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INTERNATIONAL COMMERCIAL ARBITRATION

Possible future work in the area of international commercial arbitration

Note by the Secretariat

Contents

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INTRODUCTION

1. The Commission, during its thirty-first session, held on 10 June 1998 a special commemorative New York Convention Day in order to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The opening speech was made by the Secretary-General of the United Nations. In addition to speeches by former participants in the diplomatic conference that adopted the Convention, leading arbitration experts gave reports on matters such as the promotion of the Convention, its enactment and application. Reports were also given on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on practical difficulties that were encountered in practice but were not addressed in existing legislative or non-legislative texts on arbitration.[1]

2. In reports presented at that commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible.

3. The Commission, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a consideration of possible future work in the area of arbitration at its thirty-second session in 1999. It requested the Secretariat to prepare for the current session a note that would serve as a basis for the considerations of the Commission. It was noted by the Commission that, in addition to the considerations at the New York Convention Day, considerations at other international conferences of arbitration practitioners (such as the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998) might be taken into account in the preparation of the note.[2] The present note has been prepared pursuant to that request.

I. SUMMARY OF PROPOSALS

4. The present document briefly discusses certain issues and problems identified in arbitral practice in order to facilitate a discussion in the Commission as to whether it wishes to put any of those issues on its work programme. The issues discussed include certain aspects of conciliation proceedings; the legislative requirement of a written form for the arbitration agreement; arbitrability; sovereign immunity; consolidation of more than one case into one arbitral proceeding; confidentiality of information in arbitral proceedings; raising claims in arbitral proceedings for the purpose of set-off; decisions by "truncated" arbitral tribunals; liability of arbitrators; power by the arbitral tribunal to award interest; costs of arbitral proceedings; enforceability of interim measures of protection; and discretion to enforce an award that has been set aside in the State of origin. Any other issues

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[1] United Nations publication: Proceedings of the New York Convention Day Colloquium, "Enforcing arbitration awards under the New York Convention: experience and prospects", May, 1999, ISBN 92-1-133609-0.

[2] Report of the United Nations Commission on International Trade Law on the work of its thirty-first session (1998), Official Records of the General Assembly, Fifty-third Session, Supplement No. 17, Doc. A/53/17, para. 235.

pertaining to the law of arbitration may be raised at the session of the Commission for possible consideration by the Commission.

5. The Commission may wish to consider the desirability of preparing uniform provisions on any of those issues, possibly indicating whether further work should be towards a legislative text (such as a model legislative provision or a treaty) or a non-legislative text (such as a model contractual rule). Even if ultimately no uniform solutions would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission or its Working Group would be useful in that it would provide welcome information to users of arbitration world-wide about the difficulties that have emerged in practice and the possible solutions to such difficulties.

6. In considering its future work in this area, the Commission may wish to take note of the fact that the Working Party on International Legal and Commercial Practice of the Economic Commission for Europe (ECE) has been discussing various issues relating to the Convention on International Commercial Arbitration (Geneva, 1961), including its possible revision. While no decision has yet been made as to whether the Convention should be revised, or the thrust of any revision, the ideas tentatively discussed include the possibility of a revision that would increase the utility of the Convention for existing and potential new signatories. In view of the potential universal interest of the discussions in the ECE Working Party, and in view of the connection between those discussions and any future work in the area of arbitration to be decided by the Commission, the Commission may wish to request the Secretariat to follow closely the considerations in the ECE Working Party and report about those considerations to the Commission or its Working Group.

7. Should the Commission decide to include on its work programme any of the issues mentioned in this document or any issue raised at the session of the Commission, it may wish to request the Secretariat to prepare studies, in cooperation with relevant international organizations, and perhaps to prepare first tentative proposals for consideration by the Commission or one of its Working Groups.

II. POSSIBLE TOPICS FOR CONSIDERATION BY THE COMMISSION

A. **Conciliation**

8. The term "conciliation" is used here to refer to proceedings in which an independent and impartial person is assisting parties in dispute to reach a settlement. Conciliation differs from negotiations between the parties (which typically take place after a dispute has arisen) in that a conciliation is conducted by a third independent and impartial person, whereas in settlement negotiations between the parties no such third independent and impartial person is involved. The difference between conciliation and arbitration is that conciliation is purely voluntary in that both parties participate in it only to the extent that, and as long as, they both so agree. Thus, a conciliation ends either in a settlement of the dispute or it ends unsuccessfully, whereas the arbitral tribunal, if there is no settlement, imposes a binding decision on the parties.

9. Conciliation proceedings in the above sense are envisaged and dealt with in a number of rules of arbitral institutions, as well as in the UNCITRAL Conciliation Rules (1980). These Rules are widely

used and have served as a model for many other sets of conciliation rules. In practice, such conciliation proceedings are referred to by various expressions, including "mediation".

10. Conciliation is being increasingly practiced in various parts of the world, including regions where until several years ago it was not commonly used. This trend is reflected, inter alia, in the establishment of a number of private and public bodies offering conciliation services to interested parties. This trend, and a growing desire in different regions of the world to promote conciliation as a method of dispute settlement, has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation. Ideas raised in such discussions are summarized below.

1. Admissibility of certain evidence in subsequent judicial or arbitral proceedings

11. In conciliation proceedings, the parties typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and the parties initiate judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility may discourage parties from actively trying to reach a settlement during conciliation proceedings, which may greatly reduce the usefulness of conciliation.

12. In order to address the above problem, the UNCITRAL Conciliation Rules contain a rule in article 20, which reads as follows:

> "The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:
> (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
> (b) Admissions made by the other party in the course of the conciliation proceedings;
> (c) Proposals made by the conciliator;
> (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

13. If the parties use no conciliation rules or use rules that do not contain a provision such as article 20 of the UNCITRAL Conciliation Rules, under many legal systems the parties may be affected by the above-described problem. Even if the parties have agreed on a rule such as the one contained in article 20, it may not be certain that the agreement concerning evidence will be given full effect. In order to assist the parties in such situations, some jurisdictions have adopted laws designed to prevent the introduction of certain evidence relating to previous conciliation proceedings into subsequent judicial or arbitral proceedings.

2. Role of conciliator in other adversary proceedings

14. A party may be reluctant to actively strive for a settlement in conciliation proceedings if it has to take into account the possibility that, if the conciliation is not successful, the conciliator might be appointed as counsel of the other party or as an arbitrator. The conciliator's awareness of certain facts occurring during conciliation (e.g. proposals for settlement and admissions) might prove to be prejudicial for the party who made them. This is the reason behind the provision of article 19 of the UNCITRAL Conciliation Rules, which reads as follows:

"The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."

15. Some jurisdictions have included similar provisions in their legislation. In some cases, however, prior knowledge on the part of the arbitrator might be regarded by the parties as advantageous (in particular because that knowledge will allow the arbitrator to conduct the case more efficiently); in such cases, the parties may actually prefer that the conciliator be appointed as an arbitrator in the subsequent arbitral proceedings. In order to overcome any objection based on assertions of prejudice in those cases, some jurisdictions have adopted laws expressly allowing a conciliator, subject to agreement of the parties, to serve as an arbitrator.

3. Enforceability of settlement agreements

16. One of the major potential disadvantages of conciliation is the possibility that the time and money spent for the conciliation will be in vain if the parties do not reach a settlement. It has often been said that the attractiveness of conciliation would be greatly increased if a settlement reached during a conciliation would have executory force so that a party to the settlement would not be compelled to litigate in order to achieve what has been agreed upon. Admittedly, obtaining an executory title in court proceedings would likely be less protracted if the claim is based on a settlement as compared to the case where there has been none. Nevertheless, the prospect of litigation in order to enforce a settlement reduces the attractiveness of conciliation.

17. A possible way of obtaining an executory title would be for the parties who have reached a settlement to appoint the conciliator as an arbitrator and limit the arbitration proceedings to recording the settlement in the form of an arbitral award on agreed terms (as provided for, e.g., in art. 34(1) of the UNCITRAL Arbitration Rules (1976)). A possible obstacle to this approach, however, may arise in a number of legal systems in which, once a settlement has been reached and the dispute has thereby been eliminated, it is not possible to institute arbitral proceedings.

18. In light of the above, some jurisdictions have adopted laws that establish the enforceability of settlement agreements reached in conciliation proceedings. Such laws provide, for example, that the written settlement agreement should, for the purposes of its enforcement, be treated as an arbitral award and may be enforced as such. Another possible solution may be for legislation to expressly permit the parties to the settlement, despite the disappearance of the dispute, to commence arbitration and obtain from the arbitrator (who may be the former conciliator) an award on agreed terms.

4. Conclusion

19. The Commission may wish to consider whether, with a view to encouraging and facilitating conciliation, it would be useful for it to consider preparing harmonized legislative model provisions that would deal with questions such as the admissibility of evidence submitted during conciliation in subsequent arbitration or court proceedings; any role that a conciliator might play in subsequent arbitral proceedings; and the conditions under which a settlement reached during conciliation proceedings may be treated as an executory title.

