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Report of the Working Group on Arbitration on the work of its thirty-second session (Vienna, 20 – 31 March 2000)

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I. Introduction

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

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

3. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session in 1999. It requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.[2]

4. At its thirty-second session, the Commission had before it the requested note entitled "Possible future work in the area of international commercial arbitration" (document A/CN.9/460). The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day, the Congress of the International Council for Commercial Arbitration (Paris, 3-6 May 1998),[3] and other international conferences and forums, such as the 1998 "Freshfields" lecture.[4] The note discussed some of the issues and problems identified in arbitral practice in order to facilitate a discussion in the Commission as to whether it wished to put any of those issues on its work programme.

5. The Commission welcomed the note by the Secretariat and the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration. It was generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.

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

[2] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[3] *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999.

[4] Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, page 211.

6. Possible work topics considered by the Commission were the following:

a) Conciliation (A/CN9/460, paras. 8-19; A/54/17, paras. 340-343);
b) Requirement of written form (A/CN.9/460, paras. 20-31; A/54/17, paras. 344-350);
c) Arbitrability (A/CN.9/460, paras. 32-34; A/54/17, paras. 351-353);
d) Sovereign immunity (A/CN.9/460, paras. 35-50; A/54/17, paras. 354-355);
e) Consolidation of cases before arbitral tribunals (A/CN.9/460, paras. 51-60; A/54/17, paras. 356-357);
f) Confidentiality of information in arbitral proceedings (A/CN.9/460, paras. 62-71; A/54/17, paras. 358-359);
g) Raising claims for the purpose of set-off (A/CN.9/460, paras. 72-79; A/54/17, paras. 360-361);
h) Decisions by "truncated" arbitral tribunals (A/CN.9/460, paras. 80-91; A/54/17, paras. 362-363);
i) Liability of arbitrators (A/CN.9/460, paras. 92-100; A/54/17, paras. 364-366);
j) Power by the arbitral tribunal to award interest (A/CN.9/460, paras. 101-106; A/54/17, paras. 367-369);
k) Costs of arbitral proceedings (A/CN.9/460, paras. 107-114; A/54/17, para. 370);
l) Enforceability of interim measures of protection (A/CN.9/460, paras. 115-127; A/54/17, paras. 371-373);
m) Possible enforceability of an award that has been set aside in the State of origin (A/CN.9/460, paras. 128-144; A/54/17, paras. 374-376).

7. At various stages of the discussion, several other topics, in addition to those contained in document A/CN.9/460, were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time (A/54/17, para. 339).

8. In its considerations the Commission kept an open mind as to the ultimate form that future work of the Commission might take. It was agreed that decisions as to the form should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). It was thought that, even if ultimately no new uniform text would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission, possibly with suggestions for uniform interpretation, would be a useful contribution to the practice of international commercial arbitration. The considerations of the Commission on those issues are reflected in document A/54/17 (paras. 337-376 and para. 380).

9. After concluding the discussion on its future work in the area of international commercial arbitration, it was agreed that the priority items for the working group should be conciliation (A/54/17, paras. 340-343), requirement of written form for the arbitration agreement (A/54/17, paras. 344-350), enforceability of interim measures of protection (A/54/17, paras. 371-373) and possible enforceability of an award that had been set aside in the State of origin (A/54/17, paras. 374-375). It was expected that the Secretariat would prepare the necessary documentation for the first session of the Working Group for at least two, and possibly three, of those four topics. As to the other topics discussed in document A/CN.9/460, as well as topics for possible future work suggested at the thirty-second session of the Commission (A/54/17, para. 339), which were accorded lower priority, the Working Group was to decide on the time and manner of dealing with them.

10. The Commission entrusted the work to a working group to be named "Working Group on Arbitration" and requested the Secretariat to prepare the necessary documentation for the meeting.

11. The Working Group on Arbitration, which was composed of all the States members of the Commission, held its thirty-second session at Vienna from 20 to 31 March 2000. The session was attended by representatives of the following States members of the Working Group: Austria, Cameroon, China, Colombia, Egypt, Finland, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Russian Federation, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

12. The session was attended by observers from the following States: Argentina, Canada, Costa Rica, Cuba, Czech Republic, Denmark, Indonesia, Lebanon, Morocco, Netherlands, Peru, Poland, Portugal, Republic of Korea, Rwanda, Saudi Arabia, Slovakia, Sweden, Switzerland, Turkey, Ukraine and Venezuela.

13. The session was attended by observers from the following international organizations: Economic Commission for Europe, NAFTA Article 2022 Advisory Committee; Permanent Court of Arbitration; Cairo Regional Centre for International Commercial Arbitration, Chartered Institute of Arbitrators; International Chamber of Commerce (ICC); International Federation of Commercial Arbitration Institutions.

14. The Working Group elected the following officers:

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

Rapporteur: Mr V. G. HEGDE (India).

15. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.107) and the report of the Secretary-General entitled "Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement" (A/CN.9/WG.II/WP.108 and Add.1).

16. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Possible preparation of harmonized texts on conciliation; interim measures of protection; and written form of arbitration agreements.
4. Other business.
5. Adoption of the report.

II. Deliberations and Decisions

17. The Working Group discussed agenda item 3 on the basis of the report of the Secretary-General (A/CN.9/WG.II/WP.108 and Add.1). The deliberations and conclusions of the Working Group with respect to that item are reflected below.

A. Conciliation

1. General considerations

18. The Working Group took note of statements to the effect that conciliation or mediation was being increasingly used for settling commercial disputes, that the use of such non-contentious methods of dealing with disputes deserved to be promoted and that the work of the Commission in the area should be geared to such promotion. It was noted that conciliation was being used either independently from court or arbitral proceedings or as part of, or in close relationship to, such proceedings and that solutions to be adopted should take that fact into account.

19. It was generally agreed that the term “conciliation” should be understood as a broad notion encompassing various types of proceedings in which a person or a panel of persons was invited by the parties in dispute to assist them in an independent and impartial manner to reach an amicable settlement of the dispute. It was also generally agreed that such proceedings may differ as regards the procedural techniques used to facilitate settlement and that different expressions might be used to refer to such proceedings, such as, for example, "mediation" or other expressions used for non-binding methods of dispute settlement.

20. It was generally considered that decisions as to the form of the text to be prepared should be made at a later stage when the substance of prepared solutions would become clearer. However, it was noted that model legislative provisions seemed to be the appropriate form for a number of matters proposed to be discussed in the area of conciliation.

21. There was general agreement in the Working Group that the applicability of any uniform rules to be prepared should be restricted to commercial matters. It was suggested that a flexible provision such as the one contained in the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration was an appropriate way for defining which matters were to be considered commercial.

2. Admissibility of certain evidence in subsequent judicial or arbitral proceedings (A/CN.9/WG.II/WP.108, paras. 18 -28)

22. General statements were made that confidentiality of information put forward by the parties during conciliation should be safeguarded. It was noted that confidentiality of information relating to conciliation may become an issue in different contexts: (a) in the circumstances dealt with in article 20 of the UNCITRAL Conciliation Rules; (b) as a general obligation on the conciliator and the parties to keep confidential all matters relating to the conciliation proceedings (such an obligation was contained in article 14 of the UNCITRAL Conciliation Rules); and (c) in the cases where a party gave information to the conciliator subject to a specific condition that it be kept confidential and the conciliator (in line with article 10 of the UNCITRAL Conciliation Rules) was not to disclose that information to the other party. The discussion in the Working Group centered on cases under (a), which were covered by article 20 of the UNCITRAL Conciliation Rules. There was no discussion or decision made to prepare a uniform rule on a general obligation to keep matters relating to the conciliation proceedings confidential (article 14 of the UNCITRAL Conciliation Rules). (As to information given by a party to the conciliator subject to a specific condition that it be kept confidential, see below, paras. 54-55).

23. There was wide agreement in the Working Group that article 20 of the UNCITRAL Conciliation Rules provided a good basis for drafting a model legislative provision on the admissibility of certain oral and written evidence in arbitral or judicial proceedings. There was no doubt in the Working Group about the proposition that the provision to be prepared was to be subject to party autonomy.

