

ASIA PACIFIC REGIONAL ARBITRATION GROUP

Report on Fifty-first Session of the UNCITRAL Working

Group II (Arbitration)

Vienna, 14-18 September 2009

Background

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

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

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

185. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that a study might be undertaken of the question of arbitrability and other forms of alternative dispute resolution in the context of immovable property, unfair competition and insolvency. It was cautioned, however, that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.
186. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the Convention on Electronic Contracts, already accommodated a number of issues arising in the online context. Another topic mentioned was the issue of arbitration in the field of insolvency. Yet another suggestion was to address the impact of anti-suit injunctions on international arbitration. A further suggestion was to consider clarifying the notions used in article I, paragraph 1, of the New York Convention, of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their

recognition and enforcement are sought”, which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.

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

4. On the basis of this mandate from the Commission the Working Group commenced its work revising the UNCITRAL Arbitration Rules during its forty-fifth session in Vienna, in September 2006. Following the session in Vienna, the Working Group convened, in its forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth and fifty-first sessions, in New York (February 2007), Vienna (September 2007), New York (February 2008), Vienna (September 2008), New York (February 2009) and Vienna (September 2009), respectively. The Working Group has been assisted in these sessions by sets of extensive notes prepared by the UNCITRAL Secretariat², all of which are entitled *Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules (Note by the Secretariat)*. The Secretariat Note (A/CN.9/WG.II/WP.151/Add.1) contains an annotated draft of the UNCITRAL Arbitration Rules (based on the deliberations of the Working Group at its forty-sixth to forty-eighth sessions) and on comments received by the Secretariat at the occasion of conferences and meetings organised to discuss the

² A/CN.9/WG.II/WP.145 (6 Dec 2006) and A/CN.9/WG.II/WP.145/Add.1 (6 Dec 2006), A/CN.9/WG.II/WP.147 (3 Aug 2007), A/CN.9/WG.II/WP.147/Add.1 (3 Aug 2007), A/CN.9/WG.II/WP.149 (30 Nov 2007), A/CN.9/WG.II/WP.151 (6 Aug 2008) and A/CN.9/WG.II/WP.151/Add.1 (6 Aug 2008), available at www.uncitral.org

revision of the Rules (see Secretariat Note WP.151/Add.1 ¶3, p2)). For convenience this document is referred to as “the Secretariat Note” or “WP.151/Add.1”).

5. The Working Group was assisted at its most recent session in Vienna by the Secretariat Note.

Revision of the UNCITRAL Arbitration Rules

6. The approach adopted by the Working Group to the revision of the UNCITRAL Arbitration Rules was to reconvene in New York in February 2007, Vienna in September 2007, New York in February 2008, Vienna in September 2008, New York in February 2009 and Vienna in September 2009 in order to continue discussion in relation to areas of the UNCITRAL Arbitration Rules where revision might usefully be made. It is presently anticipated that the task of the Working Group in revising the Rules will be completed at its fifty-second session, in New York in February 2010. As previously, “it was considered that the focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years.”³ It was, again, noted that the UNCITRAL Arbitration Rules were intended to apply to a broad range of circumstances and that at least four main types of arbitration could be identified where the Rules were used in practice, namely: “...disputes between 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”.⁴ 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

³ A/CN.9/614 para 16, p 5.

⁴ A/CN.9/614, ¶17, p 5.

broadly indeed. The footnote to Article 1, paragraph (1) of the Model Law indicates this very clearly, in the following terms:

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

7. More specifically, in relation to methodology, the Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006) A/CN.9/614 noted the position as follows:⁵

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.

⁵ *Id.*, ¶¶18 to ¶20, pp 5 and 6.

20. With respect to the working method to be followed at the current session, it was suggested that the Working Group should identify areas where a revision of the UNCITRAL Arbitration Rules might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for subsequent sessions the first tentative draft of the revised UNCITRAL Arbitration Rules. The Working Group agreed, on the basis of documents A/CN.9/WG.11/WP.143 and Add.1, to define the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules and to hear suggestions to the Secretariat for drafting such revisions but not to reach any conclusion at the current session.
8. As indicated above, further, more detailed, information in relation to the provisions of the UNCITRAL Arbitration Rules and issues arising with respect to their revision are contained in the UNCITRAL Secretariat Note A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶6.
9. Having already settled the methodology for the work of revision of the UNCITRAL Arbitration Rules the Working Group turned to consider the Rules themselves. During the course of deliberations of the Working Group in New York in February 2008 the position was reaffirmed (as noted previously in the APRAG Report on the forty-sixth session in New York in January 2007 before the discussion of the provisions of the Rules in detail) that the Working Group agreed that the harmonisation in the drafting of the revised UNCITRAL Arbitration Rules with the Model Law was not an essential requirement, though in some instances the Working Group might regard it as appropriate (see Secretariat Note A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶6). It is noted that the Working Group had also agreed at the beginning of the New York session, in January 2007, to replace phrases such as “both parties”, “either party”, “one of the parties” with the word “parties” to promote the applicability of the Rules to multi-party arbitrations (see Secretariat Note A/CN.9/WG.II/WP.145 (6 Dec 2006) ¶7).

10. The following is a summary of some of the important issues identified with respect to Articles 27 to 39 of the Rules which were considered by way of a “second reading” at the fifty-first session of the Working Group in Vienna in September 2009.

Section III – Arbitral Proceedings

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

Article 27 – Expert’s appointed by the arbitral tribunal

12. The proposed revised Article 27 is set out in Secretariat Note (¶17) as follows:

Article 27[17]

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties..
2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
3. Upon receipt of the expert’s report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.
4. At the request of any party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing any party may present expert witnesses in order to testify on the points at issue. The provision of article 25 shall be applicable to such proceedings.

13. There were no observations in relation to proposed Article 27, on the basis that its substance was generally acceptable.

