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SETTLEMENT OF COMMERCIAL DISPUTES

Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement

Report of the Secretary General

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[Chapter III, "Requirement of written form for arbitration agreement", will be published in doc. A/CN.9/WG.II/WP.108/Add.1]

INTRODUCTION

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

2. In reports presented at that commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible.

3. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session in 1999. It requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.2/

4. At its thirty-second session, the Commission had before it the requested note entitled "Possible future work in the area of international commercial arbitration" (document A/CN.9/460). The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day, the Congress of the International Council for Commercial Arbitration (Paris, 3-6 May 1998),3/ and other international conferences and forums, such as the 1998 "Freshfields" lecture.4/ The note discussed some of the issues and problems identified in arbitral practice in order to facilitate a discussion in the Commission as to whether it wished to put any of those issues on its work programme.

5. The Commission welcomed the note by the Secretariat and the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration. It was generally

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

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

[3] *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999.

[4] Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, page 211.

considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.

6. Possible work topics considered by the Commission were the following:

(a) Conciliation (A/CN9/460, paras. 8-19; A/54/17, paras. 340-343);
(b) Requirement of written form (A/CN.9/460, paras. 20-31; A/54/17, paras. 344-350);
(c) Arbitrability (A/CN.9/460, paras. 32-34; A/54/17, paras. 351-353);
(d) Sovereign immunity (A/CN.9/460, paras. 35-50; A/54/17, paras. 354-355);
(e) Consolidation of cases before arbitral tribunals (A/CN.9/460, paras. 51-60; A/54/17, paras. 356-357);
(f) Confidentiality of information in arbitral proceedings (A/CN.9/460, paras. 62-71; A/54/17, paras. 358-359);
(g) Raising claims for the purpose of set-off (A/CN.9/460, paras. 72-79; A/54/17, paras. 360-361);
(h) Decisions by “truncated” arbitral tribunals (A/CN.9/460, paras. 80-91; A/54/17, paras. 362-363);
(i) Liability of arbitrators (A/CN.9/460, paras. 92-100; A/54/17, paras. 364-366);
(j) Power by the arbitral tribunal to award interest (A/CN.9/460, paras. 101-106; A/54/17, paras. 367-369);
(k) Costs of arbitral proceedings (A/CN.9/460, paras. 107-114; A/54/17, para. 370);
(l) Enforceability of interim measures of protection (A/CN.9/460, paras. 115-127; A/54/17, paras. 371-373);
(m) Possible enforceability of an award that has been set aside in the State of origin (A/CN.9/460, paras. 128-144; A/54/17, paras. 374-376).

7. At various stages of the discussion, several other topics, in addition to those contained in document A/CN.9/460, were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time (A/54/17, para. 339).

8. In its considerations the Commission kept an open mind as to the ultimate form that future work of the Commission might take. It was agreed that decisions as to the form should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). It was thought that, even if ultimately no new uniform text would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission, possibly with suggestions for uniform interpretation, would be a useful contribution to the practice of international commercial arbitration. The considerations of the Commission on those issues are reflected in document A/54/17 (paras. 337-376 and para. 380).

9. After concluding the discussion on its future work in the area of international commercial arbitration, it was agreed that the priority items for the working group should be conciliation(A/54/17, paras. 340-343), requirement of written form for the arbitration agreement (A/54/17, paras. 344-350), enforceability of interim measures of protection (A/54/17, paras. 371-373) and possible enforceability of an award that had been set aside in the State of origin (A/54/17, paras. 374-375). It was expected that the Secretariat

would prepare the necessary documentation for the first session of the Working Group for at least two, and possibly three, of those four topics. As to the other topics discussed in document A/CN.9/460, as well as topics for possible future work suggested at the thirty-second session of the Commission (A/54/17, para. 339), which were accorded lower priority, the Working Group was to decide on the time and manner of dealing with them.

10. The Commission entrusted the work to a working group to be named “Working Group on Arbitration”, authorized it to meet from 20 to 31 March 2000 and requested the Secretariat to prepare the necessary documentation for the meeting. The present document has been prepared pursuant to that request.

I. CONCILIATION

A. General remarks

11. The term "conciliation" is used here as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. Conciliation differs from negotiations between the parties in dispute (in which the parties would typically engage after the dispute has arisen) in that conciliation involves independent and impartial assistance to settle the dispute, whereas in settlement negotiations between the parties no such third-person assistance is involved. The difference between conciliation and arbitration is that a conciliation ends either in a settlement of the dispute agreed by the parties or it ends unsuccessfully; in arbitration, however, the arbitral tribunal imposes a binding decision on the parties, unless the parties have settled the dispute before the award is made.

12. Conciliation proceedings in the above sense are envisaged and dealt with in a number of rules of arbitral institutions and institutions specializing in the administration of various forms of alternative methods of dispute resolution, as well as in the UNCITRAL Conciliation Rules, which the Commission adopted in 1980. These Rules are widely used and have served as a model for rules of many institutions.

13. Conciliation proceedings in which parties in dispute agree to be assisted in their attempt to reach a settlement may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. Nevertheless, such proceedings, as considered in this paper, are characterized by independent and impartial assistance in reaching an amicable settlement of a dispute and the fact that no binding decision will be made if the parties are unable to settle the dispute.

14. In practice, such conciliation may be referred to by other expressions, among which "mediation" or terms of similar meaning are frequently used. The notion of “alternative dispute resolution” is also used to refer collectively to various techniques and adaptations of procedures for solving disputes by conciliatory methods rather than by a binding method such as arbitration. This paper uses the term “conciliation” as synonymous to all those procedures. To the extent that such “alternative dispute resolution” procedures are characterized by features mentioned above, they are covered by this paper.

15. Conciliation is being increasingly practiced in various parts of the world, including regions where until a decade or two ago it was not commonly used. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. This trend, and a growing desire in various regions of the

world to promote conciliation as a method of dispute settlement, has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation.

B. Consideration in the Commission

16. When the Commission discussed its possible future work in the area of conciliation (A/54/14, para. 340), there was general agreement that the following three issues were particularly important: admissibility of certain evidence in subsequent judicial or arbitral proceedings; role of the conciliator in subsequent arbitration or court proceedings; and procedures for enforcing settlement agreements. It was widely felt that, in addition to those three issues, the possible interruption of limitation periods as a result of the commencement of conciliation proceedings was worthy of consideration.

17. The prevailing view that emerged in the Commission was that it would be worthwhile to explore the possibility of preparing uniform legislative rules to support the increased use of conciliation (A/54/17, para. 342). It was noted that, while certain issues (such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings, or the role of the conciliator in subsequent proceedings) could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there were many cases where no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules. Moreover, in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide a useful clarification. In addition, it was pointed out with respect to issues such as facilitating the enforcement of settlement agreements resulting from conciliation and the effect of conciliation with respect to the interruption of a limitation period, that the level of predictability and certainty required to foster conciliation could only be achieved through legislation.

C. Possible questions on which uniform provisions may be prepared

1. Admissibility of certain evidence in subsequent judicial or arbitral proceedings

18. In conciliation proceedings, the parties typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If despite such efforts the conciliation does not result in a settlement and a party initiates judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility of “spillover” of certain facts that occurred during conciliation may discourage parties from actively trying to reach a settlement during conciliation proceedings, which may greatly reduce the usefulness of conciliation.

