

ASIA PACIFIC REGIONAL ARBITRATION GROUP

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

Vienna, 11-15 September 2006

Background

1. The United Nations Commission on International Trade Law (UNCITRAL) at its Thirty-ninth Session (New York, 19 June-7 July 2006) adopted the recommendations of the Working Group in relation to the form of arbitration agreement and interim measures of protection.¹ The recommendation of the Working Group on the interpretation of Article II, paragraph (2) and Article VII, paragraph (1), of the New York Convention was also adopted by the Commission.²

2. The Commission also discussed the future work.³ In particular, the Report of the Commission notes:⁴
 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,

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

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

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

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

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

184. It was agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as 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.

3. On the basis of this mandate from the Commission the Working Group, at its last session (Vienna, September 2006), commenced the work of revising the UNCITRAL Arbitration Rules. The Working Group was assisted in this work by two sets of extensive notes prepared by the UNCITRAL Secretariat⁵, both of which are entitled *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by Secretariat)* (referred to as the Secretariat Note). The Working Group was substantially assisted in its work by a Report prepared by Mr Jan Paulsson and Dr Georgios Petrochilos, which is entitled *Revision of the*

⁵ A/CN.9/WG.II/WP.143 (20 July 2006) and A/CN.9/WG.II/WP.143/add.1 (20 July 2006); both of which are available at www.uncitral.org

*UNCITRAL Arbitration Rules*⁶. This Report is, for convenience, referred to as the Paulsson and Petrochilos Report. There are extensive references to this Report in the Secretariat Note.

Revision of the UNCITRAL Arbitration Rules

4. The approach adopted by the Working Group to the revision of the UNCITRAL Arbitration Rules was to use the week-long session in Vienna, in September 2006, to discuss, on a preliminary basis, all the UNCITRAL Arbitration Rules for the purpose of identifying areas where revisions might usefully be made. 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".⁷ More specifically, in relation to methodology, the Draft Report of the Working Group noted the position as follows:⁸

4. Broad support was expressed for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. The Working Group took note that the Rules had been easily adapted to be used in a wide variety of circumstances covering a broad range of disputes

⁶ 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).

⁷ *Draft Report of the Working Group on Arbitration and Conciliation on the work of its Forty-fifth Session (11 September 2006) (A/CN.9/WG.II/XLV/CRP.1/Add.1)*, ¶3, pp1-2.

⁸ *Id.*, ¶4 to ¶6, p2.

and that this quality should be retained. The Working Group further noted that the Rules could apply in the future to other situations or types of disputes that had not yet been identified. The view was expressed that, since practice in various areas, including in investor-State dispute settlement, was still developing, it would be undesirable to seek to design specific provisions at this stage. It was also stated that inclusion of specific provisions could undermine the existing flexibility of the Rules and limit the discretion of users to adapt the Rules as they saw fit.

5. After discussion, the Working Group agreed that the structure and spirit of the UNCITRAL Arbitration Rules should be maintained. Given that some of the discussion would potentially develop useful conclusions relating to specific situations, such as investor-State disputes or institutional arbitration, it was agreed that any such conclusions should be reflected in the *travaux préparatoires* whether or not those conclusions were ultimately reflected in the Rules or in any material that might accompany the Rules.
 6. With respect to the working method to be followed at the current session, it was suggested that the Working Group should identify areas where a revision of the UNCITRAL Arbitration rules might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for subsequent sessions the first tentative draft of the revised UNCITRAL Arbitration Rules. The Working Group agreed, on the basis of documents A/CN.9/WG.11/WP.143 and Add.1, to define the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.
5. As indicated above, further, more detailed, information in relation to the provisions of the UNCITRAL Arbitration rules and issues arising with respect to their revision are contained in the Secretariat Note (see ¶3 above).
 6. Having settled the methodology for the work of revision of the UNCITRAL Arbitration Rules the Working Group turned to consider the rules themselves.

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

Section 1. Introductory rules

Article 1 – Scope of application

7. Issues were raised in relation to transition arrangements for the application of revised rules (see Secretariat Note ¶¶8 to ¶¶11). The broad alternatives are that the rules as they existed at the time the contract containing the arbitration clause was made should apply or that, as is the case with many institutional arbitration rules, the rules as they exist at the time of the notice of arbitration should apply. A comment was made that, in relation to the latter alternative, it may be desirable to include an “opt out” provision which enables one or all of the parties to opt for the rules applicable at the date the contract was made, rather than any rules since revised. It was noted that some institutional experience is that parties tended to want the most current and up to date set of arbitration rules available, even if they had been revised since the making of the contract containing the arbitration clause. Rarely, it seems, do parties insist on the application of “old” rules.

