

# ASIA PACIFIC REGIONAL ARBITRATION GROUP

## *Report on Forty-ninth Session of the UNCITRAL Working*

### *Group II (Arbitration)*

*Vienna, 15-19 September 2008*

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#### *Background*

1. The United Nations Commission on International Trade Law (UNCITRAL) at its thirty-second session welcomed the opportunity to discuss the desirability and feasibility of developing the law of international arbitration. The proposed developments included assessing and reviewing the UNCITRAL Model Law on International Commercial Arbitration (“the UNCITRAL Model Law”) and the UNCITRAL Arbitration Rules (or “the Rules”).
2. The Commission at its thirty-ninth session (New York, 19 June-7 July 2006), discussed the future work of the Working Group.
3. In particular, the Report of the Commission notes:<sup>1</sup>
  183. The Commission took note of suggestions of the Working Group made at its forty-fourth session (New York, 23-27 January 2006) that priority consideration be given to, inter alia, possible revision of the UNCITRAL Arbitration Rules; arbitrability of intra-corporate disputes (and possibly other issues relating to arbitrability, for example, arbitrability in the fields of intellectual property rights, investment disputes,

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<sup>1</sup> *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 and forty-eighth and forty-ninth sessions, in New York (February 2007), Vienna (September 2007), New York (February 2008) and Vienna (September 2008), respectively. The Working Group has been assisted in these sessions by five

sets of extensive notes prepared by the UNCITRAL Secretariat,<sup>2</sup> all of which are entitled *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by the Secretariat)*. The Secretariat Note (WP.151) 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 ¶3, p 2)).

5. The Working Group was assisted at its most recent session in Vienna by two additional sets of extensive notes prepared by the UNCITRAL Secretariat,<sup>3</sup> both of which are entitled *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by Secretariat)*. The first of these additional papers (WP.151) provided notes with respect to Articles 1 to 17 of the UNCITRAL Arbitration Rules. As the deliberations of the Working Group in Vienna did not proceed beyond Article 17 only the first of these additional papers is referred to in this Report and is, for convenience, referred to as the Secretariat Note. The Working Group was assisted at the forty-ninth session in Vienna, 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*.<sup>4</sup> This Report is, for convenience, referred to as the

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

<sup>3</sup> A/CN.9/WG.II/WP.151 (6 Aug 2008) and A/CN.9/WG.II/WP.151/Add.1 (6 Aug 2008)

<sup>4</sup> which is not an official UNCITRAL Document, but appears on the UNCITRAL website in the material in relation to Working Group II (Arbitration) Forty-fifth session, Vienna, 11-15 September 2006 (see [www.uncitral.org](http://www.uncitral.org)).

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 and Vienna in September 2008 in order to continue discussion in relation to areas of the UNCITRAL Arbitration Rules where revision might usefully be made. “It was considered that the focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years.”<sup>5</sup> It was noted that the UNCITRAL Arbitration Rules were intended to apply to a broad range of circumstances and that at least four main types of arbitration could be identified where the Rules were used in practice, namely: “...disputes between private commercial parties where no arbitral institution was involved (a type sometimes referred to as “ad hoc” arbitration), investor-State disputes, State to State disputes and commercial disputes administered by arbitral institutions”.<sup>6</sup> 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

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<sup>5</sup> A/CN.9/614, ¶16, p 5.

<sup>6</sup> A/CN.9/614, ¶17, p 5.

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 cooperation; 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:<sup>7</sup>
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 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

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<sup>7</sup> *Id.*, ¶¶18 to ¶20, pp 5 and 6.

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.

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. As was noted previously in the APRAG Report on the forty-sixth session in New York in January 2007 before the discussion of the provisions of the rules in detail, the Working Group agreed, at that New York session, that harmonisation in the drafting of the revised UNCITRAL Arbitration Rules with the UNCITRAL Model Law was not 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). The Working Group also agreed at the beginning of the New York session, in January 2007, to replace phrases such as “both parties”, “either party”, “one of the parties” with the word “parties” to promote the applicability of the rules to multi-party arbitrations (see Secretariat Note A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶7).

10. The following is a brief summary of some of the important issues identified with respect to Articles 1 to 17 of the Rules which were considered by way of a “second reading” at the forty-ninth session of the Working Group in Vienna in September 2008. Articles 1 to 4 of the Rules were considered in the latter part of the forty-eighth session of the Working Group in New York in February 2008 but these articles were also considered further in some of the New York discussions revisited at the forty-ninth session in Vienna (see the APRAG Report on the forty-eighth session, ¶¶41 to 54).

### **Section I – Introductory Rules**

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

#### **Article 1- Scope of Application**

12. The proposed revised Article 1 is set out in Secretariat Note WP151 (¶1) as follows:

##### **Article 1**

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

1 bis. Unless the parties have agreed to apply another version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by

UNCITRAL of the revised version of the Rules] an offer made before that date.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.
13. The position reached at the forty-eighth session of the Working Group in New York (Secretariat Note WP.151 ¶2), was as follows:

2. The provisions of paragraph (1 bis) were not contained in the 1976 version of the Rules. That paragraph seeks to determine which version of the Rules applies to arbitrations. The proposed draft is based on discussions of the Working Group at its forty-eighth session (A/CN.9/646, paras. 72-77). It contains a presumption aimed at providing guidance to the arbitrators in case the parties have not expressly indicated which version of the Rules would apply. The presumption that parties have referred to the Rules in effect at the date of commencement of the arbitration applies only to arbitration agreements concluded after the adoption of the revised version of the Rules. That presumption does not apply where arbitration agreements are formed by one or more parties accepting an open offer to arbitrate made by other party or parties before the date of adoption of the revised version of the Rules (A/CN.9/646, paras. 75 and 76).

See also the APRAG Report on the forty-eighth session at ¶42 to ¶48.

14. In relation to paragraph (1 bis) consensus was in favour of revising the opening provisions to read “unless the parties have agreed to apply a particular version of the Rules...”. The change was to replace the word “another” with the words “a particular” with reference to a version of the Rules.<sup>8</sup> The comment was also made that difficulties may arise as a result of the lapse of time involved in the process of offer and acceptance and the conclusion of a

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<sup>8</sup> *Draft Report of the Working Group on Arbitration and Conciliation on the work of its Forty-ninth Session (15 September 2006) (A/CN.9/WG.II/XLIX/CRP.1/Add.1), ¶3, p 2.*

contract containing an arbitration agreement which, it was thought, 1 bis with the agreed change, would resolve satisfactorily.

### **Model Arbitration Clause**

15. The discussion in relation to the Model Arbitration Clause was on the basis of the draft which was adopted in substance by the Working Group at its forty-eighth session in New York, which was set out in the Secretariat Note WP.151 ¶4 as follows:

#### **\* MODEL ARBITRATION CLAUSE FOR CONTRACTS**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

*Note – Parties may wish to consider adding:*

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town and country);
- (d) The language to be used in the arbitral proceedings shall be ...

The issue which arose for discussion was whether the words “might wish to” which appear in the chapeau of the note to the model arbitration clause should remain as is or whether, in order to indicate to the parties the importance of agreeing on the matters listed, the phrase might be replaced with the word “should” (see Secretary Note WP.151 ¶5).

16. Comments were made in support of strengthening the phrase “may wish to consider” with a word such as “should” as suggested in the Secretariat Note.

There was also discussion of the positioning of the asterisk which currently appears in Article 1.1 after the introductory words “whether the parties to a contract have agreed in writing \*...”. There was some suggestion that the asterisk might be inserted at the end of Article 1.1; the comment was made that this was undesirable as it would tend to suggest that the modifications which the parties may agree in writing (to which reference is made in the concluding part of Article 1.1) were to be limited to the elements contained in the Model Arbitration Clause, which is not the case. Views were also expressed in support of maintaining the existing phraseology in the note to the Model Arbitration Clause on the basis that most of the matters dealt with in the Model Clause are, in any event, resolved by the provisions of the Rules themselves so there is no need to deal with these matters in the Arbitration Clause.

As an alternative to “may wish to consider” it was suggested that the expression “parties are encouraged” might be added and that this would emphasise the advisory nature of the Note. It was suggested that the use of the word “should” may create a problem in some circumstances and provide a basis for challenges or delays to the arbitration process on the basis that there had been a failure to comply with mandatory provisions of the rules. Hence, the expression “parties are encouraged...” was suggested as a compromise between the two approaches, but one which would avoid these potential difficulties. In any event the consensus was for replacing “may wish to consider” by the word “should”.

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

17. The proposed provisions of Article 2 are set out in Secretariat Note WP.151 (¶6). It had been proposed at the forty-eighth session in New York (2008) that paragraph (1) be revised in a relatively minor respect and that a new paragraph (1 bis) be added. As a result of deliberations of the Working Group in New York (see APRAG Report ¶50 to ¶54) the Secretariat provided for consideration revised paragraphs (1) and (1 bis), as follows:

**Draft Article 2**

**Notice, calculation of periods of time**

**Article 2**

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

[1 bis. Any notice, including a notification, communication or proposal shall be delivered by registered post, delivery against receipt, courier service or transmitted by telex, telefax or other means of telecommunication, including electronic communication, that provide a record of its transmission.]

2. ...

18. It appears that the revised draft of paragraphs (1) and (1 bis) was intended to deal with the problems of non-delivery (paragraph (1)) and then, specifically, make provision for “delivery” by electronic means (paragraph (1 bis)),

following the discussions in New York.<sup>9</sup> These revised paragraphs were discussed at very considerable lengths by the Working Group.

