleted. Also since paragraph 11 by itself provided sufficient justification for the interpretative declaration, paragraph 10 could be safely omitted. An alternative view expressed was that paragraph 10 established an important foundation relating to the scope of article II(2), especially since the draft revision to article 7 of the Model Law on Arbitration included language based upon the UNCITRAL Model Law on Electronic Commerce which was a text designed specifically to accommodate new technology. It was further noted that paragraph 10 of document A/CN.9/WG.II/WP.110 contained language which could serve as a useful reference in subsequent drafts of the interpretative declaration.[13] Support was expressed for that view.

76. After discussion, the Secretariat was requested to prepare a revised draft of the interpretative instrument taking into account the discussion in the Working Group.

G. Other writing form requirements in the New York Convention

77. Having completed its consideration of the preliminary draft interpretative instrument, the Working Group turned its attention to other writing and form requirements in the New York Convention. It was recalled that other provisions in the New York Convention, as well as other conventions on international commercial arbitration, contained additional requirements of writing which, if not interpreted in line with the decisions of the Working Group regarding the revision of the provisions on the writing requirement, might operate as barriers to the use of modern means of communication in international commercial arbitration. In this regard, it was noted that the UNCITRAL Working Group on Electronic Commerce was expected to undertake further work to consider the issue of how to ensure that treaties governing international trade were interpreted in light of the UNCITRAL Model Law on Electronic Commerce.

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

A. General remarks

78. It was recalled that there had been a preliminary discussion of the issue of enforceability of interim measures at the previous session of the Working Group (document A/CN.9/468, paras. 60 to 79), where it had been generally recognized not only that interim measures of protection were increasingly being found in the practice of international commercial

[13] Paragraph 10 states in relevant part:

" It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade; nevertheless, it was observed, some doubts remained or views differed as to their proper interpretation."

arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures (para. 60). General support had been expressed in favour of the proposal to prepare a harmonized and widely acceptable model legislative regime governing the enforcement of interim measures of protection ordered by arbitral tribunals.

B. Text and general consideration of draft proposals

79. The Working Group had before it two draft proposals presented by the Secretariat in document A/CN.9/WG.II.WP.110 (after paras. 55 and 57) as follows:

Variant 1

"An interim measure of protection referred to in article 17, irrespective of the country in which it was made, shall be enforced, upon application by the interested party to the competent court of this State, unless:

(i) Application for a corresponding interim measure has already been made to a court;

(ii) The arbitration agreement referred to in article 7 was not valid;

(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];

(iv) The interim measure has been set aside or amended by the arbitral tribunal;

(v) The court or an arbitral tribunal in this State could not have ordered the type of interim measure that has been presented for enforcement [or the interim measure is manifestly disproportionate]; or

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

Variant 2

"The court may, upon application by the interested party, order enforcement of the interim measure of protection referred to in article 17, irrespective of the country in which it was made."

General remarks

80. It was noted that variant 1, which was drafted in terms of "the court shall enforce, unless …", was intended to establish an obligation to enforce if the prescribed conditions were met, whereas variant 2 was in terms of "the court may enforce … ", expressing a degree of discretion. It was further noted that variant 1 had been prepared on the basis of article 36 of the Model Law on Arbitration (and article V of the New York Convention), but adapted to the specific features of interim measures as opposed to final awards.

81. Variant 2 was supported on the basis of the idea that the court being endowed with a discretionary power as to whether or not to grant enforcement was more in line with the provisional nature of interim measures; that such an approach was likely to assist in those countries where there was resistance to the idea that interim measures issued by an arbitral

tribunal could be enforced; and that it was difficult to ensure that the appropriate grounds for refusing enforcement were properly enumerated. Notwithstanding those views, it was generally felt that the discretionary powers entailed by variant 2 might result in lack of uniformity of interpretation and therefore jeopardize harmonization. It was also observed that setting forth an obligation for courts to enforce interim measures might ultimately enhance their effectiveness.

82. The Working Group discussed the approach to defining the interim measures of protection to be covered by the model legislative provision. Views were expressed that the definition should be formulated broadly, similarly to article 17 of the Model Law on Arbitration and article 26 of the UNCITRAL Arbitration Rules; to the extent examples were to be included, they should be illustrative rather than limiting. It was also suggested that such a definition might be clearer if there was some indication of decisions that were not intended to be covered such as awards for advance payment (which constituted final decisions resolving a part of the claim to the extent it was beyond doubt) or procedural decisions. It was noted that some interim measures of protection concerning evidence might be regarded as covered by article 27 of the Model Law on Arbitration, and that it was necessary to clarify the relationship between article 27 and the draft model provision. The suggestion not to formulate a definition of interim measures but instead to refer to the law of the State of enforcement for such a definition did not receive support.

83. It was noted that in practice arbitrators issued their decisions on interim measures of protection in different forms and under different names, including as orders or interim awards. Sometimes the purpose of designating the decision as an order (as distinguished from an award) was to prevent it being challenged in court, whereas the purpose of designating it as an award was to allow it to be treated as an award. It was, however, observed that different labels did not necessarily ensure different treatment of interim measures of protection in courts and that therefore the model provision should apply to interim measures of protection irrespective of the label given to it by the arbitral tribunal. To the extent it was desirable to leave a degree of control to the arbitral tribunal over whether the party might request its enforcement in court, this might be achieved by providing that enforcement may be requested with the approval of the arbitral tribunal only (in a manner similar to article 27 of the Model Law on Arbitration).

