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Report of the Working Group on Arbitration on the work of its thirty-fourth session (New York, 21 May – 1 June 2001)

Contents

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I. Introduction

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

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

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

evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[3]

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 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958, also referred to in this report as "the New York Convention").[4]

5. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be requirement of written form for the arbitration agreement,[5] enforceability of interim measures of protection,[6] conciliation,[7] and possible enforceability of an award that had been set aside in the State of origin.[8]

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

7. The Commission, at its thirty-third session, in 2000, commended the work accomplished so far by the Working Group and heard various observations according to which 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 (see 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 (see A/55/17, para. 395). Several statements were made to the effect that, generally, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in 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 1958 New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention; and the power by the arbitral tribunal to award interest. It was noted with approval that, with respect to “on-line” arbitrations (i.e., arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication), the

Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin, a view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend (see A/55/17, para. 396).

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

9. With respect to the writing requirement, the Working Group considered a draft model legislative provision revising article 7 (2) of the Model Law (see A/CN.9/WG.II/WP.110, paras. 15-26) as well as a further draft prepared during the session (see A/CN.9/485, para. 52). The Secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the thirty-fourth session, based on the discussion in the Working Group. As to the preliminary draft of an interpretative instrument on article II(2) of the New York Convention (see A/CN.9/WG.II/WP.110, paras. 27-51 and A/CN.9/485, para. 61), the Working Group requested the Secretariat to prepare a revised draft taking into account the discussion in the Working Group (see A/CN.9/485, paras. 60-77). With respect to interim measures of protection, the Working Group had before it two draft variants prepared by the Secretariat (see A/CN.9/WG.II/WP.110, paras. 55 and 57; and A/CN.9/485, para. 79). Due to time constraints, the Working Group postponed to its thirty-fourth session, paragraph (iv) in variant 1 and possible additional provisions (for discussion, see A/CN.9/485, paras. 78 to 103). With respect to conciliation, the Working Group considered articles 1, 2, 5, 7, 8, 9 and 10 of the draft model legislative provisions (see A/CN.9/WG.II/WP.110, paras 81-111). It requested the Secretariat to prepare revised drafts of these articles, taking account of the views expressed in the Working Group (see A/CN.9/485, paras. 107-159). The remainder of the draft articles (3, 4, 6, 11 and 12) were not considered due to lack of time.

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

11. The Working Group on Arbitration, at its thirty-fourth session (New York, 21 May - 1 June 2001) was composed of all States members of the Commission. The session was attended by the following States members of the Working Group: Algeria, Australia, Austria, Brazil, Bulgaria, Burkina Faso, Cameroon, China, Colombia, Egypt, Fiji, Finland, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Nigeria, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, and United States of America.

12. The session was attended by observers from the following States: Belarus, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Ecuador, Ethiopia, Gabon, Guatemala, Indonesia, Israel, Kuwait, Lesotho, Malta, Monaco, Peru, Philippines, Republic of Korea, Saudi Arabia, Slovenia, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia and Venezuela.

13. The session was attended by observers from the following international organizations: NAFTA Article 2022 Advisory Committee, Permanent Court of Arbitration, International Institute for the Unification of Private Law (Unidroit), League of Arab States, Cairo Regional Centre for International Commercial Arbitration, *Centre d'arbitrage et d'expertise du Rwanda*, *Comité Maritime International*, European Law Students' Association (ELSA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), and The Chartered Institute of Arbitrators.

14. The Working Group elected the following officers:

Chairman:
Mr. José María **Abascal Zamora** (Mexico);

Rapporteur:
Mr. Hossein **Ghazizadeh** (Islamic Republic of Iran).

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

(a) Provisional agenda (A/CN.9/WG.II/WP.112);

(b) Report of the Secretary-General entitled "Settlement of commercial disputes: Preparation of uniform provisions on: written form for arbitration agreement, interim measures of protection, and conciliation" (A/CN.9/WG.II/WP.113 and Add.1).

16. 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.

II. Deliberations and decisions

17. The Working Group discussed agenda item 3 on the basis of the documents prepared by the Secretariat (A/CN.9/WG.II/WP.113 and Add.1). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapters III to V below. The Secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for continuation of the discussion at a later stage.

18. 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 (see A/CN.9/WG.II/WP.113, para. 13-14). The Secretariat

was requested to prepare a revised draft provision, based on the discussion in the Working Group, for consideration at a future session. The Working Group also discussed a draft interpretative instrument regarding article II (2) of the New York Convention (ibid., para. 16) and requested the Secretariat to prepare a revised draft of the instrument, taking into account the discussion in the Working Group, for consideration at a future session.

19. With regard to the issues of interim measures of protection, the Working Group considered a draft text for a revision of article 17 of the Model Law and the text of paragraph (1) (a) (i) of a draft new article prepared by the Secretariat for addition to the Model Law (ibid., para. 18). The Secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. Due to lack of time, the remainder of the additional article was not considered by the Working Group.

20. With regard to conciliation, the Working Group considered articles 1 to16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). The Secretariat was requested to prepare revised drafts of those articles, based on the discussion in the Working Group, for consideration at its next session.

21. It was noted that, subject to a decision to be made by the Commission at its forthcoming session, the thirty-fifth session of the Working Group was scheduled to be held from 19 to 30 November 2001 at Vienna.

III. Requirement of written form for the arbitration agreement

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

22. The Working Group based its deliberations on the draft text prepared by the Secretariat pursuant to the request made by the Working Group at its thirty-third session (A/CN.9/485, para. 59). That text read as follows (A/CN.9/WG.II/WP.113, para. 14):

“Article 7. Definition and form of arbitration agreement

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

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

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

if the

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

in writing,

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

Paragraph (1)

23. There was general agreement as to the form and substance of paragraph (1), which merely replicated article 7(1) of the Model Law.

Paragraph (2)

24. While there was general agreement as to the substance of the provision, the discussion focused on the appropriateness of maintaining the words between square brackets ("for the avoidance of doubt") and the final words ("including electronic, optical or other data messages").

"[for the avoidance of doubt]"

25. The view was expressed that those words were essential to make it clear that the substantial rule embodied in paragraph (2) was not intended to alter any liberal interpretation that might be given readily, through case law or otherwise, to the notion of "writing" under either the Model Law or the New York Convention. It was stated that clarification as to the preservation of existing interpretations of the notion of "writing" was particularly important for those countries that would not adopt the revised version of article 7 of the Model Law, or during the transitional period before the enactment of that revised provision. In response, it was pointed out that a formulation along the lines of "for the avoidance of doubt" was familiar to some legal systems but foreign to legal drafting traditions in many countries. In those countries, such wording might create difficult problems of interpretation as to the nature of the doubt to be avoided. A suggestion was made that the words between square brackets might be replaced by wording along the lines of "without limiting the generality of this requirement". It was widely felt, however, that such wording would equally be faced with the above-mentioned objection.

26. The prevailing view was that appropriate explanations should be given in the guide to enactment as to the intent that lay behind paragraph (2) not to conflict with existing interpretations given to the notion of "writing". It was also felt that the inclusion of such explanatory wording might be reconsidered in the context of paragraph (3) and of the interpretative instrument regarding article II (2) of the New York Convention. Subject to those considerations, the Working Group decided that the words "[for the avoidance of doubt]" should be deleted from paragraph (2).

“including electronic, optical or other data message”

27. Various concerns were expressed regarding the reference to “electronic, optical or other data messages”. One concern was that any such list introduced by the word “including” might raise difficult issues of interpretation as to whether the listing was intended to be exhaustive or merely descriptive and open-ended. Should it be read as an exhaustive list, it might unduly limit the generality of the rule embodied in paragraph (2). Another concern was that, while the reference to “electronic, optical or other data messages” was clearly inspired by article 2 (a) of the UNCITRAL Model Law on Electronic Commerce, it deviated slightly from the formulation of that provision and might thus create difficulties of interpretation. Yet another concern was that notions such as “electronic” and “optical” means of communication might run the risk of becoming rapidly obsolete, thus raising the same difficulties as references to “telegram and telex” in existing international instruments, or to “letters or telegrams” in article II (2) of the New York Convention. In response to that concern, it was explained that the high level of generality of notions such as “electronic or optical messages” made it difficult to foresee rapid technological development that would make such notions obsolete.

28. With a view to alleviating some of the other concerns that had been expressed, while maintaining explicit reference to electronic commerce techniques, it was suggested that wording such as “inter alia”, “including but not limited to” or “such as, for example” should be added to make it abundantly clear that the list was merely illustrative and served an educational purpose. It was also suggested that any such change should take into account the use of the word “includes” earlier in paragraph (2) which was likewise intended to be non-exclusive. After discussion, the Working Group adopted those suggestions and requested the Secretariat to prepare appropriate wording.

Paragraph (3)

29. The Working Group recalled that paragraph (3) was based on the widely prevailing view expressed at the thirty-third session of the Working Group that the model legislative provision should recognize the existence of various contract practices by 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 (see A/CN.9/485, para. 40).

