ASIA PACIFIC REGIONAL ARBITRATION GROUP

Report on Forty-eighth Session of the UNCITRAL Working Group II (Arbitration)

New York, 4-8 February 2008

Background

1. The United Nations Commission on International Trade Law (UNCITRAL) at its thirty-second session welcomed the opportunity to discuss the desirability and feasibility of developing the law of international arbitration. The proposed developments included assessing and reviewing the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and the UNCITRAL Arbitration Rules (or "the Rules").

2. The Commission at its thirty-ninth session (New York, 19 June-7 July 2006), discussed the future work of the Working Group.

3. In particular, the Report of the Commission notes:[1]

> 183. The Commission took note of suggestions of the Working Group made at its forty-fourth session (New York, 23-27 January 2006) that priority consideration be given to, inter alia, possible revision of the UNCITRAL Arbitration Rules; arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes,

[1] *Id., Sixty-first Session, Supplement No 17* (A/61/17), ¶183-¶187, pp 32-33

insolvency or unfair competition); and online dispute resolution (see A/CN.9/592, paras. 89-95).

184. It was agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules. It was observed that the list contained in document A/CN.9/610/Add.1 provided a useful starting point in that respect.

185. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that a study might be undertaken of the question of arbitrability and other forms of alternative dispute resolution in the context of immovable property, unfair competition and insolvency. It was cautioned, however, that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.

186. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and

the Convention on Electronic Contracts, already accommodated a number of issues arising in the online context. Another topic mentioned was the issue of arbitration in the field of insolvency. Yet another suggestion was to address the impact of anti-suit injunctions on international arbitration. A further suggestion was to consider clarifying the notions used in article I, paragraph 1, of the New York Convention, of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.

187. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should undertake work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic that the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but, at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.

4. On the basis of this mandate from the Commission the Working Group commenced its work revising the UNCITRAL Arbitration Rules during its forty-fifth session in Vienna, in September 2006. Following the session in Vienna, the Working Group convened, in its forty-sixth, forty-seventh and forty-eighth sessions, in New York (February 2007), Vienna (September 2007) and New York (February 2008), respectively. The Working Group has been assisted in its most recent sessions by five sets of extensive notes prepared by

the UNCITRAL Secretariat[2], all of which are entitled *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by the Secretariat)* (referred to in this Report as the Secretariat Note, plus the specific reference which is abbreviated to WP.145, WP.145/Add.1 etc, as appropriate). The Working Group has also been assisted in its work by a Report prepared by Mr Jan Paulsson and Dr Georgios Petrochilos, which is entitled *Revision of the UNCITRAL Arbitration Rules*[3]. This Report is, for convenience, referred to as the Paulsson and Petrochilos Report. There are extensive references to this Report in the Secretariat Note(s).

Revision of the UNCITRAL Arbitration Rules

5. The approach adopted by the Working Group to the revision of the UNCITRAL Arbitration Rules was to reconvene in New York in February 2007, Vienna in September 2007 and in New York in February 2008 in order to continue discussion in relation to areas of the UNCITRAL Arbitration Rules where revision might usefully be made. "It was considered that the focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years."[4] It was noted that the UNCITRAL Arbitration Rules may be used in a broad range of circumstances and that at least four main types of arbitration could be identified where the Rules were used in practice, namely: "…disputes between private commercial parties where no arbitral institution was involved (a type sometimes referred to as "ad

[2] A/CN.9/WG.II/WP.145 (6 Dec 2006) and A/CN.9/WG.II/WP.145/Add.1 (6 Dec 2006), A/CN.9/WG.II/WP.147 (3 Aug 2007), A/CN.9/WG.II/WP.147/Add.1 (3 Aug 2007) and A/CN.9/WG.II/WP.149 (30 Nov 2007), available at *www.uncitral.org*

[3] which is not an official UNCITRAL Document, but appears on the UNCITRAL website in the material in relation to Working Group II (Arbitration) Forty-fifth session, Vienna, 11-15 September 2006 *(see www.uncitral.org).*

[4] A/CN.9/614 para 16.

hoc" arbitration), investor-State disputes, State to State disputes and commercial disputes administered by arbitral institutions".[5] It was also noted, in discussions in the forty-eighth session in New York that the Model Law treats the expression "commercial" very broadly indeed. The footnote to Article 1, paragraph (1) of the Model Law indicates this very clearly, in the following terms:

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency, factoring; leasing; construction of work; consulting; engineering; licensing; investment; financing; banking; insurance; exportation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

6. More specifically, in relation to methodology, the Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006) A/CN.9/614 noted the position as follows:[6]

> 4. Broad support was expressed for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. The Working Group took note that the Rules had been easily adapted to be used in a wide variety of circumstances covering a broad range of disputes and that this quality should be retained. The Working Group further noted that the Rules could apply in the future to other situations or types of disputes that had not yet been identified. The view was expressed that, since practice in various areas, including in investor-State dispute settlement, was still developing, it would be undesirable to seek to design specific provisions at this stage. It was also stated that inclusion of specific provisions could undermine the existing flexibility of the Rules and limit the discretion of users to adapt the Rules as they saw fit.

---

[5] *Draft Report of the Working Group on Arbitration and Conciliation on the work of its Forty-fifth Session (11 September 2006) (A/CN.9/WG.II/XLV/CRP.1/Add.1),* ¶17, p5.

[6] *Id.,* ¶18 to ¶20, pp 5 and 6.

> 5. After discussion, the Working Group agreed that the structure and spirit of the UNCITRAL Arbitration Rules should be maintained. Given that some of the discussion would potentially develop useful conclusions relating to specific situations, such as investor-State disputes or institutional arbitration, it was agreed that any such conclusions should be reflected in the *travaux préparatoires* whether nor not those conclusions were ultimately reflected in the Rules or in any material that might accompany the Rules.
>
> 6. With respect to the working method to be followed at the current session, it was suggested that the Working Group should identify areas where a revision of the UNCITRAL Arbitration Rules might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for subsequent sessions the first tentative draft of the revised UNCITRAL Arbitration Rules. The Working Group agreed, on the basis of documents A/CN.9/WG.11/WP.143 and Add.1, to define the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.