Variant 1

84. There was general approval in the Working Group for the suggestion that the model provision should be structured and drafted in such a way that it would be clear which grounds for refusal of enforcement were to be taken into account on the motion of the respondent and which ones the court should take into account on its own motion. It was observed that the distinction was clear in article 36 of the Model Law on Arbitration (and article V of the New York Convention) and that the structure of those provisions should be adopted also for the model provision.

85. For consistency with article 36 of the Model Law on Arbitration and article V of the New York Convention it was suggested that the word “enforcement ... may be refused only” should be used in the chapeau instead of “shall be enforced ... unless”. That suggestion was opposed on the ground that the word “may" in article V of the New York Convention had given rise to differing interpretations (in some legal systems it was understood as allowing a degree of discretion in permitting enforcement even if a ground for refusal was present, in particular if it was trivial and did not influence the substance of the award, while in other legal systems the expression “might be refused only” was understood only as limiting the grounds on which enforcement may be refused). An alternative proposal was to formulate the provision along the following lines: “shall be enforced ... except that the court may at its discretion refuse enforcement if one of the following circumstances exists ...”. While some opposition was expressed to that proposal (because it was considered that the court should be able to rely on

other grounds not listed in the provision for refusal to enforce or because the existence of a ground listed in the provision should allow no other result than refusal to enforce), the prevailing view was that the proposal presented a good basis for future consideration. To the extent a single regime could not be agreed upon (in particular if a national law provided a regime that was more favorable than the one in the model provision), a suggestion was made that the technique of a footnote to the provision (such as the one to article 35(2) of the Model Law on Arbitration) might be used to indicate that it would not be contrary to the harmonization to be achieved by the model provision if a State retained less onerous conditions.

Variant 1, subparagraph (i)

86. It was noted that subparagraph (i) envisaged a situation where a court would receive a request for enforcement of an interim measure while that (or another) court in the State was considering (or had already denied) a request for the same or a similar measure. In order to express such a situation better it was suggested that the expression "corresponding" be replaced by the expression "same or similar". A suggestion that such cases of coordination between requests regarding interim measures should be exclusively dealt with under the principle of "res judicata" did not receive support. The Working Group requested the Secretariat to consider various possible situations where coordination might be needed and to prepare a draft, possibly with alternatives. It was considered that the model provision should deal only with coordination within the enacting State and not attempt to establish a cross-border regime.

Variant 1, subparagraph (ii)

87. Suggestions were made for the deletion of subparagraph (ii) since, at the time of the request for enforcement, the arbitral tribunal was already functioning and any issue regarding its own jurisdiction should be left to the arbitral tribunal to decide. Moreover, it was said that claims that the arbitration agreement was not valid were likely to be intended simply to delay enforcement. Furthermore, the ground of refusal was self-evident and could be relied upon even if it was not specifically listed.

88. However, the widely held view was that the substance of the subparagraph should be retained with the understanding (to be expressed in the guide to enactment or possibly in the provision itself) 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 issue to the arbitral tribunal (whose decision was in any case subject to court control as provided e.g. in article 16 of the Model Law on Arbitration). Moreover, if the model provision were to allow the applicant to request enforcement without the respondent having been given notice of the measure (see below paras. 90 to 94), the respondent should be able to raise the issue of the validity of the arbitration agreement in court in the context of opposing enforcement of the interim measure (since that would be the first opportunity of it so doing). A similar situation would exist where the respondent had refused to participate in the arbitration (up to the point of the application for enforcement) because it was convinced that the arbitral tribunal had no jurisdiction.

Variant 1, subparagraph (iii)

89. It was pointed out that subparagraph (iii) was intended to address two distinct situations, namely: the one where the party against whom the interim measure was invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings as a whole and the one where that party had not been able to present its case in respect of issuance of an *ex parte* interim measure.

90. Allowing the enforcement of *ex parte* interim measures was opposed on the basis that such interim measures were not entitled to enforcement under the Convention on Jurisdiction

and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968). In response it was noted that that Convention only addressed foreign decisions and that no distinction should be drawn between enforcement of domestic and foreign interim measures. A further ground for opposing enforcement of *ex parte* interim measures was that their issuance was not allowed in the practice followed, for example, by some major international arbitration institutions, without notice, (such notice might be given by serving the application for the interim measure or by serving of the interim measure on the respondent prior to any application to a court for its enforcement). That objection was based on the fundamental importance to arbitration of the principle of equal treatment of parties as set forth in article 18 of the Model Law on Arbitration.

91. The need to preserve the element of surprise for ensuring the effectiveness of some interim measures was generally recognized (with a view to preventing, for example, the destruction of evidence or, more generally, to address any situations requiring urgent action). It was suggested that objections based upon the equal treatment of parties could possibly be addressed by providing that the validity of *ex parte* interim measures be limited to a fixed time period, upon expiration of which the responding party should be entitled to fully present its case before any decision was made on maintenance or revocation of the measure. That suggestion of a two-step procedure, combining an *ex parte* phase with a subsequent *inter partes* phase, received some support. It was observed that such a procedure (irrespective of whether the *inter partes* phase was to be held before the arbitral tribunal, the court or both) could counterbalance the risks potentially implied in *ex parte* interim measures.

