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Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006)

Contents

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I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered that the time had come to, inter alia, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures and the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") and article II, paragraph (2), of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention").

2. The most recent summary of the discussions of the Working Group on interim measures, preliminary orders and the form of arbitration agreement is contained in document A/CN.9/WG.II/WP.140, paragraphs 5 to 26. The Secretariat was asked to prepare proposals on the form in which the revised versions of draft article 17 of the Arbitration Model Law relating to the power of an arbitral tribunal to order interim measures, of a new article to the Arbitration Model Law relating to the recognition and enforcement of interim measures (tentatively numbered article 17 bis), of a new article to the Arbitration Model Law relating to court-ordered interim measures (tentatively numbered article 17 ter) could be presented, for consideration by the Working Group at its forty-fourth session. The Secretariat was also asked to prepare a revised version of draft article 7 of the Arbitration Model Law relating to the definition and form of arbitration agreement as well as a note considering how State courts have interpreted the form requirement in article II, paragraph (2), of the New York Convention and exploring the extent to which article VII, paragraph (1), of the New York Convention might assist in modernizing the form requirement for arbitration agreement, for consideration by the Working Group at its forty-fourth session.

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its forty-fourth session in New York, from 23 to 27 January 2006. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Italy, Japan, Lebanon, Madagascar, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

4. The session was attended by observers from the following States: Azerbaijan, Bangladesh, Dominican Republic, Finland, Guinea, Indonesia, Iraq, Ireland, Kyrgyzstan, Malaysia, Netherlands, New Zealand, Philippines and Ukraine.

5. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: African Union,

European Community, NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.

6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration, Asia Pacific Regional Arbitration Group (APRAG), Association of the Bar of the City of New York (ABCNY), Center for International Legal Studies, Association Suisse de l'Arbitrage (ASA), Club of Arbitrators of the Milan Chamber of Arbitration, Forum for International Commercial Arbitration (FICA), International Chamber of Commerce (ICC), International Cotton Advisory Committee (ICAC), International Law Institute (ILI), Kuala Lumpur Regional Centre for Arbitration (KLRCA), School of International Arbitration (Queen Mary University of London), the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), the London Court of International Arbitration (LCIA) and Union Internationale des Avocats (UIA).

7. The Working Group elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico);

Rapporteur: Mr. Mostafa Dolatyar (Islamic Republic of Iran).

8. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.140 and A/CN.9/WG.II/WP.140/Add.1); (b) a note by the Secretariat containing a newly revised draft of article 7 of the Arbitration Model Law prepared by the Secretariat pursuant to the decisions made by the Working Group at its thirty-sixth session (A/CN.9/WG.II/WP.136); (c) a note by the Secretariat containing a proposal made by a delegation for a revision of article 7 of the Arbitration Model Law (A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1); (d) a note by the Secretariat regarding the interpretation and application of the writing requirement contained in article II, paragraph (2), of the New York Convention (A/CN.9/WG.II/WP.139); (e) a note by the Secretariat on newly revised drafts of articles 17, 17 bis and 17 ter, for insertion in the Arbitration Model Law, prepared by the Secretariat pursuant to the decisions made by the Working Group at its forty-third session (A/CN.9/WG.II/WP.141); and (f) the report of the Working Group on the work of its forty-third session (A/CN.9/589).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of uniform provisions on interim measures and on the requirement that an arbitration agreement be in writing.
5. Possible future work in the field of settlement of commercial disputes.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

10. The Working Group resumed its deliberations on agenda item 4 on the basis of the texts contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP.136, A/CN.9/WG.II/WP.137, A/CN.9/WG.II/WP.137/Add.1, A/CN.9/WG.II/WP.139 and A/CN.9/WG.II/WP.141). The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters IV to VII. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. The Working Group discussed agenda items 5 and 6. The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters VIII and IX, respectively.

11. The Working Group adopted the revised version of draft legislative provisions on interim measures, preliminary orders and the form of arbitration agreement as well as a text of a draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention. The Secretariat was requested to circulate the revised version of those draft provisions and the text of the draft interpretative declaration to Governments for their comments, with a view to consideration and adoption of the draft provisions and draft interpretative declaration by the Commission at its thirty-ninth session, scheduled to be held in New York, from 19 June to 7 July 2006.

IV. Draft legislative provisions on interim measures and preliminary orders

12. The Working Group recalled that, at its forty-third session (Vienna, 3-7 October 2005), it had undertaken a detailed review of the text of the revised version of article 17 regarding the power of an arbitral tribunal to grant interim measures and preliminary orders, article 17 bis regarding the recognition and enforcement of interim measures issued by an arbitral tribunal and article 17 ter on court-ordered interim measures. At that session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions on interim measures and preliminary orders could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/589, paras. 104-106). The Secretariat was also requested to take account of the suggestions that those provisions be placed in a new chapter, numbered chapter IV bis of the Arbitration Model Law, and be restructured by grouping paragraphs relating to similar issues under separate articles (A/CN.9/589, para. 106).

13. The Working Group resumed discussions on the draft legislative provisions on interim measures and preliminary orders on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group, as set out in A/CN.9/WG.II/WP.141.

