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Report of the Working Group on Arbitration and Conciliation on the work of its forty-second session (New York, 10-14 January 2005)

Contents

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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 (hereinafter referred to as "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 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.

3. The Working Group, which was composed of all States members of the Commission, held its forty-second session in New York, from 10 to 14 January 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, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Lebanon, Madagascar, Mexico, Morocco, Nigeria, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela (Bolivarian Republic of) and Zimbabwe.

4. The session was attended by observers from the following States: Afghanistan, Bolivia, Cape Verde, Congo, Costa Rica, Cuba, El Salvador, Finland, Holy See, Ireland, Malaysia, Myanmar, Netherlands, New Zealand, Nicaragua, Philippines, Senegal, Syrian Arab Republic and Ukraine.

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

6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for 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), Global Center for Dispute Resolution Research, International Chamber of Commerce (ICC), International Law Institute (ILI), Inter-Pacific Bar Association (IPBA), Kuala Lumpur Regional Centre for

Arbitration (KLRCA), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration (Lagos), School of International Arbitration, the European Law Students' Association (ELSA) and Union International des Avocats (UIA).

7. The Working Group elected the following officers:

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

Rapporteur: Mr. Lawrence BOO (Singapore).

8. The Working Group had before it the following documents: (a) the provisional agenda (A/CN.9/WG.II/WP.133); (b) a note by the Secretariat containing a newly revised text of paragraph (7) of draft article 17 on the power of an arbitral tribunal to order interim relief on an ex parte basis, pursuant to the decisions made by the Working Group at its forty-first session (A/CN.9/WG.II/WP.134); (c) a note by the Secretariat containing a revised version of a draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the Model Law, tentatively numbered 17 bis) (A/CN.9/WG.II/WP.131); (d) a note by the Secretariat containing a proposal for a draft provision on the power of courts to order interim measures of protection in support of arbitration (for insertion as a new article of the Model Law, tentatively numbered 17 ter) (A/CN.9/WG.II/WP.125); (e) a note by the Secretariat regarding the inclusion of a reference to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the draft convention on the use of electronic communications in international contracts (A/CN.9/WG.II/WP.132); and (f) the report of the Working Group on its forty-first session (A/CN.9/569).

9. 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 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") in the list of international instruments to which the draft convention on the use of electronic communications in international contracts would apply;
6. Other business;
7. Adoption of the report.

II. Deliberations and decisions

10. The Working Group discussed agenda item 4 on the basis of the text contained in notes prepared by the Secretariat (A/CN.9/WG.II/WP.125, A/CN.9/WG.II/WP.131 and A/CN.9/WG.II/WP.134). The deliberations and conclusions of the Working

Group with respect to that item are reflected in chapters III, IV and V. 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 VI and VII, 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

11. The Working Group recalled that, at its forty-first session (Vienna, 13-17 September 2004), it had undertaken a detailed review of the text of paragraph (7) of the revised version of article 17 regarding the power of an arbitral tribunal to grant interim relief on an ex parte basis, before coming to a decision as to whether a specific mention of preliminary orders should appear in draft article 17 (in draft article 17 and in this report, the notion of interim relief being granted on an ex parte basis is generally reflected through use of the term "preliminary order(s)"). The Working Group resumed discussions on paragraph (7) of draft article 17, on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group and set out in A/CN.9/WG.II/WP.134.

Paragraph 7

12. There remained division in the Working Group as to whether or not to include a provision on preliminary orders in draft article 17.

13. It was said that international arbitration practice would benefit from allowing the possibility for arbitral tribunals to grant preliminary orders, for a number of reasons, including that:

- The parties to an arbitral proceeding might prefer to obtain preliminary orders from the arbitral tribunal instead of requesting a State court to issue such an order;
- The power to grant ex parte interim relief already vested with State courts, and arbitral tribunals should enjoy the same level of powers as State courts in that respect;
- The absence of regulation regarding preliminary orders had the consequence of leaving open the possibility that an arbitral tribunal might order and enforce a preliminary order and the inclusion of paragraph 7 was important as it provided for valuable safeguards and useful guidance for those States that were willing to adopt legislation on preliminary orders.

14. However, opposition was expressed to its inclusion on a number of grounds, including that:

- Paragraph (7) was contrary to the principle of equality of treatment of the parties as provided for under article 18 of the Model Law and contrary to the provision of article 36 (1)(a)(ii) of the Model Law;
- There was no consensus as to whether, as a matter of general policy, the Model Law should seek to establish full parity between the powers of the arbitral tribunals and those of the State courts, as illustrated by the divergence of opinions in respect of the issue of preliminary orders.

15. After discussion, the Working Group agreed to further consider the principles of whether paragraph 7 should be drafted as an opt-in or opt-out for States and/or for the parties to an arbitral proceeding and whether a court enforcement regime should apply to preliminary orders.

Opt-in or opt-out for States

16. The view was expressed that it was illogical and unnecessary to include either an opt-in or opt-out clause for States given that the draft instrument was in the form of a Model Law and therefore States were free to enact or not, or to modify, any of its provisions.

