

## Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration

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### I. MOST RECENT DEBATES WITHIN THE COMMISSION

UNCITRAL (the Commission), during its 31st annual session in 1998, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the 40th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). 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.<sup>1</sup> In reports presented at that commemorative conference, various suggestions were made regarding some of the problems identified in practice so as to enable the Commission to consider whether any future work by UNCITRAL in the field of dispute settlement would be desirable and feasible. The Secretariat was requested to prepare a note for continuation of the discussion at the 1999 annual session.<sup>2</sup>

At its 32nd session, in 1999, the Commission had before it the requested note as 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),<sup>3</sup> and other international conferences and forums, such as the 1998 Freshfields lecture.<sup>4</sup> During the deliberations, a number of other issues were mentioned as potentially suitable for future work by the Commission.

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

<sup>2</sup> Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17), para. 235.

<sup>3</sup> *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.

<sup>4</sup> Gerold Herrmann, *Does the World need Additional Uniform Legislation on Arbitration?*, (1999) 15 *Arbitration International*, p.211.

## A. GENERAL REMARKS

The Commission welcomed the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration. It was generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) 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.

The Commission undertook its deliberations with an open mind as to the ultimate form that future work of the Commission might take. It was agreed that any considerations as to the form would, at the current time, be tentative, leaving firmer decisions to 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.

At various stages of the discussion, the following 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) gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties;
- (b) changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances;
- (c) freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association;
- (d) questions relating to the interpretation of legislative provisions such as those in Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration), which in practice led to divergent results, in particular the question of the court's terms of reference:
  - (i) in deciding whether to refer the parties to arbitration;
  - (ii) in considering whether the arbitration agreement was null and void,

- inoperative or incapable of being performed; and
- (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued;
- (e) questions relating to cases where a foreign court judgment was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked:
  - (i) the existence of an arbitration agreement; or
  - (ii) the fact that an arbitration proceeding was pending; or
  - (iii) the fact that an arbitral award had been issued in the same matter.

It was noted that those instances were often not addressed by treaties dealing with the recognition and enforcement of foreign court judgments. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgments, but the treaty itself did not allow recognition or enforcement to be refused on the ground that the dispute dealt with by the judgment was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

## B. DISCUSSION OF SPECIFIC ITEMS

### 1. *Conciliation (A/CN.9/460, paras 8–19)*

There was general agreement in the Commission that the three issues identified by the Secretariat (namely: admissibility of certain evidence in subsequent judicial or arbitral proceedings; the role of the conciliator in subsequent proceedings; and procedures for enforcing settlement agreements) were particularly important, and were the object of ongoing discussions in professional circles involved in dispute settlement (see A/CN.9/460, paras 8 to 19). It was widely felt that, in addition to those three issues, the possible interruption of the limitation periods as a result of the commencement of conciliation proceedings was worthy of consideration.

The view was expressed that the issues of conciliation might not easily lend themselves to international unification by way of uniform legislation. The desirability of preparing uniform legislative rules was questioned in view of a general concern that the flexibility of rules governing conciliation should be preserved. It was stated that most procedural difficulties that might arise in the field of conciliation could probably be solved by agreement between the parties.

The widely prevailing view, however, was that the Commission should explore the possibility of preparing uniform legislative rules to support the increased use of conciliation. It was explained 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 (e.g. enforcing them in the same way as arbitral awards) 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.

After discussion, the Commission decided that a working group to be entrusted with the subject matter should consider whether, with a view to encouraging and facilitating conciliation, it would be useful for it to prepare harmonized legislative model provisions on conciliation that would deal with the above questions, and possibly others.

