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Report of the Working Group on Arbitration on the work of its thirty-ninth session (Vienna, 10-14 November 2003)

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** The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.



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I. Introduction

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.¹

2. The Commission entrusted the work to one of its working groups, which it established as Working Group II (Arbitration), and decided that the priority items for the Working Group should be conciliation,² requirement of written form for the arbitration agreement,³ enforceability of interim measures of protection⁴ and possible enforceability of an award that had been set aside in the State of origin.⁵

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.⁶

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.⁷

5. At its thirty-fifth session, in 2002, the Commission adopted the UNCITRAL Model Law on International Commercial Conciliation and 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. 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.

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

8. At its thirty-seventh session (Vienna, 7-11 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 (A/CN.9/523, paras. 14, 78 and 79).

9. At its thirty-eighth session (New York, 12-16 May 2003), the Working Group discussed the issue of recognition and enforcement of interim measures issued by an arbitral tribunal and also considered a draft provision expressing the power of the court to order interim measures of protection in support of arbitration. The Secretariat was requested to prepare a revised text setting out the various options discussed by the Working Group.

10. At its thirty-sixth session (Vienna, 30 June-11 July 2003), the Commission agreed that it was unlikely that all the topics, namely, the written form for arbitration agreements and the various issues to be considered in the area of interim measures of protection, could be finalized by the Working Group before the thirty-seventh session of the Commission in 2004. It was the understanding of the Commission that the Working Group would give a degree of priority to interim measures of protection and the Commission noted the suggestion that the issue of *ex parte* interim measures, which the Commission agreed remained a point of controversy, should not delay progress on that topic.⁹

11. The Working Group on Arbitration which was composed of all States members of the Commission, held its thirty-ninth session in Vienna, from 10 to 14 November 2003. The session was attended by the following States members of the Working Group: Austria, Brazil, Canada, China, Colombia, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, the Russian Federation, Singapore, Spain, Sweden, Thailand, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay.

12. The session was attended by observers from the following States: Albania, Algeria, Argentina, Australia, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Finland, Ireland, Kuwait, Lebanon, Nigeria, Pakistan, Panama, Peru, Poland, Qatar, the Republic of Korea, Slovakia, Switzerland, Turkey, Ukraine, Venezuela, Yemen and Zimbabwe.

13. The session was also attended by observers from the following intergovernmental organizations: Hague Conference on Private International Law (HCCH), International Union of Latin Notaries (UILN), NAFTA Article 2022 Advisory Committee and Permanent Court of Arbitration (PCA).

14. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), Arab Union of International Arbitration, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies (CILS), *Conseil des Barreaux de l'Union Européenne (CCBE)*, International Council for Commercial Arbitration (ICCA), International Court of Arbitration of the Chamber of Commerce (ICC), Moot Alumni Association, Regional Centre for Arbitration Kuala Lumpur, School of International Arbitration, The Chartered Institute of Arbitrators, the Club of Arbitrators, and The European Law Student's Association (ELSA).

15. The Working Group elected the following officers:

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

Rapporteur: Mrs. Vilawan MANGKLATANAKUL (Thailand).

16. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.124); (b) a note by the Secretariat containing a revised text of a draft provision on the power of an arbitral tribunal to order interim measures (A/CN.9/WG.II/WP.123); (c) a newly revised draft provision on enforcement and recognition of interim measures of protection pursuant to the decisions made by the Working Group at its thirty-eighth session (A/CN.9/WG.II/WP.125); (d) the report of the Working Group on its thirty-seventh and thirty-eighth sessions (A/CN.9/523 and 524).

17. The Working Group adopted the following agenda:

1. Scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of uniform provisions on interim measures of protection for inclusion in the UNCITRAL Model Law on International Commercial Arbitration.
5. Other business.
6. Adoption of the report.

II. Summary of deliberations and decisions

18. The Working Group discussed agenda item 4 on the basis of the text contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP.123 and 125). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapters III and IV below. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group.

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

19. The text of draft article 17 as considered by the Working Group was as follows:

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

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the

issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute [, in order to ensure or facilitate the effectiveness of a subsequent award];

(b) Take action that would prevent, or refrain from taking action that would cause, current or imminent harm [, in order to ensure or facilitate the effectiveness of a subsequent award];

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

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

“(3) The party requesting the interim measure of protection shall [demonstrate] [show] [prove] [establish] that:

(a) Irreparable harm will result if the measure is not ordered, and such harm substantially outweighs the harm that will result to the party affected by the measure if the measure is granted; and

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

“(4) [Subject to paragraph (7)(b)(ii),] [except where the provision of a security is mandatory under paragraph (7)(b)(ii),] the arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection.

“(5) The arbitral tribunal may modify or terminate an interim measure of protection at any time [in light of additional information or a change of circumstances].

“(6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection.

“(7) (a) Unless otherwise agreed by the parties, the arbitral tribunal may [, in exceptional circumstances,] grant an interim measure of protection, without notice to the party [against whom the measure is directed] [affected by the measure], when:

(i) There is an urgent need for the measure;

(ii) The circumstances set out in paragraph (3) are met; and

(iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted;

(b) The requesting party shall:

(i) Be liable for any costs and damages caused by the measure to the party [against whom it is directed] [affected by the measure] [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]; and

(ii) Provide security in such form as the arbitral tribunal considers appropriate [, for any costs and damages referred to under subparagraph (i),] [as a condition to granting a measure under this paragraph];

[(c) [For the avoidance of doubt,] the arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to [subparagraph (b)], above;]

[(d) The party [against whom the interim measure of protection is directed] [affected by the measure granted] under this paragraph shall be given notice of the measure and an opportunity to be heard by the arbitral tribunal [as soon as it is no longer necessary to proceed on an *ex parte* basis in order to ensure that the measure is effective] [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances];]

[(e) Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days [from the date on which the arbitral tribunal orders the measure] [from the date on which the measure takes effect against the other party], which period cannot be extended. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party [against whom the measure is directed] [affected by the measure] has been given notice and an opportunity to be heard;]

[(f) A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;]”

Paragraph (1)

20. The Working Group found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

Exhaustive nature of the list of functions characteristic of interim measures

21. The Working Group recalled that, at its thirty-seventh session, it had agreed that it should be made abundantly clear that the list of provisional measures provided in the various subparagraphs was intended to be non-exhaustive (A/CN.9/508, para. 71). The Working Group noted that, as redrafted, the list appeared exhaustive. The Working Group proceeded to consider whether all conceivable grounds for which an interim measure of protection might need to be granted were covered by the current formulation. It was suggested that a subparagraph could be added to leave open the possibility that an arbitral tribunal might order an interim measure in exceptional circumstances not currently covered

by paragraph (2). Although some support was expressed for that suggestion, it was widely felt that the suggested addition was unnecessary. It was recalled that the paragraph, as previously drafted, attempted to list all types of interim measures, whereas the current draft provided generic broadly cast categories describing the functions or purposes of various interim measures without focusing on specific measures. The current draft thus provided a flexible approach covering all possible circumstances in which an interim measure might be sought. It was also pointed out that an exhaustive generic list was preferable because it provided clarity in respect of the powers of the arbitral tribunal and might reassure courts at the point of recognition or enforcement of an interim measure. After discussion, the Working Group agreed that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), it was no longer necessary to make that list non-exhaustive.

