United Nations A/CN.9/569

General Assembly

Distr.: General
4 October 2004

Original: English

United Nations Commission on International Trade Law
Thirty-eighth session
Vienna, 4-22 July 2005

Report of the Working Group on Arbitration and Conciliation on the work of its forty-first session (Vienna, 13-17 September 2004)

Contents

V.04-58040 (E) 201004 211004

I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, inter alia, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures of protection.

2. The most recent summary of the discussions of the Working Group on, inter alia, a revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") relating to the power of an arbitral tribunal to order interim measures of protection and a proposal for a new article to the UNCITRAL Model Law relating to the enforcement of interim measures of protection (tentatively numbered article 17 bis) can be found in document A/CN.9/WG.II/WP.130, paragraphs 5 to 17. The Secretariat was asked to prepare a revised version of these texts for consideration by the Working Group at its forty-first session.

3. The Working Group, which was composed of all States members of the Commission, held its forty-first session in Vienna, from 13 to 17 September 2004. The session was attended by the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Belgium, Brazil, Cameroon, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, Italy, Japan, Kenya, Lebanon, Mexico, Morocco, Nigeria, Pakistan, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Singapore, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

4. The session was attended by observers from the following States: Bulgaria, Finland, Greece, Iraq, Ireland, Malaysia, Myanmar, Netherlands, New Zealand, Peru, Philippines, Slovakia and Yemen.

5. The session was also attended by observers from the following organizations of the United Nations system: the United Nations Industrial Development Organization (UNIDO).

6. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS), NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.

7. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), Arab Union of International Arbitration, *Association Suisse de l'Arbitrage* (ASA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Chartered Institute of Arbitrators, Club of Arbitrators of the Milan Chamber of Arbitration, Forum for International Commercial Arbitration (FICA), Inter-American Commercial Arbitration Commission (IACAC), International

Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration (Lagos), School of International Arbitration and *Union des Avocats Européens*.

8. The Working Group elected the following officers:

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

Rapporteur: Mr. Il Won KANG (Republic of Korea).

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.130); (b) a note by the Secretariat containing a newly revised text of a draft provision on the power of an arbitral tribunal to order interim measures pursuant to the decisions made by the Working Group at its thirty-ninth session (A/CN.9/WG.II/WP.131); (c) a note by the Secretariat concerning a proposal to include the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") in the draft convention on the use of electronic communications in international contracts (A/CN.9/WG.II/WP.132); and (d) the report of the Working Group on its fortieth session (A/CN.9/547).

10. The Working Group adopted the following agenda:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Preparation of uniform provisions on interim measures of protection for inclusion in the UNCITRAL Model Law on International Commercial Arbitration;
5. Possible inclusion of the New York Convention in the list of international instruments to which the draft convention on the use of electronic communications in international contracts applies;
6. Other business;
7. Adoption of the report.

II. Deliberations and decisions

11. The Working Group discussed agenda item 4 on the basis of the text contained in the note prepared by the Secretariat (A/CN.9/WG.II/WP. 131). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapter III. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. The Working Group discussed agenda item 5, on the basis of proposals contained in the note prepared by the Secretariat (A/CN.9/WG.II/WP.132), and agenda item 6. The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters IV and V respectively.

III. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

12. The Working Group recalled that it had agreed to resume discussions on a revised version of a provision regarding the power of an arbitral tribunal to grant interim measures of protection. The Working Group considered the text of a newly revised version of article 17 of the Model Law prepared by the Secretariat on the basis of discussions and decisions made by the Working Group at its fortieth session (A/CN.9/547, paras. 68-116), hereinafter referred to as "draft article 17" (A/CN.9/WG.II/WP.131):

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

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

"(a) Maintain or restore the status quo pending determination of the dispute;

"(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm [, or to prejudice the arbitral process itself];

"(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

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

"(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

"(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

"(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

"(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

"(5) The requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

"(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time, upon application of any party or, in exceptional circumstances, on the arbitral tribunal's own initiative, upon prior notice to the parties.

"(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

"(7) (a) [Unless otherwise agreed by the parties,] where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure, the requesting party may file its application without notice to that party and request a preliminary order [directing that party to preserve the status quo until the arbitral tribunal has heard from that party and ruled on the application].

"(b) The provisions of paragraphs [(2),] (3), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

"(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

"(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application [, unless the arbitral tribunal determines [pursuant to paragraph 7 (i)[1]] that such notification should be deferred until court enforcement or expiry of the preliminary order].

"(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after

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[1] Proposed subparagraph relating to deferral of notification for the purpose of allowing court enforcement:

"[(i) If notification by the arbitral tribunal risks prejudicing court enforcement of the preliminary order, the arbitral tribunal may defer notification to the party against whom the preliminary order is directed of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The duration of such deferral shall be indicated in the order and shall not exceed the maximum duration of the preliminary order. At the expiration of the period fixed for the deferral of notification, the arbitral tribunal shall give immediate notice to the party concerned of the application, the preliminary order and all other communications between any party and the arbitral tribunal relating to the application. The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time, and [in any event] no later than forty-eight hours after notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.]"

notice is given, or on such [earlier] [other] date and time as is appropriate in the circumstances.

"(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form]. Such confirmation, extension or modification shall take place only after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

"(g) The arbitral tribunal shall require the requesting party to provide appropriate security in connection with such preliminary order.

