

ASIA PACIFIC REGIONAL ARBITRATION GROUP

Report on Fiftieth Session of the UNCITRAL Working

Group II (Arbitration)

New York, 9-13 February 2009

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), 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 a 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, forty-eighth, forty-ninth and fiftieth sessions, in New York (February 2007), Vienna (September 2007), New York (February 2008), Vienna (September 2008) and New York (February 2009), respectively. The Working Group has been

assisted in these sessions by sets of extensive notes prepared by the UNCITRAL Secretariat², all of which are entitled *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by the Secretariat)*. The Secretariat Note (WP.151/Add.1) contains an annotated draft of the UNCITRAL Arbitration Rules (based on the deliberations of the Working Group at its forty-sixth to forty-eighth sessions) and on comments received by the Secretariat at the occasion of conferences and meetings organised to discuss the revision of the Rules (see Secretariat Note WP.151/Add.1 ¶3, p2)).

5. The Working Group was assisted at its most recent session in New York by two additional sets of extensive notes prepared by the UNCITRAL Secretariat³, the principal documents of which are entitled *Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules (Note by Secretariat)*. As noted, the additional document is a proposal by the Government of Switzerland with respect to the revision of Articles 19 to 26 with proposals for consideration by the Working Group. The first of the principal additional papers (WP151/Add.1) provided notes with respect to Articles 18 to 41 together with draft additional provisions and the second of these principal documents provided notes with respect to Articles 1 to 19 of the UNCITRAL Arbitration Rules. As the deliberations of the Working Group in New York did not proceed beyond Article 26 the first of these additional

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), A/CN.9/WG.II/WP.149 (30 Nov 2007), A/CN.9/WG.II/WP.151 (6 Aug 2008) and A/CN.9/WG.II/WP.151/Add.1 (6 Aug 2008), available at www.uncitral.org

³ A/CN.9/WG.II/WP.151 (6 Aug 2008), A/CN.9/WG.II/WP.151/Add.1 (6 Aug 2008) and also A/CN.9/WG.II/WP.152 (9 Sep 2008) being a proposal by the Government of Switzerland with respect to the revision of Articles 19 and 26 for consideration by the Working Group.

papers is referred to in this Report and is, for convenience, referred to as the Secretariat Note. The later of the principal documents⁴ does, however, also contain notes with respect to the revision of Articles 18 and 19 and is referred to in this Report and is, for convenience, referred to as Further Secretariat Note. The Working Group was assisted at its fiftieth session in New York, as in previous sessions, by a Report prepared by Mr Jan Paulsson and Dr Georgios Petrochilos, which is entitled *Revision of the UNCITRAL Arbitration Rules*⁵. This Report is, for convenience, referred to as the Paulsson and Petrochilos Report. There are extensive references to this Report in the Notes prepared by UNCITRAL Secretariat, referred to above.

Revision of the UNCITRAL Arbitration Rules

6. 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, New York in February 2008, Vienna in September 2008 and New York in February 2009 in order to continue discussion in relation to areas of the UNCITRAL Arbitration Rules where revision might usefully be made. As previously, “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.”⁶ It was, again, 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

⁴ A/CN.9/WG.II/WP.154 (8 Dec 2008)

⁵ 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*).

⁶ A/CN.9/614 para 16, p 5.

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”.⁷

It was also noted, in discussions in the forty-eighth session in New York, that the *UNCITRAL Model Law on International Commercial Arbitration* (“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 works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation 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.

7. 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:⁸

18. 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

⁷ A/CN.9/614, ¶17, p 5.

⁸ *Id.*, ¶18 to ¶20, pp 5 and 6.

of specific provisions could undermine the existing flexibility and simplicity of the Rules and therefore make them less attractive. Others were of the view that, either it would be desirable to identify provisions which might need a different set of rules for specific purposes or that, at a minimum, that option should not be disregarded.

19. 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 or not those conclusions were ultimately reflected in the Rules or in any material that might accompany the Rules.
 20. 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 and to hear suggestions to the Secretariat for drafting such revisions but not to reach any conclusion at the current session.
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8. 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 UNCITRAL Secretariat Note A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶6.
 9. Having already settled the methodology for the work of revision of the UNCITRAL Arbitration Rules the Working Group turned to consider the Rules themselves during the course of deliberations of the Working Group in New York in February 2008 the position was reaffirmed, as 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, that the Working Group agreed that the harmonisation in the drafting of the revised UNCITRAL Arbitration Rules with the UNCITRAL Model Law was not an essential requirement, though in some instances the Working Group might regard it as appropriate (see Secretariat Note A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶6). It is noted that the Working Group had 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 A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶7).

10. The following is a summary of some of the important issues identified with respect to Articles 18 to 26 of the Rules which were considered by way of a “second reading” at the fiftieth session of the Working Group in New York in February 2009.

Section III – Arbitral Proceedings

11. The Working Group continued the “second reading” of the Rules with reference to Secretariat Note WP.151/Add.1.

Article 18 – Statement of Claim

12. The proposed revised Article 18 is set out in Secretariat Note (¶1) as follows:

Article 18[1]

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a

period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim.

2. The statement of claim shall include the following particulars:
 - (a) The names and contact details of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought;
 - (e) The legal grounds or arguments supporting the claim.
3. A copy of any contract, or other legal instrument, and of the arbitration agreement shall be annexed to the statement of claim. The statement of claim should, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant, or contain references to them.

13. The position reached at the forty-ninth session of the Working Group in

Vienna (Secretariat Note, ¶(1), was as follows:

1. Paragraphs (1), (2) and (3) reflect the modifications adopted by the Working Group at its forty-sixth session (A/CN.9/619, paras, 147-154). The last sentence of paragraph (1) is proposed to be added to deal with the situation where the claimant decides to treat its notice of arbitration as a statement of claim. Its purpose is to allow a claimant to postpone its decision on whether its notice of arbitration constitutes a statement of claim until the time the arbitral tribunal requires the claimant to submit its statement of claim, instead of having to make that decision at the time of the notice of arbitration. If that sentence is adopted by the Working Group, article 3, paragraph (4)(c) should then be deleted (see document A/CN.9/WG.11/WP.151, para. 12).

See also the APRAG Reports on the forty-sixth session at ¶48, and forty-ninth session at ¶27.

14. The comment was made that it would be desirable that the notice of arbitration referred to in paragraph (1) should make it clear that the notice must comply with the requirements for a statement of claim as set out in paragraph (2). It

was suggested that an ambiguity in this respect arises because of the reference to Article 18 (2) in Article 19 (2) with respect to the statement of defence. There was support for this suggestion, and the comment was made that it would be advisable to consider the revisions proposed in Article 3(4)(c) which refer to the statement of claim referred to in Article 18, in the context of provisions with respect to the notice of arbitration and response. The comment was also made that it did not necessarily follow, on the basis of the drafting of Article 18, that the right of a claimant to treat its notice of arbitration as its statement of claim necessarily implied that the statement must comply with all the requirements of paragraph (2) of Article 18. By implication, the issue was raised as to whether it was desirable or necessary that the notice of arbitration should comply with the paragraph (2) requirements. The further comment was made that any difficulties with the notice of arbitration would arise after the arbitral tribunal had been constituted and that these could be dealt with as a procedural matter by the tribunal. Nevertheless, the general view was that any ambiguity should be addressed, and a number of suggestions were made. One suggestion was to remove the reference to Article 18 (2) from Article 19 (2) so that no ambiguity was generated by comparing the provisions of Article 18 and Article 19. Another suggestion was that the following be added to the second sentence in paragraph (1): “Provided it meets the requirements of paragraph 2”. It was agreed that Article 18 should be redrafted by the Secretariat to avoid the ambiguity which had been highlighted. It was also noted that the requirements for the notice of arbitration contained in Article 3 should be reflected in Article 18, or that both provisions should be harmonised.

Article 19 – Statement of Defence

15. The proposed revised Article 19 is set out in Secretariat Note (¶2) as follows:

Article 19

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration in article 3, paragraph 5 as a statement of defence. [2]
 2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 18, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidentiary material relied upon by the respondent, or contain references to them.
 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 counterclaim or rely on a claim for the purpose of a set-off [*option 1*: arising out of the same legal relationship, whether contractual or not.] [*option 2*: provided that it falls within the scope of the arbitration agreement.] [3]
 4. The provisions of article 18, paragraph 2, shall apply to a counterclaim and a claim relied on for the purpose of a set-off.
16. The position reached at the forty-sixth session of the Working Group was that an additional sentence should be added to paragraph (1) to accommodate the situation where the respondent elects to treat its response to the notice of arbitration provided for in Article 3 (5) as its statement of defence (see A/CN.9/WG.II/WP.151, para. 12). It was also noted that the Secretariat would prepare revisions to Article 19 to reflect the discussion of Article 18 in relation to the particulars required to be included in the notice of arbitration, reflecting the requirements with respect to the statement of claim. The provisions of Article 19 are to be amended, analogously to the amendments to Article 18, to

reflect the requirements of the respondent's notice in response to the notice of arbitration as set out in Article 3 (5). See also Article 19(2).