Subparagraphs (a) and (b)

“[in order to ensure or facilitate the effectiveness of a subsequent award]”

22. It was suggested that the bracketed text in both subparagraphs (a) and (b) namely “in order to ensure or facilitate the effectiveness of a subsequent award” should be deleted. In support of that suggestion, it was said that paragraph (2) provided a definition of an interim measure rather than the conditions required to order an interim measure which were set out in paragraph (3) of the draft article. It was said that retaining the bracketed text in subparagraphs (a) and (b) could be read as imposing an additional condition to be met before an interim measure could be granted. In addition, it was said that there might be circumstances where an interim measure could be sought for purposes other than to ensure or facilitate the effectiveness of a subsequent award, for example where a party sought an interim measure preventing one party from aggravating the dispute by initiating proceedings in another forum. The Working Group agreed that the bracketed text in subparagraphs (a) and (b) should be deleted.

“maintain or restore the status quo”

23. A suggestion was made that subparagraphs (a) and (b) should be merged since the need to maintain or restore the status quo should only be regarded as a subcategory of a broader set of circumstances where an interim measure would be necessary to preclude harm to the party seeking such interim measure. A more fundamental question was raised as to whether preservation or restoration of the status quo should be regarded as a natural function of an arbitral tribunal in the absence of any of the circumstances covered by subparagraph (b). However, it was strongly felt that it was necessary to maintain subparagraph (a), which set out the concept of maintaining the status quo, since that concept was well-established and understood in many systems as one purpose of an interim measure.

“current or imminent harm”

24. The view was expressed that, if the Working Group agreed to the deletion of the bracketed text in subparagraph (b), this would leave a very broad definition referring to “harm” without any indication as to the nature of such harm or the person that would be harmed. It was suggested that this could lead to arbitral tribunals making orders for interim measures that would not be upheld by courts

and also could encourage arguments regarding what harm was required before the enforcement court. After discussion, however, the Working Group agreed that, while there was undoubtedly some overlap between subparagraphs (a) and (b), retaining both subparagraphs was unlikely to create harm and might be regarded as particularly helpful in certain legal systems.

25. A question was raised as to whether the words “would cause, current or imminent harm” in subparagraph (b) were appropriate or whether they could create problems of proof given that, at the time an interim measure was sought, there were often insufficient facts to provide proof that, unless a particular action was taken or refrained from being taken, harm would inevitably result. It was proposed that wording along the lines of “is likely to cause” or “could cause” could address this concern. A number of delegations expressed concern that such a formulation might make the threshold for obtaining an interim measure too low and result in excessive discretion being granted to the arbitral tribunal with respect to the issuance of an interim measure. After discussion, however, the Working Group decided that the words “would cause” should be replaced by wording along the lines of “is likely to cause”.

Subparagraph (c)

26. Clarification was sought as to the meaning of subparagraph (c) and in particular as to the use of the phrase “securing assets”. It was said that this term could be incorrectly understood as requiring the giving of a legal guarantee or security. The Working Group agreed that the term merely referred to the securing of assets and should not be interpreted as requiring a legal guarantee or security in all cases. The Working Group generally agreed that the intention in subparagraph (c) was to refer to the preservation of assets. The Working Group took note of the suggestion that the drafting group to be established at a later stage by the Secretariat to ensure consistency between the various linguistic versions should consider the possibility of using wording along the lines of “preserving assets” instead of “securing assets”. The Working Group also took note of a suggestion that the word “preliminary” in subparagraph (c) was unnecessary, potentially misleading, and should be deleted.

Subparagraph (d)

27. The Working Group recalled that subparagraph (d) of the revised draft had not been discussed at the thirty-seventh session. It was agreed that the text contained in subparagraph (d) should be retained in substance and that the brackets should be omitted. While the view was expressed that in certain legal systems subparagraph (d) was superfluous, the text was considered important as the preservation of evidence was not necessarily dealt with to a sufficient extent by all domestic rules of civil procedure.

Paragraph (3)

“[*demonstrate*] [*show*] [*prove*] [*establish*]”

28. The Working Group recalled that, at its thirty-eighth session, a concern was expressed that the word “demonstrate” in the opening words of the paragraph might connote a high standard of proof. It was recalled that a similar debate had

taken place at the thirty-seventh session of the Working Group and that the verbs “show”, “prove” and “establish” had been suggested together with the verb “demonstrate”, without the Working Group making a decision in that regard (A/CN.9/508, para. 58). At its current session, the Working Group agreed that the chapeau of paragraph (3) should be redrafted in order to better reflect the intention of the Working Group to provide a neutral formulation of the standard of proof. Wording along the following lines was suggested: “The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:”. Broad support was expressed in favour of the suggested wording. As an alternative drafting suggestion, the words “The party requesting the interim measure of protection shall produce evidence that:” were proposed. A view was expressed that an even more neutral formulation might read along the lines of “The arbitral tribunal is satisfied that”. It was stated in response that, while neutrality in respect of the *standard* of proof was desirable, the provision should clearly establish that the *burden* of convincing the arbitral tribunal that the conditions for issuing an interim measure were met should be borne by the requesting party. After discussion the Working Group decided that the words “The party requesting the interim measure of protection shall satisfy the arbitral tribunal that” should be used.

Subparagraph (a)

“irreparable harm”

29. Concerns were raised about the use of the term “irreparable harm”. It was suggested that, in the commercial context, most occurrences could be cured with monetary compensation and the term “irreparable harm” might be too narrow. Alternative proposals were made to refer to “significant”, “exceptional” or “considerable” harm. It was pointed out, however, that the notion of “irreparable harm” was well known in many legal systems and constituted an ordinary pre-requisite for ordering an interim measure. Interim measures of protection were an exceptional form of relief granted when damages might not constitute an adequate alternative remedy. The Working Group agreed that this wording should be retained, possibly with an explanatory note in any accompanying guide to the Model Law as to the meaning of “irreparable harm”. It was acknowledged, however, that the notion of irreparable harm might lend itself to various interpretations. In the view of some delegations, the term should be used only to refer to a truly irreparable damage such as the loss of a priceless work of art. Other delegations referred to the notion of “irreparable damage” as a means of describing particularly serious types of damage that would outweigh the damage that the party against whom the interim measure would be granted could be expected to suffer if that measure was effectively granted. The Working Group noted that the discussion might need to be reopened at a later stage.

“will result”

30. The Working Group recalled that, in the context of paragraph (2), it had decided that the draft provision should avoid creating problems of proof that might arise given that, at the time an interim measure was sought, there were often insufficient facts to provide proof that, unless a particular action was taken or refrained from being taken, harm would inevitably result. For that reason, the words “would cause” in paragraph (2) had been replaced by the words “is likely to cause”

(see para. 25, above). For a similar reason, it was decided that in subparagraph (a) of paragraph (3), the words “will result” should be replaced by wording along the lines of “is likely to result”.

Subparagraph (b)

“will succeed”

31. It was suggested that a similar change should be made to subparagraph (b) in respect of the words “will succeed”, which could be replaced by wording along the lines of “is likely to succeed”. After discussion, it was generally agreed that the suggested change was unnecessary in view of the fact that the introductory words “There is a reasonable possibility” provided the required level of flexibility.

“provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determinations”

32. The Working Group considered whether the proviso in subparagraph (b) that “any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determinations” should be maintained. It was pointed out that, for the sake of simplifying drafting, this phrase should be deleted and included in an explanatory guide to the Model Law. It was widely felt, however, that the Model Law itself should provide guidance to the arbitrators and give them the necessary level of comfort when they were called upon to decide on the issuance of an interim measure of protection. After discussion, it was agreed that the substance of the proviso should be retained.