B. **Requirement of written form for arbitration agreement**

20. Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states as follows:

> "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985) provides that:

> "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

21. Problems arising from the requirement that arbitration agreements be in written form have often been described as difficult and frustrating. It is at the stage of recognition or denial of an effective agreement to arbitrate that tensions can still be seen between the courts and the arbitral process. It has also been said that the harmonization of interpretation of article II(2) of the Convention should have priority for a better functioning of the Convention. However, before discussing this issue, this note will consider first the issue of the requirement of "written form" for an arbitration agreement and its compatibility with the increased use of electronic commerce.

1. Arbitration agreement "in writing" and electronic commerce

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

23. As to the New York Convention, it is generally accepted that the expression in article II(2) "contained in an exchange of letters or telegrams" should be interpreted broadly to include other means of communication, particularly telex (to which facsimile could nowadays be added). The same teleological interpretation [3] could be extended to cover electronic commerce. Such an extension would also be in line with the decision taken by the Commission when it adopted the UNCITRAL Model Law on Electronic Commerce together with its Guide to Enactment in 1996.[4] However, further study might be needed to determine whether interpretation of article II(2) of the New York Convention by reference to either the UNCITRAL Model Law on Arbitration or the UNCITRAL Model Law on Electronic Commerce would be likely to gain wide international consensus and should be recommended by the Commission as a workable solution in respect of this issue and also for dealing with the more general issues of form requirements.[5]

2. "Exchange of letters or telegrams " as form requirement

24. The problem arises from the combination of the question of form and the way the arbitration agreement comes about (i.e. its formation), expressed by the expression "exchange of letters or telegrams", which is found both in the Convention and in the Model Law. This expression lends itself to an overly literal interpretation in the sense of a mutual exchange of writings. A tacit acceptance would be, in principle, not sufficient. Neither would be a purely oral agreement.

25. Fact situations that have posed serious problems under the Convention, and require at least very extensive, teleological interpretation of the Model Law include the following: tacit or oral

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

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

[5] This question raises more general concerns regarding the compatibility of electronic commerce with the legal regime established by a series of international conventions that contain mandatory requirements for the use of written documents. An inventory of such instruments was prepared by the United Nations Economic Commission for Europe (Trade/R.1096/Rev.1), together with a recommendation that work might be undertaken by UNCITRAL to identify possible solutions to those concerns.

acceptance of a written purchase order or of a written sales confirmation; an orally concluded contract referring to written general conditions (e.g., oral reference to a form of salvage); or, certain brokers' notes, bills of lading and other instruments or contracts transferring rights or obligations to non-signing third parties (i.e., third parties who were not party to the original agreement). Examples of such transfers to third parties include the following: universal transfer of assets (successions, mergers, demergers and acquisitions of companies); specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party (*stipulation pour autrui*)); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto.[6]

26. Courts have reached rather disparate decisions in those situations, often reflective of their general attitude towards arbitration. In the great majority of cases, they have been able to hold the parties to their agreement. However, under existing case law, it has been noted, for example, that an arbitration clause in a sales or purchase confirmation will meet the written form requirement of article II(2) of the Convention only if: (a) the confirmation is signed by both parties; or (b) a duplicate is returned, whether signed or not; or possibly (c) the confirmation is subsequently accepted by means of another communication in writing from the party who received the confirmation to the party who dispatched it. Conditions such as these are no longer in accord with international trade practice.

27. Various means of solving the above-mentioned problems might be envisaged at the legislative level. One possible solution, on which the Commission might wish to request further study, would rely on the UNCITRAL Model Law on Arbitration as a tool for interpreting the New York Convention. Such a solution might require possible amendments or additions to the current text of the Model Law; should it be amended, a range of alternative approaches might be considered.

28. One possible approach, in line with recent legislative developments in a number of countries, would be to include a list of instruments or factual situations where arbitration agreements would be validated despite the lack of an exchange of documents. Such a list might include, for example, the use of bills of lading or other instruments and situations listed above.

29. A broader solution would be to validate arbitration agreements entered into in the absence of an exchange of documents where the applicable law did not impose any form requirement on the main contract. Language might be considered along the lines of a proposal made during the preparation of article 7(2) of the Model Law as follows: "An arbitration agreement also exists when one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner".[7]

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[6] J.-L. Delvolvé, "Third parties and the arbitration agreement", in Proceedings of the New York Convention Day Colloquium, supra note 1.

[7] Doc. A/CN.9/WG.II/WP.37 (1982), draft article 3.

That proposal had been rejected "since it raised difficult problems of interpretation."[8] However, in support of such an approach, it has been suggested on several occasions, as well as at the "New York Convention Day" in 1998, that article 7(2) should be amended so as to widen the definition of writing (for example to cover situations when parties conclude a contract on the basis of one party's standard conditions with an arbitration clause that is not signed by one party nor is there any exchange of documents which could bring the arbitration clause within the definition of writing).[9] It might be objected that there may be specific reasons why a party would wish to refuse a specific provision, particularly a stipulation as important as a waiver of the right to go to court. However, that objection might sufficiently be taken care of through the possibility granted to the refusing party to object to the arbitration clause. In order to find a suitable rule for universal use, more discussion and study is needed of proposals made during the preparation of the Model Law and especially of the various solutions developed in recent national laws.

30. The most radical solution might be to amend the Model Law to establish total freedom with respect to the form of the arbitration agreement. Such freedom would even validate oral arbitration agreements. It might be objected, however, that allowing oral agreements would lead to uncertainty and litigation.

31. The solution of relying on a possibly amended version of the Model Law as a tool for interpreting article II(2) of the New York Convention (without amending or revising that Convention) might not bring about a sufficient level of certainty and uniformity, particularly as regards oral agreements, which courts would, in all likelihood, be reluctant to accept in a number of countries. A second solution could be to rely on the more-favourable-law provision of article VII of the Convention. That solution could be pursued only if article II(2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing but would instead be understood as establishing the maximum requirement of form. If article II(2) were to be interpreted as establishing a uniform rule, a reference to article VII for the purpose of alleviating the form requirement would be possible only where the national law provides a full enforcement mechanism since the Convention becomes inapplicable in toto.[10] In that case, possible additions to the Model Law might need to include express provisions for recognition and enforcement of arbitral awards based on agreements meeting the more liberal form requirement - a solution which would have to be dealt with in the wider context of a possible chapter on enforcement. Further study of the two possible interpretations of article II(2) may be found appropriate by the Commission.

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[8] Doc. A/CN.9/232 (1982), para. 45.

[9] N. Kaplan, "New developments on written form", in Proceedings of the New York Convention Day Colloquium, supra note 1.

[10] A. J. van den Berg, "The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas", in (1996) Association suisse de l'arbitrage, Special Series No. 9, pp. 25-45, at p. 44.

C. **Arbitrability**

32. In some States the commercial subject matters that are reserved to the courts are determined by case law only, while in other States they are determined by various statutes, for instance, those dealing with anti-trust or unfair competition, securities, intellectual property, labour or company law. Various States have included in their arbitration law a general provision going beyond the traditional formula of "what parties may compromise on or dispose of" to cover, for example, "any claim involving an economic interest". Uncertainty about, and differences among definitions of, which disputes are arbitrable may cause considerable difficulties in practice.

33. One way of approaching the problem may be to attempt to reach a world-wide consensus on a list of non-arbitrable issues. If that does not seem feasible, it may be considered whether it would be desirable to agree on a uniform provision setting out three or four issues that are generally considered non-arbitrable and then call upon States to list immediately thereafter any other issues deemed non-arbitrable by that State. Such an approach of channelled information, as used in article 5 of the UNCITRAL Model Law on International Commercial Arbitration, would provide certainty and easy access to information about those restrictions.

34. In searching for the best approach that would be workable world-wide and that would provide the desired degree of certainty and transparency, one would face a dilemma. The more general the formula, the greater would be the potential risk of divergent interpretation by courts of different States; the more detailed the list, the greater would be the risk of non-acceptance by States and, to the extent the list would be accepted, the greater would be the risk of solidifying matters and thus impeding further development towards limiting the realm of non-arbitrability. Nevertheless, a considered attempt seems desirable since the result of a world-wide discussion would in itself be revealing and useful.

D. **Sovereign immunity**

35. When a private party initiates arbitral proceedings against a State, it runs the risk that the State may decline to participate on the grounds of sovereign immunity. Or, the private party may try to seek recognition and enforcement of an arbitral award against the State and encounter the plea of sovereign immunity at that stage. Since arbitration arises out of an agreement, the question to be addressed is whether the State can rely on the defence of sovereign immunity where it has previously entered into an agreement to arbitrate with the other party.

1. Sovereign immunity in arbitral proceedings

(a) International law

36. A review of various international instruments as well as national legislation in many States suggests that a State may enter into a binding arbitration agreement or that agreement by a State to arbitrate international commercial disputes implies waiver of its sovereign immunity.

37. A number of international and regional instruments contain a provision to the effect that States are bound to recognize agreements to arbitrate. For example, the European Convention on

International Commercial Arbitration (Geneva, 1961) provides that in matters to which the Convention applies "legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements" (art. II(1)).

