United Nations A/CN.9/665

General Assembly

Distr.: General
30 September 2008

Original: English

United Nations Commission on International Trade Law
Forty-second session
Vienna, 29 June-17 July 2009

Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008)

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V.08-57077 (E) 031008 061008

I. Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.[1]

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("the UNCITRAL Arbitration Model Law"), as well as the use of the UNCITRAL Arbitration Rules ("the UNCITRAL Arbitration Rules" or "the Rules") and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[2] When the Commission discussed that topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).[3]

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated 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, 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 carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[4]

4. 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 define

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[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[2] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[3] Ibid., para. 338.

[4] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.

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 studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. 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 predefined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[5]

5. 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 was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made 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.[6]

6. 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 resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which 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, deal with the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[7]

7. At its fortieth session, the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[8] The Commission

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[5] Ibid., para. 185.
[6] Ibid., para. 186.
[7] Ibid., para. 187.
[8] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.

noted that broad support had been expressed in the Working Group 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. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.[9]

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take. After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.[10]

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its forty-ninth session in Vienna, from 15 to 19 September 2008. The session was attended by the following States members of the Working Group: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, Fiji, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Namibia, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Argentina, Belgium, Croatia, Dominican Republic, Finland, Hungary, Indonesia, Ireland, Jordan, Mauritius, Netherlands, Philippines, Portugal, Romania, Slovakia, Slovenia, Sudan, Sweden, Turkey, Ukraine, United Republic of Tanzania and Yemen.

11. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Permanent Court of Arbitration (PCA).

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[9] Ibid., para. 175.

[10] Report of the United Nations Commission on International Trade Law, Forty-first Session (A/63/17), para. 314.

12. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), *Association Suisse de l'Arbitrage* (ASA), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIArb), Construction Industry Arbitration Council – Singapore International Arbitration Centre (CIAC-SIAC), Corporate Counsel International Arbitration Group (CCIAG), Inter-American Bar Association (IABA), International Arbitral Centre of the Austrian Federal Economic Chamber, International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Law Institute (ILI), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators and *Union Internationale des Avocats* (UIA).

13. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland);

Rapporteur: Mr. Sainivalati Navoti (Fiji).

14. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.150); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules pursuant to the deliberations of the Working Group at its forty-sixth to forty-eighth sessions (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1 and A/CN.9/WG.II/WP.152).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Arbitration Rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1 and A/CN.9/WG.II/WP.152). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group.

IV. Revision of the UNCITRAL Arbitration Rules

17. The Working Group recalled that it had concluded a first reading of the revised version of the Rules at its forty-eighth session and that it had commenced its second reading of articles 1 and 2. The Working Group agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.151 and the proposed revisions contained therein.

Section I. Introductory rules

Scope of application

Article 1

Paragraph (1)

18. The Working Group considered paragraph (1). A concern was expressed that the deletion of the requirement that the arbitration agreement be in writing might create difficulties in practice, and therefore there should be convincing evidence indicating the existence of such agreement. In response, it was recalled that the Working Group had agreed to delete the writing requirement (A/CN.9/646, para. 71), in view of the fact that some legal systems and a number of arbitration rules did not require an arbitration agreement to be in writing (see A/CN.9/614, para. 29 and A/CN.9/619, paras. 28-29). It was observed that the Rules did not take a stand on the form of the arbitration agreement, as it was preferable that that matter be regulated by applicable law. After discussion, the Working Group adopted paragraph (1) as contained in document A/CN.9/WG.II/WP.151, without any modification.

Paragraph (1 bis) – Applicable version of the UNCITRAL Arbitration Rules

19. The Working Group considered paragraph (1 bis), which established a deeming provision on the applicable version of the Rules. As a matter of drafting, it was suggested to replace the word “another” in the first line of the paragraph with the words “a particular”, in order to clarify that the will of the parties would in all circumstances prevail. That proposal was adopted.

Paragraph (2)

20. The Working Group adopted the substance of paragraph (2), without any modification.

Model arbitration clause for contracts

“may wish to” – “should”

21. The Working Group considered a proposal to replace the words “may wish to consider” appearing in the chapeau of the note to the model arbitration clause with the words “should consider”, in order to emphasize the importance for the parties of considering inclusion of the elements listed. A concern was expressed that such replacement might have an impact on the validity of the clause if the parties did not include one of the matters listed in their arbitration agreement. After discussion, the

Working Group agreed that the concern was unfounded and decided to replace the words "may wish to" with the word "should". The substance of the model arbitration clause was adopted without any further modification.

Placement

22. It was observed that the model arbitration clause appeared in the 1976 version of the Rules as a footnote to the writing requirement contained in article 1, paragraph (1). Following the deletion of that requirement, the Working Group agreed that it would consider later whether to place the model arbitration clause at the end of the Rules, together with other model provisions such as model statements of independence.

Notice, calculation of periods of time

Article 2

Paragraphs (1) and (1 bis)

23. The Working Group recalled that it had agreed to expressly include in the Rules language which authorized both electronic as well as other traditional forms of communication (A/CN.9/619, para. 50). It was said that, although the 1976 version of the Rules did not preclude electronic communications, it might be helpful for the revised Rules to provide clear guidance to their users on that question. Especially since paragraph (1) relied on notions such as the notification being "physically delivered to the addressee" or "delivered at its habitual residence", a clear reference to electronic communications was necessary to avoid arguments as to whether all means of communication, including dematerialized communications, were intended to be covered by the Rules.

24. The discussion focused on the interplay between paragraphs (1) and (1 bis) and the manner in which the provisions should be restructured to provide additional clarity regarding their purposes and avoid possible overlap. It was pointed out that paragraph (1) was intended to create a presumption (in the form of a deeming provision) regarding the receipt and delivery of a notice of arbitration. Paragraph (1 bis) established a list of the actual modes of communication acceptable for delivering such notice. Various proposals were made to clarify the functions served by the two provisions.