7. As indicated above, further, more detailed, information in relation to the provisions of the UNCITRAL Arbitration Rules and issues arising with respect to their revision are contained in the Secretariat Note WP.145 ¶6.

8. Having already settled the methodology for the work of revision of the UNCITRAL Arbitration Rules the Working Group turned to consider the rules themselves. As was noted previously in the APRAG Report on the forty-sixth session in New York in January 2007 before the discussion of the provisions of the rules in detail, the Working Group agreed, at that New York session, that harmonisation in the drafting of the revised UNCITRAL Arbitration Rules with the UNCITRAL Model Law was not a fundamental requirement, though in some instances the Working Group might regard it as appropriate (see Secretariat Note WP.145 ¶6). The Working Group also agreed at the

beginning of the New York session, in January 2007, to replace phrases such as "both parties", "either party", "one of the parties" with the word "parties" to promote the applicability of the rules to multi-party arbitrations (see Secretariat Note WP.145 ¶7). The following is a brief summary of some of the important issues identified with respect to each of the rules considered at the forty-eighth session of the Working Group in New York in February 2008. This New York session began with consideration of the provisions of Article 38 of the Rules, following on from the previous session in Vienna at which discussion of the Rules had concluded with a discussion of Article 37 (see the APRAG Report on the forty-seventh session, ¶56).

Section IV – The Award

Costs - Articles 38-40

Article 38

9. The consensus was that the word "reasonable" should be added to qualify paragraphs (b), (c) and (d) of Article 38 as proposed in Secretariat Note WP.145/Add 1 ¶42. This means that travel and other expenses incurred by the Arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal and the travel and other expenses of witnesses to the extent that these expenses are approved by the arbitral tribunal must, in all cases, be "reasonable". It was also agreed to remove the word "legal" from paragraph (e) of Article 38 so the costs of "representation and assistance of the successful party" generally might be claimed; without the existing limitation that these must be costs for "legal representation and assistance". There was also

agreement for the deletion of the word "successful" as Article 38 did not deal with the question of the criteria for apportionment of costs.

Article 39

10. Issues regarding the operation of Article 39 were raised in the Secretariat Note WP145/Add 1 in the following terms:

> 44. The Working Group might wish to further discuss whether the appointing authority should be given a wider role for the determination of the fees or whether it would be preferable to provide a more transparent procedure for agreeing on the method of calculating the arbitral tribunal's fees from the outset.
>
> 45. The Working Group might wish to note that the Permanent Court of Arbitration in the Hague has been approached on that matter and agreed to be involved to a greater extent in practical issues relating to the fixing of the fees, in accordance with a provision which could read along the following lines, and which would replace paragraphs (3) and (4): "The arbitral tribunal shall make a proposal setting out the principles according to which its fees are to be fixed, and shall subsequently specify the amounts established by applying those principles. At any stage, (a) the arbitral tribunal, or (b) any party, no later than 15 days after the proposal was made, may ask that the principles or the amounts of the fees, and, if applicable, the deposit, be established by the appointing authority or, if no appointing authority has been agreed upon or if the agreed appointing authority does not decide within thirty days of a party's request, by the Secretary-General of the Permanent Court of Arbitration at The Hague.

11. There was significant discussion in relation to the provisions of Article 39 and the importance of its provisions as going to legitimacy of the international commercial arbitration process and the confidence of its users. Comments were made in relation to the inherent conflict of interest in an arbitral tribunal negotiating its own fees and rare situations where arbitrators may "overreach" in seeking excessive fees. It was suggested that possible conflicts may arise from situations where both chairing and presiding arbitrators have differing views with the negotiated fees. Reference was also made to the problem that

parties are likely to feel constrained in negotiating fees with an arbitral tribunal as they may feel that it would not be in their interests to disagree with or question either the basis upon which the arbitral tribunal proposed to calculate its fees or the sum as ultimately calculated. The comment was also made that the proposed revisions to Article 39 not only gave legitimacy to the international commercial arbitration process but also provided a means of "policing" any fee regime established. It was noted that the provisions of paragraph (3) of Article 39, which provide for advice to a party or parties by the appointing authority as to the usual basis for establishing fees which is customarily followed in international cases in which that authority appoints arbitrators, do not appear to be resorted to by parties. The reason for this was said to be that paragraph (3) of Article 39 does not presently address the difficulties that a party or parties may perceive in a "free and frank" discussion with the arbitral tribunal in relation to the fees of the arbitral tribunal and the basis of their calculation.

12. The consensus was in favour of the proposed new provision under which the Permanent Court of Arbitration in The Hague would be involved to a greater extent in relation to the practical issues relating to the fixing of fees, both in terms of the development and application of principles for the charging of fees and the consequent calculation of fees in accordance with those principles. It was agreed, consistently with the terminology of paragraph (4) of Article 40, that the proposed new provision would refer to the "charging" of fees rather than their "fixing", whether in terms of principles or the calculation of fees based on those principles. The significant and growing involvement of the

Permanent Court of Arbitration in relation to the establishing of principles for the charging of fees by arbitral tribunals and the process of calculation of those fees was noted by the Working Party. Comments were also made that unless the process of determining the basis of charging and calculation of fees by arbitral tribunals was dealt with in the Rules (and in a manner which enables parties to freely negotiate fees with the arbitral tribunal) the whole issue is likely to be a matter that will need to be addressed by the national courts, which will assess the fees, costs and expenses of arbitral tribunals. This would be to move away from the transnational operation of international commercial arbitration, is at odds with the underlying philosophy of the Model Law and the Rules and would be likely to lead to lack of uniformity, particularly due to differing approaches of national courts with respect to fees, costs and expenses – both in terms of entitlement and calculation, jurisdiction by jurisdiction (and particularly between courts of common law countries and courts of civil law countries). Furthermore, it was suggested that any assessments made by the national courts could give rise to concerns with regards to arbitral confidentiality being compromised.