19. In order to address the above problem, article 20 of UNCITRAL Conciliation Rules provides:

> "The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:
>
> “(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
>
> “(b) Admissions made by the other party in the course of the conciliation proceedings;

"(c) Proposals made by the conciliator;

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

20. If the parties use no conciliation rules or use rules that do not contain a provision such as article 20 of the UNCITRAL Conciliation Rules, under many legal systems the parties may be affected by the described problem. Even if the parties have agreed on a rule such as the one contained in article 20, it may not be certain that the agreement concerning evidence will be given full effect by the court. In order to assist the parties in such situations, some jurisdictions have adopted laws designed to prevent the introduction of certain evidence relating to previous conciliation proceedings into subsequent judicial or arbitral proceedings. Some of those laws are modeled on article 20 of the UNCITRAL Conciliation Rules.

21. The Working Group may wish to consider whether it would be useful to prepare a uniform provision on this matter and which approach should be followed in drafting the provision.

22. One possible approach may be for the law to give express recognition to an agreement of the parties such as the one contained in the above-cited article 20 of the UNCITRAL Conciliation Rules. This solution would be designed to eliminate any uncertainty as to whether the parties may agree not to use as evidence in arbitral or judicial proceedings certain facts that occurred during the conciliation. The solution would also leave it to the parties to tailor the extent to which those facts may be used as evidence outside the conciliation. However, a consequence of this approach would be that, if the parties participate in conciliation proceedings without having agreed on a rule of evidence such as in article 20 of the UNCITRAL Rules, the consideration of views, suggestions, admissions made during conciliation proceedings in subsequent adversary proceedings may not be prevented.

23. Another approach may be taken if it is considered that certain circumstances in conciliation proceedings should not be relied upon as evidence in court or arbitral proceedings even if the parties have failed to agree on a rule such as article 20 of the UNCITRAL Rules. Two possible solutions may be envisaged: (a) under one, the law would provide that evidence of facts such as those mentioned in article 20 of the UNCITRAL Rules are not to be admitted in evidence and that disclosure of those facts is not to be ordered by the arbitral tribunal or the court; (b) under another solution, it may be provided that it is an implied term of an agreement to conciliate that the parties undertake not to rely as evidence in any arbitral or judicial proceedings on facts such as those mentioned in article 20 of the UNCITRAL Rules.

24. There may be little practical difference in the enacting State between the straightforward evidentiary rule under (a) and the "implied agreement" rule under (b). However, there may be a difference between them in a foreign State where the subsequent court or arbitral proceedings are taking place. A provision such as the one under (a) that has been enacted in State A may not be heeded in State B, whereas, if an agreement to conciliate is to imply an evidentiary undertaking of the parties, such undertaking might be recognized in State B.

25. Whichever approach is chosen, the Working Group may also wish to consider whether it would be useful to clarify that there should be no limitation to the admissibility of evidence if all parties participating in the conciliation later consent to its disclosure.

26. It may also be considered whether it should be provided that, in the event that any evidence is offered in contravention of the statutory provision, the arbitral tribunal or the court is to make any order it considers to be appropriate to deal with the matter. Such order may be, for instance, an order restricting the introduction of evidence, or an order dismissing the case on procedural grounds without prejudice for the substance of the case.

27. Some laws contain a provision, in addition to the provision modeled on article 20 of the UNCITRAL Rules, dealing with documents prepared for the purpose of, or in the course of, or pursuant to, the conciliation. They provide that no such documents are admissible in evidence, and disclosure of such documents should not be compelled in any arbitration or civil action. The Working Group may wish to consider what would be the practical consequences of such a provision in view of the fact that a provision that prevents raising the facts mentioned in article 20 of the UNCITRAL Rules would largely have the same effect as a provision barring the use as evidence of documents prepared for the purpose of, or in the course of, or pursuant to, the conciliation.

28. In some legal systems a party may not be compelled to produce in court proceedings a document that enjoys a "privilege", such as, for example, a written communication between a client and its attorney. However, such privilege may be deemed lost if a party has relied on the privileged document in a proceeding. As privileged documents may be presented in conciliation proceedings with a view to facilitating settlement, and in order not to discourage the use of privileged documents in conciliation, the Working Group may wish to consider whether it would be useful to prepare a uniform provision stating that the use of a privileged document in conciliation proceedings does not constitute a waiver of the privilege.

2. Role of conciliator in arbitration or court proceedings

29. A party may be reluctant to strive actively for a settlement in conciliation proceedings if it has to take into account the possibility that, if the conciliation is not successful, the conciliator might be appointed as a representative (or counsel) of the other party or as an arbitrator in subsequent arbitration or court proceedings. The party may be similarly reluctant if the conciliator may be presented as a witness in such subsequent proceedings. The conciliator's knowledge of certain facts occurring during conciliation (e.g. proposals for settlement and admissions) might prove to be prejudicial for one of the parties if the conciliator would use or express that knowledge in the subsequent proceedings. This is the reason behind the provision of article 19 of the UNCITRAL Conciliation Rules, which reads as follows:

> "The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."

30. However, in some cases, prior knowledge on the part of the arbitrator might be regarded by the parties as advantageous, in particular if it is thought that that knowledge will allow the arbitrator to conduct the case more efficiently. In such cases, the parties may actually prefer that the conciliator and not somebody else be appointed as an arbitrator in the subsequent arbitral proceedings. The rule in article 19 of the Conciliation Rules poses no obstacle to such appointment of the former conciliator provided the parties depart from the rule by agreement. A joint appointment of the conciliator to serve as an arbitrator would constitute such an agreement.

31. Considerations such as those summarized in the preceding paragraph have led some jurisdictions to adopt legislative provisions modeled on article 19 with the provision that the provision is not mandatory.

32. The Working Group may wish to consider whether it would be useful to prepare a uniform legislative provision on this matter. If so, one question to be considered is whether the provision should state that the parties and the conciliator are deemed to have undertaken that the conciliator will not be involved in any arbitral or judicial proceedings (as an arbitrator, representative, counsel or witness), or whether the provision should set out a straightforward prohibition for the conciliator to be involved in such subsequent proceedings. In either case, the Working Group may wish to provide that the parties' agreement may override the deemed undertaking or the prohibition. As to the restriction regarding admissibility of the conciliator's testimony in court or arbitral proceedings, the Working Group may wish to discuss whether the restriction needs to be qualified. For example, it may be considered that the conciliator may be called to give testimony about facts mentioned in article 20 of the UNCITRAL Conciliation Rules in order to prove other circumstances (e.g. fraud).

33. Another question that may be discussed is whether the provision is to be limited to the arbitrator's participation "in respect of a dispute that is the subject of the conciliation proceedings". Namely, in the case of contracts that are distinct but commercially and factually closely related, a conciliator may be restricted from participating in arbitration or court proceedings concerning one contract but would not be so prevented regarding other related contracts, with respect to which the same or similar reservations as to the conciliator's participation may apply. Extending such a restriction to a group of contracts raises questions such as how to define the connection between contracts and whether the benefits from the provision would justify the potentially far-reaching restrictions resulting from it.