Location and structure of chapter IV bis

14. The Working Group agreed that the draft legislative provisions on interim measures and preliminary orders should be located in a new chapter of the

Arbitration Model Law and agreed that the articles could be grouped into sections as suggested in A/CN.9/WG.II/WP.141.

Numbering of provisions

15. A comment was made that the Latin numbering of articles could be problematic for users unfamiliar with such numbering. In response, it was noted that the Latin numbering was consistent with the approach taken in other UNCITRAL instruments, such as, for example, article 5 bis of the UNCITRAL Model Law on Electronic Commerce.

16. After discussion, the Working Group agreed to retain the numbering of the draft legislative provisions, as set out in A/CN.9/WG.II/WP.141.

Article 17

Paragraph (1)

17. The substance of paragraph (1) was adopted by the Working Group without modification.

Paragraph (2)

18. Reservations were expressed about paragraph (2) (b) directly or indirectly allowing the use of anti-suit injunctions given that such injunctions were unknown or unfamiliar in many legal systems and that there was no uniformity in practice relating thereto. As well, it was said that anti-suit injunctions did not always have the provisional nature of interim measures. It was suggested that there were already a number of rules that protected the arbitral process and that a reference to anti-suit injunctions under paragraph (2) (b) was therefore unnecessary.

19. The Working Group recalled that it had already considered that matter at its forty-third session and agreed to adopt the text of paragraph (2) (b) (A/CN.9/589, paras. 20-26). It was observed that the provisions as contained in A/CN.9/WGII/WP.141 represented a package and the Working Group should not reopen discussions on substantive issues that might affect that package.

20. The substance of paragraph (2) was adopted without modification.

Article 17 bis

Paragraphs (1) and (2)

21. The substance of paragraphs (1) and (2) was adopted without modification by the Working Group.

Article 17 ter

Title

22. A proposal was made to amend the title of article 17 ter so that it would read: “applications for preliminary orders and conditions for granting preliminary orders” in order to better reflect the content of the provision. That proposal was adopted by the Working Group.

Paragraphs (1) and (2)

23. The substance of paragraphs (1) and (2) was adopted without modification.

Paragraph (3)

24. For linguistic reasons, the Working Group agreed to reformulate paragraph (3) along the following lines:

> "(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1) (a), is the harm likely to result from the order being granted or not."

Article 17 quater

Paragraphs (1), (2), (3) and (4)

25. The substance of paragraphs (1), (2), (3) and (4) was adopted without modification.

Paragraph (5)

26. It was suggested that the reference to "preliminary order binding on the parties" was ambiguous in that it appeared to require all parties to comply with the preliminary order rather than only the party against whom the order was requested. It was further observed that, if the intention was to bind all parties, that formulation did not sufficiently clarify the nature of the obligations of the parties. In response, it was said that the plural reference to "the parties" should be retained to reflect the fact that an order would be binding not only on the party against whom the measure was directed but also on the party applying for the measure (for example, in relation to providing information or security).

27. Another proposal was made to add the following text to paragraph (5), "a party shall not be prevented from seeking any relief in a court because it has obtained such a preliminary order from the arbitral tribunal." It was suggested that that proposal would be better dealt with in article 17 undecies, which related to court-ordered interim measures. As well, it was suggested that article 9 of the Arbitration Model Law already protected the right of a party to arbitral proceedings to request from a court an interim measure. In response, it was observed that article 9 dealt with interim measures and not preliminary orders. It was suggested that this proposal merely clarified the operation of provisions and did not seek to reopen substantive questions relating thereto. The Working Group took note of that proposal.

28. After discussions, the Working Group retained the text of paragraph (5), without modification.

Article 17 quinquies

29. The substance of article 17 quinquies was adopted without modification.

Article 17 sexies

Title

30. A proposal was made to delete the words “by the arbitral tribunal” from the title of article 17 sexies. That proposal was adopted.

Paragraphs (1) and (2)

31. The substance of paragraphs (1) and (2) was adopted without modification.

Article 17 septies

Paragraphs (1) and (2)

32. The substance of paragraphs (1) and (2) was adopted without modification.

Article 17 octies

33. It was decided to replace the words, “the party against whom it is directed” with the words, “any party” for the reason that the measure could impact upon any party.

Article 17 novies

Title

34. A proposal was made to delete the words “of interim measures” in order to avoid repetition of the Section title. That proposal was adopted.

Paragraph 1

35. The Working Group agreed that paragraph (1) should refer to article 17 decies instead of article 17 novies.

Paragraphs (2) and (3)

36. The substance of paragraphs (2) and (3) was adopted without modification.

Article 17 decies

Title

37. Consistent with the modification to the title of article 17 novies, the Working Group agreed to delete the words “of interim measures” from the title of article 17 decies.

Paragraphs (1) and (2)

38. The substance of paragraphs (1) and (2) was adopted without modification

Footnote

39. The Working Group agreed that the footnote to article 17 decies should refer to article 17 decies instead of article 17 novies.

Article 17 undecies

Placement of article 17 undecies

40. The Working Group considered whether article 17 undecies should be located in another part of the Arbitration Model Law for the reason that it dealt with court-ordered interim measures which might not easily fit in a chapter intended to deal mostly with interim measures granted by arbitral tribunals.