25. One proposal was to delete paragraph (1 bis) and to include in paragraph (1) wordings catering for electronic communication, along the following lines: "For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered (including by electronic communication that provides a record of its transmission) at its habitual residence, place of business, or designated address." An alternative proposal was to use instead of the words "electronic communication" the words "any form of communication", which were said to encompass all possible modes of communication, including both future means of telecommunication and currently existing techniques, such as telefax, that were rapidly becoming obsolete.

26. Another proposal was to clarify that communication could be sent to a postal or an electronic address by amending paragraph (1) along the following lines: "or if

it is delivered at its habitual residence, place of business, mailing or designated electronic address". While that proposal drew on terminology used in the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, it was objected to on the grounds that it might require extensive explanations and the use of additional concepts, such as "data message" which was found unnecessary in the context of the Rules.

27. In favour of maintaining two separate paragraphs, it was observed that it might not be advisable to combine a rule establishing which means of communication might be used by the parties with a rule indicating the conditions under which a presumption as to receipt might flow from the use of such means of communication. A proposal was made to retain paragraph (1 bis) without modification. Another proposal was to amend paragraph (1 bis) to avoid listing specific means of communication and enlarge its scope along the following lines: "Any notice, including a notification, communication or proposal may be delivered by any means of communication, including electronic communication, that provide a record of its transmission." A concern was expressed that the reference to a record of transmission raised a number of technical and legal difficulties that could not be addressed in the context of the Rules. In response, it was observed that comparable wording had been used by some arbitral institutions in their international arbitration rules, as well as in other UNCITRAL instruments, such as the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, apparently without giving rise to practical difficulties.

28. As a matter of structure, it was suggested that it was preferable first to describe the acceptable means of communication, as currently laid out in draft paragraph (1 bis), and only thereafter to provide for a presumption regarding receipt of a notice of arbitration delivered through such means of communication. For that reason, it was proposed to reverse the order of the paragraphs. That proposal received support.

29. After discussion, the Working Group agreed to include a paragraph dealing with the means of communication that the parties might use under the Rules, and to ensure that all means of communication would be acceptable under the Rules. For that purpose, the Working Group agreed to reverse the order of paragraphs (1) and (1 bis). The first paragraph would be drafted so as to reflect the principle that a notice might be delivered by any means that provided a record of its transmission. The second paragraph would reflect the principle that, if a notice was not delivered to the addressee in person, it might be delivered at its habitual residence, place of business or at any other address identified by the addressee for the purpose of receiving such a notice "or, if none of these can be found after making reasonable inquiry, at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered".

30. The Working Group requested the Secretariat to draft a revised version of paragraphs (1) and (1 bis), taking account of the principles agreed to by the Working Group.

Paragraph (2)

31. The Working Group adopted paragraph (2) in substance, without any modification.

Notice of arbitration and response to the notice of arbitration

Article 3

32. It was observed that article 3 dealt with both the notice of arbitration and the response to the notice of arbitration, and it might be preferable to insert the provisions on the response to the notice of arbitration in a separate article.

Paragraph (1)

33. With respect to paragraph (1), a proposal was made to replace the word "give" by the word "deliver", in order to align the wording of article 3 with article 2. That proposal did not find support. Another proposal was to include the appointing authority as a recipient of notice. No support was expressed for that inclusion. It was noted, however, that there was no objection to a party including the appointing authority in the notice of arbitration.

34. The Working Group adopted paragraph (1) in substance, without any modification.

Paragraphs (2) and (3)

35. The Working Group adopted paragraphs (2) and (3) in substance, without any modification.

Paragraph (4)

Subparagraph (c)

36. The Working Group considered whether the option for the claimant to communicate its statement of claim together with the notice of arbitration should be retained. A proposal was made to delete subparagraph (c) and to insert the following sentence at the end of article 3, paragraph (1): "The claimant may elect to treat its notice of arbitration in article 3, paragraph (3) as a statement of claim." The proposal to insert such provision in paragraph (1) was opposed on the ground that the decision to treat the notice of arbitration as a statement of claim should only be required after the respondent had submitted its response. Otherwise, the claimant would not know whether it should further develop its position. The Working Group agreed to delete subparagraph (c), and to include the proposed sentence in article 18.

37. Subject to the deletion of subparagraph (c), the Working Group adopted the substance of paragraph (4) without modification.

Paragraph (5)

38. The Working Group agreed to delete the words "to the extent possible" in square brackets in the chapeau of paragraph 5.

Subparagraph (a)

39. It was observed that there might be a contradiction between subparagraph (a), which required the respondent to include in its response to the notice of arbitration a plea on lack of jurisdiction, and article 21, paragraph (2) of the Rules which required that such a plea be raised no later than in the statement of defence. Thus, it

was suggested to delete subparagraph (a). In response, it was proposed to remove subparagraph (a) from paragraph (5) and place it under paragraph (6), which listed optional items that might be included in the response to the notice of arbitration. That proposal was adopted by the Working Group.

40. The Working Group adopted the substance of paragraph (5) with the modifications agreed to in paragraph 39 above and paragraph 67 below.

Paragraph (6)

41. The Working Group adopted the substance of paragraph (6) with the inclusion of the provision removed from paragraph (5) (a) (see above, paras. 39 and 40).

Paragraph (7)

42. A suggestion was made to replace the word "impeded" by the word "hindered". That suggestion found broad support and the Working Group adopted paragraph (7) with that modification.

Representation and assistance

Article 4

43. Broad support was expressed for the retention of the text between square brackets, which was viewed as capturing the different approaches in different legal systems for administering proof of authority and to promote good practice for international arbitration.

44. It was suggested to replace the words "the parties" at the beginning of paragraph 4 with the words "each party" and the words "by them" with the words "by it". In the second sentence, it was further suggested to include the tribunal as an additional recipient of the communication after the word "parties". Both suggestions found broad support.

45. The Working Group adopted article 4 with the above-stated modifications.

Designating and appointing authorities

Article 4 bis

46. The provision tentatively numbered article 4 bis expressed the principle that the appointing authority could be appointed by the parties at any time during the arbitration proceedings, and not only in circumstances provided for in the 1976 version of the Rules. It also sought to clarify for the users of the Rules the importance of the role of the appointing authority. The Working Group confirmed the principle of including in the Rules a provision addressing the respective roles of the designating and appointing authorities.