8. Consideration was also given as to whether the writing requirement should apply in respect of the revised rules (see Secretariat Note ¶¶12 to ¶¶23). Comments were made that regardless of what the revised rules might say if the substantive law applicable to the arbitration agreement requires writing then the substantive law provisions will prevail over the rules. The comment was also made that the

removal of the writing requirements for arbitration agreements under the Model Law amendments does not mean that the writing requirements should be removed from the rules. The view was expressed that there was no need for a writing requirement in the rules themselves as any requirement of this nature was, rather, a matter for the substantive law and that, in this respect, nothing should be done which might affect the enforceability of arbitral awards in terms of the writing requirements of the New York Convention.

9. Consideration was also given as to whether the ambit of the rules should be widened beyond the present provisions of Article 1, paragraph (1) which refers to disputes “in relation to ...[a] contract ...” (see Secretariat Note ¶24). It was noted that Article 7 of the Model Law permits arbitration of disputes “in respect of a defined legal relationship, whether contractual or not”. There was support for the view that the contractual limitation should be removed. The extent to which the provisions might be broadened was discussed. A possibility is to remove any limitations with respect to the nature of the dispute the subject of arbitration or to have some more general limitation, perhaps in terms of a “defined legal relationship”. It was also noted that the “Model Arbitration Clause” which is provided in the UNCITRAL Arbitration Rules as a footnote to Article 1 deals only with “any dispute, controversy or claim arising out of or relating to this *contract...*” (emphasis added). This, naturally, follows from the present provisions with their “contractual limitation”. It was suggested that this footnote should be deleted or further “models” provided for other types of legal

relationship, depending upon the extent of any limitation in Article 1 in the revised rules.

Article 2 – Notice, calculation of periods of time

10. Views were expressed in support of the position that Article 2, paragraph (1) should be amended to reflect the current practice with respect to electronic communications (and see Secretariat Note ¶¶27 to ¶29).

11. In relation to the question whether the rule should be revised to provide the Arbitral Tribunal with express power to extend or shorten time periods stipulated under the rules comments were made in support of the view that the Tribunal should be so empowered (and see Secretariat Note ¶¶30 and ¶31). Comments were also made that any revision to this effect should be linked to the general powers of the Arbitral Tribunal in relation to the conduct of the arbitration, particularly under Article 15. In contrast it was said that the operation of Article 2 paragraph (2) is limited to the calculation of time periods and that no amendment is necessary to these provisions even if it were desired to empower the Arbitral Tribunal to vary time limits otherwise imposed by the rules. In relation to the possibility of empowering the Arbitral Tribunal to vary time limits a further comment was made that the present rules do not confer any general power on the Arbitral Tribunal to abridge or alter time limits under the rules because some provisions of the rules allow for variation and others do not. Consequently, the

view was expressed that provisions to allow the Arbitral Tribunal to alter time limits should be looked at on a rule by rule basis.

Article 3 – Notice of arbitration

12. The question was raised as to whether it might be desirable to separate the Notice of Arbitration from the Statement of Claim (see Secretariat Note ¶33 and ¶34). It was observed that any requirement that a comprehensive Statement of Claim be given with the Notice of Arbitration may cause difficulty where circumstances require the commencement of arbitral proceedings with minimal delay. However, the comment was also made that a Notice of Arbitration containing only material necessary to satisfy the requirements of Article 3, paragraphs (3) and (4) may not enable the respondent to understand the claim being made against it (and see Secretariat Note ¶36 to ¶39). Consequently it was thought that the real issue may be the requirements in the rules in relation to the content of the Notice rather than whether a separate Statement of Claim should be required. In this vein, it was thought that an expansion of the requirements of Article 3 paragraphs (3) and (4) to provide sufficient information to enable the respondent to understand the claim being made against it would save time and money. A contrary view was that there may be an urgent need to trigger an arbitration in a particular dispute and that this may be inhibited unless the requirements as to the content of the Notice of Arbitration were left general. Consequently, it was suggested that Article 3 paragraphs (3) and (4) should be left unchanged, save that paragraph (4)(c), which provides that the Notice of Arbitration may also include the Statement of Claim

referred to in Article 18, should be deleted. A further observation was made that it may assist arbitral proceedings, in terms of time and cost, if it were possible for the respondent to provide a brief response to the matters raised by the claimant in the Notice of Arbitration (and see Secretariat Note ¶40 and ¶41). The further observation was made that this would also assist arbitral institutions which presently find difficulty in some cases in not knowing the position of the respondent in response to the Notice of Arbitration.

