

## ASIA PACIFIC REGIONAL ARBITRATION GROUP

### *Report on Forty-sixth Session of the UNCITRAL Working Group II (Arbitration)*

*New York, 5-9 February 2007*

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#### *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 UNCITRAL 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), adopted the recommendations of the Working Group in relation to the form of arbitration agreement and interim measures of protection<sup>1</sup> The recommendation of the Working Group on the interpretation of Article II,

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<sup>1</sup> *Report of the United Nations Commission on International Trade Law on the work of its Thirty-ninth Session (New York, 19 June-7 July 2006), Official Records of the General Assembly, Sixty-first Session, Supplement No 17 (A/61/17), ¶87-¶181, pp15-31. (See [www.uncitral.org](http://www.uncitral.org)).*

paragraph 2 and Article VII, paragraph 1, of the New York Convention was also adopted by the Commission.<sup>2</sup>

3. The Commission also discussed the future work.<sup>3</sup> In particular, the Report of the Commission notes:<sup>4</sup>

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, 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

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<sup>2</sup> *Id.*, Sixty-first Session, Supplement No 17 (A/61/17), ¶¶177-181, pp29-30

<sup>3</sup> *Id.*, Sixty-first Session, Supplement No 17 (A/61/17), ¶182-¶187, pp31-31

<sup>4</sup> *Id.*, Sixty-first Session, Supplement No 17 (A/61/17), ¶183-¶187, pp32-33

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 reconvened, in its forty-sixth session, in New York, in February 2007. The Working Group was assisted in its most recent session by two sets of extensive notes prepared by the UNCITRAL Secretariat<sup>5</sup>, both 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). The Working Group was also 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*<sup>6</sup>. This Report is, for convenience, referred to as the Paulsson and Petrochilos Report. There are extensive references to this Report in the Secretariat Note.

#### ***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 in order to continue discussion in relation to areas of the UNCITRAL

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<sup>5</sup> A/CN.9/WG.II/WP.145 (6 Dec 2006) and A/CN.9/WG.II/WP.145/Add.1 (6 Dec 2006), available at [www.uncitral.org](http://www.uncitral.org)

<sup>6</sup> 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](http://www.uncitral.org)).

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.”<sup>7</sup> It was noted that the UNCITRAL Arbitration Rules were intended to apply to 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 hoc” arbitration), investor-State disputes, State to State disputes and commercial disputes administered by arbitral institutions”.<sup>8</sup> More specifically, in relation to methodology, the Draft Report of the Working Group noted the position as follows:<sup>9</sup>

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. 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

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<sup>7</sup> A/CN.9/614 para 16.

<sup>8</sup> *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), ¶3, pp1-2.

<sup>9</sup> *Id.*, ¶4 to ¶6, p2.

institutional arbitration, it was agreed that any such conclusions should be reflected in the *travaux préparatoires* whether or 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.
  
6. 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 (see ¶4 above).
  
7. Having already settled the methodology for the work of revision of the UNCITRAL Arbitration Rules the Working Group turned to consider the rules themselves. Before the discussion of the provisions in detail, the Working Group agreed 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 ¶6). The Working Group also agreed at the beginning of the session 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 ¶7).

The following is a brief summary of some of the important issues identified with respect to each of the rules.

## **Section 1. Introductory rules**

### **Article 1 – Scope of application**

8. Issues were raised regarding the types of disputes that could be referable to arbitration (see Secretariat Note ¶¶9 to ¶¶11). The current text refers only to “disputes in relation to that contract”, which in modern day commercial practice may be too restrictive. It was agreed by the Working Group that the revised text should be amended “...so as not to suggest any limitation with respect to the types of disputes that parties could submit to arbitration” (A/CN.9/WG.II/XLVI/CRP.1/Add.1). Proponents of widening the scope of application of the text believed doing so would “...avoid the ambiguity on the scope of application of the Rules and ensure that the provision not be limited to disputes of a contractual nature only” (A/CN.9/WG.II/XLVI/CRP.1/Add.1). The inclusion of the phrase “any defined legal relationship, whether contractual or not” was debated as the possible machinery to overcome the current problem. This proposal was generally well received. While there were some concerns that the new text would weaken legal certainty (i.e. by allowing oral agreements binding as agreements to arbitrate), it was argued such wording is consistent with other international texts, including the New York Convention and Article 7(1) of the UNCITRAL Model Law.