Paragraph (4)

33. This paragraph was based on the idea that, in respect of *inter partes* measures, the possibility of requiring security should be within the discretion of the arbitral tribunal (A/CN.9/523, para. 46). In order to clarify that paragraph (4) was not intended to create a possibility to avoid supplying mandatory security in respect of *ex parte* interim measures of protection (A/CN.9/523, para. 46), two alternative texts had been included in the revised draft in square brackets.

34. The Working Group considered paragraph (4) and agreed that the wording in square brackets was unnecessary and should be deleted, as the remainder of paragraph (4) makes it clear that the arbitral tribunal retains the right, in all circumstances, to require the provision of security as a condition to granting an interim measure of protection.

Paragraph (5)

“modify or terminate”

35. It was suggested that, for the sake of completeness and for better consistency between draft articles 17 and 17 bis, the words “modify or terminate” should be amended to read “modify, suspend or terminate”. The Working Group adopted that suggestion.

“[in light of additional information or a change of circumstances]”

36. While some support was expressed for the retention of the words between square brackets (“[in light of additional information or a change of circumstances]”), it was widely felt that those words were superfluous. Among the reasons given for the deletion of those words, it was stated that arbitrators would generally explain in the text of their decision the reasoning they followed when deciding to grant the interim measure. It was also felt that those words in square brackets should be deleted since they might be misread as unduly restricting the discretion of arbitrators when making the decision to grant an interim measure. After discussion, the Working Group decided that the words between square brackets should be deleted.

Modification of an interim measure on the initiative of the arbitral tribunal

37. Diverging views were expressed as to whether an interim measure could be modified or terminated by the arbitral tribunal only upon request by a party or whether such modification or termination could be ordered by the tribunal acting of its own initiative. One view was that the text of draft article 17 should make it abundantly clear that the tribunal could only act upon request by a party. It was stated that a party who had sought and obtained an interim measure had a legitimate expectation that the measure would produce its intended effect over its intended duration. In that context an interim measure granted at the request of a party could only be terminated at the request of that party. More generally, it was stated that such a rule was necessary to ensure consistency with the consensual nature of arbitration as understood in many countries. It was pointed out that, should an arbitral tribunal acting on its own initiative decide to terminate an interim measure granted at the request of a party, it might be seen as unduly protecting the interests of the other party, thus deviating from the impartiality that should be strictly observed by the arbitral tribunal.

38. A contrary view, however, was that a degree of discretion was necessary to make it possible for the arbitral tribunal to correct the serious consequences of an interim measure, particularly where that measure appeared to have been granted on an erroneous or fraudulent basis. It was pointed out that a useful precedent might be found in article 33(2) of the Model Law, which stated, in respect of awards on the merits, that “The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award”.

39. With a view to reconciling the various opinions on that matter, it was suggested that the order of paragraphs (5) and (6) could be reversed. It was stated that placing paragraph (6) before paragraph (5) would appropriately emphasize the obligation of parties to inform the arbitral tribunal of any change in the circumstances on the basis of which the interim measure had been granted. That suggestion was generally accepted by the Working Group. In addition, various suggestions were made for improving the current text of paragraph (5). One suggestion was that the arbitral tribunal should only be allowed to modify or terminate an interim measure on its own initiative where such power had been expressly conferred upon the arbitral tribunal through prior agreement of the parties. The Working Group took note of that suggestion. Another suggestion was that the following text should replace the current text of paragraph (5):

“The arbitral tribunal may modify or terminate an interim measure of protection at any time upon application of any party or upon the tribunal’s own motion upon prior notice to the parties.”

40. Broad support was expressed for the proposed text. However, it was suggested that, in order not to leave too much discretion to the arbitral tribunal acting of its own initiative, paragraph (5) should clearly establish that, while under normal circumstances an interim measure could only be terminated or modified at the request of a party, specific circumstances might justify modification or termination of an interim measure by the arbitral tribunal on its own initiative. To that effect, it was suggested that the words “or upon the tribunal’s own motion upon prior notice to the parties” in the proposed text should be replaced by the words “or, in exceptional circumstances, on the tribunal’s own initiative, upon prior notice to the parties”. A view was expressed that a reference to “exceptional circumstances” might be overly restrictive. A suggestion was made that broader wording along the lines of “in light of additional information or a change of circumstances” (see above, para. 36) might be preferable. After discussion, however, the Working Group decided that paragraph (5) should be renumbered paragraph (6) and read along the following lines:

“The arbitral tribunal may modify or terminate an interim measure of protection at any time upon application of any party or, in exceptional circumstances, on the tribunal’s own initiative, upon prior notice to the parties.”

41. A concern was expressed that the revised text of the paragraph might be misread as establishing the right for the arbitral tribunal to terminate or modify interim measures granted by another tribunal or by a State court. It was generally agreed that the provision should be further amended to clarify that, irrespective of whether it acted at the request of a party or on its own initiative, the arbitral tribunal could only modify or terminate the interim measures issued by that arbitral tribunal. The Secretariat was requested to implement the common understanding of the Working Group when preparing a revised draft for further consideration at its next session.

Situation where a respondent objects to the jurisdiction of the arbitral tribunal

42. A question was raised with respect to the operation of paragraph (5) regarding the power of the arbitral tribunal to modify an interim order already made by the tribunal in the situation where a respondent would not submit to the jurisdiction of the arbitral tribunal. It was stated that this question raised a broader issue with respect to the position of a respondent who objected to the jurisdiction of the arbitral tribunal on the merits of the case but wished to oppose or sought to modify an interim order. It was widely felt that, in such a situation, the respondent should not be regarded as having waived its objection to the jurisdiction of the arbitral tribunal by appearing before the tribunal in connection with the interim order only. With a view to reflecting that policy in draft article 17, the following text was proposed:

“(6) bis

(a) When a party against whom such an application, or an interim order, is made, objects or does not submit to the jurisdiction of the Tribunal in respect of [the merits of] the claim made against him [in the arbitration proceedings], that party may

(i) oppose the application, or

- (ii) request the Tribunal to exercise its power [to modify etc.] under subparagraph (5),

without thereby waiving the objection or submitting to the jurisdiction of the Tribunal in respect of [the merits of] the claim.

- (b) In such a case, the Tribunal may exercise its power [to modify etc.] under subparagraph (5) notwithstanding that no request [therefore] has been made by the party against whom the interim order was made.”

43. The Working Group took note of the proposal. It was widely felt, however, that, as redrafted to provide for modification or termination of the interim measure on the initiative of the arbitral tribunal in exceptional circumstances (see above, paras. 40 and 41), the paragraph sufficiently addressed the above concern.

Paragraph (6)

Numbering of paragraphs

44. For the reasons expressed in the context of the discussion of paragraph (5), (para. 39, above), the Working Group decided that paragraph (6) would be renumbered paragraph (5), and paragraph (5) renumbered paragraph (6).

Communication of information to both parties

45. A concern was expressed that paragraph (6) did not require the requesting party to notify the other party of a material change in the circumstances. The Working Group noted that paragraph (3) of article 24 of the Model Law provided that “all statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party”. As well, article 18 of the Model Law provided that the parties “shall be treated with equality and each party shall be given a full opportunity of presenting his case”. A concern was expressed that duplication of these principles in draft paragraph (6) could be detrimental and that the issue should instead be addressed in a commentary to the Model Law. After discussion, the Working Group agreed that, notwithstanding the obligations set out in article 24(3) and article 18 of the Model Law, it would be useful to require expressly in paragraph (6) that all information supplied to the arbitral tribunal by one party pursuant to that paragraph should also be communicated to the other party.