47. The Working Group recalled the discussions at its forty-sixth session, where a proposal had been made to provide as default rule that, if the parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration ("PCA") should act directly as the appointing authority, instead of designating an appointing authority (A/CN.9/619, para. 71). It was further stated that to address concerns expressed on that proposal (A/CN.9/619, para. 72), an additional proposal had been made that such a default rule should not apply when

the parties expressly agreed that the Secretary-General of the PCA should not act as an appointing authority or where, given the circumstances, the Secretary-General of the PCA considered that another appointing authority should be appointed.

48. The above proposals were reiterated. In support of including the proposed default rule, it was stated that it provided the parties with a simple, streamlined and efficient procedure. The representative of the PCA reiterated the agreement of its Secretary-General to perform the functions provided for in the draft revised Rules, and would be ready to perform the functions of appointing authority in case the parties would not have agreed on an appointing authority. The representative of the PCA also reminded the Working Group of the report of the Secretary-General of the PCA on its activities under the UNCITRAL Arbitration Rules since 1976 made at the fortieth session of the Commission (A/CN.9/634).

49. The Working Group recalled that, at its forty-sixth session, the prevailing view had been, however, that the proposal constituted a major and unnecessary departure from the existing UNCITRAL Arbitration Rules (A/CN.9/619, paras. 72 and 74). Diverging views were expressed whether that question should be debated again in the Working Group.

50. After discussion, the Working Group agreed that that question might need to be re-examined after completion of the second reading of the Rules, on the basis of a written proposal to be submitted to the Secretariat in time for translation before the next session of the Working Group. The view was also expressed that, whether or not consensus could be reached in the Working Group regarding a possible default rule, the matter was of political nature and could only be settled by the Commission.

Paragraph (1)

51. The Working Group agreed to clarify in paragraph (1) that the Secretary-General of the PCA was expressly entitled to act as an appointing authority under the Rules by including a reference to the Secretary-General of the PCA as one example of an institution that could serve as appointing authority. As a matter of drafting, it was proposed to add the words “at The Hague” to the title of the “Secretary-General of the Permanent Court of Arbitration”. With those modifications, paragraph (1) was adopted in substance by the Working Group.

Paragraph (2)

52. The Working Group adopted the substance of paragraph (2), without any modification.

Paragraph (3)

53. The Working Group adopted the substance of paragraph (3), without any modification.

Paragraph (4)

54. The Working Group agreed to delete the words “to the extent it considers possible” in the first sentence of paragraph (4), and to add, at the end of that first

sentence, the words “in any manner it considers appropriate”, in order to better reflect the discretion of the appointing authority in obtaining views from the parties.

Paragraph (5)

55. The Working Group adopted the substance of paragraph (5), without any modification.

Paragraph (6)

56. The Working Group adopted the substance of paragraph (6), without any modification.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 5

57. The Working Group considered the two options on the number of arbitrators contained in article 5, which reflected the discussions of the Working Group at its forty-sixth session (A.CN.9/619, paras. 79-82). Both options received support.

58. Option 1 provided that if the parties did not agree on the number of arbitrators within 30 days after the receipt by the respondent of the notice of arbitration, three arbitrators should be appointed. Support was expressed for that option on the ground that a default rule providing for a three-member arbitral tribunal might enhance the legitimacy of the arbitral tribunal and better guarantee impartiality and fairness of the proceedings, in the situation where parties could not agree on the number of arbitrators. It was observed that in complex arbitration cases, a default rule requiring one arbitrator might not be workable. It was pointed out that a three arbitrator default rule solution most closely reflected the 1976 version of the Rules, as well as the solution contained in article 10, paragraph 2, of the UNCITRAL Arbitration Model Law.

59. Option 2 provided that if the parties did not reach agreement on the number of arbitrators, one arbitrator should be appointed, unless either the claimant, in its notice of arbitration, or the respondent, within 30 days after receipt of the notice of arbitration, requested that three arbitrators should be appointed. Support was expressed for option 2 on the ground that it reduced the risk of imposing three-member arbitral tribunals in cases involving small claims. In support of that argument, it was observed that the UNCITRAL arbitration cases that were brought to the attention of the PCA often related to disputes involving small claims, where a default rule of three arbitrators might be overly burdensome for the parties. It was observed as well that option 2 was particularly useful in cases where a party failed to participate in the process, since it provided the other party the opportunity to decide on the number of arbitrators. However, it was observed that option 2 might create an unbalanced situation between the parties, as the claimant had to decide, at the stage of the notice of arbitration, whether to opt for a three-member arbitral tribunal, whereas the respondent might do so at the later stage of its response to the notice of arbitration, when the degree of complexity of the dispute would be more clearly identified.

60. An alternative proposal was made that, if the parties were unable to agree on the number of arbitrators, that number should be determined by the appointing authority. The Working Group recalled that it had rejected a similar proposal at its forty-fifth (A/CN.9/614, para. 60) and forty-sixth (A/CN.9/619, para. 80) sessions for the reason that involving an appointing authority at such an early stage of the arbitral proceeding could create unnecessary delays.

61. After discussion, the Working Group did not reach consensus in favour of either option, and for that reason decided that the default rule, as contained in article 5 of the 1976 version of the Rules should be maintained, with necessary adjustments to ensure consistency of article 5 with other revised articles of the Rules.

Role of the appointing authority for the determination of the number of arbitrators

62. Concern was raised that in practice, the default provision of article 5 of the 1976 version of the Rules created situations where, despite the claimant's proposal in its notice of arbitration to appoint a sole arbitrator, a three-member arbitral tribunal had to be constituted due to the respondent's failure to react to that proposal. A suggestion was made to add a new provision either under article 5 or article 7 to cope with that specific situation where the parties had not previously agreed on the number of arbitrators and the respondent failed to respond to the claimant's proposal to appoint a sole arbitrator. In those circumstances, and in case the respondent failed to appoint a second arbitrator, it was suggested that the appointing authority might, at the request of the claimant, appoint a sole arbitrator, if it determined that, in view of the circumstances of the case, this would be more appropriate.