24. With a view to avoiding too much detail in the model legislative provision, a suggestion was made not to list the types of facts that were to be covered by the provision, but instead to employ a more general wording relying on the applicable national law governing admissibility of evidence. However, caution was expressed that such an approach might not provide sufficient certainty in particular because the applicable law of evidence might itself not be sufficiently clear or because the parties might not be familiar with it.

25. It was considered that the model provision to be prepared should deal with situations where the parties had agreed to a rule such as the one contained in article 20 of the UNCITRAL Conciliation Rules (and thereby give legislative backing to such an agreement) as well as with situations where the parties engaged in a conciliation without having agreed to such a rule. In both cases, it was said, the uniform rule should aim at preventing the "spillover" of certain facts (in particular those mentioned in article 20 of the UNCITRAL Conciliation Rules) into subsequent judicial or arbitral proceedings. As to cases where the parties have not agreed on a rule such as article 20 of the UNCITRAL Conciliation Rules, it was suggested that the model provision should state that it was an implied term of an agreement to conciliate that the parties undertook not to rely in any subsequent arbitral or judicial proceedings on evidence of the types of facts to be specified in the model provision. In order to ensure that such an implied agreement would be given effect by courts and arbitral tribunals, it was suggested that it should also be provided that evidence of facts to be specified in the model provision were not to be admitted in evidence and that disclosure of those facts was not to be ordered by the arbitral tribunal or the court. In that connection, it was also suggested that the model provision should cover cases where views, admissions or proposals made during conciliation proceedings were sought to be raised in subsequent court or arbitral proceedings not by a party who had participated in the conciliation but by a third party such as a sub-contractor of a party.

26. It was suggested it should be made clear that the model provision would apply to facts to be specified in it whether or not they were recorded in a document.

27. For the cases where evidence was offered in contravention of the statutory provision to be prepared, it was considered that the court or the arbitral tribunal should deal with the issue by ordering that such evidence was inadmissible and was to be disregarded. While other sanctions might apply when a party breached the statutory provision on the exclusion of certain evidence, as provided in the applicable law, the model provision did not necessarily have to deal with those sanctions.

28. It was pointed out that any solution should be flexible enough to deal adequately with different circumstances in which parties might participate in conciliation proceedings, including those where the parties attempted to reach settlement in a conciliation during court or arbitral proceedings.

29. It was observed that a party might attempt to present, during court or arbitral proceedings, inadmissible evidence of proposals or views which that party itself had made during earlier conciliation proceedings and mention in that connection also proposals or views that had been made during the conciliation by the other party. It was considered that the model provisions to be prepared should be broad enough to cover such situations.

30. The Working Group requested the Secretariat to prepare for its next session draft legislative provisions based on the considerations in the Working Group.

3. Role of conciliator in arbitration or court proceedings (A/CN.9/WG.II/WP.108 paras. 29-33)

31. On the question of whether a person who had acted as a conciliator could subsequently be appointed as an arbitrator, represent a party in an arbitration or be called as a witness, it was generally agreed that article 19 of the UNCITRAL Conciliation Rules provided a useful starting point for consideration of a possible legislative provision. It was observed that in some States a clear distinction was drawn between the conduct of conciliation and arbitration and there was a concern that, if the conciliator could subsequently act as arbitrator, the parties would be less likely to approach the conciliation openly and share information, potentially jeopardizing its success. In other States the conduct of conciliation and arbitration were not so clearly distinguished.

32. As a preliminary point, it was suggested that the roles referred to in article 19 (arbitrator, representative or counsel, witness) should be treated separately, since each raised different considerations. It was also suggested that, while some of those issues could appropriately be addressed in a statutory provision, others might best be addressed by, for example, codes of conduct or ethics. The view was expressed that in the context of the conciliator acting as representative of a party, the general position should be a prohibition, subject to contrary agreement by the parties. That approach would encourage frank exchanges between the parties and protect the confidentiality and integrity of conciliation and arbitration processes. Ethical considerations might also be relevant in that context.

33. In the context of the conciliator appearing as a witness, it was suggested that the general position should also be a prohibition against parties or others compelling such testimony, although there might be a need for exceptions. Circumstances in which that might be necessary could include, for example, proceedings to enforce the settlement agreement where it was alleged that the agreement was fraudulently obtained. In that regard, however, it was pointed out that fraud might be either civil or criminal in nature and raise questions of national law. Any exceptions to the general rule would need to be carefully considered. It was also noted, in the context of witnesses, that considerations relating to witnesses appearing in arbitral proceedings might be different to those applicable to judicial proceedings. In addition, concern was expressed as to the extent to which, firstly, parties could agree to exclude a witness from subsequent proceedings, whether arbitral or judicial, and secondly, an undertaking on the part of the conciliator not to appear would always be effective in all circumstances.

34. As to the question of a conciliator acting as an arbitrator, it was suggested that that should also be prohibited unless otherwise agreed by the parties. It was noted, however, that in some cases there might be ethical considerations which would suggest that the conciliator should decline to act.

35. General support was expressed in favour of a rule which provided that, unless otherwise agreed by the parties, the conciliator could not perform those roles. It was observed that the benefit of establishing a statutory provision to that effect would be to ensure that the agreement between the parties was given full effect and observed by all relevant parties and institutions, including the appointing authority and a court. Some support was also expressed in favour of a rule providing that the parties would be deemed to have agreed that the conciliator should not act.

36. A further question was raised concerning extension of the restrictions on the conciliator beyond the actual case considered in the conciliation to cases on related contracts or other disputes arising from the same contract as discussed in paragraph 33 of document A/CN.9/WG.II/WP.108. It was suggested that that issue was very complex and raised difficult drafting issues of how the relationship between the different contracts and disputes could be defined. It was pointed out that an examination of the facts of each case would be necessary to

determine, for example, the extent to which a dispute raised issues relating to the main contract and the extent to which the conciliator was required to consider issues central to that contract. Another view was that disclosure requirements or codes of ethics were more appropriate to address the issues raised by such considerations. Although some support was expressed for omitting the issue from statutory rules, the general view was that the Secretariat should be requested to consider it further to see if an appropriate general formulation could be found.

37. After discussion, the Working Group agreed that a provision based upon article 19 should be drafted taking into account the discussions of the Working Group.

4. Enforceability of settlement agreements reached in conciliation proceedings (A/CN.9/WG.II/WP.108, paras. 34 to 42)

38. The Working Group discussed the question whether a settlement reached during a conciliation should be treated as an enforceable title as, or similarly to, arbitral awards. Views were divided on the question. According to one view, it was desirable to increase the attractiveness of conciliation, and therefore settlements reached during conciliation should be given the effect of an enforceable title. A number of States had adopted legislation to that effect and it was considered desirable to take into account their good experience and prepare a harmonized model provision for other States that might wish to enact it.

39. According to another view, it was not feasible, notwithstanding the desirability of promoting the use of conciliation, to prepare a workable uniform rule and that therefore the matter should be left to non-harmonized legislation of States. It was said that it would be difficult to distinguish in a legislative provision between settlements that should be treated as enforceable titles and those that should not enjoy such a special treatment. It was also considered inappropriate to equate settlements reached in conciliation with arbitral awards because of the fundamental differences between arbitration and conciliation. Moreover, in the view of some there was no need to treat settlements reached during a conciliation as enforceable titles because in many States there were simple ways in which a settlement between parties could be made enforceable (e.g. by converting the settlement into a notarized document or by obtaining a judicial sanction for the settlement). Furthermore, if the parties wanted to make their settlement an enforceable title, it was often not overly cumbersome for them to initiate arbitral proceedings with the sole purpose of converting the settlement into an arbitral award on agreed terms. In response to those arguments it was said that those possibilities did not exist in some countries or were connected with difficulties which parties in international trade might wish to avoid. Furthermore, sometimes the parties did not take advantage of those possibilities at the time the settlement was entered into, and the need to enforce the settlement became apparent only later when a party refused to live up to its part of the settlement. In addition, it was observed that legislation treating settlements reached during conciliation as enforceable titles existed and functioned satisfactorily in a number of States.

