

For participants only
26 February 2004

Original: English

**United Nations Commission
on International Trade Law**
Working Group II (Arbitration)
Fortieth session
New York, 23-27 February 2004

Draft report of the Working Group on Arbitration on the work of its fortieth session

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

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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. At its thirty-ninth session (Vienna, 10-14 November 2003), the Working Group discussed the issue of interim measures ordered by the arbitral tribunal on the basis of a note prepared by the Secretariat (A/CN.9/WG.II/WP.123). The Working Group also commenced discussion on the issue of recognition and enforcement of interim

measures ordered by an arbitral tribunal based on a note prepared by the Secretariat (A/CN.9/WG.II/WP.125).

12. The Working Group on Arbitration which was composed of all States members of the Commission, held its fortieth session in New York, from 23 to 27 February 2004. The session was attended by the following States members of the Working Group: Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Romania, Russian Federation, Rwanda, Sierra Leone, Singapore, Spain, Sudan, Sweden, Thailand, the Former Yugoslav Republic of Macedonia, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

13. The session was attended by observers from the following States: Belarus, Croatia, Cuba, Democratic Republic of the Congo, Denmark, Finland, Ireland, Madagascar, Malaysia, Pakistan, Peru, Philippines, Poland, Qatar, Republic of Korea, South Africa, Switzerland, Timor Leste, Turkey, United Republic of Tanzania, Venezuela and Viet Nam.

14. The session was also attended by a non-member State maintaining observer mission at Headquarters: Holy See.

15. The session was also attended by observers from the following intergovernmental organizations: International Cotton Advisory Committee, NAFTA Article 2022 Advisory Committee and the Permanent Court of Arbitration.

16. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Bar Association, Association Suisse de l'Arbitrage, Association of the Bar of the City of New York, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Club of Arbitrators of the Milan Chamber of Arbitration, Global Center for Dispute Resolution Research, International Chamber of Commerce, International Council for Commercial Arbitration, Regional Centre for International Commercial Arbitration, School of International Arbitration and Union des Avocats Européens.

17. The Working Group elected the following officers:

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

Rapporteur: Mr Sundaresh MENON (Singapore).

18. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.126); (b) a 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); (c) a note by the Secretariat containing a newly revised text of a draft provision on the power of an arbitral tribunal to order interim measures pursuant to the decisions made by the Working Group at its thirty-ninth session (A/CN.9/WG.II/WP.128); (d) a note by the Secretariat containing the information communicated by the delegations on the liability regime in the context of interim measures of protection (A/CN.9/WG.II/WP.127); (e) a proposal by the International Chamber of Commerce on articles 17 and 17 bis (A/CN.9/WG.II/WP. 129); and (f) the reports of the Working Group on its thirty-eighth and thirty-ninth sessions (A/CN.9/524 and 545).

19. 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

20. 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. 125, 127 and 128) and the proposal by the International Chamber of Commerce (A/CN.9/WG.II/WP. 129). 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.

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.