## 2. *Requirement of Written Form for Arbitration Agreement (A/CN.9/460, paras 20–31)*

It was widely agreed that Article II(2) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (which required the arbitration agreement to be in written form “in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”), and subsequent uniform provisions modelled on that Article, were outdated. The discussion thus focused on the extent to which modernization of the New York Convention was needed in respect of the formation of the arbitration agreement, as well as the nature and the urgency of any work that might be undertaken by the Commission for such modernization. The view was expressed that, in the majority of cases, parties had no difficulty in complying with the current form requirements, that those requirements compelled the parties to consider carefully the exclusion of court jurisdiction and that, therefore, if any work should be undertaken, it should be limited to the formulation of a practice guide. While that view received some support, the Commission decided that future work was necessary with respect to matters arising in connection with Article II(2) of the New York Convention, and that legislative work was among the options to be considered.

As regards the scope of future work with respect to Article II(2) of the New York Convention, work may be needed in connection with the two general issues addressed in the note by the Secretariat (A/CN.9/460, paras 22–31), namely: the issue of the written form requirement and its implications with respect to modern means of communication and electronic commerce; and the more substantial issues of consent by the parties to an arbitration agreement where the arbitration agreement was not embodied in an exchange of letters or telegrams.

In addition to those two general issues, special attention may need to be given to specific fact situations that pose serious problems under the New York Convention, including the following: tacit or oral acceptance of a written purchase order or of a written sales confirmation; an orally concluded contract referring to written general conditions (e.g. oral reference to a form of salvage); or, certain brokers' notes, bills of lading and other instruments or contracts transferring rights or obligations to non-signing third parties (i.e. third parties who were not party to the original agreement). Examples of such transfers to third parties include the following: universal transfer of assets (successions, mergers, demergers and acquisitions of companies); specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party (*stipulation pour autrui*)); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto (A/CN.9/460, para. 25).

Various views were expressed in the Commission as to the means through which modernization of the New York Convention could be sought. One view was that the issues related to the formation of the arbitration clause should be dealt with by way of an additional protocol to the New York Convention. It was explained that redrafting, or promoting uniform interpretation of, Article II(2) could only be achieved with the required level of authority through treaty provisions similar in nature to those of the New York Convention. While support was expressed for that view, concern was expressed that any attempt to revise the New York Convention might jeopardize the excellent results reached over 40 years of international recognition and enforcement of foreign arbitral awards through worldwide acceptance of that Convention. In response to that concern, however, it was pointed out that the very success of the New York Convention and its establishment as a world standard should make it possible for UNCITRAL to undertake a limited overhaul of the text if such work was needed to adapt its provisions to changing business realities, and to maintain or restore its central status in the field of international commercial arbitration.

Another view was that, while no attempt should be made to revise the New York Convention directly, the desired result with respect to Article II(2) might be achieved through model legislation. This could be prepared for the benefit of national legislators with a view to superseding the outdated provisions of Article II(2) by relying on the more favourable law provision of Article VII of the Convention. While support was expressed in favour of that view, it was noted that such a solution could be pursued only if Article II(2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing, but would instead be understood as establishing the maximum requirement of form. It was pointed out that the worldwide acceptance of such an interpretation was currently doubtful and could only become established as the result of a lengthy harmonization process based on case law. However, it was suggested that the Commission could usefully contribute to speeding up that process by elaborating (in addition to model legislation) guidelines or other non-binding material

to be used by courts as guidance from the international community in the application of the New York Convention. It was also suggested that any model legislation that might be prepared with respect to the formation of the arbitration agreement might include a provision along the lines of Article 7 of the United Nations Convention on Contracts for the International Sale of Goods to facilitate interpretation by reference to internationally accepted principles.