30. In reviewing the draft, there was general agreement expressed in the Working Group that an oral reference to a written arbitration clause expressing an agreement to arbitrate should be regarded as meeting the written form requirement. Differing views, however, were expressed regarding whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules would satisfy the written form requirement. One view expressed was that this should not be taken as satisfying the form requirement. The reason for this view was that the written text referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration. According to that view, the procedures for carrying out the arbitration should be distinguished from the parties’ agreement to arbitrate. It was also considered that that solution would have the effect of discriminating against arbitrations where the parties had agreed to arbitrate but had not agreed on a set of arbitration rules or on specific terms and conditions for the

arbitration. For that reason, it was suggested that the writing requirement was only met if the arbitration clause, whether signed or not, was in writing. The prevailing view, however, was that, in an oral agreement to arbitrate, a reference to arbitration terms and conditions or to a standard set of arbitration rules should be taken as satisfying the written form requirement because it expressed in a sufficiently specific way how the arbitration was to be conducted. It was also considered that that approach would not discriminate against cases where the parties had agreed to arbitrate, without agreeing on a set of arbitration rules, if the law applicable to the arbitration procedure (such as a law based on the UNCITRAL Model Law on International Commercial Arbitration) contained sufficiently specific procedures for carrying out the arbitration. The contrary view was that it was not sufficient if arbitration terms and conditions were in writing, but it was preferable to require the agreement to arbitrate to be in writing. In accordance with that view, it was suggested to adopt the words "[the arbitration clause, whether signed or not]". It was stated in reply that, in the case of contracts, to the extent that they were required to be in writing, the interpretation of when that requirement was met was interpreted in such a way that an oral agreement that standard written agreements applied was taken as meeting the form requirement. However, the widely prevailing view was that it was sufficient if the arbitration terms and conditions were in writing, irrespective of whether the arbitration clause was in writing. Consequently, the words "[arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are]" were to be preferred to "[the arbitration clause, whether signed or not, is]".

31. Noting the prevailing view that oral agreements to arbitrate that could be linked to written terms and conditions for arbitration (even if those terms and conditions did not actually express the agreement to arbitrate) should be regarded as satisfying the form requirement, it was pointed out that it would be more appropriate to expressly state that oral agreements satisfied the form requirement or that an agreement to arbitrate might be concluded under form requirements that might, or might not, rely on the use of a written document. In opposition to that opinion, it was stated that it was still preferable to declare oral agreements referring to written terms and conditions for arbitration as written agreements because article II of the New York Convention required the arbitration agreement to be in writing and because it was necessary to reflect that the wording was included to confirm existing interpretations of the writing requirement under that article rather than to create a new legal regime. For that very reason, it was also necessary to retain the phrase "for the avoidance of doubt"; that phrase was necessary in order to clarify that liberal interpretations of the written form requirement were within the meaning of the notion of "writing" as expressed in article II of the New York Convention. On that basis, the phrase "[For the avoidance of doubt, the writing requirement in paragraph (2) is met]" was to be preferred to "[The arbitration agreement is in writing]".

32. Views were expressed that paragraph (3) created a legal fiction by declaring what was effectively an oral agreement as meeting the writing requirement. It was pointed out that the effect of such a provision was far-reaching and its consequences needed to be carefully considered. It was noted that creating such a fiction was an unorthodox drafting technique which might make it more difficult to convince legislative bodies that they should enact the new provision. It was pointed out that some courts might require that the existence of an oral agreement to arbitrate had to

be proved, which might lead to increased uncertainty. With a view to alleviating some of the concerns that might stem from the creation of the above-mentioned legal fiction, it was widely felt that the wording of paragraph (3) should be as descriptive as possible. Accordingly, the words set out in variant 1 were preferred (namely "notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing"). It was considered that the use of these words would counter the criticism that the draft was not sufficiently transparent. The Working Group, after discussion, adopted the text of variant 1.

Additional paragraphs for inclusion in a revision of article 7

33. Having completed its deliberations regarding paragraphs (1) to (3), the Working Group discussed whether paragraphs (4) to (7) of the "long version" considered at the end of its thirty-third session (reproduced in A/CN.9/485, para. 52) should be added to the revised text of article 7. The text of those paragraphs read as follows:

> **"(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].***"**

Paragraph (4)

34. The view was expressed that the substance of paragraph (4) did not, in fact, deal with the question of whether the arbitration agreement met the writing requirement under paragraph (1), but with the existence and validity of an arbitration agreement formed by way of a statement of claim and defence in which the existence of an agreement was alleged by one party and not denied by the other. Under that view, the substance of paragraph (4) should be placed elsewhere in the Model Law.

35. Doubts were expressed as to the usefulness of the rule contained in paragraph (4), in view of the infrequent occurrence of situations where questions about the existence of the arbitration agreement were not raised prior to the exchange of statements of claim and defence.

36. It was widely felt, however, that the substance of paragraph (4) was useful, that it was contained in the current text of article 7(2) of the Model Law, that its

deletion might result in uncertainty, and that it should also appear in the revised text. After discussion, the Working Group adopted the text of paragraph (4) unchanged.

Paragraph (5)

37. It was widely felt that the substance of paragraph (5) was useful, particularly in the context of electronic commerce, which relied heavily on the notion of incorporation by reference. It was recalled that the origin of paragraph (5) was in the current text of article 7(2) of the Model Law, and that it should also appear in the revised text. After discussion, the Working Group adopted the text of paragraph (5). As a matter of drafting, the Secretariat was requested to ensure full consistency between the text of paragraphs (3) and (5).

Paragraph (6)

38. Consistent with the views expressed in the context of the discussion regarding paragraph (3), concerns were raised as to the notion of "arbitration terms and conditions". In view of the decision made by the Working Group as to paragraph (3), it was agreed, however, that the text of paragraph (6), should it be retained, should be consistent with that of paragraph (3).

39. The discussion focused on whether the substance of paragraph (6) should appear in article 7 or whether it should be included in a possible revision of article 35 of the Model Law. The view was expressed that the requirement contained in article 35 (2) that "the original arbitration agreement referred to in article 7 or a duly certified copy thereof" should be supplied by the party applying for the enforcement of an award was inconsistent with the definition of "writing" considered by the Working Group. It was recalled that the Working Group, by adopting a definition of "writing" that encompassed an oral agreement, had made the notions of "original" and "copy" of that agreement irrelevant in practice. Examples were given of countries where the arbitration law had done away with that requirement of article 35.

40. While the proposal to amend article 35 was met with considerable interest and received support from a number of delegations, the prevailing view was that it would be premature for the Working Group to make a decision that the substance of paragraph 6 should be included in article 7, or rather should be included in an amendment to article 35. The Secretariat was requested to study the implications of the proposed revision of article 35 for continuation of the discussion by the Working Group at a future session. Pending that discussion, it was decided that the text of paragraph (6) should be placed within square brackets.

Paragraph (7)

41. The view was expressed that paragraph (7) played a useful role and should be retained for educational purposes. The prevailing view, however, was that providing in the text of the Model Law examples of circumstances[9] where the writing requirement was met would be unnecessarily cumbersome and potentially dangerous, as it might create difficulties in interpreting whether the list of examples should be treated as exhaustive or illustrative. After discussion, the Working Group decided that paragraph (7) should not appear in the text of article 7 but that its contents might be taken into consideration when preparing the guide to enactment or any explanatory material that might accompany the model legislative provision.

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

42. The Working Group proceeded to consider a preliminary draft interpretative instrument relating to article II(2) of the New York Convention, as contained in paragraph 61 of document A/CN.9/WG.II/WP.113. The draft text discussed by the Working Group read as follows:

"[Declaration] regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,

"*The United Nations Commission on International Trade Law*,

"[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

"[2] *Conscious* of the fact that the Commission includes the principal economic and legal systems of the world, and developed and developing countries,

"[3] *Recalling* resolution 55/151 of the General Assembly of 12 December 2000 reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to co-ordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Noting* that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, [and that those technologies in international commerce have developed along with the development of electronic commerce],

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

"[8] *Noting further* article II(1) of the Convention, according to which 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a

subject matter capable of settlement by arbitration', and article II(2) of the Convention, according to which 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams',

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

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

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

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

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

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

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

General comments

43. The Working Group focused initially on the feasibility of an interpretative instrument as compared to an amendment of the New York Convention. Under one view, it was not appropriate to use such an instrument to declare that article II(2) of the Convention should be interpreted as having the meaning of article 7 of the Model Law in the wording being prepared by the Working Group. It was stated that the draft legislative provisions being considered by the Working Group differed significantly from article II(2) in that, for example, under the draft legislative provision an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II(2) of the New York Convention, as interpreted in some legal systems, it would not be so regarded. Support was expressed for the position that the only appropriate way to achieve the goal of uniformity was to amend the Convention itself. The prevailing view, however, was

that the Working Group should reconfirm its earlier decision that the New York Convention should not be amended (see A/CN.9/485, para. 60). It was stated that it was appropriate to use a declaratory instrument to recommend a uniform interpretation of article II(2) of the New York Convention in view of the fact that in some States a liberal interpretation of article II(2) was accepted whereas in other States a more narrow interpretation was still prevalent. The purpose of the declaration was to extend to all States the liberal interpretation, and the interpretative declaration was regarded as the most appropriate vehicle for achieving that purpose without amending the Convention.