63. That suggestion received support and was said to provide a useful corrective mechanism in case the respondent did not participate in the process and the arbitration case did not warrant the appointment of a three-member arbitral tribunal. In addition, it was noted that the suggested provision would not create delays, as in any case the appointing authority was requested to intervene in the appointment process. It was observed that according to article 4 bis, paragraph (5), the appointing authority would have all relevant information to make its decision on the number of arbitrators. Concerning the placement of that new provision, preference was expressed for its inclusion as a new paragraph to article 5, instead of article 7, because that would more logically follow the order of the provisions.

64. After discussion, the Working Group requested the Secretariat to draft a provision reflecting the above proposal for consideration at its next session.

Consistency between article 3 (5) (d) and article 5 on time limits for the determination of the number of arbitrators

65. It was observed that article 3 (5) (d) contained a provision on the number of arbitrators to be proposed by the respondent, a provision under which the respondent enjoyed a 30-day time limit to make its proposal on the number of arbitrators. In contrast, article 5 provided for a period of 15 days from the notice of arbitration within which the parties should agree on the number of arbitrators, failing which, the default rule would apply. It was said that the inconsistency of time limits contained in those two articles needed to be addressed.

66. In that respect, various proposals were made. One proposal was to provide that the 15-day time limit under article 5 should commence from the expiration of the time limit for the response to the notice of arbitration. That additional time period was said to be necessary to allow further exchange between the parties on that question. In response, it was observed that that additional time period of 15 days might not be necessary, as the 30-day limitation provided for the response to the notice of arbitration under article 3, paragraph (5) was sufficient to allow parties to try to find an agreement on that question. It was therefore proposed to avoid mentioning any time limit in article 5 as that article would apply once the parties had already an opportunity to exchange the notice of arbitration and the response to it.

67. After discussion, the Working Group agreed that article 3, paragraph (5) (c) should be amended to include a reference to article 3, paragraph (3) (g), which would put it beyond doubt that the respondent should provide a response to the claimant on the number of arbitrators. As a consequence, article 3, paragraph (5) (d) would be deleted. In addition, it was agreed to provide under article 5 that the three-arbitrator default rule would apply if the parties failed to reach an agreement on the number of arbitrators within the 30-day time limit provided for responding to the notice of arbitration under article 3, paragraph (5).

Appointment of arbitrators

Article 6

68. It was observed that the words “at the request of a party” were included in paragraph (2), but were omitted in paragraph (1). For the sake of consistency, it was agreed to include those words at the end of paragraph (1) and to delete them from both the first sentence of the chapeau to paragraph (2), and paragraph (2) (a). With those modifications, the Working Group adopted the substance of article 6.

Article 7

69. The Working Group adopted article 7 in substance, without any modification.

Article 7 bis

70. It was observed that article 7 bis did not contain any limitation of time. In response, it was said that it was not necessary to include a time limit under article 7 bis, as there was no need to provide for specific deadlines applicable to the appointment of arbitrators in multiparty arbitration. It was further observed that the provision contained in article 7 bis was commonly found in international arbitration rules of other arbitral institutions, and did not create any difficulty in practice.

71. The Working Group adopted article 7 bis in substance, without any modification.

Article 8

72. The Working Group recalled that it had agreed to the deletion of article 8, the substance of which had been placed in article 4 bis on the designating and appointing authorities (A/CN.9/619, para. 94).

Challenge of arbitrators (Articles 9 to 12)

Article 9

Title

73. The Working Group agreed to include in the title of the section the words "Disclosures by and", in order to better reflect the content of article 9.

Members of the arbitral tribunal

74. The Working Group agreed to add the words "and the other members of the arbitral tribunal" after the word "parties" in the second sentence of article 9 to clarify that an arbitrator should disclose not only to the parties, but also to the other members of the arbitral tribunal, circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. With that modification, the Working Group adopted article 9 in substance.

Model statements of independence

75. The Working Group recalled that it had agreed at its forty-sixth session that guidance should be provided in the Rules on the required content of disclosure, in the form, for instance, of a model statement of independence attached as a footnote to article 9 or in any accompanying material (A/CN.9/619, paras. 96-99).

Title

76. The Working Group agreed that the model statements of independence should be entitled "Model statements pursuant to article 9 of the Rules".

"Impartial and independent"

77. Concern was expressed that the model statements of independence were not fully consistent with article 9, as the first sentence of both statements contained a declaration on the independence of the arbitrator, but omitted a reference to his or her impartiality. After discussion, the Working Group agreed that the first sentence of both statements should read: "I am impartial and independent of each of the parties and intend to remain so."

Content of the statements

78. It was said that it might not be appropriate that the first statement combined a situation where "no circumstances to disclose" were identified and a subjective approach based on a declaration by the arbitrator that, in his or her opinion, circumstances should not give rise to justifiable doubt as to his or her independence and impartiality, and that in the second statement, the relations and circumstances which would be mentioned should, *a contrario*, necessarily be considered as likely to give rise to justifiable doubts. It was suggested that to better distinguish between the two statements, the first one should more clearly focus on the absence of any relation between the arbitrator and the parties. It was proposed that the second sentence of the first statement of independence should be replaced by wording along the following lines: "To the best of my knowledge, there are no past or present professional, business or other relationships with the parties, or any other circumstances that might cause a party to question my impartiality or

independence". In response, it was said that the inclusion of such language in the first statement was unnecessary and would be too far-reaching. The Working Group did not adopt that proposal.

79. With a view to alleviating the above concern, the Working Group agreed to add in the second statement of independence entitled "circumstances to disclose", an additional sentence after the words "[include statement]" along the following lines: "Nevertheless, I do not regard such circumstances as likely to give rise to justifiable doubts as to my impartiality or independence."

80. The Working Group adopted the two model statements of independence in substance, with the agreed amendments mentioned in the preceding paragraphs.