Yet another view was that an intermediary solution should be sought to avoid both the alleged dangers of revisiting the New York Convention and the possible inconvenience of relying merely on progressive harmonization through model legislation and case law interpretation. It was thus suggested that consideration might be given to preparing a convention separate from the New York Convention to deal with those situations which arose outside the sphere of application of the New York Convention, including (but not necessarily limited to) situations where the arbitration agreement failed to meet the form requirement established in Article II(2). Some support was expressed in favour of that suggestion. Another view, however, was that experience indicated that the process of adopting and securing widespread ratification of a new convention could take many years, and that meanwhile there would be an undesirable lack of uniformity. It was stated that the suggested approach might be particularly suitable to deal with a number of the above-mentioned specific fact situations that posed serious problems under the New York Convention. However, with respect to a number of those situations (e.g. transfer of rights or obligations to non-signing third parties), it was widely felt that the issues at stake went to general questions regarding the substance and validity of the underlying transaction. Accordingly, doubts were expressed as to whether it would be desirable and feasible to attempt to deal with those issues in the context of a set of provisions geared primarily to the formation of the arbitration agreement.

With respect to the establishment of priorities, it was stated that, unless it could be envisaged to amend the New York Convention through a protocol or otherwise to prepare provisions in the nature of a treaty, work on the issues arising from Article II(2) of the New York Convention should not constitute a priority, since no satisfactory solution was to be expected regarding those issues. Some support was expressed in favour of that view. The widely prevailing view, however, was that the Commission, at the current stage, should recognize that issues of formation of the arbitration agreement should be given a high priority on the programme of future work, and that none of the above-suggested approaches should be ruled out until they had been considered carefully by the Working Group to which the issue would be entrusted.

### 3. *Arbitrability (A/CN.9/460, paras 32–34)*

It was observed that uncertainties as to whether the subject matter of certain disputes was capable of settlement by arbitration was a matter that caused problems in international commercial arbitration (e.g. where arbitrators or parties, in particular

those that were foreigners at the place of arbitration, were not aware that a particular issue was not arbitrable or where the law was unclear and parties and arbitrators were unsure to what extent an issue could be taken up in arbitral proceedings).

Views were expressed that it might be useful to include arbitrability in the work programme or at least to refer the topic to the Secretariat for further study. To the extent that the issue should be considered, the purpose should not be to strive for uniformity, but to stimulate transparency of solutions on that question. Work might be geared, for example, towards formulating a uniform provision setting out three or four issues that were generally considered non-arbitrable and calling upon States to list immediately thereafter any other issues regarded as non-arbitrable by the State.

At the same time, concerns were expressed that any national listing of non-arbitrable issues might be counter-productive by being inflexible. It was said that the question of arbitrability was subject to constant development (including through case law) and that some States might find it undesirable to interfere with that development. It was agreed that the topic should be accorded low priority.

#### 4. *Sovereign Immunity (A/CN.9/460, paras 35–50)*

The Commission noted that the matter of State immunity remained under consideration by the International Law Commission, and that the General Assembly, by its resolution 53/98 of 20 January 1999, had decided to establish a working group of the Sixth Committee to consider, at its 54th session, outstanding substantive issues related to the Draft Articles on Jurisdictional Immunities of States and their Property, which draft Articles had been prepared by the International Law Commission.

The Commission requested the Secretariat to monitor that work and to report on the outcome of those discussions at an appropriate time.

#### 5. *Consolidation of Cases before Arbitral Tribunals (A/CN.9/460, paras 51–61)*

It was pointed out that consolidation of arbitration cases into a single proceeding was not a novel issue and that it had practical significance in international arbitration, in particular where a number of interrelated contracts or a chain of contracts were entered into. Therefore, it was suggested, it might be useful for the question to be studied further. Views differed, however, as to whether the matter should be given high or low priority. It was also suggested that it might be useful for the Commission to prepare guidelines to assist parties in drafting arbitration agreements that envisaged consolidation of proceedings.

Another view was that it would not be realistic to expect to achieve substantive progress in that area at the current stage and that the matter should not be placed on the current work programme. After discussion, it was decided that the topic should be accorded low priority.