"(h) Until the party against whom the preliminary order is directed has presented its case under subparagraph (7) (e), the requesting party shall have a continuing obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant to its determination whether to grant a preliminary order under subparagraph (7) (c)."

Paragraph (7)

General remarks

13. The Working Group recalled that, at its fortieth session (New York, 23-27 February 2004) due to lack of time, the text of paragraph (7) of draft article 17 had not been discussed. It was noted that the Commission, at its thirty-seventh session (New York, 14-25 June 2004), had reiterated that the issue of ex parte interim measures, which the Commission agreed remained an important issue and a point of controversy, should not delay progress on the revision of the Model Law. The Commission however noted that the Working Group had not spent much time discussing that issue at its recent sessions and expressed the hope that consensus could be reached on that issue by the Working Group at its forthcoming session, based on a revised draft to be prepared by the Secretariat (A/59/17, para. 58).

14. The Working Group recalled that the issue of including ex parte interim measures had been the subject of earlier discussions in the Working Group (see A/CN.9/468, para. 70; A/CN.9/485, paras. 89-94; A/CN.9/487, paras. 69-76; A/CN.9/508, paras. 77-79; A/CN.9/523, paras. 15-76; A/CN.9/545, paras. 49-92 and A/CN.9/547, paras. 109-116).

15. It was recalled that a provision allowing interim measures to be ordered on an ex parte basis had arisen in part from the recognition that, in some cases, an element of surprise was necessary, i.e. where it was possible that the affected party might try to pre-empt the measure by taking action to make the measure moot or unenforceable (A/CN.9/WG.II/WP.110, para. 69). It was also said that the granting of interim measures on an ex parte basis was quite usual in State courts and that the fact that such measures were rarely asked for in arbitration might be in part because of the lack of a statutory regime supporting such measures. It was said that omission of the provision would force parties that had chosen to resolve their dispute outside

the court system to nevertheless revert to courts on questions of ex parte interim measures.

16. Opposition was expressed against the inclusion of the provision. It was stated that the inclusion of the ex parte provision ran counter to the principles of trust and consensus underlying international arbitration and contradicted the principle that parties to arbitral proceedings should be treated on the basis of fairness and equality. It was said that inclusion of the provision would be extremely difficult to reconcile with existing provisions of the Model Law, notably article 18 (which required that parties should be treated equally and be given a full opportunity of presenting their case), article 24 (3) (which required that all documents should be communicated to both parties) and paragraph 36 (a) (ii) (which allowed refusal to recognize or enforce an award if a party had been unable to present its case). As well, it was suggested that paragraph (7) introduced a level of complexity and could create obstacles to enactment of the Model Law in certain countries, to the extent it might be considered in those countries that ex parte measures ran counter to public policy, constitutional rules or international treaties. It was pointed out that, in countries where ex parte interim measures would be acceptable, such measures might be available on the basis of contractual arrangement in the absence of any specific legislation. From that perspective, the inclusion of a provision along the lines of paragraph (7) might even be seen as limiting party autonomy. In addition, it was also stated that, in jurisdictions where ex parte interim measures were rare or unknown, it might be difficult for State courts to enforce interim measures ordered on an ex parte basis by an arbitral tribunal.

17. In response, additional arguments were put forward in favour of a provision recognizing ex parte interim measures of protection. It was said that due process and equal treatment of disputing parties were essential to most systems of justice but that, nevertheless, ex parte practices had developed therein because it was recognized that, in certain circumstances, the unfairness of one party's frustrating the arbitral proceedings could only be avoided through ex parte proceedings. To meet concerns about ex parte measures, courts had fashioned strict safeguards. It was pointed out that paragraph (7) took account of such precedents in procedure before State courts and established strict safeguards, including strict limitation in time, a requirement that the party against whom the measure was ordered be given an opportunity to be heard as soon as possible, a requirement that mandatory security be provided and a requirement for full disclosure of the facts. However, it was recalled that, while ex parte proceedings were acceptable in the case of State courts given their public nature, it might be less acceptable to create a parallel mechanism for arbitral tribunals. It was also pointed out that attempts to equate fully arbitral tribunals and State courts might be counter-productive and detrimental to the development of international commercial arbitration in certain countries.

Opt-out/opt-in

18. With a view to bridging the gap between the opposing views expressed above, the Working Group engaged in a discussion as to whether or not the Model Law should deal with the issue of ex parte measures by way of a provision allowing the parties to opt-out or opt-in.

19. The "opt-out" approach was reflected by the bracketed words "Unless otherwise agreed by the parties" as the opening words of the provision. Some

support was expressed for that approach on the basis that it was more grounded in the contractual nature of arbitration. It was said that the opt-out approach better reflected the legislative approach taken elsewhere in the Model Law and that an opt-in provision was highly unusual in the legislative tradition observed in many countries. It was also said that leaving the question of ex parte measures to the choice of parties was not beneficial to providing uniformity on this question.

20. However, a number of delegations spoke in favour of an "opt-in" approach, with a proposal that the provision dealing with ex parte interim measures should open with wording along the lines of "If expressly agreed by the parties" or "When the parties so empower the arbitral tribunal". It was said that the opt-in approach was more likely to preserve the consensual nature of arbitration by limiting the possibility for automatic application of the ex parte provision. It was also suggested that the inclusion of an opt-out approach could raise public policy objections in some jurisdictions.