40. After discussion, the view prevailed that it would be premature to decide not to prepare the suggested uniform rule and therefore the Secretariat was requested to prepare draft provisions, possibly with variants, to be considered by the Working Group at its next session. Those provisions should address enforcement, irrespective of the country in which the settlement was made. Several suggestions were made regarding the preparation of the drafts. One was that the settlement agreement should be made in writing or a form equivalent to writing and that it should be signed or authenticated by the parties and the conciliator. Another suggestion was that such settlement agreements should be made subject to the legislative provisions governing the recognition and enforcement of arbitral awards. A further suggestion was, instead of subjecting settlements reached in conciliation to provisions on arbitral awards, to prepare a special provision on settlements reached in conciliation; in drafting such a provision, articles 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration provided a good model. In discussing that suggestion a proposal was

made to adapt article 36 of the Model Law to the characteristics of settlements reached in a conciliation; the proposal was to reduce the grounds on which the recognition or enforcement of a settlement may be refused to an incapacity of a party and a violation of public policy. Non-arbitrability of a dispute was mentioned as a further possible ground for refusal to recognize or enforce a settlement. The procedure under which a settlement agreement would be enforced was considered by some to be a matter to be left to the law of the State in question.

5. Other possible items for harmonized treatment

a) Admissibility or desirability of conciliation by arbitrators (A/CN.9/WG.II/WP.108 paras. 44-48)

41. The Working Group noted that there was a wide diversity of views as to the desirability of an arbitrator acting as a conciliator in arbitration proceedings and the attendant difficulty of achieving a common solution. One view was that a distinction should be drawn between an arbitrator recommending the use of a conciliator to reach a settlement and the arbitrator actually performing that function him or herself. While recommending the use of a conciliator should be encouraged, since the arbitrator would be in a unique position to decide whether such a step was appropriate and likely to be successful, the arbitrator acting as a conciliator was not desirable on the basis that different skills and qualities were required to perform the two functions. It was also suggested that such a practice might lead to procedural difficulties, including where an arbitrator acting as conciliator was involved in recommending the terms and conditions of a settlement which was then rejected, leaving that person to arbitrate the dispute. It was noted in response to those objections that in those jurisdictions and institutions where the practice was permitted, there was little evidence of disruption to the dispute resolution process in the cases where it had occurred.

42. An alternative view was that the arbitrator should be permitted to act as a conciliator and, under the national law of a number of countries, an arbitrator in fact had a duty to try to conciliate a dispute referred to arbitration. It was suggested that because the arbitrator was in a unique position to know the facts and circumstances of the case, it was the most cost effective option for the arbitrator to act as the conciliator, rather than referring the parties to a conciliator external to the arbitration proceedings, who would not have the same familiarity with the case and would have to start from the beginning.

43. A further distinction was noted between the situation where an arbitrator took the initiative to conciliate and where the parties requested the arbitrator to conciliate. The view was expressed that emphasis should be placed upon party autonomy and only where the parties agreed should the arbitrator be permitted to act as conciliator.

44. As to the desirability of formulating a legislative provision on the issue, one view that it should not be the purpose of the work of the Commission to unify arbitration and conciliation practices and that therefore no uniform rule should be prepared. Another view, however, was that it would be worthwhile to prepare a uniform rule whose purpose would be to recognize party autonomy and to clarify that it was not incompatible with the role of the arbitral tribunal to raise the question of a possible conciliation and, to the extent agreed by the parties, to participate in the efforts to reach an agreed settlement. It was agreed that the Secretariat should prepare a draft provision along those lines, possibly with alternatives.

b) Effect of an agreement to conciliate on judicial or arbitral proceedings (A/CN.9/WG.II/WP.108 paras 49-52)

45. The Working Group considered the question whether, when the parties agreed to resolve a dispute by conciliation (as opposed to arbitration or court proceedings), it was

advisable for the law to regard that agreement as binding in the sense that a party was not free to initiate arbitration or court proceedings until it complied with its commitment to conciliate.

46. Some support was expressed for the position that, in view of the fact that conciliation was seen as a preferred method of settling disputes, the law should treat conciliation agreements as binding; therefore, a uniform provision to that effect should be prepared.

47. However, the prevailing view was that conciliation should be regarded as a voluntary process in that the parties should be obliged to conciliate only if, and as long as, they believed that there was hope that a settlement could be achieved. Any notion that there should be a "paralysis" of arbitral or court proceedings until the parties went through the process of conciliation was bound to result in more difficulty than benefit and that therefore no uniform rule treating conciliation agreements as binding should be prepared. Pursuant to those views, one suggested conclusion was that no uniform provision was necessary, since conciliation rules (such as art. 15 of the UNCITRAL Conciliation Rules) generally allowed a party to terminate conciliation proceedings. Another suggested conclusion was that it might be useful to have a uniform legislative provision that would clarify that a party was free to terminate conciliation proceedings. A view was expressed that a uniform provision should clarify that if during conciliation proceedings a party commenced arbitral or court proceedings that act should be deemed as terminating conciliation proceedings.

48. Some support was expressed for a provision which would recognize the effectiveness of an express agreement of the parties limiting their own freedom to commence arbitral or court proceedings until they complied with their obligation to conciliate.

49. After discussion, the Secretariat was requested to prepare alternative versions of a uniform provision reflecting the views of the Working Group.

c) Effect of conciliation on the running of the limitation period
(A/CN.9/WG.II/WP.108, paras. 53-55)

50. The Working Group discussed the question of whether it would be desirable to prepare a uniform rule providing that the initiation of conciliation proceedings would interrupt the running of limitation and prescription periods concerning the claims involved in the conciliation.

51. Some support was expressed for the preparation of such a uniform provision. It was said that the situation created by such a provision was preferable to a situation where a party was compelled to initiate arbitral or court proceedings only for the purpose of preserving its rights. Formulating such a provision was desirable as a measure to foster the use of conciliation and protect the legitimate interests of parties engaging in it.

52. However, while expressing sympathy for the objectives of the proposed provision, doubts were voiced as to its feasibility. The grounds included the following: it would be difficult to define the moment when conciliation proceedings commenced, which was the moment triggering the interruption of a limitation or prescription period; it would be difficult to define the moment conciliation proceedings ended, which was the moment the limitation or prescription period continued to run; the proposed uniform provision would touch upon national rules of procedure (some of which were of a mandatory nature), an area where the readiness of States to accept unified concepts was not as great as in the area of substantive rules; and it would be necessary to resolve the relationship between the proposed uniform provision and international treaties governing limitation periods.

53. After discussion, and recognizing the difficulties involved in formulating a widely acceptable provision on the issue under discussion, the Working Group considered that it would be worthwhile to study the matter further. It was suggested that the rule would be more

acceptable if the prescription or limitation period was suspended as a result of conciliation proceedings and would continue to run after the conciliation proceedings had ended. The Secretariat was requested to prepare a draft, possibly with alternatives, to be considered by the Working Group at its next session.

d) Communication between the conciliator and parties; disclosure of information (A/CN.9/WG.II/WP.108, paras. 56-60)

54. The Working Group discussed the question of whether it would be desirable to prepare a uniform provision clarifying that it was consistent with the principles of equality between the parties (a) if the conciliator met either with the parties together or with each of the parties separately, and (b) if the conciliator did not disclose to all parties the information that he or she received from one party subject to a specific condition that it be kept confidential. It was noted that such a manner of proceeding was expressly dealt with in articles 9 and 10 of the UNCITRAL Conciliation Rules. A view was expressed that the provisions of a model law should be more flexible than article 10 in order not to restrict conciliators from using a variety of techniques that were useful in practice.

55. There was agreement in the Working Group that a provision along those lines would be useful because it would provide welcome clarification of the flexible nature of the conciliation process and remove any doubts as to the propriety of procedures such as those covered by articles 9 and 10 of the UNCITRAL Conciliation Rules. The Secretariat was requested to prepare draft provisions for the next session of the Working Group using as starting points the referred to articles 9 and 10 of the Rules.

e) Role of conciliator (A/CN.9/WG.II/WP.108, paras. 61 and 62)

56. There was general agreement in the Working Group that it would be useful to prepare a uniform provision setting out the guiding principles of conciliation proceedings. Such a general provision would contribute to harmonizing standards of conciliation and would also be helpful in defining conciliation proceedings to which other uniform provisions on conciliation to be prepared by the Commission would apply. It was agreed that article 7 of the UNCITRAL Conciliation Rules was a good basis for drafting the uniform provision.

