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Report of the Working Group on Arbitration on the work of its thirty-eighth session* (New York, 12-16 May 2003)

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* The date of submission of this report is a consequence of the dates of the Working Group session.

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I. Introduction

1. At its thirty-second session, in 1999, the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) (hereafter referred to as “the Model Law”), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.¹

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

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as “the New York Convention”) (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (ibid., para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). It was noted with approval that, with respect to “online” arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (ibid., para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (ibid., para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.⁶

4. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and

thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. At its thirty-fifth session, in 2002, the Commission took note with appreciation of the report of the Working Group on the work of its thirty-sixth session (A/CN.9/508). The Commission commended the Working Group for the progress accomplished so far regarding the issues under discussion, namely, the requirement of the written form for the arbitration agreement and the issues of interim measures of protection.

6. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph (2), of the Model Law (see A/CN.9/WG.II/WP.118, para. 9) and discussed a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (*ibid.*, paras. 25-26). The Commission noted that the Working Group had not reached consensus on whether to prepare an amending protocol or an interpretative instrument to the New York Convention and that both options should be kept open for consideration by the Working Group or the Commission at a later stage. The Commission noted the decision of the Working Group to offer guidance on interpretation and application of the writing requirements in the New York Convention with a view to achieving a higher degree of uniformity. A valuable contribution to that end could be made in the guide to enactment of the draft new article 7 of the Model Law, which the Secretariat was requested to prepare for future consideration by the Working Group, by establishing a “friendly bridge” between the new provisions and the New York Convention, pending a final decision by the Working Group on how best to deal with the application of article II(2) of the New York Convention (A/CN.9/508, para. 15). The Commission was of the view that member and observer States participating in the Working Group’s deliberations should have ample time for consultations on those important issues, including the possibility of examining further the meaning and effect of the more-favourable-right provision of article VII of the New York Convention, as noted by the Commission at its thirty-fourth session.⁷ For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions regarding the requirement of written form for the arbitration agreement and the New York Convention until its thirty-eighth session, in 2003.

7. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the Model Law (A/CN.9/WG.II/WP.119, para. 74) and that the Secretariat had been requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. It was also noted that a revised draft of a new article prepared by the Secretariat for addition to the Model Law regarding the issue of enforcement of interim measures of protection ordered by an arbitral tribunal (*ibid.*, para. 83) would be considered by the Working Group at its thirty-seventh session (A/CN.9/508, para. 16).

8. At its thirty-seventh session, held in Vienna from 7 to 11 October 2002, the Working Group discussed the issue of interim measures ordered by the arbitral tribunal on the basis of a proposal by the United States of America (A/CN.9/WG.II/WP.121) and a note prepared by the Secretariat (A/CN.9/WG.II/WP.119).
9. The Working Group on Arbitration, which was composed of all States members of the Commission, held its thirty-eighth session in New York, from 12 to 16 May 2003. The session was attended by the following States members of the Working Group: Austria, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Iran (Islamic Republic of), Japan, Lithuania, Mexico, Morocco, Paraguay, Russian Federation, Rwanda, Singapore, Spain, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.
10. The session was attended by observers from the following States: Australia, Cambodia, Czech Republic, Denmark, Finland, Ireland, Kuwait, Libyan Arab Jamahiriya, Madagascar, Monaco, Pakistan, Panama, Peru, Philippines, Poland, Republic of Korea, Syrian Arab Republic, Switzerland, Turkey and Venezuela.
11. The session was also attended by observers from the following international organizations: (a) intergovernmental organizations; International Cotton Advisory Committee (ICAC), the NAFTA Article 2022 Advisory Committee and the Permanent Court of Arbitration; (b) non-governmental organizations invited by the Commission: the Arab Union of International Arbitration, Center for International Legal Studies, Club of Arbitrators, Global Center for Dispute Resolution Research, Inter-American Bar Association (IABA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Law Institute (ILI), the Regional Centre for International Commercial Arbitration, School of International Arbitration, the American Bar Association, the Cairo Regional Centre for International Commercial Arbitration, the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), the Gulf Cooperation Council, the International Federation for Commercial Arbitration, the London Court of International Arbitration (LCIA), the National Law Center for Inter American Free Trade and the Union des avocats européens.
12. The Working Group elected the following officers:
Chairman: Mr. José María ABASCAL ZAMORA (Mexico)
Rapporteur: Ms. Pakvipa AHVIPHAN (Thailand)
13. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.122); (b) a note by the Secretariat containing the text on recognition and enforcement of interim measures of protection (A/CN.9/WG.II/WP.119); (c) the report of the Working Group on its thirty-seventh session (A/CN.9/523); (d) a note by the Secretariat containing a revised text of the power of an arbitral tribunal to order interim measures (A/CN.9/WG.II/WP.123).
14. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on interim measures of protection.
4. Other business.
5. Adoption of the report.

II. Summary of deliberations and decisions

15. The Working Group discussed agenda item 3 on the basis of the text contained in paragraph 78 of A/CN.9/523. The deliberations and conclusions of the Working Group with respect to that item are reflected in chapters III and IV below.

III. Recognition and enforcement of interim measures issued by the arbitral tribunal

A. General discussion

16. The Working Group recalled that, at its thirty-fourth session (2001), it had discussed the question of enforcement of interim measures of protection issued by an arbitral tribunal under article 17 on the basis of draft provisions that had been prepared by the Secretariat. The considerations of the Working Group were reflected in the report of that session (A/CN.9.487, paras. 76-87) but for lack of time, the Working Group did not complete its consideration on the enforcement provisions.