21. No consensus was reached at that stage as to whether the provision should allow the parties to opt-out of, or opt-in to, the ex parte regime. Support was expressed for the view that it might be impossible to deal with the issue by way of a harmonized rule. Thus, the matter might need to be left for individual legislators in enacting States to decide upon. As to practical formulations of paragraph (7) as an optional provision, it was suggested that precedents might be found in the footnote to article 35 (2) of the Model Law, or in the footnote to article 4 of the UNCITRAL Model Law on International Commercial Conciliation.

22. Before coming to a decision as to whether a specific mention of ex parte interim measures of protection should appear in a revised version of article 17 of the Model Law and, if so, what form such a mention might take, the Working Group proceeded with a detailed review of the text of paragraph (7) of draft article 17 as it appeared in the note by the Secretariat (A/CN.9/WG.II/WP.131). In the course of its deliberations, the Working Group also considered a text that was proposed by one delegation as a possible alternative to draft article 17. Due to lack of time, the Working Group only considered paragraph (7) of that proposal. The complete proposed text was as follows:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection or modify them.
>
> "(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
>
> "(a) Maintain or restore the status quo pending determination of the dispute;
>
> "(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;
>
> "(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> "(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

"(3) Except with respect to the measure referred to in sub-paragraph (d) of paragraph (2), the party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

"(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

"(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

"(4) The arbitral tribunal may require the requesting party or any other party to provide appropriate security in connection with such interim measure of protection.

"(5) If so ordered by the arbitral tribunal, the requesting party shall promptly make disclosure of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection.

"(6) (deleted)

"(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure was unjustified. The arbitral tribunal may order an award of costs and damages at any point during the proceedings.

"(7) (a) Unless otherwise agreed by the parties, a party requesting an interim measure of protection may file its request without notice to the other party, together with an application for a preliminary order necessary to prevent the frustration of the purpose of the interim measure requested.

"(b) The provisions of paragraphs [(2),] (3), (4), (5), (6) and (6 bis) of this article apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph.

"(c) [The arbitral tribunal may grant a preliminary order if it concludes that the purpose of the requested interim measure may otherwise be frustrated before all parties can be heard.]

"(d) After the arbitral tribunal has made a determination in respect of a preliminary order, it shall give immediate notice to the party against whom the preliminary order is directed of the application, the preliminary order, if any, and all other communications between any party and the arbitral tribunal relating to the application, unless the arbitral tribunal determines that such notification should be deferred until court enforcement or expiry of the preliminary order.

"(e) The party against whom the preliminary order is directed shall be given an opportunity to present its case before the arbitral tribunal at the earliest possible time. Within 48 hours or such other short time period

following the expiration of the time for the other party to present its case, the arbitral tribunal shall decide whether to confirm, extend or modify a preliminary order.

"(f) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal, unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form].

"(g) (deleted)

"(h) (deleted)"

Subparagraph (a)

"[Unless otherwise agreed by the parties]"

23. The Working Group agreed to defer discussions on whether or not to include the words "[Unless otherwise agreed by the parties]" until it had completed its review of paragraph 7.

Nature of preliminary orders

24. Doubts were expressed as to whether or not the notion of "preliminary order" should be regarded as a subset of the broader notion of "interim measure". It was suggested that, should the two notions belong to the same legal category, the distinction between them might be regarded as artificial and might lead to difficulties in implementation and practice. It was suggested that, if the intention was that interim measures were the same in nature and effect as preliminary orders then, to avoid any confusion, it might be preferable to use the same term for both.

25. In support of the view that preliminary orders and interim measures shared the same legal nature, it was observed that the reference in paragraph (7)(b) to paragraphs (2), (3), (5), (6) and (6 bis) made the definition and the legal regime applicable to interim measures also applicable to preliminary orders. It was explained that the definition of interim measures under paragraph (2) was so broad that a preliminary order would necessarily be encompassed by that definition.

Purpose, function and legal regime of preliminary orders

26. It was clarified that, although a preliminary order might be regarded as a subset of an interim measure, it could be distinguished from any other interim measure in view of its narrower purpose, which was limited to preventing the frustration of the specific interim measure being applied for. Another distinguishing feature of a preliminary order was that its function was limited to directing a party to preserving the status quo until the arbitral tribunal had heard from the other party and ruled on the application for the interim measure. Yet another distinctive characteristic of a preliminary order was to be found in its legal regime, which made it subject to stricter time limits than other interim measures. To summarize these specific characteristics of a preliminary order, it was stated that the preliminary order was effectively limited to providing a bridging device until an *inter partes* hearing could take place in respect of a requested interim measure.

Proposed redrafts of subparagraph (a)

27. With a view to clarifying the distinction between interim measures and preliminary orders, and to further restricting the functions served by a preliminary order, support was expressed in favour of the following alternative wording for subparagraph (a):

> "Unless otherwise agreed by the parties, a party requesting an interim measure of protection may file its request without notice to the other party, together with an application for a preliminary order necessary to prevent the frustration of the purpose of the interim measure requested."

28. It was stated that such alternative wording was more likely to achieve consensus since it appeared to provide a higher standard, limiting cases where a provisional order might be issued to situations where the arbitral tribunal determined that an ex parte order was necessary to prevent the frustration of the purpose of the interim measure. It was stated that, by omitting the reference to preserving the status quo, the alternative wording provided greater flexibility for the arbitral tribunal. It was also said that the proposal represented an improvement on the draft text by clarifying the differences between an interim measure and a preliminary order.