19. The first general issue raised was whether draft paragraph (1 bis) was necessary. In an initial comment, concern was raised that the addition of paragraph (1 bis) may have the effect of constraining possible modes of service to those specified in that paragraph. Numerous comments were made and warning sounded in relation to the risk of seeking to be very specific in the Rules in relation to modes of electronic communications in these service provisions having regard to the extremely rapid rate of development of technology in this area in recent years. It was suggested that paragraph (1 bis) may be confusing but that electronic communications are not dealt with satisfactorily in the existing rules and that there is a need to give some signal that the new rules are intended to accommodate a variety of forms of service by electronic transmission which provide a record of that transmission. Consequently it was suggested that a user of the Rules may not be put on notice that the Rules accommodate service by electronic communications if paragraph (1) only, not also paragraph (1 bis), was to be included in the new rules.
20. Some conflict was identified between draft paragraph (1) and paragraph (1 bis). The problem, and conflict, was said to arise as a result of the reference to “physically delivered” in paragraph (1) which might be thought to be inconsistent with the concept of electronic communication in paragraph (1

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<sup>9</sup> A/CN.9/646, ¶83.

bis). It was suggested that the conflict might be overcome by clarifying that paragraph (1) and paragraph (1 bis) are intended to accommodate both physical delivery and electronic communications. It was said that this clarification might be effected in either paragraph. Further comment was made that although the Working Group had intended there to be a link between the concept of “designated address” in paragraph (1) to Article 9 of the *United Nations Conventions on the Use of Electronic Communications in International Contracts* 2005, this may not be immediately apparent to those outside the Working Group. It was suggested that the difficulty might be overcome by adding the phrase such as “designated electronic address” in paragraph (1). It was also said that paragraph (1 bis) is not satisfactory because it does not state when the electronic communication is deemed to have been received and, further, as a general comment, that it is not helpful to concentrate in this paragraph on means of communication rather than provisions with respect to deemed delivery. Discussion then turned to resolving the apparent conflict between these paragraphs on the basis that paragraph (1 bis) is directed to the means of communication, hence reference to “physically delivered” as presently appearing in paragraph (1) would need to be part of paragraph (1 bis) to avoid overlap between these provisions. There were, however, views expressed to the effect that the reference to “physical delivery” in paragraph (1) is not a limiting concept and that the conflict might be resolved by expanding the first sentence of paragraph (1) to indicate that notice might be given by an electronic communication that provides a record of delivery. A number of comments were made to the effect that the important aspect of any provision in relation to service by electronic

means is that, whatever the process used, it should provide proof of transmission.

21. Discussion then turned to the possibility of expanding the provisions of paragraph (1) to accommodate electronic communications or, as it was suggested, communications which might be more satisfactorily and more broadly referred to as “telecommunications”. In any event, in the suggestions for expanding the wording of paragraph (1) the point was emphasised that the provisions should use in broad terms as possible to accommodate technological development. Discussion then turned to the issue of the “record of transmission” which was generally thought to be required in the event that there was no actual delivery. In this respect it was suggested that the drafting of these paragraphs should not venture into the difficulty of technical definitions, which would require expert input. It was also suggested that paragraph (1) is a deeming provision and not a provision directed to the mode of communication. Consequently, it was suggested that paragraph (1 bis) should precede paragraph (1) and that paragraph (1 bis) could be a very general provision along the lines of “any notice...may be delivered by any means that provides a record of transmission”. It was observed that similar wording had been included in international arbitration rules of arbitral institutions and some UNCITRAL instruments, without causing any apparent practical difficulties. Paragraph (1) then becomes a special rule to deal with situations where there is doubt as to delivery and, for the purposes of such a provision there will be no difficulty in imputing into “designated address” and electronic address or the like.

22. The consensus at this stage of the discussions was that it was desirable to open up paragraph (1) to electronic communications and that the discussions were focused on the best way to do this. It appeared that the trend was in favour of a separate provision along the lines of paragraph (1 bis), but drafted in such a way to avoid the present overlap between the paragraphs. Consideration would be given to the suggestion that paragraph (1 bis) should precede paragraph (1) and emphasise that it is concerned only with provision of a record of delivery. It is also suggested that the word “shall” in paragraph (1 bis) should be replaced by “may”. It was agreed that further attention needed to be given to the issue of “physical delivery” as appearing in paragraph (1).
23. Discussion also ensued in relation to the use of the expression “designated address” in paragraph (1). It was noted that the expression was not a defined term and questions were raised as to whether this was a desirable term. Issues were also raised in relation to the possible application of different rules for service on a “designated address” and service on a “non-designated address”. Questions were raised as to whether this was a desirable distinction and whether, in any event, the word “designated” is a clear and unambiguous term for use in this context. The comment was made that an address might be “designated” by the terms of the relevant contract or, alternatively, it may be identified as such, subsequently, by the parties. In any event, the consensus appeared to be that this position and process of identifying a “designated address” should be made clear.

24. As the discussion continued a consensus developed in relation to the approach to paragraphs (1) and (1 bis). In terms of principles the consensus was:

- (1) The means of transmission should be addressed to make it clear that electronic transmission is permissible. The consensus was that a separate provision is clearer as long as there is no overlapping between the paragraphs, as is the position now.
- (2) There is a problem with addresses where a party has several email addresses. Simply providing for an electronic address is, consequently, too vague. In relation to drafting provisions with respect to electronic address one of the problems now is that terminology is not firmly established – for example, “designated address” is an expression sometimes used in the context of electronic transmission, but other terminology is often more general.
- (3) The provision in paragraph (1) as to timing, namely that “Notice shall be deemed to have been received on the day it is so delivered” was not regarded as being controversial.

Moving on from issues of principle it appeared that there was a degree of consensus on draft wording for these paragraphs to address the problems highlighted, at least in general terms.

- (4) In relation to the mode of transmission wording was suggested such as “Notice...may be delivered by any means that provides a record of its transmission...” whilst there was consensus as to the desirability of a clear and direct provision of this nature. The comment was also

made that the use of the expression “a record of transmission” would indicate to users and potential users of the Rules that the Working Group thought of and considered “electronic communications” and that, by implication, the new rules made provision in this respect.

- (5) In relation to the reference to addresses in paragraph (1) it was accepted that there are two situations dealt with or to be dealt with, namely physical delivery, that is delivery to the natural person and physical delivery in another sense, such as by post. Consequently, it was suggested that the following form of words may go some way to reducing this confusion:

“A notice if it is not delivered to the addressee in person may be delivered to its habitual residence...or any other address it has identified for this purpose, or, if none of these can be found after making reasonable enquiry...”

Further, there was consensus that terminology needed to be kept general and that any adopting of the terminology with respect to electronic communications contained in the UNCITRAL Model Law or the *United Nations Convention on the Use of Electronic Communications in International Contracts* 2005 may cause problems for states which have not adopted the Model Law or this Convention and, more generally, as technology develops and, with it, new concepts and terminology.

25. Discussion continued in relation to paragraphs (1) and (1 bis) of draft new Article 2 following on from this position. It was generally agreed that this statement of principles and suggestions in relation to drafting changes represented the then current consensus. In particular, there was consensus that

the new rules should permit any form of service, physical delivery or electronic, as long as whatever means is used provides a record of delivery. In relation to the question of addresses, it was suggested that the rules might provide for service, simply, at the “last known address”. Nevertheless, the consensus appeared to be that this would not provide sufficient precision for rules which had the effect of deeming proper service even in the absence of actual delivery, whether by physical or electronic means.

26. Further discussion took place in which comments were made in relation to the importance of an address for service being specified by some means for the purpose of electronic transmission. As noted above, comments had been made previously in relation to the potential difficulties that might arise when a party has more than one email address. These further discussions concluded with consensus supporting the principle that the rules should recognise electronic communications for the purpose of service of documents. It was noted that there was some suggestions that this could be achieved by drafting revisions in paragraph (1) without the necessity for a separate paragraph (1 bis). Nevertheless, the consensus appeared to be in support of retaining two paragraphs, with one being a separate provision with respect to the place of delivery, whether by physical or electronic means. Consequently, the modified question became whether it was necessary to qualify the provisions with respect to the transmission of documents with a provision requiring a record of transmission or whether the provisions should be expanded more broadly to provide for any means of service, including electronic transmission. It was noted that the drafting in this respect might involve modification to the

words of the present draft to paragraph (1 bis), which would become the initial paragraph, providing for service “by any means including electronic means”. The question then raised was whether this modification made the position sufficiently clear or whether there was a need to retain a requirement for the process of service, whether physically or by electronic means, that it produce a record of delivery or transmission. The consensus appeared to be that the means of service chosen must produce a record of transmission – and no practical problems were identified as likely to arise as a result of a requirement for a record of transmission. It was agreed that the provisions of draft Article (1) and (1 bis) would be redrafted for further consideration at the fiftieth session in New York in 2009 applying the principle that a record of transmission requirement is to be included.

### **Article 3 – Notice of Arbitration and response to the Notice of Arbitration**

27. The Secretariat Note WP.151 (¶12 and ¶13) summarises the position reached by the Working Group in New York in 2007, as follows:
12. The Working Group agreed at its forty-sixth session to further discuss whether the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in article 18 (A/CN.9/619, para. 57). If that option is retained, paragraph 4(c) could be deleted, and the following provision could be added to article 18: “The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim” (see document A/CN.9/WG.11/WP.151/Add.1, para. 1). A similar solution would then be proposed in relation to the response to the notice of arbitration, where the respondent would be given the opportunity to decide whether its response to the notice of arbitration should be treated as a statement of defence, under article 19. The following paragraph would be added to article 19: “The respondent may elect to treat its response to the notice of arbitration in article 3, paragraph 5 as a statement of defence” (see document A/CN.9/WG.11/WP.151/ Add.1, para. 2).

13. Paragraphs (5) and (6), which cover response to the notice of arbitration were not contained in the 1976 version of the Rules and the draft takes account of comments made in the Working Group that more precise language should be used (A/CN.9/619, paras. 58 and 60).

See also the APRAG Report on the forty-sixth session, ¶¶16 to ¶18.

28. As the deliberations of the Working Group focused on paragraphs (4), (5) and (6) of Article 3, it is helpful to set these out in the draft form in which they appear in the Secretariat Note WP.151 (see ¶13):

4. The notice of arbitration may also include:
- (a) A proposal for the appointment of an appointing authority referred to in article 4 bis, paragraph 1;
  - (a bis) A proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;
  - (b) Notification of the appointment of an arbitrator referred to in article 7 or article 7 bis [;
  - (c) The statement of claim referred to in article 18.]
5. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall [, to the extent possible,] include:
- (a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;
  - (b) The name and contact details of each respondent;
  - (c) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraph 3(c), (d), (e) and (f);
  - (d) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.
6. The response to the notice of arbitration may also include:

- (a) A proposal for the appointment of an appointing authority referred to in article 4 bis, paragraph (1);
- (b) A proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;
- (c) Notification of the appointment of an arbitrator referred to in article 7 or article 7 bis;
- (d) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.