41. One suggestion was to place article 17 undecies following provisions enacting article 9 of the Arbitration Model Law, which dealt with interim measures granted by courts. However, given that article 9 was located within chapter II of the Arbitration Model Law, which related to arbitration agreement, that option was not considered appropriate.

42. The Working Group agreed that wording along the lines of the text suggested in the note by the Secretariat (A/CN.9/WG.II/WP.141, para. 13) for a footnote to article 17 undecies could be included in explanatory material accompanying that provision. Such a text could draw the attention of States to the issue of placing article 17 undecies in the most appropriate part of their enacting legislation.

43. The substance of article 17 undecies was adopted without modification.

Reference to articles 17 novies, 17 decies and 17 undecies in article 1, paragraph 2 of the Arbitration Model Law

44. At its forty-third session, the Working Group noted that, given the intention that the provision on court-ordered interim measure should apply irrespective of the country where the arbitration took place, that provision should be added to the list of articles contained under article 1, paragraph (2), of the Arbitration Model Law. That article provided that, in respect of the listed articles, the Arbitration Model Law, as enacted in a given State, would apply even if the place of the arbitration was not in the territory of that State (A/CN.9/589, paras. 101-103). It was also suggested that a reference to articles 17 novies and 17 decies (which dealt with recognition and enforcement of interim measures and the grounds for refusal thereof, respectively) should be included within the list of excepted articles so that article 1, paragraph (2) of the Arbitration Model Law would read as follows:

> "The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State."

45. That proposal was adopted in substance by the Working Group.

V. Draft legislative provisions on the form of arbitration agreement

46. The Working Group recalled that, at its forty-third session, it had resumed discussions on a draft model legislative provision revising article 7 of the Arbitration Model Law on the basis of a text prepared by the Secretariat ("the revised draft article 7") following discussions in the Working Group held at its thirty-sixth session (New York, 4-8 March 2002) (A/CN.9/508, paras. 18-39) and had also considered a proposal by the Mexican delegation regarding that issue

reproduced in A/CN.9/WG.II/WP.137, as modified by A/CN.9/WG.II/WP.137/Add.1 ("the alternative proposal") (A/CN.9/589, paras. 108-112). It was further recalled that the Working Group had considered that both texts provided useful options to address concerns relating to the form of arbitration agreement. The Working Group agreed to further consider both options.

The alternative proposal

47. It was noted that the alternative proposal omitted entirely the writing requirement. It was said that, if that text were adopted, the question of the conclusion of the arbitration agreement and its content would be solely a matter of proof rather than of validity. It was said that the revised draft article 7 established the minimum requirements that should apply in respect of the form of arbitration agreement, whereas the alternative proposal went much further and did away with all form requirements to recognize, for example, oral arbitration agreements. In support of the alternative proposal, it was said that many national laws contained requirements as to form for arbitration agreements that could be regarded as outdated. While the alternative proposal was met with considerable interest, the view was expressed that it might depart too radically from traditional legislation, including the New York Convention, to be readily acceptable in many countries. It was also stated that the purpose of the revision of paragraph (2) of article 7 of the Arbitration Model Law was to harmonise existing domestic laws in that respect and it was suggested that that purpose would be better achieved by the revised draft article 7 than the alternative proposal (for discussion on the alternative proposal, see also below, paragraphs 74 and 75).

48. The Working Group continued its discussion based on the revised draft article 7, as contained in A/CN.9/WG.II/WP.136. The Working Group was reminded that, whatever formulation was accepted in relation to paragraph (2) of article 7 of the Arbitration Model Law, it would be necessary to consider the impact of that provision upon article 35, given that that article included a cross-reference to article 7 in its requirement in paragraph (2), which provided that the party relying on an award or applying for its enforcement "supply the original arbitration agreement referred to in article 7 or a duly certified copy thereof" (for discussion on that matter, see below, paragraphs 76 to 80).

Revised draft article 7

Paragraph (1) of the revised draft article 7

49. The substance of paragraph (1) was adopted without modification.

Paragraphs (2) and (3) of the revised draft article 7

50. Support was expressed for retaining the substance of paragraph (2) as it gave a clear indication, consistent with article II, paragraph (2), of the New York Convention, that arbitration agreements had to be in writing and provided examples regarding the meaning of the writing requirement. However, it was noted that paragraph (2) of the revised draft article 7 sought by way of a definition to clarify that the term "writing" covered modern means of communications that might not be considered, in some countries, as meeting the writing requirement. A concern was expressed that this approach would be inconsistent with the approach taken in

UNCITRAL texts on electronic commerce, which relied not on a definition but on a functional equivalence approach to "writing".

Compliance of paragraph (2) of the revised draft article 7 with the UN Convention on the Use of Electronic Communications in International Contracts ("the Convention on Electronic Contracts")

51. It was observed that the revised draft article 7 had been prepared before the UNCITRAL Working Group on Electronic Commerce finalized its work on the Convention on Electronic Contracts and that it should be revised to ensure consistency with that Convention. In addition, it was observed that article 20 of that Convention included the New York Convention in the list of international instruments to which it applied and that, to the extent the Arbitration Model Law might be used to assist with the interpretation of the New York Convention, it would be important to ensure compatibility between the three instruments.