29. As a matter of drafting, it was suggested that the words "a preliminary order necessary" should be replaced by "such preliminary order as may be necessary". Another drafting suggestion was made in response to a question as to whether the absence of notice to the other party applied to both the request for the interim measure and the application for a preliminary order. With a view to making it abundantly clear that both the request and the application were made without notice to the other party, it was suggested that the words "without notice to the other party" should be moved to the end of subparagraph (a). Some support was expressed for these suggestions.

30. It was suggested that subparagraph (a) was intended to reflect an existing practice, whereby arbitrators would notify a party of an application for a preliminary measure, together with an order by the arbitral tribunal (sometimes referred to as a "stop order") requiring that party to refrain from taking any action that might affect the position of the parties until both parties had been heard. With a view to further restricting the function of an interim order to reflecting that practice, it was proposed that subparagraph (a) should read along the following lines:

> "Unless otherwise agreed by the parties, a party requesting an interim measure of protection may file its request without notice to the other party, together with an application for a preliminary order directing the other party to take no action to frustrate the purpose of the interim measure requested."

31. Although that proposal was too restrictive in the view of some delegations, it received broad support as a formulation that could reconcile the opposing views expressed in respect of ex parte interim measures. It was also pointed out that the proposed wording would be particularly helpful in providing a distinction between the limited purpose of a preliminary order and the more general functions served by interim measures. In response to questions, it was explained that the reference to "directing the other part to take no action to frustrate the purpose of the interim measure" should not be interpreted as only requiring a party to refrain from acting

but rather should be broadly understood to also encompass a direction for an affirmative action. In addition, it was pointed out that the term "order" should not be interpreted as imposing any procedural requirement as to the form that a preliminary order should take.

32. After discussion, the Working Group adopted the alternative wording proposed above under paragraphs 30 and 31, subject to its future deliberations regarding the placement of paragraph (7) and the formulation of any opting-out or opting-in clause.

Subparagraph (b)

References to paragraphs (2), (3), (5), (6) and (6 bis)

33. Concern was expressed that the references in subparagraph (b) to paragraphs (2), (3), (5), (6) and (6 bis) could be interpreted as creating a single regime for both interim measures and preliminary orders. In response, it was said that references to paragraphs (3), (5), (6) and (6 bis) were designed to build in the same safeguards and conditions that applied to interim measures and should not be interpreted as equating a preliminary order with any other interim measure.

34. Given that the Working Group agreed to delineate preliminary orders in a more limited fashion (see above, paras. 30-32), the Working Group, after discussion, agreed to delete the reference to paragraph (2) in subparagraph (b). It was also agreed to maintain the reference to paragraphs (3), (5), (6) and (6 bis).

Possible reference to paragraph (4)

35. A proposal was made that subparagraph (b) should include a reference to paragraph (4) which provided that the arbitral tribunal "may" require security in the context of an application for an interim measure. As a consequence of that proposal, it was also suggested that subparagraph (g) (under which an arbitral tribunal came under an obligation to require security in connection with the issuance of a preliminary order) should be deleted. It was recalled that the Working Group had, in earlier discussions, concluded that the provision of appropriate security should be a mandatory requirement to the granting of ex parte interim measures of protection (see A/CN.9/545, para. 69). Some support was expressed for the retention of security as a mandatory requirement given that it was one of the most important safeguards in an ex parte situation.

36. However, concern was expressed that, in some circumstances, requiring security would not be feasible, for example, where a claimant was in an impecunious state because of action taken by the respondent or where injunctive relief was sought. In response, it was said that paragraph (g) was already intended to accommodate these concerns through its reference to "appropriate" security.

37. Nevertheless, strong support was expressed for the view that it would be preferable to preserve a level of discretion for the arbitral tribunal to exercise when dealing with the matter of security. To achieve that result, it was suggested that subparagraph (g) should be modified so as to oblige the arbitral tribunal to consider the issue of security but leave the decision on whether to require such security to its discretion. Concerns were expressed, however, with the possible consequences of failure by the arbitral tribunal to meet such an obligation. To alleviate those

concerns, a proposal was made that no reference should be made to paragraph (4) in subparagraph (b) and that, instead, the following words should be added at the end of subparagraph (g): "unless it is satisfied that there are special reasons not to do so". Broad support was expressed for the substance of that proposal. As a matter of drafting, a question was raised as to whether the word "special" should be used, at the risk of suggesting that the arbitral tribunal ought to be presented with pre-defined specific reasons. In response, it was suggested that words along the following lines might be used: "unless the arbitral tribunal considers it inappropriate or unnecessary to do so". The Secretariat was requested to prepare a revised draft of subparagraph (g) taking account of that discussion.

38. Concern was expressed that the point in time when security might be required was not clearly defined. As well, concern was expressed that insufficient attention had been given to date on the relationship between subparagraph (g) and provisions relating to enforcement dealt with in draft article 17 bis. It was recalled that that matter had been the subject of earlier discussions in the Working Group, but that the full implications of the relationship between an order for security made by an arbitral tribunal and its impact or relevance in later court proceedings for enforcement had not been fully considered (for earlier discussions, see A/CN.9/524, paras. 72-75). It was agreed that the matter might need to be further considered at a later stage.

Subparagraph (c)

39. The Working Group proceeded to consider subparagraph (c). It was suggested that subparagraph (c) should be omitted for the reason that it merely repeated what was already in subparagraph (a). Another suggestion was that, to the extent subparagraph (c) offered guidance that might be useful to arbitrators, its content could be included in explanatory material to clarify the meaning of subparagraph (a).