3. Enforceability of settlement agreements

34. Many practitioners have put forward the view that the attractiveness of conciliation would be greatly increased if a settlement reached during a conciliation would, for the purposes of enforcement, be treated as or similarly to an arbitral award. By subjecting conciliation settlements to the enforcement rules governing arbitral awards, the enforcement of these settlements would be simplified and expedited. Typically this would mean that conciliation settlements would be enforced by the court without reopening factual or substantive legal questions (except for the possible question of public policy).

35. In assessing the benefits of giving the quality of an enforceable title to a settlement reached in conciliation proceedings, the question may be asked whether it is worthwhile to confer that quality on conciliation settlements in view of the fact any settlement, whether or not it is concluded during conciliation proceedings, is binding and enforceable as a contract. Admittedly, it is usually relatively easy to obtain a court judgment or an arbitral award on the basis of an agreed settlement (in any case easier as compared to the case where the parties in dispute have not concluded a settlement). Nevertheless, the prospect of having to spend time and money on court proceedings or an arbitration in order to enforce a settlement reduces the attractiveness of conciliation. In line with this reasoning, proposals have been advanced, and legislation adopted in some States, that seek to facilitate enforcement of settlements reached in conciliation.

36. A possible way of obtaining an enforceable title and avoiding initiation of adversary proceedings would be for the parties who have reached a settlement to appoint the conciliator as an arbitrator and limit the arbitration proceedings to recording the settlement in the form of an arbitral award on agreed terms (as provided for, e.g., in art. 34(1) of the UNCITRAL Arbitration Rules). A possible obstacle to this

approach, however, may arise in a number of legal systems in which, once a settlement has been reached and the dispute has thereby been eliminated, it is not possible to institute arbitral proceedings. In order to avoid this obstacle, legislation might expressly permit the parties to the settlement, despite the disappearance of the dispute, to commence arbitration with a view to requesting the arbitrator (who may be the former conciliator) to record the settlement in the form of an arbitral award on agreed terms.

37. In order to provide a straightforward solution, and thereby avoid the need for instituting arbitral proceedings that would convert a settlement into an award on agreed terms, some laws have provided that the settlement agreement reached in conciliation proceedings is to be enforceable as an arbitral award. For example, according to one law, the settlement agreement is to be treated, for the purposes of its enforcement in that State, as an arbitral award pursuant to an arbitration agreement and may be enforced as such; another law provides that the written settlement agreement is to have the same status and effect as if it were an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal.

38. The question that arises with respect to a legislative provision which subjects conciliation settlements to the enforcement rules applicable to arbitral awards is how to distinguish settlements that should receive this special status from settlements (which may or may not have been reached with the assistance of a third person) which should not enjoy such a special status.

39. Laws that contain a legislative provision subjecting conciliation settlements to the enforcement provisions governing arbitral awards do not provide a discrete and express definition or distinction of such conciliation settlements. An answer may be deduced, however, from the following: the law contains procedures for conciliation and requires that the conciliator be an independent and impartial person, with the result that only those settlements that are concluded pursuant to the procedures set out in the law would be enforceable as an award. One law adds a requirement that the conciliator “authenticate the settlement agreement and furnish a copy thereof to each party”. Other laws provide that if “the result of the conciliation is in writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award”. Another law states that “if the parties to an arbitration agreement” reach agreement by means of conciliation or otherwise in settlement of their dispute and enter into an agreement in writing containing the terms of settlement, that settlement agreement is to be treated as an award. It may be concluded from such a provision that only settlement agreements reached between parties that have concluded an arbitration agreement enjoy the special status of enforceability as long as the dispute is covered by the arbitration agreement. Finally, provisions on enforceability of settlements reached in conciliation are found in legislation on commercial arbitration, with the implication that only conciliation settlements in commercial matters are enforceable as awards.

40. There might be additional features that could be considered as possible distinguishing elements for settlements that should be enforceable like arbitral awards. One may be that the settlement agreement signed by the parties and the conciliator should contain an "enforceability clause"; the advantage of such a requirement would be that the parties would be alerted to the fact that, by signing the settlement, they are opting for an enforcement procedure different from the procedures generally applicable to the enforcement of contracts.

41. As noted above, “conciliation proceedings” cover different types of proceedings, including those referred to as "mediation". Therefore, it seems that, whichever the definition of enforceable settlements, it is desirable to make sure that the definition is broad enough to cover any proceedings, whether or not

designated as "conciliation", as long as the proceedings are characterized by the required features. In considering such a definition, article 7 of the UNCITRAL Conciliation Rules (reproduced below in para. 61) may serve as an inspiration. Furthermore, the Working Group may wish to bear in mind that, depending on the decisions to be taken on other issues on conciliation outlined below, the way in which conciliation is defined may be important for questions of application.

42. An additional, and practically important, question that the Working Group may wish to discuss is whether settlement agreements declared by law as enforceable in one country should enjoy the same or similar status in other countries. If such international effects of enforceability are contemplated, a treaty might seem as a traditional vehicle for achieving the objective. While certainty of a treaty may appear as an advantage, its disadvantage lies, for instance, in the difficulty of its adoption by a sufficient number of countries within a foreseeable period of time. Therefore, the Working Group may wish to consider model legislative provisions as an appropriate vehicle for harmonization, in the same manner as articles 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration have been used for regulating the enforcement of domestic and foreign arbitral awards.

4. Other possible items for harmonized treatment

43. In addition to discussing possible uniform provisions on the topics mentioned above, the Working Group may wish to consider whether, with a view to encouraging and facilitating settlement of disputes by conciliation, it would be useful to prepare harmonized model provisions on other related matters, outlined below.

(a) Admissibility or desirability of conciliation by arbitrators

44. The UNCITRAL Arbitration Rules do not deal with the question whether and, if so, to what extent an arbitrator is permitted to raise during arbitral proceedings the possibility of a settlement.

45. It has been observed in the UNCITRAL Notes on Organizing Arbitral Proceedings that:

> “Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.” (para. 47).

46. Some States desiring the clarification that, subject to the parties’ agreement, it is not a violation of arbitral procedures if the arbitrators facilitate settlement, have adopted provisions such as that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute, and that, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other proceedings to encourage settlement.

47. Other jurisdictions have gone further and included in their laws provisions encouraging the arbitral tribunal to conciliate between the parties, without expressly linking that encouragement to the agreement of the parties.

48. Given the different practices and attitudes with regard to this question, it may be difficult to elaborate a single uniform rule that would attract equal support in different jurisdictions. If, however, the Working

Group considers that a model legislative provision or provisions should be prepared, it may be useful to distinguish three possible concepts of a provision. According to one concept, the provision would be limited to recognizing that the arbitral tribunal may conduct and schedule the proceedings in such a way that would facilitate settlement negotiations, without itself suggesting or participating in them. Another concept may be to recognize the discretion of the arbitral tribunal to recommend to the parties to try to settle the dispute, but the arbitral tribunal should not participate in the negotiations. A further concept may be to state that it is not incompatible with the role of the arbitral tribunal to suggest to the parties to settle the dispute, and, to the extent agreed by the parties, to participate in the efforts to reach an agreed settlement.