13. Also discussed was the issue of the effect of an incomplete Notice of Arbitration due to a failure to provide all the information required under Article 3, paragraphs (3) and (4). It was suggested that the revised rules might empower the Arbitral Tribunal to request the provision of the omitted information but that, in any event, the Notice would still have the effect of triggering the commencement of the arbitration. There was general agreement that the rules should make clear which event triggers the commencement of the arbitral proceedings, even if it be an incomplete notice under Article 3. It was also observed that, perhaps, the rules should indicate which matters or information is essential to a valid, though incomplete, notice under Article 3. Reference was made to Article 4 paragraph (4) of the *Rules of Arbitration of the International Chamber of Commerce* (“ICC Rules”) which was said to enable the ICC Secretariat to require and fix a time for compliance with the requirement for the provision of information by way of pleadings and other communications etc in accordance with Article 3 paragraph (1) of the ICC Rules; though the further comment was made that Article 4

paragraph (4) only applies to the provision of copy documents and payments as required under those rules. Further support was expressed for the view that the rules themselves should indicate the essential requirements for a valid notice in order to avoid the possibility of different arbitral tribunals interpreting the mandatory requirements of the rules differently.

Article 4 – Representation and assistance

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Section II. Composition of the arbitral tribunal

Article 5 – Number of arbitrators

14. It was noted that no express provision may be needed in favour of utilisation of a single arbitrator, rather than a tribunal of three, because the *travaux préparatoires* in relation to Article 5 as it now stands indicates that the parties have the right to agree subsequently to the Arbitration Agreement that there shall be a single arbitrator (see Secretariat Note ¶42). Nevertheless, the comment was made that the general position now appears to be that the default provision in most rules is in favour of a single arbitrator though, some institutional rules do enable the appointment of a tribunal of three by the arbitral institution if that is thought appropriate in the particular circumstances. There was also discussion as to the possibility of providing for an “appointing authority” which might, in ad hoc arbitrations, assume the role now undertaken in institutional arbitrations by the arbitral institution in relation to deciding whether a tribunal of three or a single arbitrator was appropriate. Concern was expressed in relation to the potential for cost and delay inherent in introducing an arrangement of this kind and it was

suggested, as an alternative, that UNCITRAL might provide guidelines to assist parties in providing for a tribunal of appropriate composition, commensurate with the magnitude and complexity of the matters in dispute. The comment was also made that it should not be overlooked that some parties regard the right to appoint one member of the arbitral tribunal as being very important. Finally, it was suggested that an option may be to empower the arbitral tribunal to make an adverse award of costs where it is of the opinion that one party has unreasonably required a tribunal of three where a tribunal of one would, in the arbitral tribunal's opinion, have been appropriate.

Articles 6 – 8 Appointment of arbitrators

15. The provisions of Articles 6 to 8 deal with appointment of arbitrators but do not make provision for the appointment of arbitrators in multi-party cases (see Secretariat Note ¶¶45 to ¶47). The comment was made that 30% to 40% of cases are, in the experience of some arbitral institutions, multi-party disputes but that institutional rules generally provide for default appointments by the arbitral institutions or appointing authority where agreement cannot be reached by the multiple parties (see also pages 47 to 49, ¶¶83 to ¶88 of the Paulsson and Petrochilos Report).

Articles 9 – 12 Challenge of arbitrators

16. Three principal issues were raised in the Secretariat Note with respect to challenges to arbitrators. The first was whether consideration should be given to

providing for a general and continuing duty of disclosure (see Secretariat Note ¶48); the second was whether time limits should be provided during which any challenge must be made and a decision sought from any appointing authority (see ¶49 and ¶50); and the third, whether conditions should be provided for the resignation of an arbitrator, such as the approval of other members of the arbitral tribunal, in multi-member arbitral tribunals (see ¶51 to ¶53).