38. Another such instrument is the European Convention on State Immunity, which states in article 12(1):

> "Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:
>
> (a) the validity or interpretation of the arbitration agreement,
>
> (b) the arbitration procedure,
>
> (c) the setting aside of the award, unless the arbitration agreement otherwise provides."[11]

39. Similar provisions are contained in the draft Articles on Jurisdictional Immunities of States and their Property, adopted by the International Law Commission in 1991,[12] and the draft Convention on State Immunity prepared by the International Law Association.[13]

40. It may be noted also that in 1976 the Asian-African Legal Consultative Committee (AALCC) recommended that UNCITRAL consider preparing a protocol to the New York Convention

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[11] Council of Europe, European Convention on State Immunity and Additional Protocol, done at Basle, May 16, 1972.

[12] Report of the International Law Commission on the work of its forty-third session (1991), Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10, Doc. A/46/10. Article 17 states as follows:
"If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure; or

(c) the setting aside of the award;

unless the arbitration agreement otherwise provides."

[13] Reproduced in (1983) 22 International Legal Materials 287. Article III states as follows:
"2. An implied waiver may be made inter alia:
(b) by agreeing in writing to submit a dispute which has arisen, or may arise, to arbitration in the forum State or in a number of States which may include the forum State. In such an instance a foreign State shall not be immune with respect to proceedings in a tribunal of the forum State which relate to:

(i) the constitution or appointment of the arbitral tribunal, or

(ii) the validity, or interpretation of the arbitration agreement or the award, or

(iii) the arbitration procedure, or

(iv) the setting aside of the award."

clarifying, inter alia, that "where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration pursuant to that agreement".[14]

(b) National Laws

41. The first attempts by national legislatures to codify rules on sovereign immunity began in the 1970's and since then several States have enacted foreign sovereign immunity legislation. A few of these laws contain provisions similar to those in the international instruments noted above. In other States, the same result is achieved by providing that a foreign Government enjoys immunity from the courts of the legislating State, subject to certain exceptions; one such exception is where the foreign Government has entered into an arbitration agreement. It has also been legislated that if a party to the arbitration agreement is a State, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement. In yet other States, the rules on sovereign immunity have evolved through case law.

2. Sovereign immunity in enforcement of arbitral awards

(a) International law

42. After having successfully obtained an arbitral award against a State, the claimant may encounter a plea of sovereign immunity by the State when seeking enforcement of the award.

43. As regards the New York Convention, which provides for a general obligation to recognize as binding foreign arbitral awards, some commentators are of the view that the text and *travaux preparatoires* would support the position that a State which has agreed to submit a dispute to arbitration is required to comply with the resulting arbitral award and cannot plead immunity.

44. In the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 1965), despite the requirement on the part of States to recognize as binding and to enforce awards rendered pursuant to that Convention, sovereign immunity is specifically preserved. Article 54(1) of the Convention states as follows:

> "(1)Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State ... .

However, article 55 states that:

> "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

45. In the view of some, if the generally accepted principle is that, by entering into an agreement to

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[14] Doc. A/CN.9/127, UNCITRAL Yearbook, vol. VIII:1977, part two, III, Annex, para. 3(c).

arbitrate, a foreign State has waived any right to claim sovereign immunity, then it should follow that such waiver extends also to the enforcement of the arbitral award. It is noted that otherwise there would be little point in applying the waiver principle to engage in arbitral proceedings, if the State against which the award is made can later avoid enforcement proceedings by yet another plea of sovereign immunity. Others argue that refusal by a foreign State to honour an arbitral award constitutes a separate act by the State, so that sovereign immunity can be raised again, or possibly for the first time, as a defence to the enforcement proceedings.

46. Most national legal systems distinguish between waiver of immunity from jurisdiction and waiver of immunity from execution. As a consequence, in some cases, agreement by a State to submit to arbitration may not be sufficient to imply consent to the jurisdiction of the court in the State where enforcement is being sought, nor to imply consent to execution. The requirement for express consent is set out in articles 7 and 18(2) of the International Law Commission's draft Articles on Jurisdictional Immunities of States and their Property. What these draft provisions clarify is that waiver of sovereign immunity will be considered to have been made if the State has given its consent to the jurisdiction and its consent to execution.[15]

47. Another basis for the exclusion of the sovereign immunity defence from execution proceedings is where the property that is sought to be attached as a result of execution is property that is used in commercial activities by the foreign State. This exception is outlined in the provisions of article 18(1) of the draft Articles of the International Law Commission, which follow below.[16] The draft Articles also specify certain caategories of property that are exempt from attachment.[17]

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[15] Draft article 7 states as follows:

"1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

"2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State."

Draft article 18(2) states as follows:

"2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary."

[16] This exception follows from the general principle that a governmental entity which engages in a commercial activity, as opposed to a governmental activity, is not immune from suit. There are several international instruments that contain provisions to that effect (e.g., art. 7(1) of the European Convention on State Immunity). It is also a common provision in national laws, and there is considerable jurisprudence discussing means for differentiating "governmental activity" from "commercial activity".

[17] The categories that are exempt from attachment as outlined in article 19 include: property used or intended for use for the purposes of the various diplomatic missions of the State, or for military purposes; property of the central bank or similar authority; property forming part of the cultural heritage of the State or part of an exhibition of scientific, cultural or historic interest.

Article 18(1)

"1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
(a) the State has expressly consented to the taking of such measure as indicated:
(i) by international agreement;
(ii) by an arbitration agreement or in a written contract; or
(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."

(b) National laws

48. Only a few States have enacted enforcement provisions specific to arbitral awards. For example, in one law it is stated that where the foreign State is a party to an arbitration agreement, that State is not immune in a proceeding for the enforcement of an award made pursuant to the arbitration. Under the law of another State, the plaintiff cannot levy execution to enforce an arbitral award against a foreign State's property unless that State has consented or the property is used or intended for commercial purposes.

49. It is more common for the legislation to address enforcement of judgements of all kinds, without specific reference to arbitral awards. The approach usually follows one of two theories. One is the absolute theory, which prohibits attachment of foreign State property of any kind without consent of that State. The more common and modern approach is based on the restrictive theory, which prohibits attachment under more limited circumstances. There is variation, however, in its application. In some laws, the "State" is defined narrowly, so as to exclude State trading entities or State entities engaged in commercial activities. Most legislation also excludes immunity when the State has given its consent to execution or attachment, and in some laws such consent is construed to cover an implied as well as an express waiver. Some States do not permit enforcement against foreign State property located in the State where enforcement is being sought unless there is a sufficient jurisdictional connection. Other States require a link between the property to be attached and the claim. Most States accept that certain categories of State property must remain non-attachable, similar to the categories outlined in article 19 of the draft Articles of the International Law Commission referred to above.

3. Conclusion

50. Given that the matter of State immunity remains under consideration by the International Law Commission, and given that the General Assembly has decided to establish a working group of the

Sixth Committee to consider outstanding substantive issues related to the Draft Articles of the International Law Commission at its fifty-fourth session, beginning in 1999,[18] the Commission may wish to request the Secretariat to monitor that work and to report on the outcome of those discussions.

E. Consolidation of cases before arbitral tribunals

51. Sometimes it may be desirable to consolidate into one arbitral proceeding two or more arbitral cases based on different arbitration agreements. For the purposes of the present discussion, consideration is being given only to those situations involving possible consolidation of two or more proceedings where the proceedings to be consolidated take place or are to take place in the same State. Although consolidation may also be desirable in some instances where the arbitral proceedings take place in different States, those situations raise additional issues of international cooperation between national courts, which are beyond the scope of the present discussion.

52. Consolidation may be considered desirable in a variety of situations. The most usual situations are those where more than one arbitration arises out of the same set of facts or involves the same parties. One example is where there exists an arbitration agreement between a purchaser of industrial works and its general contractor, and other arbitration agreements exist between the general contractor and its various subcontractors to which the purchaser is not a party. An occurrence that brings about arbitration between one set of parties often precipitates arbitration between the other parties. In such a situation, one or more of the parties may wish these related arbitral proceedings to be joined.

53. One of the advantages of consolidation is avoidance of inconsistent decisions. Where more than one arbitral tribunal deliberates on matters arising out of the same set of facts, it is possible for each tribunal to arrive at a different conclusion. In the example given above, if the parties were to arbitrate separately after a problem in a project under construction, it is conceivable that one tribunal may find that the general contractor is not responsible while another tribunal may find that none of the subcontractors is responsible. Yet, the facts may indicate that the purchaser of the industrial works should be entitled to recover its loss from at least one of the parties. Another possible advantage of consolidation is efficiency. If one arbitration tribunal can hear all of the parties and their expert witnesses, and review all of the evidence, this might avoid duplication, reduce costs and save time for all of those involved.

54. An important difference should be noted between those situations where the parties have agreed upon consolidation, whether in the arbitration agreement or otherwise, and those where they have not. In cases where parties have already agreed, they may require assistance in order to implement the agreement; for example, the terms for consolidation may not have been stipulated, the parties may be unable to agree on the selection of the tribunal, or they may be in a deadlock in respect of other issues. On the other hand, one or more of the parties in this situation may not wish to have the related disputes considered in consolidated proceedings (e.g., in order to maintain confidentiality or for reasons of procedural tactics). It may thus occur that in some cases the multiple parties involved

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[18] Resolution 53/98 by the General Assembly, Convention on Jurisdictional Immunities of States and their Property (20 January 1999).

agree that the different disputes should be considered in consolidated proceedings while in other cases such agreement may not exist.