(b) Effect of an agreement to conciliate on judicial or arbitral proceedings

49. Article 16 of the UNCITRAL Conciliation Rules provides that:

> "The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights".

50. Some jurisdictions have adopted legislative provisions modeled on this rule; but, instead of casting them in terms of an undertaking of the parties as it has been done in the cited article 16, they have provided that the parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Other laws, however, have provided that the conciliation agreement is deemed to be an agreement to stay all judicial or arbitral proceedings from the commencement of the conciliation until its termination. It appears that the expression "stay" in such laws is to be understood as a stay of any existing judicial or arbitral proceeding as well as a bar to initiation of a new proceeding. If the Working Group considers that it would be desirable to prepare a uniform provision restricting the parties to initiate arbitral or judicial proceedings, it may be necessary to define the moment when conciliation proceedings are deemed to have commenced (such a definition may be inspired by art. 2 of the UNCITRAL Conciliation Rules).

51. To the extent the conciliation rules agreed upon by the parties expressly permit or assume that a party may terminate the conciliation at any time (either informally or by a written declaration), a legislative provision preventing the commencement of arbitral or judicial proceedings will have little effect in the sense that a party will be able to overcome the obstacle by terminating the conciliation proceedings. If, however, participation in conciliation proceedings is regarded as an obligation (which is in some States provided for by law and is subject to mandatory time periods) or there are restrictions on the right to terminate conciliation proceedings (e.g. before a first settlement proposal has been made), a legislative provision modeled on article 16 of the UNCITRAL Conciliation Rules may constitute a real obstacle to initiating arbitral or court proceedings.

52. The positions in national laws differ as to the binding nature of an agreement to conciliate or as to the statutory duty to conciliate before resorting to adversary proceedings. Some countries have introduced the notion that parties in dispute are obliged to participate in conciliation proceedings in order to foster conciliation and reduce adversary court or arbitration proceedings. In light of this, the Working Group may wish to combine its considerations of a possible model legislative provision restricting the initiation

of arbitral or judicial proceedings with the discussion of whether it is advisable (and if so to what extent) to regard an agreement of the parties to conciliate as obligatory (in the sense that a party's right to refuse to conciliate or to terminate a conciliation would be subject to time periods or conditions), and whether harmonized guidance by the Commission to legislators on this point would be desirable. The approach taken by the UNCITRAL Conciliation Rules on this latter question is that a party may at any time terminate the conciliation proceedings by a written declaration to the other party and the conciliator. The main reason of this approach is that, despite the general policy that conciliation is to be stimulated, conciliation proceedings in a dispute in which at least one party is less than willing to arrive at a settlement are unlikely to be successful and that the time and money spent in such cases is likely to be spent in vain.

(c) Effect of conciliation on the running of the limitation period

53. Article 16 of the UNCITRAL Conciliation Rules, cited above in paragraph 49, is based on the assumption that conciliation proceedings do not interrupt the running of a limitation period. The purpose of article 16 is to permit the conciliation to proceed and at the same time allow the creditor to preserve its rights by initiating arbitral or judicial proceedings. Without article 16, a creditor may be put in an undesirable position in which it would see it as being in its best interest to terminate the conciliation proceedings and commence judicial or arbitral proceedings not because the conciliation does not offer a hope of success but because the creditor does not wish to risk a failed conciliation while its right would become unenforceable as a result of the expiration of the limitation period. In some legal systems the creditor and the debtor may address this dilemma by an agreement to extend the running of a prescription or limitation period; such an agreement would allow the creditor to continue participating in the conciliation proceedings without risking the loss of right as a result of the expiry of a time period. However, such arrangements between the creditor and the debtor are not allowed in all legal systems.

54. It has been said that, by allowing the initiation of arbitral or court proceedings, even if only for the purpose of preserving rights, costs are incurred and the conciliatory spirit between the parties may be spoiled. It would therefore be preferable, it is argued, if the initiation of conciliation itself would, by operation of law, interrupt the running of the prescription period. Some jurisdictions have adopted legislation to that effect.

55. The Working Group may wish to consider whether it would be useful to prepare a uniform provision on the effect of conciliation on the running of the limitation period. If such a provision is found to be desirable, it should be borne in mind that it should encompass all time periods whose expiry may affect rights, such as limitation periods and periods of prescription.

(d) Communication between the conciliator and parties; disclosure of information

56. In arbitration proceedings the arbitrator must treat the parties with equality and each party must be given a full opportunity to present its case. That principle (enshrined in art. 18 of the UNCITRAL Model Law) prevents an arbitrator from communicating with or meeting one party to the exclusion of the other. However, in conciliation proceedings (where the dispute can be resolved only by agreement of the parties as opposed to a binding decision) such a strict rule is not considered necessary, and it is widely regarded as permissible for the conciliator to meet or communicate with the parties together or with each of the parties separately. The possibility of such separate communication between the conciliator and a party is provided for in article 9(1) of the UNCITRAL Conciliation Rules, which reads:

> "The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately."

57. Some States have included this principle in their national laws on conciliation by providing that a conciliator is allowed to communicate with the parties collectively or separately.

58. Another reflection of the principle of equality of parties is the principle, generally accepted to be an indispensable part of arbitral procedures (and contained in art. 24 of the UNCITRAL Model Law), that any factual information concerning the dispute that the arbitral tribunal receives from one party must be communicated to the other party, so as to give each party a full opportunity of presenting its case. Again, in conciliation proceedings it is considered permissible to relax somewhat this principle. Thus, article 10 of the UNCITRAL Conciliation Rules provides:

> "When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party."

59. Some States have incorporated the principle contained in article 10 of the UNCITRAL Conciliation Rules into their law on conciliation. One question that arises in connection with such a provision concerns a case where the conciliator who has obtained information subject to a specific condition that it be kept confidential later becomes an arbitrator in the same dispute (because the conciliation has ended unsuccessfully and the conciliator is validly appointed as arbitrator). In such a case it may be considered appropriate or imperative that the information be made available to all parties in accordance with the general principles applicable to arbitral proceedings. Some laws that allow the conciliator to receive information subject to a specific condition of confidentiality provide that, when conciliation proceedings terminate without settlement, the arbitrator who has received such information must disclose as much of that information as he or she considers material to the arbitral proceedings.

60. The Working Group may wish to consider whether it would be useful to elaborate (a) a model provision permitting the conciliator to meet or communicate with the parties together or with each of the parties separately and (b) a model provision according to which the conciliator does not disclose to all parties information received from one party subject to a specific condition of confidentiality. A possible benefit of such provisions is that they would eliminate doubts as to the propriety of procedures such as those contained in article 9 and 10 of the UNCITRAL Conciliation Rules and, to the extent conciliation is given certain effects (e.g. enforceability of a settlement agreement or the interruption of the prescription period), those effects would not be called into question if those procedures are used.

(e) Role of conciliator

61. Conciliation rules often contain principles that should guide the conciliator in conducting the proceedings. For example article 7 of the UNCITRAL Conciliation Rules provides:

"(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

"(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

"(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

"(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor."

62. Some national laws have included some of these guiding principles in their laws on conciliation. The Working Group may wish to consider whether it would be useful to elaborate a model provision that would set out such principles. Such a provision may be useful in that it would contribute to harmonizing standards of conciliation and thereby facilitate and promote its use in international trade.