92. To ensure equal treatment of the parties and address the potentially great impact that an *ex parte* interim measure might have on the responding party, a suggestion was made that enforcement of the measure be preceded by some kind of judicial examination or, as an alternative, that the granting of counter-security might be envisaged. It was also proposed that those issues could be adequately addressed within subparagraph (vi) on the basis of public policy; the prevailing view was that that proposal was unacceptable as it placed too much emphasis on the public policy exception.

93. A further issue for consideration was the degree to which the court would be entitled to evaluate an *ex parte* measure prior to enforcing it. One view was that it could be distinguished from the review of the validity of the arbitration agreement where the evaluation was "at arm's length" and that in the case of the interim measure the respondent should be given the opportunity to present its case. A different view was that in evaluating an *ex parte* interim measure a court should, as much as possible, not review the decision of the arbitral tribunal.

94. Following discussion, the Working Group decided that agreement could not be reached on a specific solution at the current session of the Working Group. The Secretariat was requested to prepare a revised provision which would address the various concerns expressed with a view to preserving both the element of surprise and the principle of equal treatment of the parties.

Variant 1, subparagraph (iv)

95. It was pointed out that, basically, enforcement of an interim measure required that the measure still be in force as originally issued and that subparagraph (iv) was designed to address the issue of how certainty as to persistence of the interim measure could be achieved by the enforcing court. It was noted that two solutions might be envisaged: the first solution would consist of obliging the applicant for enforcement to inform the court of any changes that might have occurred following granting of the measure; the second in providing that the request for enforcement be submitted to, and approved by, the arbitral tribunal.

96. The Working Group recognized the acceptability of the substance of the rule as drafted,

with a reference to suspension of the interim measure as a possible further ground for refusing enforcement.

Variant 1, subparagraph (v)

97. It was pointed out that subparagraph (v) included two grounds that were very different in nature.

98. Concerning the first ground, that is refusal on the basis that the court or an arbitral tribunal in the State could not have ordered the type of measure presented for enforcement, a number of different views were expressed.

99. It was pointed out that it was not necessary to consider what domestic arbitral tribunals could issue, but rather what interim measures would be enforceable under the law of the enforcing State, since the emphasis was upon enforcement of the interim measure. Accordingly, it was suggested that reference to the arbitral tribunal be deleted. As a matter of drafting, it was proposed to delete the words “in this State”, since in many cases enforcement was sought in a country other than the one where the interim measure was granted and no specific relationship was required between the country where the arbitral tribunal was established, the country whose law was applied and the country where enforcement was sought. A suggestion to replace the word “could” with the word “would” was objected to on the basis that it might result in uncertainty as to the kind of examination the court was supposed to undertake.

100. Some concerns were expressed that the provision as drafted might lead to different results in different countries. Given the differences between the measures known in different legal systems, it was suggested that the fact that a court could not issue a particular measure was not sufficient grounds for refusing enforcement of a similar measure issued in another country. A contrary view was that a court could not be expected to enforce a measure that it itself could not issue since in that situation the machinery to enforce the order would not be available and enforcement would therefore be ineffective. A suggestion was made that problems of unknown orders might be resolved in part by allowing the court the ability to reformulate the measure along the lines of "unless the court can reformulate the interim measure in accordance with its own powers and procedures" (it was noted that the issue of possible reformulation was addressed at paras. 71-72 of document A/CN.9/WG.II/WP.110 under possible additional provisions). A further suggestion that the provision could be deleted as it was already covered by subparagraph (vi) was not supported.

101. To address the views of the Working Group some alternative drafts were proposed: to draft the provision in terms of “if the type of interim measure cannot be enforced within the limits of the powers of the court as set forth in its procedural rules”; to include the wording “enforcement of an interim measure might be refused to the extent that such measure is incompatible with the procedural power conferred upon the court by its procedural laws”. Despite uncertainty as to the best possible solution, there was wide recognition that the provision relied on an acceptable and reasonable principle and should therefore be retained. There was also broad support for the powers of a court to reformulate the measure in accordance with its procedural powers. The Secretariat was requested to revise the provision providing alternative solutions, possibly also adding clarification as to the kind of situations which would fall within its scope. A number of examples of interim measures that might be beyond the power of a particular national court were described, including fines, freezing orders over less than all of a party‘s property, mandatory injunctions requiring a party to build something and, in general, orders for which a court lacked machinery for enforcement.

102. As to the part of the provision relating to disproportionality, the Working Group agreed that it would not be included.

Subparagraph (vi) and possible additional provisions

103. Due to time constraints, it was agreed to postpone consideration of the further draft provisions contained in document A/CN.9/WG.II/WP. 110, including subparagraph (vi) of Variant 1, to the next session of the Working Group.

C. Future work

104. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group exchanged views and information on a number of arbitration topics which were identified as likely items for future work. Some of those topics arose in the course of the Working Group's deliberations, others had already been considered by the Commission at its thirty-second session (reproduced in document A/CN.9/468 at paras. 107 and 108), while yet others had been proposed by arbitration experts (reproduced at para. 109 of document A/CN.9/468).