40. Views were expressed, however, for the retention of subparagraph (c) in the body of paragraph (7). It was stated that subparagraph (a) dealt with the procedure to be followed by a party when applying for a preliminary order whereas subparagraph (c) dealt with the issue from the perspective of the arbitral tribunal's powers and provided guidance as to the considerations to be taken into account by an arbitral tribunal when granting such an order. In that way, subparagraph (c) could be seen as supporting and strengthening subparagraph (a).

41. To emphasize the exceptional nature of preliminary orders and to ensure that subparagraph (c) complemented rather than duplicated paragraph (a), it was suggested that subparagraph (c) should be replaced by the following: "The arbitral tribunal may not grant a preliminary order unless it concludes that there are grounds for concern that the purpose of the requested interim measure will otherwise be frustrated before all parties can be heard". Support was expressed for that proposal, which was said to place adequate emphasis on the exceptional circumstances that were required to justify the issuance of a preliminary order. It was suggested that, to further emphasize the serious implications of a preliminary order, the words "grounds for concern" (which were considered imprecise and too broad in scope) should be replaced by the words "substantial likelihood" or "reasonable basis for concern". In that connection, it was suggested that the draft provision should not

only concern itself with the risk of frustration of the measure but also with the appropriateness of the measure.

42. Concern was expressed that requiring arbitrators to apply standards such as "substantial likelihood" or "reasonable basis for concern" might lead to uncertain results and might not offer the simple guidance called for, in particular by less experienced arbitrators. The Working Group took note of that concern.

43. Another suggestion was made that subparagraph (c) might be more helpful if it was to be drafted in an affirmative rather than negative way. As a matter of drafting, it was suggested that the term "concludes" should be replaced by the term "considers" and that the word "otherwise" should be deleted as unnecessary. It was suggested that subparagraph (c) should be redrafted along the following lines: "The arbitral tribunal may only grant a preliminary order if it considers that there is a reasonable basis for concern that the purpose of the requested interim measure will be frustrated before all parties can be heard". After discussion, the Working Group adopted the substance of that proposal.

Subparagraph (d)

Notice

44. The Working Group focused its attention on the first unbracketed text of subparagraph (d). Noting that, in some cases, it would be difficult for an arbitral tribunal to give notice to the party against whom the preliminary order was directed, it was suggested that, in line with the approach taken elsewhere in the Model Law, the question of who shall give notice should be left open. For example, article 24 (2) of the Model Law provided that the parties "shall be given sufficient advance notice" and did not specify who would give such notice. It was said that such an approach could allow the arbitral tribunal to direct the requesting party to give notice. The Working Group agreed that subparagraph (d) should provide such flexibility to the arbitral tribunal.

45. It was suggested that subparagraph (d) required that notice of the application for a preliminary order should be given but did not expressly include an obligation that notice should also be given of the request for an interim measure. It was suggested that, although that request might already be covered by the term "all other communications", the term ", the request for an interim measure" should be added after the word "application" when first appearing in subparagraph (d) to put that point beyond doubt. The Working Group adopted the substance of that suggestion and requested the Secretariat to redraft subparagraph (c) accordingly.

Deferral of notification and court enforcement

46. The Working Group then turned its attention to the issue of deferral of notification until court enforcement of the preliminary order as set out in the bracketed text at the end of subparagraph (d).

47. It was stated that including the bracketed text would permit a continuing dialogue between the party applying for the preliminary order and the arbitral tribunal to the exclusion of the other party and allow the arbitral tribunal to become enmeshed in episodic renewals of the deferral of notification to the other party. It was submitted that confidence in the arbitral process would be undermined by the

inclusion of text that would disregard the principle of due process by allowing an arbitral tribunal to make an enduring decision against a party without first hearing from that party. In response, it was stated that the issue was one of preventing frustration of the requested interim measure and, in any event, the maximum period during which notification to the other party could be deferred would be limited to twenty days under subparagraph (f). As to the view that including the bracketed text would undermine confidence in arbitration, it was pointed out that there were often times in the course of an arbitration when arbitrators made decisions that were against the desire of one party, as for example, in setting terms of reference and time periods. The view was expressed that confidence in arbitration came from preventing one party from gaining an unfair advantage, not from avoiding unpopular decisions. The view was expressed, however, that these examples were inapposite as such matters were settled *inter partes* so that due process was not affected.

48. The view was also expressed that requiring an arbitral tribunal to take account of the need for court enforcement presupposed a culture of cooperation between arbitral tribunals and courts that did not exist in all countries. It was pointed out that, where it was foreseen that court enforcement of a preliminary order would be necessary (i.e. where a degree of surprise was required to prevent frustration of the purpose of the interim measure), it would be more logical and practical for the requesting party to address a request to the same effect directly to the competent State court rather than prolong the unilateral phase before the arbitral tribunal. Against that view, it was stated that, in certain complex arbitrations, it would be more efficient for parties to request a preliminary order from the arbitral tribunal that already had knowledge of the case. It was also stated that, in any event, the choice of whether to go to court or an arbitral tribunal to request a preliminary order should be left to the parties.