29. It was agreed that the consensus of the Working Group in relation to the claimant's option of treating its notice as its Statement of Claim is correctly set out in the Secretariat Note WP.151 (¶12), above. In particular, it was agreed that paragraph 4(c) should be removed and it was also agreed that paragraphs (5) and (6) represent redrafting as a result of the Working Group's previous discussions. In relation to paragraphs (5) and (6), there was discussion in relation to the possible removal of paragraph (5)(a) because the Respondent's last opportunity for raising jurisdictional objections is in its Statement of Defence, hence the proposed paragraph (5)(a) would appear to conflict with Article 21(2) (Statement of Defence). There was further discussion of the provisions of Article 3 in the course of discussion of Article 5 – with further suggestion for amendment of Article 3 (see ¶40 to ¶43, below).

30. In the course of ensuing discussion it was suggested that the rules might distinguish between the time available for objection to jurisdiction and claims and responses in relation to the substantive matters. It was also suggested that it might be left to the parties to decide when they should raise a jurisdictional issue, noting that paragraph (5)(a) was in part a provision which was

“educational” in nature. The result of the discussion was consensus to move paragraph (5)(a) into paragraph (6), a paragraph cast in permissive terms (cf paragraph (5) and that the qualification to the mandatory requirements of paragraph (5), the words in square brackets “to the extent possible” should be removed entirely.

31. In relation to paragraph (7) of Article 3 it was suggested that the word “impeded” in the sentence “the constitution of the arbitral tribunal shall not be impeded by: (a) any controversy with respect to the sufficiency of notice...; or (b) failure by the respondent to communicate a response to the notice...” with the word “hindered”. It was agreed.

#### **Article 4 – Representation and Assistance**

32. The proposed provisions of Article 4 are set out in Secretariat Note WP.151 (¶15). For convenience, the draft article is set out, as follows:

##### **Draft Article 4**

##### **Representation and assistance**

##### **Article 4**

The parties may be represented or assisted by persons chosen by them. The names and addresses of such persons must be communicated to all parties. Such communication must specify whether the appointment is being made for purposes of representation or assistance. [Where a person is to act as a representative of a party, the arbitral tribunal, itself or upon the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine].

33. The issue for consideration in relation to Article 4 was the last sentence as indicated in the Secretariat Note WP.151 (¶15), as follows:

15. Article 4 includes the modifications agreed by the Working Group at its forty-sixth session to replace the words “of their choice” in the first sentence with the words “chosen by them” (A/CN.9/619, para. 63), and to delete the words “in writing” in the second sentence as the manner in which communications should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (A/CN.9/619, para. 68). The Working Group might wish to consider whether the last sentence on the communication of proof of authority, which constitutes an addition compared to the 1976 version of the Rules, is needed (A/CN.9/619, paras. 64-67).

See also APRAG Report forty-sixth session, New York, 2007 (¶19 and ¶20).

34. In the course of discussions the comment was made that in some cases it is quite usual for lawyers to prove their authority. Further, it was said that the value of this rule is that the request would cause no offence even in jurisdictions where the request might otherwise be seen as an “offensive” request. Other comments also supported the retention of the words of the last sentence, in [of the draft article as establishing good practice]. The consensus was that the last sentence of draft article 4 should be retained but that a provision should be added which would require communication of this proof of authority to the arbitral tribunal.
35. It was also suggested, as a matter of drafting, that the first sentence of Article 4 should read: “Each party may be represented or assisted by persons chosen by it”. There appeared to be consensus in support of this change.

#### **Proposed Article 4 bis – Designating and appointing authorities**

36. The proposed new Article 4 bis was considered at the forty-sixth session in New York in 2007 (see APRAG Report ¶21 to ¶25). The Secretariat Note

WP.151 (¶16) contains the following comment on the development of this draft new article:

16. Article 4 bis was not contained in the 1976 version of the Rules. Its purpose is to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration. The draft seeks to better clarify the role of the designating and appointing authorities, as discussed by the Working Group at its forty-sixth session (A/CN.9/619, paras. 69-78). The Working Group might wish to consider whether paragraph (1) should include a reference to the Secretary-General of the PCA as one institution which could serve as appointing authority.
  
37. In the course of discussions, the point was made that the proposed new article serves to group the provisions in the rules in relation to the role of the appointing authority. The proposed new article concerns, specifically, what is to occur if the parties failed to name an appointing authority, or subsequently failed to agree on an appointing authority, or where the appointing authority refuses to act. Broadly speaking, in these events the Permanent Court of Arbitration (“the PCA”) may designate the appointing authority. It was also suggested that paragraph (2) of the draft new Article 4 bis may allow the parties to request the PCA to designate an appointing authority even in the absence of a dispute. In the course of these discussions it was agreed that the reference to the PCA should be a reference to the Permanent Court of Arbitration “at the Hague”. There was some discussion as to whether the Secretary-General of the PCA should be highlighted specifically for the purposes of this proposed new rule, but no consensus was reached in this respect, pending resolution of discussion on a suggestion that instead of providing in Article 4 bis for the PCA to act as the designator of an appointing authority it would be better to have a “one stop shop” rather than a “two stop

shop” and provide for the PCA acting as appointing authority. It was suggested, further, that if the proposed new article was to provide for the PCA acting as an appointing authority in circumstances where it might otherwise act under these proposals as a designating authority, that its appointing authority role should be subject to two exceptions. It was suggested that the first should be in the event of agreement of the parties to the contrary and the second where it is the view of the PCA that it would be more appropriate for it to act as a designating authority. There was also disagreement in relation to these proposals, particularly on the basis that they had been presented and rejected during the forty-sixth session (New York, 2007). It was suggested that the present two step procedure whereby the PCA acts as a designating authority operates quite satisfactorily. Further, it was said that nothing in the current process impedes the operation of the PCA. There was discussion as to whether the debate on the role of the PCA was concluded during the forty-sixth session of the Working Group with a number of delegations supporting the view that it was not concluded and, in terms of the substance of the discussion, that parties should be able to utilise the PCA as appointing authority under the provisions of the new Rules. The position reached in this discussion was that the views of some states were evolving in relation to this proposed new article but no consensus had yet been reached. It was agreed that the PCA would be invited to explain how it would exercise the role of an appointing authority as proposed. It was said that if no consensus was reached, the matter would be put before the Commission as the rules can function with or without the PCA as an appointing authority or as a fall back appointing authority. In response, the PCA said that it could fulfil all

expanded functions proposed in the Working Group discussions so far. It was said that the PCA regularly acts as an appointing authority and feels capable and well qualified in that role. The PCA also indicated that member states were aware of how the PCA operates and that a summary of PCA experience as an appointing authority and in related functions is set out in detail in the report of the fortieth session of the Commission (A/CN.9/634).

38. The discussion on proposed new Article 4 bis was resolved on the basis that further discussion would be deferred until the completion of the “second reading” of the present draft of the rules (as contained in Secretariat Note WP.151 and WP.151/Add.1). At the stage of that further consideration a fresh draft of that proposal would be provided – with provision made for the PCA being a fall back position. A further question is whether draft Article 4 bis paragraph (1) should make specific reference to the Secretary-General of the Permanent Court of Arbitration. Draft Article 4 bis, paragraph (1) is in the following terms:

1. Unless the appointing authority has already been agreed, a party may at any time propose the name or names of one or more institutions or persons [including the Secretary-General of the Permanent Court of Arbitration (hereinafter called “the PCA”),] one of whom would serve as appointing authority.

Questions were also raised in relation to possible problems with draft Article 4 bis paragraph (4), which is presently in the following terms:

4. In exercising its functions under these Rules, the appointing authority may require from any party the information it deems necessary and, to the extent it considers possible, it shall give the parties an opportunity to present their views. All communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided by the sender to all other parties.

Specifically, the problem highlighted related to the words “to the extent it considers possible”. It was suggested that it would always be possible for an appointing authority to give parties an opportunity to present their views which may provide a basis for challenges to the arbitration. It was suggested that the first sentence should be deleted and replaced with: “The Appointing Authority shall give the parties an opportunity to present their views in any manner it considers appropriate”. The consensus was that this proposed change was desirable as it would maintain the control of the appointing authority in determining the nature and extent of the opportunity to be given to parties to present their views.

## **Section II – Composition of the Arbitral Tribunal**

### **Article 5 – Number of Arbitrators**

39. As was clear in discussions on this article at the forty-sixth session of the Working Group in (New York, 2007) the Working Group was divided on whether the default rule on the number of arbitrators, which is presently three, should be modified (see APRAG Report on the forty-sixth session, ¶26 and ¶27). The now proposed provisions of Article 5 are set out in Secretariat Note WP.151 (¶17). The new draft article, with two options, is helpfully set out, as follows:

#### **Draft Article 5**

##### **Number of arbitrators**

##### **Article 5**

1. *Option 1:* [If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not

agreed that there shall be only one arbitrator, three arbitrators shall be appointed.]

2. *Option 2:* [If the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either the claimant, in its notice of arbitration, or the respondent, within 30 days after receipt of the notice of arbitration, requests that there be three, in which case three arbitrators shall be appointed.]