Title of declaration

44. The substance of the title was found to be acceptable. The Secretariat was requested to review its drafting to avoid the unintended meaning that the date referred to the declaration rather than to the Convention. It was agreed that the square brackets should be removed from the word “declaration”.

Recital 1

45. The Working Group approved the substance of recital 1.

Recital 2

46. The Working Group approved the substance of recital 2.

Recital 3

47. The Working Group adopted recital 3, subject to indicating that the General Assembly had repeatedly confirmed the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law.

Recital 4

48. The Working Group approved the substance of recital 4.

Recital 5

49. The Working Group adopted recital 5, subject to replacing the word “essential” with the word “significant”.

Recital 6

50. The view was expressed that recital 6 should not refer to changes in business practices because it was not certain that those practices had in fact changed after the conclusion of the New York Convention. A further view was that the references to changes in practices and technologies in recital 6 might be understood as calling for a change to article II(2), which the Working Group had already decided against. On that basis, the Working Group decided to delete recital 6, noting, however, that developments in communication technologies should still be referred to elsewhere in the preambular statements.

Recital 7

51. It was considered that this recital should be deleted on the basis that it could be understood as calling for a change to article II(2). It was recalled that the purpose of the declaration was not to change the Convention but to provide a uniform interpretation of its article II(2). In opposition, recalling the view already expressed that, on the basis of a plain reading, article II(2) of the Convention could not be given the meaning of the draft legislative provision being considered by the Working Group (see above, para. 43), it was stated that the paragraph was necessary to explain the action being contemplated by the Working Group.

52. After discussion, the Working Group reaffirmed the view taken earlier that the purpose of the draft declaration was not to change article II(2) of the New York Convention but rather to promote its uniform interpretation; because recital 7 was not necessary to support that position it was decided that it should be deleted.

Recitals 8 and 9

53. While it was noted that recital 8 merely cited article II, paragraphs (1) and (2), it was considered that the citation was not helpful because it did not show the slight differences that existed among the different language versions, which were partly the reason for the differences in interpretations of the phrase “agreement in writing”. It was decided, instead, that a recital should state that differing interpretations in part resulted from differences of expression among the authentic texts of the Convention. It was noted that, for example, the English version of article II(2) (by using the term “include”) indicated that the provision did not exhaustively define the requirements of an arbitration agreement but rather allowed other more liberal ways of meeting the form requirement. By contrast, some other language versions used expressions that indicated that the provision exhaustively enumerated the requirements necessary for a valid arbitration agreement. Moreover, some courts had adopted a construction of article II(2) of the New York Convention according to which the expression “an arbitral clause in a contract” should be read independently from the expression “arbitration agreements, signed by the parties or contained in an exchange of letters or telegrams”. By separating the provision into those two limbs, the courts were able to give the requirements of article II(2) a broad and liberal meaning by recognizing as valid arbitration clauses contained in contracts that were neither signed by both parties nor contained in an exchange of letters or telegrams. Other courts however had taken the position that the requirement “signed by the parties or contained in an exchange of letters or telegrams” applied to both an arbitration clause in a contract and a separate arbitration agreement.

Recital 10

54. The Working Group approved the substance of recital 10.

Recital 11

55. It was decided that recital 11 should be deleted because it implied that the instrument sought to change the interpretation of article II(2).

Recital 12

56. It was suggested that the provision should be deleted because, as had already been argued, the declaration was said to be proposing a change to article II(2) rather than simply promoting its uniform interpretation (see above, para. 43), and that therefore the recital should not be termed as promoting uniformity of interpretation. However, the Working Group, noting its decision that the purpose of the instrument was to promote uniformity rather than to change the Convention, decided to retain the substance of recital 12.

57. It was decided, however, that the words "and the observance of good faith" should be deleted because those words were not relevant to the purpose of the declaration.

Recital 13

58. The substance of recital 13 was retained subject to the deletion of the words "reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect evolving methods of communication and business practices".

Recital 14

59. The Working Group agreed to retain recital 14, subject to replacing the word "predictability" with "certainty".

Operative provision (paragraph 15)

60. There was general agreement to delete the words "to Governments" because judges and arbitrators, and not necessarily national Governments, would be called upon to take the declaration into account. One suggestion was to replace the word "Recommends" with the word "Declares", which would align the operative paragraph with the title of the declaration. That suggestion received support but was opposed by some on the basis that it was considered to be too prescriptive and might be understood as an attempt to impact directly upon the national enactments of the Convention or state categorically what its interpretation should be. In that context, a doubt was expressed as to whether UNCITRAL, as opposed to the Conference of the States Parties to the New York Convention, could regard itself as entitled to provide an authoritative interpretation of that instrument. It was stated in response that the exercise was in accordance with the law of treaties and consistent with the general mandate of UNCITRAL as the core legal body within the United Nations system in the field of international trade law. The point was not discussed further at the current session.

61. As to the text of the operative provision, a view shared by a number of delegations was that it was necessary to avoid any implication that the declaration was seeking to impose a new interpretation of the New York Convention or that it was declaring what the meaning of the provision as incorporated into national laws was. A contrary view was that, to the extent that the declaration was intended to promote an interpretation of article II(2) of the New York Convention in line with the revised draft article 7 of the Model Law, it would be regarded in a number of countries as bringing forward an innovative or revolutionary interpretation of the form requirement under article II(2) of the New York Convention. While no

consensus was achieved on that point, there was general agreement within the Working Group that the effect of the declaration would not be binding on the Governments, national judiciaries or arbitrators to whom it was addressed. It was acknowledged that the text merely reflected a considered conviction or view of the Commission, which was suggested for consideration by persons engaged in interpreting article II(2), in particular judges and arbitrators.

62. The Working Group did not make a final decision as to the appropriate words to be used in the operative provision of the declaration. The Secretariat was requested to prepare wording, with possible variants taking into account the various views expressed, for continuation of the discussion at a future session.

63. Following discussion of the text and informal discussions, the Working Group adopted the following text of the draft declaration:

"Declaration 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 comprises the principal economic and legal systems of the world, and developed and developing countries,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

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

"[7] *Concerned about* differing interpretations of article II(2) of the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Desirous of* promoting uniform interpretation of the Convention in the light of the development of new communication technologies and of electronic commerce,

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

"[10] *Considering* that in interpreting the Convention regard is to be had to its international origin and to the need to promote uniformity in its application,

"[11] *Taking into account* subsequent international legal instruments, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce,

"[12] […] *[the operative paragraph to be prepared by the Secretariat as indicated above in paragraph 62]***".**

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

64. The Working Group proceeded to consider draft article 17 of the Model Law, which contained a definition of interim measures of protection and additional provisions on *ex parte* interim measures. The text considered by the Working Group was as follows:

"Draft article 17
Power of arbitral tribunal to order interim measures

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

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

Paragraph (1)

65. According to one view, paragraph (1) was satisfactory in that it allowed the arbitral tribunal a broad scope for the issuance of different types of interim measures of protection as might be considered necessary by the arbitral tribunal. In the light of that view, it was argued that the text should be left unchanged and that perhaps the guide to enactment should explain the scope of the provision. It was noted in that connection that the Working Group had decided to prepare a non-legislative empirically based text that would provide guidance to arbitral tribunals in a situation when a party requested that an interim measure of protection be issued (see A/CN.9/WG.II/WP.111, paras. 30-32, and A/CN.9/485, paras. 104-106). Another view, however, was that the expression "in respect of the subject matter of the dispute" narrowed the scope of the interim measures that the arbitral tribunal might issue. Since the paragraph established the power of the arbitral tribunal to issue interim measures, it was necessary to consider how that power should be most appropriately expressed in the paragraph. If necessary, the wording should be amended to clarify the scope of that power.

66. In the context of the discussion relating to the power to issue interim measures of protection, it was suggested to draft language that would address the conditions or the criteria for the issuance of those measures. It was also suggested that the draft provision should set out in a generic way the types of interim measures of protection that were intended to be covered. Those additions (which would enhance the certainty as to the power of the arbitral tribunal to issue interim measures of protection) were thought to be desirable because they would also enhance the acceptability of the provision establishing an obligation on courts to enforce those measures. The opposing view was that those additions were unnecessary and even counter-productive since paragraph (1) allowed a broad scope for the issuance of interim measures and providing additional detail would undesirably limit the discretion of the arbitral tribunal, invite argument and hamper the development of arbitration practice. If any explanatory detail was considered necessary, a guide to enactment was the proper place for such detail.