Article 28 – Default

14. The proposed revised Article 28 is set out in Secretariat Note (¶18) as follows:

Article 28

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause: [18]
 - (a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the respondent has submitted a counterclaim;
 - (b) The respondent has failed to communicate as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.
 2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.
 3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it. [19]
15. The consensus was that the wording of paragraph 28(1)(a) was deficient as it leaves the impression that the only order open to the arbitral tribunal in the event of the failure by the respondent to submit a counterclaim is an order for the termination of the arbitral proceedings. Further, the comment was made that revised Article 28 seems to proceed on the basis that the respondent does not have a legitimate interest in obtaining a binding award and does not accommodate the defaulting claimant which

may, for various reasons, wish to discontinue the claim and pursue it in another forum. Consequently it was suggested that it is desirable that the arbitral tribunal has power under these rules to dismiss the claim with a *res judicata* effect to prevent a claimant discontinuing the arbitral proceedings or allowing them to lie dormant pending proceedings in another forum. There was discussion of the possibility of the arbitral tribunal dismissing a claim “with prejudice” under these provisions, and comments were made that the prejudice for the purpose of these provisions should be the *res judicata* effect which would prevent the claimant instituting further proceedings. In this respect, the further comment was made that a difficulty with providing for dismissal “with prejudice” arises if the statement of claim has not been communicated. It was said that, in these circumstances, dismissal of the arbitral proceedings with costs might be appropriate but that the absence of any statement of claim would cause difficulties in providing for any *res judicata* effect. In response, it was suggested that issues may nevertheless have been joined in the arbitral proceedings, even in the absence of a statement of claim, and, consequently, a dismissal “with prejudice”, that is with *res judicata* effect, could be made to the extent of those joined issues. Issues were also raised in relation to the desirability of using the word “submitted” with respect to the counterclaim and discussion took place as to the desirability of harmonising the terminology with Article 19 (Statement of defence).

16. It was suggested that the difficulties highlighted with respect to paragraph 28(1)(a) might be overcome by replacing the concluding words “unless the respondent has submitted a counterclaim” with “unless there remain other issues to be decided”. It was suggested that this might overcome the apparent automatic requirement that the arbitral tribunal terminate the arbitral proceedings in the event that the respondent had

not submitted a counterclaim. It would, it was said, also enable the arbitral tribunal to deal with a claimant which was not pursuing the proceedings and to provide for a respondent seeking a *res judicata* order to prevent the claimant pursuing the same claim elsewhere and, possibly, to enable a substantive order to be made with respect to the respondent's counterclaim. In the course of further discussions it was suggested that the concluding words might, alternatively, read "with such *res judicata* effect as the arbitral tribunal feels appropriate". Further it was suggested that "matters" rather than "issues" would be more appropriate terminology. In any event there was consensus that the issues raised were to be resolved by redrafting. In this vein, there was a further proposal that the concluding words should read "unless there are any matters that may be decided and the arbitral tribunal considers it appropriate to do so." Comments were also made in relation to the importance of harmonising these provisions with those provisions of the rules applicable to the statement of defence and counterclaims. The discussion concluded on the basis of a consensus that the concern of the Working Group was that the opportunity for further orders by the arbitral tribunal, other than merely an order for termination of the arbitral proceedings, should be preserved, including the opportunity of the respondent to seek a decision on its counterclaim. Finally, the point was made that the provisions of paragraph 28(1)(a) should not overlook the position of third parties.

17. It was agreed by the Working Group that paragraph 28(1)(a) should be redrafted to remove any limitation on the power of the arbitral tribunal to make orders other than termination of the arbitral proceedings. The Working Group was of the view that paragraph 28(2) was generally acceptable but some issues were raised as to whether paragraph 28(3), which deals with the failure of a party to produce documents exhibits

or other evidence to the arbitral tribunal within the time provided for production, should be located in revised Article 24 (evidence and hearings) which deals with the burden of proving facts in support of a claim or defence and the delivery of documents etc to the arbitral tribunal. The consensus was against moving these provisions from Article 28, noting that there were arguments in favour of locating its provisions under the evidentiary provisions of revised Article 24 but also that there were arguments in retaining paragraph (3) in Article 28 as a group of “default” provisions. In relation to the substance of the provisions of Article 28(3) there was some discussion in relation to the failure to specify in its provisions the consequences of a failure to produce documents, exhibits or other evidence where there was sufficient cause established for the failure to produce. As a result of discussion the consensus was that paragraph (3) was generally in acceptable form and that its provisions will be unduly complicated by attempting to provide for the consequences of non-production with sufficient cause.

Article 29 – Closure of hearings

18. The proposed revised Article 29 is set out in Secretariat Note (¶20) as follows:

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.
 2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.
19. The comment was made that a party might delay closure of an arbitral hearing by bringing forward frivolous witnesses and, consequently, paragraph (1) of Article 29 should empower the arbitral tribunal to declare the hearing closed if, in spite of a party indicating it had further witnesses to bring forward, the arbitral tribunal thinks it

appropriate to do so. The further comment was made that Article 29 is wrongly placed in that the Rules here are dealing with hearings rather than proceedings. It was suggested that the provisions of Article 29 should deal with the closure of proceedings and not be limited to hearings; as the consequence of a closure of a hearing under these provisions would not, it was said, be to preclude the arbitral tribunal from permitting the opening of a fresh hearing at a later date. The comment was made that paragraph 29(1) indicates by its terms that what is closed is the proof of witnesses and the making of submissions and that, consequently, whether the terminology used is “proceedings” or “hearings” does not appear to be a matter of substance; or confusing as to the intended effect of closing this aspect of the arbitral proceedings. In any event, no consensus was reached in the discussions for change and, consequently, the position reached was Article 29 as revised was generally acceptable in this respect. There was, however, a further question raised in relation to whether the “hearings” referred to in Article 29 were limited to “oral” hearings or whether they extended to evidence and submissions in written form. As a result of discussion the consensus was that the word “hearing” was understood as not being limited to an “oral hearing” and that, consequently, the Working Group saw no need to qualify or explain the word “hearing”.