Article 10

81. The Working Group adopted article 10 in substance, without any modification.

Article 11

Paragraph (1)

82. A suggestion was made to add the words "should have been known" at the end of paragraph (1) to ensure that a notice of challenge sent 15 days after the date a party should have known the circumstances triggering the challenge would not be admissible. In response, it was said that it would be for the party that challenged the arbitrator to determine when the circumstances were actually known. It was observed that that matter would be better dealt with under article 12, paragraph (2), which related to the appointing authority making that determination. The Working Group agreed not to include the proposed words in paragraph (1) and to consider whether the Rules should include a provision based on imputed knowledge of circumstances giving rise to the challenge when discussing article 12, paragraph (2) (see below, paras. 99-102).

83. The Working Group adopted paragraph (1), without any modification.

Paragraph (2)

84. The Working Group agreed to delete the words in brackets "shall be in writing and" and, with that modification, adopted paragraph (2) in substance.

Paragraph (3)

"[all other parties] [the party or parties that appointed the challenged arbitrator]"

85. The Working Group considered whether, where a party challenged an arbitrator, the agreement of all parties should be required for the challenge to be successful, or whether the agreement of the party that appointed the challenged arbitrator was sufficient. Strong support was expressed for requiring the agreement of all parties. It was said that that solution would be consistent with the one adopted in the 1976 version of the Rules, where "the other party" was required to agree. It was recalled that the words "all parties" had been proposed to cater for multi-party arbitration.

86. In favour of requiring the agreement of the party or parties that appointed the challenged arbitrator, it was said that in a case with two respondents, if one of them

challenged the arbitrator appointed by a single claimant, the effect of requiring all parties to agree would be to give the second respondent a provisional veto over the challenge. This would force the challenging party to bring its challenge before an appointing authority, despite the willingness of the claimant that had appointed the challenged arbitrator to accept the challenge. That situation might arise where, for instance, a respondent would have tactical reasons to delay the arbitral proceedings by forcing a lengthier challenge process. It was said that there might be a need to provide for additional language to deal with the case where the challenged arbitrator was either the sole or presiding arbitrator.

87. In response, it was observed that once a party appointed an arbitrator, that party should not retain a greater stake in the future service of that arbitrator in the proceedings. It was said that differentiating among the arbitrators based on who appointed them would run contrary to the fundamental principle whereby all arbitrators were equally appointed for the overall purpose of the arbitration. It was also said that requiring the agreement of the party or parties that appointed the challenged arbitrator would add an unnecessary layer of complexity to cope with situations that occurred infrequently in practice, since arbitrators would normally consider voluntarily withdrawing. Moreover, it was contended that if agreement of only the appointing authority was required for a successful challenge, then a party would have an absolute right to challenge or remove an arbitrator appointed by it. It was further contended that, as a practical matter, the proposal to require all parties to agree to a challenge was better adapted for challenges to sole or presiding arbitrators not appointed by a party.

88. After discussion, the Working Group agreed to insert the words “all parties” as proposed in the first bracketed option of the first sentence of paragraph (3).

Termination of the mandate of the arbitrator

89. The Working Group considered whether it should be expressly clarified in paragraph (3) that once the parties agreed on the challenge, the mandate of the arbitrator would terminate whether or not the challenged arbitrator agreed to withdraw. It was said that if that addition was made, the words “and the challenged arbitrator does not withdraw” could be omitted from article 12 (see below, paragraphs 94-98). That proposal was seen as providing an opportunity to better clarify the date when the arbitrator’s removal would take effect. It was observed that that question was important in practice, namely when the challenge occurred during the arbitral proceedings, when, for instance, provisional measures were to be taken by the arbitral tribunal.

90. Objections were expressed to that proposal on the ground that in certain jurisdictions, the applicable law included statutory provisions on the mandate of the arbitrators, which could not be merely terminated by agreement of the parties. The Working Group noted that the absence of an express reference to the termination of the mandate of the arbitrator did not seem to have created much difficulty in practice and that an additional statement on the termination of the arbitrator’s mandate was therefore unnecessary.

91. The Working Group agreed that the last sentence of paragraph (3) should be deleted as it was redundant with the provision of article 13, paragraph (1), which contained a generic provision on procedures in case of replacement of an arbitrator.

With a view to providing clarity regarding the removal of the arbitrator and the applicable procedure, the Working Group agreed to include a sentence at the end of paragraph (3), along the following lines: "In both cases, the arbitrator shall be replaced by the procedure in article 13". The Working Group agreed that similar language should be included in article 12. It was noted that such language might not be necessary in articles 11 and 12 if adequately dealt with in article 13.

92. After discussion, the Working Group adopted paragraph (3) with the modification mentioned in paragraphs 88 and 91 above.

Article 12

Paragraph (1)

"any party"

93. Consistent with the decision made under article 11, paragraph (3), the Working Group agreed to insert the words "any party" in the first sentence of paragraph (1), after the words "the notice of challenge," (see above, paras 85-88).

"and the challenged arbitrator did not withdraw"

94. A concern was expressed that, as currently drafted, paragraph (1) might create a risk that, in the exceptional situation where an arbitrator would refuse to withdraw despite the parties having agreed on the challenge, such refusal would prevent the parties from pursuing the challenge. To avoid that risk, it was suggested that the word "and" should be replaced by the word "or".

95. Objections were raised against replacing "and" by "or" for the reason that the 1976 version of the Rules used the word "and" and that language had never created difficulties.

96. In support of the suggested replacement, it was observed that the word "or" would better mirror the structure of article 11, paragraph (3), which referred in its first sentence to the situation where all parties agreed to the challenge, and in the second sentence, provided that the arbitrator might withdraw from his or her office. It was said that in the situation where all parties agreed on the challenge, but the challenged arbitrator refused to withdraw, he or she would nevertheless be removed from office without the need to continue with the challenge procedure. Therefore, the use of the word "or" would clarify the applicable procedure.

97. After discussion, the Working Group agreed to replace the word "and" appearing after the words "to the challenge" in the first sentence of paragraph (1) by the word "or".