105. At the current session Working Group considered document A/CN.9/WG.II/WP.111, which described the preparatory work in the Secretariat with respect to three of those topics:

(a) court-ordered interim measures of protection in support of arbitration (with a view to preparing uniform rules addressed to courts when they order such measures) (paras.2-29);

(b) the scope of interim measures that may be issued by arbitral tribunals (with a view to preparing an empirically based text that would provide guidance to arbitral tribunals when a party requested an interim measure of protection) (paras. 30-32); and

(c) the validity of the agreement to arbitrate (a study of uniform rules on the interrelationship between the principle according to which "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" (art. 16(1) of the Model Law on Arbitration) and the scope of the court's terms of reference in deciding whether to refer the parties to arbitration when the respondent in the court proceedings invoked an arbitration agreement and the claimant argued that the arbitration agreement was invalid (para. 33).

106. Broad support was expressed for future work on all three topics. It was said that building upon the success of texts such as the UNCITRAL Arbitration Rules, the Model Law on Arbitration and the Notes on Organizing Arbitral Proceedings, the Commission could further enhance the effectiveness of arbitration in international trade. While it was noted that topics (a) and (b) concerned court procedure, an area where harmonization had been traditionally difficult to achieve, it was said that more legal certainty in those areas was desirable for the good functioning of international commercial arbitration. As to topic (b), it was considered that the text to be prepared should analyse arbitration practice and that the analysis would in itself be useful and might lead to a text in the nature of non-binding practice notes. It was noted that in particular the work on topic (b) as well as on the other two topics would have to be founded on broad empirical information and that the Secretariat would contact arbitration organizations and Governments with a view to obtaining such information. The Working Group called on Governments and relevant organizations to provide the necessary information to the Secretariat. While the Working Group heard some indications that topic (a) should be given the highest priority, it took no decision as to the relative priority among the topics, and it requested the Secretariat to prepare for a future session of the Working Group preliminary studies and proposals.

V. Conciliation

A. General remarks

107. The Working Group recalled that, at its previous session, there was recognition of the increasing use of conciliation as a method for settling commercial disputes and that strong support had been expressed for the development of draft provisions on conciliation. The Working Group exchanged views on the proposed provisions for a model legislative provisions as set out in paragraphs 87-112 of document A/CN.9/WG.II/WP.110.

108. It was observed that, in addition to the term "conciliation", other terms were used in practice, such as mediation" and "neutral evaluation". Frequently these terms were used interchangeably without an apparent difference in meaning. In other cases a distinction was made depending on the procedural styles or techniques used. However, even if a particular meaning was attached to a term, the usage was not consistent.

109. The Working Group then agreed with the assessment that, in view of the fact that the linguistic usage was not settled, the term "conciliation" would be used in the draft to indicate a broad notion encompassing various types of procedures in which parties in dispute were assisted by independent and impartial persons to settle a dispute.

110. The Working Group exchanged general views on the form that the provisions should take but agreed to defer a final decision on the issue of form until the substantive provisions had been settled. While there was some support for developing a model law, the prevailing view was that, in the interim, the Working Group would proceed on the assumption that the provisions would take the form of model legislative provisions.

B. Article 1

111. The text of draft article 1, as considered by the Working Group, was as follows:

"Article 1. Scope of application

[Unless otherwise agreed by the parties,] these legislative provisions apply to conciliation in commercial* transactions.

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

(2) A conciliation is international if:

(a) the parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have

their places of business:

(i) the place where meetings with the conciliator are to be held [if determined in, or pursuant to, the agreement to conciliate];

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.

(3) For the purposes of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) if a party does not have a place of business, reference is to be made to the party's habitual residence."

Non-mandatory nature of the draft provisions

112. The Working Group generally agreed to proceed on the basis that the provisions would be non-mandatory and therefore support was expressed for retaining the words "unless otherwise agreed by the parties". However, the question of whether a provision ought to be included to allow the parties to opt out altogether from the model regime was not finally decided. It was, however, noted that the issue of the degree to which individual draft provisions be non-mandatory would need to be considered as work progressed on the substantive provisions (see also below para. 142)

Definition of "commercial"

113. The Working Group discussed the question whether the draft provisions ought to be restricted to commercial disputes.

114. Suggestions were made that distinctions between commercial and non-commercial disputes were difficult to draw and that it was premature to adopt a restriction at that point of the deliberations of the Working Group as much would depend on the substance of the final text of the provisions. Nonetheless there was considerable support for the idea that the Working Group proceed on the assumption that the model provisions apply to commercial transactions only. In that context, the way of expressing that restriction through a footnote as set out in the draft text received wide support.

115. As an alternative to that approach, it was suggested that the current text of the footnote should be modelled on footnote *** to article 1 of the UNCITRAL Model Law on Electronic Commerce (which envisaged the broadest possible application of the Model Law, while providing for specific exclusions) to enable enacting States, should they so choose, to widen the scope of the model legislative provision on conciliation with the option of excluding certain types of transactions from the scope of the model legislative provisions.