9. Other issues were raised including the requirement that the agreement to arbitrate be in writing, together with any modifications thereto (see Secretariat Note ¶12 to ¶13). It was noted that the writing requirement of the arbitration agreement is designed to "...set out the scope of application of the UNCITRAL Arbitration Rules and...(separate the) question of the validity of the arbitration agreement (which is left to the applicable law)" (A/CN.9/614, para. 28). Proponents of deleting the phrase "in writing" argued that the form of the arbitration agreement should be addressed by the applicable law, not the UNCITRAL Arbitration Rules. It was argued that the Rules should as far as possible be consistent with the Model Law, "...which has reflected a broad and liberal understanding of the form requirement" (A/CN.9/WG.II/XLVI/CRP.1/Add.1 para. 14). Moreover, Article 19 of the Model Law allows the parties freedom to agree on the procedural rules to be followed by the arbitral tribunal in conducting the proceedings, and thus the Rules should also follow this position to promote synergy between international instruments. It was also noted that retaining a writing requirement in the Rules may possibly clash with domestic legislation which may not require arbitration agreements be in writing. Consequently, to promote efficiency and practicability in all legal systems, it was suggested that the Rules should as far as possible be kept as neutral as possible. On the other hand, opponents of the deletion argued that the writing requirement was necessary to promote certainty and "...to remind the parties that, depending on the applicable law, the agreement to arbitrate might only be valid if made in writing and second, from the point of view of convenience, to provide a basis upon which an Appointing Authority could appoint arbitrators" (A/CN.9/WG.II/XLVI/CRP.1/Add.1 para. 16).

10. Significant debate occurred on the issue of which should be the applicable version of the UNCITRAL Arbitration Rules to apply to a dispute where parties simply agree in the arbitration agreement that they will use the UNCITRAL Arbitration Rules (with no reference to edition or versions) (see Secretariat Note ¶14 to ¶19). Of the three variations proposed by the Secretariat, the Working Group expressed considerable support for variants 2 and 3. It was noted that variant 2, which would apply the Rules as in effect at the commencement of the arbitration (as opposed to the Rules in force on the date of the arbitration agreement) unless the parties agreed to the contrary, “...corresponded with the approach taken by a number of arbitration institutions when revising their Rules” (A/CN.9/WG.II/XLVI/CRP.1/Add.1 para. 20); while variant 3 provided “...a precise and simple rule which put the parties on notice that, if they did not express their agreement to apply the Rules as in effect on the date of their agreement, then the Rules as in effect on the date of the commencement of the arbitration should be presumed to apply” (A/CN.9/WG.II/XLVI/CRP.1/Add.1 para. 21). Some concern was noted regarding the possibility that variant 3 may allow past versions of the UNCITRAL Arbitration Rules to apply retrospectively “...without sufficient regard for the principle of party autonomy” (A/CN.9/WG.II/XLVI/CRP.1/Add.1 para. 22). The view was also expressed that parties may expect that the most recent version of the Rules should apply. The Working Group agreed that this issue should be further considered.

**Model Arbitration Clause**

11. Issues such as the wording and location of the model arbitration clause were considered by the Working Group (see Secretariat Note ¶¶20 and ¶21). It was agreed that the wording of the clause should reflect the fact that the Rules have a contractual rather than a legislative nature, and thus “as at present in force” should be rephrased to “as at present in effect”.
  
12. The note to the model arbitration clause was considered by the Working Group (see Secretariat Note ¶¶22 and ¶23). In relation to sub-paragraph (a), the Working Group noted that it was preferable to name institutions as appointing authorities instead of individual persons. However, it was also noted that this position may cause some difficulty as, for example, the Secretary-General of the Permanent Court of Arbitration (who acts as a regular Appointing Authority) may, under this proposed amendment, be prohibited from acting in this capacity. In relation to sub-paragraph (c), it was noted that the text should refer to the “seat” rather than the “place” of the arbitration, which arguably will identify more clearly to the parties the legal importance of the location of the proceedings (and note the subsequent discussion of those issues in relation to Article 16). Further, the reference to “town or country” was criticised as not providing a sufficiently clear method of identifying the place of arbitration; an issue which gives rise to significant legal consequences. Lastly, in relation to the proposed sub-paragraph (e), a provision as to the law governing the arbitration agreement, it was agreed that the provision should not contain any reference to the applicable law as it addresses only one aspect of the laws applicable in the context of arbitration. It should be noted that the

proposal to include a reference to consolidation in the model arbitration clause was abandoned. While intended to promote efficiency, it was agreed that such clause may unnecessarily complicate the provision.

### **Article 2 – Notice, calculation of periods of time**

13. A number of issues were debated by the Working Group; notably the deemed delivery provision, the notice of arbitration and the inclusion of reference to electronic communications as a permitted means of providing such notice.
  
14. The Working Group was of the view that the deemed notice delivery provision (see Secretariat Note ¶24) should not be amended as it had not created any problems in practice, and it was consistent with other international texts, such as the United Nations Convention on the Limitation Period in the International Sale of Goods and the United Nations Convention on Contracts for the International Sale of Goods. Nevertheless, it was suggested that a fallback position be developed regarding the delivery of notice, in particular along the lines of Article 3.3 of the *ICC Rules of Arbitration* (1998). This suggestion was considered important as it “...would encompass situations where physical delivery of notices was not possible” (A/CN.9/WG.II/XLVI/CRP.1/Add.2 para. 3; and see Article 3.2 of the *ICC Rules of Arbitration* (1998)). The Working Group also expressed support for the deletion of the reference to “mailing address” given the developments in electronic communications. Preference was indicated for use of the word “address” only which may apply more widely to both postal and electronic addresses. The issue of whether deemed delivery should extend to include the notice of arbitration was also

debated. It was suggested that a better way to deal with the issue was to replace the deemed delivery provision with a “proper service” provision, however this proposal did not receive wide support.