67. Another view taken was that the appropriate place for including the criteria on which, and the circumstances required, to allow an order for interim measures was within the model legislative provision itself. After discussion, it was agreed that the Secretariat should seek to establish the terms, conditions and circumstances in which an arbitral tribunal could or should issue interim measures of protection. This could be drafted as a new paragraph (3), which could be considered at future sessions of the Working Group. It was pointed out that this list should be illustrative rather than exhaustive. However, it was noted by several delegations that even a non-exhaustive list ran the risk of being read in such a way as to be limiting and that it also could impede the autonomy of arbitral tribunals in determining the type of interim measures to order. It was suggested that, to avoid this risk, the draft should avoid the use of any detailed list and instead aim for listing general categories following the approach taken in other international instruments, such as the Conventions on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels, 1968, and Lugano, 1988). The point was made that the model legislative provisions should include a provision requiring that the party seeking the interim measure provide appropriate security for enforcement of the measure.

68. After discussion, the Working Group did not reach a firm conclusion and requested the Secretariat to prepare alternative texts for consideration at a future session of the Working Group. Any drafting to be prepared should take care not to interfere with the autonomy of the arbitral tribunal and also to leave broad scope for the autonomy of the parties. It was stressed that the requirement for appropriate security to be given by the party seeking interim measures was crucial for the acceptability of the provision. The Secretariat was requested to review national enactments of article 17 that might be helpful in future considerations of the provision.

Paragraph (2)

69. In respect of the text allowing an arbitral tribunal to make a temporary interim measure of protection on an *ex parte* basis (i.e., without notice to the party against whom the measure was directed), broad support was expressed as a matter of principle. While the element of surprise inherent in *ex parte* measures of protection was described as being more in line with the nature of court proceedings than with the philosophy and the practice of arbitration, it was pointed out that the words "unless otherwise agreed by the parties" in paragraph (1) took care of the situation where the parties would decide to rule out the possibility that such provisional measures would be granted. Subject to such a determination by the parties, the aim of the model legislative provisions should be to allow as much parity as possible between the powers of the arbitral tribunal and those of the court that might be called upon to rule on the same dispute.

70. However, serious concerns were raised as to whether it was appropriate to include a provision allowing *ex parte* measures at all in the model legislative provisions. These concerns focused on the fact that such a measure had far-reaching consequences for the party against whom it was made and yet the order could be made quickly, without a review of the merits of the case. In addition, it was considered that *ex parte* orders were completely novel and thus untested, and presented real dangers for commercial users and had the potential to impact negatively on third parties. Support was expressed in favour of eliminating any reference to *ex parte* measures of protection in the model legislative provision. It was pointed out that the situation of a court of justice was different from that of an arbitral tribunal as far as enforcement of interim measures abroad was concerned. While the application of the model legislative provisions under consideration (or even of the New York Convention) might result in an obligation to enforce foreign measures of protection awarded by the arbitral tribunal, that obligation did not exist to the same extent in respect of interim measures ordered by a foreign court. The Working Group was urged to exercise extreme caution in extending the enforceability of such measures.

71. After discussion, it was generally felt that the acceptability of an express recognition of *ex parte* measures of protection would largely depend on the safeguards that might be introduced with respect to both the granting and the enforcement of such measures in article 17 and in the proposed new article.

72. A strong view was expressed that, given the *ex parte* nature of the order and the potentially serious negative impact on the party against whom such a measure was taken, it was important to include certain safeguards in the provision. Such safeguards might include the requirement that the party seeking such a measure

should provide appropriate financial security to avoid frivolous claims and that such an order should only be made in exceptional or urgent circumstances. It was suggested, in addition, that the party seeking such an order should be obliged to provide a full and frank disclosure of all relevant information, including information that might be taken as an argument against the issuance of the interim measure. A drafting suggestion was made to replace the words "The arbitral tribunal may, in order to ensure that any such measure is effective, grant" by such words as "The arbitral tribunal may, where it is necessary to ensure that any such measure is effective, grant" in order to better reflect that *ex parte* measures were the exception rather than the rule. There was some discussion as to whether the 30-day period for the application of interim measures was appropriate or whether the time period should be left to national legislatures.

73. Further suggestions were made as to how the issue of the enforcement of *ex parte* measures of protection should be dealt with. One suggestion was that the matter should be dealt with in paragraph (4) of the suggested new article, which should be redrafted along the following lines:

> "(4) Paragraph (1)(a)(iii) does not apply to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked, provided that such interim measure is confirmed by the arbitral tribunal after the other party has been given notice of the making of the order and an opportunity to contest the continuation of the order."

74. Another suggestion was that a provision be prepared based on the following reasoning:

> "In cases in which an arbitral tribunal grants a temporary protective measure *ex parte*, the party granted the measure may seek court enforcement either *inter partes* or *ex parte*. When enforcement is sought *ex parte*, the court shall have discretion to determine whether the circumstances are sufficiently urgent to justify its acting *ex parte*. If the court decides that acting *ex parte* is justified in the circumstances, it shall decide the issue of enforcement applying the same standards as apply to enforcement of measures granted by an arbitral tribunal *inter partes*. If the court enforces the measure, the enforcement order shall be served on the other party, and the arbitral tribunal shall be required to conduct an *inter partes* proceeding to determine whether the temporary measure shall be terminated or continued. If, after receiving the views of both sides, the arbitral tribunal decides that the temporary measure shall be continued, any request for court enforcement shall be handled in the same way as any other measure granted *inter partes*."

75. After discussion, the Working Group requested the Secretariat to prepare revised draft provisions, with possible variants, for continuation of the discussion at a later stage.

76. The Working Group proceeded to consider a new draft article concerned with enforcement of interim measures as follows:

"New article Enforcement of interim measures of protection

> **"(1) Upon the application to the competent court by [the arbitral tribunal or by] the interested party made with the approval of the arbitral**

tribunal, an interim measure of protection referred to in article 17 shall be enforced, irrespective of the country in which it was made, except that the court may at its discretion refuse enforcement if:

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

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

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

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

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

(b) The court finds that:

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

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

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

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

"(4) Paragraph (1)(a)(iii) does not apply to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked, provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of

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

the measure is requested before the expiry of that period."

Paragraph (1)

"[the arbitral tribunal or by]"

77. The discussion focused on whether the draft new article should provide expressly for an application being made by the arbitral tribunal to a court for enforcement of an interim measure of protection. The view was expressed that mentioning the arbitral tribunal or any party as applying for enforcement was unnecessary since the decision as to the enforcement of the interim measure would be made by the competent court not only on the basis of the model legislative provisions but also with regard to other applicable law. Such domestic law would presumably determine who was eligible to apply for enforcement. Examples were given of countries where the arbitration law allowed for the application for enforcement in such a case to be made by the arbitral tribunal itself. It was pointed out that it would be inappropriate for the model legislative provision to interfere with such legislation. It was noted that another reason for deleting mention of the arbitral tribunal applying for court enforcement was the practical difficulty of tribunals doing so.

78. A contrary view was that it would be contrary to the spirit of arbitration to allow the arbitration tribunal to apply for the enforcement of an interim measure. It was stated that, by applying to a court, the arbitral tribunal would substitute itself to the party in favour of whom the interim measure had been taken, thus compromising its status as an impartial and independent arbitrator. While support was expressed in favour of that view, it was pointed out that, by applying for enforcement of the interim measure it had granted, the arbitral tribunal would not substitute itself to a party but merely seek court assistance in enforcing the interim measure the arbitral tribunal itself had taken as an impartial and independent arbitrator. Action by the arbitral tribunal in that respect would be fully consistent with the decision it had made in the first place to grant the interim measure of protection. Furthermore, it was pointed out that, in certain countries, circumstances might make it extremely difficult for the parties themselves to apply for enforcement of the interim measure. Providing certainty as to whether the arbitral tribunal could intervene directly to seek enforcement of the measure it had granted might thus improve greatly the efficiency of arbitration in those countries.

79. After discussion, the Working Group decided that, for continuation of the discussion, the words "[the arbitral tribunal or by]" should be deleted, on the assumption that the guide to enactment, or possibly a footnote to the provision, would make it clear that the rule was not intended to interfere with the situation where applicable law would allow for the application for enforcement to be made by the arbitral tribunal itself. In that context, a proposal to delete both references to "the arbitral tribunal" and "the interested party" was noted with interest.

"enforced"

80. A question was raised as to whether a reference to "recognition and enforcement" would not be more appropriate than a mere reference to "enforcement". In support of that view, it stated that enforcement of an interim measure by a court would presuppose its recognition by that same court. It was pointed out that the notion of recognition as understood in the New York Convention

and the Model Law was broader and might carry effects beyond those of enforcement. It was also pointed out that "recognition" under article V of the New York Convention was not necessarily suited for such ephemeral measures as interim measures of protection. However, after discussion, the Working Group decided that, for reasons of consistency with the New York Convention and article 36 of the Model Law, the terms "recognition and enforcement" should be used.