49. It was noted that paragraph 7 (i), currently contained in a footnote to subparagraph (d), set out a detailed procedure for the deferral of notification to allow court enforcement of the preliminary order. It was pointed out by a number of delegations that the provision delved into too much procedural details. Such details, it was said, did not easily lend themselves to harmonization by way of uniform legislation, were unnecessarily complex, risked burdening arbitrators with a procedural framework that was too rigidly inspired from procedural rules followed by certain State courts, and might insufficiently cover the broad range of practical circumstances that might arise in the context of interaction between State courts and arbitral tribunals. The prevailing view was that the procedure for deferral of notice should be simplified. To that end, it was agreed that the reference to paragraph 7 (i) in subparagraph (d) and subparagraph (i) itself should be deleted.

50. As a matter of drafting, it was suggested that the words “until court enforcement or expiry of the preliminary order” at the end of the bracketed part of subparagraph (d) should be replaced by the words “until the court decides whether or not to enforce the preliminary order or the order expires”. Another drafting suggestion was that, to clarify that the deferral should be as short as possible, words along the lines of “whichever be the earlier” should be added to the end of subparagraph (d). The Working Group took note of those suggestions.

51. After discussion, the Working Group failed to reach consensus as to whether the issue of court enforcement of preliminary orders should be dealt with in the revised draft of article 17. It was decided that the bracketed text at the end of

subparagraph (d), subject to the deletion of the reference to subparagraph (i), should remain in square brackets for continuation of the discussion at a future session. The Secretariat was requested to prepare a revised draft of subparagraph (d), taking into account the deliberations of the Working Group. At the close of its deliberations, the Working Group was reminded that the deletion of all provisions dealing with the court enforcement of preliminary orders might make the entire text of paragraph (7), including the opting-out clause, more acceptable to a number of delegations.

Subparagraph (e)

52. It was recalled that subparagraph (e) dealt with the opportunity for the responding party to present its case after it had received notice from the arbitral tribunal and established a corresponding time period. That period was specified to be the earliest possible time and, in any event, no later than forty-eight hours after notice was given to the responding party.

53. It was suggested that, in order to clarify that the arbitral tribunal had an obligation to give the responding party an opportunity to present its case, the opening words of the subparagraph should be redrafted in the active voice, along the following lines: “The arbitral tribunal shall give an opportunity to the party against whom the preliminary order is directed to present its case ...”. The Working Group adopted that suggestion.

54. A concern was raised that the reference to the time limit of forty-eight hours might not be appropriate given that a responding party might require a longer period to prepare and present its case. It was explained, in response, that the reference to “the party against whom the preliminary order is directed” being given “an opportunity to present its case” was intended to establish the right of that party to be heard but not to burden that party with an obligation to react within forty-eight hours.

55. With a view to introducing further clarity and to avoid the risk that the provision could be misinterpreted as creating an obligation for the responding party to react within forty-eight hours, various proposals were made. One proposal was that the time period for the responding party to present its case should be more flexible and refer simply to “the earliest possible time”. A related proposal was that the words “at the earliest possible time” should be replaced by the words “at the earliest practicable time”. Another proposal was that the reference to forty-eight hours or other short time period should be redrafted to delimit the period during which the arbitral tribunal should decide on the measure after having heard from the responding party. Under those combined proposals, subparagraph (e) would read along the following lines: “The arbitral tribunal shall give to the party against whom the preliminary order is directed an opportunity to present its case before the arbitral tribunal at the earliest practicable time. Within forty-eight hours or such other short time period, following the expiration of the time for the other party to present its case, the arbitral tribunal shall decide whether to confirm, extend or modify a preliminary order.”

56. As a matter of drafting, it was suggested that the words “to confirm, extend or modify a preliminary order” in the proposed redraft of subparagraph (e) should be replaced by the words “to confirm, extend or modify the preliminary order as an interim measure, or to terminate the order” so that all occurrences could be covered.

Yet another drafting suggestion was that, with a view to avoiding possible confusion between a hearing on the preliminary order and a hearing on the merits of the underlying application for the interim measure, the words "to present its case" should be replaced by the words "to present its case for termination of the preliminary order".

57. While it was observed that that proposed redraft of subparagraph (e) provided greater flexibility for the time period during which the responding party should present its case, concern was expressed that the deletion of the forty-eight-hour period during which the responding party should present its case removed a fundamental safeguard for that party. To meet that concern, it was suggested that the words ", normally within forty-eight hours" could be added at the end of the first sentence of the proposed redraft. While the concern was widely shared, the view was also expressed that the term "normally" was not generally used in legislative texts and that alternative wording should be sought, possibly inspired from the original text of subparagraph (e) or otherwise referring to the time appropriate "in the light of the circumstances".

58. Another concern in relation to the proposed redraft of subparagraph (e) was that, once the arbitral tribunal had heard from the responding party, the preliminary order became obsolete and the regime of interim measures should then be applied. After discussion, the second sentence of the proposed redraft was withdrawn by its proponents. However, it was pointed out that the deletion of the second sentence might create a gap in that it was not clear what happened to the preliminary order after the party had been given an opportunity to present its case.

59. A further proposal was made to redraft subparagraph (e) as follows: "The arbitral tribunal shall give to the party against whom the preliminary order is directed an opportunity to present its case no later than forty-eight hours after notice is given or a longer period of time if it is so required by that party." It was explained that the purpose of that proposal was to expressly provide for a longer period for the responding party to present its case and, as well, to expressly allow that party to request that longer period rather than leave that matter entirely to the judgement of the arbitral tribunal based on the circumstances.