13. An important point was also made that a problem may arise for the arbitral tribunal in circumstances where the member or members constituting that tribunal have already agreed to act as a tribunal member or members and have made a commitment to do so. In these circumstances problems may arise if the principles by which fees are to be charged can be varied subsequent to appointment and commitment of an arbitrator or arbitrators. Consequently, it was suggested that the determination of the methodology for the fixing of fees

must take place at an early stage, during the process of appointment of arbitrators, so it is still possible to choose another tribunal in the event that the original tribunal member or members do not accept these principles.

14. The comment was also made that the proposed changes to Article 39 would make the outcome in terms of arbitral tribunal fees more predictable and certain for parties which would provide an incentive for use of the Rules. The observation was also made, however, that there needs to be some balance between predictably and flexibility. In this respect, it is noted that the Permanent Court of Arbitration has administered arbitrations with a wide variety of fee arrangements. In any event, the proposed new wording (see Secretariat Note WP.145/Add.1 ¶45) clarifies that the appointing authority, whether it be an agreed appointing authority or the Secretary-General of the Permanent Court of Arbitration at The Hague, has, in the event of a request from the arbitral tribunal or any party, the ultimate authority to settle the final computation of the fees of the arbitral tribunal. The discussions anticipated resort may be had to the Permanent Court of Arbitration when the original appointing authority declined responsibility or where the parties had not originally agreed on an appointing authority. In this regard it was noted that an appointing authority could be agreed to at any stage of the arbitral proceedings and that the Rules may need to explicitly remind parties of this option. In relation to the "principles according to which … fees" of the arbitral tribunal are to be charged it was suggested that these principles should be set forth in the Rules and should not be left as a matter to be debated on an ad hoc basis. The further suggestion was made that a general rule might be provided for in

the Rules but where there is disagreement with respect to the general rule the matter would be one for resolution by the appointing authority. Some doubts were expressed as to how a general statement of principles would work in practice and the further concern was expressed that a statement of principle may preclude later agreement to an appointing authority. In any event, it was thought that the proposal to specify a general rule or principles in the Rules may assist by indicating to parties a broadly accepted methodology which could serve as a basis for charging arbitral tribunal fees.

15. It was suggested that the proposed provision enabling the arbitral tribunal or any party to ask for the determination of methodology for the charging of fees, the amounts of fees established by applying those principles and, if relevant, the amount of the deposit within 15 days after the proposal is made may be too short a period and, consequently, may tend to reduce the use to which the revised Article 39 may be put (see the proposed provision in Secretariat Note WP.145/Add.1¶45 (as set out above, ¶10)). Further, it was suggested that a distinction might need to be made in the time period allowed for making requests to the appointing authority or the Permanent Court of Arbitration depending upon whether the request related to issues as to the principles for determining fees or issues as to computation of the fees of the arbitral tribunal.

16. Comments were also made in relation to the importance of controlling, or providing some needs of controlling, the amount fixed by the arbitral tribunal as the deposit to secure the fees and expenses of the tribunal. It was noted that a party or parties may be significantly disadvantaged or prejudiced in

circumstances where an arbitral tribunal choses to fix a very large sum of money at the outset by way of deposit.

17. The consensus was, with respect to Article 39, that paragraph (1) should remain and paragraph (2) tentatively removed (but left in square brackets for further consideration during the second and final reading of draft revisions to the Rules by the Working Group). Paragraphs (3) and (4) would be replaced by the proposed new wording as set out in ¶45 of the Secretariat Note WP.145/Add 1 (as set out above, ¶10). Some further comment was made in relation to the potential usefulness of the publication of a schedule of fees by an appointing authority, hence the agreement to consider paragraph (2) in this respect again at a later stage.

Article 40

18. The Secretariat Note WP.145/Add 1 contains a suggested modification of Article 40 which is consistent with the proposed modification to paragraph (e) of Article 38, which removes the requirement that costs for representation and assistance be for "legal" representation and assistance (see ¶46 of the Secretariat Note WP.145/Add 1; and see ¶9, above). Further, it was noted that the Paulsson and Petrochilos Report at ¶280-¶281 suggested paragraphs (2) and (4) of Article 40 be deleted in their entirety.

19. Extensive discussion ensued in relation to the possible deletion of paragraph (4) of Article 40 which presently prevents any "additional fees" being charged by an arbitral tribunal for any interpretation, correction or completion of its

award under Articles 35, 36 or 37 of the Rules (which deal with interpretation of the award, correction of the award and an additional award, respectively). A broad range of views was expressed in relation to the desirability or otherwise of maintaining paragraph (4) of Article 40. In the course of the comments on the proposal attention was directed to the three different bases to which paragraph (4) is directed, each of which may raise different considerations and possible consequences in relation to the entitlement of the arbitral tribunal to additional fees. The comment was also made that the operation of paragraph (4) must be considered in the context of the fees regime agreed with the arbitral tribunal and, particularly, that different considerations may arise where the agreement is for an hourly rate rather than, as in some institutional arbitrations, the remuneration of the tribunal is, in effect, in the nature of a "lump sum".