Article 30 – Waiver of right to object

20. The proposed revised Article 30 is set out in the Secretariat Note (¶21) as follows:

Article 30

A party which knows that any provision of these Rules or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived its right to object.

21. It was suggested that proposed revised Article 30 could helpfully be drafted in clearer and more positive form, as follows:

A party which knows:

1. that there has been a failure to comply with any provision of these Rules; or
2. that there has been a failure to comply with any requirement under the arbitration agreement, and proceeds with the arbitration without making, within a reasonable time, any objection shall be deemed to have waived its right to make such objection.

The consensus was against making a drafting change to revised Article 30 as proposed and thereby departing from the approach contained in Article 30 as it appears in the existing Rules and, consequently, departing from the corresponding provisions of the Model Law⁶.

22. A further issue which arose in the course of discussion of the recasting or simplification of the terms of proposed revised Article 30 was whether actual or constructive knowledge of a party was required for the purpose of waiver of the right to object. In this context the revised wording suggested (as set out above) initially opened with the passage “a party which knows or ought to have known”. In support of extending the waiver provisions to both actual and constructive knowledge it was said that it was much easier to prove the basis of waiver objectively on the basis of what ought to have been known and, conversely, very difficult to establish actual knowledge for the purpose of a provision such as revised Article 30. In response, the comment was made that Article 30 is directed to a situation where there has been a violation of the rules where a violation would not need to be proved by deemed knowledge. In the course of

⁶ See Model Law Article 4 (waiver of right to object) which is in the following terms:

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within which such period of time, shall be deemed to have waived his right to object.

discussions it was also pointed out that adding a new phrase “ought to have known” may create problems in particular circumstances where, for example, one party has engaged a major law firm and the other party has no legal representation and is working in a language other than its mother tongue. On the basis of this example the question was raised whether a constructive knowledge test would be applied differently to each of those parties. In the case of the well represented party it might be expected that it would be much easier to establish that the represented party through its agent, the major law firm, “ought to have known”; but it may be far more difficult to establish this with respect to the unrepresented party. It was suggested that this inequality would be unnecessary and may create problems. A further example was raised of parties which enter into an agreement for the supply of goods containing an arbitration clause in circumstances where there are orders initially and then further orders and arguments as to whether the subsequent orders are covered by the initial agreement, hence the arbitration clause. The initial agreement may also include some reference to industry practice or standards and so issues may arise as to the terms of the agreement. On this basis the question was raised whether a party ought to have known what was in some industry standards which would raise the whole series of questions with respect to waiver and the giving up of rights.

23. It was also noted that Article 4 of the Model Law (waiver of right to object) does not contain any phrase such as “ought to have known” and is therefore directed to actual rather than constructive knowledge. It was suggested in the course of further discussions that the word “ought” is inherently subjective but that it is sufficiently flexible to allow the arbitral tribunal to take the particular circumstances into account, including whether or not a party has taken advice as to its position. The further

comment was made that it is impossible to know the extent to which the absence of provisions catching constructive knowledge under Article 30 of the Rules or Article 4 of the Model Law have given rise to problems; but, nevertheless, the view was expressed that problems with the present actual knowledge requirement have occurred many times. Further support was expressed for the addition of words such as “ought to have known” in order to allow the arbitral tribunal to make a just decision in the course of the proceedings. The point was made that a provision of this nature does not contemplate some automatic sanction but enables the arbitral tribunal to determine whether a party was “constructively” aware of a departure from the Rules. As a result of further discussions a revised text was proposed, as follows:

A failure to comply with any provision of these Rules or with a requirement of the arbitration agreement may not be invoked by a party that has failed to object without undue delay. This provision does not apply if the party invoking the failure had no knowledge of it.

It was said that this proposal goes some way to dealing with the problems of burden of proof as to knowledge but does not go the further step to provide a constructive knowledge test, “ought to have known”. As a result of further discussion a slightly revised version of these revised provisions was proposed, as follows:

“The failure by any party to timely object to any non-compliance with these Rules or with any requirements of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can prove that under the circumstances its failure to object was justified or excusable.

The comment was made that these attempts to bridge the gap between the views in favour of retaining only an actual knowledge requirement for waiver and those in favour of extending the possibility of waiver to constructive knowledge as well is to reverse the burden of proof. It was suggested that the proposals are closer to the existing concept but as there is a reversal of the onus of proof the proper working of the rule is restored.

Contrary views were expressed, including that the introduction of phrases such as “excusable and justifiable” might lead to difficulties which are not encountered with the rule as presently drafted. The discussion concluded with the consensus that Article 30 should be redrafted for further consideration at the next sessions of the Working Group along the lines of the proposals for revisions referred to above.

Section IV – The Award

Article 31 – Decisions

24. The proposed revised Article 31 is set out in the Secretariat Note (¶22) as follows:

Article 31

1. *Option 1:* When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of the arbitrators.

Option 2, Variant 1: When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made by the presiding arbitrator alone. *Variant 2:* When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made, if previously agreed by the parties, by the presiding arbitrator alone.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorises, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

25. It was noted at the outset that the proposed revisions contained in draft Article 31 raise a fundamental philosophical issue, which is whether the chairperson or presiding arbitrator of an arbitral tribunal must find a majority for any award or other decision or whether in the absence of the majority the chairperson or presiding arbitrator can decide the question alone. The comment was also made that if one member of the arbitral tribunal decides not to co-operate then the chairperson or presiding arbitrator is in the hands of the other co-arbitrator.