15. As a result of the increasing use of electronic communications in international trade, the Working Group considered the inclusion of a reference to electronic communications highly desirable in order to accommodate modern communication practices in international commercial arbitration (see Secretariat Note ¶25). This proposal received considerable support from the Working Group. It was noted that the reference to the words “electronic communication” was widely supported as this is consistent with the words used in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). It was also noted that this Convention could be used as a means of defining terms used in the newly revised UNCITRAL Arbitration Rules with respect to electronic communications.

### **Article 3 – Notice of arbitration and response to the notice of arbitration**

16. Consistently with its preliminary discussion on the desirability of seeking to accommodate multi party arbitrations the Working Group favoured use of the expression “or parties” in paragraph 1 of Article 3 (see Secretariat Note ¶7 and ¶30).
17. A number of issues were raised regarding the notice of arbitration; in particular the issue of the extent to which mandatory items ought to be

prescribed for inclusion in the notice of arbitration. It was noted that increasing the scope of mandatory obligations on the parties may give rise to problems with invalid notices of arbitration, as a consequence of non-compliance with requirements of this type. In an attempt to alleviate such concerns, but also to promote efficiency in requiring adequate information in notices, it was proposed that an incomplete notice of arbitration should not prevent an arbitral tribunal being constituted, and, further, that power be conferred on the arbitral tribunal to rule on whether an incomplete notice is, nevertheless, valid. It was agreed that this issue would be reconsidered at future sessions of the Working Group. It was also suggested that the arbitral tribunal should be given the express power to request rectification of the notice of arbitration so that, if the notice is rectified, the proceedings may be deemed to commence as at the date the (defective) notice was initially communicated.

18. The Working Group also considered a number of proposed amendments to paragraphs 3 and 4 of Article 3 and proposed new paragraphs 4 to 7 (see Secretariat Note ¶31 to ¶39). It was agreed that the “names and contact details” of the parties should be required in the notice, amending Article 3, sub-paragraph 3(b). No support was given to the proposed amendment to Article 3 sub-paragraph 3(c) to require only identification of the arbitration argument that was being involved. It was noted that the proposed amendment may cause difficulties for the use of the Rules in multi party arbitrations. Support was given to the proposed amendment to Article 3, sub-paragraph 3(d) to include reference to disputes of a non-contractual nature; however it

was agreed that such reference should be consistent with prior wording agreed upon by the Wording Group (see ¶8 above and Secretariat Note ¶11). The Working Group expressed some support for including within the permissive provisions, of Article 3 sub-clause 4(c), provisions permitting the claimant to include its statement of claim in the notice of arbitration if it so chooses. This was, however, subject to further discussion. A number of issues were raised regarding proposed new Article 3, paragraph 5. It was noted that reference to “any comment” on the demand as proposed in new sub-paragraph 5(a) was vague and ambiguous and should not form the basis of a mandatory obligation on the respondent with respect to the notice of arbitration. Further, it was debated whether the requirements of the proposed new paragraph 5 would be better suited being optional rather than mandatory. Lastly, concern was raised over the time period within which the respondent is to provide a response to a notice of arbitration under proposed new paragraph 5. Concern was expressed that, in practice, the proposed thirty day time limit may provide too short a time period in some cases and “...did not appear to be synchronised with other time periods such as the fifteen day period for challenging an arbitrator...” (A/CN.9/WG.II/XLVI/CRP.1/Add.2 para. 16).

#### **Article 4 – Representation and assistance**

19. It was agreed to replace the phrase “persons of their choice” with “persons chosen by them” to take into consideration counsel who may not be able to be present at an arbitration by virtue of a heavy schedule, for example.

20. Issues discussed included the extent to which a representative of a party acting for that party should be required to disclose the scope of their authority (see Secretariat Note ¶40). Concerns were raised at the possibility of requiring parties to an arbitration to disclose the scope of authority, particularly if such disclosure gave rise to matters the subject of legal professional privilege. Despite such concerns, it was agreed that it would be beneficial for represented parties to be required to disclose the content of its representative powers. “It was suggested that the provision should be drafted in a flexible manner, allowing the arbitral tribunal to determine on its own motion the extent to which it needed to be provided with information on the scope of authority” (A/CN.9/WG.II/XLVI/CRP.1/Add.2 para. 23). The purpose of the modification is to prove to an opposing party that a representative of the party has authority to act in that capacity.

**Proposed article 4 bis – Designating and appointing authorities**

21. An issue raised for consideration was a proposed new article, Article 4 bis (see Secretariat Note ¶41 and ¶42). This provides for the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an Appointing Authority in default of agreement between the parties as to an Appointing Authority or where the agreed Appointing Authority refuses or fails to act in accordance with the UNCITRAL Arbitration Rules, on request from any party to the arbitration. (Proposed Article 4 bis, paragraph 2). Proposed new Article 4 bis, paragraph 1, provides that the parties may agree that the Secretary-General of the Permanent Court of Arbitration act as the Appointing Authority under the Rules. Neither proposed new paragraph 2 (or other proposed

paragraphs 3 to 6) make provision for the Permanent Court of Arbitration to designate itself as the Appointing Authority.