17. It had been agreed that paragraph (3) of Article 19 will accommodate the possibility of a claim of set-off. The position reached was as follows (Secretariat Note, ¶3, p 4):

3. The Working Group agreed that paragraph (3) should contain a provision on set-off and that the arbitral tribunal's competence to consider counterclaims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances (A/CN.9/614, paras, 93 and 94; A/CN.9/619, paras. 157-160). To achieve that extension, in option 1 the words "arising out of the same contract", which were contained in the 1976 version of that paragraph are replaced with the words "arising out of the same legal relationship, whether contractual or not" (A/CN, 9619, para. 157). Option 2 reflects a proposal that the provision should not require that there be a connection between the claim and the counterclaim or set-off, leaving to the arbitral tribunal the discretion to decide the question (A/CN.9/619, para.158).

See also the APRAG Report on forty-sixth session at ¶49 to ¶51.

18. In relation to paragraph (3) of Article 19 a proposed amended version was put to the Working Group, in the following terms:

Article 19, paragraph 3 – proposed amended version

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.

The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the claim on which the set-off is based does not fall within the scope of the arbitration agreement, and even if such claim is the object of a different arbitration agreement or of a forum selection clause, provided that the requirements for a set-off under the substantive law applicable to the main claim are fulfilled.

A counter-claim is admissible only if it falls within the scope of an arbitration agreement between the parties to arbitrate under these Rules and has a sufficient link to the main claim.

A/CN.9/WG.II/WP.152Annex.

19. The issue whether specific provision should be made for both set-offs and counterclaims was discussed. In support of the argument that specific provision should be made for both circumstances it was said that while set-off is always a defence, a counterclaim is in the nature of a “new attack”, a fresh claim and, consequently there should be two different conditions. Continuing, it was said that a counterclaim is only admissible in the scope of the arbitration agreement but that a set-off defence does not require anything in terms of arbitration procedure, rather it is a question for the substantive law. In this respect it was suggested that a true set-off extinguishes the principal claim. So, it was said, the question was whether the proposed amended version of Article 19(3) was acceptable, the effect of which is to confer jurisdiction on an arbitral tribunal to decide the claim before including a set-off defence irrespective of whether the claim upon which the set-off is founded would have been within the arbitral tribunal. There was considerable support for the proposed amended version of paragraph (3), but some concern expressed that the position depends upon the effect of a set-off defence in the applicable substantive law. Concern was, however, also expressed at the prospect of subjecting all claims, set-off, defences and counterclaims, to one arbitration regime. It was suggested that these claims should be treated separately because to do otherwise would go against the basic principle that the arbitral tribunal only has jurisdiction conferred upon it by the arbitration agreement. In

response to this concern it was said that if the Rules provided for the jurisdiction of the arbitral tribunal to extend the set-off, this is, in effect, an agreement by the parties to extend the jurisdiction, in this respect, as a result of adopting the arbitration Rules. Further concern was expressed in relation to the prospect of broadening this jurisdiction on the basis that the effect of the proposal to provide for jurisdiction to hear a set-off defence which may be to subject another contract and or separate arbitration regime. It was said that the parties may not have contemplated this position. As a result of this discussion, the consensus was in favour of rejecting the proposed amended version of Article 19(3) and also the option 1 proposal set out in the Secretariat Note (see above) in favour of the option 2 proposal set out in that Note.

20. Following this consensus in favour of option 2, there was a suggestion of a third option involving a combination of options 1 and 2 as contained in the Secretariat Note. It was noted that the effect of option 2 is to provide for set-off defences as long as they fall within the scope of the arbitration agreement whereas option 1 might be seen as producing a problematic restriction on set-off defences. It was also said that the point in relation to option 1 was that there may be a situation where a dispute arises in the context of a number of separate contracts. The scope of the arbitration agreement is therefore wider than the “same legal relationship” because a series of contracts will generally contain an arbitration agreement to cover disputes in one or more of the series of contracts, and not just one of them. It was suggested that the express “the same legal relationship” would limit matters in dispute to those under only a single contract. A further suggestion was made that paragraph 3 might say,

quite simply, that the respondent may make a counterclaim or rely on a set-off if the arbitral tribunal has jurisdiction to deal with it. Further, it was suggested that if this was not thought possible there remains a need to change the existing rule which refers to contracts, but that it was not profitable to look at provision using the expression “arising out of the same legal relationship” because there is no consensus as to what this expression means – though it is used in the Model Law and the New York Convention. It was said that the expression “arising out of the same legal relationship” goes back to an English case where the trial Judge thought that this expression meant no more than a “sufficient connection”. It was noted that the expression still causes difficulty in interpretation of the New York Convention. In the course of further discussion the simplified version was restated as “or acclaimed for the purpose of set-off provided the Tribunal has jurisdiction over it”. The simplified wording was, however, criticised as being circular, though there were contrary views in relation to this criticism. It was noted that the approach underlying the further simplified proposal was a decision not to expand the jurisdiction of the arbitral tribunal with respect to set-off in the Rules themselves. The proposal is that the Rules leave whatever jurisdiction exists already on other grounds rather than at a new provision which regulates jurisdiction in relation to counterclaims and set-offs. It was suggested that specific Rules, where it did exist on other grounds, would only be restrictive of jurisdiction and it followed, on this basis, that no distinction should be introduced in the Rules in relation to counterclaims or set-off defences.

21. Further discussion took place in relation to the proposed amended version of paragraph (3) (WP.152 Annex), options 1 and 2 as contained in the Secretariat Note and the simplified version of paragraph (3) as set out in the Secretariat Note (see ¶22, above). The comment was made that initially it was thought that option 2 was a satisfactory solution but that this raised alternative proposals caused problems, so the easiest and simplest solution was the simplified version of the Secretariat proposal. The comment was also made that the proposed amended version of paragraph (3) was broader in relation to the arbitration agreement referring to any arbitration agreement between the same parties but then narrower by requiring that any counterclaim have “a sufficient link to the main claim”. It was said that this would have the effect of imposing a fetter on counterclaims under the main arbitration agreement and that this was undesirable. Consequently, the simplified version was to be preferred. Nevertheless, there remained further criticism of the simplified proposal, on the basis that it did not provide sufficient guidance and on this basis option 2 was to be preferred. In any event, the consensus was in favour of the simplified proposal so that paragraph (3) of Article 19 would read:

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 counterclaim or rely on a claim for the purpose of a set-off provided the arbitral tribunal has jurisdiction over it.

(Simplified wording indicated by underlining)

In conclusion the comment was made that one of the general principles being applied by the Working Group is that conformity between the UNCITRAL Rules and the Model Law is not something that is necessarily desirable and to

be sought after (see ¶9 above). The support for the simplified version of the revision to paragraph (3) was on the basis that the consensus was in favour of not making a separate rule for jurisdiction here in the Rules. Consequently, it was suggested that this principle might be applied for consistency throughout the Rules and, in particular, consideration should be given as to whether this principle should be applied to Article 20 (amendments to the claim or defence).

Article 20 – Amendments to the Claim or Defence

22. The proposed revised Article 20 is set out in the Secretariat Note (¶4) as follows:

Article 20 [4]

During the course of the arbitral proceedings a party may amend or supplement its claim or defence, including a counterclaim, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim may not be amended or supplemented in such a manner that the amended claim falls outside the scope of the arbitration agreement.

23. The position reached at the forty-sixth session of the Working Group was noted as follows (Secretariat Note ¶4):

4. The Working Group adopted draft article 20 in substance at its forty-sixth session (A/CN.9/619, para. 161). Consistent with a decision not to distinguish between arbitration “clause” and “agreement” (see article 3(3)(c)), the words “arbitration clause” which appeared in the second sentence article 20 have been deleted. The words “or supplemented” are proposed to be added in the second sentence for the sake of consistency with the wording adopted in the first sentence of article 20.