"may, at its discretion"

81. The discussion focused on whether refusing enforcement should be an obligation or a mere discretion for the court under the various circumstances listed in paragraph (1). The attention of the Working Group was drawn to somewhat different formulations on that point in article 36(1) of the Model Law. The view was expressed that listing the grounds for refusal of enforcement following the pattern of article V of the New York Convention might result in an excessively burdensome provision. It was stated in response that the regime set forth in the draft legislative provision was more liberal than article V of the New York Convention, a solution that was justified in view of the provisional nature of the measures of protection. In that context, the view was expressed that the model legislative provision might take into account that, with respect to recognition and enforcement of arbitral awards, legal regimes more liberal than that established by the New York Convention had developed in the world since 1958 and had come to coexist with that Convention. Accordingly, a reference to more liberal regimes, along the lines of the provision contained in article VII of the New York Convention, was useful. It was generally felt that the footnote to the draft legislative provision was helpful in that respect.

82. After discussion, the Working Group decided that no decision could be taken at that early stage as to whether the court would be under an obligation to refuse enforcement or whether it could exercise discretion. It was agreed that the issue would require further discussion after the various grounds for refusing enforcement under subparagraphs (a) and (b) had been examined.

Subparagraph (a) (chapeau)

83. The Working Group approved the substance of the chapeau of the subparagraph. Despite the view that the words "furnishes proof" should be replaced with the words "establishes that", the Working Group agreed to retain the current wording on the grounds that the suggested words might have a less certain meaning in other languages than the current words and that they reflected the corresponding language in both article 36 of the Model Law and article V of the New York Convention.

Subparagraph (a)(i)

84. The Working Group noted that subparagraph (i) covered a situation where a court would receive a request for enforcement of an interim measure while that or another court in the State was dealing with or had dealt with a request for the same or similar measure.

85. It was noted that the subparagraph dealt with a ground with respect to which the court should have discretion as to whether it should prevent enforcement of the interim measure. It was suggested that the ground was the only one where such

discretion was warranted, that with respect to other grounds listed in the article no such discretion should exist, and that the article should be redrafted accordingly.

86. It was suggested that the court dealing with the request for enforcement of an interim measure should take into account (or should be able to take into account) applications for interim measures not only in "this State" (i.e., the State that enacted the provision) but also in other States. It was added that the court should also be able to take into account applications for enforcement of interim measures to courts in "this State" and other States. It was warned, however, that suggesting or obliging the court to take into account applications to courts outside the country where the enforcement was being sought might delay the enforcement proceedings and would give rise to complex issues regarding the extent to which a civil proceeding in foreign country should produce effects in another State. Those issues were not resolved in civil procedure in general and it might be counterproductive to introduce them in the model provision under consideration.

87. At that point, the Working Group for lack of time suspended its discussions on the enforcement of interim measures of protection until a future session.

V. Model legislative provisions on conciliation

Article 1. Scope of application

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

"(1) These model legislative provisions apply to a conciliation, as defined in article 2, if:

(a) It is commercial;*

(b) It is international, as defined in article 3;

(c) The place of conciliation is in this State.

"(2) Articles … apply also if the place of conciliation is not in this State.

"(3) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of a party, in compliance with an agreement of the parties, or pursuant to a direction or request of a court or competent governmental entity.

"(4) These model legislative provisions do not apply to: […].

"(5) Except as otherwise provided in these model legislative provisions,

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"* 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 cooperation; carriage of goods or passengers by air, sea, rail or road".

the parties may agree to exclude or vary any of these provisions."

Paragraph (1)

Subparagraph (a)

89. The substance of subparagraph (a) was found acceptable by the Working Group, together with footnote *.

Subparagraph (b)

90. The Working Group decided that subparagraph (b) should be discussed in the context of draft article 3.

Subparagraph (c)

91. With respect to the structure of article 1, the view was expressed that the territorial factor should be listed as the first factor to be taken into account when determining the applicability of the draft legislative provisions. Such restructuring would make it clear that the territorial factor was intended to establish a default rule that would trigger application of the model legislative provisions in the absence of other elements listed under paragraph (1), such as the international nature of the conciliation or the agreement of the parties to opt into the legal regime set forth in the model legislative provisions. That view was generally supported by the Working Group.

92. In order to increase certainty as to when the model legislative provisions would apply, it was suggested that a provision should be included in paragraph (1) to the effect that the parties would be free to agree upon the place of conciliation and, failing that agreement, it would be for the conciliator or the panel of conciliators to determine that place (see A/CN.9/WG.II/WP.113/Add.1, footnote 2). Wording along the following lines was proposed as a possible substitute for subparagraph (c): "The place of conciliation, as agreed by the parties, or as determined by the conciliator, is in this State." Subject to possible restructuring of paragraph (1), the substance of the proposal was found generally acceptable. As a matter of drafting, it was suggested that, in order to emphasize that the conciliation was consensual in essence (and so remained even where the conciliator had to intervene in the choice of the place of conciliation), wording along the lines of "The place of conciliation, as agreed by the parties, or as determined with the assistance of the conciliator, is in this State" was to be preferred.

93. There was general agreement that article 1 should address cases where the place of conciliation had not been agreed upon or determined and where, for other reasons, it was not possible to establish the place of conciliation (for example, when a conciliation was carried out by using telecommunications). It was suggested that the criteria for the applicability of the model legislative provisions might be, for example, the place of the institution that administered the conciliation proceedings, the place of residence of the conciliator, or the place of business of both parties if that place was in the same country (ibid.). The Working Group generally agreed that those criteria should be taken into account by the Secretariat when preparing a revised draft of article 1.

Paragraph (2)

94. It was recalled that paragraph (2) was intended to indicate whether certain provisions (such as those on the admissibility of evidence in other proceedings, the role of the conciliator in other proceedings or the limitation period) should produce effects in the enacting State even if the conciliation proceedings took place in another country and would thus not generally be governed by the law of the enacting State (see A/CN.9/485, paras. 120 and 134). The substance of the paragraph was found generally acceptable. It was agreed that the issue dealt with in paragraph (2) might need to be considered further in the light of the decisions yet to be made by the Working Group with respect to draft articles 11, 12, 13 and 14.

Paragraph (3)

"on the initiative of a party"

95. The view was expressed that, taking into account the consensual nature of conciliation, the initiative of a party would not be sufficient to carry out a conciliation process, since the other party would, at least, have to agree with that initiative. It was suggested that paragraph (3) should be reworded accordingly.

"pursuant to a direction or request of a court or competent governmental entity"

96. As to whether conciliation could result from a "direction" or any mandatory decision, the view was expressed that in certain countries, it would be inconceivable for a court or any other third party to impose the use of conciliation on parties. It was stated that, in principle and without exception, conciliation presupposed the agreement of both parties. In addition, it was pointed out that, in practice, any conciliation mechanism forced upon the parties would invariably result in failure of the process. While that view was noted by the Working Group, it was recalled that, in a number of countries, legislation might regard conciliation as a necessary step to be taken before litigation could be initiated. Other procedural laws might give courts or other administrative entities the power to suspend the judicial proceedings and order the parties to attempt conciliating prior to carrying on with litigation. Other laws might leave it to the parties to decide whether conciliation should be undertaken in the circumstances. It was generally agreed that the model legislative provisions should apply to such instances of mandatory conciliation.

97. As a matter of drafting, it was suggested that paragraph (3) might need to be restructured to indicate more clearly that it was intended to cover the three following types of situations: (a) where an agreement to conciliate pre-existed the dispute (for example where a general provision had been made in a contract that possible future disputes would be settled through conciliation); (b) where an agreement to conciliate was made by the parties after the dispute had arisen; and (c) where mandatory conciliation was imposed on the parties by a court, an arbitral tribunal or an administrative entity. After discussion, it was generally agreed that the Secretariat should prepare a revised draft of paragraph (3), based on the views that had been expressed, with a view to covering all possible origins of the conciliation process.

Paragraph (4)

98. The substance of paragraph (4) was found generally acceptable. It was agreed that the guide to enactment should seek to provide illustrations and explanations as to the situations that were likely to be regarded by enacting legislators as exceptional cases where the model legislative provisions should not apply. Possible areas of exclusion might cover situations where the judge or the arbitrator, in the course of adjudicating a particular dispute, himself or herself would conduct a conciliatory process either at the request of the disputing parties or exercising his or her prerogatives or discretion. Another area of exclusion might be collective bargaining relationships between employers and employees (A/CN.9/WG.II/WP.113/Add. 1, footnote 5).

Paragraph (5)

99. The substance of paragraph (5) was found generally acceptable. The view was expressed that, irrespective of the general reference to party autonomy contained in the paragraph, such a reference might need to be repeated in the context of a number of specific provisions of the draft legislative provisions. The Working Group agreed that the issue might need to be further discussed in the context of the substantive provisions of the draft instrument.

Article 2. Conciliation

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

> **"For the purposes of these model legislative provisions, 'conciliation' means a process [,whether referred to by the expression conciliation, mediation or an expression of similar import,] whereby parties request a third person, or a panel of persons, to assist them in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute arising out of or relating to or contract or other legal relationship."**

101. The Working Group recalled that this provision aimed to set out the elements for the definition of conciliation, taking account of the agreement of the parties, the existence of a dispute, the intention of the parties to reach 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. The Working Group recalled that these 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.

