United Nations A/CN.9/619

General Assembly

Distr.: General
20 March 2007

Original: English

United Nations Commission on International Trade Law
Fortieth session
Vienna, 25 June-12 July 2007

Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5-9 February 2007)

Contents

V.07-81818 (E) 290307 300307

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

---

[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 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.[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 United Nations Convention on the Use of Electronic Communications in International 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]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its forty-sixth session in New York, from 5 to 9 February 2007. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Belarus, Benin, Cameroon, Canada, Chile, China,

[5] Ibid., para. 185.
[6] Ibid., para. 186.
[7] Ibid., para. 187.

Colombia, Croatia, Czech Republic, Fiji, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Madagascar, Mexico, Nigeria, Poland, Republic of Korea, Russian Federation, Rwanda, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Albania Bahrain, Bulgaria, Cuba, Egypt, El Salvador, Finland, Greece, Haiti, Honduras, Ireland, Jamaica, Kuwait, Liberia, Malaysia, Mauritius, Nepal, Netherlands, Romania and Trinidad and Tobago.

9. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: Asian African Legal Consultative Organization, European Community and Permanent Court of Arbitration.

10. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arab Union for International Arbitration (AUIA), Asia Pacific Regional Arbitration Group (APRAG), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Environmental Law (CIEL), Chartered Institute of Arbitrators, Forum for International Commercial Arbitration (FICA), International Arbitration Institute (IAI), International Chamber of Commerce (ICC), International Cotton Advisory Committee (ICAC), International Institute for Sustainable Development (IISD), Kuala Lumpur Regional Centre for Arbitration (KLRCA), the London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Moot Alumni Association, NAFTA Article 2022 Advisory Committee, School of International Arbitration of the Queen Mary University of London, Swiss Arbitration Association (ASA), the European Law Students' Association and *Union Internationale des Avocats* (UIA).

11. The Working Group elected the following officers:

Chairman: Mr. Michael Schneider (Switzerland);

Rapporteur: Mr. Andrés Jana (Chile).

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.144); (b) a note by the Secretariat on a revision of the UNCITRAL Arbitration Rules pursuant to the deliberations of the Working Group at its forty-fifth session (A/CN.9/WG.II/WP.145 and A/CN.9/WG.II/WP.145/Add.1).

13. 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 and organization of future work.
5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

14. 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.145 and A/CN.9/WG.II/WP.145/Add.1). The deliberations and conclusions 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 conclusions of the Working Group.

IV. Revision of the UNCITRAL Arbitration Rules

15. The Working Group recalled the mandate given by the Commission at its thirty-ninth session (New York, 19 June-7 July 2006) and set out above (see above paragraph 3). The Working Group recalled as well its decision that harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the UNCITRAL Arbitration Model Law should not be automatic but rather considered only where appropriate (A/CN.9/614, para. 21).

16. The Working Group agreed to resume discussions on the revision of the Rules on the basis of documents A/CN.9/WG.II/WP.145 and A/CN.9/WG.II/WP.145/Add.1 and the proposed revisions contained therein.

General remarks on the reference to "parties" in the Rules

17. The Working Group agreed on the principle to replace words such as "both parties", "either party", "one of the parties" with the more generic formulation of "parties" in the text of the Rules, where appropriate, so as to encompass multi-party arbitration.

Section I. Introductory rules

Scope of application

Article 1

Title

18. The Working Group considered whether the title of article 1 should read "Applicability" instead of "Scope of application", given that article 1 contained provisions on the principles of application of the UNCITRAL Arbitration Rules and was not limited to matters relating to the scope of application. After discussion, it was agreed to retain the existing title without change, following the generally agreed principle that the Working Group should avoid making unnecessary changes to the Rules.

Paragraph (1)

"*parties to a contract*"

19. The Working Group proceeded to consider two options in respect of the question whether paragraph (1) should contain a reference to the "parties". It was noted that option 1 most closely corresponded to the existing version of the Rules, by including a reference to "parties", whereas option 2 implemented a suggestion made in the Working Group at its forty-fifth session to delete any reference to "parties" in the opening words of paragraph (1) (A/CN.9/614, para. 34).