57. The following suggestions were made concerning the drafting of the provision: to add facilitation of international trade as one of the objectives of conciliation; to refer to "ethics" in the wording modeled on paragraph 2 of article 7 of the UNCITRAL Conciliation Rules; to delete reference to "the rights and obligations of the parties", because in conciliation, unlike arbitration, settlement might be sought on bases other than legal rights and obligations (e.g. business interests of the parties); and to include reference to the "law" in the wording modeled on paragraph 2 of article 7 to avoid the implication that the applicable law was not relevant in seeking a settlement.

58. The Working Group requested the Secretariat to prepare a draft provision based on article 7 of the UNCITRAL Conciliation Rules. As to the proposed changes in the text modeled on article 7, the Working Group did not take any firm position but it was widely considered that, on balance, it was preferable not to deviate from the substance of article 7, which was tested in practice, was widely used as a model in non-legislative as well as legislative texts and was considered to be an appropriate expression of the essence of conciliation proceedings.

59. The Working Group considered additional topics which might be included in uniform provisions on conciliation. A number of matters were raised which the Working Group felt required further study and elaboration. Those included further work to clarify the scope of application of the uniform provisions, with particular focus on the nature of the agreement to conciliate and the general definition of the notion of such a procedure; the extent to which the

agreement to conciliate might be considered to be binding; procedural issues such as selection of the conciliator, date, time and place of conciliation, pre-conciliation exchange of documents, termination of conciliation, and liability of conciliators; issues particular to ad hoc as opposed to institution annexed or administered conciliation; and the need for, and the principles and issues to be included in, a preamble to the uniform provisions with the aim of promoting its use in the resolution of international commercial disputes. It was also suggested that the formulation of a code of ethics for conciliators might be considered by the Working Group to build confidence in the conciliation process by distilling issues from the best traditions and openly enunciating standards of practice. The Secretariat was requested to further study those issues based upon the discussion in the Working Group and to prepare material for consideration at a future session of the Working Group.

B. Enforceability of interim measures of protection (A/CN.9/WG/WP.108, paras.63-101)

1. General considerations

60. There was general recognition in the Working Group of the fact that interim measures of protection were increasingly being found in the practice of international commercial arbitration and that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures. In some cases the very usefulness of the award for the winning party depended on whether the party had been able to enforce the interim measure designed to facilitate later enforcement of the award.

61. It was noted that in many legal systems a party to arbitral proceedings might request interim measures of protection from either the arbitral tribunal or a court, and there was no doubt in the Working Group that such a dual availability of those measures should be preserved. At the same time, it was noted that in some States there were no adequate regulations in that field.

62. It was observed that interim measures of protection ordered by arbitral tribunals were often combined with orders for the provision of appropriate security designed to protect one or both parties against misuse of interim measures. Such security was considered essential for the good functioning of interim measures and it was agreed that the uniform provisions to be prepared should take that into account.

63. A proposal was made, in particular, for elaboration of a general regime covering the adoption of interim measures of national and foreign courts in the period before the arbitral tribunal had been constituted and, at the choice of a party, by a court or the arbitral tribunal after it had been constituted (see below paras. 85-87).

64. It was further observed that interim measures of protection were temporary in nature in that any such measure ordered by an arbitral tribunal might be reviewed or altered if the circumstances of the case or the progress of arbitral proceedings required. That salient feature should be reflected in any uniform provision to be prepared. Yet another circumstance to be borne in mind was that interim measures of protection ordered by an arbitral tribunal may only be directed to a party or parties bound by the arbitration agreement and not to third parties. On the other hand, it was noted that, even if not directed at a third party, an interim measure may nevertheless affect third persons holding, for example, money or other assets of the party concerned, since they may be obliged to take some action in respect of that property by virtue of the order directed to the party.

65. It was noted that under the procedures used in some jurisdictions the arbitral tribunal might order a party to make an "interim payment" or "interim partial payment" to the other party (insofar as it was beyond doubt that the amount of the interim payment was due) and

that such payment was to be merged into the final award. There was general agreement that such orders for interim payment were not to be considered interim measures of protection as discussed by the Working Group and were not to be a subject matter of any uniform provisions to be prepared.

66. At various stages of the discussion of enforceability of interim measures of protection reference was made to the power of the arbitral tribunal to issue such measures, the scope of that power and procedures for issuing interim measures. Noting that a model legislative provision dealing with that power was contained in article 17 of the UNCITRAL Model Law on International Commercial Arbitration, it was recognized that the issue of enforceability of interim measures of protection should be considered separately from the issue of the power of the arbitral tribunal to order interim measures of protection and related procedural questions. (See below, paras. 80-84, for the discussion on the scope of interim measures that may be issued by an arbitral tribunal and conditions for issuance.)

2. Need for a uniform regime

67. There was general support in the Working Group for the proposition to prepare a legislative regime governing the enforcement of interim measures of protection ordered by arbitral tribunals (document A/CN.9/WG.II/WP.108, para. 76). It was generally considered that that legislative regime should apply to enforcement of interim measures issued in arbitrations taking place in the State where enforcement was sought as well as outside that State (ibid., para. 92).

68. It was noted that a number of States had adopted legislative provisions dealing with the court enforcement of interim measures, and it was considered desirable that a harmonized and widely acceptable regime be prepared by the Commission.

69. During the discussion reference was often made to paragraph 63 of document A/CN.9/WG.II/WP.108, which distinguished three groups of interim measures of protection: (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award. While noting that that classification was one of a number of possible alternatives and that the examples of measures given under each category were not exhaustive, it was pointed out that the need for an enforcement mechanism was the greatest for measures under (c) (e.g. attachments of assets, orders not to remove the subject matter of the dispute out of the jurisdiction or orders to provide security) and for some of the measures under (b) (e.g. orders to continue performing a contract during the arbitral proceedings or orders to refrain from taking an action until the award was made). As to measures under (a) it was noted that, because the arbitral tribunal might "draw adverse conclusions" from the failure of the party to comply with the measure or might take the failure into account in the final decision on costs of the arbitral proceedings, there was less need to seek court intervention in the enforcement of the measure. However, no firm view was reached at that stage of the discussion as to whether, and if so in what way, those differences among interim measures should influence the drafting of the future enforcement regime.

3. Elements of a possible uniform provision

70. Various views were expressed as to whether the court requested to enforce an interim measure of protection should have discretion in making its decision concerning enforcement and, if so, what should be the extent of that discretion. Under one view, there should be no discretion in enforcing the measure, similar to the obligation of the court to enforce an arbitral award if the conditions of articles 35 and 36 of the UNCITRAL Model Law (or articles IV and V of the 1958 New York Convention) were met. Under another view, which received considerable support, it was felt that the regime contained in articles 35 and 36 of the

UNCITRAL Model Law was too rigid and did not take into account the special features of interim measures of protection which distinguished them from arbitral awards and which called for a degree of flexibility to be built into the uniform regime to be prepared. Those special features included the following: the temporary nature of interim measures and the resulting possibility that the measures might have to be modified or terminated; the need to adapt the interim measure to the enforcement procedures of the enforcing court; the possibility that the measure would affect the interests of third parties; and the possibility that the measure might have been issued *ex parte* (i.e. on the application of one party without hearing the other affected party) and that the requirement that both parties be heard would have to be complied with after the issuance of the interim measure.

71. There was broad agreement in the Working Group that the uniform regime should be based on the assumption that the court should not repeat the decision-making process in the arbitral tribunal that led to the issuance of the measure; in particular, the court should not review the factual conclusions of the arbitral tribunal or the substance of the measure. The court's discretion should be limited to procedural aspects of the enforcement of the measure. In that context the view was expressed that often it was not clear whether an issue was to be considered procedural or substantive and that the distinction was prone to controversy; therefore, it was desirable to avoid making the distinction, and, for that reason, the enforcement regime for interim measures should track as closely as possible the regime governing the enforcement of awards. Another view was that the scope of procedural discretion should be narrowly circumscribed so that the enforcement process would not be delayed and the court would not repeat the decision-making process of the arbitral tribunal. Under yet another view, it was difficult to be precise in describing the conditions for enforcement and that therefore the legislative provision should be broadly worded.