52. It was suggested that the formulation in paragraph (2) of article 9 of the Convention on Electronic Contracts, which provided that an electronic communication met a requirement under law that it be in writing "if the information contained therein is accessible so as to be useable for subsequent reference" could be used in the revised draft article 7 as follows: "A data message satisfies the requirement for writing if the information contained therein is accessible so as to be useable for subsequent reference." That proposal received some support.

"concluded or documented"

53. With a view to achieving the required level of flexibility, it was said that the form requirement for arbitration agreements should mirror similar provisions that existed in respect of litigation in national courts, for example, article 3 (c) of the Convention on Exclusive Choice of Court Agreements prepared by the Hague Conference on Private International Law and adopted on 30 June 2005, which provided that "an exclusive choice of court agreement is required to be concluded or documented in writing or by any other means of communication which renders information accessible so as to be useable for subsequent reference". It was also said that a similar reference to "concluded or documented in writing" was reflected in article 76 of the draft convention on the carriage of goods [wholly or partly] [by sea] currently being developed by the UNCITRAL Working Group on Transport Law (see, A/CN.9/WG.II/WP.140/Add.1, annex).

54. It was suggested that the words "concluded or documented" be considered for insertion under paragraph (2) of the revised draft article 7, as these words would clarify that the form requirement applied not necessarily at the stage of the formation of the arbitration agreement, but could also apply at the subsequent stage of evidencing the existence of the arbitration agreement. In support of that proposal, it was said that these words would be useful to encourage a liberal interpretation of the form requirement under article II, paragraph (2), of the New York Convention. A proposal was made that paragraph (2) of the revised draft article 7 should read: "The arbitration agreement shall be in writing. 'An agreement in writing' means an agreement concluded or documented in any form, including, without limitation, a data message, that provides a record of the arbitration agreement or is otherwise accessible so as to be useable for subsequent reference." That proposal received some support. A proposal was made to simplify that text, as follows: "The

arbitration agreement shall be in writing. An agreement is 'in writing' if it is concluded or documented in any form or is accessible so as to be useable for subsequent reference, including in the form of a data message." In support of that proposal, it was stated that it would cover both situations where writing was required for validity or for evidentiary purposes.

55. Questions were raised as to whether the terms "concluded" and "documented" were both needed as it was widely felt that the term "documented" encompassed the term "concluded". In response, it was said that if only the term "documented" were used, that provision might be interpreted in a very restrictive way as only applying where an agreement was concluded in writing. For that reason, it was suggested that both terms were needed.

56. Objections were raised on the ground that inclusion of those terms introduced issues related to proving the existence of an arbitration agreement that fell outside the intended purpose of paragraph (2) of the revised draft article 7, which related to the requirement that an arbitration agreement be in writing. A proposal was made to delete any reference to those words so that the revised paragraph would read: "The arbitration agreement shall be in writing. An agreement is "in writing" if it is in any form or is accessible so as to be useable for subsequent reference, including in the form of a data message". The Working Group took note of that proposal.

Proposals for restructuring paragraphs (2) and (3) the revised draft article 7

57. It was observed that paragraph (2) of the revised draft article 7 sought to deal with different issues, namely:

- To state the principle that an arbitration agreement shall be in writing;
- To determine whether the purpose of the writing requirement was to provide certainty as to the consent of the parties to arbitrate or as to the contents of the arbitration agreement; and
- To clarify how the writing requirement could be fulfilled.

58. A proposal was made to address each of these issues by including text along the following lines: "The arbitration agreement shall be in writing. An arbitration agreement is in writing if it can be evidenced in writing. A data message meets the requirement of a writing if the information contained therein is accessible so as to be useable for subsequent reference. 'Data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy." That proposal received some support.

59. A related proposal was made to replace paragraphs (2) and (3) of the revised draft article 7 by the following restructured provision: "(2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its terms are recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference." It was explained that the latter proposal had the following advantages:

- The language used in paragraph (2) of that proposal was consistent with article II, paragraph (2), of the New York Convention and therefore, that sentence maintained "the friendly bridge" between the texts;
- Paragraph (3) of that proposal by referring to "its terms are recorded" made it clear that only the terms of the arbitration agreement were required to be recorded and not the actual will of the parties to enter into the arbitration agreement. In that context, it was pointed out that the question whether the parties actually reached an agreement to arbitrate should be left to national legislation;
- The language used in paragraph (4) of the proposal was consistent with that used in paragraph (2) of article 9 of the Convention on Electronic Contracts.

60. That proposal was widely supported. However, clarification was sought on a number of aspects thereof.

61. Questions were raised as to whether the words "its terms" in paragraph (3) of the above proposal (see above, paragraph 59) were necessary given that the existence of an agreement to arbitrate assumed the existence of terms relating thereto. After discussion, the Working Group was generally of the view that some reference to the contents of the arbitration agreement should be retained to make it clear that what was to be recorded was the content or terms of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement. In response to questions regarding the scope of the words "its terms", divergent views were expressed. One view was that the reference to the "terms" of the contract could be interpreted as covering all of the contractual stipulations applying between the parties. Another view was that the "terms" of the agreement could be read more broadly to encompass, for example, the arbitration rules agreed upon by the parties or the law governing the arbitral procedure to the extent the parties did not agree on any procedural rules. It was also explained that "its terms" was not restricted to terms agreed by the parties expressly but could also cover agreements concluded by conduct, for example where one party sent an offer to conclude a contract to the other party which contained an arbitration agreement and the other party, without expressly accepting the offer, performed its part of the bargain (for example, it shipped the goods and paid the price).