26. Some textual points were also made in relation to the two options, and the variants. It was suggested that there may be some difficulty with the reference to “substance” in the variations contained in Option 2 and that the reference may unintentionally include both jurisdictional and procedural matters. Again the point was made that the existing requirements of majority decision making forced the chairperson or presiding arbitrator

of the arbitral tribunal to align himself or herself with the least unreasonable co-arbitrator. In Option 2, where the chairperson or presiding arbitrator alone may make a decision in the absence of a majority view, it was suggested that this regime actually provides an incentive for each of the co-arbitrators to seek to be the most reasonable; and, consequently, may provide a useful incentive towards unanimous decision making. It was also noted that in previous discussions the point was made that the majority rule did not necessarily produce the most "legitimate" award. From the point of view of the party who has lost the more "legitimate" award is the one decided by the chairperson or presiding arbitrator alone. More often the dissenting arbitrator is the arbitrator appointed by the losing party so that in a majority situation the losing party will find that a decision is made against it by the co-arbitrator appointed by the other party, the other side, and the chairperson or presiding arbitrator. Consequently the losing party in this situation is not likely to see the award as "legitimate". On this basis the comment was made that Variant 1 of Option 2 would be the preferable solution. Further, it was said that it is illusory to think that the parties will direct their minds to the issue of majority decision making at the time they are preparing and entering into their arbitration agreement; and so it is unlikely that there would be any previous agreement by the parties for decision making by the chairperson or presiding arbitrator alone in the absence of a majority which would be necessary to trigger the application of Variant 2 of Option 2. There was, however, some support for Variant 2 of Option 2 on the basis that it was a compromise between views favouring Option 1 and Option 2 and one which allowed the parties to direct their minds to and express a preference with respect to the alternatives of majority decision making or ultimate decision making in the absence of a majority by the chairperson or presiding arbitrator. Although it was acknowledged that Variant 2 did require the parties to direct their minds to the question

and that, as with many arbitration agreement provisions in commercial documents this would not always be the case, it was suggested that Variant 2 of Option 2 would accommodate and allow best practice with respect to the nature of arbitral tribunal decision making to develop. It was also noted that a move to ultimate decision making in the absence of majority by the chairperson or the presiding arbitrator was a step with very significant consequences.

27. There was considerable support for Option 1 on the basis that the Option 2 proposals would represent a major change to the rules and that a change of this nature and extent should only be made where it is shown that there are problems with the existing rules; and there was significant support for the view that this was not the case. On the other hand, comments were also made that as a result of the privacy of the deliberations of arbitral tribunals it was very difficult to assess the extent to which the existing rule was operating satisfactorily and not causing the sort of problems that had been highlighted in striving for a majority and the possible undesirable compromises needed to be made by the chairperson or presiding arbitrator to secure a majority decision with the support of the “least objectionable” views of one of the co-arbitrators.
28. The position reached was that there was a fairly sharp dividing line between strong views in support of both Option 1 and Option 2. The support for Option 2 Variant 2 was greater than for Variant 1 because, as indicated, it was thought that the requirement of prior agreement by the parties to decision making by the chairperson or presiding arbitrator alone in the absence of the majority allowed party involvement and consent to be applied with respect to a very significant change in the ultimate decision making regime by arbitral tribunals under the UNCITRAL Rules. The other basis of support for

Option 2 was the view that modern commercial arbitration rules now provide for ultimate decision making by the chairperson or presiding arbitrator of an arbitral tribunal in circumstances where a majority view cannot be obtained.⁷ There was, however, no consensus in the Working Group to change the present rule, a position which led to the endorsement of Option 1 but with consensus that the Commission would be advised of some support for Variant 2 of Option 2 as something in the nature of a compromise position between Option 1 and Option 2 Variant 1.

29. Paragraph 2 of proposed revised Article 31 was agreed in substance.

Article 32 – Form and effect of the award

30. The proposed revised Article 32 is set out in Secretariat Note (¶23) as follow:

Article 32

1. The arbitral tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the arbitral tribunal. **[23]**
2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out all awards without delay. Insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree. **[24]**
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given. **[25]**
4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature. **[26]**

⁷ See ICC Rules of Arbitration, Article 26.3; LCIA Arbitration Rules, Article 61; and ACICA Arbitration Rules, Article 17.3.

5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. **[27]**
 6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal. **[28]**
 7. **[Deleted] [29]**
31. In relation to paragraph 32(1) the Working Group agreed that it was desirable to simplify the corresponding paragraph of the existing rules by referring to “separate awards on different issues at different times”, rather than listing possible types or circumstances of awards such as “interim, interlocutory, or partial awards” as listed in this provision of the existing rules. The comment was made that the issue with these provisions was to make it clear that all these various awards have effect as awards and that their common feature is that they are all final and binding, as indicated in the opening sentence of paragraph 32(2), as proposed. Consequently it was said that the second sentence proposed in paragraph (1) was not necessary as the intention behind that sentence was to state that all awards are final and binding rather than that they are all of the same status and effect; which is not really the position with respect to awards which are interim, interlocutory or partial. Rather, they are final and binding within the limits of their particular status and effect. The consensus was that, for these reasons, the second sentence proposed for paragraph 1 should be deleted.
32. The comment was made in relation to paragraph 32(2) that the focus on these proposed provisions seems to be on setting aside awards and the extent to which the right to apply for setting aside might be waived but with no reference to resisting enforcement of awards. It was suggested that this was an omission and an important one having regard to the need for ready enforcement of international arbitral awards

without unnecessary delay. Further, it was suggested that these provisions should be consistent with the New York Convention and indicate expressly that awards are to be final and binding on the parties subject only to the applicable law and the provisions of the New York Convention. In this respect it was also suggested that any waiver provisions should also cover expressly any other rights the parties might have under the New York Convention and specifically refer to resisting enforcement in proceedings where enforcement is sought.