22. Proponents of the amendment argued that vesting the Permanent Court of Arbitration with a designating function as proposed was an attractive and sensible solution whereby the UNCITRAL Arbitration Rules themselves could provide for a possible “gap” in the appointment machinery. It was noted that the Permanent Court of Arbitration is an intergovernmental institution, with a broad membership, which has a successful history in acting as an Appointing Authority. It was argued that vesting such a power in the Permanent Court of Arbitration would minimise the delay in commencing arbitration proceedings and provide a more streamlined approach; and without the possibility of needing to seek the assistance of State courts. Further it was argued that the proposal would promote accountability and flexibility given the membership and record of performance of the Permanent Court of Arbitration. Additionally, it was argued that such change “...would preserve the freedom of the parties to select any other Appointing Authority but give them a predictable rule in the event they do not agree.” (A/CN.9/WG.II/XLVI/CRP.2)
23. Opponents to the change argued that the proposal “...would not sufficiently take account of the cultural and regional applicability of the UNCITRAL Arbitration Rules, and would have the consequence of centralising all cases where the parties had not designated an Appointing Authority in the hands of one organisation” (A/CN.9/WG.II/XLVI/CRP.1/Add.3 para 4). Further, it was noted that while such provision may be more suitable for investor-State

arbitration, such provision may not be suited to regional or domestic arbitration.

24. While a variation of the amendment was put forward allowing the Permanent Court of Arbitration to designate another Appointing Authority if it considers it appropriate, the prevailing view, subject to further discussion at subsequent Sessions of the Working Group, was the existing mechanism for the designation of an Appointing Authority should be preserved. Consequently further consultation and comment is required from APRAG members (as indicated in the intervention made on behalf of APRAG by Dr Croft, which is set out in the Appendix to this Report).
25. In relation to paragraph 2, the Working Group was of the view that the text should be amended to clarify that the parties could seek the assistance of the Appointing Authority at any time during the arbitration proceedings.

## **Section II. Composition of the arbitral tribunal**

### **Article 5 – Number of arbitrators**

26. The Working Group was divided on whether the default rule on the number of arbitrators, which is presently three, should be modified. In its debate, option 1 variant 1 of the proposals received the widest support; namely that if the parties have not previously agreed that there shall be only one arbitrator, then three arbitrators should be appointed (see Secretariat Note ¶43). An issue was raised regarding the practicality of imposing a three member tribunal in small arbitrations. To alleviate such concerns and to promote procedural flexibility,

an alternative proposal was put forward for the automatic appointment of one arbitrator where the process can be extended to provide for appointment of three arbitrators on the request of **either** party. This proposal received considerable support. Option 2 raised for discussion a proposal whereby, absent agreement between the parties, the notice of arbitration would contain a proposal on the number of arbitrators and in the absence of the respondent's agreement the Appointing Authority would determine the number (see Secretariat Note ¶43). This option received less support, on the basis that involving an Appointing Authority from such an early point in time may lead to unnecessary time delays. The Working Group agreed to consider the wording of this alternative proposal and its time limit for the respondent's agreement at a later session.

27. Paragraph 2, as proposed, was supported by the Working Group (see Secretariat Note ¶44). It was agreed that, as proposed, the parties should define their own method for constituting an arbitral tribunal where they decide that the tribunal is to be composed of a number of arbitrators other than one or three.

## **Articles 6-8 – Appointment of arbitrators**

### **Article 6**

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**Article 7**

28. Most of the discussion concerned the inclusion of proposed new Article 7 bis in the text, which makes specific provision for the appointment of arbitrators in multi-party arbitrations (see Secretariat Note ¶47). Given the emphasis placed on developing the UNCITRAL Arbitration Rules to accommodate and facilitate multi-party arbitrations, more specifically, the Working Group generally supported the principle of allowing multiple claimants (jointly) and multiple respondents (jointly) to each (as a group) appoint an arbitrator. It was also noted that the provision should also be worded in a way that takes into consideration the possibility of there being multiple claimants and one respondent, or vice versa.
  
29. Further issues were raised in relation to proposed new Article 7 bis, paragraph 2, which deals with the failure of the parties to agree to constitute an arbitral tribunal. Views were expressed in favour of giving these provisions a broad operation and including provisions which give the relevant Appointing Authority power to constitute the arbitral tribunal to "...cover all possible failures" (A/CN.9/WG.II/XLVI/CRP.1/Add.3 para 13), as it may be difficult to predict the circumstances in which the appointment process may break down. These views received wide support.
  
30. There was further discussion on whether the discretionary power conferred on an Appointing Authority in proposed Article 7 bis paragraph 2, which gives discretion to the Appointing Authority to appoint an arbitral tribunal, also grants the power to revoke such appointments (see Secretariat Note ¶47). This

issue gave rise to concern that it may “...deprive parties of the right to appoint their own arbitrator and give the multiple parties who failed to appoint an arbitrator the ability to cause all arbitrators to be appointed anew by the Appointing Authority” (A/CN.9/WG.II/XLVI/CRP.1/Add.3 para 14).