“From the time of the request onward”

46. It was suggested that the words “from the time of the request onward” could be deleted given that the point at which the duty to inform arose was evident from the remainder of the paragraph, namely from the words “on the basis of which the party sought the interim measure of protection”. It was further suggested that, to clarify the duty to inform, the word “sought” should be replaced by “made the request for”. The Working Group agreed to delete the words “from the time of the request onward” and replace the term “sought” with “made the request for”.

“change in the circumstances”

47. The view was expressed that, as a matter of consistency, the language used in respect of an arbitral tribunal’s power to modify or terminate an interim measure “in light of additional information or a change of circumstances” should be harmonized with that used in paragraph (6) regarding the requesting party’s duty to inform “of any material change in circumstances”. However, it was recalled in that respect that the words “in light of additional information or a change of circumstances” had been deleted from paragraph (5) by the Working Group (see above, para. 36).

“Liability of the requesting party”

48. Concern was expressed that, in contrast to subparagraph (7)(b), which imposed a mandatory requirement that security be given by the party applying for the *ex parte* order to cover possible damages resulting from the measure, no liability provision was included in the context of *inter partes* interim measures of protection which were subsequently shown to have been unjustified. The Working Group agreed to defer discussion on liability for unjustified interim measures issued in the context of *inter partes* proceedings to a later stage in its deliberations.

Paragraph (7)

General remarks

49. The Working Group recalled that, at the thirty-seventh session, the question whether to include a provision allowing for interim measures to be ordered *ex parte* by an arbitral tribunal had been extensively discussed and that opposing views had been expressed as to whether this matter should be included in draft article 17 (A/CN.9/523, paras. 16-27). The Working Group also recalled that, at its thirty-sixth session, the Commission noted the suggestion that the issue of *ex parte* interim measures, which the Commission agreed remained a point of controversy, should not delay progress on the finalization of draft article 17 (A/58/17, para. 203).

50. Strong opposition was expressed to discussing the text of paragraph (7) before having first a discussion on whether, as a matter of general policy, it would be suitable for a revision of the Model Law to establish the possibility of interim measures to be ordered *ex parte* by an arbitral tribunal. However, the Working Group was reminded that, at its thirty-seventh session, there had been wide agreement that, by strengthening and increasing the safeguards, a provision on *ex parte* interim measures of protection might be more acceptable (A/CN.9/523, para. 27). On that basis, the Working Group agreed to proceed with an examination of the text and following that to consider whether, as a matter of general policy, a provision on interim measures granted *ex parte* should be retained in draft article 17.

51. A proposal was made to add to subparagraph 7(a) new wording to cover the question of jurisdictional immunities of States and their property, along the following lines : “This subparagraph is without prejudice to the immunities enjoyed by States or their various organs under international law in relation to measures of protection.”

Subparagraph (a)

Opt in or opt out

52. As currently drafted, the power to order interim measures applied “Unless otherwise agreed by the parties”. It was proposed that these words should be deleted from the text and replaced by “If expressly agreed by the parties”. It was stated that the suggested wording was more apt to preserve the consensual nature of arbitration. It was suggested that this approach which provided that parties “opt in” to a provision allowing *ex parte* interim measures was more consistent with the expectation of the parties in an arbitration given that *ex parte* provisions were not specifically provided for in a large number of domestic arbitration laws. The Working Group took note of that suggestion, for which some support was expressed. It was stated that experience gathered by one major international arbitral centre over many years indicated that parties never requested *ex parte* interim measures.

“in exceptional circumstances”

53. Divergent views were expressed as to whether or not to retain the bracketed words “in exceptional circumstances”. It was suggested that the words were redundant and should be deleted given that the circumstances listed in subparagraphs (a)(i) to (iii) only referred to exceptional circumstances. As an alternative to deletion, it was suggested that the words “in exceptional circumstances” could be retained, provided that appropriate clarification was introduced in the text that “exceptional circumstances” referred to those circumstances listed in subparagraphs (a)(i) to (iii). Such clarification was said to be necessary in order not to suggest that the reference to “exceptional circumstances” should be interpreted as establishing a further condition to the issuance of an interim measure *ex parte* in addition to those already listed in subparagraphs (a)(i) to (iii). A contrary view was that the words should be retained to underscore that the *ex parte* measure should only be granted in truly exceptional circumstances. In support of that view, it was said that the circumstances listed in subparagraph (a) were not necessarily exceptional circumstances. The Working Group did not reach consensus on that issue and decided that the words “in exceptional circumstances” should be retained in square brackets for continuation of the discussion at a future session.

“[against whom the measure is directed][affected by the measure]”

54. The Working Group agreed that the words “against whom the measure is directed” were preferable to the words “affected by the measure”. It was said that the latter phrase was ambiguous in view of the multiplicity of parties potentially “affected” by an interim measure. In the light of that decision, it was suggested that the language used in paragraph (3)(a) and in other parts of draft article 17 might need to be reviewed to ensure consistency in terminology, where appropriate.

Subparagraph (a)(i)

55. The Working Group found the substance of subparagraph (a)(i) to be generally acceptable.

Subparagraph (a)(ii)

56. The Working Group agreed to replace the word “circumstances” with the word “conditions” to better reflect the nature of the list contained in paragraph (3). A view

was expressed that subparagraph (a)(ii) which only referred to “the circumstances set out in paragraph (3)” could be misinterpreted as excluding the application of paragraphs (5) and (6) to *ex parte* interim measures. It was recalled that subparagraph (a)(ii) had been included for the avoidance of any doubt that all the prerequisites applying to the granting of an *inter partes* interim measure should also apply to an interim measure that was ordered *ex parte*. It was said that, if re-emphasising that point cast doubt on whether or not the other paragraphs applied, then paragraph (a)(ii) should be deleted. The Working Group made no final decision regarding that issue and noted that it might need to be further discussed at a later stage.

Subparagraph (a)(iii)

57. It was suggested that the words, “the requesting party shows” should be harmonized with the amended text agreed to in the chapeau of paragraph (3) which provided that “the requesting party satisfies the arbitral tribunal” (see para. 28, above). Some opposition was expressed to that proposal on the basis that a higher standard of proof should be required in respect of *ex parte* interim measures. The Working Group made no final decision regarding that issue and noted that it might need to be further discussed at a later stage.

58. A suggestion was made that the phrase “the requesting party shows” or any phrase as might be agreed should be transposed to the chapeau of paragraph 7(a) to make it clear that it applied to all the elements of paragraph 7(a) and not only to subparagraph (a)(iii). The Working Group took note of that suggestion.

Subparagraph (b)

General remarks

59. The Working Group recalled that, at its thirty-seventh session, it had agreed that the revised draft should ensure that the requirement that the party seeking the measure give security be mandatory and that the requesting party be considered strictly liable for damages caused to the responding party by an unjustified measure (A/CN.9/523, para. 31).

60. The question was raised whether a general liability provision should apply not only to interim measures ordered on an *ex parte* basis but also to those ordered on an *inter partes* basis. In support of establishing such a general liability provision, it was stated that in either case, the measure could ultimately be found to have been unjustified to the detriment of the responding party. However, some opposition was expressed to the suggestion that subparagraph (b)(i) should apply generally to both *ex parte* and *inter partes* measures. It was said that the strict liability imposed under subparagraph (b)(i) was appropriate given the nature of an *ex parte* measure, due to the risks inherent in such procedure. However, it was said that misrepresentation or fault in relation to the *inter partes* regime could be dealt with by procedural national laws. As a general remark, it was said that the scope of subparagraph (b)(i) should be limited to establishing the basic principles of a liability regime, without dealing in any detail with substantive issues covered by national laws. After discussion, the Working Group agreed that, at its next session, its deliberations should continue on the basis of both subparagraph (7)(b)(i) regarding the liability of the party requesting an *ex parte* measure, and a new paragraph (provisionally numbered

(6 bis)), which should mirror the text of subparagraph (7)(b)(i) in the context of *inter partes* measures.