72. During the discussion of the above views, the Working Group considered possible approaches to the drafting of the uniform provision. One possible approach identified was that the uniform provision should be based on articles 35 and 36 of the UNCITRAL Model Law. The advantage of that approach was that the regime was known and tested in practice. It was also said that orders for interim measures, irrespective of whether called provisional awards or orders, were different from final awards. For that reason, articles 35 and 36 were not a suitable basis for an enforcement regime for interim measures of protection as those articles referred to a regime for enforcement of arbitral awards. It was, however, noted in response that interim measures of protection were in practice issued in different forms and under different labels, which included interim awards (see, e.g., arts. 26(2) and 32(1) of the UNCITRAL Arbitration Rules), and that the form in which the interim measure of protection was issued should not influence the decision whether articles 35 and 36 were a suitable basis for a regime of enforcement of interim measures of protection. Under another approach, the uniform provision would not list the grounds on which the court might refuse to enforce the measure, but would deal with issues such as the possibility of recasting the interim measure by the court; the possibility that the court might, upon request, repeal or amend its own decision to enforce the interim measure; the obligation by the party who obtained the enforcement of the measure to compensate the other party if the measure proved to have been unjustified from the outset; and a clarification that such a claim for compensation could be put forward in the pending arbitral proceedings. A further possible approach was to formulate a general provision which would be limited to providing that, if the party did not comply with the interim measure voluntarily, the competent court may be requested to render an enforcement order. Such a general provision might be complemented by provisions regarding the law to be applied by the court and security to be provided by a party. It was noted that all three approaches had been used in national laws and that the future uniform provision might be inspired by all of them. It was noted, in particular, that the second or third approach may be effected, for example, by adding to article 17 of the Model Law a general provision that a court should enforce the interim measure imposed by the arbitral tribunal; articles 35 and 36 would remain solely applicable to the enforcement of a final award.

73. It was said that any solution must be efficient and that, to the extent flexibility ought to be a factor, it was desirable to minimize the possibility of delay. It was considered that giving discretion to the court meant opening the scope for argument and delay. That consideration was said to be a further reason in favour of adopting the regime of articles 35 and 36 of the UNCITRAL Model Law. However, it was stated in response that, if properly defined, flexibility and discretion were desirable and that such flexibility did not necessarily increase the scope for delay; moreover article 36 of the Model Law might be said to give scope for delay such as when the party raised objections that the arbitration agreement was not valid, that proper notice was not given of the appointment of an arbitrator or of the arbitral proceedings or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place (art. 36(1)(a)(i), (ii) or (iv) of the Model Law).

74. In discussing how the enforcement regime of interim measures of protection should reflect the fact that such measures were temporary (in that the circumstances on the basis of which a particular measure was ordered by the arbitral tribunal might change by the time the court considered the request for enforcement or even thereafter), it was noted that the UNCITRAL Model Law on Cross-Border Insolvency dealt with the recognition of a foreign insolvency proceeding, whose status might also change over time and that some of the solutions in that Model Law might serve as an inspiration in devising the enforcement regime of interim measures of protection. The relevant provisions in the Model Law were contained in articles 17(4), 18 and possibly 22(2).

75. The Working Group engaged in a preliminary discussion of the question whether it should be only for the interested party to request the enforcement of the interim measure or whether the arbitral tribunal should also have a role in requesting enforcement. The view was expressed that the arbitral tribunal should not be put in a position where it would have to approach a national court with a view to obtaining enforcement of an interim measure ordered by it; thus, the enforcement of interim measures should be left entirely to the interested party. According to another view, however, it was useful to maintain a role for the arbitral tribunal in the enforcement of its measure, e.g. by providing that the request for enforcement could be made with leave of the arbitral tribunal or that the arbitral tribunal itself was able, but not obliged, to request enforcement.

76. An observation was made that the International Convention on Arrest of Ships, 1999, dealt with interim measures of protection and their enforcement and that some of the solutions of the Convention, in particular those in its article 7, might serve as a model in drafting the uniform provisions to be prepared by the Working Group.

77. It was suggested that any regime to be elaborated should not impose substantially more onerous conditions or higher fees or charges on the enforcement of interim measures issued outside the State of the enforcing court than are imposed on the enforcement of interim measures issued in that State (cf. art. III of the New York Convention).

78. The Working Group, in view of the preliminary stage of the discussion, did not take a decision as to the question whether the harmonized regime for the enforcement of interim measures should be in the form of an international convention or in the form of model legislation. While noting the view that the form of a convention was preferable, the Working Group considered that the decision as to the form would be made at a later stage. Notwithstanding that position, much of the discussion in the Working Group proceeded under the assumption that the solutions would be cast in the form of model legislation.

79. The Secretariat was requested to prepare alternative draft provisions based on the considerations in the Working Group to be discussed at a future session.

C. Scope of interim measures that may be issued by arbitral tribunal and procedures for issuance (A.CN.9/WG.II/WP.108, paras. 102-108)

80. The Working Group considered the desirability and feasibility of preparing a harmonized non-legislative text on the scope of interim measures of protection that an arbitral tribunal might order and procedural rules therefor.

81. Wide support was expressed for preparing a non-legislative text, such as guidelines or practice notes, which would discuss issues such as the types of interim measures of protection that an arbitral tribunal might order, discretion for ordering such measures, and guidelines on how the discretion was to be exercised or the conditions under which, or circumstances in which, such measures might be ordered. It was suggested that clarification provided by such guidelines should be broad in scope and should cover all interim measures of protection mentioned in paragraph 63 of document A.CN.9/WG.II/WP.108 (i.e. (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award). However, it was added that the guidelines would be particularly useful for measures with respect to which court enforcement was more frequently needed.

82. An observation was made that guidelines clarifying how the power of arbitral tribunals to order interim measures of protection was exercised would foster the acceptance by States of uniform legislative provisions on enforcement of those measures, which the Working Group had decided to prepare (see above, paras. 67). However, it was noted that those uniform legislative provisions would be prepared, and would apply, independently from the future non-legislative text discussing interim measures of protection that might be issued by an arbitral tribunal and procedures for their issuance.

83. It was suggested that in preparing the proposed text account should be taken of the inter-relationship between interim measures that might be ordered by a court and interim measures that might be ordered by the arbitral tribunal (e.g. the question whether a party might request an interim measure from a court after the arbitral tribunal had been constituted and was able to issue the requested measure itself, or whether a party, after unsuccessfully seeking an interim measure from the arbitral tribunal, might request such a measure from the court).

84. It was agreed that the Secretariat should prepare a document that would analyse rules and practices regarding interim measures of protection issued by arbitral tribunals and provide elements for the future harmonized non-legislative text. The Working Group was aware that the information needed for the preparation of the document was not readily available and therefore requested the States and international organizations participating in the considerations of the Working Group as well as experts interested in its work to send to the Secretariat relevant information (e.g. arbitration rules, academic and practice writings, as well as examples of texts of interim measures of protection ordered omitting the names of parties and other confidential information).

D. Proposal for preparing uniform provisions on court-ordered interim measures of protection in support of arbitration

85. In the context of the discussion of interim measures that might be issued by an arbitral tribunal (see above, paras. 80-84), it was proposed that the Working Group consider preparing uniform rules for situations in which a party to an arbitration agreement turned to a court with a request to obtain an interim measure of protection. It was pointed out that it was particularly important for parties to have effective access to such court assistance before the arbitral

tribunal was constituted, but that also after the constitution of the arbitral tribunal a party might have good reason for requesting court assistance. It was added that such requests might be made to courts in the State of the place of arbitration or in another State.

86. It was observed that in a number of States there were no provisions dealing with the power of courts to issue interim measures of protection in favour of parties to arbitration agreements; the result was that in some States courts were not willing to issue such interim measures while in other States it was uncertain whether and under what circumstances such court assistance was available. It was said that, if the Working Group decided to prepare uniform provisions on that topic, the ILA Principles on Provisional and Protective Measures in International Litigation (reproduced in paragraph 108 of document A.CN.9/WG.II/WP.108), as well as the preparatory work that lead to those Principles would be useful in considering the content of the proposed uniform rules.