62. To avoid a possible unclear or overly broad interpretation that could flow from the use of the word "terms", a proposal was made to replace that word with a more generic one such as "content". That proposal received some support. However, it was suggested that the phrase "its content is" might be improved upon. In order to provide a better formulation, it was proposed to redraft paragraph (3) of the above proposal (see above, paragraph 59) to read as follows: "an arbitration agreement is in writing if there is a record of the agreement in any form whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by any other means". It was suggested that that text should be accompanied by explanatory material in a guide to enactment and use. Another proposal was made that paragraph (3) be redrafted as follows: "an arbitration agreement is in writing if the rules applicable thereto are embodied in a recorded text". The Working Group did not agree that either of these formulations should be adopted but agreed that further clarification might be needed to be included in a guide to enactment and use in

respect to the factual situations that were intended to be covered by paragraph (3), such as those listed in A/CN.9/WG.II/WP.110, paras. 16 to 26. The Working Group requested the Secretariat to revise the text taking account of those suggestions, with appropriate explanations being provided in a guide to enactment and use of article 7.

63. In response to a question, it was explained that the words "or contract" in paragraph (3) of the above proposal (see above, paragraph 59) were intended to address the issue of incorporation by reference in a contract of an arbitration agreement. It was noted that the question of incorporation by reference was a matter to be further considered when discussing paragraph (5) of the revised draft article 7 (see below, paragraphs 69 to 73).

64. A suggestion was made that the words "electronic communication" contained in paragraph (4) of the above proposal (see above, paragraph 59) should be replaced by the words "electronic means" for the reason that the latter formulation was broader and covered a wider range of factual situations. After discussion, the Working Group agreed to retain the words "electronic communication" and to include under paragraph (4) of the above proposal the definition of "electronic communication" and "data message" as contained in paragraphs (b) and (c) of article 4 of the Convention on Electronic Contracts.

Paragraph (4) of the revised draft article 7

65. A proposal was made that, in order to meet the variety of submissions that were used in modern arbitration practice in addition to the statement of claim and defence, paragraph (4) of the revised draft article 7 should be redrafted as follows: "Furthermore, an arbitration agreement is in writing if it is contained in an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement is alleged by one party and not denied by the other party in such submissions". In response, it was stated that the term "submission" might be too vague and a source of ambiguity. As well, it was said that the terms "statement of claim" and "statement of defence" had well established and broad meaning in arbitral and litigation practice. Doubts were also expressed as to whether the reference to "written" submissions was appropriate and whether the words "arbitral or legal" sufficiently differentiated arbitral practice from court litigation.

66. Questions were raised whether paragraph (4) should be maintained, given that paragraph (3) of the above proposal (see above, paragraph 59), already included arbitration agreements concluded by conduct. In support of its retention, it was said that paragraph (4) provided an illustration of a specific situation, namely where the arbitration agreement was alleged by one party and not denied by the other. The view was expressed that at least the situation where an exchange of statements would evidence an arbitration agreement concluded elsewhere was not covered by paragraph (3) of the above proposal (see above, paragraph 59).

67. A suggestion was made that paragraph (4) should include more generic language to cover situations where parties communicated on the merits of the dispute. It was suggested that paragraph (4) should be redrafted in order to cover cases where no arbitration agreement existed but a party nevertheless submitted a claim to arbitrate which was not opposed by the other party.

68. After discussion, the Working Group agreed to retain paragraph (4) of the revised draft article 7 without modification notwithstanding some reservations that

it might cover some of the situations dealt with under articles 4 and 16, paragraph (2) of the Arbitration Model Law as well as paragraph (3) of the above proposal (see above, paragraph 59). It was said that paragraph (4) was useful, since the narrow scope of article 4 of the Arbitration Model Law did not allow it to be construed as a positive presumption of the existence of an arbitration agreement, in the absence of material evidence merely by virtue of the exchange of statements of claim and defence and since paragraph (4) was more specific than article 16, paragraph (2) of the Arbitration Model Law.

Paragraph (5) of the revised draft article 7

69. The Working Group recalled that one of the main purposes of paragraph (5) was to address factual situations such as the case where a maritime salvage contract was concluded orally by radio with reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form or a contract concluded orally but subsequently confirmed in writing or otherwise linked to a written document containing an arbitration clause, such as the general sale or purchase conditions or reference to existing rules of arbitration proposed unilaterally by a party and communicated to the other. The Working Group agreed to maintain the provision on the basis that it corresponded to modern practices.

70. Taking account of the decision of the Working Group to amend paragraph (2) of the revised draft article 7 (see above, paragraphs 50 to 64), which addressed a number of situations already covered by paragraph (5) of the revised draft article 7, a proposal was made to simplify the drafting of paragraph (5) to deal only with the issue of incorporation by reference as follows: "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, if the reference incorporates that clause into the contract." That proposal received some support.