The Secretariat Note also contains the following remarks on draft Article 5:

17. Article 5 contains alternative proposals on the number of arbitrators, reflecting discussions at the forty-sixth session of the Working Group (A/CN.9/619, paras. 79-82).
40. It was suggested that Option 2, which provides for an arbitral tribunal of one arbitrator as the default position, is preferable as there are many international disputes which cannot be dealt with cost effectively with an arbitral tribunal of three arbitrators. The contrary position was that Option 1, being the default position in favour of an arbitral tribunal of three arbitrators, provides a greater spread of experience and expertise and is more of a guarantee of fairness and impartiality as it allows both parties to appoint one arbitrator, with the two party appointed arbitrators choosing the third arbitrator to act as the presiding arbitrator of the arbitral tribunal (see Article 7, paragraph 1). Additionally, concern was expressed in relation to the 30 day time limit provided in both options, but particularly in Option 2 where the default position would, in the absence of a request within 30 days, be an arbitral tribunal composed of one arbitrator. The comment was also made that Option 2 responds to a problem which has been noticed in relation to the operation of the current rules. Option 2 deals with a situation where the respondent does not respond, which, it was said, is important because many disputes are quite small, and often in those disputes there is no response from the respondent. The effect of the non-

responsive respondent is to burden the complainant in a relatively small dispute with a three arbitrator tribunal. It was also suggested that a means of trying to deal with the situation where there is a non-responsive respondent, which would otherwise leave the claimant with a three arbitrator tribunal for small disputes, would be to provide an option for the appointing authority to appoint one arbitrator only to constitute the arbitral tribunal in these circumstances. It was also said that there are a number of other circumstances in which difficulties may be encountered with appointment of members of the tribunal and the number of members required to constitute the arbitral tribunal. One circumstance, it was said, is where the parties have tried to agree and failed to reach agreement on the number of members that should constitute the arbitral tribunal and the other circumstances is where the claimant has proposed to an arbitrator member of the tribunal that there has been no response from the other side. In latter circumstances the suggestion was reaffirmed that the claimant should then be able to request the appointing authority to, instead, exercise an option to say that the case only merits a sole arbitrator and, consequently, the appointing authority should appoint that sole arbitrator instead of the claimant. The view was also expressed that it did not seem appropriate that the appointing authority should have any role in this respect in the event that the parties actually agreed on a three arbitrator tribunal, even if the appointing authority may think this is not necessary given the nature of the dispute. However, there was support for the view that a rule enabling the appointing authority to determine, upon the request of the claimant, that a case only warranted the appointment of a sole arbitrator would provide a useful corrective mechanism. The Secretariat was asked to prepare a

further draft reflecting this proposal for consideration at the next session in New York 2009.

41. The discussion in relation to Article 5 then turned to the issue of the time limit, under either option, within which either the parties must agree that there is to be only one arbitrator (for the purposes of Option 1) or the respondent requests that there be a tribunal of three arbitrators and not the default position of one arbitrator (for the purposes of Option 2). The time limit of 30 days after receipt of the Notice of Arbitration was thought by some delegations to be too short, particularly if one of the parties is a state which is named as a respondent in an investor-state arbitration. Comments were also made in relation to the need to harmonise the time limits provided for in Article 5 with the notice of arbitration and response provisions contained in Article 3. The comment was made that under the current rules the time limit under Article 5 is 15 days and it was suggested that the Option 2 proposal would complicate procedures for agreement and result in, for example, the parties spending the best part of 30 days discussing the possibility of one arbitrator then, finally, the respondent, just prior to the expiration of the 30 days, opting for a three arbitrator tribunal. In other words, it was suggested that this proposal would promote delay. As a result of this discussion there appeared to be majority support for the option 2 version of Article 5, but the point was made that without a consensus for change the position adopted by the Working Group is that the existing rules should prevail. Nevertheless, it appeared that, on this basis, Option 2 appeared to be the preferred solution but the discussion then

turned to whether the time allowed for a party to raise the requirement of a three arbitrator tribunal should be 15 or 30 days.

42. In relation to the proposed time limits the point was made that it was difficult for the claimant to know whether a single member or three member arbitral tribunal would be appropriate until there is a response from the respondent indicating the nature and extent of any defence or counterclaim; hence the case that the claimant must meet. It may be, it was said, that once all “pleadings” come in the claimant might find a huge counterclaim or complex defence which may lead it to think that it should opt for a three arbitrator tribunal, but by then it will be too late for it to make an election. Hence the point was made again that there needs to be a relationship between the operation of Article 5 and Article 3, as the latter deals with the process of the giving of the notice of arbitration and the response. In particular, an inconsistency was pointed out between the options proposed for Article 5 and Article 3 paragraph (5)(d) as proposed, which requires a response from the respondent within 30 days of the receipt of the notice which includes a proposal as to the number of arbitrators, if the parties have not previously agreed the number. It was suggested that a way of dealing with this inconsistency may be to revise the time limits in the Article 5 options by way of keeping the present 15 day time limit but providing that this runs for 15 days after receipt of the response from the respondent under Article 3 paragraph (5).
43. Discussion continued in relation to the time limits under the proposed Article 5 options, and there was general support for the proposal to maintain the 15

day time period but as a period which would commence to run after receipt of the response from the respondent. It was also agreed that care needs to be taken in the event that the respondent does not respond at all, because then there is a problem that the respondent's response is the only "trigger" of the further time period. As a result of further discussion it was suggested that a means of resolving the conflict between Article 3 and proposed Article 5 provisions was to delete paragraph (5)(d) from Article 3 and then perhaps, the Article 5 time limits could be changed to 60 days. However, if after a response in terms of Article 3(5)(d), the respondent responded with a one arbitrator proposal then the claimant would have 60 days under the Article 5 time limit to deal with the proposal, within the framework of the Article 3 time limits. As an alternative, it was suggested that there may not be any need to add a time limit with respect to any agreement being reached under Article 5 but, rather, leave the process for finding agreement, or not, under the procedure established by Article 3. There was some agreement in relation to this proposal but the point was also made that it may be helpful to allow two time limits to run in parallel under both Article 3 and Article 5 as this maintains the prospect of the default position under Article 5 coming into play. In terms of the Article 3 provisions it was suggested that a reference to Article 3 paragraph (g) should be added in paragraph (5)(c). Such a reference would mean that the respondent's response to the notice of arbitration should include a response to the proposal made by the claimant in relation to the number of arbitrators. Consequentially, reference to the number of arbitrators should be removed from paragraph (5)(d) of Article 3. Discussion continued and there appeared to be general support for this approach and, particularly, the removal

of time limits from Article 5 so that all the Article 5 provisions do apply whatever default rules are established with respect to the number of arbitrators under the UNCITRAL Rules. It was agreed that a fresh draft of proposed Article 5, prepared on the basis of the above discussion, would be considered at the fiftieth session in New York in 2009.

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

### **Article 6**

44. The proposed provisions of Article 6 are set out in Secretariat Note WP.151

(¶18). For convenience, the draft is set out as follows:

#### **Draft Article 6**

##### **Article 6**

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt of all other parties of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority.
2. The appointing authority shall, at the request of a party, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
  - (a) At the request of a party the appointing authority shall communicate to each of the parties an identical list containing at least three names;
  - (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

- (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
- (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

The comments by the Secretariat in relation to this draft are as follows:

- 18. Article 6 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/646, para. 84). Consistent with the recommendation of the Working Group to assess further possible simplification that could be made following the adoption of draft article 4 bis, article 6, paragraphs (1) and (2) of the 1976 version of the Rules have been merged and paragraph (4) deleted as its content is covered by draft article 4 bis, paragraph (6) (A/CN.9/619, para. 69).
- 45. As a result of discussion of the draft it was agreed that the following words should be added after the words “sole arbitrator shall” in the latter part of paragraph (1) of proposed Article 6, “at the request of a party”. It follows from this language that the appointing authority would not act on its own volition but only upon a party request.

### **Article 7**

- 46. The proposed provisions of Article 7 are set out in Secretariat Note WP.151 (¶19). The proposed article is in the following terms:

### **Article 7**

- 1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.
3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 6.

The comments by the Secretariat in relation to this draft are as follows:

19. Article 7 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9.646, para. 85. Article 7, paragraph (2) (b) as contained in the 1976 version of the Rules has been deleted, for the same reason as mentioned under paragraph 18 above.

See also the APRAG Report of the forty-sixth session ¶28 to ¶30.

47. Similar changes were suggested to Article 7 as were suggested to Article 6. There was, however, no agreement or consensus in this respect as the point was made that there was no need to make a similar amendment to paragraph (3) of Article 7 as was made to paragraph (1) of Article 6 because the operation of paragraph (3) of Article 7 relies upon the operation of Article 6.

#### **Article 7 bis**

48. The proposed provisions of Article 7 bis are set out in Secretariat Note WP.151 (¶20). As appears from the comment contained in the Secretariat Note, Article 7 bis was inserted to address multi-party arbitrations and to clarify how arbitrators are to be appointed where there are multiple parties.

The comment in Secretariat Note WP.151 is as follows:

20. Article 7 bis was not contained in the 1976 version of the Rules. The purpose of paragraph (1) is to address multi-party arbitration, and the draft seeks to clarify how arbitrators are to be appointed where there are multiple parties, as claimant or

defendant, and the parties agreed to the appointment of three arbitrators. Paragraph (2) deals with situations where parties have agreed to appoint a number of arbitrators other than one or three, i.e. situations not covered by articles 6 and 7 (A/CN.9/619, para. 83). Paragraph (3) provides a solution in case of failure to constitute the arbitral tribunal in those situations, and includes the suggestions made in the Working Group (A/CN.9/619, paras. 88-91).

49. It was suggested that paragraph (1) of Article 7 bis should make it clear that there may be multi-parties as both claimant *and* respondent. It was suggested the addition of “and/or”. The general view was that there is no ambiguity in the proposed paragraph (1) and that the word “or” as used also includes “and” so that the provisions do accommodate multi-parties as claimant and respondent in the same proceeding.
  
50. A question was raised in relation to the lack of any deadline in Article 7 bis for the appointment of arbitrators. It was said that wherever a party is concerned about delay and desire some action, it can approach the appointing authority. The general view was that there was no difficulty in relation to the lack of a deadline. Further, in response, it was said that the difficulty works out in the course of the life of the arbitration. Deadlines fall on the parties in the same way naturally and, in any event, the ICC Rules upon which this text is based have not caused any problems. Over 30 per cent of all ICC cases involve more than two parties and there do not appear to be any reported problems in practice. In terms of mechanics it was said that multi-parties will be expected to try to meet together and agree the appointment of an arbitrator. However, if they conclude that they cannot reach agreement then they are able, under the

Rules, to approach the appointing authority under proposed paragraph (3) of Article 7 bis.