Nevertheless, the Working Group agreed that such discretionary power of the Appointing Authority to revoke is important for flexibility. The Working Group noted that the problems highlighted in the *Dutco*<sup>10</sup> case on this issue had resulted in amendments to the ICC Rules and LCIA Rules and the view was expressed that amendments should also be made in a revised text of the UNCITRAL Arbitration Rules to accommodate the problems associated with this decision. Consequently it was agreed that the Appointing Authority should appoint the entire arbitral tribunal in circumstances where parties on the same side in a multi-party arbitration are unable jointly to agree on an arbitrator. The Working Group also debated whether a two-step procedure should be put in place in order to preserve the right of the parties to appoint their arbitrator. Under this procedure, the parties would first nominate their proposed arbitrator to the Appointing Authority and then have that nominated arbitrator appointed. The view of the Working Group was that while the two-step procedure had merits it may overly complicate the proposed provisions. It was agreed that there may be an easier solution by a simple rephrasing of the proposed provision (by inserting the words “or re-appoint”). The Working Group will revisit this provision at a later session.

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<sup>10</sup> Cass Civ Ire, 7 January 1992, *Sociétés Siemens & BKMI v Société Ducto* (1992) 119 JDI 707. In this case the French *Cour de cassation* declined to uphold the validity of an appointment of an arbitrator, and held that “the principle of the equality of the parties in the appointment of arbitrators is a matter of public policy and can be waived only after a dispute has arisen” (see the Paulsson and Petrochilos Report at ¶83). This decision “directly influenced” (Paulsson and Petrochilos Report at ¶84) the revision of Article 10 of the ICC Rules and Article 8.1 of the LCIA Rules. It has been noted that the solutions made in both the revised ICC and LCIA Rules are “sound and workable” (Paulsson and Petrochilos Report at ¶87).

**Article 8**

31. It was agreed that Article 8 be deleted considering it had effectively been substituted by Article 4 bis (see Secretariat Note ¶48).

**Challenge of Arbitrators – Articles 9 – 12****Article 9**

32. The proposed amendments to Article 9 arose out of suggestions by the Working Group that the ongoing duty of disclosure by arbitrators should be clarified using similar language to Article 12(1) of the UNCITRAL Model Law (see Secretariat Note ¶49 and ¶50).
33. Issues arose regarding the content and form of the required disclosure by arbitrators, establishing to the parties that they are independent and impartial. It was agreed that the proposed model statement of independence was beneficial (see Secretariat Note ¶50). It was noted that the language used in the proposed statement corresponded with the language of the model statement in the IBA Rules on Ethics for Arbitrators.<sup>11</sup>

**Articles 10 and 11**

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**Article 12**

34. Issues arose regarding the time limits for challenge of arbitrators provided for in paragraph 1 (see Secretariat Note ¶53). It was noted that a proposed provision allowing the party making the challenge to have sixty days to seek a

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<sup>11</sup> IBA Rules of Ethics for International Arbitrators, in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XII (1987), pp. 199 – 202, accessed via Kluwer Law International, 12/03/2007

decision on the challenge by the Appointing Authority may be too long in practice. It was suggested that a time period of thirty days would be more practicable if an initial period of fifteen days was provided from the date of notice of the challenge to allow for the possibility of the other party agreeing to the challenge and the challenged arbitrator withdrawing.

35. There was also discussion of the proposal to empower the Appointing Authority, in amendments proposed to paragraph 2, to appoint an arbitrator directly if it considered in the circumstances that a party should have its right to appoint a replacement arbitrator withdrawn (see Secretariat Note ¶54). It was agreed that this power should not be limited merely to certain situations, for example where a party abuses the challenge procedure constantly, but rather to all circumstances. So instead of adopting a threshold requirement in the Rules, a broad wording of this empowering provision, allowing discretion, was favoured by the Working Group.

### **Article 13 – Replacement of an arbitrator**

36. The issue of unapproved resignation or failure to perform by arbitrators was a topic of discussion for the Working Group in the context of proposed amendments to Article 13, paragraph 2 (see Secretariat Note ¶55). A particular issue discussed was how and in what circumstances an Appointing Authority might decide that “the circumstances of the arbitration” warrant the appointment of a substitute arbitrator. Concern was raised regarding the proposed wording of the provision, and it was agreed that the original wording of the text, which had provided no problems in the past, was sufficient. The

Working Group also discussed whether power should be given to the arbitrators themselves (rather than only a party) to determine, in certain circumstances, whether to proceed as a truncated tribunal or seek approval from the Appointing Authority to do so (see Secretariat Note ¶55). It was noted that such power may not give enough protection to the parties, especially if there is collusion between arbitrators. However, support was expressed for such a provision because the parties may not always be aware during proceedings that an arbitrator is failing to perform arbitral functions. Further support was expressed for the suggestion that the arbitrators, in such circumstances, should be required to refer the issue to the parties, who in turn can proceed with designating an Appointing Authority.