71. A comment was made that the words "if the reference incorporates that clause into the contract" might be understood as requiring stricter conditions for a valid conclusion of an arbitration agreement than the 1985 text of the Arbitration Model Law and that therefore the existing language on that point should be maintained. To that end, the following text was proposed: "provided that the reference is such as to make that clause part of the contract". It was said that it was preferable to avoid departure from the wording of the Arbitration Model Law, which was widely understood as deferring to applicable law to determine what linkage between the reference and the clause was needed to incorporate the clause into the contract. After discussion, the Working Group agreed to maintain the original wording of the 1985 text of the Arbitration Model Law.

72. It was said that the scope of application of paragraph (5) should be limited. To that end, a proposal was made to add at the end of paragraph (5) the words "and if arbitration agreements are customary for such contracts". That proposal was objected to on the basis that it was too restrictive and created different categories of contracts, which might be unfamiliar in certain jurisdictions. The use of the word "customary" was considered to be vague and open to potentially diverging interpretations. It was recalled that the Arbitration Model Law did not provide a substantive rule as to the application of incorporation by reference but rather left its determination to national laws.

73. After discussion, the Working Group agreed that paragraph (5) would read as follows: "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

Reconciling the conflicting approaches on the form of arbitration agreement

74. It was recalled that the Working Group's intention in revising article 7 of the Arbitration Model Law had been to update domestic laws on the question of the writing requirement for the arbitration agreement, while ensuring access to enforcement under the New York Convention. To achieve that purpose, two options had been presented, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other deleted the writing requirement altogether (the alternative proposal, see above, paragraph 47). A suggestion was made and adopted that both the revised draft article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.

75. The Working Group agreed to further consider the drafting of the alternative proposal, based on the text contained in A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.137/Add.1. It was said that the main purpose of the alternative proposal was to delete paragraph (2) and only retain paragraph (1) of article 7 of the Model Law. The Working Group agreed that the last sentence of paragraph (1) which read: "[An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.]" should be deleted and the alternative proposal would read as follows: "'An arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

Article 35, paragraph (2) of the Arbitration Model Law

76. The Working Group considered whether revision of article 7 impacted on paragraph (2) of article 35 of the Arbitration Model Law (see above, paragraph 48). It was proposed that paragraph (2) of article 35 of the Arbitration Model Law be amended to omit the requirement to submit the original arbitration agreement, a duly certified copy or any translation thereof such that the provision would read: "The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a certified copy thereof. If the award is not made in an official language of this State, the party shall supply a translation thereof into such language." It was stated that, irrespective of the option chosen by an enacting State in respect of revisions to article 7, the amendment to article 35 should be effected.

77. Some concerns were expressed with the proposed deletion of the requirement to provide the arbitration agreement in paragraph (2) of article 35. It was said that that modification could introduce inconsistency between the Arbitration Model Law and article IV of New York Convention, which required that the arbitration agreement or a certified copy thereof be presented. On the other hand, it was noted that article VII, paragraph (1), of the New York Convention recognized the right of a party to enforce an arbitral award in the manner allowed by applicable national law. It was also stated that deleting the requirement to provide the arbitration agreement

would impact negatively on article 36 of the Arbitration Model Law where the grounds upon which enforcement of an award might be refused rested on the terms of the arbitration agreement. It was noted that the 1985 text of the Arbitration Model Law already included a footnote to paragraph (2) of article 35, which explained that the conditions set forth in that paragraph were intended to set maximum standards and thus left it open to a State to impose less onerous conditions to be met by a party seeking enforcement. The view was expressed that it was therefore unnecessary to delete the reference to the arbitration agreement from the text of paragraph (2) of article 35.

78. Nevertheless, after discussion, the Working Group agreed that the requirement to provide the arbitration agreement could be dispensed with under paragraph (2) of article 35 and that if the award was not made in an official language of the State, then the court might, but was not obliged to, require the requesting party to provide a duly certified translation thereof.

79. It was further proposed to delete from the revised draft paragraph (2) of article 35 the words "duly authenticated" used in relation to the award as these words had given rise to problems in practice and were open to different interpretations. That proposal was adopted by the Working Group.

80. It was agreed that paragraph (2) of article 35 be redrafted as follows: "The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language." It was agreed that the existing footnote to paragraph (2) of article 35 should be maintained without modification. It was noted that flexibility with respect to the submission of the translation into the language of the court existed in a number of legal systems and that it was desirable to recommend that national legislators consider adopting such a flexible approach.

VI. Explanatory material in relation to the legislative provisions on interim measures, preliminary orders and the form of arbitration agreement

81. The Working Group agreed that explanatory material in relation to the legislative provisions on interim measures, preliminary orders and the form of arbitration agreement could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraphs 18, 19, 26 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on interim measures, preliminary orders and the form of arbitration agreement to enacting States in a guide to enactment and use of the revised provisions.

VII. Draft interpretative instruments regarding article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

82. The Working Group recalled that, at its thirty-sixth session, it discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention, in order to offer guidance on the interpretation and application of the writing requirement contained in article II, paragraph (2), of the New York Convention and to achieve a higher degree of uniformity. At its thirty fourth session (Vienna, 25 June-13 July 2001) (A/56/17, para. 313), the Commission agreed that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-right provision set out in article VII, paragraph (1), of the New York Convention. For that purpose, the Working Group had agreed to postpone its discussions regarding the writing requirement and the New York Convention.