17. The Working Group also recalled that it had had a brief discussion at its thirty-seventh session (2002) on the issue of recognition and enforcement of interim measures of protection based on the note prepared by the Secretariat (A/CN.9/WG.II/WP.119, para. 83) and draft text (also reproduced in A/CN.9/523, para. 78) as follows (“the draft enforcement provision”):

Enforcement of interim measures of protection

“(1) Upon an application by an interested party, made with the approval of the arbitral tribunal, the competent court shall refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if:*

- (a) The party against whom the measure is invoked furnishes proof that:
 - (i) [*Variant 1*] The arbitration agreement referred to in article 7 is not valid [*Variant 2*] The arbitration agreement referred to in article 7 appears to not be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement]

* The conditions set forth in this article are intended to limit the number of circumstances in which the court must refuse to enforce interim measures. 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 must be refused.

to be decided by the arbitral tribunal in accordance with article 16 of this Law];

(ii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

(iii) The party against whom the interim measure is invoked was unable to present its case with respect to the interim measure [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

(iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal;

(b) The court finds that:

(i) The measure requested is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or

(ii) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

“(2) Upon application by an interested party, made with the approval of the arbitral tribunal, the competent court may, in its discretion, refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if the party against whom the measure is invoked furnishes proof that application for the same or similar interim measure has been made to a court in this State, regardless of whether the court has taken a decision on the application.

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

“(4) In reformulating the measure under paragraph (1) (b)(i), the court shall not modify the substance of the interim measure.

“(5) Paragraph (1) (a)(iii) does not apply

[*Variant 1*] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period.

[*Variant 2*] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.

[*Variant 3*] if the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17 (2), the interim measure of

protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the measure is invoked.”

18. The Working Group also recalled that another drafting proposal had been made by one delegation at its thirty-seventh session (A/CN.9/523, para. 79). That text (“the alternative proposal”) was as follows:

“(1) Interim measures of protection issued and in effect in accordance with article 17, irrespective of the country in which they were issued, and whether reflected in an interim award or otherwise, shall be recognized as binding and, upon application in writing to the competent court, be enforced subject to the provisions of articles 35 and 36, except as otherwise provided in this article. Any determination made on any grounds set forth in article 36 in ruling on such an application shall be effective only for purposes of that application.

“(2) (a) Recognition or enforcement of interim measures of protection shall not be refused on the ground that the party against whom the measures are directed did not have notice of the proceedings on the request for the interim measures or an opportunity to be heard if

(i) The arbitral tribunal has determined that it is necessary to proceed in that manner in order to ensure that the measure is effective, and

(ii) The court makes the same determination

(b) The court may condition the continued recognition or enforcement of an interim measure issued without notice or an opportunity to be heard on any conditions of notice or hearing that it may prescribe.

“(3) A court may reformulate the interim measure to the extent necessary to conform the measure to its procedural law, provided that the court does not modify the substance of the interim measure.

“(4) While an application for recognition or enforcement of an interim measure is pending, or an order recognizing or enforcing the interim measures is in effect, the party who is seeking or has obtained enforcement of an interim measure shall promptly inform the court of any modification, suspension, or termination of that measure.”

19. Pursuant to its earlier agreement, the Working Group agreed to discuss the provision on recognition and enforcement of interim measures before it reverted back to the provision on interim measures of protection ordered by an arbitral tribunal.

20. At the thirty-seventh session (2002) it was decided that the discussion would be continued at a future session on the basis of both prepared texts. At the thirty-eighth session, the discussion focused initially on the text of the draft enforcement provision. It was suggested that a provision on recognition and enforcement of interim measures should reflect four principles. First, that the legal framework for enforcement of interim measures should be similar to that existing for the enforcement of arbitral awards under articles 35 and 36 of the Model Law, in particular, with some specific changes needed to adapt these grounds to interim measures. In this respect, it was said that, whilst the draft enforcement provision took account of most of the grounds listed in article 36, it had excluded some of the

grounds. For example, it was noted that, as currently drafted, that provision did not include the grounds that the party to the arbitration agreement was under some incapacity as was provided in article 36 (1) (a)(i) of the Model Law or that the decision on the interim measure was beyond the scope of the submission to arbitration (article 36 (1) (a)(iii)).

21. Second, it was suggested that the right to seek recognition and enforcement of an interim measure should not, as was currently the case under paragraph (1) of the draft enforcement provision, be conditional upon the approval of the arbitral tribunal. Third, it was said paragraph (2) of the draft enforcement provision, which gave a court the discretion to refuse to recognize or enforce an interim measure solely on the ground that a similar application had been made in another court in that State was too broad. It was suggested that, where an application for enforcement was made before several courts, these courts should be free to evaluate the best way to proceed. It was said that the mere fact that a party had sought enforcement in two different State courts should not of itself be a ground for non-enforcement as there could be legitimate grounds why the application would be made in different State courts. For example, the applicant could have assets in more than one jurisdiction in a State or it could be unclear which court was the proper court in which to make that application.

22. Fourth, it was suggested that it was crucial that the arbitral tribunal's power to decide its own jurisdiction should be preserved. It was said that variant 1 in subparagraph (a)(i) of paragraph (1) of the draft enforcement provision held the risk that a court could rule on an arbitral tribunal's jurisdiction and thereby pre-empt that determination by an arbitral tribunal. Therefore, the policy sought to be achieved by variant 2, namely that it was for the arbitral tribunal to determine in the first instance its jurisdiction, was broadly supported.

23. As to the drafting of variant 2, various observations were made. It was said that the language was too narrow because it referred only to one type of jurisdictional issue, namely the validity of an agreement, and did not cover other jurisdictional issues that could arise and were contemplated by article 36 of the Model Law, such as, for example, the possibility that the interim measure was outside the scope of a valid arbitration agreement. It was also said that the wording in variant 2 did not appropriately cover all instances, such as when the tribunal had already ruled on its jurisdiction and the instance where jurisdiction was disputed but the arbitral tribunal had not yet determined the matter. To the extent that, as currently drafted, variant 2 allowed the court to make a determination as regards the jurisdiction of the arbitral tribunal (for example, by refusing enforcement on the basis that the arbitral tribunal did not have jurisdiction) it was said that such a determination should have effect only in respect of the enforcement of the interim measure of protection, and in particular should not prevent the arbitral tribunal from continuing with the arbitral proceedings.

24. It was noted that the words "made with the approval of the arbitral tribunal", which appeared in both paragraphs (1) and (2) of the draft enforcement provision, meant that recognition and enforcement was conditional upon the approval of the arbitral tribunal. The Working Group undertook a careful examination of the question whether an arbitral tribunal's approval should be sought before an application for recognition and enforcement of an interim measure could be sought. It was said that the chapeau, as currently drafted, did not make it clear that that

approval referred to the application for recognition and enforcement of an interim measure of protection. In order to clarify this point it was suggested that the chapeau be redrafted to provide that: "Upon an application by an interested party, made with the approval of the arbitral tribunal to recognize and enforce an interim measure of protection issued pursuant to article 17, irrespective of the country in which it was ordered, the competent court shall".