87. The Working Group took note of the proposal and decided to consider it at a future session.

E. Requirement of written form for arbitration agreement (A/CN.9/WG.II/WP.108/Add.1, paras. 1-40)

88. It was generally observed that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form. It was noted that the practice in some respects was no longer reflected by the position set forth in article II(2) of the 1958 New York Convention (and other international legislative texts modelled on that article) if interpreted narrowly. It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade; nevertheless, it was observed, some doubts remained or views differed as to their proper interpretation. The existence of those doubts and a lack of uniformity of interpretation was a problem in international trade in that it reduced the predictability and certainty of international contractual commitments. It was further noted that current arbitration practice was different from what it was in 1958 in that arbitration was now widely accepted for resolution of international commercial disputes and could be regarded as usual rather than as an exception that required careful consideration by the parties before choosing something other than litigation before the courts.

89. It was observed that in many countries the arbitration agreement was required to be in writing to serve certain functions which included: providing evidence as to the conclusion of the agreement; enabling the parties to that agreement to be identified; and providing a warning as to the importance of renouncing rights of recourse to the courts. The view was expressed that, given the importance of those functions, the requirement for a strict interpretation of what constituted a writing should be preserved. In reply, it was suggested that, because the development of arbitration practice between 1958 and the current time made arbitration the preferred or the usual method for international commercial dispute resolution, the warning function was no longer as important as formerly.

90. It was also observed that a number of countries had no requirement for arbitration agreements to be concluded in writing in order to be valid, a situation which did not create problems with respect to proving an arbitration agreement since evidence of the existence of an agreement could be produced in any way that would suffice to prove the existence of a contract under general law. In order to accommodate not only those current developments in arbitration practice, but also likely future developments, the view was expressed that it might be appropriate to consider removing the writing requirement and aligning the practice with respect to arbitration agreements with that of contracts more generally. Another suggestion

was that it might be possible to focus on the circumstances in which an agreement might be considered to have been concluded. Those circumstances could include where there was an agreement in writing; where an agreement was evidenced by any other means as set forth in article 6 of the UNCITRAL Model Law on Electronic Commerce; where the agreement was concluded in accordance with usage recognized by the parties; or where the agreement was concluded in accordance with a usage of which the parties were aware or should have been aware because it pertained to the particular trade in which the parties were engaged.

91. As to the way in which an updated and uniform interpretation of the writing requirement could be achieved, a number of suggestions were made. One approach was to develop a model legislative provision, based upon article 7 of the UNCITRAL Model Law on International Commercial Arbitration, to clarify for the avoidance of doubt the interpretation of the requirement for writing since that provision represented a widely accepted international standard on which considerable practice had developed. Suggestions were made that the model legislative provision might possibly follow a more general approach such as the one in article 178(1) of the Swiss Federal Act of Private International Law, in article 1021 of the Arbitration Act of the Netherlands, or the somewhat more detailed approach in section 1031 of the German Arbitration Law of 1997 or section 5 of the English Arbitration Act of 1996 (those national legislative provisions are reproduced in paras. 29-31 of document A/CN.9/WG.II/WP.108/Add.1). Another suggestion, which addressed the issue in terms of the impact of electronic commerce, was to promote the adoption of the UNCITRAL Model Law on Electronic Commerce, which would have the advantage of addressing the writing issue at a broader level than that related simply to arbitration agreements (for the discussion of this topic, see below, paras. 100-106). An alternative view was that no new provisions were needed, as article 7 of the UNCITRAL Model Law on International Commercial Arbitration itself was sufficient for the purpose of providing an updated standard. Promoting wider adoption and uniform interpretation of the Model Law would lead, in time, to the required level of international uniformity.

92. Noting that there was a need for article II(2) of the New York Convention to be interpreted in accordance with a desired updated standard as to the form requirement, the Working Group discussed the question of how that objective could best be achieved. A number of different views were expressed on the issue. One view was that a protocol amending the terms of article II of the New York Convention was required. Another view was that amending the New York Convention in that way was a course of action likely to exacerbate the existing lack of harmony. It was observed that the Convention was widely adopted and extremely successful; that discussing changes to the writing requirement of the Convention could lead to suggestions for changes to other provisions which should not be reopened; and that adoption of a protocol by a number of countries was likely to take a significant number of years and, in the interim, to create more uncertainty as two different regimes would potentially apply.

93. An alternative suggestion was for the adoption of a declaration, resolution or statement addressing the interpretation of the Convention and providing that, for the avoidance of doubt, article II(2) of the Convention was intended to cover certain situations or to have a certain effect. It was observed that although that instrument would not be formally adopted as a treaty by States members of the Convention, it would potentially have persuasive force and could be considered as material assisting with the interpretation of the Convention within the terms of the Vienna Convention on the Law of Treaties. It was noted that a similar approach had been adopted in relation to other conventions, such as the Convention on the Law applicable to Contractual Obligations (Rome, 1980) and the Convention on the Law applicable to International Sales of Goods (The Hague, 1955). As to the body to adopt such a statement or declaration, it was suggested that UNCITRAL, the core legal body in the United Nations system for the development of international trade law and a body whose work in the area of arbitration had gained universal recognition, was the appropriate body to take such an action. Alternatively, States members of the New York Convention might take that action. Concerns

were expressed that that approach might create uncertainty as to the status of those States not accepting the instrument and as to the possible application of reciprocity between States. It was also suggested that a declaration or recommendation was not binding on national courts and there was therefore no certainty that it would be universally followed, even if promoted by UNCITRAL.

94. As a further alternative, it was suggested that a liberal interpretation of the New York Convention should be encouraged by following the approach of some courts as noted in document A/CN.9/WG.II/WP.108/Add.1 at footnote 9, according to which the writing requirement in the New York Convention should be interpreted in the light of the subsequent UNCITRAL Model Law, whose authors wished to adapt the regime of the Convention to current needs without modifying the Convention. Another possibility suggested was to prepare practice guidelines or notes which could set out the use of article 7 of the Model Law as an interpretation tool to clarify the application of article II(2), along the lines discussed in paragraphs 33 and 34 of document A/CN.9/WG.II/WP.108/Add.1.

95. The Working Group exchanged views as to whether the cases listed at paragraph 12 of document A/CN.9/WG.II/WP.108/Add.1 would be covered by national law provisions addressing form requirements for the arbitration agreements, particularly in States that had not enacted the Model Law. A number of different views were expressed and it was clear that there was no common position for all States. It was also noted that the answer might differ if the question related to enforcement of a domestic award or a foreign award, where the terms of the New York Convention would be relevant. Cases (a) to (h), which related to issues of writing and exchange, and thus to the manifestation of the will of the parties, were said to be distinguishable from cases (i) to (l), which were considered to relate to matters outside the form requirement and were covered by the law governing the way in which rights and obligations that were validly assumed by a party (including those arising from an arbitration agreement) were transferred from that party to third parties or were extended to include third parties. The discussion showed that in some States cases (a) to (h) would generally be covered by the requirements of national law relating to the form of arbitration agreements, while in others it was said that certain cases would not be covered or that it was doubtful whether they were covered. Cases (a) and (d), for example, were not covered in some States with a more restrictive interpretation of the writing requirement. In some cases, the question of coverage depended upon what was intended by the parties and no clear general answer could be given. Case (c) was said to be covered in some cases if the broker was deemed to represent both parties to the agreement, but was not covered if it was not representing both parties. As to bills of lading (which were typically signed by the master of the ship only), it was said that they were generally regarded by the participants in the shipping industry as evidence of valid and binding agreements to arbitrate or that, despite certain doubts, they were regarded as valid as cases *sui generis*. It was suggested that cases (i) to (l), which raised issues of assignment, subrogation, incorporation by reference and third party rights, should not be addressed by the Working Group. Case (m) was widely considered to raise difficult issues and had not gained wide acceptance.

96. The Working Group also considered whether article II(2) of the New York Convention could be interpreted to cover all of the cases listed in paragraph 12. As in the case of national law provisions, the views expressed in the Working Group differed as to the various cases and whether or not the Convention would be interpreted to cover all of them. It was noted that the views were somewhat tentative because the cases considered were described too generally to allow definitive answers; nevertheless, the discussion showed that it was either doubtful or that there was no general agreement as to whether or not article II(2) of the New York Convention should be interpreted to cover all of the cases in paragraph 12. In addition, it was not clear how frequently the issues set forth in paragraph 12 arose in practice and how urgent they might therefore be considered to be.