II. ENFORCEABILITY OF INTERIM MEASURES OF PROTECTION

A. General remarks

63. Arbitral tribunals, in response to a request of a party, often order interim measures of protection before issuing an award in the dispute. Such measures, directed to one or both of the parties, are referred to by expressions such as "interim measures of protection", "provisional orders", "interim awards", "conservatory measures" or "preliminary injunctive measures". The purposes of such measures differ and may include the following:

(a) *Measures aimed at facilitating the conduct of arbitral proceedings*, such as orders requiring a party to allow certain evidence to be taken (e.g. to allow access to premises to inspect particular goods, property or documents); orders for a party to preserve evidence (e.g. not to make certain alterations at a site); orders to the parties and other participants in arbitral proceedings to protect the privacy of the proceedings (e.g. to keep files in a certain place under lock or not to disclose the time and place of hearings);

(b) *Measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved*, such as orders to continue performing a contract during the arbitral proceedings (e.g. an order to a contractor to continue construction works despite its claim that it is entitled to suspend the works); orders to refrain from taking an action until the award is made; orders to safeguard goods (e.g. to take specific safety measures, to sell perishable goods or to appoint an administrator of assets); orders to take the appropriate action to avoid the loss of a right (e.g. to pay the fees needed to extend the validity of an intellectual property right); orders relating to the clean-up of a polluted site;

(c) *Measures to facilitate later enforcement of the award*, such as attachments of assets and similar acts that seek to preserve assets in the jurisdiction where enforcement of the award will be sought (attachments may concern, for example, physical property, bank accounts or payment claims); orders not to move assets or the subject-matter of the dispute out of a jurisdiction; orders for depositing in a joint account the amount in dispute or for depositing movable property in dispute with a third person; orders to a party or parties to provide security (e.g. a guarantee) for costs of arbitration or orders to provide security for all or part of the amount claimed from the party.

64. Interim measures of protection may concern assets or property located in the jurisdiction where the arbitration takes place or outside that jurisdiction.

65. The above enumeration of possible interim measures of protection is not exhaustive. Arbitration rules that provide for their issuance typically do not provide a hard and fast definition of the scope of measures that an arbitral tribunal may issue. Often the formulations in the arbitration rules are rather broad; for example, they provide generally that the arbitral tribunal is allowed to take the interim measures it deems necessary in respect of the subject-matter of the dispute; in some cases examples of measures that may be ordered are included (for example, art. 26(1) of the UNCITRAL Arbitration Rules). Some rules empower the arbitral tribunal in broad terms to order on a provisional basis, subject to final determination in the award, any relief which the arbitral tribunal would have power to grant in an award.

66. The temporary nature of interim measures of protection is reflected in the expectation (which is also stated in some arbitration laws) that any interim measure ordered by an arbitral tribunal may be reviewed and altered by the arbitral tribunal and that, in any event, it should be subject to the arbitral tribunal's final adjudication, with the award taking account of any previously ordered interim measure of protection. However, an interim measure, in its own terms, may have final and significant consequences that cannot be reversed even if the measure is later modified or turns out to be unnecessary in the light of the final award.

67. Some interim measures of protection are issued *ex parte*, that is on the application of one party without hearing the other affected party before ordering the measure. Arbitration statutes usually do not contain provisions on the possibility of ordering *ex parte* measures and do not specify which types of measures may be ordered *ex parte*. Among the reasons given in arbitral awards for issuing *ex parte* measures are the following: showing that irreparable loss or damage will occur without the measure, particular urgency that does not allow hearing the other party (e.g. measures concerning perishable goods) or desirability of not giving advance notice of the measure to the party to whom the measure is directed (e.g. a hearing on a requested measure not to remove assets from the jurisdiction may allow the party to remove the assets before the measure is issued).

68. Neither statutory provisions governing arbitral procedures nor arbitration rules normally contain express provisions as to whether a decision on an interim measure of protection should state the reasons upon which it is based. Generally, it appears, arbitral tribunals issue reasoned decisions.

B. Power to order interim measures

69. Legislative solutions regarding the power of the arbitral tribunal to order interim measures of protection are not uniform. In some jurisdictions, the power is implied. In other jurisdictions there are express provisions empowering the arbitral tribunal to order interim measures. Such is the case, for

example, in jurisdictions that have adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. Article 17 of the Model Law provides the following:

> "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

70. According to some arbitration laws, the power of the arbitral tribunal to order interim measures of protection depends on the agreement of the parties, and the law limits itself to recognizing the effectiveness of parties' agreement to grant such power to the arbitral tribunal. There are also jurisdictions where the arbitral tribunal is deemed not to have the power to order interim measures and it is considered that the parties cannot confer such power on the arbitral tribunal.

71. Pursuant to many sets of arbitration rules, an arbitral tribunal is given the power to order interim measures. For example, article 26(1) of the UNCITRAL Arbitration Rules provides as follows:

> "At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."

72. In many jurisdictions the parties can choose between requesting an interim measure of protection from the arbitral tribunal and requesting it from a court. When the arbitral tribunal has not yet been constituted, and a party wishes an interim measure of protection, approaching the court is the only possibility. This possibility of requesting an interim measure from the arbitral tribunal or from the court is envisaged also in the UNCITRAL Model Law, which, in addition to empowering the arbitral tribunal to issue interim measures (see above cited art. 17), provides in article 9:

> "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

Article 9 of the Model Law limits itself to declaring that it is not incompatible with the arbitration agreement for the court to issue an interim measure. Whether and to what extent the court is in fact empowered to issue such measure in favour of an ongoing arbitration is left to legislative provisions outside the Model Law.

C. Arguments in favour of enforceability of interim measures ordered by arbitral tribunal

73. As arbitrators do not have coercive powers to enforce interim measures of protection, practitioners have in recent years argued in various forums that the question of enforceability of interim measures of protection is an issue to be considered by legislators. The need for enforceability is usually supported by arguments such as that the final award may be of little value to the successful party if actions of the recalcitrant party have rendered the outcome of the proceedings largely useless (e.g. by dissipating assets or removing them from the jurisdiction); or that preventable loss or damage should not be allowed to happen (e.g. if a party refuses to take precautionary measures at the construction site or it fails to continue construction works while the dispute is being resolved). Thus, it is argued, in some cases an interim order may in practice be as important as the award.

74. In connection with arguments in favour of enforceability of interim measures of protection, it has been pointed out that international arbitrations are often held in places where neither party has assets or commercial operations (so called “neutral” places). This often means that the action to be taken pursuant to an interim measure ordered by the arbitral tribunal is to be taken outside of the jurisdiction where the arbitration takes place. Therefore, to the extent it is possible to establish a regime for court assistance in enforcing interim measures, there should be a possibility for enforcement by courts in both the State of arbitration as well as outside that State.