116. A further suggestion was made that the term "commercial transactions" used in draft article 1 was too narrow and could depend on the technicalities of national laws. To avoid that narrowness, it was proposed that the term "transactions" be replaced by the term "activities" in line with the terminology used in the UNCITRAL Model Law on Electronic Commerce. However, that proposal was opposed on the basis that the word "transaction" implied that an

agreement was required.

International or international and domestic

117. The Working Group noted that it might facilitate the adoption of the model regime if the provisions were to be restricted to international conciliation. However, the Working Group noted that it would reconsider whether or not the legislative provisions would be useful in the domestic context once the substance of the text was finalized. It was also noted that, regardless of a decision by the Working Group in scope, any State could choose to adopt the provisions in respect of both domestic and international conciliation as some States had done in respect of the Model Law on Arbitration.

118. Whilst there was a suggestion that the definition of "international" be restricted to subparagraph (a) of draft article 1(2), the Working Group adopted the view that it was necessary to have additional criteria to cover a broad range of situations and ensure that the requisite "internationality" may be found in certain cases even if the two disputing parties had a place of business within one State. A further reason for retaining the broader definition of "international" was that the current draft was similar in scope to that used in article 1(3) of the Model Law on Arbitration and that it was important, given that arbitration could follow conciliation, to have a similar definition in the conciliation provisions. In support of the view that the draft should retain flexibility in defining "internationality", a suggestion was made that the Working Group consider including within the scope of the model provisions all situations which had a "foreign element".

119. The Working Group also discussed whether the draft articles should include further provisions defining when the model legislative provisions would apply. In principle, support was expressed for the model regime applying if the conciliation proceedings took place in the State that had enacted the model provisions. However, it was noted that, in some circumstances, there were difficulties in determining the place of conciliation; for example in cases where the participants communicated by electronic means without actually meeting in one State. The place of conciliation was questioned as appropriate criterion where the place was chosen for reasons of convenience rather than because of any link between the dispute or the parties and the place of the conciliation.

120. It was also observed that some draft provisions dealt with effects of conciliations in States other than the enacting State and appeared to deal with effects of conciliations not only in the enacting State but also abroad (for example, draft article 7 on the limitation period and draft article 8 dealing with admissibility of evidence in other proceedings). It was suggested that this should be considered in drafting the provision on the application of the model provisions (see also below, para.134).

C. Article 2

121. The text of draft article 2, as considered by the Working Group, was as follows:

"Article 2. [General provisions] [Conduct of conciliation]

(1) The conciliator or a panel of conciliators assists the parties in an independent and impartial manner in their attempt to agree on a settlement of their dispute.

(2) The parties determine, [by reference to conciliation rules or otherwise], the selection of the conciliator or the panel of conciliators, the manner in which the conciliation is to be conducted and other aspects of the conciliation proceedings.

(3) [Subject to agreement of the parties] [Failing such agreement] the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as it considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, [including any request by a party that the conciliator hear oral statements,] and the need for a speedy settlement of the dispute.

(4) The conciliator shall be guided by principles of objectivity, fairness and justice. [Subject to agreement of the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]

[(5) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]"

122. Suggestions were made for placing paragraph (2) into a separate article with the remainder of the article to be patterned after article 7 of the UNCITRAL Conciliation Rules.

123. During the subsequent discussion, it was suggested (and the Working Group agreed) that the current draft articles 2(2) and 1 should be expanded and transformed into separate provisions which should, following the structure of the UNCITRAL Conciliation Rules, provide for the definition of conciliation, the scope of application of the model provisions, the commencement of conciliation proceedings, the number and selection of conciliators and the role of conciliators, including the principles that should guide the conduct of conciliation.

124. In setting out the elements for the definition of conciliation, it was suggested to take into account the agreement of the parties, the existence of a dispute, the intention of the parties of reaching an amicable settlement and the participation of an impartial and independent third person or persons who assisted the parties in an attempt to reach an amicable settlement. Those elements distinguished conciliation on the one hand from binding arbitration and, on the other hand, from negotiations between the parties or representatives of the parties. According to the wording offered for consideration, conciliation was to be regarded as a process in which a third person, or persons, assisted parties who mutually desired such assistance, to reach a voluntary agreement for amicable settlement of their dispute. While the view was expressed that some forms of conciliation may be without the involvement of a third person, the general view was that such cases would fall outside the scope of the model provisions.

125. It was noted that the text as currently drafted did not provide for any consequences should a conciliator fail to act impartially. It was recognized that in such a case any party was free to terminate the conciliation proceedings. A question was raised, however, whether, in circumstances when the conciliator did not act in an impartial way, that could result in the model legislative provisions not being applicable. While it was generally understood that such conduct of a conciliator would not result in inapplicability of the provisions, such as, for example, the provisions on confidentiality and those on admissibility of evidence in arbitration or judicial proceedings, it was considered necessary to review the text with a view to ensuring that that interpretation would follow from the model provisions.

D. Articles 3-5

126. The text of draft articles 3, 4 and 5 as proposed for consideration by the Working Group was as follows (although it should be noted that draft articles 3 and 4 were not

considered at the current session of the Working Group):

"Article 3. Communication between conciliator and parties

Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.