98. With the modifications mentioned above, the Working Group adopted paragraph (1). The Secretariat was requested to examine whether drafting simplifications could be made in that paragraph.

Paragraph (2)

99. It was observed that paragraph (2) was not contained in the 1976 version of the Rules, and that its purpose was to deal with potential abuse by a party of the challenge procedure, with the aim to delay the arbitral proceedings. Support was expressed for the idea that the appointing authority should be able to consider the

factor described in paragraph (2) in making its decision concerning whether to accept or reject a challenge.

100. Strong concerns were raised that paragraph (2) would be difficult to apply in practice. It would put the appointing authority in the situation where it had to determine whether the challenging party ought to have known the grounds for challenge at an earlier stage of the procedure, a determination that would suppose inquiries that might be impractical for the appointing authority to perform. It was pointed out that there was no need for that provision, since the appointing authority had, in any case, the discretion to reject a challenge on any ground it deemed appropriate, including in the case covered in paragraph (2). It was said that paragraph (2) might have the unintended effect of limiting the grounds on which the appointing authority might reject a challenge. It was said that an additional unintended effect of that provision was that a party might feel compelled to bring claims prematurely, in order to avoid the foreclosure effect of the provision. That effect would create particular difficulties in arbitration cases involving States, which were usually reluctant to enter into challenge procedures, unless and until the accuracy of serious allegations would be ascertained.

101. In addition, it was observed that the inclusion of a mechanism based on imputed knowledge would constitute a novelty in the Rules, and might lead to potential inconsistencies with other provisions of the Rules, such as for instance, article 30 on waiver to object, which was based on a concept of actual knowledge.

102. After discussion, the Working Group agreed to delete paragraph (2).

Replacement of an arbitrator

Article 13

Paragraph (1)

103. The Working Group considered paragraph (1), which established a general rule on the replacement procedure to be applied, when it was necessary to appoint a substitute arbitrator during the course of the arbitral proceedings. The Working Group agreed that the reference to articles 6 to 9 should be replaced by a reference to articles 6, 7 and 7 bis. The Working Group adopted the substance of paragraph (1), without any further modification.

Paragraphs (2) and (3)

104. Paragraphs (2) and (3) addressed the procedure applicable to the replacement of an arbitrator in case the arbitrator to be replaced resigned for invalid reasons, refused or failed to act or was successfully challenged. Paragraph (2) provided that in the event that an arbitrator had resigned for invalid reasons or refused or failed to act, the appointing authority might, if so requested by a party, either replace that arbitrator or authorize the other arbitrators to proceed with the arbitration and make any decision or award. Paragraph (3) provided that in those circumstances as well as in the event of successful challenge under article 12, the appointing authority should decide whether itself to proceed with the appointment of the substitute arbitrator.

105. It was observed that those two paragraphs required careful consideration as they both had the consequence of depriving the parties of the fundamental right to appoint an arbitrator. Therefore, it was said that safeguards should be provided in those paragraphs to ensure that they would apply only in exceptional circumstances.

106. It was observed that paragraph (2) dealt with situations that differed in nature, some of which implied misconduct from either the parties or members of the arbitral tribunal, while others involved the arbitrator being prevented from performing his or her functions for legitimate reasons. It was observed that there was a need to better delineate the cases that triggered the application of the exceptional procedure referred to in paragraph (2) and to distinguish the consequences attached to those cases depending on their nature. The Working Group reviewed the various situations dealt with under paragraphs (2) and (3), and then proceeded to discuss the impact of those situations on the replacement procedure to be applied.

Situations triggering the application of exceptional procedures for the replacement of an arbitrator

107. The Working Group first considered the situation where an arbitrator would refuse or fail to act, and therefore would not exercise its functions, for any reason, not necessarily tainted by misconduct. The attention of the Working Group was drawn to objective situations where the appointing authority would need to make the appointment, for example, where a court decision or another public authority enjoined an arbitrator from participating in the proceedings. In response to a question whether, in such circumstances, the Rules should distinguish between temporary and long-lasting absence of the arbitrator, it was observed that such a distinction might complicate the mechanism and was not commonly used in international arbitration rules. It was observed that article 13, paragraph (2) of the 1976 version of the Rules simply provided that the procedure in respect of the challenge and replacement of an arbitrator should apply. It was pointed out that a similar provision was found in article 14 of the UNCITRAL Arbitration Model Law.

108. For the sake of consistency in the structure of articles 12 and 13 of the Rules, it was suggested that a paragraph should be added under article 12 to the effect that, in the event an arbitrator failed to act or in the event of de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge should apply. That proposal was adopted by the Working Group.

109. As to the situation where an arbitrator had to be replaced due to resignation or failure or refusal to act for invalid reasons, concerns were expressed regarding the reference to “invalid reasons”. The word “invalid” was said to be vague and open to divergent interpretations. Various alternative wordings were proposed, such as “insufficient”, “untenable”, “unwarranted”, “unjustified”, or “objectively frivolous”. It was observed that, in a slightly different formulation, the notion of validity of grounds was used in other UNCITRAL instruments, such as in article 14, paragraph (2), of the UNCITRAL Arbitration Model Law, which had not resulted in difficulties of interpretation. A suggestion was made to use positive wording along the lines of “without valid reasons” to emphasize that the withdrawing arbitrator should provide reasons for his or her withdrawal. It was suggested to establish an even higher standard by including words, such as, “manifestly” before “without valid reasons” and “in exceptional circumstances”.

110. A proposal was made to refer to the notion of "improper conduct" which was said to better encompass the situations of abuse and manipulation, which might not be covered by the notion of "invalid reasons". That proposal was objected to on the grounds that, together with some of the above-suggested alternative language, a reference to "improper conduct" implied a subjective assessment of the conduct of the arbitrator by the appointing authority, which might run counter to the goal of predictability and consistency in the application of the Rules, particularly where less experienced appointing authorities were involved. It was said that the language used should clarify which situation would trigger the intervention of the appointing authority, instead of referring to faulty behaviour of a party.