33. Issues were also raised with respect to the first sentence of paragraph 32(2) and the expression "final and binding". It was suggested that this expression needs amendment because it could not be said, correctly, that all awards shall be final and binding as the word "final" has a variety of different meanings; such as the final disposition of proceedings or the final disposition of an issue. It was suggested that the meaning inherent in the word "final" in the proposed provisions was final in the sense that the award could not be varied by the arbitral tribunal itself. It was, however, suggested that the expression "final and binding" is a well known phrase and one which is used in many rules. Consequently, it was said, that problems may arise with new language because of the implication that might be said to arise from the revised drafting; namely that a change in meaning was intended, both from the meaning flowing from the language in the existing rules and also by comparison with other international arbitration rules. Further, reference was made to an example of the difficulty that might be caused by the proposed deletion of the word "final". In the example the arbitral tribunal had made a partial award which included an order that a party purchase a company which subsequently became bankrupt. The arbitral tribunal took the view that it could deal with the problem caused by the intervening bankruptcy

and deal with it in the final award in the proceedings. It was suggested that the new language proposed would prevent this. It was also noted and suggested that the problems with the expression “final and binding” were aggravated by the use of the words “all awards” in the first sentence of paragraph 32(2). Further, comments were made in favour of the view that “final and binding” is a well understood phrase and that the proposed omission of “final” does not achieve what is intended and would cause confusion. It was suggested that the word “final” in the phrase “final and binding” is used in a qualitative sense and not in the sense of the last chronological award. It was suggested that this was clear from the reading of the rules as a whole and that it was also clear that there may be a number of awards apart from the chronologically final award. There was also some discussion as to whether the position could be made clearer by deleting the words “all awards” in the opening of paragraph 32(2) and the replacing these words with “The award”. As against this proposal it was noted that the Working Group had taken the view that it was desirable to cast these provisions in the plural rather than the singular to avoid ambiguity where more than one award had been delivered. Further, it was noted that the basis on which it had been decided to delete the last sentence of proposed paragraph 32(1) was because of the clear reference to “all awards” in paragraph 32(2). As a result of further discussion the consensus was to retain the expression “final and binding” in the first sentence of paragraph 32(2).

34. There was also very significant discussion in relation to the extent of the waiver of recourse to the courts under the provisions proposed for paragraph 32(2). Issues were raised as to the extent to which the proposed provisions would amount to a waiver of the right of recourse under various national laws and issues were raised as to the desirability of indicating that mere entry into the revised UNCITRAL Rules would not

produce a waiver and exclusion of recourse to the courts. It was also said that these provisions created a problem in distinguishing between recourse etc and the right to set aside an arbitral award. It was said that these provisions open new problems and the need to specify the effect of operation of the new rules with respect to enforcement proceedings and resisting enforcement proceedings, by way of example. Accordingly, it was proposed that the last sentence of proposed paragraph 32(2) should be deleted and the third sentence revised to read:

The parties shall be deemed to have waived the right to any form of appeal, review or recourse to any court or other competent authority that may be waived and the waiver of which does not require express agreement.

35. In relation to proposed paragraph 32(2) two points were raised in further discussion. The first was whether the waiver extends to the right to set aside an award and, secondly, whether the waiver extends to resisting enforcement. As to these points it was said that the third sentence in paragraph 2 is something sought to be imported from Article 28 of the ICC Rules of Arbitration and Article 26 of the LCIA Arbitration Rules. In 2007 it was noted by the Working Group that these provisions effected a waiver of unusual rights of appeal and would apply to the right to seek to set aside an award when the applicable law allowed this.⁸ It was also said that the relationship between the final sentences was not clear in that there was an ambiguity as to whether the waiver of the right to set aside an award was effected by the preceding provisions. In this respect it was suggested that the last sentence be revised to read:

However, this deemed waiver of the right to recourse shall not extend to an application for setting aside an award which may be waived only if the parties so expressly agree.

Reference was also made to Articles 34 and 35 of the Model Law and to paragraph 45 of the *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on*

⁸ See A/CN.9/641.

*International Commercial Arbitration as amended in 2006.*⁹ The discussion continued and the point was made that paragraph 32(2) needs to be more specific in relation to what it is trying to achieve – namely to exclude appeals on the merits but not exclude applications for setting aside or resisting enforcement. The question was how to make this clear in the revised rules. In the course of discussion various forms of words were suggested. One suggestion was to replace the final sentences in paragraph 2 of reposed revised Article 32 with the following:

By adopting the rules the parties waive their right to any form of appeal, review, or recourse to any court or competent authority except for an application for setting aside an award.

Further, it was suggested that any ambiguity as to whether the waiver extends to resisting enforcement should be resolved. The revised form of the final sentences does not extend to raising grounds for resisting enforcement. It was suggested that some reference could be made in notes to the revised rules rather than the text to explain the position so as not to encourage parties not to comply with awards and wait to raise grounds for resisting enforcement when a party takes steps to enforce the award. In the course of further discussion it was suggested that one of the difficulties with the latest revision proposed (as set out above) was that removal of any reference to review or appeal on the merits whilst at the same time referring to “setting aside” leaves unresolved ambiguity. Consequently it was suggested that the proposal be modified to include reference to “any form of appeal or review on the merits or any other similar recourse...”. Following further discussion there was general consensus in favour of the proposal set out above.¹⁰

⁹ 2006 this note was prepared by the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Year Book, vol. XVI-1985, United Nations Publication, Sales No. E.87.V.4).

¹⁰ See ¶34.