102. A suggestion was made that the words "in an independent and impartial manner" could be deleted on the basis that this would introduce a subjective element to the definition. Furthermore, those words might be understood as establishing a legal requirement whose violation would have consequences beyond the model legislative provisions and might even be misunderstood as an element determining whether the model legislative provisions applied or not. It was said that reference to "an independent and impartial manner" was not necessary for the definition of conciliation and that it was sufficient to make reference to that notion in draft article 6 (5). However, in support of the retention of the phrase, a view was expressed that

the phrase was useful because it emphasized the nature of conciliation. The Working Group decided to place the words in brackets and to take a decision on the matter at its next session.

103. Another suggestion was made that draft article 2 should be redrafted to exclude from its application cases where the judge or the arbitrator, in the course of adjudicating a particular dispute, himself or herself conducted a conciliatory process exercising his or her prerogatives or discretion or acting at the request of the disputing parties. It was suggested that that distinction might appropriately be made in article 1 (4). Another suggestion was to clarify in draft article 2 that the conciliator was a person who did not have the authority to impose a binding decision on the parties. The Secretariat was requested to prepare a draft reflecting those considerations.

104. Support was expressed for the words in square brackets "[, whether referred to by the expression conciliation, mediation or an expression of similar import,]" which indicated that the draft model legislation applied irrespective of the name given to the process. It was noted that different procedural styles and techniques might be used in practice to facilitate dispute settlement and that different expressions might be used to refer to those styles and techniques. It was agreed that the model legislation should encompass all those styles and techniques provided that they fell within draft article 2.

Article 3. International conciliation

105. The text of draft article 3 as considered by the Working Group was as follows:

"(1) 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 of conciliation;

(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.

"(2) 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."

106. Doubts were expressed as to whether domestic conciliation should be excluded from the scope of the model legislative provisions. It was pointed out that the issues were largely identical in all instances where conciliation was resorted to within the commercial sphere. Accordingly, it was suggested that the reference to internationality should be deleted from the text, thus leaving it to enacting States to limit the scope of the enactment of the model legislative provisions through article 1 (4). Another view was that the question of internationality might appropriately be dealt with using the approach taken in the UNCITRAL Model Law on Electronic Commerce. The prevailing view, however, was that the acceptability of the model legislative provisions might be greater if no attempt was made to interfere with domestic conciliation. It was generally agreed that, subject to any agreement by the parties to opt into the legal regime set forth in the model legislative provisions, the instrument should be limited in scope to international conciliation. Accordingly, it was agreed that a test of internationality should be provided.

107. The discussion focused on paragraph (1) (c). With respect to the structure of the provision, a widely shared view was that it was inappropriate to combine in a single paragraph objective criteria such as the place of conciliation and a subjective test such as the agreement of the parties to opt into the legal regime set forth in the model legislative provisions. As to the method used in the draft instrument to refer to the agreement of the parties, it was pointed out that it was artificial to envisage that the parties would agree "that the subject-matter of the agreement to conciliate relates to more than one country". Should the parties wish to opt into the model legislative provisions, a widely shared view was that they should be allowed to do so directly, by the effect of an appropriate statement to be included in article 1, and not through a fiction regarding the location of the subject-matter of the dispute. Another view was that it was preferable to include the opt-in provision in the definition of "international" as was done in the UNCITRAL Model Law on International Commercial Arbitration.

108. As to whether the word "expressly" should be retained, it was pointed out that, in view of the informal nature of the conciliation process, parties might not always consider it necessary to record their agreement to conciliate in a formal document. Accordingly, a more liberal formulation should be used. Support was expressed, however, for the retention of the word "expressly". The prevailing view was that the word should be maintained in square brackets, for continuation of the discussion at a later stage.

109. After discussion, the prevailing view was that paragraph (1) (c) should be reworded along the lines of "the parties have [expressly] agreed that these model legislative provisions are applicable". The Secretariat was requested to prepare a revised draft containing those words and to place it at an appropriate location in the draft model legislative provisions.

Article 4. Commencement of conciliation proceedings

110. The text of article 4 as considered by the Working Group was as follows:

"(1) The conciliation proceedings in respect of a particular dispute commence on the day on which an invitation to conciliate that dispute made by one party is accepted by the other party.

"(2) If the party initiating conciliation does not receive a reply within [thirty] days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate."

111. It was suggested, and the Working Group agreed, that draft article 4(1) (which was drafted exclusively in terms of communications between the parties) should be harmonized with draft article 1(3), which envisaged that conciliation might be carried out as a consequence of a direction or request by a dispute settlement body such as a court or arbitral tribunal.

112. With respect to paragraph (2), some support was expressed for a reconsideration of the concept that the thirty-day period started to run from the day that the invitation was sent and replace it by the day on which the invitation was received. However, there was considerable opposition to that proposal on the ground that the provision was modeled on article 2(4) of the UNCITRAL Conciliation Rules and that it was desirable to maintain harmony between the two texts. Furthermore, the day of dispatch was easier to ascertain for the sender than the day of receipt. It was pointed out, however, that modern means of communication provided sufficient means for establishing the date of the receipt.

113. It was suggested that, in view of modern means of communication, the time period of thirty days should be shortened to two weeks.

114. It was noted that article 4 did not deal with the situation where an invitation to conciliate was withdrawn after it had been made, and a suggestion was made that it might be appropriate to address that situation in the provision.

115. The Secretariat was requested to prepare a redraft of article 4 reflecting the considerations of the Working Group. As paragraph (2) did not deal with the commencement of conciliation proceedings, it was suggested that that paragraph might be included elsewhere in draft model legislation. Furthermore, it was noted that the need for maintaining article 4 and its precise content should be decided upon after the Working Group had considered, in particular, draft article 11 and possibly also draft article 10.

Article 5. Number of conciliators

116. The text of article 5 as considered by the Working Group was as follows:

"There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators."

117. The Working Group agreed with the substance of draft article 5.

Article 6. Appointment of conciliators

118. The text of article 6, as considered by the Working Group was as follows:

"(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

"(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.

"(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

"(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) a party may request such an institution or person to recommend names of suitable persons to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

"(5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

119. It was suggested that the provision should provide that the appointment of each conciliator be agreed to by both parties. It was said that leaving it to each party, in the case of a conciliation panel of more than one person, to appoint conciliators without consulting and seeking agreement of the other party might create a perception of partisanship and thereby decrease the confidence of the parties in the conciliation process. However, the prevailing view was that the solution in the current text was more practical, allowed for speedy commencement of the conciliation process and might actually foster settlement in the sense that the two party-appointed conciliators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement.

Article 7. Conduct of conciliation

120. The text of article 7 as considered by the Working Group was as follows:

"(1) The parties determine [, by reference to a standard set of rules or otherwise,] the manner in which the conciliation is to be conducted.

"(2) Failing agreement on the manner on which the conciliation is to be conducted, the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, the wishes that the parties may express, and the need for a speedy settlement of the dispute.

"(3) The conciliator shall be guided by principles of objectivity, fairness and justice. [Unless otherwise agreed by 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.]

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

121. There was broad agreement for casting paragraph (1) along the lines of article 19 of the UNCITRAL Model Law on International Commercial Arbitration and to stress that the parties were free to agree on the manner in which the conciliation was to be conducted. The words in square brackets were approved, subject to the deletion of the term "standard". The suggestion to delete paragraph (1) and to provide in paragraph (2) that the conciliator should be able to decide on the manner in which the conciliation should be conducted after hearing the views of the parties did not receive support.

122. It was noted that paragraph (2) (modelled on article 7(3) of the UNCITRAL Conciliation Rules) indicated that the conciliator take into account, inter alia, the "wishes that the parties may express". The Working Group considered whether the term "wishes" was appropriate in that context and whether some other expressions such as "views", "expectations" or "intentions" might be more appropriate. It was noted that the expression "wishes" and its equivalents in other languages were unusual for inclusion in legal provisions. The Working Group decided that, given that the term was used in the UNCITRAL Conciliation Rules, it could be retained if no other satisfactory expression could be found.

Paragraph (3)

123. The view was expressed that the text of paragraph (3) was not sufficiently homogenous, since it combined a general statement of principles that should guide the conduct of the conciliator in the first sentence and more operational advice as to how conciliation should be conducted in the second sentence. One suggestion was that the text should simply mirror the language of article 7(2) of the UNCITRAL Conciliation Rules, on which paragraph (3) was based. Another suggestion was that the two sentences should be embodied in the model statutory provisions as distinct provisions. The Working Group discussed the two sentences separately.