Discretion of the appointing authority to appoint a substitute arbitrator and truncated tribunal

111. It was observed that it was possible either to opt for a generic description of the cases where a party should be deprived of a right to appoint the substitute arbitrator or to enumerate such cases. Some support was expressed for adopting a generic approach granting the appointing authority broad discretion in its decision whether itself to proceed with the replacement of the arbitrator, subject to clarification that such discretion would only exist in exceptional circumstances. It was stated that the need for direct appointment of an arbitrator might arise in a variety of situations, not limited to the misconduct of a party or an arbitrator. A view was expressed that, whether or not a specific provision was adopted under article 13, the discretion of the appointing authority, as generally recognized by the Rules, was sufficiently broad to allow it to replace an arbitrator.

112. Diverging opinions were expressed on whether the appointing authority should be allowed more broadly to itself proceed with the appointment of a substitute arbitrator. It was observed that depriving a party of its right to appoint an arbitrator should only occur as a matter of sanction in case a party or an arbitrator misbehaved. In response, it was said that that provision dealt with replacing an arbitrator in the most efficient manner, and was therefore not connected to the notion of sanction. In support of enumerating the cases where a party would be deprived of a right to appoint a substitute arbitrator, it was said that such listing would provide more safeguards to the parties. The prevailing view, however, was that a provision allowing an appointing authority to proceed with the direct appointment of an arbitrator should not extend beyond the cases of improper conduct and should remain generic so as to cover all possible instances.

113. It was stated that the provision in paragraph (2) on a truncated tribunal should focus on the rare circumstances in which the truncated tribunal mechanism would apply. It was agreed that a provision should indicate what kind of conduct would trigger the mechanism, and at what point the mechanism could begin to operate (i.e., only after the conclusion of the hearings or possibly earlier). It was agreed that a provision allowing the appointing authority to opt for a truncated tribunal should include all necessary limitations so as to ensure that it might only happen in exceptional circumstances, and taking account of the stage of the proceedings. It was observed that other international arbitrational rules regulated the matter of a truncated tribunal, including the arbitration rules of the International Chamber of Commerce ("ICC rules") and of the American Arbitration Association ("AAA rules"). It was recalled that article 10 of the AAA rules provided, inter alia,

that the administrator should determine whether there were sufficient reasons to accept the resignation of an arbitrator.

114. It was suggested that the mechanism should apply within strict time limits, for example, only once the hearings were closed. It was observed that under the ICC rules, the decision to establish a truncated tribunal was only possible at the closure of proceedings. In response, it was recalled that one of the purposes of the revision of the UNCITRAL Arbitration Rules was to include more time flexibility to establish a truncated tribunal, in order to address the difficulties arising in practice with arbitrators' withdrawals throughout the arbitral proceedings.

Proposal

115. In order to address the various concerns expressed regarding paragraphs (2) and (3), a proposal was made to replace those two paragraphs by a provision, which would read along the following lines: "If, on the application of a party, the appointing authority determines that the need for replacement of an arbitrator was caused by improper conduct in circumstances that justify a party's not having the right to appoint the substitute arbitrator, then the appointing authority may, after giving an opportunity to the parties, the arbitrators, and the arbitrator being replaced to express their views: (a) proceed itself to make the appointment of the substitute arbitrator; or (b) if the same occurs at the late stage of the proceedings, authorize the other arbitrators to proceed with the arbitration and make any decision or award."

116. That proposal received broad support. However, a number of observations were made regarding its formulation. It was observed that that proposal referred to the notion of "improper conduct in circumstances", which might be too vague a concept. It was proposed to refer instead to a "conduct justifying a party being deprived of the right to appoint a replacement arbitrator". It was noted that referring to a party being deprived of "the right" to appoint a substitute arbitrator might be inappropriate and that the notion might be better captured using the word "opportunity" instead of "right". A variant of that proposal was to replace the words "improper conduct in circumstances" by the words "an attempt to obstruct the proceedings". It was pointed out that a general reference to "improper conduct" did not clarify whose conduct was at stake, which might imply the arbitrators only or the parties as well. In response, it was observed that it might be appropriate for the appointing authority itself to appoint the arbitrator or authorize a truncated tribunal if there was improper conduct of an arbitrator in the circumstances that justified a party not having the right to appoint a substitute arbitrator. It was suggested that a reference to "exceptional circumstances" should be added to better qualify the conditions under which the provisions of subparagraphs (a) and (b) would apply. The need to provide the replaced arbitrator with an opportunity to be heard was questioned. It was stated that the notion of "late stage in the proceedings" was ambiguous and should be replaced with a more specific concept, such as the "closure of the proceedings" or "a substantially advanced stage of the proceedings".

117. After discussion, the Working Group requested the Secretariat to provide a revised draft of the proposal referred to above in paragraph 115, for consideration by the Working Group at a later stage.

Repetition of hearings in the event of the replacement of an arbitrator

Article 14

118. The Working Group adopted the text of article 14 in substance, without any modification.

Section III. Arbitral proceedings

General provisions – Article 15

Paragraph (1)

119. The Working Group adopted paragraph (1) in substance, without any modification.

Paragraph (1 bis)

120. It was clarified that paragraph (1 bis) only applied to the time periods concerning the arbitration procedure and not to any substantial time periods concerning the dispute underlying the arbitration case.

121. A concern was raised that paragraph (1 bis) might create difficulties in practice, where national laws would not permit arbitrators to extend the periods of time in the arbitration procedure. In response, it was said that the practice of the ICC Court of Arbitration, which frequently extended the periods of time of the arbitration procedure, did not seem to have caused any problems and also that the question of non-derogable provisions of national law were already accommodated in article 1 of the Rules.

122. Another concern was expressed that paragraph (1 bis) as currently drafted included an invitation for the parties to express their views only in case of extension or abridgement of any period of time agreed by the parties, as provided for under subparagraph (b), but not for any period of time prescribed under the Rules, as provided for under subparagraph (a). It was pointed out that it was a fundamental right of the parties to express their views and it should apply generally to the instances referred to in both subparagraphs. More generally, it was said that that right applied in many different instances under the Rules, and it might be awkward to expressly refer to that right in paragraph (1 bis) only. It was therefore proposed to delete that reference. However, it was generally felt in the Working Group that it might be important to signal to arbitral tribunals the significance of not amending periods of time without the parties being involved in that decision-making process.