20. Support for deleting paragraph (4) of Article 40 was based on a variety of considerations. In this respect the point was made that the underlying assumption in paragraph (4) appears to be that there has been some "default" by the arbitral tribunal which has led to the need for additional work. A number of comments were made indicating that the position may be quite the contrary. Rather, concern was expressed that the losing party may, in effect, be seeking an appeal of the award and relying upon Articles 35, 36 and 37, individually or in various combinations, for this purpose. In any event, speaking generally, the comment was made that where there is a need for an additional award there would appear, clearly, to be a need for further work by the arbitral tribunal for which it ought to be paid. On the other hand, it was

said that "interpretation" or "correction" imply work of a different nature and suggest that the original task of the arbitral tribunal in producing the award has not been satisfactorily completed. The further comment was made that it could not always be considered to be the fault of the arbitral tribunal when any further work in the nature of "corrections" may be required; most notably when the requests are unmeritorious. Further, it was suggested the right of parties to seek corrections under Article 36 should be limited to cases of real ambiguity. It appears the same applies to requests for interpretation of the award under Article 35. These Rules are in contrast to the provisions of paragraph (1)(b) of Article 33 of the Model Law which provides for a request for an interpretation of an award, but only where both parties agree. Again, the point was made that the use of the request for corrections is often, in reality, an attempted appeal. Consequently, it was said that a request for corrections or for an interpretation of an award should only be allowed where both parties request a correction or an interpretation and in these circumstances it is reasonable to deny further fees to the arbitral tribunal on the basis that, if both parties agree to make the request, the award must clearly have been ambiguous or otherwise deficient. The point was also made that it seems to be assumed in paragraph (4) of Article 40 that any request for interpretation, correction or completion of the award is a matter which can be dealt with summarily. However, it was also noted that there may be very considerable work involved in responding to a request for interpretation, correction or completion, whether or not the request is actually well founded. There was a suggestion that the appointing authority should determine whether any additional fees could be charged under paragraph (4) of Article 40, under

or by reference to Article 39. There were further suggestions that additional fees should not be recoverable for further work done unless there were "compelling reasons" to the contrary or "exceptional circumstances" which suggested otherwise. The problem with this proposal, as it was suggested, is the difficulty in finding an appropriate person or institution who could make that decision; the implication being that the person or institution chosen or appointed for this purpose would have difficulty in acquainting himself, herself or itself sufficiently with the arbitration proceedings to be in a position to make a decision of this kind.

21. In conclusion the consensus was that there was significant support for deleting paragraph (4) of Article 40, or at least reducing its rigour. There was, however, no consensus on removing it so the provisional position adopted was to retain paragraph (4) in the Rules but to request the Secretariat to prepare, in Article 39, wording that would permit the appointing authority to deal with any abuse or unfairness – within the jurisdictional provisions of Article 39 and to provide an amendment to paragraph (4) of Article 40 so the provisions of this paragraph could be ameliorated or reversed in exceptional circumstances, by the appointing authority. Consequently, there was no consensus for removing paragraph (4) of Article 40 from the Rules at this stage.

22. The discussion then turned to paragraphs (1) and (2) of Article 40. It was noted that the success of a party is the primary basis for an entitlement to a costs order under paragraph (1) of Article 40. There was some suggestion that the "success" trigger should be removed in favour of rules which give a

general discretion to the arbitral tribunal as to the payment of costs. In this regard it was noted that paragraph (1) of Article 40 adopts a presumptive principle that the losing party should bear costs of the arbitration and that this principle was not found in all legal systems. There was a proposal to remove this principle from the Rules, however, this proposal did not receive support.

23. Discussion then turned to the question whether there were different criteria for the purposes of paragraph (1) and paragraph (2) of Article 40.

24. The consensus reached was that paragraph (2) of Article 40 should be deleted together with the words “Except as provided in paragraph 2” from paragraph (1) of Article 40 and that there should be a consequential amendment to paragraph (e) of Article 38 with the deletion of “successful” as qualifying party. The purpose of the latter is, as with the proposed amendments to Article 40, to produce an uninhibited discretion in the arbitral tribunal with respect to the payment of the costs of the arbitration by one or other of a number of parties.

Article 41

25. In relation to paragraph (3) of Article 41 the consensus was that the Secretariat would look at these provisions in the context of the jurisdictional provisions of Article 39 which it was agreed ought to be revised. Otherwise no revisions were proposed to Article 41.

Proposed Additional Provisions

Liability of Arbitrators

26. It was proposed that consideration be given to the inclusion of an additional provision in the Rules with respect to the liability of arbitrators. The form of the new rule proposed (as is set out in Secretariat Note WP.145/Add 1 ¶47) is as follows:

> Liability to arbitrators
>
> Neither the arbitrators nor the appointing authority shall be liable to any person for any act or omission in connection with the arbitration save for the consequences of conscious and deliberate wrongdoing.

Reference was made in the course of discussions to the exclusion of liability provision contained in the *ICC Rules of Arbitration* (1998) and also the corresponding provision contained in the *LCIA Arbitration Rules* (1998). The ICC provision is as follows:

> ***Article 34 – Exclusion of Liability***
>
> Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration and the LCIA provision is as follows:

The LCIA provision is as follows:

> ***Article 31 – Exclusion of Liability***
>
> 31.1 None of the LCIA, the LCIA Court [including its President, Vice Presidents and individual members], the Registrar, any deputy Registrar, any arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration conducted by reference to these Rules, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.
>
> 31.2 After the award has been made and the possibilities of correction and additional awards referred to in Article 27 have lapsed or have been exhausted, neither the LCIA, the LCIA

> Court [including its President, Vice Presidents and individual members], the Registrar, any deputy Registrar, any arbitrator or expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

27. It was acknowledged in discussions that the extent of any liability exclusion provided for in the Rules will depend upon the public policy of the applicable law and the extent to which that law permits an exclusion of liability. In this respect reference was also made to paragraph (2) of Article 1 of the Rules which is intended to apply the provisions of the Rules to the extent the applicable law allows their operation. There was some suggestion that the provisions of paragraph (2) of Article 1 might be clarified in this respect as there appears to be an argument that any conflict between the applicable law and a provision of the Rules may result in the striking down of the whole rule rather than the saving of the rule to the extent it is consistent with the provisions of the applicable law. In any event, it is helpful to set out paragraph (2) of Article 1 of the Rules, as follows:

> 2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

28. Extensive discussion ensued in relation to the appropriate formulation of the excepting provisions of the proposed exclusion of liability rule. Issues were raised in relation to the possibility of phrasing the exception with reference to “gross negligence” but the discussion indicated that it was unclear to what extent the concept of “gross negligence” would be recognised or understood under the domestic law of many States. It was said that some States did not

have a concept of degrees of negligence and, consequently, there appeared to be a risk that a "gross negligence" exception might have no operation or might possibly operate as an exception on the basis of negligence generally, which would tend to defeat the purpose of the proposed exclusion of liability provision. The extent of the exception under the exclusion of liability provisions in the ICC Rules and the LCIA Rules was noted as was the exception in some jurisdictions and in some other institutional rules which simply provided an exception in the case of fraud. It was also suggested that the operation of the exclusion of liability provision would be strengthened by ensuring that its wording indicated that the liability of arbitrators is to be determined by the law of the seat of the arbitration. Otherwise, it was said, there may be a chance that arbitrators could be sued in the countries of their domicile.