First sentence

124. The substance of the first sentence was found generally acceptable as a statement of principles that should somehow be reflected in the model statutory provisions or in any explanatory material that might accompany the instrument. A concern was expressed, however, as to the effect of enacting such wording as a statutory obligation in article 7. It was stated that, by providing courts with a yardstick against which to measure the conduct of conciliators, the first sentence might have the unintended effect of inviting parties to seek annulment of the settlement agreement through court review of the conciliation process. Accordingly, it was suggested that the statement of principles would be more appropriately located in the guide to enactment of the model statutory provisions. The prevailing view, however, was that the first sentence should be retained as an operative provision of the instrument to provide necessary guidance regarding the conciliation process, in particular for the benefit of less experienced conciliators. It was pointed out that judicial control over the conciliation process was very limited, and that the use of the UNCITRAL Conciliation Rules, which included wording along the lines of the first sentence of paragraph (3), had not resulted in increased litigation. Establishing guiding principles was regarded as useful not only for parties that

might become involved in conciliation but also for conciliators themselves. A view was expressed that, in such cases, guiding principles were particularly necessary in view of the absence of judicial review of the conciliation process, which might leave actions based on personal liability as the only recourse open to parties.

125. As to the wording of the first sentence, the attention of the Working Group was drawn to difficulties that might stem from the use of such terms as "fairness", "*équité*" and "*equidad*" as expressions of the same notion in the English, French and Spanish versions. Some support was expressed in favour of using the word "equity" instead of or along with the word "fairness" in the English version. That suggestion was strongly opposed on the grounds that using the word "equity" might raise considerable difficulties of interpretation. Another view was that, in some language versions, the references to "fairness and justice" connoted the role of a decision maker (either a judge or an arbitrator) and not the basic function of a conciliator, which was to assist parties in the search for a settlement agreement. Accordingly, it was suggested that the words "fairness and justice" should be replaced by "impartiality and independence". The suggestion was noted with interest. A related view was that the notion of fairness might be reflected in paragraph (2), which dealt with a number of procedural issues involved in the conduct of the conciliation process. After discussion, it was agreed that the words "objectivity, fairness and justice" should be retained, at least as one possible variant, for reasons of consistency with the terminology used in the UNCITRAL Conciliation Rules. The Secretariat was requested to study the appropriateness of possible substitute wording, based on the views and concerns that had been expressed.

Second sentence

126. To the extent that it dealt with elements to be taken into account in the substance of the settlement agreement, it was generally agreed that the factors listed in the second sentence, together with possible additional factors, such as the business interests of the parties, would be more appropriately reflected in a guide to enactment of the model statutory provisions.

Paragraph (4)

127. Doubts were expressed as to the usefulness of the paragraph. It was pointed out that deleting paragraph (4) would not prevent any conciliator who might wish to do so from making proposals for a settlement of the dispute. It was also pointed out that, in some cases, the making of such proposals by the conciliator might prove counter-productive. It was thus suggested that, from an educational perspective, it might be misleading to draw the attention of less experienced conciliators on such types of initiatives. However, in view of the importance that might be attached to proposals by the conciliator in the practice of conciliation as developed in certain countries, it was decided that the substance of paragraph (4) should be reflected, without square brackets, in the text of draft article 7.

Article 8. Communication between conciliator and parties

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

"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."

129. The Working Group expressed overall satisfaction with the substance of draft article 8. It was suggested that the draft article might provide an appropriate location for reflection of the principle that both parties should receive equal treatment from the conciliator. While general agreement was expressed as to the spirit of the suggestion, a note of caution was struck about introducing in draft article 8 an operative rule that might result in the imposition of excessive formalism. It was pointed out, for example, that it would be inappropriate to require the conciliator to record the time spent communicating with each of the parties, to ensure that equal time was spent with both. After discussion, it was generally agreed that a reference to the equality of treatment to be given by the conciliator to both parties would be better reflected in draft article 7. The Secretariat was requested to prepare appropriate wording for inclusion in draft article 7. The attention of the Secretariat was drawn to the need to avoid wording that might lend itself to confusion between "equality of treatment" and the notion of "equity".

Article 9. Disclosure of information

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

"*[Alternative 1.]* When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators 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.]* Unless otherwise agreed by 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."

131. Some support was expressed in favour of alternative 2. It was stated that, in the absence of agreement to the contrary, requiring the conciliator to maintain strict confidentiality of the information communicated by a party was the only way of ensuring frankness and openness of communications in the conciliation process. Such confidentiality was reported to be consistent with conciliation practice in certain countries. With a view to introducing some flexibility in the wording of alternative 2, it was suggested that the reference to "the express consent" of the party who gave the information might be replaced by a mere reference to "the consent" of that party. Along the same line, it was suggested that exceptions might need to be made to the general rule contained in alternative 2, for example where issues of criminal law might be at stake.

132. The widely prevailing view, however, was that alternative 1 should be preferred as the better option to ensure circulation of information between the

various participants in the conciliation process. It was pointed out that requiring consent by the party who gave the information before any communication of that information to the other party by the conciliator would be overly formalistic, inconsistent with established practice in many countries as reflected in article 10 of the UNCITRAL Conciliation Rules, and likely to inhibit the entire conciliation process. As to the wording of alternative 1, it was generally agreed that the words "in order that the other party may have the opportunity to present any explanation which it considers appropriate" should be deleted as superfluous, or as introducing an unnecessary degree of formalism. In addition, it was agreed that the words "the parties are free to agree otherwise, including that" should be deleted from the second sentence of alternative 1, in order to ensure that the confidentiality provision would apply in all cases, even without a specific agreement of the parties.

133. A question was asked as to whether the notion of "factual information" as envisaged in article 10 of the UNCITRAL Conciliation Rules should be used instead of "information" in the text of alternative 1. In response, it was generally felt that the broader notion of "information" was preferable in the context of a statutory rule, which should cover all relevant information communicated by a party to the conciliator and avoid any difficulty as to the interpretation of what might constitute "factual" information.

134. It was generally agreed that, in preparing the guide to enactment of draft article 9, it should be made clear that the notion of "information" as used in the draft article should be understood as covering also communications that took place before the actual commencement of the conciliation.

Article 10. Termination of conciliation

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

"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."

136. Support was expressed for the current draft of article 10 although a number of drafting suggestions were made. In respect of subparagraph (a), support was expressed for the drafting suggestion set out in footnote 23 of A/CN.9/WG.II/WP.113/Add.1 to replace the words "the signing" with the words "the conclusion" so as to better accommodate the use of electronic commerce. In addition, it was stated that subparagraph (b) of draft article 10 was unclear regarding

the situation where the conciliation proceedings were conducted by a panel of conciliators but the proceedings were declared as terminated not by the whole panel but by one or more of its members. It was noted that the UNCITRAL Conciliation Rules provided that, where there was more than one conciliator, they ought, as a general rule, to act jointly. While the view was expressed that subparagraph (b) should be redrafted to clarify that the declaration envisaged therein had to originate from the entire panel of arbitrators, it was widely felt that this was a drafting matter as to which the Secretariat was requested to make suggestions in the next draft.

Article 11. Limitation period

137. The text of draft article 11 as considered by the Working Group was as follows:

> **"[(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.**
>
> **"(2) Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement.]"**

138. Some support was expressed in favour of draft article 11 for the reason that, from a practical viewpoint, it offered a simple and useful solution for a large number of cases and it would enhance the attractiveness of conciliation by preserving the parties' rights without encouraging them to initiate adversarial proceedings. However, considerable opposition was expressed by a large number of delegations. The grounds cited for deletion of draft article 11 included that: the draft article was not indispensable for the protection of the rights of the claimant (because under draft article 14(1) a claimant could initiate court or arbitral proceedings just to preserve its rights); the provision would not produce effects outside the enacting state; the provision would be difficult to incorporate into national procedural regimes which took fundamentally different approaches to the issue (for example, under some legal systems, the provision merely produced procedural effects, whereas in other systems it was considered to be part of substantive law). A further reason cited in opposition to draft article 11 was that the retention of the provision would complicate the finalization of some other provisions in the draft model legislative provisions, such as the definition of conciliation, and provisions dealing with the commencement and termination of conciliation proceedings. It was pointed out that, should draft article 11 be retained, those provisions would have to be redrafted in ways that might undermine the acceptability of the draft model legislative provisions. In support of the deletion of draft article 11, it was noted that, as currently drafted, the provision was unclear as to how it would apply in cases where conciliation was used only with respect to part of a dispute between the parties. After discussion, however, the Working Group considered that it would be premature to delete the provision and agreed to retain it provisionally between square brackets for continuation of the discussion at a later stage. If the provision was ultimately retained, it was noted that it would be necessary to clarify whether the effect of draft article 11 was to interrupt or merely to suspend the running of the limitation period.

Article 12. Admissibility of evidence in other proceedings

139. The text of draft article 12 as considered by the Working Group was as follows:

"(1) [Unless otherwise agreed by the parties,] a party who participated in the conciliation proceedings [or a third person] 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 unless such disclosure is permitted or required under the law governing the arbitral or judicial 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.

"(4) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation."

140. The Working Group affirmed its general support for the policy underlying draft article 12, namely, that it was designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph (1) in any later proceedings. Broad support was expressed for retaining the words "or a third person" because it was necessary to ensure that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings were also bound by paragraph (1). Doubt was expressed whether it was appropriate for a third person (a concept that might be given a very broad meaning) to be bound by paragraph (1), in particular if the parties to the conciliation controlled the extent to which those third persons were so bound (by virtue of the words "unless otherwise agreed by the parties"). It was observed that conciliation proceedings might still continue when paragraph (1) became applicable; one possible way to reflect that situation would be to rephrase the relevant part of the provision along the following lines: "the dispute that *is or* was the subject of the conciliation proceedings".

