



General Assembly

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**United Nations Commission
on International Trade Law**
Working Group II (Arbitration)
Forty-first session
Vienna, 13-17 September 2004

I. Provisional agenda

1. Opening of the session.
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. Possible inclusion of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the list of international instruments to which the Convention on the Use of Electronic Communications in International Contracts applies.
6. Other business.
7. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission which are the following States: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Ecuador, Fiji, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Nigeria, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United



Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Zimbabwe.

2. In addition, States that are not members of the Commission, as well as relevant intergovernmental organizations and international non-governmental organizations, may be invited to attend the session as observers. In accordance with established UNCITRAL practice, observer delegations may participate actively in the deliberations leading to decisions, which are taken by consensus.

III. Annotations to agenda items

1. Opening of the session and scheduling of meetings

3. The forty-first session of the Working Group will be held at the Vienna International Centre from 13 to 17 September 2004. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2 p.m. to 5 p.m., except on Monday 13 September 2004, when the session will be opened at 10 a.m. There will be five working days available for consideration of the agenda items at that session. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session in 2001 (see A/56/17, para. 381), the Working Group is expected to hold substantive deliberations during the first eight half-day meetings (that is, from Monday to Thursday), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon). The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record by the Chairman at the tenth meeting and subsequently incorporated into the report.

2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

4. Preparation of uniform provisions on interim measures of protection for inclusion in the UNCITRAL Model Law on International Commercial Arbitration

(a) Previous deliberations of the Working Group

5. 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) ("the Model Law"), 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

6. 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

7. 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 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

8. 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

9. 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.

10. 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 Model Law (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.

11. 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

12. At its thirty-sixth session, in 2003, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-seventh and thirty-eighth sessions (A/CN.9/523 and A/CN.9/524, respectively). 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

13. At its thirty-seventh session, in 2004, the Commission took note of the progress accomplished by the Working Group at its thirty-ninth and fortieth sessions (A/CN.9/545 and A/CN.9/547, respectively). The Commission noted that the Working Group had continued its discussions on a draft text for a revision of article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration¹⁰ (“the Model Law”) on the power of an arbitral tribunal to grant interim measures of protection, and on a draft provision on the recognition and enforcement

enforcement of interim measures of protection issued by an arbitral tribunal (for insertion as a new article of the Model Law, tentatively numbered 17 bis). The Commission commended the Working Group for the progress accomplished so far regarding the issue of interim measures of protection.¹¹

14. The Commission was informed that the Working Group intended to complete its review of draft articles 17 and 17 bis of the Model Law, including finalizing its position on how to deal with *ex parte* interim measures in the Model Law, at its forthcoming two sessions. The view was reiterated that the issue of *ex parte* interim measures, which the Commission agreed remained an important issue and a point of controversy, should not delay progress on the revision of the Model Law. It was observed, in response, that the Working Group had not spent much time discussing that issue at its recent sessions. The hope was expressed that consensus could be reached on that issue by the Working Group at its forthcoming session, based on a revised draft to be prepared by the Secretariat.¹²

15. The Commission also noted that the Working Group had yet to complete its work in relation to draft article 17 ter dealing with interim measures issued by State courts in support of arbitration and in relation to the “writing requirement” contained in article 7 (2) of the Model Law and article II (2) of the New York Convention. In respect of the New York Convention, the Commission was informed that the Working Group had been invited to consider whether the New York Convention should be included in a list of international instruments to which the draft convention dealing with certain issues of electronic contracting, currently being prepared by Working Group IV (Electronic Commerce) would apply (see also above para. 10 and below para. 21).¹³

16. The Commission noted that 2005 would mark the twentieth anniversary of adoption of the Model Law and agreed that conferences to celebrate that anniversary should be organized in different regions to provide a forum for considering the experience of courts and arbitral tribunals with domestic enactments of the Model Law, as well as for considering possible future work in the field of settlement of commercial disputes.¹⁴