17. However, the view was also expressed that the inclusion of an opt-out option for the States should be given consideration in order to provide guidance to States that had doubts about the usefulness of preliminary orders. That option could be reflected by adding a footnote to paragraph (7), modelled on the approach taken in article 35 (2) of the Model Law, along the lines that "paragraph (7) is intended to define the procedure applicable to preliminary orders. It would not be contrary to the harmonization to be achieved by the model law if a State decided not to include this paragraph".

Opt-in or opt-out for the parties

18. The opt-in option was viewed as an advisable solution and, in particular, was strongly supported by those delegations opposing preliminary orders. It was also pointed out that an opt-in approach provided a legal foundation for preliminary orders as an expression of the will of the parties. In addition, to answer concerns that an opt-in solution would result in preliminary orders never being issued in practice, it was stated that there existed examples of arbitration rules applied by arbitration institutions which contained such a right to order ex parte interim relief and those rules could be incorporated in arbitration clauses concluded by commercial parties. However, it was stated that where no such rules were incorporated, the opt-in approach would result in preliminary orders being unavailable in most cases.

19. Support was expressed for the opt-out option for the parties. The opt-out option was described as more in line with the current structure of the Model Law, which contained several instances of such default rules subject to contrary agreement by the parties. It was further observed that while opt-out provisions were commonly used in codes and other legislation of civil law countries, that was not the case for opt-in provisions. The opt-out option was also thought to be more in line with efforts by the Working Group at previous sessions to recognize preliminary orders provided that appropriate safeguards were in place to prevent abuse of such orders.

Enforcement

20. It was recalled that draft article 17 bis (see A/CN.9/WG.II/WP.131) contained in its paragraph (6) a provision on court enforcement of preliminary orders. It was widely felt that the inclusion of paragraph (7) in draft article 17 could be more acceptable to those opposing preliminary orders if no provision was made for the court enforcement of such orders. It was understood that parties to an arbitration typically complied with orders of the arbitral tribunal.

Proposals

21. A number of proposals were made for the structuring of paragraph (7).

22. One proposal was that the revised draft could be acceptable provided that it combined an opt-in approach for the parties and the deletion of paragraph (6) of article 17 bis, which dealt with enforcement of preliminary orders. However, it was pointed out that providing an enforcement regime for preliminary orders under paragraph (6) of article 17 bis would be more acceptable if the opt-in option was retained, and the parties authorized the arbitral tribunal to apply preliminary orders.

23. To overcome the wide divergence of views between the opt-in approach and those opposing that approach, another proposal was made that the words "unless otherwise agreed by the parties" and "if expressly agreed by the parties" would be deleted and explanations along the following terms be included as footnotes to paragraph (7):

- Arbitral institutions were free to set up their own rules and the parties were free to agree on other provisions;
- Paragraph 7 was intended to define the procedure applicable to preliminary orders and it was not contrary to harmonization to be achieved by the Model Law if a State decided either:
    - Not to include paragraph 7;
    - Only to apply such a provision where the parties so agreed;
    - Not to apply such a provision if the parties have agreed otherwise; or
    - To establish less onerous conditions than those contained in paragraph 7.

24. With the same objective of overcoming the wide divergence in opinions regarding the opt-in or opt-out solutions, yet another proposal was that, if the Working Group agreed to retain the opt-out option for the parties, a footnote to paragraph 7 (a) could be added, providing that it would not be contrary to the harmonization to be achieved by the Model Law if a State decided to retain the opt-in approach for the parties.

25. Some support was expressed for the proposals that would leave open various possibilities in a footnote. However, it was pointed out that spelling out all possible options in a footnote to paragraph (7) would run contrary to the purpose of achieving harmonization of legislation, and would deprive States from receiving clear guidance on that issue.

26. A further proposal was that paragraph 7 should provide that a preliminary order was in the nature of a procedural order (as opposed to an award). It was said that that clarification would distinguish preliminary orders from interim measures of protection, which according to article 17 (2) could be issued in the form of an award or in another form. Thus, the enforcement regime provided for under article 17 bis would apply only to interim measures of protection.

27. After discussion, the Working Group, notwithstanding the wide divergence of views, agreed to include the revised draft of paragraph (7) in draft article 17, on the basis of the principles that that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards, that no enforcement procedure would be provided for preliminary orders in article 17 bis, and that no footnote would be added.

Subparagraph (a)

Opt-out option

28. In order to reflect the decision made by the Working Group concerning the retention of the opt-out option for the parties (see above, paragraph 27), the Working Group agreed to retain the words "unless otherwise agreed by the parties" and to delete the words "if expressly agreed by the parties".

"take no action"

29. A proposal was made to substitute the words "take no action" with the word "not" in order to clarify that a preliminary order might be aimed not only at preventing a party from taking an action but also at requiring a party to take an action such as, for instance, to protect goods from deterioration or some other threat. It was said that that proposal might render the distinction between preliminary orders and interim measures more difficult to establish. After discussion, that proposal was adopted.

30. It was said that paragraph (7) (a) could be misunderstood as providing that the arbitral tribunal could only direct the parties in general terms not to frustrate the purpose of the interim measure. It was agreed that the arbitral tribunal had discretion to issue a preliminary order that was appropriate and was in keeping with the circumstances of the case and that such an understanding should be made clear in any explanatory material relating to that provision.