24. In the course of discussion of Article 20 the comment was made that these provisions might, at first sight, appear to contain a degree of circularity on the

basis that the provisions operate in the event that the proposed amendment etc is within the scope of the arbitration agreement and provided the arbitral tribunal has jurisdiction. Nevertheless, it was thought that these provisions were not circular in this respect; it was said that there may be a claim which is not arbitral under provisions of the mandatory law so that there is no jurisdiction in the arbitral tribunal even if the claim would otherwise fall within the scope of the arbitration agreement. Consequently, the comment was made that this indicates that it is better not to make a rule dealing with jurisdiction but to leave jurisdictional matters to the applicable law. The comment was also made that it might be desirable to bring the concluding words of Article 20 into line with the now concluding wording of Article 19(3) and, additionally, a drafting point was noted in a query as to whether the intention was to allow amendments to the claim or defence. In any event the discussion concluded with no consensus to make any changes to Article 20 as set out in the Secretariat Note (above ¶23).

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

25. The proposed revised Article 21 is set out in the Secretariat Note (¶5) as follows:

Article 21 [5]

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail of itself the invalidity of the arbitration clause.
2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with

respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to a claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.
26. The position reached as a result of previous deliberations of the Working Group is set out in the Secretariat Note ¶(5) as follows:
5. Draft paragraph (1) reflects the view expressed in the Working Group that article 21, paragraphs (1) and (2), should be redrafted along the lines of article 16, paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) in order to make it clear that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97). Paragraph (2) was adopted by the Working Group in substance (A/CN.9/619, para. 163). Paragraph (3), which replaces article 21, paragraph (4) of the 1976 version of the Rules, contains a provision consistent with article 16, paragraph (3) of the Model Law, in accordance with the Working Group discussions (A/CN.9/614, paras. 99-102; A/CN.9/619, para. 164; A/CN.9641, para. 18).

See also the APRAG Reports on the forty-fifth session at ¶28 and the forty-sixth session at ¶52.

27. Comment was made in the course of discussion that the revised Rules had been expanded to include both contracts and other legal instruments but that this approach has not been followed in paragraph (1) of the draft (and in this respect see A/CN.9/WG.II/WP.151 ¶1 to ¶3; and see also the APRAG Report on the forty-eight session at ¶41 to ¶49). It was confirmed that this observation

also applied to the drafting of the second and third sentences of paragraph (1). It was suggested that the drafting throughout should refer to “a contract or other legal instrument”.

28. More generally, the comment was made in relation to paragraph (1) that the first sentence is a provision which empowers an arbitral tribunal to determine its own jurisdiction whereas the second and third sentences concern the severability of arbitration clauses in contracts. Concern was expressed that different issues arise in relation to severability of arbitration clauses in treaties which provide for arbitration under the UNCITRAL Rules. Further, concern was expressed that a consequence of paragraph (1) applying beyond private contracts might be that an arbitration clause could survive the lapse of a treaty which, it was said would be a very significant change from the present position. In the same vein, the comment was made that where a treaty contains provision for arbitration as between investors and a state, this is an entirely different type of arbitration clause from that contained in an ordinary commercial contract and one which actually confers a right on the investors vis-à-vis the State. Consequently, it was suggested, that provision in a treaty for arbitration is a substantive provision to which the usual severability or separability principles do not apply. Discussion continued as to whether it was desirable to bring paragraph (1) of Article 21 into conformity with Article 1 and, particularly, to extend the reference to “contracts and other legal instruments”. As a result of consideration of the consequences this drafting change might make to treaty arbitrations, the original suggestion was withdrawn. The further comment was

made that to extend the reach of paragraph (1) beyond commercial contracts would be to effect a very dramatic change in public international law, which would involve the continued operation of treaty obligations whereby a lapsed treaty would continue in terms of the arbitration clause. It was noted that the principle of severability in this context has never been adopted in relation to treaty obligations in public international law and was suggested that the Working Group has no mandate to make this very significant extension.

29. Issues were also raised in relation to Article 21(1) in relation to the provisions of the first sentence of paragraph (1) which provides for an arbitral tribunal to rule on its own jurisdiction. In this respect the question was raised as to whether these provisions should be expanded to make provision for the arbitral tribunal ruling both as to the “admissibility and validity”. . In relation to this issue the comment was made that the question of jurisdiction and the question of admissibility are separate; the first being the primary issue and the second, admissibility, only arising where the arbitral tribunal has jurisdiction. Consequently it was suggested that the two terms or concepts should not be mixed up in the first sentence, and therefore it is undesirable to add the word “admissibility” as proposed. The contrary view was that the provisions of the first sentence of paragraph (1) provide a power to exercise jurisdiction which can be exercised without, necessarily, any need for a ruling on its exercise. Nevertheless, it was suggested that the arbitral tribunal should have power to rule on its jurisdiction and the extent of its jurisdiction, and the concern was expressed that the concept of “admissibility” may not be treated as included within the concept of “jurisdiction” in the first sentence. Further, it was said

that expanding the word “jurisdiction” to the phrase “scope of jurisdiction” would not assist because the problem is that the conferral of a power to rule on “jurisdiction” may not be treated as including a power to rule on issues such as “admissibility”. Returning to the problem of mixing concepts, the comment was made that a further issue which might be considered was whether the terms bear different meanings in different jurisdictions, hence compounding the problem. This discussion concluded with the consensus that there was no need to make any changes to the wording of the first sentence of Article 21(1). Consequently the suggestion that the first sentence of paragraph (1) be changed to read “the arbitral tribunal made rule on its own jurisdiction and the exercise thereof, ...” was not adopted.

30. The second issue raised in relation to paragraph (1) of Article 21 was whether the expression “null and void”, as used in the third sentence, should be retained or replaced by other terminology. The comment was made that concepts of “null and void” caused significant problems, particularly in common law jurisdictions where the use of the formula may lead to issues and questions as to whether a contract is void or voidable and hence may raise issues as to the right to avoid. Consequently, it was suggested that more “neutral” terminology might be used such as “non-existent or invalid”, which would avoid these problems. Attention was drawn to the difficulties in common law jurisdictions which were highlighted, particularly, as a result of the decision in *Harbour Assurance Co (UK) v Kansa General International Insurance Co* [1993] QB 701 (CA), [1993] 1 Lloyd’s Rep 455 (CA) which lead the United Kingdom Parliament to depart from Article 16(1) of the Model

Law in the English *Arbitration Act* 1996. Consequently, section 7 of that Act provides:

7. *Separability of Arbitration Agreement*

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

The comment was made that these provisions were well received by the users of London arbitration. The suggestion that the expression “null and void” be replaced by “non-existent or invalid” is the approach reflected in Article 23(1) of the LCIA Rules. It is noted that this provision of the LCIA Rules provides as follows:

23.1

The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause.

31. It was suggested further, that instead of using the longer English terminology the expression “inexistence or invalidity” could be used. It was also said that any phraseology needed to encompass the possibility of factual non-existent or invalidity of the contract. There was support for the broader language suggested but also the view that the current text has not caused problems and that the expression “null and void” is consistent with the provisions of the New York Convention which also uses the expression “null and void”. It was

also noted that the same expression is used in the Model Law. Consequently, it was said that there was an argument to retain this expression in the Rules to maintain consistency with the New York Convention and the Model Law. Additionally, it was suggested that the expression “null and void” is an expression of broader meaning than an expression such as “existence and validity”. It was agreed that whichever phraseology was to be used it should be as broad as possible in meaning. A further comment was made that the use of the word “non-existent” would be contrary to the usual approach applied to the UNCITRAL Rules and UNCITRAL instruments, which is usually to try and avoid terms that have particular meanings in one jurisdiction. It was suggested that the adoption of an expression such as “non-existent” given its use in the English Arbitration Act may lead to non-uniform interpretation of the UNCITRAL Rules. In order to avoid some of the difficulties highlighted it was suggested that the expression be broadened further. The suggestions included recasting the third sentence of paragraph (1) along the lines of “a decision of the arbitral tribunal that the contract is void, invalid, non-existent or otherwise ineffective...”. Additionally, it was suggested that the word “non-existent” might be expanded to include the “inefficiency or ineffectiveness of the arbitration clause”.

32. The consensus reached in relation to the expression “null and void” as used in the third sentence of Article 21(1) was that the words “and void” be taken out of that expression because it was thought that this would overcome the difficulties highlighted in the discussion and also, as it was noted in that discussion, bring the English text of the UNCITRAL Rules into line with the

other language texts which relied on the concept of nullity rather than adding any possible additional concept of voidness. In the course of the discussion of the consensus of the Working Group, it was noted that the expression “null and void” has been used as a principle of severability but its use does not exclude the possibility of the arbitral tribunal acting on the basis of some other deficiency in the contract. The general view of the Working Group was in favour of its broader provision as a possibility to avoid whatever defect there might be in the contract affecting the operation of the arbitration clause. It was noted that the cumulation of “null and void” in the English text was not reflected in other texts which relied on one word, conveying the sense of “null” in English. In summary, it was decided that the word “void” should be removed and the word “null” left on its own as this would reflect other texts; with the understanding that all other defects of a minor gravity and all other defects that may exist in the contract will not require any finding that the arbitration clause is invalid.