61. In preparation for the continuation of its deliberations on this topic, it was felt that additional research on the liability regimes in the context of national laws on interim measures of protection was needed. Some reservations were expressed as to the usefulness of further research given the scarcity of arbitration laws that included a regime on liability in the context of interim measures of protection, and the possibility that civil procedural laws applicable to State courts might not provide rules that could appropriately be transposed in the context of arbitration proceedings. Nonetheless, after discussion the Working Group agreed that the matter could profit from additional information regarding national law on that matter. Delegations were invited to make such information available to the Secretariat by mid-December 2003 for circulation and translation in preparation for the next session of the Working Group.

62. As a matter of drafting, it was suggested that subparagraphs (b)(i) and (ii) should not be grouped together in one paragraph since those subparagraphs dealt with different issues, respectively liability and security. The Working Group took note of that suggestion.

Subparagraph (b)(i)

Costs

63. Diverging views were expressed as to the need for a reference to costs. It was suggested that the scope of the subparagraph should be restricted to damages, since it was aimed at providing compensation to the responding party for damages arising from an *ex parte* interim measure, under certain conditions. The Working Group was alerted to the danger of including costs, which could be understood very broadly in some jurisdictions and narrowly elsewhere, and which could be interpreted in a variety of ways covering, for example, legal costs, including attorney's fees, or costs associated with implementing the measure. It was suggested that the word "costs" should be interpreted strictly and replaced by the word "expenses". However, there was a suggestion to retain the reference to costs, as the term was defined under the UNCITRAL Arbitration Rules.

Damages

64. Concerns were raised that, as currently drafted, the reference to damages was not sufficiently defined as it could cover both direct and indirect or consequential damages caused by the measure. It was suggested that it might be preferable to define more clearly the scope of the damages intended to be covered. Diverging views were expressed as to whether a wider definition of damages (which would provide appropriate safeguards) or a more limited one (restricting the ambit of the rule to direct damages) should be retained.

65. The Working Group considered the circumstances when damages might be payable in respect of an *ex parte* measure. A question was raised as to whether merely requesting an *ex parte* interim measure should make the requesting party liable for damages caused, irrespective of whether the measure was found to be justified or unjustified and irrespective of whether there was any fault by the

requesting party. In response, it was widely felt that, irrespective of whether or not the liability rule established in respect of the requesting party was based on fault or not, the application for an *ex parte* interim measure should not be regarded in itself as creating a damage that should be compensated. The view was expressed that the issue of damages should be left to domestic law. The prevailing view, however, was that the requesting party should be liable only if the measure was ultimately found to have been unjustified. Questions were raised as to the meaning to be attributed to the word “unjustified” and whether the notion of an “unjustified” measure should be considered per se, or in the light of the results on the merits. It was strongly felt in that respect that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not.

66. It was suggested that the point in time when compensation for damages could be obtained should be defined. It was pointed out that damages could arise prior to the rendering of the final award. In that connection, it was said that, as an additional safeguard to the regime of *ex parte* measures, the language of the revised draft should include the possibility for the responding party to claim for compensation immediately after the *ex parte* interim measure had been granted by the arbitral tribunal and to obtain immediate awarding of damages. It was also pointed out that damages for *ex parte* measures would apply only for the time in which the measure was in effect on an *ex parte* basis.

“[against whom it is directed] [affected by the measure]”

67. Support was expressed for the retention of the first bracketed text for the sake of consistency with the words used in paragraph 3 and subparagraph 7(a). However, it was suggested that, in the context of subparagraph 7(b)(i), it could be preferable to retain the second bracketed text “affected by the measure” as it would allow a party, other than the party against whom the measure was directed, to claim damages. It was also suggested that the words “the party affected by the measure” could, in this context, be replaced by the words “any party affected by the measure”. It was explained that wording establishing the principle of a guarantee on the part of the requesting party would provide appropriate protection to arbitrators against third party’s incurring damages as a result of the *ex parte* interim measure and seeking compensation. In reply to the above suggestions, it was recalled that an arbitral tribunal would not have jurisdiction over third parties not bound by the arbitration agreement.

“[to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merit]”

68. Diverging views were expressed as to the need to retain the last bracketed text of subparagraph (b)(i). It was said that the phrase “to the extent appropriate” should be maintained, to show that the measure is legitimate. Other views were expressed stating that the bracketed text was not necessary, as it did not provide any new element. For that reason, it should be replaced by a provision on the possibility for the responding party to claim for compensation immediately after the *ex parte* interim measure was granted by the arbitral tribunal. The Working Group took note of those views.

Subparagraph (b)(ii)

69. The Working Group agreed that the provision of security should be mandatory in the context of *ex parte* interim measures. It was pointed out that, as a matter of consistency, the wording of this subparagraph should be aligned with the wording used in paragraph (4) relating to the provision of security in the context of *inter partes* interim measures, except for the word “may” which could be replaced by the word “shall”.

70. It was suggested that, in order to enhance the safeguards necessary in the context of *ex parte* interim measures, subparagraph b(ii) should be made a condition for granting an *ex parte* interim measure.

Subparagraph (c)

71. It was suggested that the subparagraph was unnecessary given that the jurisdiction of the arbitral tribunal was implicitly established by subparagraph (7)(b)(i). The prevailing view, however, was that subparagraph (c) served a useful purpose and should be retained. It was agreed that, if both subparagraph (b)(i) and a general provision on liability were included in draft article 17, it should be made clear that subparagraph (c) applied to both *inter partes* and *ex parte* interim measures.

72. A concern was expressed that an application under subparagraph (b)(i) could be made by the responding party well after the final award had been rendered. A suggestion was made that the subparagraph should make it clear that the jurisdiction only applied until the award was decided. In response to the above concern, it was recalled that article 32(3) of the Model Law provided that “the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings subject to the provisions of article 33 and 34(4)”. However, since the claim under subparagraph (b)(i) could be regarded as a new claim, it was suggested that subparagraph (c) was necessary. A suggestion was made that, since there was no doubt that the arbitral tribunal had jurisdiction on the issue of security under subparagraph (b)(ii), the scope of subparagraph (c) should be restricted to subparagraph (b)(i). The following text was suggested as a possible alternative to the current formulation of subparagraph (c): “A party may bring a claim under subparagraph (b)(i) and may do so at any time during the arbitration proceedings”. The Working Group took note of the suggested wording and decided that it should be further discussed at its next session, together with the current text of subparagraph (c).

73. It was suggested that the words “for the avoidance of doubt,” should be deleted. Concern was expressed that, if those words were omitted, this could lead to uncertainty regarding the existence of arbitral authority under subparagraph (b), particularly in jurisdictions that would not enact subparagraph (c). It was said that the broad drafting of paragraph (c), including the reference to “inter alia”, reduced the risk of any misinterpretation of the provision, the meaning of which could be further clarified in a commentary to article 17. On that basis, the Working Group decided that the opening words “for the avoidance of doubt” should be deleted. The Secretariat was requested to provide a revised draft taking account of the views expressed and the suggestions made.

Subparagraph (d)

74. It was pointed out that subparagraph (d) was central to the overall regime applying to *ex parte* interim measures. It was suggested that, to the extent an *ex parte* measure could impact upon parties other than the party against whom it was directed, the second bracketed text would better accommodate this situation along with substituting the opening words “The party” with the words “Any party”. The Working Group, however, agreed that in the interests of consistency with the drafting agreed to in respect of subparagraph (b)(i), the first bracketed text (“against whom it is directed”) should be retained in a future draft of this provision.