Subparagraph (b)

31. A proposal to include the words "relating to interim measures also" after the word "article" was agreed to on the basis that those words clarified that the intention of subparagraph (b) was to make the obligations set out in paragraphs (3), (4), (5) (6) and (6 bis) applicable to preliminary orders.

Subparagraph (c)

Power of the arbitral tribunal to grant preliminary order

32. As a general remark concerning the structure of paragraph (7), it was pointed out that, whereas the arbitral tribunal was expressly empowered to grant interim

measures under paragraph (1) of draft article 17, no equivalent provision was included regarding the power of the arbitral tribunal to grant preliminary orders. It was therefore proposed to modify subparagraph (c) so that the arbitral tribunal be expressly granted that right, and for that purpose, to delete the words "only" appearing before the word "grant" and to replace the word "if" by the word "provided". That proposal was adopted by the Working Group.

"reasonable basis for concern"

33. A suggestion was made that subparagraph (c) should be redrafted to emphasize the exceptional nature of a preliminary order by only permitting such an order where there were compelling reasons for concern that the requested interim measure would be frustrated before all the parties could be heard.

34. The Working Group was reminded that the formulation of the standard that an arbitral tribunal should apply in determining whether or not to grant a preliminary order had been discussed at a previous session (see A/CN.9/569, paras. 39-43) and that concerns had been expressed against using imprecise standards. It was stated that a requirement that the arbitral tribunal should find compelling reasons to grant a preliminary order could create a situation where it would be difficult for an arbitral tribunal to either issue or lift the requested preliminary order. After discussion, the Working Group agreed to retain the existing language, which would be simplified by deleting the words "basis for".

definition of the risk

35. It was suggested that the risk defined under subparagraph (c) that the measure be frustrated before all the parties could be heard did not include the risk that the preliminary order be disclosed to the party against whom it was made, and it was therefore proposed to amend subparagraph (c) to better reflect that risk. Accordingly, it was suggested that the words "before all parties can be heard" should be deleted. In that connection, it was said that the formulation contained in a previous draft of paragraph 7 (a), reproduced in A/CN.9/WG.II/WP.131, para. 4 and A/CN.9/569, para. 12, stating that "where prior disclosure of an interim measure to the party against whom it is directed risks frustrating the purpose of the measure", was preferable. The Secretariat was requested to take that suggestion into account when preparing a revised draft of that provision.

36. To reflect the decision that a preliminary order could only be issued as a procedural order and not as an award (see above, paragraph 27), the Working Group agreed that wording along the lines of "in the form of a procedural order" should be inserted after the words "a preliminary order". However, it was pointed out that the distinction between a procedural order and an interim measure was not only a matter of form but also a matter of substance, since procedural decisions were not enforceable under the New York Convention or article 36 of the Model Law. The Secretariat was requested to consider whether appropriate wording could be found to reflect the procedural nature of a preliminary order, without suggesting that preliminary orders should be issued according to any specific procedural form.

Subparagraph (d)

Communication of information

37. It was stated that the requirement to give notice to the party against whom the preliminary order was directed of all communications between the requesting party and the arbitral tribunal in relation to the request might be easily discharged in respect of written communications. However, a concern was expressed that it was less clear how to discharge that duty in respect of oral communications. To address that concern, it was suggested that words along the lines of "including a verbatim transcription of any oral communication" or "including a record of any verbal discussion" should be added at the end of subparagraph (d). In response, it was stated that the suggested additional words might create an excessively burdensome requirement, particularly in circumstances where a preliminary order was sought in urgent circumstances and arrangements for verbatim records were not practicable. With a view to achieving greater flexibility, it was suggested that it should be clarified that the arbitral tribunal was obliged to disclose not only the existence of the oral communications but also to indicate their contents. It was said that that approach provided flexibility for the arbitral tribunal to determine how best to meet its obligation of disclosure under subparagraph (d). The Secretariat was requested to implement that approach through appropriate wording.

"A determination in respect of a preliminary order"

38. A suggestion was made to add the words "in respect of an application for" after the words "a determination" for the sake of providing consistency with paragraph 7 (a), which referred to "an application for a preliminary order". The Secretariat was requested to take account of that suggestion in revising the draft.

"the party against whom the preliminary order is directed"

39. It was stated that, because a determination might be for or against the granting of a preliminary order, it might be more appropriate to refer to "the party against whom the preliminary order is requested" or "is sought", rather than to "the party against whom the preliminary order is directed". That proposal was adopted.

Notice

40. The Working Group recalled that, at its forty-first session (see A.CN.9/569, para. 44), there had been a strong preference to leave open the question as to who should bear the obligation to communicate the documents and information referred to under subparagraph (d). However, after discussion, the Working Group found that, as drafted, subparagraph (d) was ambiguous, and that it was preferable to state that the arbitral tribunal in receipt of the request was under an obligation to give notice of the documents and information to the other party. That proposal was adopted.

41. It was suggested that it should be clarified that the obligation of the arbitral tribunal to communicate documents and information to the party against whom the order was sought applied whether the arbitral tribunal accepted or refused to issue the preliminary order. The Working Group confirmed that obligation and the view was expressed that the current wording adequately expressed it. However, the Working Group took note of the suggestion that additional clarification might be

further considered in the context of any explanatory material that might be prepared at a later stage in respect of article 17.