6. *Confidentiality of Information in Arbitral Proceedings (A/CN.9/460, paras 62–71)*

It was pointed out that there were two aspects to the topic of confidentiality of information in arbitral proceedings. One aspect concerned “privacy” of arbitration, reflected in rules, agreements or methods by which the participants in an arbitral proceeding would aim at ensuring that non-participants would not become privy to the proceedings. Another aspect concerned the “duty of confidentiality”, i.e. the duty of participants in an arbitration to maintain as confidential matters relating to the arbitral proceedings. It was noted that, whereas issues of privacy had been to some degree covered by arbitration rules, such as the UNCITRAL Arbitration Rules, issues of confidentiality generally had not been addressed to much extent in arbitration rules or national legislation.

Some support was given to the topic as one of priority. In support of that view, it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rules in respect of confidentiality. It was felt that it would be useful to study the issues, which were becoming increasingly difficult and thorny. Another view was that, although the topic would merit study, it was not one that should be given high priority by the Commission, because of the absence of any viable solutions. It seemed to some that there was little likelihood of achieving anything more than a rule to the effect that “arbitration is confidential except where disclosure is required by law”. The prevailing view was that, albeit interesting, the topic was not of high priority.

7. *Raising Claims for the Purpose of Set-off (A/CN.9/460, paras 72–79)*

It was explained that sometimes in an arbitral proceeding the respondent would invoke a claim that the respondent would have against the claimant, not as a counter-claim, but as a defence for the purpose of a set-off. It was noted that, whereas it was often assumed that a claim raised for the purpose of a set-off had to be covered by the arbitration agreement, there existed rules (such as the International Arbitration Rules of the Zurich Chamber of Commerce, Article 27) that were less restrictive in that they provided that the arbitral tribunal also had jurisdiction over a set-off defence even if the claim that was set off did not fall under the arbitration clause.

Views were expressed that it was generally regarded as a sound rule that an arbitral tribunal could take up a claim only if the claim was covered by the arbitration agreement and that, therefore, the consideration of the matter was unlikely to be productive. It was agreed that the topic should be accorded low priority.

8. *Decisions by “Truncated” Arbitral Tribunals (A/CN.9/460, paras 80–91)*

It was observed that, if, during arbitral proceedings before a three-member tribunal, one of the members should resign out of bad faith, perhaps in collusion with

one of the parties, it might be unfair to delay proceedings in order to permit replacement of that arbitrator, and that in some cases the remaining two arbitrators should be able to continue the proceedings and decide the case as a “truncated” tribunal. It was noted that the later in the proceedings such resignation would occur, the more grave could be the problems and loss of resources. It was noted that some arbitration rules (as noted in document A/CN.9/460) permitted, under certain circumstances, awards to be made by truncated tribunals.

Views were expressed that the matter deserved further study by the Secretariat and should be considered by the Commission. Some spoke in favour of dealing with the matter on the level of arbitration rules, while others thought that a model legislative provision might also be envisaged. It was noted that solutions in arbitration rules already existed and that examples of legislative solutions existed as well. Another view was that in practice a truncated tribunal would come about only rarely. It was felt that it would be inadvisable to attempt to legislate on that matter because it raised sensitive issues, because it had implications in the context of recognition and enforcement of an award made by a truncated tribunal, and because agreed solutions would be difficult to achieve. It was pointed out that truncated tribunals had acted even in the absence of express rules. In these circumstances, it was agreed that the topic should be accorded low priority.

9. *Liability of Arbitrators (A/CN.9/460, paras 92–100)*

It was noted that the national laws that contained provisions on this topic generally fell into one of two categories. In one group of laws, the focus was on circumscribing the liability of arbitrators, as well as, in some cases, other participants (in some States of that group, arbitrators were considered similar to judges and were afforded similar immunities). In the other group, the approach was to describe the standard of liability (in some of those countries, arbitrators were considered akin to hired professionals and were held to similar standards of liability as other professionals). In many countries, the matter was left unlegislated.

The view was expressed that the topic was worthy of further study; it was said that, as there were many countries that did not have legislation on the matter, it would be valuable if the Commission would provide model solutions.