### **Article 8**

51. It was agreed at the forty-sixth session that Article 8 be deleted considering that it had effectively been substituted by Article 4 bis (see A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶48 and see also APRAG Report on the forty-sixth session, ¶31).

### **Articles 9 to 12 – Challenge to Arbitrators**

#### **Article 9**

52. The proposed provisions of Article 9 and the Model Statements of Independence are set out in Secretariat Note WP.151 (¶22 and ¶23). For convenience, the proposed Article 9, as adopted by the Working Group at its forty-sixth session (see Secretariat Note (¶22 and the APRAG Report of the forty-sixth session ¶32), is as follows:

#### **Article 9**

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

53. The Model Statements of Independence were discussed at the forty-sixth session at which a model statement was considered cast in language which corresponded with the language of the model statement in the IBA Rules on

Ethics for Arbitrators.<sup>10</sup> The form of the proposed model statements considered at this session are set out in the Secretariat Note (¶23) as follows:

**Model statements of independence**

*No circumstances to disclose:* I am independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstance that may subsequently come to my attention during this arbitration.

*Circumstances to disclose:* I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause a party to question my impartiality or independence. [*Include statement*] I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.

54. The discussion in relation to Article 9 concentrated on the form of the Model Statements of Independence although the comment was made that Article 9 does not indicate to whom the statement of independence should be made. It was suggested that it should be made clear that the disclosure of any relevant circumstances should not only be to the parties but also to the co-arbitrators. Discussion with respect to the model statements was particularly directed to the extent to which an arbitrator could declare that he or she was “impartial” and to the extent the declarations should emphasise a declaration of impartiality. Comments were made that impartiality issues arise as a consequence of particular circumstances in an arbitration but that independence is at a different level and this was also suggested (exploring this

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<sup>10</sup> IBA Rules of Ethics for International Arbitrators, in Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XII (1987), pp. 199 – 202, accessed via Kluwer Law International, 12/03/2007 (see APRAG Report on the Forty-sixth Session, ¶33).

distinction) that impartiality is not something that can be declared whereas a statement of independence can be made which, it might be observed, reflects a statement of existing facts rather than inferences or speculation as to circumstances that might arise in an arbitration proceeding and “test” impartiality. In any event, it was observed that the rules must be quite clear as to what an arbitrator must disclose, particularly as disclosure has now become a major issue in international arbitration proceedings and any ambiguity would likely lead to more challenges of arbitrators and awards.

55. In spite of the difficulty in declaring impartiality, a number of delegations suggested that it was useful to add a reference to impartiality, at least combined with the other disclosure requirements contained in the model statements. It was suggested that reference to impartiality in this context was a fairly standard approach in requirements of this sort. Consequently, it was suggested that the second sentence of Article 9 as proposed should accommodate two circumstances: the arbitrator’s view as to his or her impartiality and also the circumstances which give rise to a perception of any lack of impartiality. It was also suggested that the heading of the model statements would accurately be framed as “model statements pursuant to article 9 of the Rules”. There appeared to be consensus for revising the second sentence of proposed Article 9 to require the inclusion a statement by the arbitrator as part of the disclosure process in the model statement in each of the two “circumstances” that “I am impartial and independent of each of the parties and intend to remain so”.

56. It was suggested in discussions that there remain some problems with the first sentence of Article 9 as proposed. In particular, a query was raised in relation to the meaning of “justifiable doubts” as used in the first sentence which, it was suggested, was so ambiguous and difficult to interpret that it was likely to lead to challenges to arbitrators under Article 10. The comment was made that the disclosure may mention matters which might, on one view, raise “justifiable doubts” but in circumstances where these matters are not of a nature which would legitimately raise doubts as to independence. The comment was made that a party cannot challenge an arbitrator unless there are serious reasons for doing so. There appeared to be support for the proposal to take the expression “justifiable doubts” out of the first sentence of Article 9. The further comment was made that if circumstances do arise which give rise to justifiable doubts then a person cannot accept the position as arbitrator. It was also suggested that the model statement where there are circumstances to disclose would, as things presently stand, only require disclosure where the relationships etc (referred to in that model statement) give rise to “justifiable doubts”. It was suggested that the model statement, where there are circumstances to disclose, might require an additional sentence which would have the effect of providing for disclosure of business and other relationships but, at the same time, stating that the arbitrator does not see that they create any difficulty with respect to his or her impartiality or independence. It was suggested that more neutral language might better serve the purpose of the model statements so that where there were circumstances etc the statement would read along the lines of “the parties might like to know of the following matters...which would not influence my role as an arbitrator...”. As a result

of these discussions the following amendment was proposed to the first of the model statements which applies where there are “no circumstances to disclose”: “To the best of my knowledge, there are no business or other relationships which to the best of my knowledge would compromise any impartiality or independence”. The consensus was that there would no longer be any reference to “justifiable doubts”.

57. Subsequently to these discussions alternative model statements for the purposes of Article 9 were presented to the Working Group, in the following form:

**Model statements pursuant to article 9 of the Rules**

*No circumstances to disclose: [alternative wording]*

I am independent of each of the parties and intend to remain so. To the best of my knowledge, there are no **past or present professional, business or other relationships with the parties, or any other circumstances that might cause a party to question my impartiality or independence**. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstance that may subsequently come to my attention during this arbitration.

*Circumstances to disclose: [alternative wording]*

I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause a party to question my impartiality or independence. *[Include statement]* **Nevertheless, I do not regard such circumstances as likely to give rise to justifiable doubts as to my impartiality or independence**. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.

58. The proposed alternative form model statements were discussed but the consensus was that the statements should remain as set out in the Secretariat

Note WP.151 (as set out above) save that in the second statement the only change is the sentence marked in bold in the proposed alternative “circumstances to disclose” statement as set out above and that in both WP.151 statements reference to impartiality or independence is to appear.

### **Article 10**

59. The proposed provisions of Article 10 are set out in Secretariat Note WP.151 (¶24). Article 10 was adopted in substance at the forty-sixth session of the Working Group (see Secretariat Note WP.151 (¶24)). Article 10 as proposed is as follows:

#### **Article 10**

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

60. The provisions of proposed Article 10 were agreed, as above.

### **Article 11**

61. The proposed revisions of Article 11 are set out in Secretariat Note WP.151 (¶25). The matters to which discussion was directed were whether the words “shall be in writing and” within brackets in paragraph (2) of Article 11 should be deleted on the basis that the manner in which information is to be exchanged is already the subject of Article 2 and, further, a question arose with respect to paragraph (3) in relation to entitlement to agree to a challenge

(see Secretariat Note ¶¶26 and ¶¶27). In relation to the latter it is helpful to set out the remarks contained in the Secretariat Note (¶¶27):

27. The Working Group might wish to consider under paragraph (3) whether, when an arbitrator has been challenged by a party, all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator. The same question arises in relation to article 12, paragraph (1) (see below, paragraph 28).

In view of the reference, it is also helpful to set out, here, the remarks on draft Article 12, contained in ¶¶28, as follows:

28. The bracketed texts in paragraph (1) [of Article 12] reflect the question whether all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator (see above, paragraph 27). Paragraph (1) reflects the decision of the Working Group to shorten time limits for challenge (A/CN.9/619, para. 102). Article 12, paragraphs (1)(a) to (c) of the 1976 version of the Rules which referred to the appointing authority are deleted, as that matter is generally dealt with under article 4 bis (A/CN.9/619, para. 69).

As these remarks or comments are difficult to follow without reference to the draft proposed Article 11, it is now set out in full:

### **Article 11**

1. A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to all other parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification [shall be in writing and] shall state the reasons for the challenge.
3. When an arbitrator has been challenged by a party, [all other parties] [the party or parties that appointed the challenged arbitrator] may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in

article 6, 7 or 7 bis shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment.

62. In relation to proposed paragraph (1) of Article 11 it was suggested that the words “became known or should have become known” should replace the words “became known” in the last few words of that paragraph. In response, it was suggested that the point is satisfactorily dealt with in proposed Article 12, paragraph (2) (though, ultimately, it was agreed that this paragraph be deleted (see ¶72, below)). There was, however, some support for the proposed change because a finding that circumstances “should have become known” would trigger the 15 day time period within which a challenge needed to be made. Conversely the point was made that this change would create uncertainty and argument as to whether “a circumstance should have become known”. This discussion concluded on the basis that it was accepted that the issue was satisfactorily dealt with in Article 12.
63. In relation to the proposed variations in the drafted proposed paragraph (3) of Article 11, support was expressed for a variation which would enable the party or parties who appointed the challenged arbitrator to agree to the challenge so that it or they could move on with their case. The critical question in relation to these proposed variations was whether, in relation to party consent, the consent of all parties to the challenge will be required or only if the consent of the party who nominated the arbitrator was needed, as set out in the proposed variations. In favour of acquiring the consent of all parties was a concern expressed at the principle of distinguishing between parties in the rules, which

would, it was said, follow if less than all party consent was required. In this respect, the point was made that every party has an equal stake in the legitimacy of the arbitration process. In response, the comment was made that this problem, as highlighted, would only arise where there is a challenge to the continuation of the arbitration in multi-party cases. Nevertheless, support was expressed for the concern about distinguishing between parties with a strong view expressed in favour of requiring the consent of all parties to a challenge. It was said that when a party appoints an arbitrator it is appointing an arbitrator for all other purposes and so the Working Group should be concerned at any suggestion of any “proprietary” connection between a party and its party appointed arbitrator. Finally, the comment was made that it seemed likely that in most cases any problem would be solved by an application to the arbitral tribunal requesting the voluntary withdrawal of a party. As a result of this discussion there was consensus in favour of the first option and the possible variations to paragraph (3) of Article 11, namely that the consent of “all parties” would be required.

## **Article 12**

64. The proposed provisions of Article 12 as set out in Secretariat Note WP.151 (¶28 and ¶29). For convenience, these paragraphs are set out, as follows:

### **Article 12**

1. If, within 15 days from the date of the notice of challenge, [any other party] [the party or parties that appointed the challenged arbitration] does not agree to the challenge and the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought

within 15 days from the appointment or designation of the appointing authority.