83. In view of the progress that had been made at the current session in connection with the writing requirement under the Arbitration Model Law, the Working Group considered the draft interpretative instrument on article II, paragraph (2), of the New York Convention, reproduced in A/CN.9/508, para. 41 as well as the draft interpretative instrument on article VII, paragraph (1), of the New York Convention contained in A/CN.9/WG.II/WP.139, para. 37.

84. Questions were raised as to the legal status in international law of an interpretative instrument. It was questioned whether a non-binding interpretative instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention. In that respect, it was suggested that an interpretative instrument was not sufficient to deal with the practical problems and the existing disharmony in the application of article II, paragraph (2), of the New York Convention and that the Working Group should focus instead on the preparation of an amending protocol to the New York Convention. On the other hand, the view was expressed that, in order to increase the persuasive value of the instrument, the interpretative declaration should be endorsed by the General Assembly of the United Nations. The view was also expressed that UNCITRAL, as the core legal body in the United Nations system in the field of international trade law, would be the best body to adopt such a declaration.

85. Concerns were expressed that declarations interpreting either article II, paragraph (2), or article VII, paragraph (1), of the New York Convention would give an indication that article II, paragraph (2), did not already provide for a liberal, flexible and broad approach to the form requirement and that adopting such a declaration ran the risk of upsetting such interpretation that article II, paragraph (2), of the New York Convention already enjoyed in some jurisdictions. However, taking account of the diverging and sometimes conflicting interpretations that existed in relation to the application of article II, paragraph (2), the Working Group agreed that guidance on that matter would be helpful.

86. The Working Group proceeded to consider the text of the draft interpretative declaration on article VII, paragraph (1), of the New York Convention. In support of adopting that declaration, it was said that that approach would encourage the

development of rules favouring the validity of arbitration agreements in a wider variety of situations. It was explained that the declaration on article VII, paragraph (1), of the New York Convention would encourage States to adopt the revised version of article 7 of the Arbitration Model Law and pro-enforcements laws and it was observed that the recommendation contained in paragraph 13 of the draft declaration was not limited to the question of the arbitration agreement, but was broad enough to encompass any aspect of the enforcement procedure.

87. A suggestion was made that it would be preferable to include, in the draft declaration on article VII, paragraph (1), of the New York Convention, provisions clarifying the meaning of article II, paragraph (2), of the New York Convention. It was recalled that article II, paragraph (2), had been the subject of different interpretations in State courts, resulting from the differences of expression between the five equally authentic texts of the Convention. Such differences were partly due to the fact that, for example, in the English version, the definition of "agreement in writing" (by using the word "includes") appeared to provide a non-exhaustive list of examples whereas some of the other equally authentic language versions appeared to provide an exhaustive list of elements of the definition.

88. In order to address those concerns, it was said that the draft interpretative declaration on article VII, paragraph (1), of the New York Convention should include a statement on the interpretation of article II, paragraph (2), of the New York Convention. It was decided that the draft interpretative declaration regarding article VII, paragraph (1), of the Convention, as it was reproduced in A/CN.9/WG.II/WP.139, should be retained subject to two amendments. First, paragraph 10 of the declaration should be amended by adding the words "particularly with respect to article 7" after the words "as subsequently revised". Paragraph 10 of the draft declaration would therefore read: "Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts," Secondly, a new paragraph, numbered paragraph 13, could be inserted, as follows: "Recommends that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,". It was noted that that amendment would require that paragraph 13 be renumbered as paragraph 14 and the title of the declaration should be revised to refer to the interpretation of articles II, paragraph (2) and VII, paragraph (1). Those amendments were agreed to by the Working Group.

VIII. Possible future work in the field of settlement of commercial disputes

89. The Working Group undertook preliminary discussions regarding the desirability and feasibility of undertaking work on various issues, outlined in previous documents (A/CN.9/468, paras. 107-109; A/55/17, para. 396; A/60/17, para. 178) and the priority consideration that might be given to those issues.

90. The possible new topics upon which the Working Group was invited to focus its attention, included: possible revision of the UNCITRAL Arbitration Rules; arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes, insolvency or unfair competition); online dispute resolution (ODR); and State immunity in light of the recently adopted International Law Commission Convention on Jurisdictional Immunities of States and their Property (hereafter "the Jurisdictional Immunities Convention").

91. It was stated that all the listed topics were worthy of consideration and that topics such as sovereign immunity and arbitrability might require the development of a binding instrument to be effectively addressed. A broader suggestion was made that UNCITRAL should not confine itself to a piecemeal approach to individual issues but work instead on the preparation of an international binding instrument on international commercial arbitration, bearing in mind previous instruments such as the 1961 European Convention on International Commercial Arbitration and other similar texts. It was suggested that work on such a project should not seek to revise arbitration regimes that worked well in practice such as the New York Convention. While interest was expressed in such a larger project, the Working Group was cautioned not to include in its work programme unnecessarily time-consuming projects, and to focus on issues of practical interest to the arbitration community.