75. It should be noted, however, that, as a practical matter, interim measures issued by arbitral tribunals are often effective without any court coercion. Circumstances fostering the effectiveness of measures are, for example, that the party does not wish to displease the arbitral tribunal, whom the party wishes to convince that its position is justified; that the arbitral tribunal may draw adverse inferences from a refusal to comply with the measure (e.g. in case of an order to preserve a certain piece of evidence); that the arbitral tribunal may proceed to make an award on the basis of materials before it; and that the arbitral tribunal might hold the recalcitrant party liable for costs or damages arising from its non-compliance with the measure and include that liability in the award. Nevertheless, it has been pointed out that there are many instances where interim measures of protection remain unheeded, and that the incentives just mentioned may not be sufficient or effective.

76. Some propose that arbitration parties in need of enforceable interim measures should resort to the judicial process, as is possible under many national laws. However, in response, it is pointed out that this may pose difficulties. For example, obtaining a court measure may be a lengthy process, in particular, because the court may require arguments on the issue or because the court decision is open to appeal. Furthermore, the courts of the place of arbitration may not have effective jurisdiction over the parties or the assets. Since arbitrations are often conducted in a State that has little or nothing to do with the subject-matter in dispute, a court in another State may have to be approached with a request to consider and issue a measure. Moreover, the law in some jurisdictions may not offer parties the option of requesting the court to issue interim measures of protection, on the ground that the parties, by agreeing to arbitrate, are deemed to have excluded the courts from intervening in the dispute; even if the courts would have the jurisdiction to order an interim measure, a court may be reluctant to order it on the ground that it is more appropriate for the arbitral tribunal to do so.

77. It is therefore argued that resources would be used more efficiently if parties were able to make their requests for interim measures directly to the arbitral tribunal rather than to the court and if measures would be enforceable by intervention of the court in an expedited fashion. Such a possibility is said to be desirable, in particular since the arbitral tribunal is already familiar with the case, is often technically apprised of the subject-matter and may make a decision in a shorter time than the court.

78. In discussing these arguments, the Working Group might wish to bear in mind that the need for efficient court-assisted enforceability of interim measures is not the same for all interim measures that may be issued by an arbitral tribunal. For example, when arbitral tribunals order interim measures mentioned under (a) in paragraph 63 (those aimed at facilitating the conduct of arbitral proceedings), and a party fails to comply with one of those measures, the arbitral tribunal may "draw adverse inferences" from the failure and make the award on the basis of information and evidence before it. In addition or alternatively, the arbitral tribunal may take the party's failure to comply with the measure into account in its final decision on costs of the proceedings. Thus, with respect to these kinds of measures, the

arbitral tribunal may have considerable leverage over the parties, which may reduce the need for court intervention.

79. When the measure is of the kind mentioned under (b) in paragraph 63 (a measure to avoid irreparable loss or damage or to preserve a certain state of affairs until the dispute is resolved), the arbitral tribunal would also normally be able to hold the party liable for costs or damages caused by its failure to comply with the order. Nevertheless, despite the possibility of liability for costs and damages, the failure to comply with the measure may have severe and irreparable consequences, and it might be regarded as being in the interests of an orderly administration of justice that there exist a possibility of court assistance in the enforcement of such a measure ordered by an arbitral tribunal.

80. When the measure is one of those mentioned under (c) in paragraph 63 (a measure to facilitate later enforcement of the award), and a party is determined to attempt to thwart the enforcement of the award, the arbitral tribunal or the interested party may have no effective means to avoid the negative consequences of a party's failure to abide by the interim measure. In practice, this may mean that the award will remain largely useless to the winning party. Thus, in view of the magnitude of the problem potentially resulting from a recalcitrant party and the lack of effective means available to the arbitral tribunal or the other party to avoid the problem, the need for court assistance in enforcing interim measures of this type may be the greatest.

D. Considerations of the Commission

81. When the Commission discussed the question of enforceability of interim measures of protection ordered by arbitral tribunals (A/54/17, para. 371), it was generally agreed that this question was of utmost practical importance which in many legal systems was not dealt with in a satisfactory way. It was considered that solutions to be elaborated by the Commission on that topic would constitute a real contribution to the practice of international commercial arbitration. It was also agreed that the issue should be addressed through legislation.

82. As to the substance of possible solutions, several observations and suggestions were made in the Commission (A/54/17, para. 372). One was that, in addition to the enforcement of interim measures of protection in the State where the arbitration took place, enforcement of those measures outside that State should also be considered. It was said that, while the possible objective of future work was to make interim measures of protection enforceable in a similar fashion as arbitral awards, it should be borne in mind that interim measures of protection in some important respects differed from arbitral awards (e.g. an interim measure might be issued *ex parte*, and might be reviewed by the arbitral tribunal in light of supervening circumstances). As to *ex parte* measures, it was observed that under some legal systems they could only be issued for a limited period of time (e.g. 10 days), and a hearing had to be held thereafter to reconsider the measure. Court assistance to arbitration (in the form of interim measures of protection issued by a court before the commencement of, or during, arbitral proceedings) was also suggested for study.

E. Current legislative solutions

(a) New York Convention

83. Sometimes arbitral tribunals issue interim measures of protection in the form of interim awards. Such a possibility is expressly envisaged, for example, in article 26(2) of the UNCITRAL Arbitration

Rules. This raises the question of whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards covers also such interim awards. As the Convention does not define the term "award", it is not immediately clear whether the Convention applies to interim awards as well. The prevailing view, confirmed also by case law in some States, is that the Convention does not apply to interim awards.

(b) UNCITRAL Model Law

84. The UNCITRAL Model Law on International Commercial Arbitration expressly deals in article 17 with the power of the arbitral tribunal to order such interim measure of protection as it may consider necessary and also to require a party to provide appropriate security in connection with such measure. The Model Law, however, is silent on the matter of enforcement.

85. When, during the preparation of the Model Law, the substance of article 17 was considered by the Working Group, it contained a sentence that "if enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court][the Court specified in article V] to render executory assistance".[5/] Under one view in the Working Group, executory assistance by courts was considered desirable and should be available. Under another view, which the Working Group adopted after deliberation, the sentence was to be deleted since it dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many States. It was understood by the Working Group, however, that the deletion of the sentence should not be read as a precluding executory assistance in those cases where a State was prepared to render such assistance under its procedural law.[6/]

[5/] Report of the Working Group on International Contract Practices on the work of its sixth session (1983), doc. A/CN.9/245, UNCITRAL Yearbook, vol. XV : 1984, part two, II, A, 1, para. 70.

[6/] *Ibid., para. 72.*

(c) National laws

86. In respect of enforceability of interim measures issued by an arbitral tribunal, a variety of approaches have been taken by legislatures. In many States the legislation is silent on this point. In others, there are express provisions for enforcement of those interim measures.

87. In several jurisdictions, the legislation provides that the provisions on recognition and enforcement of awards apply also to orders made by the arbitral tribunal.

88. In some jurisdictions the law provides that, when a party does not comply with the order by the arbitral tribunal, the arbitral tribunal may request assistance from the court for the enforcement of the order; in other jurisdictions, a party may request such assistance, and in yet others either the arbitral tribunal or the party may request it.

89. One law provides that the court may make an order requiring a party to comply with a "peremptory" order made by the tribunal. The application can either be made by the tribunal upon notice to the parties or by a party with permission of the tribunal and upon notice to the other party. This procedure can only be followed once any available arbitral process has been exhausted and a reasonable period of time has been given to the other party to comply with the order.