["unless the arbitral tribunal…whichever occurs earlier"]

42. The Working Group agreed to delete the bracketed text appearing at the end of subparagraph (d) to reflect its earlier decision (see above, paragraph 27) that no judicial enforcement regime should be provided for in the Model Law for preliminary orders.

Subparagraph (e)

Variants A and B

43. The Working Group considered Variants A and B and the question of the appropriateness of defining a time limit for the responding party to present its case. Support was expressed in respect of both Variants.

44. Variant A, which provided for a forty-eight hour period during which the responding party should present its case was seen by certain delegations as presenting the fundamental safeguard of delimiting a time frame, thus emphasizing for the benefit of the arbitral tribunal that prompt action was required. Variant A was also considered to be flexible, as it included the possibility for the party against whom the order was directed to request another time period. A drafting suggestion was made that, in keeping with the approach taken in the Model Law, it would be more appropriate to refer to "two days" rather than "forty-eight hours".

45. Variant B, which did not include any time limitation expressed in hours or days, received support on the basis that the determination of a time limit was unnecessary, as the party affected by the order would in most cases seek to be heard by the arbitral tribunal as soon as was practicable. In addition, the definition of such a time limit was considered as presenting the risk that the arbitral tribunal might not be able to grant a preliminary order only because it was not able, for practical reasons, to hear the party affected by the order within the strict time frame of forty-eight hours.

46. A proposal was made that Variants A and B could be merged along the following lines: "at the earliest possible opportunity and, if at all practicable, within forty-eight hours after notice is received or such longer period of time as is requested by the party against whom the preliminary order has been made". A concern was expressed that the draft proposal was overly detailed and might result in over-regulating the matter.

47. Another proposal was that subparagraph (e) should be redrafted so that it was not left to the party to determine a longer period but rather that the discretion remained with the arbitral tribunal to provide such longer period as the arbitral tribunal might deem appropriate. However, it was stated that the reference to "the earliest possible opportunity" already afforded the arbitral tribunal discretion to fix a longer period even in the absence of a request from the opposing party.

48. Yet another proposal was that a distinction should be made between the obligation of the arbitral tribunal and the obligation of the party affected by the order. Under that proposal, the party against whom the order was directed should be given an opportunity to present its case "at the earliest practicable time" and

wording should be added along the lines of "the arbitral tribunal must decide as promptly as possible under the circumstances".

49. A concern was expressed that even in cases where a preliminary order was not granted, the party against whom that order had been sought might still wish to be heard by the arbitral tribunal and that possibility should be left open in subparagraph (e), by replacing the word "the preliminary order is directed" by the words "the preliminary order is sought". It was stated in response that if an arbitral tribunal decided not to grant a preliminary order against the party concerned, that party might still have recourse to the arbitral tribunal at any later stage of the procedure, including in any inter partes hearing relating to an interim measure.

50. After discussion, it was decided that subparagraph (e) should read 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 at the earliest practicable time. The arbitral tribunal shall decide as promptly as required under the circumstances". A commentary or explanatory note that might be prepared at a later stage in respect of article 17 could refer to two days as an illustration to indicate the intention of the provision.

Notice

51. A question was raised as to whether the notice referred to under Variants A and B was the notice to be given by the arbitral tribunal under subparagraph (d), or whether it referred to another notice, occurring at another point in time, given by the arbitral tribunal to the party affected by the preliminary order in order for that party to present its case. It was suggested that greater clarity could be brought as to when the notice should be given, by providing that the arbitral tribunal should give the opportunity to the party against whom the order was directed to present its case at the same time as the notification under subparagraph (d) occurred. It was proposed to add as the opening words of subparagraph (e) the words "at the same time". That proposal was accepted.

Subparagraph (f)

Twenty-day period

52. In response to a question, it was clarified that the twenty-day period referred to in subparagraph (f) should be understood as running from the date when the preliminary order was granted, and not from the date when that preliminary order was requested. It was further explained that the purpose of subparagraph (f) was to define a time limit for the validity of the preliminary order. When twenty days had lapsed, the preliminary order would be automatically terminated. However, within those twenty days, the preliminary order could be converted into an interim measure of protection issued inter partes after the party against whom the preliminary order was directed had been given an opportunity to be heard, and the arbitral tribunal had decided to confirm, extend or modify the preliminary order in the form of an inter partes interim measure of protection, which would not be affected by the twenty-day limit.

53. In order to reinforce the obligation of the arbitral tribunal to deal promptly with the application for a preliminary order in the shortest possible time, a proposal was made to modify subparagraph (f) as follows: "The arbitral tribunal shall

confirm, extend, modify, or terminate the preliminary order, within forty-eight hours if at all practicable, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case." The proposed wording was found insufficiently flexible.

Structure of subparagraph (f)

54. Questions were raised as to whether the reference to the notion of an interim measure of protection in the first sentence of paragraph 7 (f) could create confusion, as paragraph 7 was aimed solely at defining the regime of preliminary orders. A comment was made that the time limit of twenty days referred to under subparagraph (f) might, in most cases, be too short to allow an arbitral tribunal to issue an interim measure of protection, whether confirming, extending or modifying the preliminary order granted.