Another view was that, in light of different approaches in legal systems, the matter should not be considered by the Commission because it was unlikely that a consensus could be achieved on a workable solution. By addressing the topic and not being able to reach a solution, the Commission would unnecessarily raise its profile and cause confusion. It was agreed that the topic (which should more appropriately be described as “immunity of arbitrators from liability”) should be accorded low priority.

10. *Power by the Arbitral Tribunal to Award Interest (A/CN.9/460, paras 101–106)*

It was noted that the power of the arbitral tribunal to award interest was a matter of great practical importance that arose often and potentially involved large amounts of money. It was also noted that the matter involved the question of the power of the arbitral tribunal to award interest (which in some legal systems, it was said, was not implied failing agreement of the parties) as well as rules (largely pertaining to the law applicable to the substance of the dispute) on related issues such as those mentioned in paragraph 106 of document A/CN.9/460.

The view was expressed that the topic was important, that it could benefit from further study and that the absence of a model legislative provision was a problem, in particular where the absence of a legislative provision would prevent the arbitral tribunal from being able to award interest.

Another view was that, while the topic deserved to be studied at some future time, it was not of high priority, in particular because such matters were ordinarily addressed in the contract and should be left for the parties to determine. It was said, however, that providing guidance and model solutions would facilitate arbitration. It was noted that, according to Islamic law, interest was proscribed, but that that fact did not prevent finding solutions appropriate for other legal systems. It was agreed that the topic should be accorded low priority.

11. *Costs of Arbitral Proceedings (A/CN.9/460, paras 107–114)*

It was widely considered that the question of various matters relating to the costs of arbitration was not urgent. Provisions on costs were included in many arbitration rules and otherwise were best left to the agreement of the parties. It was agreed that the topic should be accorded low priority.

12. *Enforceability of Interim Measures of Protection (A/CN.9/460, paras 115–127)*

It was generally agreed in the Commission that the question of enforceability of interim measures of protection issued by an arbitral tribunal was of utmost practical importance and 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 agreed that the issue should be addressed through legislation. While suggestions were made that a convention was the appropriate vehicle for dealing with this matter, support was also expressed for the suggestion that model legislation be prepared.

As to the substance of future work, several observations and suggestions were made. 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.

It was agreed that the topic should be accorded high priority.

13. *Possible Enforceability of an Award that has been Set Aside in the State of Origin*  
(A/CN.9/460, paras 128–144)

It was generally agreed that cases of enforcement of an award that had been set aside in the State of origin, while rare, were potentially a source of serious concern; they gave rise to polarized views, and, if harmonized solutions were not found, could adversely affect the smooth functioning of international commercial arbitration. Therefore, it was considered necessary that the Commission place that topic on its agenda and entrust a working group with exploring various possible solutions. Without fully discussing the merits of possible solutions, several were mentioned.

One solution was to distinguish between standards for setting aside an award that were recognized internationally and standards that were not recognized internationally; that solution could be inspired by Article IX of the European Convention on International Commercial Arbitration (Geneva, 1961). Another solution could be to prepare provisions supplementing and clarifying Article VII of the New York Convention, according to which a party might seek enforcement of a foreign arbitral award in a State other than where the award was made on the basis of provisions of law that were more favourable than those of the New York Convention. A view was expressed that yet another solution would be to disregard, for the purposes of enforcement, the sole fact that the award had been set aside. The possible usefulness of the Commission issuing a statement of principles was also noted.

It was agreed that the topic should be accorded high priority.