75. In respect of the second set of bracketed texts “[as soon as it is no longer necessary to proceed on an *ex parte* basis in order to ensure that the measure is effective] [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances]”, various views were expressed. One view distinguished the first of these texts as referring to the giving of notice to the responding party whereas the second text was said to refer to the responding party’s opportunity to be heard. It was suggested that, given that the two texts had different functions, both should be retained but that the ordering of the language should be amended to read:

“The party against whom the interim measure is directed under this paragraph shall be given notice of the measure as soon as it is no longer necessary to proceed on an *ex parte* basis in order to ensure that the measure is effective and an opportunity to be heard by the arbitral tribunal within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances.”

76. In response, it was said that the term “as soon as it is no longer necessary” was ambiguous and that it was not clear whether the corresponding judgement was to be made by the requesting party or the arbitral tribunal. It was recalled that the only reason to include such a wording was to address the situation where the requesting party sought enforcement of the *ex parte* interim measure. It was suggested that the subparagraph should be redrafted along the following lines:

“The party against whom the interim measure of protection is directed shall be given immediate notice of the measure and an opportunity to be heard by the arbitral tribunal at the earliest possible opportunity and in any event no later than forty-eight hours after that notice, or on such other date and time as is appropriate in the circumstances.”

77. Whilst support was expressed for that proposal as it provided flexibility and some discretion for the tribunal in respect of when the responding party should be heard, concern was expressed that the proposal did not make sufficiently clear the point of time at which notice should be given.

78. Clarifying that issue was considered crucial given that notification was an essential first step to converting an *ex parte* interim measure into an *inter partes* interim measure. It was proposed that paragraph (d) should be amended to provide that the party against whom the interim measure was directed should be given notice of the measure immediately after the arbitral tribunal ordered the measure. Following that notice, the responding party should be given an opportunity to put forward its arguments in writing and, at the request of the responding party, be

heard by the arbitral tribunal. It was suggested that that approach avoided any need to refer to either time period mentioned in the last two bracketed texts of paragraph (d). That proposal was objected to on the grounds that giving notice immediately after the interim measure was ordered might not satisfy the requirement of surprise needed to give efficacy to *ex parte* measures, including time to seek enforcement in court.

79. Some reservations were expressed as to the inclusion of a time period of forty-eight hours or any other specific time period, which might prove too rigid and inadequate, depending on the circumstances. It was also pointed out that introducing wording to allow the tribunal to consider another time and date as was appropriate in the circumstances might provide appropriate flexibility but might also make it illogical to maintain in the same provision a reference to a fixed period of time. A widely shared view, however, was that the inclusion of a specific time period served two purposes, being to underscore that the opportunity to be heard was urgent and, also to put the arbitral tribunal on notice that it should be ready to reconvene to allow an opportunity for the responding party to be heard.

80. It was suggested that the words “opportunity to be heard” might need to be amended to encompass both a hearing of the responding party and a written submission from that party. It was agreed that these words should be replaced by “opportunity to present its case”.

81. After discussion, the Working Group decided that its deliberations in respect of subparagraph (d) should be continued at its next session on the basis of the text reproduced in paragraph 76 above (subject to the replacement of the words “an opportunity to be heard by” by the words “opportunity to present its case before”) and of the following alternative text:

“Any party affected by the interim measure of protection granted under this paragraph shall be given immediate notice of the measure and an opportunity to be heard by the arbitral tribunal within [forty-eight] hours of the notice, or on such other date and time as is appropriate in the circumstances.”

82. At the close of the discussion, the Working Group was reminded that the drafting of subparagraph (d) would need to be revisited when the Working Group examined the question whether enforcement of an *ex parte* interim measure should be permitted.

Subparagraph (e)

83. The Working Group considered various drafting improvements on the current text of subparagraph (e). It was agreed that the text could be simplified and include wording along the lines of “expire after twenty days” instead of “be effective for no more than twenty days”. It was also agreed that the reference to “paragraph (1)” was inappropriate. In respect of the second set of alternative bracketed texts, preference was expressed for the first formulation, namely, “from the date on which the arbitral tribunal orders the measure”. In support of that wording, it was pointed out that it would be difficult to identify the date on which a measure took effect against the other party, as proposed by the second alternative text. In keeping with its earlier decision in respect of equivalent language in subparagraph (b)(i), the Working

Group agreed to retain the text “against whom the measure is directed” in preference to “affected by the measure”.

84. It was suggested that the second sentence of the subparagraph was unnecessary. It was pointed out, however, that the final sentence in subparagraph (e) effectively allowed for the conversion of an *ex parte* interim measure into an *inter partes* interim measure after the party against whom the measure was directed had been given notice and an opportunity to present its case. Clarification was sought as to the point at which an interim measure was converted from an *ex parte* to an *inter partes* one. It was suggested that, for the sake of clarity, subparagraph (e) could be simplified by adopting a wording along the following lines:

“Any interim measure of protection ordered under this paragraph shall expire after twenty days from the date on which the arbitral tribunal orders the measure, unless that measure has been confirmed, extended or modified by the arbitral tribunal after the party against whom the measure is directed has been given notice and an opportunity to present its case.”

After discussion, that formulation was adopted to replace subparagraph (e).

85. It was observed that the subparagraph had been drafted with procedural orders in mind as shown by the words “confirm, extend or modified”, when, in fact, it was contemplated that it could also apply to interim measures in the form of awards.

86. A suggestion was made that subparagraph (e) could also include a requirement that the requesting party should provide the material on which the application was based to the responding party. In support of that suggestion, it was said that, in light of the obligation to inform contained in subparagraph (f), inclusion of a requirement to provide the material upon which the application was made and the measure granted would improve the operation of subparagraph (f). Whilst the suggestion was considered to be useful, it was noted that article 24(3) already required that information supplied to the arbitral tribunal be communicated to the other party. It was suggested that the Working Group should avoid overburdening the text in the revised draft by restating procedural elements that were already provided for in the Model Law and that the matter could be addressed in any accompanying guide to the Model Law. In response it was said that it was important to restate the requirement that information supplied to the arbitral tribunal be communicated to the other party in paragraph (e) because in an *ex parte* situation, the measure could have been made without any document being provided to the tribunal. It was suggested that, even though article 24(3) of the Model Law could be interpreted as covering oral communications, the requirement should nevertheless be included given that that article could be interpreted restrictively. In response, it was stated that there should be no implication that a tribunal would be under an obligation to make a transcript of oral proceedings for every *ex parte* request.

87. It was said that the paragraph could also better clarify who bore the burden of requesting the maintenance of the order, an issue for which it was important to decide whether the same measure initially issued *ex parte* was maintained in an *inter partes* context or whether a new measure *inter partes* replaced the original *ex parte* measure. It was suggested that the party benefiting from the measure should bear that burden. A note of caution was struck about opening up a variety of procedural matters that would unnecessarily burden the provision. The Secretariat was requested to envisage the possibility of expressing the notion that the party

benefiting from the measure should bear the burden of seeking its maintenance beyond twenty days.