55. It has been suggested that the objective of legislative efforts should be limited to facilitating implementation of agreements to consolidate cases. Others believe that legislation should go further and authorize courts to order consolidation when, in the view of the court, this appears appropriate even in the absence of agreement between the parties.

1. Current legislative solutions

56. A review of the legislation indicates that the power of a competent authority to order consolidation is not covered by any international instruments relevant to international arbitration. At the time the UNCITRAL Model Law on Arbitration was being drafted, there was general agreement that the Model Law should not deal with problems of consolidation in multi-party disputes. While it was agreed that parties had the freedom to conclude consolidation agreements if they so wished, the Working Group was of the view that there was no real need to include a provision on consolidation in the Model Law.[19]

(a) Authority to compel consolidation without agreement of parties

57. In the reviewed examples of national laws in which consolidation is addressed, only in two cases does the legislation authorize the court to order consolidation, even if not all the parties involved agree that the cases should be consolidated. In one of those States, the authority to compel consolidation applies only to domestic arbitrations; for this authority to apply to international arbitrations, the parties must first have elected by written agreement to "opt-in" to the domestic regime that contains the court-ordered consolidation provisions. In the other State, the parties can by agreement "opt-out" of the provision. After all of the parties and arbitrators have been given an opportunity to express an opinion on a party's request for consolidation, the court may grant the request wholly or partly or reject it. If the proceedings are to be consolidated and the parties cannot agree on the tribunal or the procedural rules, the court is to so decide.

(b) Authority to assist parties in consolidating cases based on agreement of parties

58. The more usual approach among countries that have enacted legislative provisions on consolidation, however, is to support party autonomy and to assist parties that have already agreed to consolidate their proceedings. Most of the legislation requires either that such agreement has to have been expressed in the arbitration agreement or otherwise, or, that the application is to be brought with the consent of all of the parties.

59. Under most of the legislation reviewed, the application for consolidation is to be made to a court. In some jurisdictions, application for consolidation can be made to the arbitral tribunal or tribunals concerned. The requested arbitral tribunals may confer with each other with a view to

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[19] Report of the Working Group on International Contract Practices on the work of its third session (1982), Doc. A/CN.9/216, UNCITRAL Yearbook, vol. VIII:1982, part two, III, A, para. 37.

making consistent orders for consolidation. If an order for consolidation is not made, or if inconsistent provisional orders by the arbitral tribunals involved are made, any party may apply to the court, which will decide on consolidation.

60. Most of the legislation reviewed provides that a consolidation order can be made where there is a common question of law or fact, that the rights to relief claimed arise out of the same transaction or that for some other reason a consolidation order is desirable.

2. Conclusion

61. The Commission may wish to consider whether the question of consolidation of arbitral proceedings is an area that merits further study with a view to the possibility of preparing model legislative provisions. If so, the Secretariat might be requested to explore, in particular, the practical experience with consolidation provisions in national laws and issues such as whether legislative recognition of the enforceability of consolidation agreements is required; whether arbitral tribunals and courts ought to be specifically empowered to facilitate consolidation of related arbitration agreements, with the consent of parties, regarding matters such as the selection of the arbitral tribunal that will continue, the terms of consolidation, and the applicable procedures; and, whether the tribunals involved ought to be specifically empowered to confer with each other on these matters.

F. Confidentiality of information in arbitral proceedings

62. Significant international discussion of the issue of confidentiality of arbitral proceedings in recent years, in part sparked by the decision of the High Court of Australia in the case of Esso v Plowman,[20] has led to an appreciation that parties' requirements for the confidentiality of proceedings may not be adequately protected by arbitration rules or by national arbitration laws. Prior to that time, it was generally assumed that if the privacy of arbitration proceedings was protected, such as by the provisions of procedural rules, confidentiality would also be protected. On that basis, confidentiality was not specifically addressed in either arbitral rules or national laws. The UNCITRAL Arbitration Rules, for example, provide that hearings shall be in camera unless the parties agree otherwise and that the award can be made public only with the consent of both parties. The UNCITRAL Model Law on International Commercial Arbitration, on the other hand, does not address either privacy or confidentiality.

63. While ensuring the privacy of proceedings does not necessarily also ensure confidentiality, privacy assists by limiting the number of people who have access to the arbitration hearing. Arbitration rules generally address the issue of privacy of the proceedings. While such rules also increasingly address the issue of confidentiality and the case law of a few jurisdictions specifically recognizes confidentiality as an implied condition of the agreement to arbitrate, confidentiality is not generally addressed in national laws, except in a very few instances. Where confidentiality is

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[20] (1995) 183 Commonwealth Law Reports 10; see also Commonwealth of Australia v Cockatoo Dockyard P/L (1995) 36 New South Wales Law Reports 662.

specifically protected, there is no single approach to the scope of the obligation of confidentiality in terms of the information that is to be treated as confidential, the persons to whom the obligation attaches, or permissible exceptions to prohibitions on disclosure and communication.

1. Current provisions on confidentiality

64. A survey of the arbitration rules and the very few national laws which address confidentiality indicates a variety of approaches. One approach to formulating a confidentiality provision that could apply to all classes of cases has been to include a general provision that material produced for, or generated by, an arbitration cannot be disclosed to third parties without the consent of the other party or leave of the court. Another approach has adopted a more detailed provision which addresses the parameters of the duty of confidentiality including, for example, (i) the material or information that is to be kept confidential; (ii) the persons to whom the duty of confidentiality is to extend and how it is to be applied; and (iii) permissible exceptions to prohibitions on disclosure and communication.

65. In terms of the material or information that is to be kept confidential, some provisions include a general description of "facts or other information relating to the dispute or arbitral proceedings". Other provisions adopt a more particular description of the information to be covered and include various categories of information which are accorded different treatment. These categories include, for example, reference to the evidence given by a party or a witness; written and oral arguments; the fact that the arbitration is taking place; the identity of the arbitrators; the contents of the award; communications between parties themselves or their advisors prior to, or in the course of, the arbitration; and, information that is inherently confidential, such as trade secrets and commercial-in-confidence information.

66. As to the persons to whom the duty of confidentiality is to extend, a range of persons are covered such as the arbitrators; the staff of the arbitration institution, where the arbitration is institutional; parties and their agents; witnesses, including experts; counsel and advisors. Since the duty may not be able to be applied to all of these persons in the same way, one approach requires arbitrators and parties' representatives, and perhaps witnesses, to sign a confidentiality agreement. Another approach regarding witnesses is to require the party calling the witness to guarantee that the witness observes the same degree of confidentiality as that required of the party. Some provisions also deal with the period for which the duty of confidentiality continues to apply.

67. Some of the circumstances in which disclosure of information is permitted have included those where the parties consent to disclosure; where the information is in the public domain; where disclosure is required by law or a regulatory body; where there is a reasonable necessity for the protection of a party's legitimate interests; and, where it is in the interests of justice or in the public interest. While the scope of some of these exceptions may be susceptible of clear definition and application, others, such as disclosure of information "in the public interest", are generally regarded as requiring some careful consideration. It has been suggested, for example, that a balance may need to be struck between a genuine public interest in the information in question and threatened disclosure of commercially sensitive information as a means of putting one party under pressure to settle.

68. Some provisions also deal with special conditions which attach to the disclosure by virtue of the

time at which disclosure occurs. If information is to be disclosed, for example, during the arbitration proceedings, one approach has been to require that notice of the disclosure be given both to the arbitral tribunal and the other party. Where disclosure occurs once the arbitration has concluded, only notice to the other party may be relevant.

69. Notwithstanding provisions protecting confidentiality of the arbitral award, some institutional rules include a provision that allows for aggregated statistics to be published, or even information on individual proceedings to be made available, provided the information disclosed does not enable individual parties or circumstances to be identified. Consent of the institution is a usual requirement.

2. Conclusion

70. On the basis that current protection may not be adequate, opinion is divided on how the confidentiality of arbitral proceedings can be ensured. One approach suggests that the difficulty of defining the scope of a general duty of confidentiality makes it difficult to address the issue at all. Others, including the High Court of Australia in Esso v Plowman, suggest that parties to an arbitration can expressly provide in their arbitration agreement for absolute or specific levels of confidentiality to apply. Yet another approach is to suggest that arbitral rules should include provisions on confidentiality, while a further approach suggests that what might be needed is a model legislative provision. In all of these cases, the emphasis has been placed upon the importance for international commercial arbitration of uniformity of treatment and widespread coverage.

71. The Commission may wish to consider whether the issue of confidentiality needs to be further examined and, in particular, whether further protection may be needed in the form of a model legislative provision. If so, the Secretariat might be requested to explore the options for protecting confidentiality and, in particular, the scope of the protection that may need to be afforded in terms, for example, of the material or information that is to be kept confidential, the persons to whom the duty of confidentiality is to extend and how it is to be applied, and permissible exceptions to prohibitions on disclosure and communication.

G. Raising claims for the purpose of set-off

72. It frequently occurs in arbitral practice that the respondent in an arbitration case, in reacting to the statement of claim, in addition to responding to the particulars of the statement of claim, invokes a claim that the respondent has against the claimant. The respondent may invoke such a claim in two ways. Firstly, it may raise a counter-claim, which is to be treated by the arbitral tribunal essentially in the same manner as if it were an original claimant's demand and is to be decided upon independently of the decision on, and irrespective of the outcome of, the claimant's demand. Thus, for example, if the claimant's demand is dismissed, the arbitral tribunal is still called upon to decide on the counter-claim.