36. The outcome of the long discussion on the waiver issue arising out of the proposed paragraph 32(2) is very helpfully summarised in the draft report of *Working Group II (Arbitration and Conciliation) on the work of its fifty-first session (Vienna, 14-18 September 2009)* as settled in draft at the final meeting of the fifty-first session of the Working Group:

20. The Working Group agreed that paragraph (2) should contain a waiver of appeal, review and recourse, and be drafted in a manner that avoided any confusion as to the scope of the waiver. To avoid listing recourses excluded from the waiver, it was proposed to adopt a provision along the lines of: "The parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority that may be waived and the waiver of which does not require express agreement". It was objected to that proposal that it would oblige parties to delve into the details of relevant applicable laws and would run counter to the harmonization objectives of the Rules. It was said that a preferable approach would be that the scope of the waiver be clearly defined in the Rules themselves, without the parties having to determine whether and under which conditions the applicable law permitted such waiver to be made. It was further said that that proposal put the emphasis on whether applicable law would require express agreement of the parties for recourse to be validly waived, a matter that was not necessarily settled in all jurisdictions.
21. In keeping with the approach to define broadly the types of recourse waived, and to clarify the exceptions, a proposal was made along the following lines: "By adopting these Rules, the parties waive their right to any form of appeal, review or recourse to any court or competent authority except for an application for setting aside an award." That proposal received broad support. The proposed wording was said to address the concerns raised in the course of the discussion that the scope be clearly and concisely defined, and that there were no interference with applicable laws. It removed the reference to a deemed waiver, which was considered to be unnecessary.
22. After discussion, the Working Group agreed that the proposal contained in paragraph 21 above should be included in a revised version of the Rules for consideration by the Working Group at a future session on the understanding, however, that a few delegations formally objected to amending the rule on that matter and one delegation requested that it be placed in square brackets.

37. The Working Group accepted proposed paragraphs 32(3) and 32(4), the latter with some minor, cosmetic, changes.
38. Proposed paragraph 32(5) provides that an award may be made public with the consent of all parties or where and to the extent disclosure is required of the party by legal duty to protect or pursue a legal right in relation to legal proceedings before a court or other competent authorities. The comment was made that it might be desirable to follow the practice of the ICC in publishing awards which have been “sanitised” three years after they are issued, to allow a time for judicial and other proceedings. Otherwise it was suggested that the text should indicate that the parties might agree to the publication of the award on some basis. This proposal was not supported and paragraph 32(5) was adopted in the form proposed.
39. Paragraph 32(6) was accepted as proposed.

Article 33 – Application law, *amiable compositeur*

40. The proposal revised Article 33 is set out in the Secretariat Note (¶30) as follows:

Article 33

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [variant 1: with which the case has the closest connection] [variant 2: which it determines to be appropriate]. [30]
2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. [31]

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of any applicable contract and shall take into account any usage of the trade applicable to the transaction. **[32]**
41. Paragraph 33(1) as proposed contains two variants, one which allows the arbitral tribunal to apply the law with which the case has the closest connection and the other to apply the law which it determines to be appropriate. These variants are, naturally, prefaced by a provision that the arbitral tribunal is to apply the rules of law designated by the parties as applicable to the substance of the dispute – the variants are to deal with the not uncommon situation where no rules of law have been designated. In the course of discussion the point was made that a problem arises with *variant 1* because it is based on an assumption that disputes are subject to one law, which is not correct. For example, it was noted that there may be different laws covering capacity and the contract under which or in relation to which the dispute arises. The unintended consequence would, therefore, be that the arbitral tribunal could only apply one law under *variant 1*, which is at odds with the reality of the position. Consequently the consensus reached in further discussion was that *variant 2* should be adopted to avoid these problems.
42. A further issue in relation to proposed paragraph 33(1) arose in relation to the first sentence and the reference to “substance of the dispute”. Questions were raised whether this includes ancillary matters such as capacity or whether these provisions need to be modified to avoid concerns raised previously in relation to the possibility of more than one law applying to various aspects of a dispute. There was a consensus that the expression is meant to distinguish rules of law from procedural laws but that “substance” includes ancillary matters such as capacity, corporate law etc. The question was also raised as to whether it was intended to exclude *renvoi* – as it dealt

with in Article 28(1) of the Model Law. The comment was also made that the choice of law by a party does not involve selecting the conflict of laws rules of that chosen law, as is made clear in the second sentence of Article 28(1) of the Model Law. The omission of provisions such as this in paragraph (1) of Article 33 may, it was suggested, open up arguments that the position is different under the Rules as the provisions of Article 28(1) of the Model Law have not been reflected in these provisions. Following further discussion it was decided that it was not necessary to make any addition along the lines of Article 28(1) of the Model Law.

43. Paragraph 33(2) as proposed was generally accepted.

44. In relation to paragraph 33(3) as proposed concern was expressed in relation to the use of the word “any” in the phrase “any applicable” in relation to a “contract” and also “any” with respect to “usage of the trade”. As a result of further discussion it was agreed that the position would be clarified by recasting paragraph 3 as follows:

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usages of trade applicable to the transaction.

Further discussion took place in relation to whether the word “contract” as used in the agreed revision of paragraph 33(3) was broad enough to include all types of agreements which may be encountered in various transactions. Some more embracing terms were proposed such as “contract or other legal instrument”. Concern was, however, expressed at the possibility of departing from the terminology used in the corresponding provisions of Article 28(4) of the Model Law which uses the term “contract” only. It was also noted that the word “contract” alone is used in the European Convention on International Commercial Arbitration 1961. It was noted that difficulties

might be created for states which have enacted arbitration laws based on the Model Law or state parties to the Convention. Additionally, it was noted that the term “contract” is used in many other provisions in the Rules, without qualification or expansion, and that a departure from this terminology in paragraph 33(3) may cause confusion and ambiguity. Consequently the consensus was that the term “contract” should be retained, without addition or modification, as used in the proposed revised form of paragraph 33(3).

Article 34 – Settlement or other grounds for termination

45. The proposed revised Article 34 is set out in Secretariat Note (¶33) as follows:

Article 34 [33]

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.
 2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.
 3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 6, shall apply.
46. In relation to paragraph 34(1) it was noted that the arbitral tribunal is not obliged to give reasons for an award recording a settlement of the dispute. Following discussion as to the possibility of adding the words “or for refusing to issue it” which would cover a situation where the arbitral tribunal refuses to issue an award, on grounds such as

where rendering the award would violate public policy, a consensus was reached that paragraph 34(1) was generally acceptable and that no addition was required.