Article 4. Disclosure of information

[Alternative 1:] **When the conciliator or the panel of conciliators receives information concerning the dispute from a party, it may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.**

[Alternative 2:] **Subject to the agreement of the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information.**

Article 5. Commencement of conciliation

The conciliation proceedings in respect of a particular dispute commence on the date on which a [written] invitation to conciliate that dispute made by one party is accepted [in writing] by the other party."

127. Statements were made in the Working Group that it would be useful to clarify when a conciliation could be taken to have commenced, including, for example, for the purpose of determining its effect on draft article 7 (which dealt with the effect of conciliation on the limitation period) and draft article 8 (which dealt with admissibility of evidence in other proceedings). While the Working Group noted that the functioning of a number of subsequent provisions depended on draft article 5, the discussion on that article was undertaken without prejudice to the decision on the following articles.

128. As a preliminary issue, it was proposed that draft article 5 should apply irrespective of whether the agreement to conciliate was made before or after the dispute arose.

129. A widely held view in the Working Group was that draft article 5 was a useful provision which should be retained and that additional text should be added to reflect the idea that if a party did not receive a reply to an invitation to conciliation then the offer to conciliate was assumed to have ended. It was accepted that the provision should be modelled on article 2(4) of the UNCITRAL Conciliation Rules.

130. It was proposed that the parties, in agreeing to commence a conciliation, might do so on the initiative of a party, in compliance with their own agreement or as a result of a suggestion or order from a court or other competent governmental agency and that draft article 5 should be compatible with those situations and should also be co-ordinated with the substance of draft article 10 ("Resort to arbitral or judicial proceedings") and, in particular, variant 3 of that article. The Working Group requested the Secretariat consider various examples of orders or requests by courts or other agencies for commencement of conciliation proceedings and requested Governments to provide those

examples to the Secretariat.

131. In order not to cast doubt on cases where the agreement to conciliate was made in a way other than in writing, the Working Group generally considered that the express reference to writing in draft article 5 should be deleted. It was, however, observed that, in view of the fact that the commencement of conciliation could produce an effect such as interruption of the running of a limitation period, it would be useful for evidentiary purposes that the commencement of the conciliation be supported by evidence in writing, including forms equivalent to writing.

132. Suggestions were made that draft article 5 be redrafted as a provision that applied unless the parties otherwise agreed and that it remained to be decided whether that principle of freedom of the parties should be expressed in a general way at the start of the draft model provisions or whether this should be provided for specifically in draft article 5.

E. Articles 6 and 7

133. The text of draft articles 6 and 7, as proposed for consideration by the Working Group, was as follows (although it should be noted that article 6 was not discussed at the current session of the Working Group):

"Article 6. Termination of conciliation

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement;

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

Article 7. Limitation period

(1) *[Alternative 1:]* **When the conciliation proceedings commence, the limitation period regarding the claim that is the subject matter of the conciliation ceases to run.** *[Alternative 2:]* **For the purposes of the cessation of the limitation period, the commencement of the conciliation proceedings is deemed to be an act that causes the limitation period to cease to run.**

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period is deemed to have continued to run. If in such a case the limitation period has expired or has less than [six months] to run, the claimant is entitled to a further period of [six months] from the date on which the conciliation proceedings terminated."

134. Questions were raised as to the effects of draft article 7 in States other than enacting States. It was considered that, ideally, the model provisions should produce effects not only in the State where the conciliation took place, but also in other States. It was recognized, however, that the model provisions could and should deal with the cessation of the running of the limitation period in the enacting State as a result of a conciliation initiated in the enacting State or in a foreign State, but that it could not regulate the cessation of a limitation period in a foreign State. It was suggested that the provision might be redrafted so that it would be more likely that a foreign State would recognize the conciliation in the enacting State as triggering the cessation of the running of the limitation period. A suggestion was made that one possible means of achieving that result might be a provision which deemed that the parties had agreed not to rely on the relevant limitation period.

135. Some of the difficulties with achieving universal application for article 7 were cited as a reason for deleting this provision altogether. It was also stated that the question of limitation should be governed by rules other than the model provisions on conciliation. Another reason was that draft article 7 was not indispensable for the protection of the rights of the claimant because draft article 10 expressly provided for the possibility of a party initiating arbitral or judicial proceedings where, "in its opinion, such proceedings were necessary for preserving its rights". A further reason was that the parties were free to agree to the extension of the length of the limitation period and that, therefore, there was no real need for cessation of the limitation period (it was responded, however, that such agreements were not permitted in a number of legal systems). A further reason against retaining the article was that, in practice, parties often initiated court proceedings simply to avoid losing their rights as a result of the expiration of the limitation period and that such practice did not hamper conciliation proceedings. Yet another reason given was that, in view of the complexity of the provision and uncertainty whether it produced the intended result in the relevant jurisdiction, the provision might introduce legal technicalities into what might otherwise be an informal process. It was also remarked that draft article 7 seemed to incorrectly equate, for the purpose of the limitation period, conciliation proceedings with judicial or arbitral proceedings; that comparison was questioned because of the fundamental differences between the purely voluntary nature of conciliation and the mandatory finality that resulted from court or arbitral proceedings. In opposition to draft article 7 it was also argued that it might affect the acceptance of the model provisions as a whole as States might hesitate to adopt a text that dealt with a matter that in many States raised issues of public policy.