Subparagraph (f)

General remarks

88. It was said that the current draft, which referred to an obligation to inform the arbitral tribunal of all the circumstances that it was “likely to find relevant and material to its determination” was ambiguous and difficult to apply in practice, as it would require the requesting party to anticipate the subjective reasoning of the arbitral tribunal. Support was expressed for deletion of subparagraph (f). The prevailing view, however, was that the subparagraph should be retained as a fundamental safeguard and an essential condition to the acceptability of *ex parte* interim measures. In that context, it was recalled that the subparagraph was inspired from the rule in existence in certain jurisdictions that counsel had a special obligation to inform the court of all matters, including those that spoke against its position. It was also recalled, however, that under many legal systems, there existed no such specific obligation to inform.

Placement of subparagraph (f)

89. Diverging views were expressed as to where this provision should be placed. One view expressed was that, as the subparagraph imposed an obligation on the requesting party, it would be better if it were relocated as the first subparagraph under subparagraph (b). The obligation of the requesting party would therefore consist in informing the arbitral tribunal, providing security and being liable for any costs and damages caused to the responding party. The prevailing view was that the subparagraph should remain in its present location, as it concluded the paragraph on *ex parte* measures with an obligation that referred to various subparagraphs therein.

Sanctions

90. The Working Group recalled that, at its thirty-seventh session, it was suggested that a further redraft of the provision should establish a clear link between the obligation to disclose a change in circumstances and the liability regime applicable to the party requesting the interim measure (A/CN.9/523, paras. 49 and 76). The Working Group agreed that the consequence for not complying with the obligation of information should be left to be decided by the general regime provided for in paragraph 7 (including termination or liability where the interim measure was unjustified) and otherwise provided by the applicable substantive law.

Redrafting proposals

91. Sympathy was expressed for the concern that, as currently drafted, the subparagraph appeared to require the requesting party to read the mind of the arbitral tribunal. A number of suggestions were made to reduce the ambiguities of the current draft. One proposal was to replace the phrase “shall have an obligation to inform” by “shall promptly inform”. However, it was said that the word “promptly” was more appropriate in the context of a continuous obligation to inform of any change in circumstances. Another proposal was to replace the entire text in the paragraph by wording along the following lines:

“A party requesting an interim measure of protection under this paragraph shall inform the arbitral tribunal of all material circumstances known to the party, adverse to the party’s case, that the requirements of this paragraph have been met.”

It was suggested that that proposal was preferable to the existing text because it did not depend on a subjective opinion of the tribunal and also addressed the party’s knowledge at the time that the request was made. That proposal was objected to on the grounds that it might only be properly applied and understood by the States from an adversarial regime, as opposed to an inquisitorial one. It was added that the word “material” could exclude certain information that might be useful for the arbitral tribunal. As well, it was said that the proposal introduced further uncertainty into the scope of the duty, as it was not clear what would constitute information adverse to the requesting party’s case. Also it was said that the proposal might be construed to include adverse matters that might arise in the discussion of the merits. It was suggested that the Working Group should seek a more flexible formulation to encourage full and frank disclosure of relevant and material information.

92. It was proposed that the paragraph could be redrafted along the following lines:

“A party requesting an interim measure of protection under this paragraph shall promptly inform the arbitral tribunal of all circumstances relevant and material to the arbitral tribunal’s determination whether the requirements of this paragraph have been met.”

Support was expressed for that proposal. With a view to clarifying that the arbitral tribunal retained the discretion whether or not to order an interim measure of protection, it was suggested that the reference to “whether the requirements of this paragraph have been met”, could be replaced by “whether the arbitral tribunal should make the order requested”. A view was also expressed that the requirement to “inform the arbitral tribunal” might be too narrow and that wording along the lines of “place before the tribunal” might be preferable. Another view was that an effort should be made to introduce in the proposed text some of the flexibility reflected in the original formulation of subparagraph (f). The Secretariat was asked to prepare a revised draft, taking account of the above suggestions.

IV. Revised draft of article 17 bis of the UNCITRAL Model Law on International Commercial Arbitration on the recognition and enforcement of interim measures of protection

93. The Working Group recalled that it had agreed that, following its completion of paragraph 7, it would revert to a general discussion on whether the inclusion of a provision on *ex parte* interim measures was acceptable or not (see above, para. 50). However, it was agreed that that general debate would take place after the provisions on recognition and enforcement of interim measures had been reviewed.

94. The Working group proceeded to discuss draft article 17 bis, which read as follows:

“(1) An interim measure of protection issued by an arbitral tribunal, that satisfies the requirements of article 17, shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application [in writing] to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.*

“(2) The court may only refuse to recognize [and] [or] enforce an interim measure of protection:

“(a) If, at the request of the party against whom it is invoked, the court is satisfied that:

“(i) *Variant 1*: There is a substantial issue as to the jurisdiction of the tribunal [[of such a nature as to make recognition or enforcement inappropriate] [of such a nature as to make the interim measure unenforceable]] [and no appropriate security was ordered by the arbitral tribunal in respect of that interim measure];

Variant 2: There is a substantial question relating to any grounds for such refusal set forth in article 36, paragraphs (1)(a)(i), (iii) or (iv); or

“(ii) *Variant 1*: That party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [, in which case the court may suspend the enforcement proceedings [until the parties have been heard by the arbitral tribunal] [until the parties have had an opportunity to be heard by the arbitral tribunal] [until the parties have been properly notified]];

Variant 2: Such refusal is warranted on the grounds set forth in article 36, paragraph (1)(a)(ii); or

“(iii) *Variant 1*: That party was unable to present its case with respect to the interim measure [in which case the court [may] [shall] suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

Variant 2: Such refusal is warranted on the grounds set forth in article 36, paragraph (1)(a)(ii); or

“(iv) The interim measure has been terminated or suspended by the arbitral tribunal or by order of a competent court; or

“(b) If the court finds that:

“(i) The interim measure requested is incompatible with the powers conferred upon the court by its laws, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure of protection. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

“(ii) *Variant 1*: The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.

Variant 2: Any of the grounds set forth in article 36, paragraphs (1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

“(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure of protection.

“(4) The party who is seeking or has obtained enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or amendment of that interim measure.

“(5) *Variant A*: The court where recognition or enforcement is sought may, if it considers it proper, order the other party to provide appropriate security for costs [unless the tribunal has already made an order with respect to security for costs] [unless the tribunal has already made an order with respect to security for costs, except when the court finds that the order is inappropriate or insufficient in the circumstances].

Variant B: The court where recognition or enforcement is sought may, if it considers it proper, order security for costs.

Variant C: The court where recognition or enforcement is sought shall not, in exercising that power, undertake a review of the substance of the interim measure of protection.

Variant D: The court where recognition or enforcement is sought may only order security for costs where such an order is necessary to protect the rights of third parties.

“(6) Paragraph (2)(a)(ii) does not apply.

Variant X: To an interim measure of protection that was ordered without notice to the party against whom the interim measure is invoked provided that the interim measure was ordered to be effective for a period not exceeding [thirty] days and the enforcement of the interim measure is requested before the expiry of that period.

Variant Y: To an interim measure of protection that was ordered without notice to the party against whom the interim measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.

Variant Z: If the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17(2), the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the interim measure is invoked.”

Paragraph (1)

95. In response to a question regarding the meaning of the words “Unless otherwise provided by the arbitral tribunal”, the Working Group was reminded that these words had been included to reflect the decision that an arbitral tribunal should

be able to provide, at the time of ordering the interim measure, that the measure was not to be the subject of an application for court enforcement (A/CN.9/524, paras. 26 and 34).