14. *Review and Possible Revision of the 1961 European Convention on International Commercial Arbitration*

As regards the current review and possible future revision of the European Convention on International Commercial Arbitration (concluded in 1961 at Geneva under the auspices of the Economic Commission for Europe (ECE)), as referred to in the note by the Secretariat (A/CN.9/460, para. 6), UNCITRAL heard statements by the observer for ECE and the two Vice-Chairpersons of the *ad hoc* informal working group

(the WP.5 Arbitration Convention Working Group) established for that purpose by the Economic Commission for Europe Working Party on International Contract Practices in Industry (WP.5). UNCITRAL was informed that the WP.5 Arbitration Convention Working Group was expected to review the 1961 European Convention in order to determine its continuing usefulness, its utility beyond that of existing conventions and the advisability of revising that Convention with a view to increasing its utility for existing and potential new signatories (and possible worldwide acceptance), as well as to report on current problems in international arbitration and provide suggestions as to how those problems might be addressed, and by which organization. UNCITRAL was invited to consider undertaking that work jointly with ECE, in compliance with its mandate of coordination and cooperation, and in order to avoid duplication of efforts.

UNCITRAL agreed that wasteful duplication of efforts should be avoided. For that reason, and in order to prevent inconsistent results, close coordination and cooperation were considered highly desirable. In order to determine the best ways of achieving those objectives, due account had to be taken of the composition and mandate of the organizations involved. In this context, it was noted that all European and the few non-European States members of ECE were either members of UNCITRAL or could actively participate in its deliberations; that UNCITRAL was the core legal body within the United Nations system in the field of international trade law; and that the subject matter of international commercial arbitration was a global issue best addressed by UNCITRAL. It was also noted that any particular issues of concern primarily or exclusively to a given region would be more appropriately dealt with by the relevant regional organization.

As a consequence, UNCITRAL appealed to ECE, in particular its Committee for Trade, Industry and Enterprise Development when defining the mandate of the WP.5 Arbitration Convention Working Group, to concentrate on questions specific to its region or to the functioning of the 1961 European Convention (e.g. Article IV and the accompanying mechanism), while exercising restraint as regards arbitration issues of general interest or concern, which were likely to be addressed by the UNCITRAL Working Group on Arbitration. UNCITRAL requested its secretariat to assist, within existing resources, the ECE Working Group in such an undertaking. It was agreed that the concrete steps to be taken in ensuring future cooperation between the two organizations would need to be tailored according to the developments in both projects.

The Commission, having concluded the discussion and exchange of views on its future work in the area of international commercial arbitration, decided to entrust the work to a working group and requested the Secretariat to prepare the necessary studies. It was agreed that the priority items for the working group should be conciliation, requirement of written form for the arbitration agreement, enforceability of interim measures of protection and possible enforceability of an award that had been set aside in the State of origin. 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, which were accorded lower priority, the working group was to decide on the time and manner of dealing with them.

## II. PREPARATION OF FUTURE WORK BY THE WORKING GROUP

The UNCITRAL Working Group on Arbitration, will meet from 20 to 31 March 2000. Its deliberations are expected to be based on two notes prepared by the Secretariat (A/CN.9/WG.II/WP.108 and Add.1). Three main issues have been placed on the agenda of the Working Group: conciliation, enforceability of interim measures of protection, and requirement of written form for arbitration agreement.

### A. CONCILIATION (A/CN.9/WG.II.WP.108, PARAS 11–62)

The following will be considered as possible questions on which uniform provisions might be prepared:

- (a) Admissibility of certain evidence in subsequent judicial or arbitral proceedings (A/CN.9/WG.II/WP.108, paras 18–28);
- (b) Role of conciliator in arbitration or court proceedings (as (a), above, paras 29–33);
- (c) Enforceability of settlement agreements (as (a), above, paras 34–42);
- (d) Admissibility or desirability of conciliation by arbitrators (as (a), above, paras 34–42);
- (e) Effect of an agreement to conciliate on judicial or arbitral proceedings (as (a), above, paras 49–52);
- (f) Effect of conciliation on the running of the limitation period (as (a), above, paras 53–55);
- (g) Communication between the conciliator and parties; disclosure of information (as (a), above, paras 56–60); and
- (h) Role of conciliator (as (a), above, paras 61–62).