136. However, in support of retaining the article it was considered that, from a practical viewpoint, it offered a simple and useful solution for a large number of cases and it enhanced the attractiveness of conciliation by preserving the parties' rights without encouraging them to initiate adversarial proceedings (which involved potentially unnecessary legal expenses). It was also observed that the provision was particularly useful when the limitation period was short, which was typically the case, for example, in claims arising out of transport contracts.

137. After extensive discussion, the Working Group adopted the view that it would be premature to delete the provision before it was fully considered how it could be improved so as to make it widely acceptable. There was no agreement on whether the provision, if retained, should be in the main body of the text or whether it would be presented in a footnote or in a guide to enactment as a suggestion for States that might wish to enact it. In light of those considerations, it was agreed that draft article 7 would be placed in square brackets and appear in the revised draft.

138. On the question of the substance of draft article 7, there was considerable preference expressed for alternative 1 in subparagraph (1). In respect of paragraph (2), it

was noted that there were essentially three ways in which conciliation proceedings might affect the running of the limitation period. One possibility was that after the limitation period was interrupted by the commencement of the conciliation proceedings it would start to run anew. Another possibility was that if the conciliation ended without a settlement, the limitation period would be deemed to have continued to run as of there had been no conciliation (in such a case there would be an additional grace period of [six months] if in the meantime the limitation period had expired or had less than [six months] to run). That approach was reflected in draft article 7(2) before the Working Group and was modelled on article 17 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974). A third option was that, during the conciliation period, the limitation period would not run and would resume running from the time the conciliation ended unsuccessfully. Of the three, that last option (referred to also as the "chess clock" solution or, in some legal systems, as "suspension") received considerable support.

F. Article 8

139. The text of draft article 8 as considered by the Working Group was as follows:

"Article 8. Admissibility of evidence in other proceedings

(1) Unless otherwise agreed by the parties, a party who participated in the conciliation proceedings [or a third party] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or] a possible settlement of the dispute;

(b) Admissions made by a party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

(2) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings].

(3) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible."

140. General support was expressed for the policy underlying draft article 8 which was to facilitate communication between the parties during the conciliation proceeding without fear that, where the conciliation ended unsuccessfully and the parties engaged in litigation or arbitral proceedings, certain information (in particular those listed in paragraphs (a) to (d)) would be used in the judicial or arbitration proceedings. It was recalled that the provision was modelled on article 20 of the UNCITRAL Conciliation Rules. However, it was noted that the draft provision was formulated as a statutory prohibition whereas article 20 established a contractual commitment of the parties not to rely on certain evidence in court or arbitral proceedings.

141. It was generally agreed that the draft provision should be understood in such a way that evidence that was admissible did not become inadmissible by virtue of being used in the conciliation (paragraph 99 of document A/CN.9/WG.II/WP.110). It was suggested that a clarification along those lines should be included in the model provision or in the guide to enactment. Such a clarification might also highlight the fact that the provision did not deal with the general question of admissibility of evidence in arbitral or judicial proceedings.

142. It was agreed that the provision should be subject to party autonomy. However, it was not decided whether that should be provided in a general manner in the model legislative provisions or in the provision itself. It was, however, said that in order to facilitate the use of the uniform regime by practitioners, the technique adopted should be clear (see also above para. 112).

143. The suggestion was made to clarify that the reference to "third party" in paragraph (1) was not meant to refer to a party to the conciliation proceedings but to a person that was not a party to the conciliation proceedings and was in a position to use as evidence views, admissions, proposals and other facts referred to in subparagraphs (a) to (d) of paragraph (1). The words "matters in dispute or" in subparagraph (a) were retained in square brackets pending further considerations as to whether the extension of the scope of the provision produced by those words was proper, not too far-reaching and sufficiently clear. The suggestion was made to delete subparagraphs (b), (c), (d) of paragraph (1), leaving subparagraph (a) which should be reformulated as a general rule so as to simplify the provision. The Working Group did not adopt the suggestion because it preferred the greater specificity and clarity of the current paragraph (1). It was proposed that a reference to an invitation to conciliate or a statement that conciliation had failed should also be included so as to make it clear that neither of those matters could be relied upon or otherwise used.

144. A view was expressed that paragraphs (2) and (3) be deleted because they dealt with the law of evidence in court and arbitral proceedings and that it was not for the law on conciliation to impinge on the law of procedure. However, the Working Group considered that those provisions were necessary because they properly clarified and reinforced paragraph (1) and because the practical significance for the parties of paragraph (1) required an express provision directed to courts and arbitral tribunals. If those provisions were to be retained, it was suggested that they should be qualified by a provision along the lines of "unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings". It was pointed out however that such an exception could swallow the rule. There was broad support expressed for the types of public policy exceptions spelled out in paragraph 100 of document A/CN.9/WG.II/WP.110.

145. It was understood that paragraph (1) covered evidence of facts and other information listed in subparagraphs (a) to (d) irrespective of whether they were in writing or in another form. No decision was taken as to whether that understanding followed sufficiently clearly from the provision, or whether it would be useful to include in the provision a clarification on this point.