33. Further discussion took place in relation to the use of the words “of itself” in the third sentence of Article 21(1). The suggestion was made that the third sentence of the corresponding provisions of the 1976 UNCITRAL Rules (Article 21(2)) was a more desirable text in which the Latin expression *ipso jure* was used rather than “of itself”. There was discussion of the meaning of the expression “*ipso jure*” in the context of these provisions, and it was suggested that the correct translation was “automatically” in English. Consequently the consensus was that the phrase “of itself” should be replaced by “automatically” as a better rendition of *ipso jure* in English. The consensus

was to define an English word to replace the Latin expression, rather than any suggestion that the meaning of the language should be changed. There was also consensus that the phrase *ipso jure* be retained in the Spanish version of the Rules.

Article 22 – Further written statements

34. The proposal Article 22 is set out in the Secretariat Note (¶6) as follows:

Article 22 [6]

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

It was noted that the Working Group had adopted the 1976 version of Article 22 of the Rules in substance at its forty-seventh session (see Secretariat Note ¶6, referring to A/CN.9/641, para.19; and see also the APRAG Report on the forty-seventh session at ¶8). The Working Group decided that no further changes would be made to Article 22.

Article 23 – Periods of time

35. The proposed revised Article 23 is set out in Secretariat Note (¶7) as follows:

Article 27 [7]

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

It was noted that the Working Group had adopted the 1976 version of Article 23 of the Rules in substance at its forty-seventh session (see Secretariat Note ¶6, referring to A/CN.9/641, para.19; and see also the APRAG Report on the

forty-seventh session at ¶9). The Working Group decided that no further changes would be made to Article 23.

Article 24 - Evidence

36. The proposed revised Article 24 is set out in the Secretariat Note (¶8) as follows:

Article 24 [8]

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
 2. [Deleted]
 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.
37. The position reached at the forty-seventh session of the Working Group (Secretariat Note ¶8), was as follows:

8. Paragraphs 1 and 3, which are reproduced without modification from the 1976 version of the Rules, were adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, paras. 21 and 26). Article 24, paragraph (2) of the 1976 version of the Rules has been deleted in accordance with a widely prevailing view in the Working that it was not common practice for an arbitral tribunal to require parties to present a summary of documents (A/CN.9/641, paras. 22-25).

See also the APRAG Report on the forty-seventh session at ¶10.

38. There was some suggestion that it was a retrograde step to delete the existing Article 24(2), which presently requires a party to deliver a summary of the documents and other evidence upon which that party intends to present in support of the facts and issues set out in the statement of claim or statement of defence if the arbitral tribunal considers this appropriate. The comment was

made, however, that the experience of arbitrators is that this procedure does not generally occur, and the presence of the current Article 24(2) is misleading in terms of contemporary arbitration practice. In any event, the view was expressed that the arbitral tribunal would not rely on the summary documents but rather the original documents which the arbitral tribunal would read itself. It was said that it does not really help the arbitral tribunal, in this event, to have the summary. It was agreed that a note would be provided to the revised Rules indicating that the deletion of Article 24(2) does not preclude an arbitral tribunal from ordering the taking of this step. Further, it was said that it appeared that Article 24(2) was added when it was not clear that the parties would be required to deliver evidence to be relied upon with the statement of claim and defence. Now that Article 18(3) makes a strong statement on this issue and requires evidentiary material to be supplied with the statement of claim, it was thought that Article 24(2) is no longer necessary.

Article 25 – Hearings, witnesses and experts [9]

39. The proposed revised Article 25 as set out in the Secretariat Note (¶9) is as follows:

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof. [10]
- 1 bis. Witnesses and experts presented by the parties may be heard under conditions set by the arbitral tribunal. For the purposes of these Rules, witnesses include any individual testifying to the arbitral tribunal on any issue of fact, whether or not that individual is a party to the arbitration. [11]
2. If witnesses and experts are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal

and to all other parties the names and addresses of the witnesses and experts it intends to present, the subject upon and the languages in which such witnesses and experts will present their statements.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing. [10].
 4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses, save when the witness is a party to the arbitration. The arbitral tribunal is free to determine the manner in which witnesses and experts are examined. [12].
 5. Evidence of witnesses and experts may also be presented in the form of written statements signed by them and oral statements by means that do not require their presence at the hearing. [13]
 6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. [10]
40. The position reached at previous sessions of the Working Group in relation to provisions of Article 25 is set out in the Secretariat Note (¶9 to ¶13). See also the APRAG Report in this respect on the forty-seventh session at ¶11 to ¶17.
41. In relation to the structure and headings of Articles 24 and 25 the Secretariat Note set out the position as follows (¶9) (see also the APRAG Report for the forty-seventh session at ¶10 to ¶17):
9. In order to reflect the decision of the Working Group to clarify that article 25 deals with witnesses and experts appointed by the parties, the title of articles 24 and 25 are proposed to be modified (A/CN.9/641, paras. 27 and 61). In the 1976 version of the Rules, articles 24 and 25 are titled “Evidence and hearings”. The Working Group might wish to consider whether, in the interest of clarity, article 24 could be titled “Evidence”, and article 25 “Hearing, witnesses and experts”. The reference to experts is proposed to be inserted where appropriate in

article 25 to clarify that it applies to expert witnesses, as suggested by the Working Group at its forty-seventh session (A/CN.9/641, para. 27).

In relation to the structure of these provisions, namely Articles 24 to 27 and their headings it was suggested that the logical structure should be Articles 24, 25 and 26 (the latter being the present Article 27) and then continue with a new Article 27 being the interim measures etc provisions of the present Article 26. Consequently it was suggested that the headings structure should be: Evidence and Hearings (Articles 24 and 25 to new Article 26), Experts (new Article 27, being former Article 26) and Interim Measures (new Article 27, being former Article 26). A more general comment was made in relation to the title of articles to the effect that they should be altered to take account of the fact that Article 27 (the present Article) only contains provisions dealing with experts appointed by the tribunal but in its heading “experts” applies that experts are to be treated differently from witnesses generally (cf Article 15). Consequently, it was suggested that the heading to Articles 24 and 25 should be “Evidence and Hearings and Witnesses including expert witnesses”. It was noted that this phraseology may need to be included in, for example, paragraphs (1 bis), (2) and (5) of Article 25. The consensus emerging from this discussion appeared to be that the headings and structure of these articles would be a matter for further drafting but that, in any event, the article should be regrouped so that existing Article 27 – Experts would become a new Article 26 and the present Article 26 would become a new Article 27.

42. The Secretariat Note records that paragraphs (1), (3) and (6) of Article 25 were adopted in substance by the Working Group at its forty-seventh session

(A/CN.9/641, paras. 28, 39 and 45) with no modification of the existing version of the UNCITRAL Rules (see Secretariat Note ¶10).

43. New paragraph Article 25(1 bis) confers a general power on the Arbitral Tribunal to hear factual witnesses and party appointed experts under conditions set by it. In relation to paragraph (1 bis) the Secretariat Note records the position reached to date as follows (see ¶11):

11. Paragraph (1 bis) reflects the decision of the Working Group to include a provision confirming the discretion of an arbitral tribunal to set out conditions under which it might hear witnesses and experts and establishing that any person, including a party to the arbitration who testified to the arbitral tribunal should be treated as a witness under the Rules (A/CN.9/641, para. 38). This paragraph is placed before paragraph (2) to take account of the observation that it is preferable first to describe the conditions under which witnesses and experts could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses and experts as currently laid out in paragraph (1 bis), and only thereafter to expand on procedural details regarding witnesses and experts (A/CN.9/641, para. 34). The words “For the purposes of these Rules” are inserted to provide a more neutral standard, particularly in States where parties are prohibited from being heard as witnesses (A/CN.9/641, paras. 31 and 38). The provision does not include examples of categories of witnesses, in order to avoid the risk of restrictive interpretation (A/CN.9/641, para. 32).

See also the APRAG Report on forty-seventh session at ¶15.

44. In relation to the present drafting of paragraph Article 25(1 bis) it was proposed that it be reduced to quite a concise provision, as follows:

- 1 bis. For the purposes of these Rules any person may be a witness or an expert witness.