25. Two conflicting views were expressed as to the necessity for obtaining the approval of an arbitral tribunal before seeking recognition and enforcement of an interim measure. Against its inclusion it was said that such an approval was implicit from the fact that the arbitral tribunal had granted such a measure and thus expressly requiring such approval was unnecessary. It was also said that imposing such a condition could have a detrimental effect on the timing of enforcement of an interim measure. It was suggested that, if such approval could not be implied, then the text could provide that the arbitral tribunal should expressly state that the interim measure was enforceable at the time that it made the interim measure. Whilst support was expressed for that suggestion, it was not ultimately accepted for the reason that it was considered unnecessarily time-consuming and unduly burdensome on the tribunal. Another suggestion was that a distinction might be introduced in the draft provision according to whether the interim measure of protection was made in the form of an award or a procedural order. That suggestion was objected to on the ground that practice might vary as to whether a given type of interim measure would be granted in the form of an award or a procedural order. The view was expressed that strictly speaking no interim measure could be regarded as an award in the sense that it would not bring a final solution to any part of the dispute.

26. In support of requiring approval by the arbitral tribunal before court enforcement could be sought, it was said that, given the different nature of interim measures that could be made by an arbitral tribunal ranging from interim awards to mere procedural orders and in order not to restrict a tribunal's discretion to amend its interim measures, it would be advisable to condition an application for recognition or enforcement of interim measures upon the approval of the arbitral tribunal. It was further said that it was not implicit in the making of an interim measure that it could be recognized and enforced in a court. In this respect it was said that, in some cases, an interim measure might be granted without its enforcement by courts being envisaged by the arbitral tribunal. It was said that, in such cases, what was implicit was that the interim measure would be complied with by a party against whom it was made or that the arbitral tribunal had available to it the means to make compliance likely, such as the power to draw adverse inferences, if the measure was not complied with. In other words, whilst it could be implied that an interim measure was binding on the parties and would be complied with, it was not implicit that court enforcement would always be needed. It was suggested that the words "made with the approval of the arbitral tribunal" in paragraph (1) of the draft enforcement provision be substituted by words along the lines of "where the interim measure so permits" or "unless otherwise provided by the arbitral tribunal".

27. In support of including a precondition that an arbitral tribunal approve an application for recognition and enforcement of an interim measure it was also stated that the arbitral tribunal was often more informed than a court as to the circumstances of the arbitral matter both in substance and in its procedural history.

For this reason it was said that consideration should be given to ensuring that an arbitral tribunal would have the discretion to determine if an interim measure was enforceable or not. It was suggested that draft article 17 could be amended to define an interim measure either as an order that was enforceable or as an expression of a provisional intention of an arbitral tribunal that was not enforceable. It was said that this did not mean that some interim measures were enforceable and others were not, but merely indicated that the sanctions available for non-compliance with an interim measure of protection depended on the subject of the interim measure.

28. It was generally agreed that the title to the draft article was too narrow and, to properly reflect the scope of the provision, reference should be made to recognition as well as enforcement of interim measures of protection. Following on from this suggestion, it was suggested that, given that this draft article was aimed at recognition and enforcement, instead of using the negative statement “the competent court shall refuse to recognize” in the chapeau of draft article (1), it would be preferable to use a positive statement. One delegation proposed the following text to address the various concerns that had been expressed: “Unless otherwise provided by the arbitral tribunal an order or award for interim measures issued by the arbitral tribunal shall be recognized as binding and, upon application in writing to the competent court, shall be enforced, subject to the provisions of this article. The court may refuse to recognize and enforce an interim measure if ...”. Some support was expressed for this text. However, it was suggested that the words “recognized as binding” should be deleted. Alternatively, it was suggested that the text could be redrafted along the lines of “an order or award for interim measures issued by the arbitral tribunal shall be recognized and, unless otherwise provided by the arbitral tribunal upon application in writing to the competent court, shall be enforced, subject to the provisions of this article”. It was agreed that the Secretariat should revise the text bearing in mind the above suggestions.

29. Concern was expressed that the reference to an application “by an interested party” (which appeared in both paragraphs (1) and (2) of the draft enforcement provision) could be too broad and could include a party other than a party to the dispute. It was suggested that consideration be given to a narrower term such as the party that was the beneficiary of the interim measure being sought. In this respect, it was noted by one delegation that the alternative proposal offered one solution as it did not include a reference to the term “interested party” and did not require approval by the arbitral tribunal before recognition and enforcement was sought. No decision was made on the point and it was widely felt that the discussion be resumed at a later point.

B. Discussion of specific provisions on the basis of a revised draft

30. With a view to accommodating various concerns expressed in respect of the draft article, a revised draft prepared by a number of delegations was presented. It was said that the intention of the revised draft was to encapsulate the conclusions that had been reached in respect of the chapeau to draft article (1) and subparagraph (a)(i). It was explained that the revised draft had been divided into four paragraphs to provide clarification. The revised draft was as follows:

“(1) An order or award for interim measures issued by an arbitral tribunal, that satisfies the requirements of Article 17, shall be recognized as binding.

“(2) Unless otherwise provided by the arbitral tribunal, such interim measure shall be recognized and enforced upon application in writing to a competent court subject to the provisions of this article.

“(3) The court may refuse to recognize and enforce an interim measure if:

(a) The court is satisfied that there is a substantial issue as to the jurisdiction of the tribunal;

(b) ...

(c) ...

(d) ...

“(4) Any determination made on any ground in (3) above shall be effective only for the purposes of the application to recognize and enforce the interim measure.”

31. The Working Group proceeded to examine the revised draft. General support was expressed for the overall approach taken in the revised draft although some concerns were expressed both as to substance and drafting.