123. After discussion, the Working Group agreed to extend the invitation to parties to express their views to cover both instances and, as a matter of drafting, to place the phrase “after inviting the parties to express their views” after the words “The arbitral tribunal may,”.

124. The Working Group heard concerns that the decision of the arbitral tribunal to extend or abridge any period of time should be taken prudently, as it disregarded the party’s agreement. It was further observed that the wording could be broadly interpreted, which might be especially dangerous in case of inexperienced

arbitrators. In order to address these concerns, it was suggested to establish a threshold for the arbitral tribunal by including words such as "if necessary", "in exceptional circumstances" or, in reference to article 23, "on justified grounds".

125. After discussion, the Working Group adopted the substance of paragraph (1 bis), with the modification referred to above in paragraph 123.

Paragraph (2)

126. The Working Group adopted paragraph (2) in substance, without any modification.

Paragraph (3)

127. It was observed that communication by one party to the arbitral tribunal could not always be communicated by that party to all other parties at the same time, as required under paragraph (3), in particular in case a party would apply to the tribunal for a preliminary order. It was thus proposed to either delete paragraph (3) entirely or the words "at the same time". In response, it was pointed out that the proposed deletion would run counter to the current practice in international arbitration to send communications at the same time to the parties and the arbitral tribunal. It was further observed that that method contributed to the facilitation of arbitral proceedings and should not be changed. To reconcile those views, it was suggested to include in paragraph (3) words along the lines of "unless otherwise authorized by the arbitral tribunal or required by the Rules". That proposal received support, and after discussion, the Working Group agreed that a revised version of that paragraph should be prepared by the Secretariat, bearing in mind the above suggestions.

Paragraph (4)

128. The purpose of paragraph (4) as considered by the Working Group was to allow one or more persons to be joined in the arbitration as a party, provided that such a person was also a party to the arbitration agreement and had consented to be joined. The Working Group recalled that, at its forty-sixth session, it had agreed that the provision on joinder would constitute a major modification to the Rules, and had noted the diverging views, which were expressed on that matter (A/CN.9/619, para. 126).

"and has consented to be joined"

129. It was recalled that the words "third person" had been used instead of "third party" in the paragraph, in recognition of the fact that the party to be joined to the arbitration proceedings was a party to the arbitration agreement. The Working Group agreed that the party to be joined should be a party to the arbitration agreement and that reference to the term "third party" should continue to be avoided.

130. A proposal was made to delete the phrase "and has consented to be joined" in the first sentence of paragraph (4). It was observed that that phrase would not be necessary as the provision already required that the party to be joined should be a party to the arbitration agreement. The agreement of parties to apply the UNCITRAL Arbitration Rules would imply their consent to the application of the

joinder provision and to the possibility of the arbitral tribunal being constituted without their consent. Requiring additional agreement by the party to be joined would provide that party with a veto right, which might not be justified.

131. Concerns were expressed that the absence of explicit consent of a party to be joined might entail the consequence that, at the stage of recognition and enforcement of the arbitral award, the party so joined might raise the argument that it did not participate in the constitution of the arbitral tribunal, and therefore the arbitral tribunal was not composed in accordance with the agreement of the parties.

132. Various suggestions were made to address that concern. A suggestion was made to insert in article 3 a provision to the effect that the parties who considered requesting joinder of another party should do so at an early stage of the proceedings, before the composition of the arbitral tribunal. It was observed that that solution might not be workable in all circumstances.

133. It was observed that article 20 of the Rules might already contain a solution to that question, as it provided that a party might amend or supplement its claim or defence, unless the arbitral tribunal considered it inappropriate having regard to the prejudice to other parties or any other circumstances.

134. Another proposal was made to expressly address that concern in the provision on joinder, by replacing the words "and has consented to be joined" by language along the following lines: ", unless the arbitral tribunal finds, after giving all parties, including the person to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties". After discussion, the Working Group decided that it should be clarified that the arbitral tribunal might decide that a party be joined without the consent of that party, but before making its decision, the tribunal should provide that party with an opportunity to be heard and decide on the prejudice. The Secretariat was requested to prepare wording reflecting that decision. A further suggestion that the proposed language should be broadened by referring to "all circumstances that the arbitral tribunal deems relevant and applicable", along the lines of article 4.2 of the Swiss Rules of International Arbitration was not adopted.

135. The Working Group agreed to include the words "or awards" after the word "award" in the second sentence of paragraph (4).

Place of arbitration

Article 16

Paragraph (1)

136. The Working Group agreed to delete the words "the convenience of the parties", because mentioning one circumstance only was not justified and there were other circumstances which might be more important. The Working Group adopted paragraph (1) in substance, with the deletion of the words "including the convenience of the parties".

Paragraph (2)

137. Concern was expressed that the current drafting of paragraph (2) suggested that the arbitrators were not free to meet at any location, unless otherwise agreed by

the parties. To address that concern, it was suggested to split the paragraph into two sentences, to clarify that the arbitrators might deliberate at any location they considered appropriate. That proposal was adopted by the Working Group.

138. It was suggested that the reference to "consultations" should be deleted, as it was redundant with "meetings and deliberations". That suggestion was adopted by the Working Group.

139. For the sake of clarity, the Working Group also agreed that the words "Notwithstanding the provisions of paragraph (1)" should be deleted. The Working Group adopted paragraph (2) in substance, with the above modifications.

Language

Article 17

140. The Working Group recalled its decision to delete the reference to "languages" in plural from the Rules (A/CN.9/619, para. 145). The Working Group was informed that such change in article 17 could have the negative consequence of depriving the arbitral tribunal of the possibility to have more than one language.

141. The Working Group adopted article 17 in substance, with references to "languages" in the plural.