17. In relation to arbitrator resignations, concern was expressed in relation to the possibility of “tactical resignations”. The comment was also made that any provisions contemplated to deal with these types of problems should also be linked with any provisions for “truncated tribunals”. Apart from the possibility of the arbitration proceeding with a truncated tribunal the comment was made that the critical question is who would be the appointing authority at the relevant time to deal with the consequences of a resignation where the arbitration is ad hoc rather than institutional. It was observed that institutional arbitration rules would almost invariably provide for appointment by a replacement arbitrator (or arbitrators) by the arbitral institution. In this respect it was also noted that under the ICSD Rules the continuing members of the arbitral tribunal are able to decide whether the original arbitrator appointment mechanism should be applied. Consequently it was thought that it might be useful to consider whether a provision along these lines might be incorporated in the revised UNCITRAL rules in the absence of an appointing authority; which may not exist or may not have been selected at the relevant time.

Article 13 – Replacement of an arbitrator

18. In relation to truncated tribunals, it was suggested that the appointing authority should be able to decide that the remaining arbitrators may continue as a truncated tribunal; with the further suggestion that the parties should be given an opportunity to make submissions or comment on whether the tribunal should proceed as a truncated tribunal. There was also discussion as to the desirability, or otherwise, of rules which either prevent the resignation of a member of an arbitral tribunal or allow the other members of the arbitral tribunal or an arbitration institution to refuse to allow the resignation. One view was that forcing a resigning member of the arbitral tribunal to continue may have adverse consequences in terms of the behaviour of that tribunal member in relation to, for example, the other members of the arbitral tribunal and in terms of communications with the parties to the dispute. In any event the difficulty in enforcing any obligation on a tribunal member to continue was noted (see Secretariat Note ¶52; and see, generally, Secretariat Note ¶51 to ¶57).

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

19. It was suggested that these provisions should apply to all arbitrators and that whether prior hearings are to be repeated is a matter for the discretion of the arbitral tribunal; but subject to a requirement to consult with the parties on this question. See Secretariat Note ¶58 to ¶61.

Section III. Arbitral proceedings

Article 15 – General provisions

20. There was general agreement that the provisions of Article 15, paragraph (1) should spell out the general principle that arbitral proceedings should be dealt with without unnecessary delay (see Secretariat Note ¶62). It was also suggested that the qualification “at an appropriate stage of the proceedings” should be inserted at the conclusion of the present text so that there is not some basis for inappropriate intervention by a party during the proceedings. An alternative view was that Article 15, paragraph (1) could be removed entirely and reliance placed on Article 18 of the Model Law which provides for equal treatment of parties:

“The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

In any event, it was suggested that the inclusion on an express provision requiring the arbitral tribunal to deal with matters expeditiously provides it with some extra leverage to assist it in resisting delaying applications by parties.

21. The Secretariat Note suggested that the working party might look at whether the rules for consolidation might provide for an efficient resolution of disputes between parties where separate arbitrations have been initiated in related matters (see the Secretariat Note ¶66 to ¶68). The position under the present rule is that specific agreement of all parties is required before consolidation is possible (see the Paulsson and Petrochilos Report p68, ¶127). The view was expressed that, subject to careful thought and drafting, consideration should be given to providing

- a power in the arbitral tribunal to order consolidation in appropriate cases (see the Paulsson and Petrochilos Report pp69-79, ¶130 and ¶131); with reference to the wording of NAFTA, Article 1126(2) as the basis for a proposed new Article 15 paragraph (4) of the UNCITRAL Rules.
22. The possibility of third party intervention in arbitral proceedings (which was raised in the Secretariat Note at ¶69 to ¶71) was considered. Reference was made to issues of confidentiality in relation to third parties and the arbitral proceedings themselves.
23. The Secretariat Note drew attention to the provisions of Article 25, paragraph (4) and Article 32 paragraph (5) of the rules which deal with the confidentiality of hearings and awards noting that they do not contain rules regarding the confidentiality of the proceedings or any documents provided to the arbitral tribunal (see Secretariat Note ¶72 to ¶74). A variety of views were expressed in relation to the desirability, or otherwise, of extending the provisions of the rules to require confidentiality in relation to arbitral proceedings and documents provided to the arbitral tribunal. The distinction between privacy and confidentiality was also made. In relation to the question of confidentiality the point was also made that the UNCITRAL Rules operate in many different contexts and circumstances (see ¶4, above). Consequently, it was suggested that a universal rule may not be possible or desirable. An example of circumstance in which “transparency” rather

than confidentiality or privacy may be required are arbitrations in investor-State disputes.