1. Paragraph (1) of the revised draft

32. It was stated that paragraph (1) of the revised draft included a broader formulation than that used in the draft enforcement provision by replacing the words “interim measure of protection referred to in article 17” with “An order or award for interim measures issued by an arbitral tribunal, that satisfies the requirements of Article 17”. It was said that the intention behind the formulation in the revised draft was to ensure that an interim measure that was sought to be enforced would have to comply with the safeguards that had been established in draft article 17, irrespective of whether that measure was ordered in a country that had adopted the Model Law or in another country. It was pointed out that the reference to “an order or award” in paragraph (1) was unnecessary, particularly given that draft paragraph 17 (2) did not prejudice the form that an interim measure should take. That proposal was accepted.

33. It was generally agreed that paragraph (1) of the revised draft should include the words “irrespective of the country in which it was ordered” as provided for in draft paragraph (1) of the draft enforcement provision.

2. Paragraph (2) of the revised draft

34. In respect of paragraph (2), it was stated that the reformulation reflected the decision of the Working Group made earlier (see para. 28, above) that the provision should first provide a positive statement that an interim measure should be recognized and enforced and then set out the grounds upon which recognition or enforcement could be refused. It was also stated that the words “Unless otherwise provided” had been included to reflect the decision that an arbitral tribunal should be able to provide at the time of ordering the interim measure that that measure was

not to be the subject of an application for court enforcement (see para. 26, above). The substance of paragraph (2) of the revised draft was said to be generally acceptable. As a matter of drafting it was suggested that paragraph (2) of the revised draft could omit the words “recognized and” since recognition was implied in enforcement. However, concern was expressed that both these terms should be included for the sake of consistency with other draft provisions as well as the Model Law. The Secretariat was requested to bear those concerns in mind when preparing a newly revised draft for continuation of the discussion at a later session. A view was expressed that the word “recognition” in paragraph (2) was not appropriate since it was very unlikely that the arbitral tribunal would provide that its decision should not be recognized as binding contrary to the general principle established in paragraph (1). The words “recognition and enforcement” were considered appropriate in paragraphs (3) and (4) of the revised draft.

3. Paragraph (3) of the revised draft

35. In respect of paragraph (3), it was pointed out that, unlike paragraph (1) (a) of the draft enforcement provision which provided that the “party against whom the interim measure is invoked furnishes proof that”, the revised draft did not make such a reference. It was said that the revised draft had been formulated more broadly so as to avoid dealing with the requirements of the burden of proof. In addition, it was said that the draft further emphasized that the circumstances in which refusal could occur were limited. To emphasize that point, it was suggested that the word “only” should be included in draft paragraph (3) of the revised draft after the word “may”. That suggestion was generally accepted.

36. It was recalled that the Working Group had had a lengthy discussion on the question of who had the burden of proof in satisfying the court of the requirements needed for enforcement of an interim measure. While it was generally acknowledged that in most practical situations it would be for the party against whom the measure was invoked to establish the grounds on which enforcement should be refused, it was widely felt that no reference to the burden of proof was needed in that paragraph. It was recalled that the prevailing view had been reached (see para. 35, above) that this was not an issue that should necessarily be dealt with in the Model Law but that it should be left to the law of the forum. It was pointed out that the revised draft had the advantage of eliminating the need to address the issue. A view was expressed, however, that a lack of such a reference in this article in comparison with articles 34 and 36 contained in the same law might be interpreted as imposing a burden of proof on the party asking for enforcement or implying that it was for the arbitral tribunal to verify these requisites *ex officio*.

37. In respect of paragraph (3) (a) of the revised draft, which included the requirement that “there is a substantial issue as to the jurisdiction of the tribunal”, it was explained that the intention was to simplify the manner in which the draft article dealt with the issue of possible court interference with the jurisdiction of the arbitral tribunal in respect of the enforcement of the interim measure. The specific criteria set out under paragraph (1) (a)(i) of the draft enforcement provision were replaced by a broad reference to the discretion of a court to decide whether there existed a substantial issue as to the jurisdiction of the tribunal. It was further explained that the intention of the revised draft was that, in order for a court to have discretion to refuse to recognize and enforce an interim measure, the court should

not only be satisfied that there was a substantial issue but also that that issue was an appropriate basis on which to refuse enforcement and recognition. It was suggested that, if that intention was not clear, a newly revised draft could expand upon this point by either noting expressly that the substantial issue should be of such a nature as to make recognition or enforcement inappropriate or that the existence of that issue was such that the interim measure was unenforceable. It was pointed out that the draft text differed from the narrower approach taken with respect to jurisdiction in the draft enforcement provision which relied on the invalidity of the arbitration agreement as a ground to refuse recognition and enforcement. That broader approach (which was said to encompass the narrower validity test) dealing, for example, with issues such as whether the arbitration exceeded the terms of reference of a valid arbitration agreement, was widely supported.

38. It was suggested that, instead of listing the grounds on which recognition and enforcement could be refused, reference could instead be made to a general ground based on a violation of public policy. Whilst some support was expressed for that suggestion, concern was expressed that that ground could provide too low a threshold for refusal. It was noted that the notion of public policy was a very vague term, described as insusceptible to definition in a number of countries. It was stated that there existed at least three different types of public policy: (1) domestic public policy understood as covering all mandatory provisions of domestic legislation; (2) public policy rules specifically established in domestic legislation for international relationships; and (3) the very limited set of rules established at the transnational level and sometimes referred to as international public policy. If the latter interpretation was to be retained, a reference to public policy might also be regarded as establishing too high a threshold for refusal of enforcement. In view of the different interpretations given by different state courts on the notion of public policy, inclusion of that as the only ground could introduce an unnecessary complication in the draft provision. It was also noted that some of the grounds upon which enforcement could be refused might not be covered by a public policy ground, in particular subparagraph (iv) which referred to the situation where an interim measure had been terminated, suspended or amended by the arbitral tribunal.

39. It was also noted that any revision of subparagraph (a) of the revised draft should also take account of earlier discussions regarding the requirement that security ought to be provided when an interim measure was granted.