90. Another law states that a court may permit enforcement of an arbitrator-granted interim measure of protection unless application for a corresponding interim measure of protection has already been made to a court. The court is empowered to recast such an order if necessary for the purpose of enforcing the measure. The court may also, upon request, repeal or amend the decision to enforce the order. Furthermore, it is provided that if a measure ordered by the arbitral tribunal proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damage.

91. In several jurisdictions it is stated that when a party applies to a court for interim measures and the arbitral tribunal has already ruled on any matter relevant to the application, the court is to treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

F. Possible harmonized solutions

(a) Domestic and foreign interim measures

92. As noted above in paragraph 74, the place of arbitration in international arbitral cases is often chosen for reasons of convenience of the parties and the arbitrators and the availability of certain services, rather than because of any connection with the subject-matter of the dispute. In such circumstances, many measures issued in such arbitrations may have to implemented outside the State where the arbitration takes place. However, also where an international arbitration takes place in the State where the subject-matter of the dispute is located, the arbitral tribunal may well issue measures that would have to be carried out in other States. In light of that, the Working Group may consider that it would be desirable to elaborate a system that would allow court enforcement of measures issued in arbitrations taking place either in the State of the enforcing court or outside that State. To the extent any different treatment for foreign measures should be called for, this might be provided by way of specified exceptions.

(b) Subjecting interim measures to provisions on recognition and enforcement of awards

93. One possible approach for consideration of the Working Group might be to devise a solution according to which the enforcing court would treat an interim measure, for the purpose of its enforcement, as an award and apply to it the provisions governing the recognition and enforcement of awards. (In the context of the UNCITRAL Model Law on International Commercial Arbitration, provisions on the recognition and enforcement of arbitral awards, whether issued in the State of enforcement or outside that State, are contained in its articles 35 and 36.) Such an approach has been adopted in several jurisdictions. For example, it has been provided that, unless otherwise agreed by the parties, the provisions on the recognition and enforcement of awards apply to orders made by the arbitral tribunal for interim measures of protection as if a reference to an award in those provisions were a reference to such an order. In some jurisdictions, enforcement of interim measures is subjected to the enforcement regime for arbitral awards only if the parties have so agreed. It should be noted, however, that the national solutions just referred to apply to arbitrations taking place in those States. There is no provision in those laws for the enforcement of measures issued in arbitrations taking place in a foreign country.

94. The Working Group may wish to discuss whether this approach is to be taken as the basis for elaborating a harmonized regime for the enforcement of interim measures. The advantage of this approach may be that it would take as a basis a regime that has been tested in practice.

95. A further question to be discussed may be whether a regime based on this approach lends itself to being extended also to interim measures issued by an arbitral tribunal outside the State of the court requested to enforce the measure. A consideration in deciding whether to extend such a regime to foreign measures may be that concepts of interim measures in legal systems differ and that thus the court may be faced with a request for an interim measure not known or uncommon in its legal system. For example, some systems recognize *ex parte* measures to a greater degree than others. Another example may be the practice of arbitral tribunals in some States of issuing "peremptory" interim measures to which sanctions are attached by the arbitral tribunal in case they are not complied with. In a further example, if the measure ordered by the arbitral tribunal does not state the reasons on which it is based or if the reasons are not sufficient, the enforcing court may have difficulty enforcing the measure because of a limited possibility of assessing the implicated public policy considerations. Furthermore, the arbitration legislation in the State of the enforcing court may exclude from the powers of an arbitral tribunal certain types of interim measures (e.g. attachment of property or of certain types of property).

96. It may be noted, however, that even when the measure has been issued by an arbitral tribunal in the State where the measure is to be enforced, the court may have to deal with measures that are not known or are unusual in that State. This is so because the procedural law on arbitration generally leaves broad latitude to the parties and the arbitral tribunal in determining the procedure to be followed in conducting the proceedings (see, e.g., art. 19 of the UNCITRAL Model Law) and therefore the arbitral tribunal may follow rules and practices for the issuance of interim measures that are different from those generally used in the State where the arbitration takes place.

97. In the situations described above courts may be reticent to enforce such measures whether they are issued in the State of the enforcing court or outside the State. To the extent enforcement of such interim measures presents a difficulty, it might be overcome by a solution that would make enforceable only those measures that are in compliance with certain procedural conditions of the State of the enforcing court. For example, an *ex parte* measure may be enforceable after the court is satisfied that both parties have been able to present their cases. It may, however, be considered too difficult to formulate a harmonized set of conditions for enforcement of different types of interim measures, including those that are not

known or are unusual in the State of enforcement. Another approach, more flexible and more accommodating of differences in procedural systems, may be to leave the court discretion as to the manner of enforcement of an interim measure.

(c) Giving the court discretion in enforcing a measure

98. The Working Group may wish to consider whether the regime to be adopted should allow the enforcing court a degree of discretion as to how the measure is to be enforced, possibly also as to whether it is to be enforced, including discretion to adapt the interim measure to the procedural and enforcement system of the court. Such an adaptation may involve amending or recasting the wording of the order. The advantage of an approach which would rely to some extent upon the discretion of the court enforcing the measure would be that, while it would provide a clear legislative basis for enforcement of interim measures, both domestic and foreign, it would not impinge upon the procedural and enforcement system of the State. This would allow the development of court practices with respect to enforcement of such interim measures, hopefully in a manner that would be supportive of arbitration.

99. If the court is to be given a degree of discretion in enforcing interim measures ordered by arbitral tribunals, the question that may need to be discussed is whether the requesting party would need to present arguments to the court to convince it that the measure is necessary. For example, would the party requesting enforcement need to prove in court the facts showing the need for the measure and present arguments as to the form and amount of any security that should be provided? Furthermore, should the other party be heard on those issues? If such arguments are to be heard again in court, after the arbitral tribunal itself has heard them, the process of enforcement may become lengthy. Therefore, the Working Group may wish to consider whether it should be provided that the court is allowed, or obligated, to take the arbitral tribunal’s factual findings as conclusive.

(c) Special provisions reflecting the interim nature of measures of protection

100. As noted above in paragraph 66, the measures of protection discussed here are interim or temporary in relation to the final award. They do not represent the final resolution of the dispute in that they might be modified by the arbitral tribunal as matters evolve during the arbitral proceedings, and that they should be taken into account and merged in the arbitral tribunal's final adjudication of the dispute. This feature distinguishes interim measures from arbitral awards and may call for special provisions on the enforcement of interim measures.

101. One such special provision may be required because, at the time of the request for enforcement or at some time thereafter but before the issuance of the award, the arbitral tribunal might modify its interim measure because circumstances have changed (e.g. the respondent is able to show that it has sufficient assets in the jurisdiction, which may allow the arbitral tribunal to lift or modify the earlier order prohibiting the removal of certain assets from the jurisdiction; or the danger of irreparable damage as the ground for continued performance of a construction contract may disappear, which would permit the earlier interim order to be amended). In order to deal with this, the Working Group may wish to consider the need for a provision empowering the court to modify its order for the enforcement of an interim measure ordered by an arbitral tribunal. Furthermore there may be a need for a provision making a court order for the enforcement of a measure dependent on the obligation of the requesting party to inform the court promptly of any amendment of the measure by the arbitral tribunal. In addition, provision may have to be made for appropriate security from the party requesting court assistance in the enforcement of the interim measure.