73. Secondly, the respondent may invoke its claim not as a counter-claim but as a defence for the purpose of a set-off. In such a case, the defence, to the extent it is admissible, is to be decided upon only if and to the extent the claimant's demand is founded. If the claimant's demand is unfounded,

there is no need for the arbitral tribunal to consider the claim relied upon for the purpose of a set-off.

74. An issue that often arises in practice is under what conditions may the arbitral tribunal take into consideration a disputed claim relied on for the purpose of a set-off. The question that has given rise to divergent answers and controversy is whether the arbitral tribunal is competent to consider the merits of a claim raised for the purpose of a set-off if the claim is not covered by the arbitration agreement covering the principal claim (but may be covered by a different arbitration agreement or may not be covered by any arbitration agreement).

1. Current solutions

75. The question may be settled by agreement of the parties. There are arbitration rules which allow the arbitral tribunal to consider claims for the purpose of a set-off even if the claim is not covered by the arbitration agreement covering the principal claim. For example, article 27 of the International Arbitration Rules of the Zurich Chamber of Commerce (1989) provides that the arbitral tribunal also has jurisdiction over a set-off defence if the claim that is set off does not fall under the arbitration clause, and even if there exists another arbitration clause or a jurisdiction clause for that claim.

76. The UNCITRAL Arbitration Rules take a more restrictive position in that the respondent may rely on a claim for the purpose of a set-off if the claim arises out of the same contract (art. 19). The Rules do not state expressly that the set-off claim must be covered by the same arbitration agreement as the main claim. If the parties have modelled the arbitration agreement on the model arbitration clause which appears in the footnote to article 1 of the Rules[21] (and have thereby submitted to arbitration the disputes arising out of the contract), both the principal claim and the claim invoked for the purpose of a set-off would be covered by the same arbitration agreement. If, however, the arbitration agreement covering the principal claim does not cover the set-off claim, the question will arise also under the UNCITRAL Arbitration Rules whether the arbitral tribunal has the competence to consider the set-off claim that is not covered by the arbitration agreement.

77. The UNCITRAL Model Law on International Commercial Arbitration does not address the question expressly. The analytical commentary on the draft text of the Model Law, which was prepared by the Secretariat, takes the position that, if the respondent raises a claim for the purpose of a set-off (or as a counter-claim), the claim must not exceed the scope of the arbitration agreement. The commentary adds that this restriction, while not expressed in the article, seems self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement.[22]

78. Views have since been expressed that the arbitral tribunal's competence to consider claims by

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[21] The relevant part of the model arbitration clause reads: "Any dispute, controversy or claim arising out of or relating to this contract ... shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force" [emphasis added].

[22] Doc. A/CN.9/264, UNCITRAL Yearbook, vol. XVI:1985, part two, I, B, commentary on draft art. 23, paras. 5 and 8.

way of a set-off should under certain conditions extend beyond the contract from which the principal claim arises. The reasons cited are procedural efficiency and the desirability of eliminating disputes between the parties; such reasons are said to carry weight in particular when both parties are merchants or when the principal claim and the claim invoked for the purpose of a set-off have arisen from economically related contracts.

2. Conclusion

79. The Commission may wish to consider whether the issue merits further study. The questions to be studied may include, for example, the question whether the competence of the arbitral tribunal to deal with claims raised by way of a set-off can appropriately be left to arbitration rules or whether an appropriate legislative rule would be desirable.

H. Decisions by "truncated" arbitral tribunals

80. It follows from laws and rules on arbitration that arbitrators, having agreed to act in that capacity, have a right and a duty to participate in the proceedings and the deliberations of the arbitral tribunal and to sign the arbitral award. Such a right and a duty is also implicit or expressly provided for in the agreement by which an arbitrator accepts the appointment.

81. It sometimes happens that an arbitrator, in particular a party-appointed arbitrator, resigns or refuses to participate in the proceedings or the deliberations of the arbitral tribunal. Most national laws and arbitration rules contain provisions addressing that situation. Generally, it is provided that the arbitrator who fails to act is to be replaced by a substitute arbitrator; usually it is provided that the rules governing the appointment of the substitute arbitrator are those applicable to the appointment of the arbitrator being replaced (e.g., art. 14(1) of the UNCITRAL Model Law on International Commercial Arbitration).

82. Irrespective of the reason for resignation or inaction of an arbitrator, an arbitrator's failure to act and the appointment of a substitute arbitrator is likely to cause delay, costs and inconvenience. One notable reason for considerable additional cost and delay is the possible need for repeating the hearings that were held before the substitute appointment (see, e.g., art. 14 of the UNCITRAL Arbitration Rules).

83. Particularly problematic are cases where resignation of an arbitrator or refusal to cooperate occurs at a late stage of the proceedings and the grounds therefor are seen by the other two arbitrators, or by the arbitral institution administering the case, as lacking justification. Because of the potential disruption to arbitral proceedings, a source of special concern are cases where resignation or refusal to cooperate occurs as a result of collusion between a party and the arbitrator appointed by that party. Such collusion may be motivated by a desire to cause delay, thwart the proceedings, and thereby deprive the other party of its legitimate rights under the arbitration agreement.

84. Failure to act by the arbitrator may give rise to liability of the arbitrator for breach of his or her contractual or statutory duties. Such liability is an issue between the aggrieved party and the arbitrator and falls outside the dispute that is being considered within the arbitration in which the

failure to act has occurred. If the issue results in a dispute, it would normally be decided by a court unless there is an arbitration agreement between the arbitrator and the party pursuing the claim against the arbitrator.

85. Notwithstanding such liability of the arbitrator, the arbitrator's failure to participate may also be dealt with in the context of the arbitral proceedings in which the arbitrator ceases to participate. As a rule, there is little difficulty caused where the refusal to cooperate occurs after the arbitral tribunal has concluded its deliberations on the substance of the award and the failure to cooperate is limited to the arbitrator's refusal to sign the award. The solution that is generally accepted in laws and arbitration rules is that the signature of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated (art. 31(1) of the UNCITRAL Model Law; a similar rule is contained, for instance, in art. 32(4) of the UNCITRAL Arbitration Rules).

86. The question that has in recent years given rise to lively discussions among practitioners is whether - when an arbitrator resigns late in the proceedings, perhaps after evidence has been taken and arguments heard - the two remaining arbitrators are permitted to complete the proceedings and render an award.[23] Such decisions by the two remaining arbitrators are often referred to as "truncated tribunal" decisions.

87. In the discussions of this issue, an assessment that has been frequently expressed is that in both civil law and common law countries courts would respect awards by truncated tribunals if the parties had agreed to that procedure. In addition, it has been said that prudent parties who wish to avoid difficulties will therefore choose rules that permit two arbitrators to continue the proceedings and render an award, in the absence of the third, when the majority determines that it is in the interest of fair and orderly arbitration to do so. A view has also been expressed that it would be hard to imagine that, even in the absence of an express rule or agreement, a modern court in a State that otherwise has a public policy of supporting international commercial arbitration would invalidate an award issued by a majority of the arbitrators because a party-appointed arbitrator, in an effort to frustrate the arbitration, chose to absent himself at a late stage of the proceedings, or refused to participate in deliberations or to sign an award. This view is based on the assumption that national laws that refer to participation by three arbitrators should be interpreted as having been satisfied when all three have had a fair and equal opportunity to participate. It has also been suggested that, as a practical matter, once it is made clear that a party-appointed arbitrator cannot succeed in preventing the issuance of an award by absenting himself or herself from the proceedings or the deliberations, the underlying problem is likely to disappear.[24] Differing views have also been expressed cautioning against a statutory authorization for a truncated tribunal to decide in its discretion. Arguments have been advanced that a party should not be responsible for misbehaviour of the arbitrator appointed by that party, and that a discretionary right to proceed as a truncated tribunal might be problematic when, after an arbitrator resigns, the other two arbitrators act

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[23] For example, the Xth International Arbitration Congress, Stockholm, 28-31 May 1990. Proceedings of the Congress: ICCA Congress Series No. 5, International Council for Commercial Arbitration, I. Preventing delay and disruption of arbitration, II. Effective proceedings in construction cases, General Editor Albert Jan van den Berg, p. 26.

[24] Ibid., pp. 28 and 29.

improperly in the interest of one of the parties.

1. Current non-legislative and legislative solutions

88. In light of these discussions, some arbitral institutions have adopted rules that determine the conditions under which a truncated tribunal may validly proceed and make an award. For example, the International Arbitration Rules of the American Arbitration Association (1991) provide in article 11:

> "1. If an arbitrator on a three-person tribunal fails to participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.
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> "2. If a substitute arbitrator is appointed, the tribunal shall determine at its sole discretion whether all or part of any prior hearings shall be repeated."

89. Provisions of essentially the same import have been incorporated into other sets of international arbitration rules, such as, for example, The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two Parties of which only one is a State (1993), (art. 13(3)) and the World Intellectual Property Organization (WIPO) Arbitration Rules (1994), (art. 32).