4. Paragraph (4) of the revised draft

40. In respect of paragraph (4), it was said that the intention of the revised draft took account of the concern expressed in the Working Group's earlier discussion on the risk that a court, in considering a request for enforcement of an interim measure, could hinder the arbitral tribunal's right to determine its own competence (see para. 22, above). It was said that paragraph (4) expressly provided that, whatever determination was made in respect of an application for recognition and enforcement of an interim measure under paragraph (3), that determination had no impact on the competence of the arbitral tribunal. It was said that the formulation in paragraph (4) did not interfere with the notion that the final determination on the jurisdiction of the arbitral tribunal would be in the hands of the courts that recognized and enforced the final award. It was suggested that the reference to "any determination" could be ambiguous and it should be made clear that what was

intended to be covered was any determination by a court. However, it was widely accepted that paragraph (4) would have to be revisited when subparagraphs (3) (a), (b), (c) and (d) had been discussed.

41. Having completed its initial review of the revised draft, the Working Group proceeded to consider the remainder of paragraph (1) of the draft enforcement provision.

5. Subparagraph 1 (a)(ii) of the draft enforcement provision

42. It was stated that for the same reasons outlined in respect of subparagraph (a)(i), it was not necessary to expressly introduce language on the burden of proof because it was apparent that it was for the party against whom the interim measure was sought to show that it was not given proper notice of the appointment of the arbitrator or of the arbitral tribunal.

43. A concern was raised that subparagraph (a)(ii) dealt in effect with *ex parte* interim measures which the Working Group had agreed to set aside for future consideration. It was suggested that to continue work on that provision might create a provision which would run counter to any *ex parte* measures that might later be formulated. On that basis, a proposal was made to delete that subparagraph.

44. However, opposition was expressed to the deletion of that subparagraph. It was observed that, should the Working Group ultimately agree to include provisions dealing with *ex parte* interim measures, then the question of inclusion of subparagraph (a)(ii) could be revisited. However, it was pointed out that that subparagraph was not primarily intended to deal with *ex parte* interim measures. It was stated that a distinction should be drawn between, on the one hand, the situation where a conscious decision had been made to exclude a party from the debate that resulted in the issuance of an interim measure, a situation that was accurately described as an *ex parte* interim measure, and on the other hand, the situation where no such decision had been made, the situation more directly covered by subparagraph (ii). It was said that, for example, subparagraph (a)(ii) should be retained because it safeguarded a party in the situation where an arbitral tribunal might take a decision on an interim measure in the absence of one of the parties erroneously believing that that party had been properly notified. It was also said that the ground for refusal set forth in subparagraph (a)(ii) appeared in both article V of the New York Convention and in article 36 of the Model Law and, on that basis, its omission here could be interpreted to mean that proper notification of the appointment of an arbitrator or of the arbitral tribunal was not as important in the context of enforcement of interim measures as it was in the context of enforcement of awards. It was also said that the bracketed text in subparagraph (a)(ii) should be retained as its intention went beyond merely preserving the competence-competence principle. It was said that, in view of the expeditious nature of the proceedings for the issuance of the interim measures, a problem could arise with the notification of the other party and if that issue came before a court it may want to refer that issue back to the arbitral tribunal or it may want to remain seized of the matter in the interests of saving time.

45. The Working Group proceeded to discuss the bracketed text in subparagraph (a)(ii). It was stated that that text could be omitted on the basis that it sought to guard against a court encroaching upon the right of the arbitral tribunal to

determine its own jurisdiction which was adequately dealt with under the proposed paragraph (4) of the revised draft. In support of retaining the bracketed text it was stated that that language might provide a level of flexibility by allowing the court to stay proceedings, for example where there was a dispute as to whether a party had been properly notified. Suggestions were made for improving the drafting of the bracketed language. One suggestion was to add language to the effect that the court might suspend the enforcement proceedings until the parties had had an opportunity to be heard by the arbitral tribunal. Another suggestion was that the court might suspend the enforcement proceedings until all parties had been properly notified. The Working Group took note of those suggestions which the Secretariat was requested to bear in mind when preparing a newly revised draft to be considered at a later stage.

6. Subparagraph (a)(iii) of the draft enforcement provision

46. It was stated that subparagraph (a)(iii), in line with article V of the New York Convention and article 36 of the Model Law, was not intended to refer to the exceptional situation where an *ex parte* measure had been issued but more generally to the situation where, for a variety of reasons, a party had been unable to present its case. The substance of the subparagraph was found to be generally acceptable. The usefulness of the language in square brackets at the end of the subparagraph was questioned. It was stated that the bracketed language described only one among many options which would normally be open to a state court under domestic law where a party had not been given full opportunity to present its case under article 18 of the Model Law. From that perspective the bracketed language would only prove useful in the unlikely situation where the domestic rules of procedural law would not allow a court to order suspension of the proceedings. The Working Group took note of that view and agreed that the discussion should be continued at a later stage. In response to a suggestion that the words “the court may suspend the court proceedings” should be replaced by the phrase “the court shall suspend the court proceedings” it was pointed out that, should the bracketed language be ultimately retained, it would be essential to preserve the broadest possible discretion for the court, a result that would be better achieved by using the verb “may”.

7. Subparagraph (a)(iv) of the draft enforcement provision

47. The substance of subparagraph (a)(iv) was found to be generally acceptable. Various views were expressed as to how its formulation might be improved. One suggestion was that the draft provision should address the situation where the interim measure, particularly if it had been issued in the form of an award, had been set aside by a court in the country of the seat of the arbitration. It was suggested that wording along the lines of article 36 (1) (a) (v) of the Model Law might need to be added to the draft provision. Another suggestion was that the Working Group should study the implications of an interim measure being issued in the form of an award on the applicability of other provisions of the Model Law, for example article 31. In response it was stated that, irrespective of whether an interim measure had been labelled as an award, it should not be treated as an award for the purposes of applying the Model Law. In the view of various delegations, strictly speaking, no interim measure should be regarded as an arbitral award, since it was ephemeral in nature and did not attempt to solve definitively all or part of the dispute (see para. 25, above). It was observed that such an interpretation of the notion of

“arbitral award” might create the need to revisit the text of draft article 17. A note of caution was struck about dealing with the situation where an interim measure had been set aside by a foreign court. It was stated that opening that discussion might create the difficult situation where standards would need to be established to assist courts in establishing an acceptable policy regarding the setting aside of interim measures and regarding the cases where an interim measure would have to be enforced even if it had been set aside by a court in another country. With a view to avoiding some of the above concerns, it was suggested that the words “or by order of a competent court” should be added at the end of subparagraph (iv). It was agreed that the Secretariat should bear those suggestions in mind when preparing a newly revised draft for a continuation of discussions at a later stage.