97. The Working Group heard statements showing that there existed in court practice a trend towards a more liberal and updating interpretation of article II(2) of the Convention. One example that was discussed was that of England where the expression "The term 'agreement in writing' *shall include*" (emphasis added) in article II(2) of the Convention indicated that the list of forms mentioned therein was not exhaustive and could be extended to cover a wider variety of circumstances. Such an interpretation would mean, it was suggested, that most of the cases set forth in paragraph 12 would be covered by the Convention. The scope of the provision, however, was not unlimited. As a minimum form requirement, the English Arbitration Act 1996 did contain a requirement for some writing in connection with the arbitration agreement - the terms of the arbitration agreement must be set out in writing even if the party expressed consent to those terms in some way other than by writing such as by oral agreement or by part performance of the contract. The view was expressed that what the Working Group should consider was not whether the cases set out in paragraph 12 were covered by the Convention or not, but whether article II(2) could be regarded as an exhaustive provision and, if not, what the minimum form requirement for an arbitration agreement to be covered by the Convention should be. A different view of article II(2) was that it provided a uniform rule on the types of situations which were intended to be covered by the Convention and that (while requirements more restrictive than the ones specified in article II(2) were not permitted by the Convention) less restrictive requirements than the ones in article II(2) were not covered by the Convention. On that view, not all of the cases in paragraph 12 would be covered by article II(2). It was noted at the end of the discussion that the question of whether article II(2) established a uniform rule or a minimum standard remained controversial.

98. After discussion, no agreement was reached as to whether article II(2) of the New York Convention would be interpreted to cover the particular cases set forth in paragraph 12. However, the Working Group considered the question of whether those cases should be covered by the writing requirement and how that could be achieved. There was general support for the view that contract practices and the role of international commercial arbitration in international trade required that in principle all cases mentioned in paragraph 12 (with the possible exception of the case of "group of companies" mentioned under (m)) should be included as meeting the written form requirement, provided that there was an agreement in substance between the parties (or that a party subsequently became bound by an arbitration agreement), together with written evidence of that agreement, which, however, did not amount to requiring a document signed by both parties or an exchange of messages between the parties. It was felt that that approach would comply with two considerations underlying the form requirement for the arbitration agreement: (a) that there was sufficient evidence of the mutual will to arbitrate and thus to exclude court jurisdiction and (b) that there was some writing with respect to arbitration and thus the parties were on notice (or were warned) that they were excluding court jurisdiction. In that connection an observation was made that the purpose of parties when they agreed to arbitration was to avoid all courts and that in most multinational cases it would be difficult to determine which was the court whose jurisdiction was being excluded; therefore, it was said, the warning function in international trade, in light of the growing importance of arbitration, was losing its importance.

99. After discussion, the view was adopted by the Working Group that the objective of ensuring a uniform interpretation of the form requirement that responded to the needs of international trade could be achieved by: preparing a model legislative provision clarifying, for avoidance of doubt, the scope of article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration; preparing a guide explaining the background and purpose of the model legislative provision; and adopting a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement. As to the substance of the model legislative provision and the interpretative instrument to be prepared, the Working Group adopted the view that, for a valid arbitration agreement to be concluded, it had to be established that an agreement to arbitrate had been reached and that there existed some written evidence of that agreement. It was noted that the issue of how best to achieve uniform interpretation of the New York

Convention through a declaration, resolution or statement should be further studied, including the public international law implications, to determine which was the optimal approach.

F. Arbitration agreement "in writing" and electronic commerce (A/CN.9/WG.II/WP.108/Add.1, paras. 35-40)

100. The Working Group considered the question of whether article II(2) of the New York Convention should be interpreted broadly to include communications by electronic means as defined by the UNCITRAL Model Law on Electronic Commerce in article 2. It was recalled that the Guide to Enactment to the Model Law, an instrument adopted by the Commission, was drafted with a view to clarifying the relationship between the Model Law on Electronic Commerce and international instruments such as the New York Convention and other trade law instruments. The Guide, at paragraph 6, suggested that the Model Law on Electronic Commerce "may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in written form". It was also noted that article 7(2) of the Model Law on International Commercial Arbitration expressly validated the use of any means of telecommunication "which provides a record of the agreement", a wording which would cover telecopy or facsimile messages as well as most common uses of electronic mail or electronic data interchange (EDI) messaging.

101. There was general agreement in the Working Group that, in order to promote the use of electronic commerce for international trade and leave the parties free to agree to the use of arbitration in the electronic commerce sphere, article II(2) of the New York Convention should be interpreted to cover the use of electronic means of communication as defined in article 2 of the Model Law on Electronic Commerce and that it required no amendment to do that. It was also considered that, in addition to the New York Convention, other conventions relevant to international arbitration such as the European Convention on International Commercial Arbitration (Geneva, 1961) and the Inter-American Convention on International Commercial Arbitration (Panama, 1975), should also be interpreted in the same way. As doubts were raised as to whether UNCITRAL was the appropriate forum to address that issue in respect of all of those Conventions, it was agreed that the issue should be studied and the optimal solution found in consultation with the organizations that sponsored the preparation of those conventions.

102. On the question of how the desired updating interpretation could be achieved, the Working Group made a number of proposals. One proposal was that the Model Law on Electronic Commerce could be used as an interpretative instrument as noted in the Guide to Enactment. Concern was expressed that that approach might have limited effect. While the Model Law was being applied in an increasing number of countries, it was not universally adopted. Furthermore it was noted that, because of the flexibility of the model law form, the Model Law might be enacted in different ways and that, therefore, the desired uniform interpretation would not be achieved.

103. A second proposal was for a declaration confirming the desired interpretation to be adopted by UNCITRAL or perhaps by the States members of the Conventions. In support of the use of a declaration, it was recalled that the Working Group had already considered and identified that form of instrument as a potentially useful way of addressing the interpretation of the writing requirement in article II(2) (see above, para. 93). It was proposed that the same measure should apply to electronic communications, although questions were raised as to whether the two declarations should be linked together. For the same reasons as discussed in the context of the writing requirement, it was suggested that any such declaration should be drafted on the basis that the UNCITRAL Model Law on Electronic Commerce can be used, by

itself, as a tool to interpret the Conventions and that therefore the declaration should be framed in terms of "For the avoidance of doubt …" (see above, para. 91).

104. A third proposal was to seek a solution in the context of a broader idea (which had been raised and discussed by the Commission at its thirty-second session (A/54/17, para. 316)) of preparing an "omnibus" protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce, as noted in paragraph 39 of document A/CN.9/WG.II/WP.108/Add.1. Little support was expressed in favour of that proposal. The Working Group was of the view that more studies were needed before a decision could be made on the nature of such instrument to be adopted and the possibility of drafting a commentary was also voiced.

105. Having concluded the discussion on the desirability of ensuring that article II(2) of the New York Convention (and the relevant provisions in other Conventions that followed that model) would validate electronic communications, concerns were expressed as to possible implications of limiting the proposed interpretative instrument to the requirement of writing for the arbitration agreement. It was noted that other provisions in the New York Convention (as well as in other Conventions on international commercial arbitration) contained additional requirements of writing which, if not interpreted to include electronic means of communication, might potentially operate as barriers to the facilitation of electronic commerce. Included among those were the requirements to provide originals of the arbitration agreement and the award in article IV of the New York Convention. The view was expressed that the issue of electronic commerce should be approached from a perspective broader than the writing requirement for the arbitration agreement and that, in considering steps to be taken with respect to the writing requirement for arbitration agreements, other form requirements in instruments governing international commercial arbitration should also be studied. It was also suggested that treating these issues as separate had the potential to encourage a proliferation of interpretative declarations on points that may be regarded, in the future, as requiring clarification.

106. After discussion, the Working Group requested the Secretariat to prepare a draft instrument that would confirm that article II(2) of the New York Convention should be interpreted to include electronic communications as defined by article 2 of the Model Law on Electronic Commerce. In drafting that instrument, the Secretariat should study the other form requirements in the New York Convention and prepare appropriate drafts to facilitate discussion in the Working Group as to the treatment of other writing requirements.