55. With a view to alleviating any confusion as to the purpose of subparagraph (f), a proposal was made to clarify that, as a matter of principle, a preliminary order should not have a life span beyond twenty days, but that certain relief granted under the preliminary order might be included in an inter partes interim measure of protection. A proposal was therefore made to reverse the order of the two sentences of paragraph (f), so that paragraph (f) would read as follows: "A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure of protection confirming, extending or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case." Support was expressed in favour of that proposal.

56. The Working Group was cautioned that any revised wording should not be interpreted as allowing arbitral tribunals to grant a preliminary order extending beyond the time limit of twenty days, unless that preliminary order was converted into an inter partes interim measure. It was suggested that the word "however", used in the second sentence of that proposal, might be understood as a derogation from the principle contained in the first sentence of the proposed draft that a preliminary order could not last longer than twenty days.

57. In order to reinforce the obligation of the arbitral tribunal, it was proposed to replace the word "may" appearing after the words "the arbitral tribunal" by the word "shall". It was also proposed to replace the words "confirming, extending" by the word "adopting", on the basis that that term better expressed the fact that the preliminary order had to be converted into an inter partes interim measure.

58. After discussion, the Working Group adopted the following revised version of subparagraph (f): "A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure of protection adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case."

Subparagraph (g)

Security as a condition precedent

59. It was suggested that subparagraph (g) should be redrafted to provide that the arbitral tribunal should condition the granting of a preliminary order upon the requesting party's providing appropriate security.

60. However, concern was expressed at creating such a rigid rule, which could create difficulties in practice. The Working Group recalled that the issue of the provision of security by the party requesting a preliminary order had previously been discussed by the Working Group (see A/CN.9/569, paras. 35-38 and A/CN.9/545, paras. 69-70) and that the Working Group had agreed that, in order to enhance the safeguards necessary in the context of preliminary orders, subparagraph (g) should reflect that the arbitral tribunal had an obligation to consider the issue of security, but that the decision on whether to require such security should be left to the discretion of the arbitral tribunal.

Time when security might be required

61. The Working Group recalled that, at its forty-first session, concern had been expressed that the point in time when security might be required was not clearly defined (see A/CN.9/569, para. 38). It was suggested that such lack of precision was appropriate as it allowed the arbitral tribunal flexibility in respect of the question of security, for example in situations where a party might require and be given more time to arrange security but the need for the preliminary order was immediate.

"appropriate security"

62. It was stated that the use of the words "appropriate security" and "inappropriate" in subparagraph (g) was confusing. In response, it was suggested that the word "appropriate" could be deleted or replaced by the word "adequate".

"unless the arbitral tribunal considers it inappropriate or unnecessary to do so"

63. It was suggested that the closing words "unless the arbitral tribunal considers it inappropriate or unnecessary to do so" could also be deleted as they expressly permitted an arbitral tribunal to decide not to ask for security. However, that proposal was objected to given that, in some exceptional circumstances, requiring security would not be appropriate, for example, where a claimant was deprived of assets enabling it to provide security because of action taken by the respondent.

64. The Working Group agreed to retain the text of subparagraph (g), with the deletion of the term "appropriate".

Subparagraph (h)

Cross references to subparagraphs (c) and (e)

65. It was proposed and accepted by the Working Group to delete the cross-references to subparagraphs (c) and (e) for the reason that these references were no longer necessary.

Interplay between subparagraph (h) and paragraph (5) of article 17

66. A question was raised as to whether the obligation contained under subparagraph (h) was redundant given the obligation of disclosure as contained in draft article 17 (5). In response, it was explained that the obligation contained in subparagraph (h) differed from the obligation in draft article 17 (5) in that the latter referred to disclosure of any material changes in the circumstances while subparagraph (h) referred to full disclosure even of those facts that did not support the application for the preliminary order. It was explained that the reason for the latter disclosure was that, in the context of a preliminary order, the arbitral tribunal did not have the opportunity to hear from both parties, and therefore an additional burden should be placed on the applicant party to disclose facts that might not help its case but that were relevant to the arbitral tribunal's determination.

"is directed"

67. A proposal was made and agreed to replace the words "is directed" appearing after the words "the preliminary order is" by the words "has been requested" to clarify that the obligation of disclosure of the requesting party applied from the moment that the request for a preliminary order was lodged by the requesting party, and not from the moment the arbitral tribunal made a determination thereon.

Footnote to subparagraph (h)

68. It was noted that the footnote to subparagraph (h) had been included to take account of the fact that, under many national laws, the obligation for the party to present information against its position was not recognized and was contrary to general principles of procedural law (A/CN.9/569, para. 68). The Working Group agreed that the footnote should be deleted for the reason that it was unnecessary and that the reference to "less onerous conditions" was awkward to apply in respect of an obligation to disclose.