Article 16 – Place of arbitration

24. It was suggested that the rules may require clarification to indicate “the legal nature of the place of arbitration” (see Secretariat Note ¶¶75 and ¶¶76). It was suggested that, by way of clarification, that the expression “place of arbitration” should be replaced by an expression such as “juridical seat” which would indicate that the reference to “place of arbitration” is an expression carrying legal significance and not merely something by way of a general description. It was also noted, however, that the expression “place of arbitration” is used in Article 20 of the Model Law. It was suggested that the term as used in the Model Law should be maintained in the UNCITRAL Rules. It was also suggested that a means of clarifying the position may be for UNCITRAL to assist by providing an interpretation of the expression “place of arbitration” for the purposes of the Model Law and the rules. It was also noted that provisions such as Article 5 paragraph (1)(d)(a) of the New York Convention also refer to “place”. Consequently, it was thought that a change in the expression “place of arbitration” in the rules may introduce new terminology at odds with a significant number of important texts, including the Model Law and the New York Convention. A further comment was made that it would assist if the word “place” was used consistently in Article 16.

Article 17 – Language

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Article 18 – Statement of claim

26. Generally the issues raised in respect of Article 18 had previously been discussed in relation to Article 3 – Notice of Arbitration (see ¶12 and ¶13, above; and see Secretariat Note ¶4 to ¶7 (Add.1)). Nevertheless, some further comments were made suggesting that the provisions of Article 18 should remain unchanged. It was also suggested that they might be expanded to provide for the addition of something in the nature of legal argument which would further clarify the claimant’s position.

Article 19 – Statement of defence

27. The particular matter of concern in relation to Article 19 arose in relation to the apparent limitation on the possibility of the raising of any defence of set-off to circumstances arising out of the “same contract”, as a result of the provisions of Article 19, paragraphs (3) and (4) (and see Secretariat Note ¶8 to ¶10 (Add.1)). It was suggested that this limitation should be removed in favour of allowing set-off defences generally (an approach which would be consistent with a broadening of the application of Article 1, beyond merely “contract” (see ¶9,)). Views were also expressed in support of broadening the ambit of the rules with respect to set-off as being desirable to avoid multiple, separate, arbitrations; which otherwise would need to occur with respect to the “set-off claims”.

Article 20 – Amendments to the claim or defence

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

28. It was suggested by the Secretariat that consideration might be given to clarifying the power of an arbitral tribunal to raise and decide the existence and scope of its own jurisdiction (see Secretariat Note ¶11 and ¶12 (Add.1)). Reference was also made to Article 16 of the Model Law which deals, specifically, with the competence of an arbitral tribunal to rule on its own jurisdiction. Views were expressed in favour of the approach in Article 16 of the Model Law which, it was said, leaves the arbitral tribunal free to raise and determine jurisdictional matters, with a desirable degree of flexibility. In contrast, it was suggested that Article 21 of the UNCITRAL Rules presently requires an objection to jurisdiction by one of the parties before the power of the arbitral tribunal to rule arises. It was also suggested that a provision of this nature is not usefully included in arbitration rules as it will not, generally, bind the domestic courts because it is, rather, a matter for the applicable law (hence the provisions of Article 16 of the Model Law). Similar issues may arise in relation to the suggestion that Article 21 should, “...make it clear that recourse to domestic courts should only be made after the arbitral tribunal has pronounced itself on its own jurisdiction, and that such recourse should not delay the arbitral proceedings or prevent the arbitral tribunal from making a further award, in accordance with Article 16, paragraph (3), of the Arbitration Model Law” (Secretariat Note ¶14 (Add.1)).

Article 22 – Further written statements

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Article 23 – Periods of time

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Articles 24–25 Evidence and hearings

29. The suggestion was made that these provisions should be left as they are.

Article 26 – Interim measures of protection

30. The suggestion was made by the Secretariat that consideration might be given to revising Article 26 in light of the extensive revisions made to the Model Law in relation to interim measures of protection, in the new Chapter IVA, recently approved by UNCITRAL (see Secretariat Note ¶16 (Add.1)).
31. The suggestion was also made that the draft provided for revision of Article 26 as set out in the Paulsson and Petrochilos Report (see pp108-112) merited consideration. Comments were made that it was too early to know to what extent the new Chapter IVA of the Model Law would be accepted by States and, consequently, it may be premature to embark on significant revisions to Article 26 of the rules on this basis.

Article 27 – Experts

32. It was suggested that the present rule operates satisfactory but it was noted that its operation is affected by any underlying procedural law. It was noted that the

Secretariat suggested that the Working Group might consider an addition to Article 20 paragraph (4) to provide that the arbitral tribunal may appoint experts “after having consulted the parties” (see Secretariat Notes ¶18 (Add.1)).