90. The issue has been addressed by few national laws on arbitration. One approach has been to include in legislation the substance of the above-described solutions in arbitration rules. Another approach has been more restrictive: while in principle the law recognizes the freedom of the parties to agree on how decisions by truncated tribunals are to be dealt with, it restricts the possibility of the parties to grant the remaining arbitrators permission to proceed without the non-cooperating arbitrator to those cases where the arbitrator refuses to take part in the vote on a decision. It is further provided that the parties are to be given advance notice of the intention to make an award without the arbitrator who refuses to participate in the vote. In the case of other decisions, the law provides that the parties need only be informed, subsequent to the decision, of the arbitrator's refusal to participate in the vote.

2. Conclusion

91. The Commission may wish to discuss the potential detrimental consequences of bad-faith withdrawals of arbitrators from arbitral proceedings on the practice of international commercial arbitration and, in that context, it may consider questions such as: (a) the extent to which the parties should be able by agreement to put beyond doubt the validity of an award issued by a truncated

tribunal; (b) whether it would be desirable for the Commission to formulate a model solution for an agreement of the parties on decisions by truncated tribunals; and (c) whether it would be desirable for laws on international commercial arbitration to deal with the issue and, if so, whether a model legislative solution should be prepared by the Commission. If the Commission should decide that the issue should be further considered, it may wish to request the Secretariat to prepare a study in which it would set out various possible solutions for consideration by the Commission.

I. Liability of arbitrators

92. In preparatory work for the UNCITRAL Model Law on International Commercial Arbitration, there was general agreement that the liability of arbitrators could not appropriately be included in the Model Law.[25]

93. National arbitration laws, including a number of laws enacting the Model Law, have added provisions dealing with liability of the arbitrator. These provisions differ on whether arbitrators should be immune from professional liability and on the parameters of the immunity. There is a tendency amongst common law jurisdictions to equate arbitrators with judges and extend an equivalent immunity, and amongst civil law jurisdictions to focus on arbitrators' contractual function as experts. Nevertheless, there is considerable diversity even within the same legal families, and no clear line of distinction can be drawn between the approaches taken by each.

1. Current legislative provisions

94. A number of national arbitration laws, including some enacting the Model Law, include provisions dealing with immunity of arbitrators, but there are considerable variations in the scope and extent of the immunity. Many of the countries which have adopted specific provisions in the arbitration laws which give effect to the Model Law are common law jurisdictions.

95. Some of the provisions included in these laws exclude liability for any act or omission in connection with the arbitration, except where the act or omission is shown to have been in bad faith, or done dishonestly, or where there has been conscious and deliberate wrongdoing. Another approach is to provide that the arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator; in some cases an exception is added for cases where there has been fraud or malice. In one instance, an arbitrator is not liable for any mistake in law, fact or procedure made in the course of the arbitral proceedings or in the making of the arbitral award. Some laws adopt the opposite approach of not seeking to limit liability, but specifying that an arbitrator may be liable for losses incurred by reason of delay or failure to comply with the arbitrator's obligations.

96. The parties to whom the exclusion may apply varies widely. In some cases, the immunity applies only to the liability of the arbitrator, while in others, this immunity is extended to employees

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[25] Report of the Working Group on International Contract Practices on the work of its third session (1982), Doc. A/CN.9/216, UNCITRAL Yearbook, vol. XIII:1982, part two, III, A, paras. 51-52.

and agents of the arbitrator and to advisers of the arbitrators and to experts. Other laws further extend the immunity to those who may be involved in appointing an arbitral tribunal and those who may carry out administrative tasks in connection with the arbitration proceedings, as well as to their employees and agents. The terms of the exceptions to immunity, in all of these laws, are the same for arbitrators and the extended classes of persons.

97. In other jurisdictions, principally civil law jurisdictions, the contractual nature of the service performed by the arbitrator is emphasized and the arbitrator would be liable for failure to fulfil the terms of the reference. This would include failure to perform with reasonable diligence; failure to make the award within the contractual or legal time limit; putting the parties at the risk of the award being annulled; bias; negligence; breach of secrecy of the arbitral proceedings; as well as every instance of fraud, misrepresentation, corruption and gross negligence. In some jurisdictions, the making of the award attracts particular immunity because of the quasi-judicial nature of the function being performed. In some cases, liability can be limited in the contract between the arbitrator and the parties to the arbitration, although this may not exclude liability for gross negligence or wilful misconduct.

98. In some common law jurisdictions, arbitrators may enjoy a high level of immunity more akin to a judge, while in others a distinction is drawn between those acts of an arbitrator which are adjudicatory, and thus entitled to this high standard of immunity, and those acts which are unrelated to any adjudicatory function and thus subject to civil liability.

2. Conclusion

99. There are considerable differences between arbitration laws and rules in their treatment of the issue of liability, and the extent of civil liability of arbitrators may vary according to a number of factors, such as (a) the choice of procedural rules governing the proceedings; (b) the law governing the contract between the arbitrator and the parties; (c) the nationality of the arbitrators; and (d) and the place where the proceedings are conducted. Given these issues, any treatment of the question of the liability of arbitrators is likely to require careful consideration.

100. Since a universally acceptable formula may assist the process of arbitration, and provide greater certainty for both arbitrators and arbitrating parties, the Commission may wish to consider whether the question of liability needs to be further examined. In considering the need for further treatment of liability of arbitrators, it may be useful to review in detail the manner in which the issue is currently treated, as well as proposals made by organizations or commentators.

J. Power by the arbitral tribunal to award interest

101. Providing an explicit authorization for the arbitrator to award interest was not considered during the preparation of the UNCITRAL Model Law on International Commercial Arbitration. Since that time, uncertainty in some jurisdictions as to the power of arbitrators to award interest has spread, particularly in the common law world, and a number of jurisdictions have added specific provisions dealing with the power to award interest to laws adopting the Model Law.

1. Current legislative solutions

102. The provisions dealing with the power to award interest which have been adopted in national laws vary greatly in scope, particularly as regards the level of detail and the issues included. At its simplest, the legislation authorizes the tribunal to award interest, except where the parties have agreed otherwise.

103. Some jurisdictions go beyond the basic power and address other matters. In terms of the sum which may attract interest, some laws limit this to the amount of the award, which might be specified as including interest and costs. Another approach is to provide that the arbitral tribunal may order interest to be paid on the whole or any part of the award. In other cases, a distinction may be drawn, in terms of the sum upon which interest is payable, between money awarded by the tribunal in the proceedings and money claimed in, and outstanding at the commencement of the proceedings, but paid before the award is made. Some jurisdictions limit the application of the interest provision and specify, for example, that it does not authorize the arbitrator to award interest on interest, and does not apply in relation to any amount upon which interest is payable as of right, whether by virtue of an agreement or otherwise.

104. A number of laws address the time from which interest may be awarded. One approach limits this to the period commencing from the date of the award, while other laws provide that interest also may be awarded for the whole or any part of the period between the date the cause of action arises and the date of the award, while a further approach provides for interest from the date of the award to the date of payment of the award. Some laws also include the times at which interest should be paid.

105. As to the rate of interest, a number of laws leave it up to the tribunal to determine a reasonable rate or reasonable commercial rate. Other laws specify that the rate should be the same rate as that applying to a judgment or, in some cases, a particular rate is fixed. A more elaborate rule provides that the rate of interest should be "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment".[26]

2. Conclusion

106. The Commission may wish to consider whether the question of the power of the arbitral tribunal to award interest is one which merits further study with a view to preparing a model legislative provision. In that context, it may also consider whether such further study should cover any of the details of the power as illustrated by the enactments referred to above, including (a) the sum upon which interest may be charged; (b) the period for which interest is payable, both before and after the award is made; (c) the type (simple or compound) and the rate of interest to be applied; and (d) other issues such as the time at which interest is to be paid.

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[26] UNIDROIT Principles of International Commercial Contracts (UPICC), Article 7.4.9.

K. **Costs of arbitral proceedings**

107. In preparatory work for the UNCITRAL Model Law on International Commercial Arbitration, there was wide support for the view that questions concerning the fees and costs of arbitration were not appropriate matters to be dealt with in a model law. It was left open for States to provide for court control concerning fees and costs and, for example, to allow for readjustment of utterly unreasonable fees.[27] Since completion of the Model Law, however, a number of Model Law enactments have added provisions on the arbitral tribunal's power to fix and allocate costs and fees. These laws often differ in substance and particularly as to the detail of the power and the scope of related issues.

1. Current legislative provisions

(a) What may be included as "costs"

108. Legislation adopting the Model Law is varied as to what is included within the meaning of "costs". Some laws adopt a general description, referring simply to the "costs of the arbitration", and may include a reference to the fees and expenses of the arbitrator or arbitrators or to those costs incurred by the parties and necessary for the proper pursuit of their claim or defence. Other laws adopt a more comprehensive approach, specifying the items to be included, such as (a) fees of the arbitrator and tribunal; (b) costs of accommodation, travel and administrative support during the arbitration proceedings; (c) costs of evidence, both factual and expert; (d) costs of legal advice and representation; and (e) other expenses incurred in connection with the arbitration.