29. The consensus was that there was overwhelming support for the inclusion of a provision excluding liability of arbitrators. It was generally acknowledged that any human activity, including arbitration, is prone to mistakes and in the case of judges mistakes are corrected on appeal. It was also said that the inclusion of an exclusion of liability provision for arbitrators was a necessary corollary to rules which limited rights of appeal from arbitral awards on the merits. It was noted that a result of limited rights of appeal was an increase in attacks on arbitrators by parties as a means of, in effect, appealing or overturning the arbitral award. It was agreed that exclusion of liability provisions are very widespread in arbitration rules throughout the world and that the general basis of the exception provided for was with respect to "wilful

wrongdoing". There was also support for extending the exclusion of liability to arbitral institutions, and their employees etc and also, possibly, to experts or expert witnesses appointed by the arbitral tribunal to assist it. There was also support for a provision excluding possible liability of the Permanent Court of Arbitration as the appointing authority and in respect of any other obligations it may have under the Rules (for example in relation to costs issues under Article 39). There were also some comments that there should be some attempt to define the liability and responsibilities of arbitrators. However, the comment was made, in this respect, that it would be very difficult to define arbitrator's liability and responsibilities and rather, that this is a matter for the applicable law, arbitral institutions and published ethical standards for arbitrators, rather than the Rules. In this regard it was noted that some national laws already contain specific provisions of this kind. As a matter of drafting, it was noted that the proposed text for the second reading of the Rules by the Working Group would exclude any reference to "any person" and so deal with removal of liability rather than also deal with the further issue of the person or persons to whom any liability might otherwise be owed. The consensus appeared to be that the latter simply provided an additional and unnecessary complication which might lead to difficulties and the circumscribing of the proposed exclusion of liability provisions.

General Principles

30. It was proposed to include in the Rules a provision with respect to the general principles to be applied in relation to their interpretation. The Secretariat Note (WP.145/Add 1 ¶48) sets out the position, as follows:

General Principles

In the interpretation of the Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith. Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Remarks

48. The provision seeks to address the suggestion made in the Working Group to include a provision on the interpretation of the Rules in accordance with their international origin in line with the new article 2A of the Model Law (A/CN.9/614, para.121). The second sentence of that paragraph seeks to clarify that the Rules constitute a self-contained system of contractual norms and that any lacuna in the Rules is to be filled by an interpretation of the Rules themselves, without reference to any non-mandatory provisions of the applicable procedural law.

31. In the course of discussions reference was made to the rules of other arbitral institutions, including the *ICC Rules of Arbitration* (1998), Article 15, which is in the following terms:

Article 15 – Rules Governing the Proceedings

1. The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

2. In all cases, the Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

Reference was also made to Article 2A of the Model Law, which is in the following terms:

Article 2A International Origin and General Principles

(As adopted by the Commission at its Thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

32. It appeared from the discussions of this proposed new Rule that the text had been taken from the *United Nations Convention on Contracts for the International Sale of Goods* 1980 which reflected similar provisions in UNIDROIT texts and also in the provisions of the Model Law, as set out above. Comments were made that there is a significant difference between provisions of this nature contained in legislative instruments as compared to the provision as proposed which is to be contained in arbitration rules, a contractual instrument. In this context comments were made in relation to the difficulty, and possible inappropriateness, of requiring in a contractual provision that an arbitral tribunal concern itself with "the need to promote uniformity". It was suggested that it would be very difficult for a particular arbitral tribunal to evaluate or implement this requirement and these difficulties may simply provide a further ground for a challenge to the award. Also, comments were made in relation to the difficulty, in many cases, of determining whether a matter had been "expressly settled" in the Rules and, also in relation to the difficulty in determining the "general principles" on which the Rules are said to be based, noting that no such general principles are spelt out in the Rules. Additionally, the confidential nature of arbitration cases would create difficulties in obtaining sufficient information in relation to how the Rules are applied. Other comments were made suggesting that these perceived difficulties were more apparent than real. In any event, there

appeared to be a consensus that the principles proposed in the new rule were laudable but that they would be difficult to apply and likely to be subject to a great deal of dispute. Consequently, concern was expressed in relation to the resultant risk that the new rule would simply be creating further grounds for possible challenges to arbitral awards. Ultimately, it was decided there was insufficient support to include the first sentence of the proposed provision. The discussion then turned to the second sentence relating to "gap filling".