17. At its forty-first session, the Working Group is expected to complete its review of the draft text for a revision of article 17 of the Model Law on the power of an arbitral tribunal to grant interim measures of protection and to further discuss the general issue of how to deal with *ex parte* interim measures in the Model Law. The Working Group is also expected to review draft article 17 bis on the recognition and enforcement of interim measures of protection issued by an arbitral tribunal. Should sufficient time be available during the session, the Working Group may also discuss the proposed draft article relating to interim measures of protection ordered by a court in support of arbitration (for insertion as a new article of the Model Law, tentatively numbered 17 ter) and consider the placement in the Model Law of articles 17 bis and 17 ter.

(b) Documentation

18. The Working Group will have before it a newly revised draft of articles 17 and 17 bis of the Model Law prepared by the Secretariat pursuant to the decisions made by the Working Group at its fortieth session (A/CN.9/WG.II/WP.131) and a draft

provision on interim measures of protection ordered by a court in support of arbitration (A/CN.9/WG.II/WP.125).

19. A limited number of the following background documents will be made available at the session:

- UNCITRAL Model Law on International Commercial Arbitration;
- Reports of the United Nations Commission on International Trade Law on the work of its of its thirty-second session (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*); thirty-third session (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*); thirty-fourth session (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*); thirty-fifth session (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*), thirty-sixth session (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*);
- Reports of Working Group II (Arbitration) on the work of its thirty-second session (A/CN.9/468); thirty-third session (A/CN.9/485); thirty-fourth session (A/CN.9/487); thirty-sixth session (A/CN.9/508); thirty-seventh session (A/CN.9/523); thirty-eighth session (A/CN.9/524); thirty-ninth session (A/CN.9/545) and fortieth session (A/CN.9/547);
- *Possible future work in the area of international commercial arbitration*: note by the Secretariat (A/CN.9/460);
- *Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement*: report of the Secretary-General (A/CN.9/WG.II/WP.108 and Add.1);
- *Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation*: report of the Secretary-General (A/CN.9/WG.II/WP.110);
- *Possible future work: court-ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate*: report of the Secretary-General (A/CN.9/WG.II/WP.111);
- *Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation*: report of the Secretary-General (A/CN.9/WG.II/WP.113);
- *Settlement of commercial disputes: Preparation of uniform provisions on interim measures of protection*: note by the Secretariat (A/CN.9/WG.II/WP.119);
- *Settlement of commercial disputes: interim measures of protection*: Proposal by the United States of America (A/CN.9/WG.II/WP.121);
- *Settlement of commercial disputes: interim measures of protection*: note by the Secretariat (A/CN.9/WG.II/WP.123);

– *Settlement of commercial disputes: interim measures of protection*: note by the Secretariat (A/CN.9/WG.II/WP.128)

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

20. The electronic version of the above-mentioned documents is accessible on the following website: www.uncitral.org

5. Possible inclusion of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in the list of international instruments to which the Convention on the Use of Electronic Communications in International Contracts will apply

21. The Working Group on Electronic Commerce is completing its work on the draft convention on the use of electronic communications in international contracts, which includes, under its article 20, a list of international instruments to which the draft convention applies. The Working Group is invited to consider whether the New York Convention should be included in that list. To assist in the consideration of that matter, the Working Group will have before it a note from the Secretariat (A/CN.9/WG.II/WP.132) and will also have available a copy of the draft convention (A/CN.9/WG.IV/WP.110) (see also above, paras. 10 and 15).

6. Adoption of the report

22. The Working Group may wish to adopt, at the close of its session, a report for submission to the thirty-eighth session of the Commission, to be held in Vienna from 4-22 July 2005.

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.

¹⁰ *Ibid.*, *Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

¹¹ *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 57.

¹² *Ibid.*, para. 58.

¹³ *Ibid.*, para. 59.

¹⁴ *Ibid.*, para. 61