2. The appointing authority may reject the challenge if the challenging party ought reasonably to have known the grounds for challenge at an earlier stage of the procedure.

65. The remarks on draft Article 12 are contained in ¶¶28 and ¶¶29 of the Secretariat Note WP.151. Part of these remarks have already been set out (see ¶¶61, above in the context of the discussion of Article 11) but it is helpful now to set out the remainder of these remarks:

29. Paragraph (2) was not contained in the 1976 version of the Rules. Its purpose is to provide guidance to the appointing authority, with a view to limiting dilatory tactics where a party has abused the challenge procedure repeatedly. Article 12, paragraph (2) of the 1976 version of the Rules on the appointment of a substitute arbitrator if the challenge is sustained has been placed under article 13, which deals with the replacement of an arbitrator (see below, paragraph 32).

66. In relation to the discussion of Article 12 at the forty-sixth session (New York, 2007) reference should also be made to the APRAG Report of this session, ¶¶34 and ¶¶35.

67. In relation to these provisions, the question was raised whether it might be said that two conditions are required in paragraph (1) of Article 12, namely that any party does not agree and *the arbitrator who has been challenged refuses to resign*. This question arose in the course of a discussion of a suggestion that the second set of words in square brackets in paragraph 1 be deleted and the word “and” in the third line be replaced with “or”. A further discussion took place in relation to the position where an arbitrator refused to resign where all parties agreed that a challenge to the arbitrator had been made out. It was

agreed by the Working Group that in these circumstances were the arbitrator to continue as a member of the arbitral tribunal, the tribunal would be improperly constituted and the award would not be enforceable. As a matter of drafting it was suggested that the position might be made clear by amending paragraph (3) of the Article 11 to the effect that if all parties agree the arbitrator is discharged from his or her office and, consequently, there would be no need for the second element in paragraph (1) of Article 12. A contrary view was that the answer to the dilemma with paragraph (1) of Article 12 is to change the “and” to “or” and then these provisions reflect the two possibilities inherent in paragraph (3) of Article 11. Otherwise, it was said, reading paragraph 12(1) as presently drafted on its own a situation may arise where the parties have agreed that the challenge is made out but that the arbitrator will not withdraw and, consequently, it is said that its operation is not “triggered”. Suggestions were also made that for the addition of provisions to paragraph (1) of Article 12 to provide that the party making the challenge may seek a decision on the challenge from the appointing authority.

68. Following consultations and further discussions a number of further points were raised in relation to the operation of paragraph (1) of Article 12 and paragraph (3) of Article 11. The situation raised was where the parties agree under Article 11(3) that an arbitrator must be removed but the arbitrator does not resign. It was suggested that the challenging party must then bring the matter to the appointing authority. Normally at that time only the challenged arbitrator would be removed. A possible course with the rules is to provide expressly that if the parties agree on a challenge to an arbitrator the arbitrator

is, as a result, removed. The problem, however, arises where the arbitral tribunal makes a decision between an agreement between the parties under Article 11(3) that the challenged arbitrator ought be removed and that arbitrator's removal under Article 12(1). Consequently, it was suggested that a clarification should be added in Article 11(3) at the end of the first sentence: "...thereby ending the arbitrator's mandate". This, it was suggested, would make clear the effect of the agreement of the parties to the arbitrator's removal. Consequently, it would then be possible to remove the second half of the sentence in Article 12.1 because the non-withdrawal of a challenged arbitrator would not then arise. In summary, the changes proposed were as follows:

- **Article 11(3)**

Add "...thereby ending the arbitrator's mandate".

- **Article 12(1)**

Delete the words "and the challenged arbitrator does not withdraw".

69. Concern was expressed at the possibility of the rules containing a provision whereby the agreement of the parties would alter – in this revoke – the mandate of an arbitrator. Concern was expressed in relation to the possible effect of the mandatory law in this respect but nobody could identify a provision of a mandatory law which would prevent the removal of an arbitrator by agreement of the parties. The further point was made that if there was a risk in any respect that the effect of Article 11(3) is not to remove the arbitrator, it is necessary for the rules to deal with the situation in the meantime, between the parties' agreement to remove and the actual removal of

the arbitrator. Questions may arise as to the validity of acts of the arbitral tribunal in the meantime; particularly, for example, if the arbitral tribunal were to grant an interim measures order during this period. The further comment was made that if all parties agree that an arbitrator should be removed and, in these circumstances the arbitrator is *functus officio* in terms of his or her mandate, why should there be any difficulty with the rules saying so? This would avoid the need for the parties to approach the appointing authority, which would not need to do anything if the rules made the position clear. The query was also raised as to how any national law would override that situation, also posing the question “who is going to be applying to the Court”?

70. Contrary views were also expressed, particularly, raising concern that the agreement of the parties could affect the arbitrator’s mandate once the arbitrator had been appointed. It was suggested that this was a step to be taken with great care, and the better approach would be to provide for the possibility of an application to the appointing authority to formally terminate the office in some manner which could be confirmatory, declaratory or dispositive.
71. In conclusion, although it had seemed, at one stage, to be clear that the view was that the agreement of the parties under Article 11(3) had the effect of terminating the arbitrator’s mandate, in light of further discussion that position was shown not to be so clear. In any event, no consensus was reached in relation to the changes proposed and, this meant that the provisions of paragraph (3) of Article 11 and paragraph (1) of Article 12 were not changed

further, apart from replacing the word “and” with “or” in the first sentence of paragraph (1) of Article 12.

72. The discussion then turned to the proposed paragraph (2) of Article 12. Views were expressed in discussion that the proposed new paragraph does not serve the purpose outlined in ¶29 of the Secretariat Note (see above) and should be deleted. It was said that challenges can be disruptive any way and this would involve the appointing authority in a significant enquiry if it is required to form a view as to whether a party “ought reasonably to have known the grounds for challenge”. Also, these provisions may force parties to bring premature challenge claims which causes difficulty because parties would be hesitant to allege improper behaviour in a party appointed arbitrator in any event, particularly where one of the parties is a government in an investor-state arbitration. The discussion concluded with no consensus to include any provision in the form proposed in paragraph (2) of Article 12 (either as Article 12(2) or in any similar form in Article 11), though it was agreed that this paragraph should be deleted.

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

73. The provisions of Article 13 are set out in Secretariat Note WP.151 (¶30). For convenience, the proposed Article 13 is set out, as follows:

#### **Article 13**

1. Subject to paragraphs 2 and 3, in the event that it is necessary to replace an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the

process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. In the event that an arbitrator has resigned for invalid reasons or refuses or fails to act, the appointing authority may, if so requested by a party, either replace that arbitrator or authorize the other arbitrators to proceed with the arbitration and make any decision or award.
3. In the event of successful challenge under article 12 or replacement of an arbitrator according to paragraph 2, the appointing authority shall decide whether to apply the procedure for the appointment of an arbitrator provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced or to proceed itself to the appointment of the substitute arbitrator.

74. The Secretariat Note also contains some remarks on the draft Article 13 which assist in appreciation of the discussion which followed. These remarks are as follows:

*Remarks on draft article 13*

30. Paragraph (1) establishes a general rule on the appointment of a substitute arbitrator, “when it is necessary to replace an arbitrator”, regardless of the cause for such replacement. The specific situations of resignation for invalid reasons or successful challenge are dealt with under paragraphs (2) and (3). The last sentence of that paragraph is proposed to be added for the sake of consistency with article 11, paragraph (3).
31. The Working Group might wish to consider whether paragraph (2) reflects the observations made in the Working Group at its forty-sixth session (A/CN.9/619, paras. 107-112).
32. Paragraph (3) was formerly placed under article 12, paragraph (2) of the 1976 version of the Rules (see above, paragraph 29). It is proposed to locate that provision under article 13 as its content relates to the appointment of a replacement arbitrator. It is recalled that the Working Group agreed at its forty-sixth session that that provision should permit the appointing authority directly to appoint an arbitrator if it considered that the circumstances of the arbitration were such that a party should be deprived of its right to appoint a replacement arbitrator (A/CN.9/619, paras. 103 and 105).

See also the APRAG Report of the forty-sixth session ¶36 and ¶37.

75. In the course of discussion it was suggested that in view of the provisions of Article 13 in the last sentence of paragraph (3) of Article 11 is no longer necessary and could be deleted.
76. Discussion then focused on the use of the expression “invalid reasons” in Article 13 with reference to the resignation of an arbitrator. It was said that the purpose of the proposed provisions and the use of this expression was to allow truncated arbitration proceedings, and thereby prevent the resignation of an arbitrator being used to prevent the continuation of an arbitral tribunal for the purpose of publishing an award. A query was also raised as to whether a withdrawal of an arbitrator under Article 11(3) is to be regarded as a “successful challenge” under paragraph (3) of Article 13. In response, the comment was made that a resignation under Article 11(3) is not a successful challenge for the purposes of Article 13(3) and hence there is a disincentive to press matters to a challenge and replacement under Article 13. It was said that voluntary withdrawal by an arbitrator is captured by the provisions of paragraph (1) of Article 13 and that paragraph (3) of Article 13 is directed to the role of the appointing authority in the absence of a voluntary withdrawal. Article 13(3) refers to a successful challenge under Article 12, which can only occur when arbitrator does not withdraw under Article 11(3).
77. Various alternatives were suggested for the expression “invalid reasons” including “unjustified”, “untenable”, “unwarranted” and “improper” with

respect to reasons. The phrase “without sufficient grounds” was also suggested as was “without valid reasons” and also “resign without valid grounds”. Concern was expressed that the failure of an arbitrator to act may be due to “legitimate reasons”, though it was harder to see how a “refusal” to act could be justified. The discussion concluded with a consensus in favour of replacing the phrase “invalid reasons” with the phrase “without valid grounds”.