### B. ENFORCEABILITY OF INTERIM MEASURES OF PROTECTION (A/CN.9/WG.II.WP.108, PARAS 63–108)

#### 1. *Arguments in Favour of Enforceability of Interim Measures Ordered by the Arbitral Tribunal (A/CN.9/WG.II.WP.108, paras 73–80)*

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.

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.

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.

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.

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.

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 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.

When the measure is intended 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.

When the measure is aimed at facilitating 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.

## 2. *Possible Harmonized Solutions (A/CN.9/WG.II.WP.108, paras 92–101)*

### (a) *Domestic and foreign interim measures*

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 be 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*

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.

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.

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).

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. Article 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.

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*

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.

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.

(d) *Special provisions reflecting the interim nature of measures of protection*

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.

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.

3. *Scope of Interim Measures that may be Issued by the Arbitral Tribunal and Procedures for Issuance (A/CN.9/WG.II.WP.108, paras 102–108)*

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.

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).<sup>5</sup>

C. REQUIREMENT OF WRITTEN FORM OF THE ARBITRATION AGREEMENT (A/CN.9/WG.II/WP.108/ADD.1)

1. *“Document Signed” or “Exchange of Documents”*: Possible Contents of Uniform Provision (A/CN.9/WG.II/WP.108/Add.1, paras 24–34)

In considering the content of uniform legislative provisions, one possible approach, in line with recent legislative developments in a number of countries, would be to include a list of instruments or factual situations where arbitration agreements would be validated despite the lack of an exchange of documents. While such a specific approach has the advantage of providing a clear and specific solution to the identified problems, it runs the risk that the provisions would not cover all situations that should be covered and may not adequately address developing business needs and practice.

A somewhat broader solution would be to validate written arbitration agreements even if they were not entered into by an exchange of documents. Language might be considered along the lines of a proposal made during the preparation of Article 7(2) of the Model Law. The proposed language was as follows:

“However, an arbitration agreement also exists where one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner.”<sup>6</sup>

While the proposal was at that time rejected “since it raised difficult problems of interpretation”,<sup>7</sup> it may be considered that the idea underlying it remains valid.

<sup>5</sup> 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, pp. 202–204.

<sup>6</sup> Document A/CN.9/WG.II/WP.37, draft Article 3, reproduced in the UNCITRAL Yearbook, Vol. XIV: 1983, part two, III, B. 1.

<sup>7</sup> Document A/CN.9/232, para. 45, reproduced in the UNCITRAL Yearbook, Vol. XIV: 1983, part two, III, A.

During the preparation of the Model Law, in the written comments by governments on the draft Model Law, a proposal was made (by Norway) in which it was observed that arbitration clauses are frequently found in bills of lading, which are usually not signed by the shipper. Nevertheless, it was said, such clauses are generally considered binding on the shipper and subsequent holders of the bill of lading. In order to clarify the status of such arbitration agreements a wording was proposed which addressed bills of lading as well as other written arbitration agreements signed by one party only. The proposal was to add to Article 7 of the Model Law the following:

“If a bill of lading or another document, signed by only one of the parties, gives sufficient evidence of a contract, an arbitration clause in the document, or a reference in the document to another document containing an arbitration clause, shall be considered to be an agreement in writing.”<sup>8</sup>

The proposal was considered during the eighteenth session of the Commission in 1985, at which the Model Law was finalized.<sup>9</sup> While the proposal was ultimately not adopted, it was noted in the discussion that a substantial number of speakers had commented favourably on it.

Various recently enacted national laws have provided for a wider definition than that included in the UNCITRAL Model Law. Examples provided to the Working Group in order to stimulate discussion and possibly to be used as an inspiration in finding acceptable harmonized solutions include the following: Article 178 of the Swiss Federal Act of Private International Law; Article 1021 of the Dutch Arbitration Act 1986; Section 1031 of the German Arbitration Law of 1997; and Section 5 of the English Arbitration Act 1996.