Article 28 – Default

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Article 29 – Closure of hearings

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Section IV. The award

Article 31 – Decisions

33. The comment was made that there is already considerable pressure on arbitral tribunals, particularly the chairman, to produce unanimous awards; which may be important in terms of enforcement issues.

34. The Secretariat invited the Working Group to consider an amendment to Article 31 to address the problem where no majority for a particular view exists (see Secretariat Notes ¶23 (Add.1)). Reference was made to Article 25, paragraph (1) of the ICC Rules which provides that:

“When the Arbitral Tribunal is composed of more than one arbitrator, an award is given by a majority decision. If there be no majority, the award shall be made by the Chairman of the Arbitral Tribunal alone.”

It was also noted that similar provisions are included in Article 26.3 of the London Court of International Arbitration (LCIA) Rules, and also various other rules. The undesirable position of a member of the arbitral tribunal compromising

his or her views to “produce” a majority was also discussed and it was suggested that this may be an unintended and unsatisfactory consequence of the operation of the present Article 31. The problem identified is that Article 31, as it presently stands, provides no way out of a difficult situation of no majority unless by a process of compromise a majority can be found.

Article 32 – Form and effect of the award

35. Support was expressed for the suggestion that a new provision might be included in Article 32, paragraph (2) whereby the parties agree to exclude recourse to any court or other authority other than for the purpose of challenges for, by way of example, lack of jurisdiction or failure to accord due process (see Secretariat Note ¶25 (Add.1)). It was suggested that this was desirable, subject to the operation of Article 35 of the Model Law, in relation to recognition and enforcement of arbitral awards.

36. It was suggested that Article 32, paragraph (5) should be amended to enable an award to be made public “where a party is under a legal duty to disclose an award or its tenor” (Secretariat Note ¶26 (Add.1)). It was also suggested that this paragraph should be amended to allow publication unless parties agree otherwise; but issues were also raised in relation to confidentiality generally. The comment was also made that an amendment of this nature may not be required because disclosure may, in any event, be required under a relevant substantive law.

37. In relation to the provisions of Article 32, paragraph (7) it was suggested that amendments should be made to avoid the arbitral tribunal being placed in the position of being burdened with compliance with any award registration requirements in the country where the award is made (see Secretariat Note ¶27 (Add.1)). The comment was made that even if this rule were amended there may be substantive law provisions which impose this obligation which cannot be excluded by the rules.
38. It was also suggested by the Secretariat that consideration might be given to whether a provision should be included requiring, as an essential duty of arbitrators and parties, that they “act in the spirit of the UNCITRAL Rules even in circumstances where no specific provision covers the situation in question” (see Secretariat Note ¶29 (Add.1)). In relation to this suggestion comments were made that it may be difficult for the arbitral tribunal or parties, to discern the “spirit” from the UNCITRAL Rules in particular cases. The comment was also made that one of the great values of the UNCITRAL Rules is that they are a self-contained set of rules and presently provide the best way of contracting out of any non-mandatory procedural law and that this proposal may allow the arbitral tribunal to ensure that there are no “gaps”, in particular circumstances, by filling them under a provision of this nature.

Article 33 – Applicable law, amiable compositeur

39. It was suggested that the reference to the applicable law be replaced with “rules of law” with a view to substituting the conflict of laws rules with the rules of law with which the dispute has the closest connection (and see Secretariat Note, ¶30 (Add.1)).

Article 34 – Settlement or other grounds for termination

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Article 35 – Interpretation of the award

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Article 36 – Correction of the award

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Article 37 – Additional award

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Articles 38-40 – Costs

40. The Secretariat suggested that the Working Group might wish to consider whether the elements within the definition of the term “costs” are set out in Article 38 paragraph (a) was exhaustive (see Secretariat Note ¶35 (Add.1)). The issue of fees was discussed generally and views were expressed in support of the position that a greater degree of transparency in the fee fixing process was desirable; noting that this may be more easily achieved in the context of institutional arbitrations than in ad hoc arbitrations. The question of reasonableness of “costs”

and arbitrator's fees generally is discussed in the Paulsson and Petrochilos Report in the context of Articles 38 to 40 (pp148-155 ¶¶274 to ¶¶282).

Article 41 – Deposits of costs

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Miscellaneous provisions

41. The desirability of provisions limiting the liability of arbitrators was also discussed (see the issues raised in the Secretariat Note ¶¶39 and ¶¶40 (Add.1)).

Conclusion

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

Please do not hesitate to contact me if you have any comments or queries

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