37. Finally, the view was expressed that the proposed suggestion mixes two situations that should be treated separately. Consequently it was suggested that a clear distinction should be made between the revocation of the appointment of an arbitrator who fails to act and the resignation of an arbitrator for invalid reasons; as each situation might give rise to different consequences, liability or otherwise. This issue will be further considered at subsequent meetings of the Working Group.

**Article 14 – Repetition of hearings in the event of the replacement of an arbitrator**

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### **Section III – Arbitral Proceedings**

#### **Article 15 – General provisions**

38. Amendments were proposed to Article 15, paragraphs 1, 2 and 3; the principal addition being the addition to paragraph 1 of the following: “The arbitral tribunal, in exercising its discretion, shall conduct the proceedings with a view to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute” (see Secretariat Note (Add.1) ¶3 and ¶4).
39. The proposed amendments to paragraphs 1, 2 and 3 were adopted by the Working Group.
40. Proposals were made for a new paragraph 4 in Article 15, providing for consolidation, joinder and confidentiality provisions (see Secretariat Note (Add.1) ¶5 to ¶8). Significant debate surrounded the issue of consolidation of cases before arbitral tribunals (see Secretariat Note (Add.1) ¶5). It was agreed that the issue of consolidation should be a matter dealt with under the Rules, as under the existing UNCITRAL Arbitration Rules it was only possible where the parties specifically agreed to consolidation.
41. The Working Group expressed some concerns over the wording of proposed new sub-paragraph 4(a). It was noted that allowing an arbitral tribunal to deal with claims which involve the same parties and “arising out of the same legal relationship” poses significant problems given its potentially ambiguous meaning. For example, does this mean fresh claims can be made under this

consolidation provision, or does it mean parties can consolidate different disputes given the link of the same legal relationship? In relation to the former, it was suggested that this possibility would be better dealt with by provisions allowing amendment to the statement of claim. In relation to the latter, “the application of the provision might subject parties to arbitration proceedings under terms which differed from those agreed in their arbitration agreement” (A/CN.9/WG.II/XLVI/CRP.1/Add.4 para 14). Despite these concerns, the view was expressed that a provision of this nature may be beneficial as a way of providing an efficient method of resolving linked disputes between a range of parties and also reduce the possibility of inconsistent awards in parallel arbitrations. Further, “[i]t was (noted)...that such a provision should be carefully drafted in order to clarify that consolidation would only be possible if either the claim was already subject to the UNCITRAL Arbitration Rules, or the parties expressly agreed that the claim should be subject to consolidation” (A/CN.9/WG.II/XLVI/CRP.1/Add.4 para 13). Despite some support, the Working Group ultimately agreed to delete the proposed sub-paragraph 4(a) given the lack of necessity in circumstances where an amendment of the statement of claim would address the problem and, if not, given the complex issues the proposal would raise.

42. Significant debate also took place in relation to the joinder proposal contained in new sub-paragraph 4(b). This proposed provision as set out in the Secretariat proposals was inspired by Article 22.1(h) of the London Court of International Arbitration Rules (see Secretariat Note (Add.1) ¶6). The LCIA Rules essentially allow, upon the application of a party, one or more third

persons to be joined in an arbitration as a party to the proceedings, and awards to be made in relation to them as a consequence. There was some concern expressed in relation to the principle that parties must consent to arbitration, which would be circumvented by the proposal if a third party could be joined over its objection. In this context it was suggested that the provision would only be acceptable if the provision contained an opt-in or opt-out proviso, or if it was modified so that all parties in an arbitration agreed to the joinder. It was also noted that securing the agreement of all the parties would be necessary should issues relating to the recognition and enforcement of the arbitral award be raised. In an attempt to alleviate concerns regarding consent, it was noted that in practice all parties always retained the right to agree on joinder without the operation of a special provision of the Rules enabling joinder. In any event it was suggested that the Working Group should follow the approach taken by the LCIA Rules and require a third party to provide consent in writing that it agrees to be joined to an arbitration proceeding.<sup>12</sup> Further, it was suggested that in relation to an award being made in cases where there is a joinder, it is irrelevant to state expressly in the Rules that an award will be made with respect of all the parties involved in the arbitration. Views were expressed that, presumably, the agreement of the third party when they join an arbitration proceeding requires them to be bound to the determination of the arbitral tribunal operating under the UNCITRAL Arbitration Rules. In other words, if the third party agrees to join as a party to a proceeding (or does not avail itself

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<sup>12</sup> Article 22.1 provides that: “Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: (h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party, provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.”

if an “opt out” provision in any joinder rules) it is at the very least implicit in that agreement that an award may be made in relation to that party as a consequence. It was suggested that reference should only be made to the making of an award, to ensure that parties are aware that an award will be binding on all parties generally, regardless of whether they are original parties or not. Given the extent of the possible change to the Rules, it was agreed that this issue be revisited in future sessions of the Working Group.