33. In relation to the "gap filling" provisions of the proposed new rule it was suggested this was not such a problem that it needed to be addressed specifically in the Rules. There were, however, contrary views in this respect, and reference was made to the commentary in the Paulsson and Petrochilos Report which highlighted the difficulties created by a "gap" in the Rules which could have been addressed by a "gap filling" provision such as that proposed. The reference was made the case of *Econet Wireless Ltd v First Bank of Nigeria and Others*[7] ("*Econet* case") cited in the Paulsson and Petrochilos Report to illustrate the problems of a "gap" in the rules; in this case, Article 7 of the Rules. According the Paulsson and Petrochilos Report, at ¶79-¶81, the *Econet* case was an example of how the Rules "do not expressly envisage the possibility of an arbitration agreement providing for the appointment of the entire tribunal by an Appointing Authority" and the consequences of when the "Appointing Authority agreed upon by the parties refuses or fails to make the necessary appointments". There was some suggestion that Article 15 of the Rules provided sufficient authority to an

---

[7] *Yearbook of Commercial Arbitration,* vol. XXXI, 2006, Kluwer Law International, p 49 – 65.

arbitral tribunal to fill gaps but some doubts were expressed in this respect. In any event, the position reached was no consensus had emerged on adding the proposed new rule. As the principle applied by the Working Group is only to recommend changes where necessary and, particularly, not simply on the basis of any desire for uniformity with other arbitral rules, it was decided that no change should be made. The comment was also made that whilst other issues may arise with respect to the desirability of uniformity in legislative instruments, the same issues did not apply to arbitration rules.

34. The completion of the discussion on the proposed new General Principles Article concluded the Working Group's "first reading" of the Rules. As agreed previously the "second reading" of the Rules will seek to settle any provisions where there was a consensus that a change to the Rules needs to be made according to the principles which have been applied by the Working Group in this respect.

Transparency in Investor-state Arbitration

35. The Working Group, having completed the "first reading" of the Rules turned its attention to the question of "transparency" in investor/state arbitrations, a matter which had been held over from its forty-sixth session (New York, February 2007), as set out in the Report of that session (A/CN.9/619 at ¶61 and ¶62). The issues raised for further consideration in the report of that session are helpfully set out, as follows:

> *Investor-state arbitration*
>
> 61. A view was expressed that specific provisions might need to be included to ensure transparency of the procedure for arbitration

involving a State. Under that view, specific provisions should be included to deal with investor-State arbitration as follows: in article 3, a paragraph should be inserted to the effect that the notice of arbitration and the composition of the arbitral tribunal should be published on the UNCITRAL website; article 15, paragraph (3), should provide that all documents received or issued by the arbitral tribunal should be published by similar means; article 15, paragraph (4), should establish the discretion of the arbitral tribunal to allow persons or entities other than the parties to submit amicus curiae briefs; article 25, paragraph (4), should provide that hearings should be open to the public; and article 32, paragraph (5), should provide for the systematic publication of awards.

62. The Working Group recalled that, at its forty-fifth session, broad support had been expressed for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations (A/CN.9/614, paras. 18-19). The Working Group reiterated its support for that approach. It was recalled that, since practice in various areas, including in investor-State dispute settlement, was still developing, it would be undesirable to seek to design specific provisions at the current stage when the Working Group was still finalizing the common denominators that should be applied to all arbitrations. The Working Group agreed to revisit the issue after it had completed its first review of the revised provisions.

36. It was noted that some treaties adopt the UNCITRAL Rules for the purpose of their arbitration provisions, hence the potential importance of the Rules in relation to investor-state arbitrations. The question was whether or not any particular revisions should be made to the Rules to accommodate the particular issues in disputes of this kind or whether other devices should be adopted. These devices include a model arbitration clause, a separate set of rules or an addendum to the Rules containing alterations or suggested alterations of the Rules which might be adopted for the purposes of these types of disputes. Whichever device or devices are relied upon they could be applied by the parties consensually or under bilateral investment or other treaty provisions.

37. There has been considerable public interest in relation to transparency in arbitrations involving investors and investor-states from a number of quarters. Consequently the Working Group heard submissions and statements on behalf of the UN Secretary-General Special Representative on Business and Human Rights, Professor John Ruggie, a presentation of a declaration from the Chamber of National and International Arbitration of Milan and also received a report and presentation from the Centre for International Environmental Law (CIEL) and the International Institute for Sustainable Development (iisd) being a revised version, dated December 2007. A copy of the CIEL and iisd material had been provided to delegates and representatives by Ms Fiona Marshall, International Law Adviser, International Institute for Sustainable Development (fiona.marshall@bluewin.ch). A copy of the Statement of Professor John Ruggie, the Declaration from the Arbitrator's Club of Milan and a copy of the Note to the CIEL and iisd paper is attached to this Report.

38. The Reports and the issues raised by the Reports were discussed by the Working Group at great length with broad support for the principle of transparency. Although there was a general view expressing, in principle, the desirability of transparency in investor-State arbitration, during the course of this discussion the point was made that the Rules are arbitration rules and not something in the nature of a legislative instrument. One of the difficulties is that various bilateral investment and other treaties have adopted the Rules for the purpose of arbitrating disputes involving investors and investor-States. Consequently issues may arise in relation to the possibility of, in effect, affecting the operation of these treaties in the event that a subsequent revision

of the Rules applies to arbitrations of these disputes as a result of some ambulatory provision of a particular treaty which applies the Rules as revised from time to time or as a result of the same position flowing from the operation of laws applicable to the treaty. Further, the point was made that UNCITRAL is not a body which, through the Rules or otherwise, can make binding rules for the governance of States. It was said that this needed to be kept in mind in the course of the discussion. It was also noted that a number of States have already agreed to transparency provisions in their bilateral treaty arrangements in relation to investor-state disputes. It follows that transparency is not an issue in those circumstances. Further, it was suggested that consideration might be given to whether the appropriate vehicle for the application of a transparency regime (which, by its nature, requires and involves the consent of the State affected) is the provisions of bilateral investment treaties themselves rather than the provisions of the Rules.

39. As a result of the discussion a consensus was reached that if the Rules were to be revised in favour of transparency this would require separate regulation, rather than merely a revision of the Rules. Further, it was thought by some delegations that this work would be too complex for the present task of the Working Group and there was general agreement that this work should not delay the current review of the Rules. Various options were considered whereby transparency provisions might be applied. The general view was that the Rules themselves should not contain special investor-State treaty provisions. Further the view was that the Working Group would now work to complete its work on the generic rules and to seek guidance from the

Commission as to whether to proceed with work on investment treaty arbitrations, and with what object it should have in mind.

