



# General Assembly

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## United Nations Commission on International Trade Law

Working Group II (Arbitration and Conciliation)  
Thirty-eighth session  
New York, 12-16 May 2003

### Provisional Agenda

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on interim measures of protection.
4. Other business.
5. Adoption of the report.

#### Notes on the provisional agenda

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come 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.<sup>1</sup>

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,<sup>2</sup> requirement of written form for the arbitration agreement,<sup>3</sup> enforceability of interim measures of protection<sup>4</sup> and possible enforceability of an award that had been set aside in the State of origin.<sup>5</sup>

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and



reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as “the New York Convention”) (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (*ibid.*, para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (*ibid.*, para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (*ibid.*, para. 109 (i)); and the power by the arbitral tribunal to award interest (*ibid.*, para. 107 (j)). It was noted with approval that, with respect to “online” arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (*ibid.*, para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (*ibid.*, para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.<sup>6</sup>

4. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. At its thirty-fifth session, in 2002, the Commission took note with appreciation of the report of the Working Group on the work of its thirty-sixth session (A/CN.9/508). The Commission commended the Working Group for the progress accomplished so far regarding the issues under discussion, namely, the requirement of the written form for the arbitration agreement and the issues of interim measures of protection.

6. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration (see A/CN.9/WG.II/WP.118, para. 9) and discussed a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (*ibid.*, paras. 25-26). The Commission noted that the Working Group had not reached consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. The Commission noted the decision of the Working

Group to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the UNCITRAL Model Law on Arbitration, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a “friendly bridge” between the new provisions and the New York Convention, pending a final decision by the Working Group on how best to deal with the application of article II(2) of the Convention (A/CN.9/508, para. 15). The Commission was of the view that member and observer States participating in the Working Group’s deliberations should have ample time for consultations on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-right provision of article VII of the New York Convention, as noted by the Commission at its thirty-fourth session.<sup>7</sup> For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions regarding the requirement of written form for the arbitration agreement and the New York Convention until its thirty-eighth session, in 2003.

7. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119, para. 74) and that the Secretariat had been requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. It was also noted that a revised draft of a new article prepared by the Secretariat for addition to the Model Law regarding the issue of enforcement of interim measures of protection ordered by an arbitral tribunal (*ibid.*, para. 83) would be considered by the Working Group at its thirty-seventh session (A/CN.9/508, para. 16).

8. At its thirty-seventh session, held in Vienna from 7 to 11 October 2002, the Working Group discussed the issue of interim measures ordered by the arbitral tribunal on the basis of a proposal by the United States of America (A/CN.9/WG.II/WP.121) and a note prepared by the Secretariat (A/CN.9/WG.II/WP.119). The Working Group also had a brief discussion on the issue of recognition and enforcement of interim measures based on the note prepared by the Secretariat. In that connection, another drafting proposal was made by the United States of America (A/CN.9/523, paras. 14, 78 and 79).

9. The Working Group is composed of all States members of the Commission. These are: Argentina, Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Romania, Russian Federation, Rwanda, Sierra Leone, Singapore, Spain, Sudan, Sweden, Thailand, the Former Yugoslav Republic of Macedonia, Uganda, United States of America and United Kingdom of Great Britain and Northern Ireland.

#### Item 1. Election of officers

10. The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Preparation of harmonized texts on interim measures of protection

11. The Working Group will have before it, and may wish to use as a basis for its deliberations a note prepared by the Secretariat for the thirty-sixth session of the Working Group discussing interim measures of protection (A/CN.9/WG.II/WP.119), as well as the various additional texts discussed in the context of its thirty-seventh session and contained in the report of that session (A/CN.9/523, paras. 15, 53 and 79). The Working Group is expected to consider first the issue of recognition and enforcement of interim measures. Should sufficient time be available during the session, the Working Group may also wish to revert to the issue of interim measures ordered by the tribunal. With a view to facilitating continuation of the discussion on the latter issue, the Working Group will have before it a newly revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration prepared by the Secretariat pursuant to the decisions made by the Working Group at its thirty-seventh session (A/CN.9/WG.II/WP.123).

12. Background materials may be found in the following documents:

- *Arbitration: interim measures of protection*: Proposal by the United States of America (A/CN.9/WG.II/WP.121);
- Report of the United Nations Commission on International Trade Law on the work of its thirty-fifth session (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 18 (A/57/17)*);
- Report of Working Group II (Arbitration and Conciliation) on the work of its thirty-sixth session (A/CN.9/508);
- *Settlement of commercial disputes: Preparation of uniform provisions on written form for arbitration agreements*: note by the Secretariat (A/CN.9/WG.II/WP.118);
- Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*);
- Report of the Working Group on Arbitration on the work of its thirty-fourth session (A/CN.9/487);
- *Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation*: report of the Secretary-General (A/CN.9/WG.II/WP.113);
- Report of the Working Group on Arbitration on the work of its thirty-third session (A/CN.9/485);
- *Possible future work: court-ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate*: report of the Secretary-General (A/CN.9/WG.II/WP.111);
- *Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation*: report of the Secretary-General (A/CN.9/WG.II/WP.110);

- Report of the United Nations Commission on International Trade Law on the work of its thirty-third session (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*);
- Report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468);
- *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 (A/CN.9/WG.II/WP.108 and Add.1);
- Report of the United Nations Commission on International Trade Law on the work of its thirty-second session (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*);
- *Possible future work in the area of international commercial arbitration*: note by the Secretariat (A/CN.9/460);
- *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2);
- UNCITRAL Model Law on International Commercial Arbitration;

13. The electronic version of the above-mentioned documents is accessible on the following website: [www.uncitral.org](http://www.uncitral.org).

#### Item 5. Adoption of the report

14. The Working Group may wish to adopt, at the close of its session, a report for submission to the thirty-sixth session of the Commission, to be held in Vienna from 30 June to 18 July 2003.

#### Dates and scheduling of meetings

15. The session of the Working Group will take place from 12 to 16 May 2003 at the United Nations Headquarters, New York. There will be five working days available for consideration of the agenda items at the session. Meeting hours will be from 10.00 to 13.00 and from 15:00 to 18:00, except on Monday, 12 May 2003, when the session will commence at 10.30 a.m. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session (see A/56/17, para. 381), the Working Group is expected to hold substantive deliberations during the first eight half-day meetings (that is, from Monday to Thursday), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon). The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record by the Chairman at the tenth meeting and subsequently incorporated into the report.

#### *Notes*

<sup>1</sup> *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

<sup>2</sup> Ibid., paras. 340-343.

<sup>3</sup> Ibid., paras. 344-350.

<sup>4</sup> Ibid., paras. 371-373.

<sup>5</sup> Ibid., paras. 374 and 375.

<sup>6</sup> Ibid., *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396.

<sup>7</sup> Ibid., para. 313.

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