92. On the question of State immunity, the Working Group noted that, in December 2004, the General Assembly adopted the Jurisdictional Immunities Convention (see resolution A/RES/59/38). The Working Group was invited to consider whether, taking account of the application of that Convention to the immunity of a State and its property from the jurisdiction of the courts of another State, the question of immunity was a matter that needed to be addressed in the context of arbitration from the perspective of an agreement by the State to participate in arbitration and the enforcement of arbitral awards against a State. Concern was expressed that the topic of sovereign immunity should be limited to the point of enforcement and that work on that topic in the area of arbitration could create confusion. Nonetheless, support was expressed for work to be undertaken on that topic, particularly noting that there was growing case law where States that participated in investment arbitrations failed to comply with arbitral awards. It was also cautioned that the topic of sovereign immunity raised questions of public policy, which did not easily lend itself to harmonisation.

93. On the topic of revision of the UNCITRAL Arbitration Rules, it was noted that these Rules would have their thirtieth anniversary in 2006 and that conferences were to be convened by the Secretariat to discuss ideas and areas for possible revision of those Rules. Although reservation was expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority. It was suggested that, given the wide use of the UNCITRAL Arbitration Rules, any needed revision would be of positive benefit to practitioners in international arbitration. In that respect, it was noted that a number of arbitration institutions had undertaken a revision of their arbitration rules based on the UNCITRAL Arbitration Rules. The work of those arbitration institutions could be made available to assist the Working Group in any review of the UNCITRAL Arbitration Rules. It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be

undertaken with practitioners to develop a list of topics on which updating or revision was necessary.

94. Another possible topic suggested for consideration to the Working Group was the revision of article 27 of the Arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence in an arbitration but allowed the court to execute that request "within its competence and according to its rules on taking evidence". It was suggested that article 27 could be revised to oblige a court to render such assistance. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration by appropriately amending the Arbitration Model Law. It was observed that those injunctions were impacting negatively on international arbitration and increased both the cost and complexity thereof. In addition, it was suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations.

95. The Working Group took note of the above suggestions.

IX. Other business

96. The Working Group took note of the discussions in Working Group III (Transport Law) at its sixteenth session (Vienna, 28 November-9 December 2005) as to the compatibility of the New York Convention and the Arbitration Model Law with the draft article 83 (Arbitration Agreements) of its draft convention on the carriage of goods [wholly or partly] [by sea] and a suggestion that the opinion of the Working Group on Arbitration should be sought (see paras. 101-103 of A/CN.9/591).

97. As a result, the Working Group requested the Secretariat to convene an informal joint group of experts drawn from both Working Groups to assist the Secretariat to report on these matters as a matter of urgency at the next sessions of the two Working Groups.

Annex I

Revised legislative provisions on interim measures and preliminary orders

Chapter IV bis. Interim measures and preliminary orders

Section 1—Interim measures

Article 17—Power of arbitral tribunal to order interim measures

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

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

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

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

Article 17 bis—Conditions for granting interim measures

(1) The party requesting an interim measure under article 17 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

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

(2) With regard to a request for an interim measure under article 17 (2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2—Preliminary orders

Article 17 ter—Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application

for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17 bis apply to any preliminary order, provided that the harm to be assessed under article 17 bis, paragraph (1)(a), is the harm likely to result from the order being granted or not.

Article 17 quater—Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3—Provisions applicable to interim measures and preliminary orders

Article 17 quinquies—Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 sexies—Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 septies—Disclosure

(1) The party requesting an interim measure shall promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (1) of this article.

Article 17 octies—Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4 - Recognition and enforcement of interim measures

Article 17 novies—Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 decies.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 decies—Grounds for refusing recognition or enforcement[*]

(1) Recognition or enforcement of an interim measure may be refused only:

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

(i) such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

[*] The conditions set forth in article 17 decies are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) if the court finds that:

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

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

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5—Court-ordered interim measures

Article 17 undecies—Court-ordered interim measures

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

Other provision of the Arbitration Model Law to be amended

Article 1, paragraph (2) of the Model Law

(2) The provisions of this Law, except articles 8, 9, 17 novies, 17 decies, 17 undecies, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Annex II

Revised legislative provisions on the form of arbitration agreement

(1) Revised draft article 7

Article 7. Definition and form of arbitration agreement

(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its [terms are] [content is] recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "Electronic communication" means any communication that the parties make by means of data messages; "Data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy .

(5) Furthermore, an arbitration agreement is in writing if it is contained 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 the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract

(2) Alternative proposal

Article 7. Definition of arbitration agreement

'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Other provision of the Arbitration Model Law to be amended

Article 35, paragraph (2) of the Model Law

The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language.

Annex III

Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

"Declaration regarding interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

"The United Nations Commission on International Trade Law,

"[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

"[2] *Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development are represented in the Commission,

"[3] *Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

"[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

"[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

"[6] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference 'considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes',

"[7] *Bearing in mind* differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

"[8] *Taking into account* article VII, paragraph (1), of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

"[9] *Considering* the wide use of electronic commerce,

"[10] *Taking into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

"[11] *Also taking into account* enactments of domestic legislation, including case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

"[12] *Considering* that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

"[13] *Recommends* that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive,

"[14] *Recommends* that article VII, paragraph (1), of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."