It was said that this is a shorter formulation and eliminates issues in relation to what may be mere issues of act. It was noted that this shorter formulation

reflects the thinking and provisions of the present Swiss Rules. The further comment was made that this short formulation may not make it clear that there is no obligation for the claimant or the respondent in an arbitration proceeding to become a witness. It was also noted that this short formulation of paragraph (1 bis) would not require any alteration to the final sentence of Article 25(4), which in any event would appear to be complimentary to the proposed short form paragraph (1 bis). In relation to party witnesses the comment was made that the final words of paragraph (1 bis) as proposed in the Secretariat Note may need to be excluded, the words “whether or not that individual is a party to the arbitration”, because in some legal systems difficulties may arise where witnesses or parties are testifying. Additionally, it was suggested that there could be some clarification as between Articles 25 and 27 to make it clear that the latter is referring to tribunal appointed experts and the former to party appointed experts.

45. The question whether a party to the arbitration proceedings could testify as a witness in those proceedings raised issues in relation to the concluding words of proposed paragraph Article 25(1 bis) and also in relation to the concluding words of Article 25(4), namely the sentence “the arbitral tribunal is free to determine the manner in which witnesses and experts are examined”. In general terms, the comment was made that in arbitration, as distinct from domestic litigation, it made no difference whether a party was testifying as a witness or whether an individual was a non-party witness. The arbitral tribunal is free to weigh the evidence and to have regard to its source, whether from an independent person or from one of the parties to the proceedings, and this

freedom to weigh evidence is provided for specifically in Article 25(6). In relation to the last sentence of paragraph (4) it was suggested that the words “save where a party is a party to the arbitration” should be added as a qualification to the arbitral tribunal’s freedom to determine the manner in which witnesses and experts are examined. Further, it was noted that Article 15(2) in relation to witnesses may be inconsistent and also, for example paragraphs (1 bis) and (4) of Article 25, and where the term “witness” is used in the remainder of the Rules. Consequently, it was suggested that Article 25 should refer to “witnesses including expert witnesses”. It was also suggested that the Rules should clearly identify where the word “witness” includes experts appointed by the parties or experts appointed by the tribunal. In this respect it was suggested that the position might be clarified by adding to the final sentence of Article 25(4) a reference to “witnesses and party appointed experts” in place of the words “witnesses and experts”. In relation to the comments in relation to paragraph (4) of Article 25 the comment was made that this paragraph and paragraph (1 bis) are dealing with different issues. Paragraph (1 bis) is dealing with broader issues and paragraph (4) is directed to the hearing process itself. It was also suggested in the course of the discussion on paragraph (1 bis) and paragraph (4) and this suite of articles that a provision should be included empowering the arbitral tribunal to resolve disputes between the parties by mediation if the parties agree to this course.

46. A further issue was raised in relation to paragraph (1 bis) of Article 25 with respect to party witnesses, noting that the current text only applies where an individual is a party. Consequently, it has no application to the situation where

the party is a corporation. The general view was that no distinction should be made in the Rules between witnesses generally and parties testifying as witnesses but that the present drafting of paragraph (1 bis) made no provision for corporate parties.

47. Some further suggestions were made in relation to other paragraphs in Article 25. It was suggested that paragraph (2) should be amended to replace the word “addresses” with “contact addresses”. In relation to paragraph (3) it was suggested that “translation” might helpfully be changed to “interpretation” as a broader expression. Reference has already been made to some of the suggested changes to paragraph (4). In further discussion, it was suggested that it should be made clear in paragraph (4) that the intended meaning of “heard” was a live rather than a non-live connection, whether by physical presence of a witness before the arbitral tribunal or by means of a video-link or some other technology. Consequently, it was suggested that it would be preferable to replace the word “heard” with “heard and examined”. The comment was also made that paragraph (5) refers to presentation of oral statements. Consequently, it was suggested that the last sentence of paragraph (4) could usefully be transferred to paragraph (1 bis) as the concluding sentence. Further, in relation to paragraph (5) concern was expressed that these provisions not be seen as conferring any absolute right on a party with respect to the presentation of written or oral evidence but that, rather, this should be a matter regulated by the arbitral tribunal. Further, in relation to absent testimony it was suggested that the provisions as drafted were now too general and provision should be made for video-conferencing and other similar technology, and for the need

for prior notice of its use to be given to other parties to the proceedings. It was also suggested in this context that the arbitral tribunal should be given specific power to disregard late evidence – that is late according to its orders for the presentation of evidence. It was also noted that the Article 18 provisions and the strict rule requiring a claimant to bring forward its full case with its statement of claim or statement of defence may be in conflict with the requirements of article 25 which allows each party to hold back details of evidence until 15 days prior to the hearing (see Article 25(2)).

48. Further comments were made in relation to the approach to Article 25 generally, particularly that the article as revised should not become a “micro-management” of the essential business of the arbitral tribunal. It was suggested that the approach ought to be to leave procedural management to the arbitral tribunal rather than by prescriptive Rules. Further, it was suggested that the prescriptive Rules approach and the consequent “micro-management” tends to lead to the possibility of challenge on the basis of a breach of the “micro-management” Rules by the arbitral tribunal. For example, referring to the discussion in relation to the right to examine or cross-examine witnesses, the view was expressed that these issues were all covered by the general position or requirement of due process. It was agreed that these comments did not apply to paragraphs (1) and (6) of Article 25. In this vein, further comments were made that paragraphs (2) and (3) were problematic in terms of the “micro-management” criticism and also the first two sentences of paragraph (4) (noting that the last sentence of paragraph (4) was to be transferred to paragraph (1 bis)). Further discussion continued in relation to the desirable

approach of the Rules from this perspective, with comments being made that more detailed Rules and with further, responsive, comments that the Working Group had resisted making the Rules educative and had taken the position against the view that the provisions of the Rules should be included, to some extent, for the education of arbitrators. It was also noted that the Working Group was not approaching the provisions of Article 25 afresh and that these provisions were substantially contained in the original, 1976, UNCITRAL Rules, though it was conceded that the Working Group should guard against inserting new wording and inserting new terms which may cause further uncertainty. In this vein the comment was also made that care should be taken in removing provisions from the Rules, particularly Article 25 in this instance, which had caused no problems in the last 30 years. It was said that if a present rule is not causing a problem and is, nevertheless, changed, the risk is confusion on the basis that the perception may be that the Working Group sees a problem, which is not actually the case. For example, in relation to the provision for witness statements in written form, the Rules are carefully constructed to emphasise that this may involve witness examination. Video-conferencing is an example of making a position clear which may not be clear merely on the basis of provisions of the Rules in general terms. As a result of this discussion the consensus was in favour of a simplification and streamlining of the Article 25 provisions and consideration of provisions which need to be retained and those which do not. In relation to paragraph 25(1), it was suggested that this paragraph should be retained but perhaps with addition at the end of the paragraph of the following words: “and shall organise the procedure to ensure the parties have timely notice of witnesses

and experts to be called, the language of the hearing, and the procedures to be employed therein". As a consequence, it might then be possible to eliminate paragraphs (2) and (3). In relation to paragraph (1 bis) it was suggested that the second sentence stress the principle now widely accepted in arbitration but that perhaps further consideration might be given to the simplified wording previously suggested, namely: "for the purposes of these Rules any person may be a witness or expert witness". This suggested that leaving out any reference to a party would resolve the problem highlighted previously in relation to the omission to provide for corporate parties. Further support was expressed for the simpler words, and reference was made to the possibility of following a provision similar to Article 20(7) of the LCIA Rules which covers the field similarly, and provides, in general terms, that anyone providing testimony is to be treated as a witness. But it was suggested that the examples provided in the LCIA Rules ("notwithstanding a person is an officer etc...") should best be omitted as these may be read as words of limitation. As a result of this discussion the consensus was in favour of a simplification of paragraph (1 bis), though there were suggestions that the simplified formulation was a little too short and that this should be a matter for further drafting. Also, in relation to experts the consensus was that it was clear that Article 25 deals with party appointed experts and, further, that expert testimony should not be rejected merely because a person is employed by a party. There was also a view that in spite of the difficulties with providing for corporate parties the Rules should expressly mention that parties may be witnesses (as may party appointed individuals as experts) as there might otherwise be some problems in some jurisdictions. Consequently, it would be necessary in any redrafting of

Article 25 to provide for the possibility of corporate parties. Further discussion took place in relation to paragraph (2) with reference to possible simplification of its provisions having regard to the requirements Article 18 which requires the provision of evidentiary materials prior to the hearing. A further issue is raised in relation to paragraph (2) on the basis that its provisions do not provide a mechanism for notifying the other party which witnesses or expert witnesses a party intends to rely upon at the arbitration hearing. In the ordinary course of litigation procedure this possible difficulty would be resolved by a party seeking to ensure the presence of a witness or expert for examination giving the party relying on that witness's evidence are "notice to attend for cross-examination".