78. The discussion then turned to whether the tribunal should be able to continue as a truncated tribunal under paragraph (2) of Article 13 in the event of an arbitrator resigning without valid grounds. This was introduced on the basis that the normal approach in under arbitration rules is to replace the “missing” arbitrator apart from in exceptional cases. It was noted that in a commercial context this kind of approach is adopted. It was suggested that the power of the appointing authority should be limited in this respect and that the appointing authority should take into account the views of the parties and other arbitrators in deciding whether the arbitral tribunal should continue truncated. However, concern was expressed that in the absence of any limitation on the power of the appointing authority, the power to allow the arbitral tribunal to continue truncated, or otherwise, could be exercised in a way which was inappropriate. In response, it was noted that for these provisions to operate there must be a serious case of unjustified resignation and that paragraph 4 bis of Article 4 bis deals with information gathering by the appointing authority and requires the parties to be heard. Reference was made to the provisions of Article 12.5 of the ICC Rules which, it was noted,

only allow for a truncated tribunal at a very late stage of the proceedings.

These ICC provisions are as follows:

**Article 12 – Replacement of Arbitrators**

- (5) Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12(1) and 12(2), the Court may decide, when it considers it appropriate, that the remaining arbitrator shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

79. The further comment was made that the concerns raised appear to be difficult to accommodate. The problem in the context of the UNCITRAL Rules is that the identity of the appointing authority is unknown and care needs to be taken to avoid possible problems with the capriciousness of a truncated tribunal at an early stage in the proceedings. It was suggested that the protection under the Rules might be strengthened in two ways:

- (1) replacing “invalid reasons” with “manifestly without justified reasons”;  
and  
(2) adding the words “in exceptional circumstances and in particular having regard to the stage of the proceedings”,

then continue with provision for the truncated tribunal provisions in the latter part of paragraph (2) of Article 13. Further supportive comments were made, particularly that the power to order a truncated tribunal is a significant sanction and that if problems with an arbitral tribunal arose early in the proceedings it will be very unusual to allow a truncated tribunal to proceed. Reference was made to paragraphs 12.2 and 12.3 of the LCIA Rules in this respect. It was noted that the LCIA approach is similar to that of the ICC,

though the ICC Rules specifically limit the possibility of truncated tribunals to subsequent to the closing of the proceedings. Reference was also made to the AAA Rules which allow the remaining two arbitrators to make it a decision as to whether the tribunal should proceed truncated. There was support for this power being given to the tribunal. In any event, the view was expressed that each of the remaining arbitrators should be heard in relation to the question whether to allow the tribunal to proceed truncated. The view was also expressed that one reason for providing for the possibility of truncated tribunals is to “hang a sword of Damocles” over the parties to prevent them raising frivolous and unnecessary challenges and arbitrators resigning to delay or prevent the continuation of arbitral proceedings because of the possibility of the matter proceeding, regardless, with a truncated tribunal.

80. The Working Group then reviewed the position reached in its discussions in relation to Article 13, as follows:
- Reference had been made to the ICC Rules which are systematic in their approach to the possibility of truncated tribunals, confining them, under Article 12.5, to the period subsequent to the close of the proceedings. In this respect the severity of the sanction provided for in proposed paragraph (2) of Article 13 was noted.
  - It was noted that these Rules are designed to cover two situations: the first situation is whether the arbitrator has withdrawn, resigned, been successfully challenged or died; and the second situation is where the arbitrator is simply not acting.

- The second situation, where the arbitrator is not acting, is dealt with in Article 13(2), but at the same time brings together treatment of these two situations, resignation or fails to act etc. It has been noted that an arbitrator may refuse to act for valid reasons or there may, in any event, be no fault. Consequently, there is a need to address the situation without looking at fault. It is noted that this is provided for in an indirect way in Article 13(2) but it is complicated by providing for replacement only if failure or refusal to act was on no valid grounds. It was suggested that it was a mistake to link both situations to fault and that there is a need for another paragraph to allow a replacement when for any other no fault reason the arbitrator does not continue to act. There is also need for a provision when the arbitrator has “gone” – what are the consequences? Article 13(1) states the consequences being that a replacement arbitrator is to be appointed in the same way and using the same procedure as the original appointment. Paragraph (1) is the “base situation”. Then the rules come to the exceptional situation once such case is dealt with in Article 13.3. The appointing authority may proceed as in paragraph (1) to replace the arbitrator or make an appointment itself. This is the first sanction provision provided. The additional sanction provided, in Article 13.2 is the possibility of the tribunal proceeding as a truncated tribunal. In conclusion, it was suggested that the structure and situation need to be dealt with more clearly, spelling out the situations to which the rules are directed and the consequences or sanctions which might follow.

81. Concern was expressed at the possibility of making the text of Article 13, particularly paragraph (3), too intricate, particularly having regard to the generality of the provisions of Article 12.4 of the ICC Rules, which provides as follows:

- (4) When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once constituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated for the reconstituted Arbitral Tribunal.

In any event, it was suggested that a higher threshold should be provided for allowing the tribunal to proceed truncated and that it was undesirable if the rules were seen as treating the “truncated tribunal” sanction and the appointing authority intervening to appoint a replacement arbitrator as being treated on the same basis. Again it was observed that difficulties arise under the UNICTRAL Rules because the identity and experience of any appointing authority is, naturally, unknown. This means that the appointing authority may be very experienced or may, on the other hand, be very inexperienced.

82. As the discussion continued possible general drafting approaches were suggested and considered which culminated in the following suggestion in relation to proposed Article 13(2):

“If, on the application of a party, the appointing authority determines that the need for replacement of an arbitrator was caused by improper conduct in the circumstances that justify a party’s not having the right to appoint the substitute arbitrator, then the appointing authority may, after giving an opportunity to the parties, the arbitrators, and the arbitrator being replaced to express their views:

- (a) proceed itself to make the appointment of the substitute arbitrator; or

- (b) if the same occurs at the late stage of the proceedings authorise the other arbitrators to proceed with the arbitration and make any decision or award.

Concern was raised in relation to the concept of “improper conduct” or similar, and it was suggested that there is no need to apply this concept in relation to a party. It was suggested that the drafting should return to phrases such as “circumstances which deprive a party of a right to appoint”. Further, it was said that the “adjectives” with respect to the two dot points of the proposed draft Article 13.2 should be different for reasons expressed previously, particularly that the possibility of the arbitration proceeding with a truncated tribunal is a significant sanction. Further comments were made that the proposed text does not indicate when any “improper conduct” is relevant and, further, was queried why where an arbitrator no longer performs his or her mission and is no longer an arbitrator the appointing authority would want to consult with that arbitrator. In response to the latter point it was said that the point of hearing the “offending” arbitrator is a precaution where his or her conduct may be the basis of a sanction. He or she may have a reasonable explanation for what did occur – and so should be heard.

83. Additional points were raised in relation to the proposed redrafted Article 13.2. In particular, questions were raised as to what is meant by “late stage in the proceedings”. It was suggested that this phraseology needs to be more precise and might, for example, follow Article 12.5 of the ICC Rules and equate “late stage” with “subsequent to the closing of the proceedings”. The comment was also made that paragraph (2) as proposed is an exception to the general rule with respect to replacement of arbitrators as the replacement

procedure occurs without the involvement of a party. On this basis it was suggested that the proposed paragraph (2) should be placed in square brackets for the purpose of further thought and deliberation at the fiftieth session in New York. Also, it was suggested that the expression “improper conduct” should be considered further so that some phraseology is used which indicates something of the nature of the “abuse” that has been targeted by proposed paragraph (2) of Article 13. Reference was made to the possible use of the expression “exceptional circumstances” but, in any event, the consensus was that the provision should be considered further in New York. Nevertheless, there did appear to be consensus that the expression “late stage” with respect to the progress of the proceedings should be replaced with the words “closure of proceedings” to aid precision. Finally, comments were made expressing concern about the extent of authority proposed to be conferred on the appointing authority noting that the proposal would give the appointing authority very broad powers indeed; secondly, it was suggested that the notion of parties not having a right or being deprived of a right to be involved in the process may cause some concern but it should be remembered that the notion of party rights, itself, depends upon the provisions; and, thirdly, it was suggested that the expression “a substantially advanced stage of the proceedings” might meet the concern in relation to the use, merely, of the word “late”.

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

84. The proposed Article 14 as set out in the Secretariat Note WP.151 was agreed, noting that this proposed Article 14 had been adopted in substance by the Working Group at its Forty-sixth Session in New York in 2007.

### **Section III - Arbitral Proceedings**

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

85. The proposed provisions of Article 15 are set out in Secretariat Note WP.151 ¶34. For convenience, this draft is set out as follows:

#### **Article 15**

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
- 1 bis. The arbitral tribunal may, at any time, extend or abridge: (a) any period of time prescribed under the Rules; or (b) after inviting the parties to express their views, any period of time agreed by the parties.
2. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
3. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties.
- [4. The arbitral tribunal may, on the application of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement and has consented to be joined. The arbitral tribunal may make an award in respect of all parties so involved in the arbitration.]

86. The Secretariat Note contains a number of remarks on draft Article 15 (see WP.151 ¶¶34 to ¶36). These remarks indicate that proposed paragraph (1) was adopted in substance by the Working Group at the forty-sixth session in New York in 2007, as were paragraphs (2) and (3). The comment is made that the word “communication” as used in proposed paragraph (3) is proposed to replace the words “documents and information supplied”, for the sake of consistency in terminology (see WP.151 ¶36). In relation to paragraph (1 bis) the following comments were made in the Secretariat Note:

35. Paragraph (1 bis) was not included in the 1976 version of the Rules. It reflects the decision of the Working Group that the Rules should establish the authority of the arbitral tribunal to modify the periods of time prescribed in the Rules but not to alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties (A/CN.9/619, para. 136).

87. The Secretariat Note contains detailed discussion in relation to proposed new paragraph (4), provisions which would allow joinder of one or more third persons to the arbitration. The Secretariat Note indicates that the Working Group was of the view that a provision on joinder would constitute a major modification to the rules and that various divergent views were expressed (see WP.151 ¶37). In relation to this and other provisions of proposed Article 15, see the APRAG Report of the forty-sixth session ¶38 to ¶44.

88. There was consensus in relation to proposed paragraphs (1) and (2). Proposed paragraph (3) of Article 15 was agreed with some minor amendments. It was agreed to delete “at the same time” in order to overcome problems in relation to interim measures (which would otherwise be created as a result of requiring

simultaneous communication) and in order to overcome any similar practical problems it was agreed to add the prefatory words “unless otherwise authorized by the arbitral tribunal or required by the Rules ”.