G. Possible topics for future work (A.CN.9/WG.II/WP.108/Add.1, para. 42)

107. Having completed its discussion on the topics set forth in documents A/CN.9/WG.II/WP.108 and Add.1, the Working Group exchanged views and information on other arbitration topics that had been identified by the Commission as likely items of future work and which had been considered by the Commission at its thirty-second session. The complete list of those topics (reproduced in document A/CN.9/WG.II/WP.108, paragraph 6), which included the three topics considered at length at the current session of the Working Group, was as follows:

a) Conciliation (A/CN9/460, paras. 8-19; A/54/17, paras. 340-343);
b) Requirement of written form (A/CN.9/460, paras. 20-31; A/54/17, paras. 344-350);
c) Arbitrability (A/CN.9/460, paras. 32-34; A/54/17, paras. 351-353);
d) Sovereign immunity (A/CN.9/460, paras. 35-50; A/54/17, paras. 354-355);
e) Consolidation of cases before arbitral tribunals (A/CN.9/460, paras. 51-60; A/54/17, paras. 356-357);

f) Confidentiality of information in arbitral proceedings (A/CN.9/460, paras. 62-71; A/54/17, paras. 358-359);
g) Raising claims for the purpose of set-off (A/CN.9/460, paras. 72-79; A/54/17, paras. 360-361);
h) Decisions by "truncated" arbitral tribunals (A/CN.9/460, paras. 80-91; A/54/17, paras. 362-363);
i) Liability of arbitrators (A/CN.9/460, paras. 92-100; A/54/17, paras. 364-366);
j) Power by the arbitral tribunal to award interest (A/CN.9/460, paras. 101-106; A/54/17, paras. 367-369);
k) Costs of arbitral proceedings (A/CN.9/460, paras. 107-114; A/54/17, para. 370);
l) Enforceability of interim measures of protection (A/CN.9/460, paras. 115-127; A/54/17, paras. 371-373);
m) Possible enforceability of an award that has been se aside in the State of origin (A/CN.9/460, paras. 128-144; A/54/17, paras. 374-376).

108. Other topics considered were those mentioned in paragraph 339 of the report of the Commission on the work of its thirty-second session (document A/54/17):

a) Gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties;
b) Changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances;
c) Freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association;
d) Questions relating to the interpretation of legislative provisions such as those in article II(3) of the New York Convention (or article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration), which in practice led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued; and
e) Questions relating to cases where a foreign court judgement was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked (i) the existence of an arbitration agreement, or (ii) the fact that an arbitration proceeding was pending, or (iii) the fact that an arbitral award had been issued in the same matter. It was noted that those instances were often not addressed by treaties dealing with recognition and enforcement of foreign court judgements. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgements, but the treaty itself did not allow recognition or enforcement to be refused on the ground that the dispute dealt with by the judgement was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

109. A number of other topics concerning the New York Convention, proposed by arbitration experts, were raised for possible consideration by the Working Group. Those included:

a) The meaning and effect of a non-domestic award, that is an award not considered as a domestic award in the State where its recognition and enforcement was sought (article I(1), second sentence);
b) Clarification of what constituted an arbitral award under the Convention. Did it cover, for example, awards on agreed terms; "Treaty awards"; a-national awards; award-like decisions in proceedings akin to arbitration, such as *arbitrato irrituale*;

c) Determination of the law applicable to arbitrability under article II(1);
d) Field of application of article II(3) concerning the enforcement of the arbitration agreement;
e) Law applicable to agreements that might be "null and void, inoperative, or incapable of being performed" under article II(3);
f) Compatibility of court-ordered interim measures with arbitration agreements falling under the Convention;
g) Enforcement conditions and procedure referred to in article III, as implementing legislation showed diverging solutions;
h) Period of limitation for enforcement of a Convention award where again implementing legislation showed a range of different periods;
i) Residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V;
j) Meaning and effect of the suspension of an arbitral award in the country of origin (article V(i)(e)); and
k) Meaning and effect of the more-favourable-right provision of article VII(1).

110. It was noted that a number of those possible additional topics might partly touch upon or overlap with topics already discussed by or raised in the Commission, but that they were raised here as matters that might be of interest to the Working Group for possible further consideration. It was noted that items (g) and (h) (above, para. 109) were the subject of the project being jointly undertaken by UNCITRAL and Committee D of the International Bar Association to monitor the legislative implementation of the New York Convention (A/54/17, paras. 331-332).

111. The Working Group, by way of an initial and tentative response, expressed particular interest in a number of the items set forth in paragraphs 108 and 109 above. Support was expressed in favour of preparatory work by the Secretariat of items (a), (b), (d) and (e) of paragraph 108 on the basis that they were of significant practical importance. Item (d), in particular, was noted as causing uncertainty and, potentially, delay in a number of States. In respect of item (e), it was noted that article II(3) of the New York Convention left doubts for some courts as to how they should proceed, which resulted in a diversity and inconsistency of approaches; for example, some courts, when they considered a request (e.g. under art. II(3) of the New York Convention) to refer the parties to arbitration, followed the spirit of the Convention and limited their consideration to whether the arbitration agreement was *prima facie* valid (and, if it was found to be *prima facie* valid, referred the issue to be determined by the arbitral tribunal), while other courts considered the validity of the arbitral agreement themselves and reached a final decision. It was noted that bringing greater clarity to those issues would better define the inter-relationship between courts and arbitral tribunals in arbitration matters. Some support was also expressed in favour of considering items (a), (b) and (e) of paragraph 109 above.

112. In terms of the items already discussed and accorded priority by the Commission, as set forth in paragraph 107 above, interest was reiterated in a number of those. With respect to item (m) (possible enforceability of awards that had been set aside in the State of origin), to which the Commission had accorded priority, a view was expressed that the case for its further consideration did not fully appreciate the fact that, in practice, the issue was not expected to raise many problems and that cases cited in connection with that issue should not be regarded as precedent. It was suggested, however, that (as noted above in paragraph 109(i)), that item involved a broader spectrum of issues, such as, the question of the discretionary power to enforce an award even where a ground for refusal existed (such as a minor procedural defect or a defect that did not influence the outcome of the arbitration). Other items in paragraph 107 in which interest was expressed in the Working Group were (e) consolidation of cases before arbitral tribunals; (f) the duty of confidentiality, with regard to both arbitration and conciliation; (g) jurisdiction for claims raised for the purpose of set-off; (h) decisions by truncated tribunals; (j) the power to award interest and possibly other issues

relating to interest; and (k) costs of arbitral proceedings.

113. Recalling the discussion of increased use of electronic commerce and the question whether electronic messages complied with formal requirements for arbitration agreements and other formal requirements (see above, paras. 100-106), the Working Group took note of suggestions that it would be useful to review the implications of "on-line" arbitrations, i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communications.

114. The Secretariat was requested to take into account the views expressed in the Working Group in preparing material to be considered by the Working Group at future sessions. In order to facilitate that preparatory work by the Secretariat, States and interested international organizations were requested to provide material on court or arbitration cases and examples of provisions from national laws that would assist the Secretariat in preparation of this material.

H. Other Business

115. The Working Group was informed by representatives of the UN/ECE Advisory Group on the European Convention on International Commercial Arbitration (Geneva, 1961) of the United Nations Economic Commission for Europe of the meeting of the Advisory Group on 17 and 18 February 2000 in Vienna at which the Group concluded that the Convention (a) remained useful; (b) provided a utility beyond that of existing conventions (in particular, as a common set of minimum standards to be observed in international arbitration); and (c) could be made even more useful to both existing and potential new contracting States if it were updated. The Advisory Group concluded at its February meeting to modify article IV of the Convention and the Agreement relating to Application of the European Convention on International Commercial Arbitration. No consensus was reached as to whether any additional changes to the Convention should be made. The Commission appreciated the report and expressed the hope that any future work in the Economic Commission for Europe would not duplicate the work undertaken at the global level by UNCITRAL .

116. The Working Group also heard with appreciation the plans of the Economic Commission for Europe to provide, in the context of the Southeast European Cooperative Initiative (SECI), advice and assistance to foster the smooth functioning of international commercial arbitration in the States members of SECI.