60. A comment was made that subparagraph (e) did not address the consequences of the situation where a party intentionally sought to delay the presentation of its case to the arbitral tribunal with the intention of taking advantage of the twenty-day time limit on preliminary orders to frustrate the request for an interim measure of protection. In response, it was pointed out that that issue should not be over regulated and the provision should seek to provide a flexible procedure for the arbitral tribunal to deal with such a case.

61. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (e) taking into account the above concerns, proposals and suggestions.

Subparagraph (f)

62. It was suggested that the second sentence of subparagraph (f) should be deleted, as its content was already reflected in paragraph (6), which applied to a preliminary order by virtue of paragraph (7)(b). It was agreed that the second sentence could be deleted on that basis. However, it was pointed out that it might be

important to keep a reference to the "extension" of the preliminary order, as that term was not expressly contained in paragraph (6). In response, it was suggested that the word "modification" implicitly included the right for the arbitral tribunal to extend the preliminary order. The view was expressed, however, that further clarification would need to be introduced in paragraph (6) with respect to the possibility of an extension of an interim measure.

63. In respect of the first sentence of subparagraph (f), it was proposed that the phrase starting with the word "unless" should be deleted. It was suggested that that provision was not necessary, created a risk of confusion between the interim measure and the preliminary order, and could contradict the principle that a preliminary order had a fixed life span of twenty days. However, it was noted that the removal of those words posed the risk that there could be a gap between the time when the preliminary order expired and the time when the interim measure took effect. It was suggested that such a gap could arise, for example, if the enforcement of a preliminary order took longer than twenty days. In response, it was said that it might be necessary to clarify in subparagraph (f) that the extension of a preliminary order would imply its conversion into an interim measure. To achieve such clarification, it was proposed to replace the words "unless it has been confirmed, extended or modified by the arbitral tribunal in the form of an interim measure of protection [or in any other form]" by a new sentence along the following lines: "The arbitral tribunal may convert the preliminary order into an interim measure." While some support was expressed for that view, it was suggested that it might be simpler to state that an interim measure could be issued which contained all or part of the contents of a preliminary order.

64. To strengthen the principle that an arbitral tribunal could not extend the ex parte phase of the proceedings beyond the twenty-day limit (which was referred to as the "drop dead date" to illustrate the view that a preliminary order could only be extended beyond that limit in the form of an inter partes interim measure), it was proposed that subparagraph (f) could be redrafted as follows: "In any event, a preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal." Some support was expressed for that suggestion. The Secretariat was requested to take account of the above proposals and suggestions when preparing a revised draft of subparagraph (f) for further consideration by the Working Group.

Subparagraph (g)

65. The Working Group agreed that, as discussed above in relation to subparagraph (b) (see above, paras. 35-38), subparagraph (g) should be modified by including wording along the following lines at the end of subparagraph (g): "unless the arbitral tribunal considers it inappropriate or unnecessary to do so".

Subparagraph (h)

66. It was recalled that subparagraph (h) was inspired from the rule in existence in certain jurisdictions that counsel had a special obligation to inform the court of all matters, including those that spoke against its position and that it was considered as a fundamental safeguard and an essential condition to the acceptability of ex parte interim measures (for earlier discussions, see A/CN.9/545, para. 88). However, it was suggested that subparagraph (h) duplicated an obligation that was already

provided for under paragraph (5) and was included, pursuant to paragraph (7) (b), in the list of provisions that applied to paragraph (7).

67. The view was expressed that a possible difference between the two provisions might be the existence of a continuing obligation of disclosure under subparagraph (h) that was not reflected under paragraph (5). Accordingly, a proposal was made in respect of paragraph (5) to replace the words "The requesting party shall promptly make disclosure of" by the words "The requesting party shall have a continuing obligation to disclose". In response, it was explained that, as currently drafted, paragraph (5) already established a continuing obligation.

68. It was stated that subparagraph (h) established a broader obligation by requiring the disclosure of all circumstances that the arbitral tribunal was likely to find relevant to its determination, whether or not related to the application, as compared to paragraph (5), which referred only to any material changes in the circumstances on the basis of which the request was made or the interim measure was granted. In addition, it was said that while paragraph (5) addressed material changes in the circumstances after the interim measure had been granted, subparagraph (h) covered the obligation to inform until the responding party had presented its case. Given those differences between the two provisions, the Working Group agreed that subparagraph (h) should be retained to ensure that the requesting party was under a strong obligation for full disclosure until the other party had been heard. However, bearing in mind that, under many national laws, the obligation for a party to present arguments against its position was unknown and contrary to general principles of procedural law, it was suggested that further consideration might need to be given to the possibility of adding a footnote inspired from the approach taken under article 35 (2) of the Model Law. The Secretariat was invited to take note of that suggestion when preparing a revised draft of subparagraph (h) for further consideration by the Working Group.

General discussion and future course of action by the Working Group

69. Due to the lack of sufficient time, the Working Group did not discuss paragraphs (1) to (6 bis) of draft article 17 (see above, para. 12). It was noted that discussion of those draft provisions, including proposals for alternative formulations (see above, para. 22) would need to be reopened at a future session. At the close of its review of the individual provisions contained in paragraph (7), the Working Group reverted to the general debate as to whether a revised version of article 17 should seek to establish a legal regime for interim measures issued ex parte by an arbitral tribunal and, if so, what form might be given to such a legal regime. The view was reiterated that, in the absence of a consensus to recognize such ex parte interim measures through model provisions that were described by some delegations as potentially damaging to the Model Law and to commercial arbitration in general, the option not to deal with ex parte measures at all should be kept open. As an additional reason for refusing to recognize ex parte measures in commercial arbitration, it was stated that a regime along the lines of paragraph (7) might be particularly difficult to apply for non-lawyers (also described as "lay arbitrators"). The hope was expressed that, even if no consensus could be found in respect of a legal regime for ex parte interim measures, at least a number of options could be outlined in the revised text of the Model Law for the benefit of national legislators and other users of that instrument. The prevailing view, however, was that every

effort should be made to preserve the benefit of the progress achieved at the current session towards a consensus on a limited recognition of ex parte interim measures in the form of preliminary orders.