(b) Apportionment and liability for costs

109. Laws enacting the Model Law generally provide that the arbitral tribunal has the discretion to decide which of the parties is to pay the costs of the arbitration and in what proportions, taking into account what is reasonable in the circumstances of the case. However, there are variations. Some laws distinguish between fees and expenses of the arbitrator and other costs of the arbitration, stipulating that the parties are jointly and severally liable for payment of the arbitrators' fees and expenses. Other laws provide a default rule that, where costs are not dealt with in the award and there is no additional award addressing the costs of arbitration, each party is responsible for its own legal and other expenses and for an equal share of the fees and expenses of the tribunal. One law directly addresses the situation where there is an offer of settlement which is rejected. If the settlement offer reflects the final award of the tribunal, the tribunal is authorized to take this into account when awarding costs and expenses.

(c) Related issues

110. Court review and assistance - A number of laws deal with aspects of court review and assistance, authorizing the courts to adjust arbitrators' fees and expenses, including ordering

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[27] Report of the Working Group on International Contract Practices on the work of its third session (1982), Doc. A/CN.9/216,UNCITRAL Yearbook, vol. XIII:1982, part two, III,A, para.99.

repayment of excessive amounts; and to determine recoverable costs, including fees and expenses of the arbitral tribunal, where the arbitral tribunal does not do so or where a party does not consent to the tribunal making that determination.

111. Incomplete awards - Some laws provide that where the award does not provide for payment of costs of the arbitration, parties may apply to the arbitral tribunal or, in some cases, the court, for a determination as to costs.

112. Limitation of recoverable costs - In some jurisdictions, parties are free to agree what costs of the arbitration are recoverable or they may to apply to the tribunal or court to make such a determination. In addition, the arbitral tribunal may be authorized to limit recoverable costs to a specified amount, subject to possible variations.

113. Interpretation or correction costs - A number of laws stipulate that the arbitral tribunal may not charge additional fees for interpretation, correction or completion of its award.

2. Conclusion

114. The Commission may wish to consider whether the power to award costs is sufficiently covered by arbitration rules or national laws or whether the conduct of international commercial arbitration would be facilitated by providing a uniform rule. In that context, the Commission might wish to consider the scope of such a rule and whether, in addition to the power to award costs, additional issues as indicated above should be covered.

L. **Enforceability of interim measures of protection**

115. According to many sets of arbitration rules, an arbitral tribunal may, at the request of a party, order interim measures intended to preserve the status quo until the arbitral award is made. Such measures are referred to by expressions such as "interim measures of protection", "provisional orders", "interim awards", "conservatory measures" or "preliminary injunctive measures". For example, article 26(1) of the UNCITRAL Arbitration Rules provides as follows:

> "At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."

116. Interim measures of protection, often not defined in rules providing for their issuance, can encompass a wide variety of measures including: orders for not removing goods or assets from a place or jurisdiction; preserving evidence; selling goods; and, posting a monetary guarantee. An interim measure may be imposed for the duration of the arbitration or it may be of a more temporary nature and expected to be modified as matters evolve. The measure may be in the form of an order by the arbitral tribunal or in the form of an interim "award".

117. The question often discussed by practitioners is the enforceability of such measures, both in

the State where the arbitration is taking place and in other States. The need for enforceability is usually supported by the argument that a final award may be of little value to the successful party if, in the meantime, action or inaction on the part of a recalcitrant party has rendered the outcome of the proceedings largely useless (e.g., by dissipating assets or removing them from the jurisdiction). It has been noted that, therefore, an interim order can be at least as or even more important than an award.[28]

118. There are, however, also views querying whether interim measures issued by the arbitral tribunal should be enforceable. It has been said that, as a practical matter, parties tend to comply with such measures anyway, for example, in order to avoid responsibility for costs caused by the failure to implement the measure, or because they are reluctant to displease the arbitral tribunal. In addition, if interim measures are treated as executory titles, there would be a need to apply to them provisions (the same as or similar to those governing the setting aside of arbitral awards) designed to cure certain serious violations of procedure, which would overly formalize the process. However, in response, it has been said that there are many cases where the party refuses to comply with the interim measure without regard to the potential adverse consequences, such as responsibility for costs. Furthermore, the provisions on judicial enforcement of interim measures, including the prerogatives of the court in the enforcement process, may reflect the interim nature of the measures and do not necessarily have to be the same as the rules governing the enforceability of final awards.

119. Some propose that arbitrating parties in need of interim measures should resort to the judicial process, as is possible under many national laws. However, in response, it is pointed out that this may pose certain difficulties. For example, obtaining a measure may be a lengthy process, in particular, because the court may require arguments on the issue or because the court decision is open to appeal. Furthermore, the courts of the place of arbitration may not have effective jurisdiction over the parties or the assets; since arbitrations are often conducted in a "neutral" territory that has little or nothing to do with the subject-matter in dispute, a court in another jurisdiction may have to be approached with a request to consider and issue a measure. Moreover, in some jurisdictions a party may not be able to request the court to issue an interim measure of protection on the ground that the parties, by concluding an arbitration agreement, are deemed to have excluded the courts from intervening in the dispute.

120. It is therefore argued that resources would be used more efficiently if parties were able to make their requests for enforceable interim measures directly to the arbitral tribunal, rather than to the court, as the tribunal is already familiar with the case and is usually more technically apprised of the subject-matter.

1. Current legislative solutions

(a) New York Convention

121. Sometimes arbitral tribunals issue interim measures of protection in the form of interim awards. Such a possibility is expressly envisaged, for example, in article 26(2) of the UNCITRAL

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[28] V. V. Veeder, "Provisional and conservatory measures", in Proceedings of the New York Convention Day Colloquium, supra note 1.

Arbitration Rules. This raises the question whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards covers also such interim awards. As the Convention does not define the term "award", it is not clear whether the Convention applies to interim awards as well. The prevailing view, confirmed also by case law in some States, appears to be that the Convention does not apply to interim awards.

(b) UNCITRAL Model Law

122. The UNCITRAL Model Law on International Commercial Arbitration expressly deals in article 17 with the power of the arbitral tribunal to order such interim measure of protection as it may consider necessary and also to require a party to provide appropriate security in connection with such measure. The Model Law, however, is silent on the matter of enforcement.

123. When during the preparation of the Model Law the substance of article 17 was considered by the Working Group, it contained a sentence that "if enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court][the Court specified in article V] to render executory assistance".[29] Under one view in the Working Group, executory assistance by courts was considered desirable and should be available. Under another view, which the Working Group adopted after deliberation, the sentence was to be deleted since it dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many States. It was understood by the Working Group, however, that the deletion of the sentence should not be read as a preclusion of executory assistance in those cases where a State was prepared to render such assistance under its procedural law.[30]

(c) National laws

124. In respect of enforceability of interim measures issued by an arbitral tribunal, a variety of approaches have been taken by legislatures. In many States the legislation is silent on this point. In others, including some of those that have incorporated article 17 of the Model Law empowering the arbitral tribunal to order interim measures of protection, there are express provisions for enforcement of those interim measures. For example, in one case a clause has been added so that the court may, at the request of a party, permit enforcement of the interim measure ordered by the tribunal, unless application for a corresponding interim measure has already been made to a court. In a few States, the legislation stipulates that the provisions modelled on chapter VIII of the Model Law on recognition and enforcement of awards (arts. 35 and 36) apply also to orders made under the provision modelled on article 17 of the Model Law.

125. As regards the powers that have been granted to the court enforcing an interim measure issued by the arbitral tribunal, a variety of approaches can also be noted. In at least one State, it is provided that the court may review the basis of the interim order made by the tribunal. In a few other cases, it is stated that the court is to give preclusive effect to the findings of fact made by the tribunal. In one country, the law provides that the court may recast the order issued by the arbitral

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[29] Report of the Working Group on International Contract Practices on the work of its sixth session (1983), Doc. A/CN.9/245, UNCITRAL Yearbook, vol XV:1984, part two, II, A, 1, para. 70.

[30] Ibid., para 72.

tribunal if necessary for the purpose of enforcing the measure; in addition the court may, upon request, repeal or amend its decision to permit enforcement.

126. One of the concerns with respect to court-ordered enforcement of measures issued by an arbitral tribunal may be the liability where there has been an abuse of rights. For such a case, it has been provided in one national law, for example, that if a measure ordered by the arbitral tribunal proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure. It is further provided that such a claim for compensation may be put forward in the pending arbitral proceedings.

2. Conclusion

127. The Commission may wish to consider whether the question of enforceability of interim measures of protection ordered by an arbitral tribunal should be further studied by the Secretariat. The Secretariat might be requested to explore the relevant practice in international commercial arbitration and court practice, and, with regard to the desirability and feasibility of uniform legislative provisions, to present first tentative solutions for consideration by the Commission.

M. **Discretion to enforce an award that has been set aside in the State of origin**

128. After an arbitral award is made, the claimant may seek enforcement of the award either before the courts in the State where the award was made ("State of origin") or before the courts in another State where the debtor has assets ("State of enforcement"). Where, however, the award is set aside (or "annulled" or "vacated") by the competent court in the State of origin, the enforcement of the award in the State of origin would not be possible. The party seeking enforcement may then try to have the award enforced by a court in another State. The issue that faces the court in the State of enforcement is whether there are any circumstances that allow the court to enforce the award, disregarding the fact that the award has been set aside in the State of origin.