47. Paragraphs (2) and (3) of Article 34 were generally acceptable.

Article 35 – Interpretation of the award

48. The proposed revised Article 35 is set out in the Secretariat Note (¶34) as follows:

Article 35

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award. [34]
2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 6, shall apply.

49. The provisions of revised Article 35 as drafted were accepted.

Article 36 – Correction of the award

50. The proposed revised Article 36 is set out in the Secretariat Note (¶35) as follows:

Article 36

1. Within 30 days after the receipt of the award, any party, with notice to the other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors or omissions of a similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 6, shall apply.

51. There was discussion in relation to the time limits provided for in proposed Article 36. Reference was made to paragraph 35(2) which requires an interpretation of the award to be given in writing within 45 days after receipt of the request. It was generally agreed that the same time limit should apply under Article 36 and that it should be

made clear in the provisions of Article 36 that this time limit is only applicable to corrections arising as a result of the request of a party and not in situations where a correction is made by the arbitral tribunal on its own initiative.

52. Consistently with the terminology of Article 37, paragraph (1), it was agreed that the expression “any party” in paragraph (1) of Article 36 should read: “a party”.

53. There was extensive discussion in relation to the scope of omissions to which Article 36 would apply. It was accepted that the provisions of Article 36 did not cover, and was not intended to cover, omissions of a substantial nature and that the phrase “of a similar nature” which follows the word “omissions” in paragraph 36(1) sufficiently confines the nature of omissions to “errors in computation, any clerical or typographical errors” or errors of like nature; in other words omissions other than omissions of substance. There was also discussion as to the possible effect of an award omitting the date upon which it was made and the place of arbitration. There was discussion of the relationship with Article 32, particularly paragraph (4) of Article 32 which requires that an award be signed by the arbitrators and contain the date upon which the award was made and indicate the place of arbitration. It would follow that a purported award which did not comply with these provisions of Article 32 would not be considered an award in some jurisdictions, in which case Article 36 could not apply. It was also noted that issues in relation to the qualification or essential elements of a valid award were matters dealt with under the applicable law.

54. A further issue was raised in relation to the effect of an interpretation of an award under paragraph (2) of Article 35. Following discussion it was agreed that a

corresponding provision should also be included in paragraph 36(2) so that the correction of an award should be treated as part of the award for the purposes of the Rules.

Article 37 – Additional award

55. The proposed revised Article 37 is set out in Secretariat Note (¶36), as follows:

Article 37 [36]

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
2. If the arbitral tribunal considers the request for an additional award to be justified, it shall complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make an additional award.

When an additional award is made, the provisions of article 32, paragraphs 2 to 6, shall apply.

56. A problem raised with respect to paragraph 37(1) was that its provisions restrict or regulate any additional awards that might follow on from an award but not an award following a termination order. The comment was made that there appears to be no reason to make this policy distinction and that difficulties may arise because where a final award was made following a termination order the arbitral tribunal might be said never to be *functus officio*. Consequently it was suggested adding at the end of paragraph 37(1) the words, “but not decided by the arbitral tribunal” in place of the words “but omitted from the award”. It was suggested that these difficulties may not appear in other arbitration rules, particularly institutional rules, because in an institutional arbitration the institution would prevent the making of a termination order without resolving matters such as costs. The further comment was made that these

issues may now be more important as the revisions to the Rules have extended the cases in which a termination may arise. In the course of discussion a further point was raised in relation to the possible need to provide for correction of a termination order, perhaps by addressing the point in amendments to paragraph (2) of Article 34. It was also suggested that the basis of the problem highlighted would be that a party having claimed for costs has slept on its rights. It was said, however, that it was not merely a matter of a party sleeping on a costs claim and that there may be circumstances where a party has not provided a statement of claim and proceedings may be terminated. The question then arises as to whether there is a remedy or ability to draw to the tribunal's attention that it has failed to deal with some outstanding issues. Further, it was suggested that there could not be an additional award after a termination order as there had been no first award. The responsive comments were that this is a matter of drafting. One suggestion, in this respect, was to add provisions in paragraph (2) of Article 34 to the effect that a termination order is to be treated as an award for the purposes of the Rules. A further issue arose as to whether it should follow that the Rules should provide that a termination order is to take the form of an award. A further suggestion was that an amendment could be made to paragraph (3) of Article 40 indicating that Article 37 applies *mutatis mutandis*.

57. The position reached as a result of further discussion is helpfully summarised in *Draft Report on the Working Group on Arbitration and Conciliation on the work of its fifty-first session*¹¹ as follows:

27. The attention of the Working Group was drawn to the fact that article 37 was restricted to "additional awards", and would therefore not find application in case the tribunal would render a termination order and a party wished to request the arbitral tribunal to make an additional

¹¹ A/CN.9/WG.II/LI/CRP.1/Add.4

decision on claims presented in the case of the arbitral proceedings, but omitted by the tribunal.

28. Various proposals were made to address that matter. It was suggested to modify the wording of paragraph (1) by inserting the words “or termination order” after the words “receipt of award” and by replacing the words “but omitted from the award” by the words “but not decided by the arbitral tribunal.” It was observed that it might be preferable to deal in a separate provision with the termination orders, so as to avoid confusion.
29. A proposal was made to provide in article 34, paragraph (2) that the termination order would have the legal effect or character of an award. It was suggested to insert in article 34, paragraph (2) wording along the lines of “For purposes of article 37, a termination order should be treated as an award.”
30. Another suggestion was to include in article 40, paragraph (3) language providing that article 37 would apply by analogy.