Explanatory materials

69. At the close of the discussion of draft article 17 (7), views were exchanged as to whether the new provisions being prepared by the Working Group for addition to the Model Law should be accompanied by explanatory materials and, if so, what form such materials might take. The Working Group tentatively agreed that explanations should be provided to facilitate the enactment and use of those new provisions. In view of the fact that the new provisions might become part of the Model Law, which was accompanied by an "Explanatory note by the UNCITRAL secretariat" currently appearing in the United Nations publication reproducing the Model Law (Sales No. E.95.V.18), it was also agreed that the explanations covering the new model provisions could appear in a revised version of that explanatory note or in another form.

IV. Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)

70. The Working Group considered the text of draft article 17 bis, as reproduced in document A/CN.9/WG.II/WP.131, para. 46.

Paragraph 1

71. The Working Group adopted paragraph 1 without change.

Paragraph 2 (a)—Chapeau

72. A proposal was made that the chapeau of paragraph 2 (a) should be modified to allow both the party against whom the measure was invoked and interested third parties to request a State court to refuse to recognize or enforce an interim measure. To that effect, it was proposed that the words "or on behalf" should be added in the chapeau of paragraph 2 (a) after the phrase "At the request". With a view to alleviating a concern raised that the term "on behalf of" could be interpreted as applying only to representatives of the parties rather than to third parties and that it might not fully address the question of protection of third party rights, another proposal was that the following language could be inserted in paragraph (2): "Nothing in this provision shall diminish the right of any affected third party to raise any defences, available to it under the law of the State court". Those proposals were objected to on the grounds that draft articles 17 and 17 bis dealt only with parties to arbitration, and not with third parties and that the proposed modification would add an unnecessary level of complexity into the provision. Nevertheless, taking account of the fact that, in practice, third parties (e.g., the custodian of assets of a party against whom an interim measure was directed) might be involved in the execution of an interim measure, it was decided that the issue might be revisited at the time of the discussion on draft article 17 ter.

Burden of proof

73. A concern was expressed that paragraph 2 (a) did not specify who should bear the burden of proof in satisfying the arbitral tribunal that either there was a substantial question relating to a ground for refusal or refusal was warranted. It was stated that the approach to the issue of burden of proof was different from that taken in article 36 (1) (a) of the Model Law. It was further stated that, if the Working Group decided not to modify the chapeau of paragraph 2 (a) to restore consistency with article 36 (1) (a), appropriate explanations should be provided to avoid confusion or diverging interpretations as to who should bear the burden of proof. It was pointed out, in response, that the chapeau of paragraph 2 (a) reflected a decision made by the Working Group at its previous sessions that no provision should be made regarding the allocation of the burden of proof and that that matter should be left to applicable domestic law (A/CN.9/524, paras. 35-36, 42, 58 and 60).

Subparagraphs (a) (i) and (a) (ii)

"[There is a substantial question relating to any grounds for refusal] [Such refusal is warranted on the grounds]"

74. It was recalled that the first bracketed text had been included to meet the view that the grounds listed in subparagraph (2) (a) (i) were difficult to assess in any definitive way at the preliminary point when an interim measure would be issued. It was pointed out that the formulation contained in the first bracketed text did provide a level of flexibility, taking account of the fact that the decision of the State court regarding enforcement of the interim measure might need to be reconsidered at the final stage of the proceeding. By contrast, the phrase in the second bracketed text was stated to provide a higher threshold to be met in order to justify refusal and more clearly emphasized that recognition and enforcement should be the rule rather than the exception. On that basis, the Working Group agreed to retain the language contained in the second bracket and to combine subparagraphs (i) and (ii) as follows: "such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a) (i), (ii), (iii) or (iv); or".

Subparagraph (a) (iii)

75. A proposal was made to delete subparagraph (iii) on the basis of an earlier decision of the Working Group that the provision of security under draft article 17 (4) would not in all cases be a condition precedent to the granting of an interim measure and that draft article 17 bis (5) already permitted State courts to order the requesting party to provide appropriate security. However, it was widely felt that that provision should be retained, as it constituted an important safeguard for the party against whom the measure was directed. It was further noted that subparagraph (iii) remained necessary in light of the fact that draft article 17 bis (5) only applied if the arbitral tribunal had not made a determination on the provision of security, whereas subparagraph (iii) dealt with the circumstances where an arbitral tribunal had made such a determination, but the determination had not been complied with.

76. It was pointed out that subparagraph (iii) only referred to the case of non-compliance with the requirement to provide appropriate security and did not fully reflect the fact that the arbitral tribunal had discretion not to require any security or that the security might have been ordered and its provision deferred. In order to better encompass those situations, a proposal was made to amend subparagraph (iii) either by replacing the words "The requirement" with "Any requirement" or by replacing the words "The requirement to provide appropriate security" with "The arbitral tribunal's order with respect to the provision of security". It was suggested that the term "order" in that proposal should be changed to refer to "decision" to reflect the possibility that security could be dealt with in an award. After discussion, the substance of those proposals was adopted and the Secretariat was requested to prepare revised wording.

Subparagraph (a) (iv)

77. It was proposed that subparagraph (iv) should be deleted because it was unnecessary to deal with the suspension or termination of an interim measure by an arbitral tribunal, since no ground could be invoked for the recognition or

enforcement of such a measure. In addition, it was stated that there was no need for a specific provision on the suspension or termination of an interim measure by a State court since such suspension or termination might not be permitted under many legal systems. No support was expressed for the proposed deletion.