40. The Working Group then turned to the "second reading" of the "generic" Rules.

Section I – Introductory Rules

41. The Working Group began the "second reading" of the Rules with reference to Secretariat Note WP.147.

Article 1 – Scope of Application

42. The proposed revised Article 1 is set out in Secretariat Note WP.147 (¶7) as follows:

7. Draft article 1

Article 1

1. Where ~~the~~ parties ~~to a contract~~ have agreed ~~in writing*~~ that disputes ~~in relation to that contract~~ between them in respect of a defined legal relationship, whether contractual or not shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree ~~in writing~~.

   1 bis. [*Option 1*: Unless the parties have agreed to apply the Rules as in effect on the date of their agreement, the parties shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration.] [*Option 2*: Unless the parties have agreed to apply the Rules in effect on the date of commencement of the arbitration, the parties shall be deemed to have submitted to the Rules as in effect on the date of their agreement.]

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

43. The position reached at the forty-sixth session of the Working Group in New York was in support of as set out in Secretariat Note WP.147 (¶10), as follows:

> 10. It was observed at the [forty-sixth] session of the Working Group that text as now reflected in option 1 comprehensively set out the parties' choice to apply either the most recent version of the Rules to their dispute or the Rules in existence at the time the arbitration agreement was made (A/CN.9/619, para. 35). That approach received considerable support. At that session, an alternative proposal, as contained in option 2, was made which sought to avoid the situation where a default rule would apply retroactively to agreements made before the adoption of the revised Rules without sufficient regard for the principle of party autonomy (A/CN.9/619, para. 36).

See also the APRAG Report on the forty-sixth session at ¶8 to ¶10. The revisions to paragraph (1) of Article 1 as set out above were, adopted as a consensus view.

44. In relation to paragraph (1 bis) the consensus was in favour of Option 1 as the generally accepted position though support was expressed for Option 2. The concern expressed was how to strike a balance between encouraging the use of the revised Rules and avoiding retroactive issues with respect to existing arbitration agreements. However, as indicated in the comments and discussion, there was concern that any revision of Article 1 in terms of the proposed new paragraph (1 bis) not apply with respect to existing arbitration agreements. It was said that to apply the revised rules in terms of Option 1 in this way would be to have a retroactive effect on those agreements that the parties would not have anticipated. Reference was made in the discussions to paragraph 1 of Article 6 of the *ICC Rules of Arbitration* (1998), which are in the following terms:

Article 6 - Effect of the Arbitration Agreement

1. Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of the arbitration agreement.

45. Comments were also made in relation to the importance, from the perspective of an appointing authority, of ensuring that any revision to the Rules made it very clear which rules were to apply to a particular arbitration proceeding. It was noted that there had been some transitional difficulties in determining the application of the current or previous version of the ICC Rules in the context of the operation of Article 6(1) of those rules. It was also noted that these issues could be and were resolved by ICC as an administering institution but that the position under the UNCITRAL Rules is that whilst there may be an appointing authority acting there is no administering institution to resolve any arguments or difficulties as to the version of the rules which applies. Were it possible to constitute the arbitral tribunal it may prove possible to reconcile any doubt with respect to the application of the Rules in that forum. However, it was noted that, depending upon the form of the final revisions to the UNCITRAL Rules the position may be that the default number of members of an arbitral tribunal under these Rules differs as between the existing rules and any revised Rules (ie three members under the existing rules and, perhaps, only one under the revised Rules). If this does prove to be the position then it would not be possible to validly constitute the arbitral tribunal to resolve the issue of which version of the Rules is applicable - because only by answering

that question is the question of the proper constitution and appointment of the arbitral tribunal itself answered. The result is an inextricable circle.

46. In order to overcome any difficulties with respect to the application of the revised Rules to existing arbitration agreements it was suggested that a provision be added whereby the revised Rules are only applicable to arbitration agreements made after a particular date, which would be specified in the Rules (or which could be specified by reference to the date the General Assembly resolved to adopt the revised Rules). This device would ensure that existing arbitration agreements would remain completely untouched by any revisions to the Rules which would respect party autonomy and reserve to the parties the option of electing, by fresh agreement, to apply the revised Rules to their arbitration agreement or to arbitration of a particular dispute if they thought that was appropriate. It was noted that some particular difficulties may arise under investment treaty arrangements. However, it was suggested that the new provisions could, in effect, equate commercial arbitration agreements and investment treaty arrangements to the extent of treating the date of the arbitration agreement and the date of conclusion of the treaty as the same for present purposes.

47. Whilst there was some support for Option 2, which was viewed as better reflecting the contractual nature of arbitration by relying on the parties' understanding at the time of arbitration agreement, it was noted as being contrary to the expectation that most recent version of the Rules would apply. Consequently, the consensus of the Working Group was that there was

significant support for Option 1. It was pointed out that the Working Group's task in relation to Article 1 was a matter that had to be resolved because there is no existing rule to fall back upon on the basis that there was insufficient consensus for change, according to the methodology generally applied to the revision of the Rules. Divergence of views persisted as to whether the deeming rule should be applied in any event to arbitration agreements made before the new rules were adopted, and so the debate continued. Ultimately, the general view seemed to be that the new revised provisions of Article 1, with paragraph (1 bis), should only apply to arbitration agreements made after the commencement of the revised rules. As discussed previously, it was agreed that one way of overcoming this difficulty was to introduce a date into the revised provisions of the Rules to indicate that only arbitration agreements made after that date would be subject to paragraph (1 bis) of Article 1. There was also a question raised as to whether to include the word "expressly" as a qualification to the phraseology "Unless the parties have agreed to apply the Rules…". The general view was that introduction of any qualification via the word "expressly" was undesirable and would only lead to undesirable uncertainty. In relation to the issue of treaty obligations it was suggested that the Working Group should leave the issue of how to determine the application of the revised rules with respect to treaty obligations to the Commission having regard to the consequences for States in the event that application of the revised Rules could have some retroactive effect on the extent of their obligations under treaties. It was again noted that the effect on treaty obligations was also dependent upon the terms of the particular treaty which may or may not resolve any issue in favour of the version of the Rules

applicable at the date of conclusion of the treaty or in favour of the application of Rules as in force at the commencement of any other arbitration under the treaty. Nevertheless in relation to treaty obligations and the proposed resolution of retroactivity issues the comment was made that by specifying a date for the prospective application of paragraph (1 bis) to arbitration agreements entered into after that date retroactive operation issues could be avoided. It was noted, however, that on the basis of the very broad treatment of the word "commercial" under the Model Law (see above ¶5) a problem may still exist.