49. As a result of discussions further work took place in relation to the drafting of proposed Article 25 as set out in the Secretariat Note and the following proposal was suggested to the Working Group, by reference to the Secretariat Note draft. The proposed draft was as follows:

Article 25 – Hearings [witnesses and experts omitted]

1. [Unchanged].
- 1 bis. Witnesses and parties [appointed/presented/retains] experts may be heard under the conditions and examined in the manner set out by the arbitral tribunal. [Incorporates ¶4, last sentence]. In any individual admitted to testify to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under these Rules, notwithstanding that the individual as a party to the arbitration or any way related to any party. [Redrafted along the lines of LCIA 20.7].
2. At least 15 days before the hearing, the arbitral tribunal, after having invited the parties' views, shall draw up a list of the persons, if any, who are to be examined at the hearing and the languages in which they are to do so.

3. [Omitted].
4. Hearings shall be heard in camera unless the parties agree otherwise. [Remainder of this paragraph omitted or transferred to ¶1 bis.].
5. The arbitral tribunal may direct that witnesses and experts be examined through means that do not require their physical presence at the hearing, such as video transmission [conferencing/connection].
6. [Unchanged].

Sequence of articles: Move Article 26 (interim measures) after Article 22 [after Article 29].

50. Additionally, it was noted that in Article 18 the expression “other evidence” had in earlier deliberations of this session been replaced by “other evidentiary material”. It was suggested that this may lead to a restrictive reading of these provisions and not include witness statements, and so it was suggested that the expression “other evidence” be restored to Article 18, so as to ensure that witness statements are included. The same change, it was suggested, should be made for the same reasons to paragraph (2) of Article 19. The proposed changes to Articles 18 and 19 were agreed.

51. Additionally, it was proposed that Article 24 be further revised as follows:

Article 24 – Evidence

1. [Unchanged].
2. Unless otherwise directed by the arbitral tribunal, statements by witnesses and experts may be presented in writing and signed by them.
3. [Unchanged].
4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. [Transferred from Article 25.6].

These proposals were discussed but there was no support for the proposed changes to paragraph (2) of Article 24.

52. In relation to the Article 25 proposals it was agreed that reference should be made to the party appointed experts as the desirable expression in the first sentence of proposed paragraph (1 bis). Further, in relation to these provisions it was suggested that the effect of proposed paragraph (1 bis) is simply that because a person is a party they are not disqualified from giving evidence but it is noted that the admissibility of this evidence remains subject to the power of the arbitral tribunal to determine relevance, materiality and weight under the provisions of paragraph (5) of Article 25 as set out in the Secretariat Note or as incorporated into paragraph 24(4) accordingly to the proposal set out above.
53. In relation to proposed paragraph (2) of Article 24 (in the revision set out above) issues were raised as to the understanding of the word “expert”. The question was asked whether this covers all experts or only party appointed experts. The comment was made that the same question arises in relation to paragraph (5) of Article 25 and the further comment was made that it is very important in relation to paragraph (1 bis) of Article 25 as proposed as well. It was noted that the second sentence of proposed Article (1 bis) (as set out above) refers to “any issue of fact or expertise” and the question was raised as to how this phraseology would be understood – in particular, whether this is intended to refer to a party appointed expert. In response it was said, in relation to the use of the word “expert” in paragraph (2) of proposed Article 24

as further revised, that care had been taken to distinguish between party or tribunal appointed experts where necessary and that the situations covered by these proposed provisions refer to party appointed experts; the clear distinction being made in Article 27 in relation to tribunal appointed experts. In relation to “any issue of fact or expertise” the comment was made that, on the basis of previous discussions, it was thought to be important not to limit the ability of a party to rely upon evidence of internal technical experts rather than outside expertise. In relation to the expression “related to a party”, the comments were made that these words have been chosen because of the difficulty in defining a party when it is a corporation. Directors and officers may differ from country to country and so a generic term has been used which is intended to cover all forms by which a legal person could appear. Again, concern was expressed that the arbitral tribunal may be bound to accept a party as a witness but, in response, the comment was made that all witnesses, party or otherwise, are subject to the admissibility provisions of the proposed revised paragraph (4) of Article 24. Further, in this respect it was said that the premise of the second sentence of paragraph (1 bis) of proposed revised Article 25 is “any individual testifying to the Tribunal”. Thus the premise of the proposed revised rule is “if a person does testify”, then the consequences set out in the remainder of the sentence follows. There is nothing in the sentence to suggest that the arbitral tribunal must accept any particular witness as a provision simply based on the situation or circumstance, “if a person is testifying”. On this basis paragraph (1 bis) of the proposed revised Article 25 was agreed.

54. Proposed paragraph (2) of revised Article 25 was discussed and it was agreed that the word “indicate” should be inserted after the words “hearing and” in the last part of that proposed paragraph.
55. In relation to proposed paragraph (4) of revised Article 25 the comment was made that it did not seem desirable to delete the second and third sentences of the existing paragraph (4) of Article 25 which appear in the original UNCITRAL Rules and have not caused problems for the last 30 years. In relation to the requirement or otherwise for provisions enabling the arbitral tribunal to exclude individuals from the hearing at various times, the comment was made that there were difficult issues in relation to the question whether party witnesses should be excluded and that the arbitral tribunal may, for example, want to exclude one party’s CEO where, for example, another party’s CEO was giving evidence. It was noted that hearing witnesses in the absence of other witnesses was not the only or most frequent method of dealing with witness issues of this kind. Consequently, it was said that in formulating the proposal for the revised Article 25 this technique should not be treated as the unique or preferred method; and that it was not desirable that the Rules refer only to this method and not others. It was a matter for the discretion of the arbitral tribunal and its management of the arbitral proceedings. Further, as a drafting point, it was noted that there may be some ambiguity in relation to the language in which a witness would be examined, though the comment was made that one might expect it to be in the language in which the witness was giving evidence. It was also noted that Article 17(2) deals with the language of hearings and it was suggested that this would seem

to cover the language of oral evidence of witnesses. The further comment was made that provision could be made in Article 25(1) as appearing in the Secretariat Note for identification of persons to be heard as witnesses. In this respect the consensus was to cover this prior notice issue in 25(1) and to delete the proposed paragraph (2) of Article 25 in the revised form. Further discussion took place in relation to the witness exclusion provisions proposed in paragraph (1 bis) of the revised Article 25 proposal and as a result the consensus was against changing the witness exclusion rule and in favour of retaining the provisions of the present 1976 UNCITRAL Rules, but subject to a general discretion in the arbitral tribunal where a witness is a party. In relation to the status of experts the consensus that a distinction should be drawn between party and tribunal appointed experts was reaffirmed and the view expressed that this distinction should be made clear in further drafts of the revised Rules. In relation to “expertise” it was suggested that the manner in which expert evidence is treated varies as between different arbitral and legal systems and may not be able to be resolved by the Rules.

Article 26 – Interim measures

56. The proposed revised Article 26 is modelled on the new provisions on interim measures of protection contained in Chapter IVA of the Model Law. Proposed Article 26 is in the following terms (see Secretariat Note ¶14 to ¶16), as follows:

Article 26 [14]

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraph 2(a), (b) and (c) or a temporary order referred to under paragraph 5 shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits on the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
4. With regard to a request for an interim measure under paragraph 2(d), the requirements in paragraph 3(a) and (b) shall apply only to the extent the arbitral considers appropriate.
5. If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from issuing a temporary order that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the requested measure. [15].
6. The arbitral tribunal may modify, suspend or terminate an interim measure or an order referred to in paragraph 5 it has granted, upon application of any party or, in exceptional

circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

7. The arbitral tribunal may require the party requesting an interim measure or applying for an order referred to in paragraph 5 to provide appropriate security in connection with the measure or the order.
 8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or the order referred to in paragraph 5 was requested or granted.
 9. The parties requesting an interim measure or applying for an order referred to in paragraph 5 may be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
 10. A request for interim measures or an application for an order referred to in paragraph 5 addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. [16].
57. The position reached at previous sessions of the Working Group are recorded in the Secretariat Note as follows (¶14 to ¶16):
14. Paragraphs 1 to 4 and 6 to 9 are modelled on the provisions on interim measures contained in chapter IV A of the Model Law. The Working Group adopted in substance those paragraphs (A/CN.9/641, paras. 46-51), save for the addition of the reference to the "order referred to in paragraph (5)", which has been inserted for the sake of consistency with the proposed new paragraph (5).
 15. The Working Group noted that chapter IV A of the Model Law deals with preliminary orders and agreed to consider a draft paragraph expressing the notion that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure that has been requested and that may be ordered by the arbitral tribunal (A/CN.9/641, para. 60). It is recalled that the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15, paragraph (1), the Rules, in and of themselves, did not

prevent the arbitral tribunal from issuing preliminary orders (A/CN.9/641, para. 59).

16. Paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules which the Working Group agreed to retain in the Rules (A/CN.9/641, para.52). A reference to “an application for an order referred to in paragraph 5” is proposed to be added for the sake of consistency with paragraph (5).

See also the APRAG Report on the forty-seventh session at ¶18 to ¶24.

58. In an attempt to shorten Article 26, the view having previously been expressed that the present version as set out in the Secretariat Note is out of proportion to the length of the other Rules, a short version was proposed, in the following terms (A/CN.9/WG.II/WP.152 (Annex):

Article 26 – proposed short version

1. The arbitral tribunal may, at the request of a party, grant interim measures that it considers necessary for a fair and efficient resolution of the dispute. Upon application of any party or, in exceptional circumstances, on its own initiative, it may also modify, suspend or terminate the measures granted.
2. Before ruling on a request for interim measures, the arbitral tribunal may order any other party not to frustrate the requested measure. Such preliminary orders may be made before the request has been communicated to any other party, provided the communication is made at the latest together with the preliminary order and such other party is afforded immediately an opportunity to be heard.

[alternatively: delete article 15(3) which in any event is in conflict with the practice of those arbitral institutions and arbitral tribunals which require the parties to make their submissions to the institution or tribunal which then passes copies to the other parties.]

3. The arbitral tribunal may require the party requesting an interim measure or a preliminary order to provide appropriate security.
4. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or preliminary order was requested or granted.

5. The arbitral tribunal may rule at any time on claims for compensation of any damage wrongfully caused by the interim measure or preliminary order.
6. A request for interim measures of whatever kind addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

In the course of the initial discussion in relation to the proposed short version of Article 26 it was noted that the detailed provisions of Article 26 in relation to interim measures as set out in the Secretariat Note reflected the regime adopted with respect to interim measures and preliminary orders in Chapter IVA of the Model Law as adopted by UNICTRAL and the thirty-ninth session of the Commission, in 2006. The intention of, what might be termed the long form proposed Article 26, was to give guidance to the arbitral tribunal as to the sort of interim measures an arbitral tribunal could grant. The comment was made that it might have been more logical to include these extensive provisions in the Rules rather than the Model Law but that the Model Law provisions arose out of the need to provide a regime for interim measures; or at least a perceived need. The reasons behind the Model Law revisions in this respect remain and it was said that it is still a real problem in determining when interim measures might be granted and this issue was, it was suggested, addressed in the core provisions of paragraphs (2) and (3) of the longer form proposed Article 26, provisions which have been deleted in the proposed short version. It was suggested that the arbitral tribunal would benefit from guidance in the Rules in relation to the scope of its powers to order interim measures, hence the desirability of provisions such as proposed paragraphs (2) and (3) of the longer form version. There was significant support for the view that the longer version of proposed Article 26 was desirable because it does provide

this further guidance to the arbitral tribunal. The further comment was made that were the provisions of the Rules in Article 26 to differ markedly from the provisions of the Model Law in Chapter IVA there is a risk that the provision of the Rules would be interpreted differently from the provisions of the Model Law, on the basis that the differences in drafting must indicate a different intended meaning. In support of the proposed short version, it was suggested that there was no need for coincidence as between the Rules and Model Law because it did not necessarily follow that the Model Law would be the applicable law in any particular case and, in any event, to the extent to which that is mandatory, it would apply in spite of any provisions in the Rules. Consequently it was said that there was no need for paragraphs (2) and (3) as set out in the longer form version of Article 26 as proposed, noting that these provisions have been deleted from the proposed short version. It was also noted that these matters would, in any event, be regulated by the applicable law and developed in practice.

59. Further it was suggested that specific Rules may constrain the powers conferred by the applicable law as the Rules may not include powers otherwise available under that law. In this respect it was observed again that the applicable law may not necessarily be the revised Model Law containing the Chapter IVA provisions with respect to interim measures and preliminary orders. In this vein the comment was also made that Article 26(2) in its longer form might possibly be restrictive by reference to the applicable law. Nevertheless, it was said that it is desirable to characterise the nature of interim measures which might be granted by an arbitral tribunal in the way

proposed because in the course of the debates with respect to the modification of the Model Law there would not thought to be any interim measures outside these categories. Consequently it was suggested that the provisions of paragraph (2) are unlikely to be restrictive in practice and are desirable for guidance. Supporting and contrary views were expressed in this respect. In support, it was suggested that the provisions of paragraph (2) were to create certainty in relation to what might be done by an arbitral tribunal by way of an interim measure as the position may otherwise vary significantly due to variations in the applicable law. Although there was some substantial support for the proposed short version of Article 26 it appeared that this support was based on different grounds and, consequently, it was thought better to follow the longer form text proposed in the Secretariat Note and, in the course of that process, to address matters arising out of the proposed short form version.

60. There was no objection to Article 26(1) as proposed in the Secretariat Note (see ¶14 to ¶16), and broad support for keeping the definition of interim measures, as set out in Article 26(2), as broad as possible. In order to ensure that paragraph (2) was not interpreted restrictively the view was expressed that it would be desirable to re-draft the introductory provisions to read that: “an interim measure includes any temporary measure...”. The comment was made that this list of possible interim measures was made an exclusive list in the Model Law revisions on the basis that courts might otherwise be reluctant to enforce interim measures and would be reassured if they knew that an order of the type granted fell within the enumerated list. Nevertheless, to ensure that the paragraph was not interpreted restrictively it was suggested that “includes”

should instead read “includes without limitation”. More generally it was said that the provisions of paragraph (2) as proposed are practical and useful and will give guidance, noting that the guidelines in paragraph (2) have been distilled from a wide variety of jurisdictions. Additionally, in order to ensure the flexibility of the paragraph (2) provisions it was suggested that a further paragraph (e) be added which would read: “(e) any other measure that the arbitral tribunal considers necessary for a fair and efficient resolution of the dispute”. The consensus was in favour of retaining Article 26(2) as set out in the Secretariat Note with the addition of “includes without limitation” in the first sentence after the words “an interim measure”.

61. In relation to paragraph (3) of proposed Article 26 in the longer form, it was suggested that paragraph (3) could be removed completely on the basis that the matter could be left to the applicable law. In opposition to this suggestion it was said that the main part of paragraph (3) is paragraph (a) and that the main thrust of that provision is circumstance of current or imminent harm. In relation to paragraph (b) the outcome of the Working Group discussion in relation to the Model Law was, in this respect, that it was most unlikely an arbitral tribunal would want to grant relief to a party which was not likely to succeed in the arbitration on the merits. Nevertheless, it was suggested that it is useful to give guidance to arbitral tribunals in this respect. In the context of the paragraph (3) discussion reference was made again to paragraph (2), particularly paragraph (b). More generally in relation to paragraph (2) it was said that the whole point of retaining that paragraph would seem to be lost if the guiding principles contained in paragraph (3) were removed. In relation to

paragraph (2)(b) it was said that there is some ambiguity as to whether these provisions are limited in their application to the arbitration process only. It was suggested that in order to avoid this confusion it would be helpful to recast paragraph (2)(b) as follows:

- (b) take action that would prevent, or refrain from taking action that is likely to cause:
 - (i) current or imminent harm; or
 - (ii) prejudice to the arbitration process itself;

As a result of ongoing discussion the consensus position reached was that paragraph (3) of the longer form of proposed Article 26 should remain as set out in the Secretariat Note. Further comment was made that the key provisions of paragraph (3)(a) resolves an issue upon which arbitral laws generally say very little until the recent additions to the Model Law in Chapter IVA. Consequently, it was said that it would be very helpful to state the position as set out in paragraph (a) because that matter is not likely to be dealt with in the applicable law. Further, it was said that removal of this clearly drafted solution at this stage might suggest that the Working Group did not think the test was appropriate, which, it was suggested, is not the case. The further comment was made that if these provisions were not retained in the Rules there is a risk that the arbitral tribunal would apply the “irreparable harm” test rather than the “balance of inconvenience” test which is now provided for in the Model Law; and which may not be inconsistent with any applicable law, which does not provide for a test. Consequently, it was said that paragraph (3) is really an addendum to the power conferred in paragraph (1) and as a qualifier to these empowering provisions is properly included in the Rules. It was suggested that it might be appropriate to include a “reminder” in

paragraph (3) which notes the possibility that there may be another test or tests required under the applicable law.