89. There was further discussion in relation to proposed paragraph (1 bis) in Article 15. The consensus was that there was a problem with proposed paragraph (b) as it was thought that the present drafting raised the question whether if the parties had agreed to a period of time in their arbitration agreement could these be extended? In this respect it was said that a distinction needed to be drawn between time limits fixed under the UNCITRAL Rules and time limits fixed by agreement of the parties. However, it was said that in both cases the parties should be entitled to be heard and to comment in relation to any proposals to extend time. There was consensus that on any decision a tribunal makes with respect to time limits, under the Rules or otherwise, the parties should be given an opportunity to be heard. There was some discussion as to whether it would be desirable to qualify or limit the operation of paragraph (b) to “exceptional circumstances”. In any event, consensus was reached, following further discussion, that if paragraph (b) of paragraph (1 bis) is required as the parties would be given an opportunity to be heard it was not necessary to further qualify this position by limiting its operation to “exceptional circumstances” or “on justified grounds”.
90. There was, as was to be expected, very significant and lengthy discussion in relation to the proposed joinder provisions in paragraph (4) of Article 15.

91. Reference is made in the Secretariat Note and was made in discussions to the provisions of Article 22.1(h) of the LCIA Arbitration Rules. It is helpful to set these provisions out in full:

***Article 23 – Additional Powers of the Arbitral Tribunal***

22.1 Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

...

- (h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.

92. As indicated a number of times in discussions the proposed paragraph (4) of Article 15 is not such an extensive joinder proposal because, unlike the position under the LCIA Rules, the “third party” must be a “party to the arbitration agreement” and also must have consented to be joined. So, in a real sense, the “third party” contemplated by the proposed UNCITRAL Rule is not a “stranger” as may be the case under the LCIA Rules. Consequently, questions were raised in relation to proposed paragraph 15(4) as in relation to the need to require the consent of the “third party” to joinder; as he, she or it must already be a party to the arbitration agreement and, it follows, that the arbitration agreement must have made reference to the UNCITRAL Rules, hence the joinder provisions of a rule such as Article 15.4 would have been known to the parties when they entered into their agreement.

93. Reference was made to some of the issues and drafting questions arising in relation to the proposed paragraph 15(4). The first issue referred to was whether a party who has already agreed to an arbitration could be joined to an existing arbitration whether or not that party consents. It was noted that the requirement of the “third party” consent does, in effect, give that third party a power of veto in relation to possible joinder. The question was also raised whether the arbitral tribunal should have discretion as to joinder or otherwise having considered whether or not any prejudice would be caused by joinder at whatever stage that might be proposed. Issues may arise in relation to amendment of the claims. It was suggested that the words “and has consented to be joined” might be replaced with words such as “unless the arbitral tribunal finds, after giving all parties including the party to be joined, ...”[then with reference to some prejudice assessment by the arbitral tribunal]. Alternatively it was suggested that possible amendments to the claim etc might be accommodated by adding “Subject to Article 20...” at the start of proposed paragraph (4) and then make the position clear that the joinder may result in an amendment pursuant to the provisions of Article 20. In any event, it was suggested that it should be made clear that any application for joinder should require an enquiry as to possible prejudice to the existing parties.
94. Comments were also made as to the need to be sure as to the meaning of joinder. It was noted that there are five different procedural instruments with respect to joinder in civil law systems. Consequently, the query was raised as to how far joinder under proposed paragraph 15(4) overlaps with the provisions of Article 20. It was suggested that a broadly formulated paragraph

15(4) could be adopted with provision for adequate procedural protection requiring joinder to be refused where undue prejudice would be caused.

95. Concern was raised in relation to the proposal to delete the requirement of consent of the party to be joined on the basis that he, she or it was not involved in the process of constituting the tribunal. It was suggested that the absence of joined party consent may lead to challenges on the basis of invalidly constituted tribunals etc, a position which would not be possible if consent were required. Further in relation to this issue it was said that a requirement, or otherwise, of consent of the third party to be joined involves a weighing of important considerations. It was suggested that in allowing this prejudice, that is the absence of consent, is to avoid prejudice to the original parties. It was said that it is important to observe that in the proposed paragraph 15(4) the party to be adjoined has already signed the arbitration agreement. If all three parties have signed the arbitration agreement then very significant potential prejudice to the other parties may be caused if the “third party” cannot be joined without its consent – even though it had signed an agreement where the very arbitration proceedings in which the other parties seek to join that third party were a possibility. Examples were given of consortium agreements. In an arbitration arising out of these agreements it may be that the claimant and the respondents say that all three parties should be involved in the arbitration. Clearly there is a potential danger and prejudice for a respondent to have to institute another separate arbitration against the “third party” to the arbitration agreement with the possibility of an inconsistent result.. In these circumstances the third party should not be heard to complain about not being

involved in the constitution of the tribunal – he, she or it should contemplated the possibility at the time it entered into agreement which provided for the arbitration of disputes.

96. As indicated with reference to the long discussion of the provisions of Article 15, there was a view that the joinder provisions proposed were a major modification of the rules. More precisely, concern was expressed at the potential prejudice to a subsequently joined “third party” who had not been able to take part in the constituting of the arbitral tribunal and, perhaps, the cross-examination of witnesses, noting also that there may be prejudice to other parties involved as a result of the delay in joinder. Support was also expressed for a provision being included in paragraph (4) of Article 15 expressly requiring the arbitral tribunal to hear the views of the parties and assess any prejudice which may occur as a result of joinder. An alternative approach to the consent and prejudice issue was a suggestion that once the arbitral tribunal had been constituted general consideration of prejudice safeguards by the arbitral tribunal would not be sufficient to protect the third party sought to be joined and, consequently, the consent of that party should be required. There was some support for this view but also a response that the original respondent may not realise that the presence of the “third party” in the proceedings is required until the tribunal is constituted and the answers to the claim for arbitration come in. It was suggested, further, that although the requirement of consent of the party to be joined is not to defeat the entire purpose of the proposal the suggestion is not practical having regard to the

difficulty that the respondent may have in determining whether the presence of the third party is required.

97. Further discussion then took place of the question whether if the consent requirement was removed what safeguards should be provided to ensure that potential prejudice is identified on an application for joinder. There was a suggestion that a requirement be included in paragraph 15(4) that the arbitral tribunal consult with all parties including the party proposed to be joined. Taking this procedure a step further the following suggestion was made for additional provisions, along these lines, in paragraph 15(4), as follows:

In the third line of paragraph 15(4) after “arbitration agreement”, strike out six words to the period and insert:

“.., unless the Tribunal finds, after giving all parties including the party to be joined an opportunity to be heard, that joinder should not be permitted because of prejudice to any of these parties.”

Further, the definition could say “should not be permitted in the circumstances (including because of prejudice)”.

In the course of the discussion of this proposed addition it was also suggested that an addition should be made to accommodate any problems with the applicable law. The addition proposed was to the effect that joinder should not be permitted if it would be inconsistent with the applicable law or relevant law. More specifically it was suggested that the principle at issue is that of a party’s right to participate in the selection of the arbitral tribunal.

Consequently, it was suggested that among the conditions for inclusion in the proposed draft should be a requirement that the tribunal consider whether circumstances justify joinder where the joinder party has not participated in

the selection of the tribunal. In response, the original proponent of the additional provisions in paragraph 15(4) indicated a need to retain a broad reference to prejudice on the basis that there may all kinds of prejudice which arise in particular circumstances and the rules needs to be flexible to deal with any sort of prejudice which may arise.

98. The consensus reached was that proposed paragraph (4) of Article 15 needed to be recast and would be acceptable as a provision which takes account of the concerns raised but, which avoids highlighting specific instances of prejudice on the basis that this specificity may create more problems and unexpected constraints than a general provision.

#### **Article 16 – Place of arbitration**

99. The proposed provisions of Article 16 are set out in Secretariat Note WP.151 ¶38). For convenience, these provisions are set out, as follows:

##### **Article 16**

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. The award shall be deemed to be made at the place of arbitration.
2. Notwithstanding the provisions of paragraph 1, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any location it considers appropriate for consultations, hearings, meetings and deliberations.

The Secretariat Note contains the following remarks on draft Article 16 (at ¶38):

*Remarks on draft article 18*

38. It was suggested in the Working Group that it might be necessary to distinguish between the legal and physical places of arbitration, and that modification of the terminology used would promote clarity (A/CN.9/619, para. 138). The proposed draft seeks to distinguish between the place of arbitration (meaning the legal seat) and the location where meetings could be held, in terms similar to those adopted under article 20 of the UNCITRAL Model Law on International Commercial Arbitration.

See also the APRAG Report of the forty-sixth session at which these provisions were considered at ¶45 and ¶46.

100. Article 16 was agreed subject to a modification to the opening words of paragraph (2). It was agreed that this paragraph should now read “irrespective of the determination of the place of arbitration, the arbitral tribunal may...”. The Working Group did not find it necessary to explore further the distinction between the legal and physical places of arbitration and the consequent terminology.

#### **Article 17 - Language**

101. The proposed provisions of Article 17 are set out in Secretariat Note WP.151 (¶39). It is noted in the Secretariat Note remarks on Article 17 (at ¶39) that the completion of the plural “languages” at the forty-sixth session might give rise to the interpretation that the arbitrators could only allow one language to be used in the arbitration proceeding (and see the APRAG Report on the forty-sixth session, ¶47). In order to make it clear that the arbitral tribunal should be able to allow the use of several languages in arbitration proceedings, particularly where in some cases it would be perfectly possible for proceedings

in two languages to be understood by all parties, the plural “languages” should be inserted.

***Conclusion***

102. It is hoped that this brief summary of the discussions of the Working Group at its last session in Vienna 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. Copies of APRAG Reports of previous sessions of the Working Group are available at [www.aprag.org](http://www.aprag.org).
103. Please do not hesitate to make contact if you have any comments or queries (ccroft@vicbar.com.au; christopher.kee@unibas.ch; or wio@deakin.edu.au).

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**10 October 2008**

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