141. As to the scope of the admissibility rule set out in draft article 12, it was suggested that the appropriate balance between evidence that was to be covered by the provision and evidence that remained outside of it would be achieved by deleting the words "matters in dispute or", replacing the word "admissions" by the

words “statements or admissions” and maintaining the substance of paragraph (4). There was support for the suggestion that even if information of the type covered by paragraph (1) was generated before and in anticipation of conciliation proceedings, such information should also be covered by the draft article. There was agreement that, if there was any doubt that the provision covered oral as well as written evidence, it should be made clear in the provision that the draft article covered any information or evidence, regardless of its form.

Article 13. Role of conciliator in other proceedings

142. The text of draft article 13 as considered by the Working Group was as follows:

> **“(1) 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 was or is the subject of the conciliation proceedings.**
>
> **“(2) Testimony of the conciliator regarding the facts referred to in paragraph (1) of article 12 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.**
>
> **“(3) 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] [or the same transaction or event] [or any related contract].”**

143. Support was expressed for the policy underlying draft article 13, subject to the following suggestions: that the scope of the prohibition provided in paragraph (2) be broadened to include testimony by a conciliator that a party acted in bad faith during the conciliation; and that in paragraph (2), the words “facts” should be replaced by a word such as “matters” or “information”. A view was expressed that perhaps the expression “testimony of the conciliator” was too narrow in the context of paragraph (2) and that words such as “evidence given by the conciliator” would be preferable. It was observed that draft article 12 (1) applied in arbitral or judicial proceedings whether or not those proceedings related to the dispute that was the subject of the conciliation proceedings, whereas the scope of draft article 13 (2) was narrower in that it referred to arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings. It was suggested that the relation between the two provisions should be reconsidered.

144. With respect to paragraph (3), support was expressed for the broadest possible formulation of the three formulations offered therein expressed by the words “or any related contract”. While not expressing opposition, it was observed that the word “related” and some terms that might be used to express that concept in other language versions, were complex and had given rise to difficulties of interpretation.

145. The Secretariat was requested to prepare a revised draft taking account of the comments made.

Article 14. Resort to arbitral or judicial proceedings

146. The text of draft article 14 as considered by the Working Group was as follows:

> **"(1) [During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.]**
>
> **"(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has occurred] 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 terms of the agreement have been complied with].**
>
> **"(3) [The provisions of paragraphs (1) and (2) of this article do not prevent a party from approaching an appointing authority with a view to requesting it to appoint a conciliator.]"**

147. Support was expressed for the substance of paragraph (1). It was noted that paragraph (1) would serve a function even if draft article 11, which dealt with the effect of conciliation on the limitation period, were to be retained (since the claimant might want to initiate arbitral or judicial proceedings for a purpose other than suspending the running of the limitation period).

148. Support was also expressed for the substance of paragraph (2), including the words placed between square brackets within the paragraph. It was considered that agreements to conciliate should be binding on the parties, in particular where the parties had expressly agreed not to initiate adversary proceedings until they had tried to settle their disputes by conciliation.

149. It was pointed out that paragraph (1), which allowed initiation of arbitral or judicial proceedings in certain circumstances, and paragraph (2), which did not permit initiation of arbitral or judicial proceedings before the parties complied with their commitment to conciliate, sought to achieve possibly conflicting results and that the operation of the two provisions should be coordinated and clarified.

150. It was noted that the words "a conciliator" in paragraph (3) should correctly read "an arbitrator".

Article 15. Arbitrator acting as conciliator

151. The text of draft article 15 as considered by the Working Group was as follows:

> **"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."**

152. Under one view, draft article 15 should be deleted because its focus was on actions that could be taken during arbitral proceedings rather than actions taken

during conciliation proceedings and that therefore, if it was needed at all, its proper place was legislation that dealt with arbitration. Moreover, it was recalled that during the discussion of draft article 1 (4), the Working Group discussed the possibility of excluding from the scope of the draft model legislative provisions those situations where an arbitrator would conduct a conciliation pursuant to his or her procedural prerogatives or discretion (for earlier discussion, see above para. 98). If that were to be the case, the draft article might be deleted. However, if the draft model legislative provisions would also cover situations where an arbitrator, in the course of arbitral proceedings, undertook to act as a conciliator, the substance of draft article 15 would remain useful; in such a case, it was suggested to express the idea of draft article 15 in draft article 1. No objection was expressed to the idea that an arbitrator could act as a conciliator, if both parties so agreed. The Secretariat was requested to prepare a draft on the basis of those discussions a draft, possibly with alternative solutions.

Article 16. Enforceability of settlement

153. The text of draft article 16 as considered by the Working Group was as follows:

> **"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]*."**

154. It was noted that legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differed widely. Some States had no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts had been restated in some laws on conciliation.

155. However, there were also laws that provided for expedited enforcement of such settlements. Reasons given for introducing an expedited enforcement usually aimed to foster the use of conciliation and to avoid situations where a court action to enforce a settlement might take months or years to reach judgement and then enforcement. Examples were given of legal systems under which a negotiated settlement could be enforced in a summary fashion, provided that the settlement was signed by the parties and their attorneys, and that the settlement agreement contained a statement to the effect that the parties were seeking summary enforcement of the agreement. Another approach taken provided that settlements might be the subject of expedited enforcement (for example, if the settlement agreement was notarized or formalized by a judge or co-signed by the counsel of the parties). A further approach taken in some national legislation was to empower the parties who had settled a dispute to appoint an arbitration tribunal with a specific purpose of issuing an award on agreed terms based on the agreement of the parties.

156. It was also noted that several laws contained provisions to the effect that a written settlement agreement was to be treated as an award rendered by an arbitral tribunal and was to produce the same effect as a final award in arbitration, provided

that the result of the conciliation process was reduced to writing and signed by the conciliator or conciliators and the parties or their representatives.

157. According to another approach found in one national law, the settlement agreement was deemed to be an enforceable title, and the rights, debts and obligations that were certain, express, and capable of being enforced, and that were recorded in the settlement agreement were enforceable pursuant to the provisions established for the enforcement of court decisions. It was pointed out, however, that that approach was used with respect to conciliation administered by approved institutions where the conciliators were selected from a list maintained by an official organ.

158. In yet other laws, it was provided that conciliation settlements were treated as arbitral awards, but that such settlements "might, by leave of the court" be enforced in the same manner as a judgement, this wording appearing to leave a degree of discretion to the court in enforcing the settlement.

159. The view was expressed that the draft model legislative provisions might give recognition to a situation where the parties appointed an arbitral tribunal with the specific purpose of issuing an award based on the terms settled upon by the parties. Such an award, envisaged in article 30 of the Model Law, would be capable of enforcement as any arbitral award. Other settlements, according to that view, were to be regarded as contracts and to be enforced as such. Under that view, the model legislative provisions should merely state the principle that the settlement agreement was to be enforced, without attempting to provide a unified solution as to how such settlement agreements might become "enforceable", a matter that should be left to the law of each enacting State. According to other views, however, it would be useful, in order to increase the attractiveness of conciliation, to endow settlements reached during conciliation with the possibility of enforcement. Accordingly, it was considered desirable to prepare a harmonized statutory provision for States that might wish to enact it. After discussion, the Secretariat was requested to prepare a revised version of draft article 16, with possible variants to reflect the various views that had been expressed and the legislative approaches that had been discussed.

Notes

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

[4] Ibid., paras. 337-376 and 380.

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

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

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

[8] Ibid., paras. 374-375.

[9] The examples may be the cases in draft article 7 (3) reproduced in document A/CN.9/485, para. 23, as rewritten pursuant to the discussion in the Working Group (i*bid., paras. 24-44):*
An arbitration agreement meets the requirement in paragraph (2) if *[ibid., paras. 28 and 29]*:
(a) it is contained in a document agreed upon by the parties whether or not it is signed by the parties; *[ibid., para. 30]*
(b) it is made by an exchange of written communications; *[ibid., para. 30]*
(c) it is contained in one party's written offer or counter-offer, provided that [to the extent permitted by law of usage] the contract has been concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party; *[ibid., paras. 31-34]*
(d) it is contained in a [contract confirmation] [communication confirming the terms of the contract], provided that, to the extent permitted by law or usage, the terms of the confirmation have been accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or by a failure to object; *[ibid., paras. 35-36]*
(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract; [i*bid., para. 37*]
(f) it is contained in an exchange of statements [of claim and defence] on the substance of the dispute] in which the extistence of an agreement is alledged by one party and not denied by the other; [i*bid., para. 38*]
(g) a contract concluded [in any form] [orally] refers to an [arbitration clause] [or arbitration terms conditions] provided that the reference is such as to make [that clause] [those terms and conditions] part of the *contract [ibid., paras. 39-41*]