70. The Secretariat was requested to prepare a revised draft of paragraph (7) outlining various options that might need to be considered in finalizing a set of model statutory provisions aimed at providing such limited recognition of ex parte measures. In particular, it was agreed that variants of the text might need to be considered in respect of the following four possible approaches that might be taken in respect of paragraph (7): opting-in by the parties; opting-out by the parties; opting-in by the enacting State; opting-out by the enacting State (see above, paras. 18-21). In that connection, it was pointed out that, when preparing a revised draft, the following issues might need to be borne in mind: an opting-in provision inserted in a set of rules along the lines of paragraph (7) should seek to preserve the freedom of the parties to enter agreements containing other legal rules governing ex parte interim measures; an opting-in regime should clarify whether it created possibilities for the parties to derogate from the provisions of the Model Law in respect of equality of the parties and the parties' right to be heard; the implications of such derogations in respect of articles 34 and 36 of the Model Law should also be clarified; in cases where an opting-in situation would be created for national legislators, explanations might need to be provided as to whether, in the absence of any specific provision regarding ex parte interim measures, the text should be interpreted as permitting or not permitting arbitral tribunals to issue such measures.

71. It was also agreed that the Working Group would need to further consider options as to whether or not court enforcement of preliminary orders might be sought and, if so, whether detailed rules in that respect should be provided in draft article 17 bis.

72. The Working Group noted that, at its forthcoming session scheduled to be held in New York from 10 to 14 January 2005, it would need to make a decision as to whether at least some of the draft articles of the Model Law currently on its work programme (i.e. draft articles 7, 17, 17 bis and 17 ter), as well as the results of its work on the interpretation of the form requirement in respect of the arbitration agreement under the New York Convention could be referred to the Commission for its final review and adoption at its thirty-eighth session (Vienna, 4-22 July 2005).

IV. Possible inclusion of the New York Convention in the list of international instruments to which the draft convention on the use of electronic communications in international contracts applies

73. The Working Group heard a brief introduction to the draft convention currently being prepared by Working Group IV, its relationship to the UNCITRAL Model Law on Electronic Commerce and its intended purpose to provide a uniform regime for the use of electronic communications in the formation and performance of international contracts.

74. Overall support was expressed in favour of the inclusion of a reference to the New York Convention in the draft convention, which was expected to provide

welcome clarity to the writing requirement contained in article II(2) and other requirements for written communications in the text of the New York Convention. A widely shared view was that another compelling reason to address the New York Convention in the draft convention would be to avoid some of the difficulties that could be foreseen if an amendment of the New York Convention itself had to be undertaken.

75. A general concern was expressed that the reference to the New York Convention in the draft convention might result in two groups of States, depending on whether or not State parties to the New York Convention had also ratified the draft convention. It was observed in response that, although the relationship between the two instruments might need to be further considered, the wide use of the UNCITRAL Model Law on Electronic Commerce, on which the draft convention was based, had already created a situation where a distinction might be made among State parties to the New York Convention depending on their possible enactment of the UNCITRAL Model Law on Electronic Commerce and the impact of such enactment under article VII of the New York Convention.

76. It was understood that the introduction of a reference to the New York Convention in the draft instrument would not provide a solution to all of the issues raised by the interpretation of article II (2) of the New York Convention. It was also understood that the possible insertion of a reference to the New York Convention in the draft convention would not negatively impact any future deliberation that the Working Group might need to take in that respect.

77. As to the detailed formulation of the provisions of the draft convention that would affect the interpretation of the New York Convention, a number of proposals were made. One proposal was that the scope of the draft convention as set forth in its article 1(4) would need to be carefully considered in the light of Variants A and B. Another proposal was that the exclusions provided under, inter alia, draft article 2 (c) and (g) might be too broadly worded to adequately accommodate the New York Convention. Yet another proposal was that clarity should be provided as to whether the notion of "contract" as used in the draft convention included an arbitration agreement. Further clarification might also be needed in respect of the application of the draft convention not only to the formation but also to the execution of the contract. The view was expressed that, while article IV (1) (a) of the New York Convention permitted the use of a "duly certified copy" in seeking recognition and enforcement of an arbitral award, that notion might not be adequately dealt with in the draft convention.

78. A question was raised as to whether the rule set forth in article 10 (2) of the draft convention under which an electronic communication was deemed to be received when the communication entered "an information system of the addressee" adequately covered the type of communications exchanged for the purposes of an arbitration agreement.

79. The Working Group agreed that close coordination was required between the two Working Groups and that the above-mentioned issues might be further discussed at its forthcoming session. Delegations were encouraged to consult and provide their comments to the Secretariat for the preparation of the future deliberations of both Working Groups.

V. Other business

80. The Working Group took note of a proposal that, when planning its future work, it might give priority consideration to the issues of online dispute resolution and to the possible revision of the UNCITRAL Arbitration Rules.