43. During the session it was considered whether it would be appropriate to include a “...general provision regarding confidentiality of proceedings, or of the materials (including pleadings) before the arbitral tribunal” (see Secretariat Note (Add.1) ¶7 and ¶8 and A/CN.9/WG.II/WP.145/Add.1 para 7). The attribute of confidentiality is seen by many to be an important element in international arbitration but at present there are ranging views on the importance of confidentiality in proceedings. In past sessions the view of the Working Group was not to include such a provision in the Rules, but leave it to the parties and the arbitral tribunal to determine the level of confidentiality for themselves on a case by case basis. Proponents of the confidentiality clause relied upon the recent English Court of Appeal decision in *City of Moscow v Bankers Trust*<sup>13</sup> in support of the desirability of the inclusion of a confidentiality provision in the revised text of the UNCITRAL Arbitration Rules. That decision required the operative part of the arbitral award to be made public. Further, it was noted that a number of other international organisations such as the LCIA and WIPO had included a confidentiality

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<sup>13</sup> *Department of Economic Policy and Development of the City of Moscow and another v Bankers Trust Company and Another* [2004] EWCA Civ 314.

clause in their Rules, and so the UNCITRAL Arbitration Rules should follow suit. Opponents of the rules questioned the extent to which the confidentiality clause is to apply. It was argued that should such a provision be included, then issues such as when the duty of confidentiality begins and ends, to whom the duty of confidentiality would apply, and what exceptions were to apply to such a duty, would overly complicate the Rules and give rise to considerable problems (and for an extensive discussion of these problems see *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 (HCA)). Further, it was argued that such a provision would run against the principle of transparency in international arbitration, and would provide an inflexible limitation on an area of law which is still developing (see Secretariat Note (Add.1) ¶8). Thus, given the fact that the issue of confidentiality is evolving, and the revised text of the UNCITRAL Rules will most likely not be reviewed for a number of decades, it was suggested that the better approach is to leave this issue to the parties themselves, who understand the particular issues in relation to their case, and thus can tailor a level of confidentiality to their needs. It was suggested that reference to the possibility of a confidentiality clause should be included in the model arbitration clause, to remind the parties that the Rules did not provide for confidentiality. The Working Group agreed not to include a confidentiality clause in the revised text of the Rules.

44. It was also debated whether the arbitral tribunal should be given express power, at any time, to extend or shorten time periods prescribed under or pursuant to the Rules. Concern was raised that the provision could infringe on the agreement of the parties, especially if the parties agree that an arbitral

proceeding should be completed within a defined period of time. To alleviate this concern, it was suggested that the arbitral tribunal should be required to provide justification for the change of procedural time limits; however, the Working Group did not support this proposal. The Working Group decided such a power should be provided for expressly in the Rules, and agreed to establish such authority. It was however, agreed that this would not "...alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties" (A/CN.9/WG.II/XLVI/CRP.1/Add.4 para 31).

#### **Article 16 – Place of Arbitration**

45. Issues arose regarding the terminology to be used in referring to the place of arbitration; in particular whether reference should be made to "seat", "location" or "venue" (see Secretariat Note (Add.1) ¶9). It was suggested that it was necessary for the purpose of clarity to distinguish between the legal and physical places of an arbitration, given the consequences. A number of proposals were considered – including replacing the phrase "place of arbitration" in paragraphs 1 and 4 of Article 16 with "seat" or "juridical seat" of arbitration. It was also suggested that reference to the place of arbitration be restricted to locating where the arbitration is to take place, geographically only. Reference was also made to Article 16.2 of the LCIA Rules which provides that: "The arbitral tribunal *may* hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration..." (emphasis added). It was

noted that the distinctions between the phrases were confusing, and the interpretation of these words may be problematic in different languages. Concerns were raised regarding the current practice of referring to the place of arbitration with the implication that it was intended that this place is to be the seat of arbitration. Further, the issue was raised whether the Working Group should, in the course of revising the Rules in this respect, maintain consistency by following the wording of Article 20 of the Model Law, which refers to the “place of arbitration”.

46. It was also debated whether the UNCITRAL Arbitration Rules should clarify whether the legal place of arbitration determines the law applicable to the arbitral procedure and court jurisdiction. The Working Group, however, agreed that it was not necessary to attempt to make provisions in this respect – rather this was an issue to be resolved by the applicable law. Additionally, the view was expressed that because of the differing approaches in this respect in various legal systems, the Rules were not the appropriate forum in which to attempt to determine these issues.

#### **Article 17 – Language**

47. The Working Group agreed that the parties to an arbitration agreement should be free to agree to use more than one language in an arbitral proceeding. Accordingly, no proposals have been made to amend Article 17 (see Secretariat Note (Add.1) ¶11).