62. Paragraph 26(4) as set out in the longer form version of Article 26 of the Secretariat Note was adopted without change (see Secretariat Note ¶14 to ¶16).
63. It was noted that the provisions of paragraph (5) of the longer form proposed Article 26 as set out in the Secretariat Note which provide for the granting of temporary orders ex parte do not mirror the provisions of Articles 17B and 17C of the Model Law which make provision for preliminary orders and the conditions for granting preliminary orders ex parte. Among other comments made in the course of debate, the comment was made that it would be desirable to harmonise the terminology as between the Rules and the Model Law and refer to a “temporary order” in the Rules as a “preliminary order”, to be consistent with the Model Law provisions.
64. The preliminary orders provisions which were included in the new Chapter IVA of the Model Law have, in many jurisdictions, been regarded as controversial on the basis that the power of an arbitral tribunal to grant orders ex parte is contrary to the generally accepted position in many jurisdictions. In many jurisdictions the view is that orders of this nature can and ought to only be granted by the courts. In this vein objection was raised to proposed paragraph (5) on the basis that ex parte preliminary orders are contrary to the consensual nature of arbitration and, consequently, the proper venue for ex

parte applications of this kind is a court. It was noted that only a court order of this kind is enforceable and that even under the Model Law provisions a preliminary order, though binding on the parties, is not subject to enforcement by a court (see Article 17C(5)). It was also noted that only a few countries had adopted the modifications to the Model Law as contained in the new Chapter IVA and that because they took the view that ex parte preliminary orders were matters exclusively for the courts. On this basis it was also suggested that inclusion of provisions for ex parte measures in the Rules would affect the universality of the UNICTRAL Rules because some countries would not agree to a bilateral investment treaty which adopted rules, such as the proposed Article 26(5) which provided for ex parte preliminary orders. It was suggested, however, that the proposed paragraph (5) could be acceptable if redrafted to permit the granting of preliminary orders only and so long as the applicable law permitted their grant by an arbitral tribunal, but that the provision was ambiguous in that it could also be read as conferring power on an arbitral tribunal to grant interim ex parte orders where the applicable law did not confer that power. There was support for these views but it was noted that in different traditions and jurisdictions provisions do exist for the granting of ex parte preliminary orders by arbitral tribunals. Consequently, it was suggested that paragraph (5) might be acceptable as long as it was “quarantined” to apply only to those countries where the applicable law permitted orders of this nature.

65. More generally, the comment was made that the present revision of the UNCITRAL Rules was called for as a result of concern as to a number of

defects which needed to be addressed. It was noted that interim ex parte measures was not a defect that had been identified in this respect. Further, it was noted that an important difference as between an ex parte application for a preliminary order in a court, and a similar application for an arbitral tribunal, was that the judge hearing the ex parte application in court would not hear the case. A position, it was said, is different with arbitration proceedings because the arbitrator or arbitral tribunal would also hear the main proceedings and may be prejudiced by the hearing of the ex parte proceedings. Further, it was said that States are likely to be concerned at the prospect of an arbitral tribunal hearing an interim ex parte application for a preliminary order under an arbitration clause adopting the UNCITRAL Rules contained in a bilateral investment treaty. There was further discussion in relation to whether BITs would be “amended retrospectively” in this respect as a result of revision of the Rules and the inclusion of a provision such as paragraph (5), but it was noted that amendments had been agreed by the Working Group in relation to the application provisions of the Rules which would prevent this retrospectivity (APRAG Report of the forty-eighth session at ¶¶8 to ¶¶10). Further discussion ensued in which a number of interventions were made from representatives of civil law jurisdictions indicating that an arbitral tribunal is empowered to grant preliminary orders on an ex parte application in those jurisdictions. The further, more general, point was made that the provisions of paragraph (5) are directed to “real life” situations. It was observed that it might prove to be worthless to obtain a final award if the subject matter of the dispute has been disposed of – the example being that of the departing ship. It was also noted that the device eventually arrived at in the Model Law

provisions, and the proposed provisions of Article 6 in longer form was to recognise what has been happening in practice for some time. It was suggested that the practical step is that the arbitral tribunal will say to the parties that it needs to hear both sides and consider the position but in the meantime would the “offending” party not do [x]. It was suggested that the provisions of the Rules should not prejudice that authority. Further, it was said that reliance upon State Courts for orders of this nature is not the answer because there may be delays and access to the courts may be difficult. Further, it was said that it is not always true that the judge who rules on a preliminary matter will not also rule on the merits at the end of the trial. Concluding these comments it was said that there was no reason why the Rules should not respect the traditions of countries in which the mandatory law prevents the granting of ex parte preliminary orders by an arbitral tribunal but that this caveat should not affect the conclusion of an empowering provision applicable to jurisdictions where this was not the position. In this respect it was also suggested that one solution might be to delete paragraph (5) entirely and leave the whole matter to be determined by the applicable law.

66. As a result of further discussion and consultation it was suggested that the proposed paragraph (5) of the longer form of Article 26 should be replaced with the following:

Nothing in these Rules shall have the effect of creating (where it does not exist) or of limiting (where it does exist) any right a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, an interim measure without notice to a party.

As noted previously it was suggested that the expression “interim measure” be replaced with “preliminary order” to be consistent with the Model Law provisions. Further suggestions were made that the better solution was to delete the proposed provisions of paragraph (5) completely but it was noted that there was a consensus in favour of proposed paragraph (5) which was the result of discussions and consensus in September 2007 (see APRAG Report of the forty-seventh session at ¶24). Reference was also made to the empowering provisions of Article 15 of the Rules which, in paragraph 1, provide, among other things, for the parties to be treated with equality and to be given a full opportunity of presenting their case as indicative of the problems in adopting the proposed paragraph (5) of Article 26. As a result of further discussion it was agreed that the expression “preliminary order” should be substituted for the expression “interim measure” in the proposed text set out above and it was agreed that there should be further clarification of the above text by adding after the words “any power of the arbitral tribunal” to issue the following words in place of those set out above: “, in either case without prior notice to a party, a temporary order that the party not frustrate the purpose of a requested preliminary order”. It was also then agreed to make further changes to the text set out above, as amended, by adding the words “which exists outside these rules” after the words “any right” and, consequently, delete the two sets of prior brackets.

67. Proposed paragraphs (6), (7), (8) and (10) of the proposed longer form Article 26 as set out in the Secretariat Note were agreed to without change notwithstanding the removal of the reference to paragraph (5), and in relation

to proposed paragraph (9) of Article 26 it was agreed that a note would be prepared by the Secretariat on the way in which civil law jurisdictions deal with liability for damages when preliminary orders are subsequently not continued and the Working Group will decide whether this whole issue can be left to the applicable law or whether paragraph (9) needs to become a substantive provision of the Rules. It is noted that the proposed short version of Article 26 deals with the issue addressed in paragraph (9) of the longer form in more general terms providing that the “arbitral tribunal may well at any time on claims for compensation that any damage wrongfully caused by the interim measure or preliminary order”. In this respect the comment was made that it might be dangerous to adopt a proposal in this form and to delete the words “wrongfully caused”. The comment was made that it is not clear that if “wrongfully” is omitted there is a further objective standard to apply. Further, it was said that there might be costs in preserving evidence which, if characterised as damages, may be recoverable. Consequently the longer form paragraph (9) approach was said to be preferable as indicating the way of approaching the issue. Additionally, it was said that it may be desirable to include some reference in paragraph (9) or its equivalent which says something along the lines of “in light of the outcome of the case” – a provision which does not have the effect of providing that the award of costs and damages depends on the outcome of the case but means, in effect, that “in light of the outcome of the case it turns out to have been an undue measure”. It was suggested that this provides a reminder that there is a substantive standard to assist determinations on this issue.

Conclusion

68. It is hoped that this 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, secondly, to assist in the formulation of views, comments and recommendations for discussion by APRAG at further sessions of the UNCITRAL Working Group.
69. Please do not hesitate to make contact if you have any comments or queries (ccroft@vicbar.com.au; christopher.kee@deakin.edu.au; or David.Fairlie@malleons.com).

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