[or under the law of which, that interim measure was granted] [the arbitration takes place]

78. The Working Group considered the bracketed texts proposed under subparagraph (iv). It was observed that the first bracketed text contained language similar to article 36 (1) (a) (v) and article V of the New York Convention and that language had raised diverging interpretations by State courts, in particular as to whether the "law" referred to was the procedural or substantive law of the State concerned. However, it was considered preferable to retain consistent language.

79. To achieve consistency between draft article 17 bis (2) (iv) and article 36 (1) (a) (v) of the Model Law, an alternative proposal was made to keep the two bracketed texts, but reverse their order. After discussion, that proposal was adopted.

Setting aside

80. In keeping with the language of article 36, it was proposed to add, after the word "suspended", the term "set aside", on the basis that, in some jurisdictions, that term had a different meaning than the term "termination". In response, it was recalled that the purpose of draft article 17 bis was to establish rules for the recognition and enforcement of interim measures but not to parallel article 34 of the Model Law. With a view to avoiding such a reference to "setting aside", it was proposed that the words "or, where so empowered, by the court of the State in which, [or under the law of which, that interim measure was granted] [the arbitration takes place]" should be deleted. Those two proposals were noted by the Working Group.

Additional provision

81. A proposal was made to add a provision to expressly deal with cases where the law of the place of arbitration, or the law under which the interim measure was granted did not permit an interim measure to be granted by an arbitral tribunal, or the parties had excluded the right for the arbitral tribunal to grant an interim measure. In that respect, the following text was proposed: "the arbitral tribunal did not have jurisdiction to grant interim measures of protection". It was said, however, that those cases were already dealt with by the reference to article 36 (1) (iii) under draft article 17 bis (2) (a) (i). That proposal was not adopted.

Subparagraph (b) (i)

82. A suggestion was made that the words "by the law" should be deleted, since they could be misinterpreted to mean that a court could operate on a law other than that for which it drew its powers. The Working Group agreed with that proposal.

Subparagraph (b) (ii)

83. The Working Group adopted the substance of subparagraph (b) (ii) without change.

Paragraph (3)

84. A proposal was made to add the following sentence to paragraph (3): "If any of the defences in paragraph 2 are raised against the enforcement of an interim measure of protection granted by an arbitral tribunal, neither the court where enforcement is sought nor any other court shall be prevented from granting pursuant to powers under its own law measures substantially identical to those ordered by the arbitral tribunal". It was stated that an addition along the lines of the proposed wording was necessary to preserve the situation where, under existing law, a court could issue its own interim measure instead of enforcing the interim measure issued by the arbitral tribunal, and avoid that court being faced with the more restrictive conditions resulting from the second sentence of paragraph (3). An alternative proposal was that, in order to prevent a party from requesting a court to grant an interim measure that it could not obtain from the arbitral tribunal, the following should be added at the end of paragraph (3): "A court shall not be prevented from granting, subject to its own laws, measures that were substantially identical to those ordered by the arbitral tribunal". An alternative to both proposals was that the proposed wording could be included in a commentary to draft article 17 bis. The Working Group took note of the proposal and decided that it should be further discussed in the context of draft article 17 ter.

Paragraph (4)

85. The Working Group adopted the substance of paragraph (4) without change.

Paragraph (5)

86. To clarify the intention that the court might order a requesting party to provide security if the court was of the opinion that it was appropriate and the tribunal had not already made such an order or such an order was necessary to protect the rights of third parties, a suggestion was made to redraft paragraph (5) along the following lines: "The court of the state where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security, if the arbitral tribunal has not already made a determination with respect to security or if such an order is necessary to protect the rights of third parties." It was also suggested that the reference to "determination" should be modified to refer to an "express determination" to direct the tribunal to expressly address the situation even if it ultimately decided not to grant security. It was proposed that the reference to "order", which appeared twice in paragraph (5), should be replaced by the verb "require" or by the substantive "decision" to avoid limiting the effect of the provision to procedural decisions. The Secretariat was requested to take those proposals into account in preparing a revised draft of paragraph (5).

Paragraph (6)

Preliminary orders and enforcement

87. Consistent with its earlier decision that a preliminary order would not be judicially enforceable, the Working Group agreed to delete draft paragraph (6). The Working Group then proceeded to consider whether or not draft article 17 bis should include an express statement that it did not apply to preliminary orders. A concern was expressed that inclusion of an express statement that preliminary orders were not enforceable might have a negative impact on such orders (in that it might call into question their binding nature) and, for that reason, it might be preferable to simply state that article 17 bis only applied to inter partes interim measures.

88. It was suggested that such an express statement was unnecessary given that draft article 17 bis (2) (a) (ii) already allowed refusal of enforcement based on the grounds set forth in article 36 (1) (b) (ii) which referred to the situation where the party against whom the measure was made was, inter alia, "unable to present his case". It was stated in response that the fact that a preliminary order would not be enforceable ought to be expressly stated rather than found in a cryptic application of the draft provisions. In addition, it was noted that both article 36 and draft article 17 bis provided discretion to refuse enforcement and that therefore it would still be possible for a court to grant an order enforcing a preliminary order.