Bearing in mind the various considerations underlying the preparation of a treaty or model legislation, including the long process of the legislative implementation of any solution that may be agreed upon, the Working Group may wish to discuss the advisability of preparing a non-legislative text. When the Commission discussed the question of the degree to which the current statutory provisions are regarded as outdated (A/54/17, para. 344), the view was expressed that, in the majority of cases, parties had no difficulty in complying with the current form requirements for arbitration agreements. It was also said that those requirements compelled the parties to consider carefully the exclusion of court jurisdiction. Therefore, it was suggested that if any work should be undertaken, it should be limited to the formulation of a practice guide. However, while that view received some support, the Commission decided that future work was necessary with respect to matters arising in connection

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<sup>8</sup> Document A/CN.9/263 (Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration), comments on Article 7, para. 5 (Norway), reproduced in the UNCITRAL Yearbook, Vol. XVI: 1985, part two, I, A.

<sup>9</sup> Summary records of the United Nations Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration, 311th meeting, reproduced in the UNCITRAL Yearbook, Vol. XVI: 1985, part three, II.

with Article II(2) of the New York Convention, and that legislative work was among the options to be considered.

In light of those considerations, the Working Group may wish to discuss the advisability of preparing practice guidelines or notes to alert parties in international transactions that in certain factual circumstances form problems might arise that might adversely affect the application of the New York Convention with respect to recognition of agreements to arbitrate and enforcement of arbitral awards. Such guidelines might be useful, for example, to warn trade organizations that sponsor standard forms that those forms may not meet the written form requirements, and the guidelines might propose changes in wording or practices to avoid such difficulties. In addition, such guidelines or notes might be useful to parties and judges of national courts in analysing whether the written form requirement has or has not been met by various types of business conduct. The Working Group might consider whether such guidelines or notes could be useful to international business as an interim or separate solution, while consideration is being given to the more time-consuming and complex process of drafting and implementing legislative solutions.

2. *Arbitration Agreement “In Writing” and Electronic Commerce (A/CN.9/WG.II/WP.108/Add.1, paras 35–40)*

The question as to whether electronic commerce is an acceptable means of concluding valid arbitration agreements should pose no more problems than have been created by the increased use of telex and subsequently of telecopy or facsimile. Article 7(2) of the UNCITRAL Model Law expressly validates the use of any means of telecommunication “which provides a record of the agreement”, a wording which would cover telecopy or facsimile messages as well as most common uses of electronic mail or electronic data interchange (EDI) messaging.

As to the New York Convention, it is generally accepted that the expression in Article II(2) “contained in an exchange of letters or telegrams” should be interpreted broadly to include other means of communication, particularly telex (to which facsimile could nowadays be added). The same teleological interpretation<sup>10</sup> could be extended to cover electronic commerce. Such an extension of Article II to cover certain means of communication that were not contemplated at the time the Convention was drafted would be in line with the decision taken by the Commission when it adopted the UNCITRAL Model Law on Electronic Commerce with its Guide to Enactment in 1996. The Guide, which was drafted with the New York Convention and other international instruments in mind, provides that

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<sup>10</sup> For example, the Swiss Federal Tribunal observed that “[Article II(2)] must be interpreted in the light of [the Model Law], whose authors wished to adapt the legal regime of the New York Convention to current needs, without modifying [the actual Convention]”. *Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A.* 16 January 1995, 1st civil division of Swiss Federal Tribunal; relevant excerpts in (1995) 13 *Association suisse de l’arbitrage Bulletin* pp. 503–511 at p. 508.

“the Model Law [on Electronic Commerce] may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.” (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 6).

The Working Group may wish to discuss whether the interpretation of Article II(2) of the New York Convention as covering also contracts and arbitration agreements entered into in the context of electronic commerce (either by reference to Article 7(2) of the UNCITRAL Model Law on Arbitration or to the UNCITRAL Model Law on Electronic Commerce) can count on wide international consensus and whether it should be recommended by the Commission as a workable solution.