1. Current legislative solutions

(a) New York Convention

129. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a list of grounds on which enforcement of an arbitral award may be refused. One of those is where "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" (art. V(1)(e)).

130. What has been under discussion among practitioners and in academic circles is whether, and the degree to which, such refusal to enforce based on article V(1)(e) of the Convention is discretionary. Discussions have centered around whether the court in the State of enforcement has authority to take into consideration the grounds on which the original award was set aside, or, whether the request for enforcement must necessarily be refused.

131. Some of the discussion has been precipitated by the language of article V(1). It has been said that use of the words "enforcement ... may be refused" implies some discretion on the part of the competent authority to refuse enforcement. However, it has also been said that, when read together with the word "only" (i.e. "enforcement ... may be refused ... only if ..."), a different interpretation may be derived. Consequently, it is said to be unclear whether enforcement is to be refused in every case where an award has been set aside.

132. It has been said that article VII(1) of the Convention may also provide an option for enforcement that avoids taking into account the decision to set aside the award.[31] Under what is referred to as the "more-favourable-right" provision, a party may seek enforcement of a foreign arbitral award in a State on the basis of other treaties or the domestic law of that State. Without having to comment on the merits of the decision to set aside by the court in the State of origin, the court in the State of enforcement would be able to determine that, on the basis of its own domestic law, the award should be enforced. One of the criticisms of this approach, however, is that if States are thereby encouraged to adopt individualized criteria for the enforcement of foreign arbitral awards, this will defeat the objectives of harmonization and unification of domestic laws.

(b) 1961 European Convention

133. Enforcement of awards that have been set aside has also been addressed in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX(1), if an award has been set aside by a court in the State of origin, this shall constitute a ground for the refusal of enforcement by the court in another State only if the reasons for the setting aside are among those outlined; these are essentially the same as the grounds given in article V(1)(a) through (d) of the New York Convention.[32] Therefore, under the European Convention, the court in the State of

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[31] The provisions of article VII(1) of the Convention are as follows:
"1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

[32] The provisions of article IX(1) of the European Convention are as follows:
"1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from

enforcement is bound to enforce the award, if it was set aside in the State of origin on grounds other than those in article IX(1) of the European Convention. Furthermore, article IX(2) limits application of article V(1)(e) of the New York Convention, as follows:

> "In relations between Contracting States that are also parties to the [New York Convention], paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

(c) UNCITRAL Model Law

134. Article 36(1) of the UNCITRAL Model Law provides the grounds for refusing recognition or enforcement of an arbitral award, which are essentially the same as the provisions in article V(1) of the New York Convention; in particular, article 36(1)(v) includes the provision that enforcement of the award may be refused if the "award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made".

135. Article 34(2) of the Model Law provides the grounds on which an arbitral award may be set aside; the first four of the grounds (in art. 34(2)(a)(i) to (iv)) parallel the first four grounds for refusing recognition and enforcement (in art. 36 (1)(a)(i) to (iv), modelled on article V(1)(a) to (d) of the New York Convention). Article 34(2)(b) also provides that an arbitral award may be set aside if the court finds that (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State of origin or (ii) the award is in conflict with the public policy of the State of origin.

(d) Policy considerations

136. In light of recent case law, a more general discussion has developed as to whether, as a matter of principle, the setting aside of an award in the State of origin should be an absolute bar to its enforcement in another State. Some of the arguments advanced in the discussion are summarized below.

137. "The award no longer exists" According to one theory, an award that has been set aside is no longer in existence and therefore cannot be enforced in any other jurisdiction. This theory, however, has been criticized on the grounds that the existence of an award - as an expression of a contract between the parties - cannot be assumed to be a matter for the exclusive determination by the courts in the State where it was rendered. The criticism follows the approach common to most questions that involve a conflict of laws; if a forum properly establishes jurisdiction, a matter can be determined as valid in accordance with the laws of that forum despite lacking validity under the laws of another.

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those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

138. "Convention not to be circumvented" If the Convention is interpreted so that an award that has been set aside by a competent authority in the State of origin cannot be enforced anywhere else, some fear that the intentions of the Convention would be circumvented. It has been said that one of the purposes of the Convention is to liberate the international arbitral process from domination by the law of the place of arbitration. If the choice of the place of arbitration affects the ultimate outcome due to certain grounds for setting aside that are peculiar to that place, then this goal cannot be met. It is possible to envision a situation where an award is set aside for reasons that are unusual or egregious. A party whose award has been so set aside would be deprived of any remedy to have this situation rectified if such an award could not be enforced elsewhere. Some argue that to interpret article V(1)(e) so as to absolutely prevent enforcement of awards set aside in the State of origin may result in the enforcement of foreign awards having been made even more difficult than in the absence of the Convention.

139. "Excessive court interference to be avoided" Another argument, which, however, could be used by either side of the debate, is that excessive court interference in arbitration should be avoided. This could support the position that the decision to set aside the award in the State of origin should not be revisited by a second court in the State of enforcement. On the other hand, it could also support the position that, where there has been excessive interference by the court in the State of origin, the court in the State of enforcement should be enabled to disregard that decision and enforce the award.

140. "Forum shopping" It has been suggested that if the courts of jurisdictions other than that of the place of arbitration are able to decide on a discretionary basis as to whether to refuse enforcement of an award set aside by the court in the State of origin, it may encourage parties to seek out those jurisdictions where the likelihood of enforcement is known to be more favourable. This may also lead to the situation where the party in whose favour the arbitral award was made can seek enforcement of that award in as many countries as will exercise jurisdiction, thereby putting the other party to the expense of defending against enforcement, without end. In other words, it would be impossible for a party against whom an award was unjustly made and which ought to be set aside on internationally recognized grounds, to obtain an annulment valid world-wide.

141. "Res judicata; need to avoid inconsistent results" The court in the State where enforcement is sought may be reluctant to comment upon whether the award ought or ought not to have been set aside by the court in the State of origin. This reluctance is considered beneficial for maintaining mutual respect for the authority of the judiciary. It is also pointed out that an interpretation of the Convention that permits the court in the State of enforcement discretion to refuse to enforce the award results in double judicial control. The question of enforcement of the arbitral award has already been determined by the court in the State of origin; enabling a second court to revisit this decision means that a matter which has already been settled by one court will be re-litigated in another forum. This, it is argued, is contrary to basic principles of law and the resultant inefficiency does not serve well the interests of international commercial arbitration. Some also express the concern that encouraging the court in the State of enforcement to revisit the grounds for setting aside may lead to inconsistent judicial decisions. One type of inconsistency would arise where an award set aside, and as a result regarded as inexistent in one jurisdiction, would be enforced in another jurisdiction. Another, more complex, type of inconsistency may arise when, after the award

has been set aside in the State of origin but enforced in another State, a reconstituted arbitral tribunal in the State of origin issues an award that is essentially different from the first award and this second award is then presented for enforcement in the State where the first award has been enforced. The court in the State of enforcement would thus be faced with requests to enforce opposing awards. Although such a case may be rare, it has occurred in practice.

142. "Expectation of the parties not to be circumvented" Parties that have agreed on the State in which the arbitral proceeding are to take place can presume to have, by their own choice, elected to be subject to the laws of that particular forum; accordingly, it is argued, to enable the courts of another State to disregard a setting aside order by a court in the State of origin would circumvent the will of the parties. Some even suggest that the parties may have deliberately chosen the place of arbitration where awards are susceptible to being set aside on grounds particular to that jurisdiction and may have an expectation that such decisions will not be disregarded by the courts of another State. Others consider it to be much more likely that the parties to an arbitral award will not have anticipated the forum-specific or egregious grounds for setting aside the award.

143. "Redundancy of article V(1)(e)" It has been suggested that the reasons for setting aside should be categorized according to whether they are in conformity with internationally accepted standards. The intention is to differentiate between "international standards" and "local standards".[33] International standards would comprise those consistent with paragraphs (a) through (d) of article V(1) of the Convention and article 34(2)(a) of the UNCITRAL Model Law. Under this proposal, only setting aside decisions based on an international standard would constitute grounds to refuse enforcement of foreign arbitral awards; setting aside based on any other ground would not preclude enforcement of the award in another jurisdiction. This approach, it is argued, upholds the intentions of the Convention by allowing an arbitral award to be enforced anywhere, unless that award has been legitimately set aside on internationally recognized grounds. In response, it has been pointed out that if the only grounds for a refusal to enforce an award that has been set aside is whether the award was set aside for reasons that are internationally accepted, then subparagraph (e) is thereby made redundant. It is argued that, as this result could not have been the intention of the Convention, paragraph (e) must provide a separate reason for the courts of the State of enforcement to refuse a request to enforce an award that has already been set aside.

2. Conclusion

144. The Commission may wish to consider whether international commercial arbitration would be facilitated by an undertaking that would seek to clarify the circumstances, if any, under which an arbitral award that has been set aside by a court in the State of origin can be enforced in another State.

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[33] Jan Paulsson," Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment" (LSA)", The ICC International Court of Arbitration Bulletin, Vol. 9, No. 1 (May 1998).