8. Subparagraph (b)(i) of the draft enforcement provision

48. It was suggested that the term “procedural” should be omitted from subparagraph (b)(i) for the reason that it might be too narrow given that there could be circumstances where the court may wish to refuse to recognize and enforce an interim measure for the reason that it was incompatible with the powers conferred upon the court by its substantive laws. Further support was given to the deletion of the term “procedural” given that there were substantial differences between the content of procedural laws in different jurisdictions. While reservations were expressed about the suggestion, it was ultimately agreed that the term “procedural” could be omitted in a revised draft.

49. A question was raised whether the omission of the term “procedural” would impact negatively on draft paragraph (4) of the draft enforcement provision which prohibited a court from modifying the substance of the interim measure. In this respect it was suggested that paragraph (4) should be combined with subparagraph (b)(i). It was agreed that the Secretariat should seek to combine subparagraph (b)(i) and paragraph (4) in a revised text to be discussed at a future session.

9. Subparagraph (b)(ii) of the draft enforcement provision

50. It was suggested that the phrase “this State” should be omitted from the draft paragraph. It was noted that, even though the term “this State” was mentioned in paragraph 36 (1) (b)(i) of the Model Law, that reference was in connection with a reference to “the law of this State” and, as that phrase was not mentioned here, it was considered that it was not necessary to refer to “this State” in subparagraph (b)(ii) of the draft enforcement provision.

51. It was also suggested that, if the intention of the Working Group was to cover all three meanings of public policy (being domestic public policy, public policy forming part of the international private law and true public policy of a transnational character as discussed earlier (see para. 38), it would be unnecessarily restrictive to refer to the public policy “of this State”. In this respect it was suggested that a reference ought to be made to international public policy. However, this suggestion did not receive support for the reasons that the notion of international public policy was still a vague term which was not uniformly understood; it was suggested that to include the expression “international” in that context could introduce complexities into the text which were unwarranted. It was observed that the Working Group was not legislating in a vacuum but against a

wealth of authority in every State. It was also observed that the jurisprudence on public policy was complex and that the debate of the Working Group had only touched upon the various differences between domestic public policy, transnational public policy and international public policy that was recognized by courts in different States. It was further observed that debate on the distinctions and content of each of these terms was not settled, and by departing from the language used in article V of the New York Convention and article 36 (1) (b)(ii) of the Model Law the new model legislative provision could undermine the position established thereunder and would have the potential of broadening the concept of public policy. It was said in response that, notwithstanding the wording that existed in both the Model Law and the New York Convention, the Working Group could take the opportunity in drafting the model provision to recognize that there had been jurisprudential development of the term “international public policy” since the time that the Model Law was finalized. It was also said that, since the intention of the Working Group had been expressed to create a *sui generis* system for enforcement of interim measures of protection, it would be helpful to refer to international public policy to recognize the developments in jurisprudence that had occurred.

52. Following discussion, the prevailing view that emerged was that the term “international public policy” was not a sufficiently clear notion since it was susceptible to different interpretations. It was suggested that the term “international public policy” could be encompassed within the “public policy of this State”. It was suggested that, insofar as it might be considered that the phrase “public policy of this State” might create an impression that it only referred to domestic public policy, it may be helpful to include the words “public policy recognized by the court”. It was suggested that that formulation could encompass international public policy where it was so recognized by courts in a particular State.

10. Paragraph (2) of the draft enforcement provision

53. The view was expressed that the provision contained in paragraph (2) of the draft enforcement provision should be considered for possible inclusion in paragraph (1), as another ground for a state court to refuse enforcement of an interim measure ordered by an arbitral tribunal. On the assumption that paragraphs (1) and (2) would later be combined, the Working Group proceeded with a review of the substance of paragraph (2).

54. Lack of clarity was evident regarding the contents of paragraph (2). A number of delegations were of the view that the provision dealt with a situation where a party applied for enforcement of a single interim measure issued by an arbitral tribunal before a number of courts, located either in the same State or in different States. It was pointed out that, in and of itself, the application for enforcement of a given interim measure before several state courts should not be sufficient ground to refuse enforcement. It was stated that such an application for enforcement might be justified, for example, where assets of the defendant were located in different court jurisdictions. Other delegations observed that paragraph (2), in fact, was intended to deal with the option that might be recognized to the parties to apply for an interim measure of protection both before a court of the enacting State and before the arbitral tribunal (with subsequent application before a court of the enacting State for enforcement of the interim measure granted by the arbitral tribunal). It was widely recognized that the latter situation was the situation that was intended to be covered

by paragraph (2). Limited support was expressed for introducing in the Model Law a provision that gave the court the discretion to coordinate the relief so as to avoid conflict between several interim measures. It was pointed out that, should such a provision be retained, extensive redrafting would be necessary to clarify the scope and purpose of that provision. The widely prevailing view, however, was that it would be unnecessary to include a provision dealing with such an infrequent situation at such a level of detail. It was generally agreed that the matter of a possible conflict between interim measures requested from an arbitral tribunal and interim measures requested from state courts should be left to applicable law. After discussion, the working Group decided that paragraph (2) should be deleted.

11. Paragraph (4) of the revised draft (continued)

55. The Working Group reverted to a consideration of paragraph (4) of the revised draft as contained in paragraph 30, above (for earlier discussion, see para. 40, above).

56. It was recalled that the Working Group had earlier agreed to add the words “by the court” following the word “made” to provide greater clarity that the paragraph was addressed to a court and not to an arbitral tribunal and to provide a clearer link of that paragraph with paragraph (3) of the revised draft. The Secretariat was requested to revise the text accordingly when preparing a newly revised draft for a later session.