48. Finally, as a matter of drafting, the comment was made that if the word "expressly" were to be included in paragraph (1 bis) care should be taken to ensure a correspondence in terms between paragraphs (1) and (1 bis) of Article 1. In any event the consensus was that there was no strong support for inclusion of the word "expressly", on the basis that it would create unnecessary uncertainty. Paragraph (2), as set out in Secretariat Note WP.147 ¶7 (see above), was adopted without any modification.

Model Arbitration Clause

49. The consensus was that the Model Arbitration Clause provided for in the Rules is a clause of long standing and should only be modified for the most compelling reasons. The proposed revisions included adding the words "for contracts" to the heading so that the Model Arbitration Clause was limited in this respect and, further, that the conjunction "or" between the words "town" and "country" in paragraph (c) of the Model Arbitration Clause be replaced by

the word "and". It was suggested that this would be a retrograde change as it may suggest that the arbitration clause is not valid unless it specifies both a town and a country. Despite views expressing concern with the addition of the words "for contracts" to the heading, the Working Group ultimately adopted the Model Arbitration Clause with the amendments suggested in ¶12 of the Secretariat Note WP.147.

Article 2 – Notice, calculation of periods of time

50. The proposed provisions of Article 2 are set out in Secretariat Note WP.147 (¶15). It was proposed that paragraph (1) be revised in a relatively minor respect and that a new paragraph (1 bis) be added. For convenience, these paragraphs are set out, as follows:

> 15. Draft article 2
>
> **Notice, calculation of periods of time**
>
> **Article 2**
>
> 1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is ~~physically~~ delivered to the addressee or if it is delivered at its habitual residence, place of business or ~~mailing~~ address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
>
> 1 bis. Such delivery may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram, or by any other means of communication, including electronic communications that provide a record of dispatch and receipt thereof.
>
> 2. …

51. Following discussion the consensus was generally in favour of deleting the word "physically" from paragraph (1) of Article 2. Following further

discussion of proposed new paragraph (1 bis) of Article 2 the consensus was that paragraph (1) should be revised in line with the various observations in relation to the provisions of paragraph (1 bis) of Article 2.

52. In relation to proposed new paragraph (1 bis) of Article 2 concern was expressed in relation to the final words "other means of communication, including electronic communications that provide a record of despatch and receipt thereof". It was noted that this terminology had substantially reflected the *United Nations Convention on the use of Electronic Communications in International Contracts* 2005. Particular concern was expressed in relation to the extent to which the specified means of communication in proposed new paragraph (1 bis) required a record of despatch and receipt. It was suggested that there was a need to ensure the requirement as to receipt was limited to electronic communications only. It was noted that the proposed paragraph (1 bis) was in the nature of a hybrid of the provisions found in the *LCIA Arbitration Rules* (1998) and other texts on electronic commerce, also incorporating some of the approach of the provisions of the *UNCITRAL Model Law on Electronic Commerce* 1996. It is noted that the LCIA Rules provide in Article 4.1, as follows:

> **Article 4 – Notices and Periods of Time**
>
> 4.1 Any notice or other communication that may be or is required to be given by a party under these Rules shall be in writing and shall be delivered by registered post or courier service or transmitted by facsimile, telex, email or other means of telecommunication that provide a record of its transmission.
>
> …

53. It is also noted that the *ICC Rules of Arbitration* (1998) provide a similar provision in paragraphs (2) and (3) of Article 3, as follows:

> **Article 3 – Written Notifications or Communications; Time Limits**
>
> …
>
> (2) All notifications or communications from the Secretariat and the Arbitral Tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.
>
> (3) A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph.

54. It was noted, in relation to the ICC Rules, that these provisions are directed to communications from the Secretariat or the arbitral tribunal rather than communications generally, between parties and otherwise. Comments were also made raising the general question as to whether the concept of "receipt" is practical or meaningful in an electronic age. Consequently, issues were raised as to the desirability of providing detailed and specific treatment in relation to electronic communications. Additionally, there was a concern raised for the proposed deletion of the word "mailing", and this concern stemmed from the possibility of parties having multiple email addresses and the burden of parties to seek all email addresses to satisfy the notice requirement. Therefore, it was suggested that more precision be given to the term "address".

Conclusion

55. It is hoped that this brief summary of the discussions of the Working Group at its last session in New York will assist APRAG Member Organisations: first, as a convenient source of additional information in relation to the revision of the UNCITRAL Arbitration Rules; and, second, to assist in the formulation of views, comments and recommendations for discussion by APRAG at further sessions of the UNCITRAL Working Group. This brief summary is, of course, not an official UNCITRAL document.

56. Please do not hesitate to make contact if you have any comments or queries (ccroft@vicbar.com.au; christopher.kee@deakin.edu.au; or wio@deakin.edu.au).

Dr Clyde Croft SC

Christopher Kee

William Ho

APRAG *Representatives/Observers*

28 February 2008

APPENDIX

- Statement of UN Secretary-General's Special Representative on Business and Human Rights, Professor John Ruggie.
- Declaration of the Chamber of National and International Arbitration of Milan (12 October 2007).
- Note to the Paper "Revising the UNCITRAL Arbitration Rules" to address investor/state arbitrations (Centre for International Environmental Law and International Institute for Sustainable Development – Revised Version December 2007).