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United Nations Commission on International Trade Law

Working Group II (Arbitration and Conciliation)
Thirty-sixth session
New York, 4-8 March 2002

Provisional Agenda

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

Notes on the provisional agenda

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

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

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

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.⁷ At its thirty-fifth session (Vienna, 19-30 November 2001), the Working Group approved the final version of the draft provisions in the form of a draft model law on international commercial conciliation. The report of that session is contained in document A/CN.9/506. The Working Group noted that the draft model law, together with the draft guide to enactment and use, would be circulated to member States and observers for comment, and presented to the Commission for review and adoption at its thirty-fifth session.

6. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration (see A/CN.9/WG.II/WP.113, paras. 13 and 14) and a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (*ibid.*, para. 16). Consistent with a view expressed in the context of the thirty-fourth session of the Working Group (A/CN.9/487, para. 30), concern was expressed as to whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules available in written form could satisfy the written form requirement. It was stated that such a reference should not be taken as satisfying the form requirement since the written text being referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration (i.e. a text that would most often exist prior to the agreement and result from the action of persons that were not parties to the actual agreement to arbitrate). It was pointed out that, in most practical circumstances, it was the agreement of the parties to arbitrate that should be required to be made in a form that was apt to facilitate subsequent evidence of the intent of the parties. In response to that concern, it was generally felt that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the meaning and effect of the more-favourable-right provision of article VII of the New York Convention.

7. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration and the text of paragraph 1 (a) (i) of a draft new article prepared by the Secretariat for addition to that Model Law (A/CN.9/WG.II/WP.113, para. 18). The Working Group was requested to continue its work on the basis of revised draft provisions to be prepared by the Secretariat.

8. The Working Group is composed of all States members of the Commission. These are:

Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Romania, Russian Federation, Rwanda, Sierra Leone, Singapore, Spain, Sudan, Sweden, Thailand, the Former Yugoslav Republic of Macedonia, Uganda, United States of America, United Kingdom of Great Britain and Northern Ireland, and Uruguay.

Item 1. Election of officers

9. The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Preparation of harmonized texts on written form for arbitration agreements and on interim measures of protection

10. The Working Group will have before it, and may wish to use as a basis for its deliberations, notes by the Secretariat discussing the issues of the written form for the arbitration agreement (A/CN.9/WG.II/WP.118), and interim measures of protection

(A/CN.9/WG.II/WP.119).

11. Background materials may be found in the following documents:

- Report of Working Group II (Arbitration and Conciliation) on the work of its thirty-fifth session (A/CN.9/506);
- *Settlement of commercial disputes: Draft Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation]*: note by the Secretariat (A/CN.9/WG.II/WP.116);
- *Settlement of commercial disputes: Model legislative provisions on international commercial conciliation*: note by the Secretariat (A/CN.9/WG.II/WP.115);
- Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*);
- Report of the Working Group on Arbitration on the work of its thirty-fourth session (A/CN.9/487);
- *Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation*: report of the Secretary-General (A/CN.9/WG.II/WP.113 and Add.1);
- Report of the Working Group on Arbitration on the work of its thirty-third session (A/CN.9/485);
- *Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement*: report of the Secretary-General (A/CN.9/WG.II/WP.110);
- Report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468);
- *Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement*: report of the Secretary-General (A/CN.9/WG.II/WP.108 and Add.1);
- Report of the United Nations Commission on International Trade Law on the work of its thirty-second session (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*);
- *Possible future work in the area of international commercial arbitration*: note by the Secretariat (A/CN.9/460);
- *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2);
- UNCITRAL Model Law on International Commercial Arbitration;

- UNCITRAL Conciliation Rules.

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

Item 5. Adoption of the report

13. The Working Group may wish to adopt, at the close of its session, a report for submission to the thirty-fifth session of the Commission (to be held in New York, from 17 to 28 June 2002, instead of being held from 10 to 28 June 2002, as originally scheduled).

Dates and scheduling of meetings

14. The session of the Working Group will take place from 4 to 8 March 2002 at the United Nations Headquarters, New York. There will be five working days available for consideration of the agenda items at the session. Meeting hours will be from 10.00 to 13.00 and from 15:00 to 18:00, except on Monday, 4 March 2002, when the session will commence at 10.30 a.m. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session (see A/56/17, para. 381), the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon)..

Notes

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

² *Ibid.*, paras. 340-343.

³ *Ibid.*, paras. 344-350.

⁴ *Ibid.*, paras. 371-373.

⁵ *Ibid.*, paras. 374 and 375.

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

⁷ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 309-315.