146. The Working Group considered the question whether the model provisions should contain a rule establishing a general duty for the conciliator and the parties to keep confidential all matters relating to the conciliation along the lines of article 14 of the UNCITRAL Conciliation Rules. There was no support for including such a provision. The reasons given included: the rule would have to set forth a number of exceptions, which would complicate its drafting; a statutory duty of that kind would introduce liability for the violation of the duty, which would raise a number of policy issues that were difficult to solve in the model provisions; and the provision was not needed because the parties could agree on the duty of confidentiality when, and to the extent, they so wished, such as by agreeing to conciliate under the UNCITRAL Conciliation Rules.

G. Article 9

147. The text of draft article 9 as considered by the Working Group was as follows:

"Article 9. Role of conciliator in other proceedings

(a) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

(b) Testimony of the conciliator regarding the facts referred to in article 7(1) shall not be admissible in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

(c) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract or another contract forming part of a single commercial transaction."

148. As a matter of drafting, it was suggested that letters (a), (b) and (c) be replaced by numbers (1), (2) and (3) in order to ensure consistency with the general structure of the document. It was also noted that reference in subparagraph (b) to "article 7(1)" should be correctly read "article 8(1)".

149. A suggestion was made that the words "unless otherwise agreed by the parties" should be deleted so that the provision would in no case allow a conciliator to act as a representative or counsel of a party or, alternatively, that the model provisions should not deal with cases where the conciliator acted as a representative or counsel of a party. A related proposal was that the possibility of the conciliator acting as an arbitrator should not be left solely to party autonomy because this could impair the integrity of the arbitration process and create problems in the enforcement of the award. However, the Working Group considered that the approach taken by the current wording of paragraph (1), which made the provision subject to party autonomy, was appropriate. It was considered that the parties should retain full control in relation to this issue. As to the appointment of the conciliator as arbitrator, it was understood that, by agreeing to the conciliator serving as arbitrator, the parties would have waived any objections arising therefrom.

150. It was suggested that the words "a dispute that <u>is</u> the subject of the conciliation proceedings" in subparagraph (a) be replaced with the words "a dispute that <u>was or is</u> the subject of conciliation proceedings" in order to align it with subparagraph (b).

151. A view was expressed that the rule set forth in subparagraph (a) should be extended to conciliators acting as judges. It was noted that in some jurisdictions the issue would not be subject to party autonomy. The prevailing view was that such an issue did not fall within the scope of the uniform regime and that it should be left entirely to other laws of the enacting country.

152. A view was expressed that the scope of the prohibition provided in subparagraph (b) would be too narrow, in that, for example, it did not include testimony by a conciliator that a party acted in bad faith during the conciliation and that therefore the scope of the prohibition in subparagraph (b) should be broadened. The Working Group decided to reconsider this issue at a future session.

153. In respect of subparagraph (c), it was widely felt that the phrase "another contract forming part of a single commercial transaction" needed clarification as to the type of contracts

which would fall within its scope. Accordingly, the Working Group requested the Secretariat to revise the provision.

H. Article 10

154. The text of draft article 10 as considered by the Working Group was as follows:

"Article 10. Resort to arbitral or judicial proceedings

[Variant 1] **The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.**

[Variant 2] **The parties may agree not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings if in its opinion such proceedings are necessary for preserving its rights [and if the party notifies the other party of its intention to commence the proceedings]. The initiation of such proceedings by the party is not in itself regarded as the termination of the conciliation proceedings.**

[Variant 3] **To the extent that the parties have expressly undertaken not to initiate [during a certain time or until conciliation proceedings have been carried out] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal until the agreed time has expired or the conciliation proceedings are in progress."**

155. It was pointed out that draft article 10 was intended to convey the idea that parties should be prevented from initiating an arbitral or a judicial proceeding while conciliation was pending and that the various drafts represented alternative ways of expressing that idea.

156. A suggestion was made that draft article 10 be redrafted so as to reflect the following elements: an obligation on the parties not to initiate court or arbitral proceedings; the effect given to that obligation by a court or the arbitral tribunal; initiation of court or arbitral proceedings merely to preserve rights; initiation of such proceedings not, of itself, being regarded as termination of the conciliation proceedings.

157. Least favoured by the Working Group was variant 2 because it was limited only to recognising the parties' right to agree not to initiate arbitral or judicial proceedings and because it did not provide a solution in the absence of an agreement by the parties. Variants 1 or 3, or possibly a combination of the two, were favoured because they offered a straightforward solution and it was decided that they provided the best basis for further discussions.

158. It was suggested that, in redrafting draft article 10, consideration should be given to the question whether the provision should also deal with whether a party was, despite the existence of an agreement to conciliate, free to approach an appointing authority with a view to establishing an arbitral tribunal.

I. Articles 11 and 12

159. The text of draft articles 11 and 12 as proposed for consideration by the Working Group was as follows (although it should be noted that draft articles 11 and 12 were not discussed at

the current session of the Working Group due to time constraints and would be considered at the next Working Group session):

"Article 11. Arbitrator acting as conciliator

It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.

Article 12. Enforceability of settlement

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable *[the enacting State inserts provisions specifying provisions for the enforceability of such agreements].*"