“in writing”

96. A proposal was made to delete the bracketed text “in writing”. That proposal was agreed to.

Footnote to paragraph 1

97. The Working Group found the substance of the footnote to paragraph 1 to be generally acceptable.

“that satisfies the requirements of article 17”

98. The Working Group recalled that paragraph (1) of the revised draft article 17 bis included a broader formulation than that used in an earlier draft by replacing the words “interim measure of protection referred to in article 17” with “an order or award for interim measures issued by an arbitral tribunal, that satisfies the requirements of article 17”. It was recalled that the intention behind that formulation in the current draft was to ensure that an interim measure that was sought to be enforced would have to comply with the safeguards that had been established in draft article 17, irrespective of whether that measure was ordered in a country that had adopted the Model Law or in another country (A/CN.9/524, para. 32). In support of including a reference to the requirements of article 17 in paragraph (1), it was said it would provide an incentive for the arbitral tribunal to comply more strictly with the conditions defined in article 17.

99. However, it was suggested that the reference to the requirements of article 17 was not necessary because it introduced ambiguity and a concern was expressed that the current text could be interpreted by an enforcing court as requiring it to undertake a review de novo of whether the interim measure satisfied the requirements of article 17. To avoid such an interpretation it was proposed to adopt wording along the lines of: “an interim measure of protection issued by an arbitral tribunal, pursuant to article 17 or standards substantially similar to those of article 17, shall be recognized as binding and, unless otherwise provided by the arbitral tribunal enforced upon application to the competent court irrespective of the country in which it was issued subject to the provisions of this article”.

100. While the above-mentioned concern was shared by a number of delegations, it was said that the proposed wording could give rise to two different problems. First, the reference to “standards substantially similar to article 17” might be interpreted as adding an unintended gloss to definition of interim measures of protection. Secondly, creating a link between article 17 and article 17 bis was said to be inappropriate when compared to the approach taken in the New York Convention with respect to the enforcement and recognition of awards. Under the New York Convention the term “award” was not defined with the consequence that the regime of recognition and enforcement applied irrespective of the origin of the award. By contrast, a reference to article 17 in article 17 bis (1) could limit recognition and enforcement of interim measures of protection to countries that had adopted article 17 of the Model Law. It was said that that outcome would run contrary to the

pro-enforcement bias favoured by the Working Group in respect of interim measures and also run counter to harmonization of this subject. On that basis, it was suggested that article 17 bis should apply to all interim measures of protection irrespective of whether the measure complied with the requirements of article 17 or not. As well, in any case, it was said that the reference to article 17 was not appropriate as it not only referred to the definition of an interim measure but also included the conditions upon which an arbitral tribunal could grant an interim measure.

101. It was noted that inclusion of the text “that satisfies the requirements of article 17” could have the consequence of creating an additional and hidden ground for the refusal to recognize and enforce an interim measure. It was said that, if it was the intention of the Working Group to include such a ground, then the phrase might be better located under paragraph 2. Some support was expressed for that suggestion. However it was noted that, if such a suggestion were adopted, it would mean that the party against whom the measure was directed would bear the burden of proving that the interim measure did not comply with article 17.

102. In order to take account of this issue it was proposed to delete the reference to “that satisfies the requirements of article 17” and to add another ground on which the court might refuse to recognize and enforce an interim measure under paragraph (2). After discussion, the Working Group adopted that proposal.

Paragraph (2)

Chapeau

103. The Working Group agreed, for the sake of consistency with article 36 of the Model Law, to delete from the chapeau of paragraph (2) the word within square bracket “and” and to retain the word “or”. The Working Group adopted the chapeau of paragraph (2) without any other comments.

Subparagraph (a)

Chapeau

104. It was suggested that the phrase “at the request of the party against whom it is invoked” should be deleted, as the court might be satisfied that a ground for non-enforcement existed from the mere examination of the case. In addition, such deletion would cover the situation where a party against whom a measure was invoked did not appear in the proceedings.

Subparagraph (a)(i)

105. Of the two variants included in the draft subparagraph, preference was expressed for the retention of Variant 2. However it was suggested that the reference to subparagraph 36(1)(a)(i) of the Model Law should be deleted from that variant as it would invite the court to inquire about the validity of the jurisdiction of the arbitral tribunal at a time when the arbitral procedure was still pending. In response, it was said that paragraph (3) of article 17 bis guarded against that risk by restricting any determination made by the court on any ground in paragraph (2) to recognition and enforcement of the interim measure. It was suggested that a general reference to article 36 rather than to specific paragraphs could be considered as an alternative approach. In that case, consideration might be given to the deletion of subparagraph (a)(iv) as it might already be covered by subparagraph 36(1)(a)(v).

Another suggestion was that the final decision to adopt Variant 2 could only be made once the Working Group had considered a consolidated version of the various references to article 36 of the Model Law contained in the current version of paragraph (2).

106. It was said that, as there was agreement to retain Variant 2, the question of the burden of proof should be revisited. In that respect, it was noted that by contrast to subparagraph (2)(a), which did not expressly specify who bore the burden of proof, article 36 (1)(a) provided that the party against whom the interim measure was invoked bore that burden.

Additional ground for refusing recognition and enforcement

107. Following the suggestion to delete the reference to article 17 from paragraph (1) and to add another ground on which the court might refuse recognition and enforcement of an interim measure (see above, para. 99), it was proposed to add a new subparagraph at the end of paragraph (2) in the following terms:

“(v) The court is satisfied that the arbitral tribunal was prohibited from issuing an interim measure [by the agreement of the parties or the mandatory law of the country where the arbitration is taking place].”

An alternative proposal was made along the following lines:

“(v) The court is satisfied that the arbitral tribunal was not authorized to issue the interim measure [either by the agreement of the parties or by the law of the place of the arbitration].”

It was said that the latter proposal improved upon the earlier one because it recognized that an arbitrator did not have an inherent power to order interim measures and that that power could only be derived from either the agreement of the parties or the applicable law.

108. It was remarked that the bracketed text in that proposed new subparagraph was already covered by article 36 (1)(a)(iii), a reason for which it should probably be deleted. With respect to the reference to the law applicable at the seat of the arbitral tribunal, it was stated that, for example, it would be difficult for a judge to enforce an interim measure when the law of the country where the arbitration took place did not allow such a procedure despite a contrary agreement of the parties. It was stated that the reference to the agreement of the parties or to the applicable law should not be provided for in the revised proposal because the matter should be left to be decided by the court.

109. It was questioned whether referring to the country where the arbitration was taking place was appropriate and whether a reference to the country where recognition and enforcement was sought did not constitute a better approach. It was noted however that article 36 (1)(a)(iv) referred to the “law of the country where the arbitration took place” and that, for the sake of consistency, that wording might need to be maintained. In response, it was stated that the reference to the law of the country where “the arbitration took place” might not be appropriate given that what was intended to be covered was the *lex arbitri* and that arbitrators might not be physically present in the legal jurisdiction governing the arbitration. On that basis, it was suggested that it might be more appropriate to refer to “the law governing the arbitral proceedings”.

110. With respect to the suggested additional ground for refusing recognition and enforcement, the view was expressed that such a provision was unnecessary since the matter was adequately covered by article 36.

111. While the recognition and enforcement regime as defined under article 17 bis was suitable for *inter partes* measures, it was suggested that its application to *ex parte* measures might need to be reviewed.

112. The Working Group agreed that the discussion on draft article 17 bis would need to be continued at its next session. The Secretariat was requested to prepare a revised draft taking account of the various views and suggestions expressed above.

Notes

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

² *Ibid.*, paras. 340-343.

³ *Ibid.*, paras. 344-350.

⁴ *Ibid.*, paras. 371-373.

⁵ *Ibid.*, paras. 374 and 375.

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

⁷ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 312-314.

⁸ *Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 182-184.

⁹ *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 203.