**Article 18 – Statement of Claim**

48. A number of issues were discussed in relation to the proposed amendments of Article 18 (see Secretariat Note (Add.1) ¶¶12 to ¶¶13). It was agreed that reference should be made to “contact details” in sub-paragraph 1(a) of Article 18 in line with previous proposed amendments to the UNCITRAL Arbitration Rules in relation to notices of arbitration (see above ¶¶18). In relation to sub-paragraph 2(b), it was debated whether the text should be phrased in a way which will encourage the parties to focus their submissions with a more legal, rather than merely factual, perspective. It was suggested that this was unnecessary, and may not be sufficiently flexible to take into consideration practice and customs in different legal systems. Despite these concerns, it was agreed that the proposal had merit and would provide for consistency of legal submissions by requiring parties from different legal cultures to focus on the legal issues. Discussion also turned to whether there should be a requirement placed on parties to include with the statement of claim all documents and evidentiary materials. In this context it was proposed that in the applicable provisions the word “may” be replaced by the words “shall, as far as practicable”. It was noted that by obliging a claimant to produce such materials, they may be precluded from providing subsequent materials at a later stage. To alleviate these concerns, it was suggested “shall” be replaced with “should”. This issue will be revisited when the Secretariat develops alternative proposals for consideration.

### Article 19 – Statement of Defence

49. Like the issues surrounding the Statement of Claim provisions in Article 18, issues were also raised in relation to Article 19 (as to the proposals with respect to Article 19, see Secretariat Note (Add.1) ¶14 to ¶16). It was agreed that the amendments to Article 19 should mirror the statement of claim requirements. Further, it was noted that the provisions should be aligned with sub-paragraph 3(d) in order to keep the requirements of the provisions consistent. It was also considered that if the agreement to arbitrate was not in writing there should, at the very least, be sufficient evidence of the agreement provided. It was agreed that an evidentiary requirement of this nature should be incorporated, which is consistent with Article 3 sub-paragraph 3(c).
50. The issue of set off was also considered in the context of Article 19. Given the complexity of set off and related issues it is helpful to set out the proposed amended paragraph 3 of Article 19 (with proposed additions underlined) as follows:
3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off arising out of the same ~~contract~~ legal relationship, whether contractual or not. ~~or rely on a claim arising out of the same contract for the purpose of a set off.~~
51. It was proposed by the Secretariat that the wording of sub-paragraph 3 of Article 19 be widened, applying to anything “arising out of the same legal relationship, whether contractual or not”. This proposal received support from the Working Group, but the main issue discussed in this context was the appropriate scope or extent of such a provision. In this respect it was

suggested that a phrase that should be incorporated into the proposed amendment requiring “substantial connection”. This, it was said, would ensure that only claims meeting the threshold of “substantial connection” could be raised against the original claim and thus possibly set off the original claim thereby limiting the application of the provision. It was also noted that the issue differs from jurisdiction to jurisdiction, and so in order to maintain the “neutrality” of the UNCITRAL Arbitration Rules it would be desirable to ensure the provision is worded in a manner which is likely to be generally applicable in a variety of legal systems and cultures. The provision will be considered further at subsequent sessions.

#### **Article 20 – Amendments to the claim or defence**

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#### **Article 21 – Pleas as to the jurisdiction of the arbitral tribunal**

52. A number of issues were discussed in relation to Article 21. It was noted in relation to paragraph 2 that the proposed provision may need to be harmonised with respect to the provisions relating to the extent of jurisdiction (see, for example, Article 1 and ¶¶8 to ¶¶12, above).

#### ***Conclusion***

53. It is hoped that this brief summary of the discussions of the Working Group at its last session will assist APRAG Member Organisations: first, as a convenient source of additional information in relation to the revision of the UNCITRAL Arbitration Rules; and, secondly, to assist in the formulation of

views, comments and recommendations for further sessions of the  
UNCITRAL Working Group.

54. Please do not hesitate to make contact if you have any comments or queries (ccroft@bigpond.com). In particular, comments on the proposed new Article 4 bis (see ¶21 to ¶24, above, and the Appendix, below) would be appreciated as soon as convenient.

**Dr Clyde Croft SC**

**Kieran Hickie**

***APRAG Representatives/Observers***

**15 March 2007**

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**APPENDIX****[see ¶24 of the Report]*****APRAG Intervention on role proposal for Permanent Court of Arbitration as Appointing Authority***

“APRAG has the utmost respect for the work and integrity of the Permanent Court of Arbitration and its staff – and thinks it presently has a very useful function as a default designating authority under Article 6.2 of the present Rules.

The present proposals do, however, represent a significant change from the present position which needs to be considered very carefully by APRAG and its member organisations.

This is particularly the case because one of the objectives of APRAG is to foster the development of arbitration and arbitral institutions in the Asia Pacific region and a balance in this respect throughout the world’s regions. It is not suggested that the Permanent Court of Arbitration would not seek to achieve regional balance but the view may be taken by APRAG and its members that it and its members should have more direct control in this respect and not surrender this responsibility to an organisation which is not based in the Asia Pacific region. Consequently the view may be taken that the role of the Permanent Court of Arbitration under the present Rules should not change.

On the basis of this concern APRAG will consult with member organisations in relation to the proposed changes in light of the debate of this Session with the view to

providing a more considered response at the forty-seventh session of the Working Group in Vienna.

Pending the consultation process APRAG would presently oppose the proposed changes to the role of the Permanent Court of Arbitration; or the substitution of any other organisation to take up the proposed extended role of the Permanent Court of Arbitration.”