Articles 38-40 – Costs

58. The proposed revised Article 38 is set out in Secretariat Note (¶37), as follows:

Article 38 [37]

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The reasonable travel and other expenses incurred by the arbitrators;
- (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for representation and assistance of the parties if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expense of the Secretary-General of the PCA.

59. Arising out of the discussion on Article 37 and termination orders the point was made that the opening of Article 38 should provide for the fixing of costs in a termination order. In response the point was made that provision is made in paragraph (3) of Article 40 requiring the arbitral tribunal to fix the costs of arbitration referred to in Articles 38 and 39 when it issues an order for the termination of the arbitral proceedings. There was discussion on whether to bring these provisions from paragraph (3) of Article 40 into Article 38, as it will not be desirable to regulate the same issue twice in the Rules. Consequently it was suggested that Article 38 should provide for the fixing of costs by the arbitral tribunal in the case of: (1) an ordinary award; (2) an award on the basis of an agreed settlement; and, (3) on the making of an order for termination. Further, it was suggested that it would be useful to give power to an arbitral tribunal to make costs orders at any time. Doubt was expressed as to whether changes of this kind were desirable and it was also suggested that there was some logic in the distinction between the different situations addressed by Articles 38 and 40, respectively. At the conclusion of the discussion the consensus was to leave the provisions of draft Article 38 unamended.

Article 39

60. The proposed revised Article 39 is set out in Secretariat Note (¶38), as follows:

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority has issued or endorsed a schedule of fees for arbitrators in

international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case. **[38]**

3. Promptly after its constitution, the arbitral tribunal shall communicate to the parties the methodology which it proposes to follow for the determination of the fees of its members. In this decision on the costs of arbitration pursuant to article 38, the arbitral tribunal shall set forth the computation of the amounts due, consistent with that methodology. **[39]**
4. Within 15 days from the date any proposal or decision is communicated by the arbitral tribunal to the parties, any part may refer the matter to the appointing authority, or if no appointing authority has been agreed upon or designated, to the Secretary-General of the PCA, for final determination in accordance with the criteria in paragraph (1). Any modification to the fees decided by the appointing authority or the Secretary-General of the PCA shall be deemed to be part of the award. **[39]**

61. Issues were raised in relation to paragraph 39(2) and the use of the word “endorsed” with respect to a schedule of fees. It was agreed that this ambiguity would be resolved by replacing the words “has issued or endorsed” with the words “has issued or has stated it will apply”.
62. Concern was also raised in relation to the drafting of proposed paragraph 39(3).
63. The first issue raised was that the word “methodology” was ambiguous as it appears in the sentence “promptly after its constitution, the arbitral tribunal shall communicate to the parties the methodology which it proposes to follow for the determination of the fees of its members”. It was suggested that the relevant parts of this sentence should be replaced with the words “shall inform the parties how it proposes to determine”. Further, in the last sentence of paragraph 39(3) it was suggested that the words after “the tribunal shall” should be deleted and replaced with the words “state how it has to

computed its fees". These proposals for clarification were accepted by the Working Group.

64. The second issue raised in relation to draft paragraph 39(3) was in relation to the second sentence. The addition of "(a)" was suggested after the words "pursuant to Article 38". More importantly, concern was expressed about the substance of the sentence, the new language and the reference to "methodology". It was suggested that the difficulty in including these matters in rules such this is that it may provide a basis for challenging awards, with the challenger arguing that the procedure agreed by the parties, in this case under paragraph (3) of Article 39, has not been followed. Further, it was suggested that the difficulties contemplated in the latter part of this sentence are catered for in paragraph (4) of Article 39. The contrary position put was that there was an ever present risk of potential for abuse of expense claims by a member of an arbitral tribunal and that the language adopted in draft paragraph 39(3) would not, on this basis, provide a ground for a challenge. It was also suggested that it may be useful to specify the principles for charging for costs or expenses of members of an arbitral tribunal and that perhaps there could be a requirement for an explanation of costs and expenses under the provisions of paragraphs (b) and (c) of Article 38. The further point was made that a dissatisfaction with the manner in which fees, as distinct from costs and expenses, have been calculated is not something that it endangers the enforcement of an award as there is a procedure for challenging the arbitral tribunal's fee calculations under paragraph 39(4). It was noted, however, that the provisions of paragraph 39(4) may not be effective to protect against challenges under the applicable law.

65. The discussion then turned to the provisions of proposed paragraph 39(4) and the extent to which this “self-contained” challenge procedure under revised Article 39 would operate; and also the extent to which it might make challengers to the award based on non-compliance with the provisions of Article 39 unlikely. There was consensus that the paragraph 39(4) procedure would reduce the danger of challenges to arbitral awards. Nevertheless, concern was also expressed that these provisions provided for the final determination on fees under paragraph 39(1) by the appointing authority or the Secretary-General of the Permanent Court of Arbitration, where any fees were modified, to be deemed to be part of the award. The comment was also made that the process of review by an appointing authority may take some time and that there were no time limits provided for that review.
66. A final comment was made that there may be two additional situations where a party may seek a review by an appointing authority or the Permanent Court of Arbitration. It was said that there may be a requirement imposed by the arbitral tribunal for a deposit of money on account of fees and expenses which may be excessive and held with no recourse by the parties until the end of the arbitration. It was noted that there was no provision proposed in Article 39 or elsewhere to review the extent or reasonableness of these payments. It was also noted that in the event of an arbitrator retiring or dying no review has been provided for in relation to that arbitrator with respect to fees and expenses until the end of the arbitration proceeding.

Conclusion

67. It is hoped that this summary of the discussions of the Working Group at its last session, the fifty-first 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.

68. Reports on earlier sessions of the Working Group are available from the APRAG website (www.aprag.org) or the authors directly. Please do not hesitate to make contact if you have any comments or queries (ccroft@bigpond.com; christopher.kee@unibas.ch).

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30 October 2009