12. Possible restructuring of paragraph (1) of the draft enforcement provision

57. At the close of the discussion regarding the individual grounds for refusing enforcement of an interim measure issued by an arbitral tribunal, it was observed that one of the results achieved by the Working Group had been to bring those various grounds somewhat closer to the grounds listed in articles 35 and 36 of the Model Law and in article V of the New York Convention. It was thus suggested that, instead of formulating each of those individual grounds, the paragraph could be recast in the form of a general reference to “the provisions of articles 35 and 36”, with exceptions, as appropriate, where the paragraph was intended to deviate from the provisions of articles 35 and 36. In addition to offering more concise drafting, the suggestion was said to limit the risk that might arise from lack of parallelism between the grounds for refusing enforcement of an interim measure issued by an arbitral tribunal and the grounds for refusing enforcement of an arbitral award under articles 35 and 36. It was stated that, for example, the suggested redrafting would avoid any doubt as to whether a general reference to the jurisdiction of the arbitral tribunal in the draft enforcement provision was intended to cover the non-arbitrability of the dispute alongside other jurisdiction-related grounds for refusing enforcement. Some support was expressed for that suggestion. Others held the view, however, that it was preferable to spell out in the Model Law the provisions applicable to the enforcement of interim measures issued by an arbitral tribunal since the policy and legal considerations governing the enforcement of those measures were sufficiently different from those governing the enforcement of an arbitral award. It was generally agreed that, in drafting that provision, unnecessary deviation from the text of articles 35 and 36 should be avoided. Another view was that a reference to article 35 and 36 of the Model Law should be avoided to facilitate the use of the draft enforcement provision by those States that might not

have already enacted the Model Law. After discussion, the Secretariat was requested to prepare a newly revised provision and, in doing so, to consider both of the above views and suggestions and to consider the possibility of drafting alternative variants so that the Working Group would have concrete texts before it when discussing the matter further at a future session.

58. The discussion also focused on the question whether, parallel to article 36 of the Model Law, the draft enforcement provision should distinguish between, on the one hand, the situation covered by article 36 (1) (a), where grounds for refusing enforcement were examined by the court “at the request of the party against whom” the interim measure had been issued and that party would “furnish sufficient proof” that enforcement should be refused, and, on the other hand, the situation covered by article 36 (1) (b), where the court, of its own motion, would “find” that there existed a ground for refusing enforcement. It was recalled that, in its earlier discussion, the Working Group, with a view to avoiding the complexities that might arise from the allocation of the burden of proof, had decided that all grounds for refusing enforcement of an interim measure of protection should be introduced in the draft enforcement provision by the wording “the court is satisfied that” (see above, paras. 35 and 36).

59. It was suggested that, in considering the possible need for a differentiated treatment of the various grounds under paragraph (1), the three following questions should be borne in mind: (1) which party should bear the burden of proof; (2) what would be the applicable standard of proof; and (3) upon whose initiative or request would a court examine a possible ground for refusing enforcement.

60. As to which party should bear the burden of proof, the view was expressed that the allocation should follow the pattern established in article 36 of the Model Law. It was pointed out, however, that article 36 (1) (a) (ii) of the Model Law, for example, should not be interpreted as requiring the party against whom the award was invoked to bear the burden of proving the negative fact that it had not received proper notice. After discussion, the Working Group reiterated the conclusion that no provision should be made in the draft enforcement provision regarding the allocation of the burden of proof and that the matter should be left to applicable law. In the context of that discussion, doubts were expressed as to whether leaving the issue of the burden of proof to domestic law would favour the wider use of arbitration. It was recalled that the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) was unclear on that issue. By contrast, the approach taken in the New York Convention had been to allocate the burden of proof to the party resisting enforcement (an approach often referred to as the “pro-enforcement bias”). It was suggested that the same approach should be followed in the draft enforcement provision. In response, it was pointed out that a “pro-enforcement bias” might not be as justified in the case of an interim measure issued without a full appreciation of all facts of the dispute, at an early stage of the proceedings, as it was regarding an award on the merits of the case.

61. Regarding the standard of proof, a widely shared opinion was that the urgent need for enforcement and the ephemeral character of an interim measure would seem to indicate that the court should apply a *prima facie* standard when examining the issue of enforcement of such a measure, as opposed to the more stringent standard of proof that would typically be required when considering the enforcement of an arbitral award on the merits of the case. The prevailing view,

however, was that the issue of the standard of proof should not be dealt with in any detail in the draft enforcement provision and would better be left to applicable law.

62. As to whether grounds for refusing enforcement should be considered only at the request of the party or whether such grounds could be raised by the court of its own motion, it was suggested that a distinction should be drawn along the lines of subparagraphs (a) and (b) of paragraph (1) of article 36 of the Model Law. The following text was proposed:

“Recognition or enforcement of an arbitral award may be refused only:

(a) At the request of the party when the court is satisfied that ...

[all subparagraphs in subparagraph (1) (a) of the draft enforcement provision];
or

(b) If the court [finds][is satisfied] that ...

[all subparagraphs in subparagraph (1) (b) of the draft enforcement provision].”

63. The Secretariat was requested to bear that proposal in mind when preparing a newly revised draft of the enforcement provision, with possible variants, for continuation of the discussion at a future session.

13. Footnote to paragraph (1) of the draft enforcement provision

64. The Working Group proceeded to consider the text contained in the footnote to paragraph (1). It was observed that the text therein closely followed the sentiment expressed in the footnote to article 35 (2) of the Model Law. General support was expressed for the inclusion of the footnote although it was suggested that the word “must”, which appeared two times in the footnote should be replaced by the word “may”. That suggestion received support.

65. Another view expressed was that, in the context of enforcement of interim measures, a different approach than that provided for enforcement of arbitral awards might be warranted. Given that interim measures were often issued without a complete appreciation by the arbitral tribunal of the circumstances of the dispute and that the grounds listed in paragraph (1) of the draft enforcement provision were to protect the party against whom the interim measure was ordered, it was suggested that it might not be appropriate to encourage States to remove these safeguards. Against this view, it was said that since the current provision was dealing with the enforcement of *inter partes* interim measures the footnote was comparable to the footnote in article 35 (2) of the Model Law and that therefore it should be retained. It was also said that, in determining whether or not to retain the footnote, the Working Group should balance the need for harmonization between the Model Law and the risk of abuse and where that risk was low should refrain from departing from the Model Law.

66. Noting the reservations expressed as to the inclusion of such a footnote in the context of enforcement of interim measures, the Working Group agreed to retain the footnote with the amendment to replace “must”, where it appeared in the footnote, with the word “may”.