89. It was noted that such a risk was enhanced given that the footnote to article 17 bis (1) permitted a State to include fewer circumstances in which enforcement might be refused. For that reason, it was generally agreed that it would be preferable to expressly put that matter beyond doubt. To that effect, it was decided that the Secretariat should prepare a draft paragraph for inclusion in article 17 bis, spelling out the principle that preliminary orders were not enforceable by State courts, keeping in mind those formulations that would not undercut the binding nature of preliminary orders.

V. Draft provision on the power of courts to order interim measures of protection in support of arbitration (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 ter)

90. The Working Group proceeded to consider two variant texts, which expressed the power of a court to order interim measures of protection in support of arbitration (as contained in A/CN.9/WG.II/WP.125, para. 42).

Variants 1 and 2

91. A view was expressed that Variant 1 provided a more flexible power for a court to order interim measures by permitting it to refer to its own rules of procedures and standards, whereas Variant 2 required that that power be exercised "in accordance with the requirements set out under article 17". For that reason, preference was expressed for Variant 1.

Interplay between draft articles 17 bis and 17 ter

92. A proposal was made that the opening words of Variant 1 should be redrafted so as to provide "Except as provided in article 17 bis, the court shall have" in order to clarify that a court should not deal with a request for an interim measure of protection where the requested measure had already been refused by an arbitral tribunal. However, it was stated that a State court could not be prevented from reviewing a case *de novo* when so requested by a party even if the State court had already made a determination under draft article 17 bis.

Interplay between draft article 17 ter and article 9 of the Model Law

93. On the question of the relationship between article 9 and article 17 ter, it was noted that the scope of article 9 and article 17 ter were different, as article 9 dealt with the right of third parties to request an interim measure of protection from a court, whereas article 17 ter expressly empowered courts to grant such measures in support of an arbitration.

Third parties

94. It was suggested that words along the following lines be included at the end of the second sentence of Variant 1: "provided that the restrictions of article 17 bis do not apply to objections of third parties to interim measures of protection." While the Working Group agreed that the issue of third parties might warrant further analysis, the suggestion did not receive support. In any case, it was generally felt that the question of third party protection would be better addressed in draft article 17 bis than in draft article 17 ter (see above, paragraph 72).

95. After discussion, the Working Group agreed to adopt the Variant 1 of article 17 ter as it appeared in the document referenced A/CN.9/WG.II/WP.125, para. 42.

VI. 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 would apply

96. The Working Group recalled its earlier discussions regarding 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 (A/CN.9/569, para. 73). 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. Views, concerns and questions expressed at the previous session of the Working Group were reiterated (A/CN.9/569, paras. 75, 76 and 78). It was emphasized that the inclusion of a reference to the New York Convention in the draft convention should not negatively impact any future deliberation that the Working Group might need to take in respect

of the issues raised by the interpretation of article II(2) of the New York Convention.

97. As to the detailed formulation of the provisions of the draft convention that would affect the interpretation of the New York Convention, proposals made at the previous session were also reiterated (A/CN.9/569, para. 77). In particular, it was suggested that clarity should be provided as to whether the notion of "contract" as used in the draft convention included an arbitration agreement. The view was also expressed that clarification might be required as to how the functional equivalent of a "duly authenticated original award" or a "duly certified copy" under article IV(1)(a) of the New York Convention would be provided under the draft convention. Delegations were encouraged to consult and provide their comments to the Secretariat for the preparation of the future deliberations of the Commission at its thirty-eighth session (to be held in Vienna from 4 to 15 July 2005), during which the draft convention would be finalized.

VII. Other business

98. As to the future course of its deliberations, the Working Group recalled that, in addition to the issues identified at the current session in respect of draft article 17 bis (see above, paras. 70-89), it should consider proposals made at its previous session in respect of paragraphs 1 to 6 bis of draft article 17 (see A/CN.9/569, para. 22). It was also recalled that some of the questions raised with respect to draft article 17 bis in the note by the Secretariat, and in particular in paragraph 51 of document A/CN.9/WG.II/WP.131 remained open. With a view to finalizing its review of draft articles 17, 17 bis and 17 ter, and also its work on draft article 7 of the Model Law and the interpretation of article II(2) of the New York Convention, the Working Group agreed to request the Commission to allocate time for two additional sessions to be held before the thirty-ninth session of the Commission (2006), at which the Commission would be expected to review and adopt those draft provisions. It was noted that, subject to approval by the commission, the forty-third session of the Working Group was scheduled to be held at Vienna from 3 to 7 October 2005

99. As to the relationship between the existing text of the Model Law and the draft revised articles, the Secretariat was requested to consider the issue of the form in which the current and the revised provisions could be presented, with possible variants to be considered by the Working Group at a future session.

100. The Working Group took note of suggestions that, when planning its future work, it might give priority consideration to the issues of arbitrability of intra-corporate disputes and other issues relating to arbitrability, e.g., arbitrability in the fields of immovable property, insolvency or unfair competition. Another suggestion was that issues arising from online dispute resolution and the possible revision of the UNCITRAL Arbitration Rules might also need to be considered. Further suggestions might also be made at future sessions. The Secretariat was invited to consider whether some of these issues could form the basis for specific proposals to be considered by the Working Group at a future session.