G. Scope of interim measures that may be issued by arbitral tribunal and procedures for issuance

102. In connection with the discussion on the enforcement of interim measures of protection, the Working Group may also wish to give consideration to the desirability and feasibility of preparing a harmonized text on the scope of interim measures of protection that an arbitral tribunal may issue and procedural rules for their issuance.

103. Many laws have broad formulations empowering the arbitral tribunal to order interim measures of protection. In this group are the jurisdictions that have adopted article 17 of the Model Law, according to which the arbitral tribunal may order "such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute". In some laws the formulations are more specific; for example, arbitrators are expressly empowered to issue attachment orders or to order the property in dispute to be deposited with a third party. Other laws have more restrictive formulations; for instance, it is provided that arbitrators do not have the power to issue attachments of property.

104. Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases. This trend and the lack of clear guidance to arbitral tribunals as to the scope of interim measures that may be issued and the conditions for their issuance may hinder the effective and efficient functioning of international commercial arbitration. To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party may avoid enforcement of the award by deliberately making assets inaccessible to the claimant. Such a situation may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure; this causes unnecessary cost and delay (e.g. because of the need to translate documents into the language of the court and the need to present evidence and arguments to the judge).

105. The Working Group may wish to consider whether it would be desirable to prepare a harmonized text dealing with the issuance of interim measures by arbitral tribunals. Such a text might be in the form of uniform legislative provisions or in the form of a non-legislative text such as model contractual rules on which parties could agree. A further possibility might be to prepare guidelines or practice notes to assist parties and arbitrators. Such guidelines or practice notes might describe and analyse the differences in various types of interim measures, the criteria applied by arbitral tribunals in determining whether to order particular interim measures, the procedures relating to seeking and ordering interim measures and means by which an arbitral tribunal can itself apply sanctions to enforce certain interim measures as contrasted with other types of measures where court assistance is needed.

106. If it is considered that work should be undertaken in this direction, some inspiration may be drawn from the Principles on Provisional and Protective Measures in International Litigation, which were adopted in 1996 by the Committee on International Civil and Commercial Litigation of the International Law Association (ILA).7/ The Principles, reproduced below in paragraph 108, are limited to provisional

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[7] The International Law Association, report of the Sixty-seventh Conference held at Helsinki, Finland, 12 to 17 August 1996, published by the International Law Association, London 1996, p. 202-204.

and protective measures that may be issued by courts; however, a number of ideas underlying the Principles appear to be relevant, *mutatis mutandis*, also to interim measures ordered by arbitral tribunals.

107. If work regarding the issuance of interim measures by arbitral tribunals appears promising, the Working Group may wish to exchange views on the topic, including on the possible form of the text to adopted, and request the Secretariat to prepare a study to facilitate its further considerations. This topic appears sufficiently separate from the topic of the enforcement of interim measures (discussed above in paragraphs 63 to 102), so that it might be found that the two topics should be dealt with differently; for example, one in a non-legislative text while the other in a legislative text.

108. The text of the ILA Principles on Provisional and Protective Measures in International Litigation is as follows:

Scope of Principles

1. Provisional and protective measures perform two principal purposes in civil and commercial litigation:
   (a) to maintain the status quo pending determination of the issues at trial; or
   (b) to secure assets out of which an ultimate judgment may be satisfied.
2. These Principles are intended to be of general application in international litigation. But they were drafted bearing in mind a paradigm case under category (b) above of measures to freeze the assets of the defendant held in the form of sums on deposit in a bank account with a third party bank.

Nature of the Remedy

3. States should make available without discrimination provisional and protective measures with the objective of securing assets out of which an ultimate judgment may be satisfied.
4. The grant of such relief should be discretionary. It should be available:
   (a) on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law; and
   (b) on a showing that the potential injury to the plaintiff outweighs the potential injury to the defendant.
5. The defendant should not be entitled to hide his assets behind a corporate veil or other subterfuge.
6. The plaintiff should ensure that the defendant be informed promptly of the order, notwithstanding any formal legal requirements for service of the order and the legal consequences which may flow from service.
7. The defendant should have the right to be heard within a reasonable time and to object to the provisional and protective measure ordered.
8. The court should have authority to require security or other conditions from the plaintiff for the injury to the defendant or to third parties which may result from the granting of the order. In determining whether to order security, the court should consider the availability of the plaintiff to respond to a claim for damages for such injury.
9. Provision should be made for access to information either through operation of law or by court order in appropriate cases as to the defendant's assets.

Ancillary Proceedings

10. The jurisdiction to grant provisional and protective measures should be independent from jurisdiction on the merits.
11. The mere presence of assets within a country should be a sufficient basis for the jurisdiction to grant provisional and protective measures in respect of those assets.
12. It should be a condition for the court exercising jurisdiction to grant provisional and protective measures that a substantive action is filed within a reasonable time either in the forum (if it has substantive jurisdiction) or abroad (but the court shall not act in aid of a substantive action abroad if there is no reasonable possibility of the judgment rendered on the substance in the foreign court being enforceable in the forum).
13. The provisional and protective measure should be valid for a specified limited time. The court should consider renewal in the light of developments in the court where the substantive action is underway.
14. There may be scope for the court exercising substantive jurisdiction to play a supervisory role, on the application of the defendant, over provisional and protective measures granted in other countries, considering in particular whether in aggregate those measures are justifiable in the light of the action as a whole, and the amount claimed in it.
15. The applicant for provisional and protective measures must inform the requested court of the current status of proceedings for provisional and protective measures and on the merits in other countries. The possibility is not even excluded of states conferring on their courts permission, where authorized, to communicate directly with relevant judicial authorities in other countries.

Territorial Scope

16. Where the court is properly exercising jurisdiction over the substance of the matter, it should have the power to issue provisional and protective orders addressed to a defendant personally to freeze his assets, irrespective of their location.
17. Where the court is not exercising jurisdiction over the substance of the matter, and is exercising jurisdiction purely in relation to grant of provisional and protective measures, its jurisdiction shall be restricted to assets located within the jurisdiction. Subject to international law, national rules (including rules of the conflict of laws) will determine the location of assets.

Cross Border Recognition and International Judicial Assistance

18. At the request of a party, a court may take into account orders granted in other jurisdictions.
19. Further, a court should co-operate where necessary in order to achieve the efficacy of orders issued by other courts, and consider the appropriate local remedy.
20. This may require an extended recognition of foreign court orders. The fact that an order is provisional in nature, rather than final and conclusive, should not by itself be an obstacle to recognition or enforcement.

Forum Arresti and Forum Patrimonii

21. The fact that the court has granted a provisional and protective measure does not in itself found jurisdiction over the substantive claim, whether or not limited to the value of the frozen assets.

Interim Payments

22. The procedure in domestic law under which the court may order an interim payment (i.e. an outright payment to the plaintiff which may be subsequently revised on final judgment) is not a provisional and protective measure in the context of international litigation.

[Chapter III, "Requirement of written form for arbitration agreement", will be published in doc. A/CN.9/WG.II/WP.108/Add.1]