14. Paragraph (3) of the draft enforcement provision

67. In respect of paragraph (3), it was observed that the paragraph was based on the principle that a party seeking enforcement of an interim measure should be obliged to inform the court of any termination, suspension or amendment of that measure. Broad support was expressed for that principle.

68. It was stated that, since the provision reflected the principle of good faith, both parties might be subject to that obligation. It was observed that the paragraph could operate in two distinct circumstances. The first was where there was no opposition from the other party to enforcement of the interim measure. In that case, the onus of showing that that interim measure was in line with what had been ordered by the arbitral tribunal properly fell on the party seeking enforcement. The second circumstance was where there was opposition to enforcement in which case it was said that the onus should be on both parties. However, the prevailing view was the obligation to notify should properly apply only to the party seeking enforcement of the interim measure in view of the fact that the decisions to enforce interim measures were often taken *ex parte* and that enforcement orders often carried with them sanctions such as penalties, fines or being found to be in contempt of court.

69. It was suggested, and the Working Group agreed, that the obligation to notify extended also to the period after an enforcement order had been granted. In order to express that idea it was decided to replace the expression “the party who is seeking enforcement” with “the party who is seeking or has obtained enforcement”.

70. It was suggested that the provision was not complete, as it did not deal with the consequences, such as liability for damages, where a party failed to fulfil that obligation. However, the prevailing view was that it was more prudent to leave such a liability regime to the applicable national law.

71. It was observed that the purpose of notifying the court under paragraph (3) was to enable it to take a corrective measure such as to terminate, suspend or amend its own enforcement order. According to one opinion, it would be useful to state expressly that the court had the power to take such corrective measures in the light of changed circumstances about which it was notified. However, the prevailing view was that courts already had sufficient possibilities to take appropriate action in accordance with the national procedural rules and that, therefore, there was no need to formulate a unified provision on that matter. In that context, it was said that for a court to modify its enforcement order it was not sufficient that a court be notified of a change in circumstance and that a request by a party was necessary. On this point too, the Working Group considered that it should be left to be governed by the applicable procedural law.

15. Proposal for a new provision on security for requests for enforcement

72. The Working Group then turned to the question whether a court, when faced with an application to enforce an interim measure, ought to be able to order the applicant to provide security. It was suggested that the question whether security ought to be mandatory when seeking enforcement of an interim measure ought to be left to domestic law. It was observed that, given that draft article 17 conferred a power on an arbitral tribunal to order security when ordering interim measures, it was appropriate that such a power be conferred on a court when enforcing an interim measure. It was suggested that the power to order security should be

expressed as a discretion and not be mandatory. It was suggested that such a power was particularly important to bind third parties, which could not be affected by an interim measure issued by an arbitral tribunal.

73. A widely held view was that a court should have the power to order security where no order regarding security had been made by an arbitral tribunal at the time of ordering the interim measure. However, concern was expressed about extending that power to the circumstance where an arbitral tribunal had made such an order given the potential for inconsistency between such orders. It was also said that there was a risk that an applicant could be disadvantaged for making an application for enforcement if a request imposed by a court was in addition to one already required by an arbitral tribunal. In that connection, it was suggested that the situation where security was requested by a court in the context of an application for enforcement of an interim measure issued by an arbitral tribunal should be distinguished from the situation where the application for an interim measure was presented directly to the court. The view emerged that any possible conflict between security granted by an arbitral tribunal and that granted by a court could be dealt with by the court and thus the provision should simply reflect that a court had the discretion to order security when enforcing an interim measure.

74. However, concern was expressed that such a power could run the risk that a court would review the tribunal's decision as to the appropriate level of security. It was suggested that one way to reduce that risk was to circumscribe the power of a court to order security by including a text that recognized that the court had the power to order security insofar as security had not already been determined by the arbitral tribunal. It was said that that would cover any decision taken by an arbitral tribunal in respect of security whether affirmative or negative as well as allowing orders for security in respect of third parties.

75. Following that discussion, the Secretariat was requested to prepare a revised text setting out the various options discussed by the Working Group. It was clarified that these options should include a provision setting out that a court had the power to order security with bracketed text that limited such a power to the circumstance where a tribunal had not made an order with respect to security. Another option would extend this power to include a power to order security where an arbitral tribunal had made an order but the court found that order to be inappropriate or insufficient in the circumstances. A further suggested option was that the provision simply provide that a court had the discretion to order security for costs, and that the scope of the power, as well as any potential conflict with an earlier determination by an arbitral tribunal on security, would be dealt with by the court under a law other than the Model Law. A related proposal that was agreed should be reflected as another option was that the provision limit the power of the court to the question whether or not to enforce an interim measure. In that respect an analogy was drawn to the situation where a court was requested to determine enforcement of a foreign judgement in *exequatur* proceedings. Yet another option suggested was that the power of the court to order security should be limited to dealing with third party rights.

IV. Court-ordered interim measures

76. The Working Group considered a possible draft provision expressing the power of the court to order interim measures of protection in support of arbitration on the basis of the Note by the Secretariat (A/CN.9/WG.II/WP.119, paras. 75-81 and, in particular, the draft provision which read as follows:

“The court shall have the same power of issuing interim measures of protection for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the courts.”

77. General support was expressed in favour of a provision that would give a court power to issue interim measures of protection, irrespective of the country where the arbitration took place. As to the criteria and standards for the issuing of such measures, different views were expressed. One view was that the court should apply its own rules of procedures and standards. Another view favoured the criteria and standards set forth in article 17. It was generally recognized that any reference to existing standards would have to provide flexibility for the court to adapt to the specific features of international arbitration.

78. The Secretariat was requested to prepare a revised draft with variants reflecting the views expressed above. It was pointed out that the scope of the provision was not in line with the rule on territoriality expressed in the Model Law. It was generally agreed that in preparing the revised draft, attention should be given to the possible need of adapting article 1 (2) to extend the exception to the territorial application of the Model Law.

Notes

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

² *Ibid.*, paras. 340-343.

³ *Ibid.*, paras. 344-350.

⁴ *Ibid.*, paras. 371-373.

⁵ *Ibid.*, paras. 374 and 375.

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

⁷ *Ibid.*, para. 313.