20. Some support was also expressed for option 2 for the reason that it provided flexibility and that it would more appropriately cover arbitrations involving situations such as disputes in the context of bilateral investment treaties, where the parties to an investment arbitration treaty containing an arbitration clause differed from the parties to the arbitration. However, preference was expressed for option 1 as it had the advantage of clarifying that disputes of a non-contractual nature would also be covered by the Rules (see below, paragraphs 21-24).

"*disputes in relation to that contract*"

21. The Working Group considered whether the words "in relation to that contract", contained in paragraph (1) should be omitted so as not to suggest any limitation with respect to the types of disputes that parties could submit to arbitration. The Working Group agreed that paragraph (1) should be widened to avoid ambiguity on the scope of application of the Rules and ensure that it not be limited to disputes of a contractual nature only. The Working Group agreed that the words "to a contract" and "in relation to that contract" should be deleted.

"*in respect of a defined legal relationship, whether contractual or not,*"

22. The Working Group considered whether the words "in respect of a defined legal relationship, whether contractual or not," should be added to paragraph (1). It was suggested that these words should not be added as they might unnecessarily limit the scope of the Rules and could raise difficult interpretative questions. It was also said that the reference to a "defined legal relationship" might not easily be accommodated in certain legal systems.

23. In response, it was said that the words "in respect of a defined legal relationship, whether contractual or not" were well recognized given that they were derived from the New York Convention, and were also included in article 7, paragraph (1) of the UNCITRAL Arbitration Model Law. In favour of their retention, it was said that these words put beyond doubt that a broad range of disputes, whether or not arising out of a contract, could be submitted to arbitration under the Rules and that their deletion could give rise to ambiguity. It was also suggested that these words would have educational impact on the future developments in the field of international arbitration.

24. Subject to possible review at a future session, the Working Group expressed strong support for the retention of option 1, with the addition of the words "in respect of a defined legal relationship, whether contractual or not".

The writing requirement for the agreement to arbitrate under the Rules and for modification of the Rules

25. The Working Group considered whether to retain the requirements in paragraph (1) that both the agreement of the parties to refer disputes to arbitration under the UNCITRAL Arbitration Rules, and any modification thereto, should be in writing.

26. It was recalled that the purpose of the requirement that the arbitration agreement be in writing was to set out the scope of application of the UNCITRAL Arbitration Rules and, unlike the function of the form requirement under the UNCITRAL Arbitration Model Law, was separate from the question of the validity of the arbitration agreement (which was governed by the applicable law) or from the question of enforcement under the New York Convention.

27. It was recalled that the *travaux préparatoires* of the UNCITRAL Arbitration Rules indicated that the purpose of the requirement that an arbitration agreement be in writing was to avoid uncertainty as to whether the UNCITRAL Arbitration Rules had been made applicable.[8] Diverging views were expressed on whether the increased use of the Rules had reduced the risk of such uncertainty.

28. In support of deleting the writing requirement, it was said that the form of arbitration agreement was a matter that should be left to the applicable law. It was said that the UNCITRAL Arbitration Rules should, in the interests of harmonization of international arbitration, take a consistent approach with the work of the Working Group in respect of the UNCITRAL Arbitration Model Law, which had reflected a broad and liberal understanding of the form requirement. It was suggested that retention of the writing requirement in the Rules could create difficulties in those States that had deleted any such requirement in their legislation. It was said that, if such a requirement were to be maintained, it should be defined and that including such a definition would go beyond the usual scope of arbitration rules. Also, it was said that article 19, paragraph (1), of the UNCITRAL Arbitration Model Law, which provided that "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings", did not require any written agreement of the parties on the proceedings, and therefore, as a matter of consistency, the Rules should not go beyond the requirements of the UNCITRAL Arbitration Model Law.

29. It was also noted that issues such as whether the writing requirement had been met and how it could be met had given rise to a substantial amount of litigation. As well, it was pointed out that there was uncertainty as to whether the writing requirement applied to the agreement to arbitrate or to the parties' agreement on the application of the UNCITRAL Arbitration Rules, and that, for that reason, that requirement should be removed.

30. In support of preserving a reference to the writing requirement, it was said that there was no uniform approach to that question, some jurisdictions having omitted that requirement while others maintained it. In addition, it was noted that the writing

---

[8] Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), Section I, Commentary on article 1, UNCITRAL Yearbook, Volume VII: 1976, Part Two, III, 2.

requirement could have two functions. First, to remind the parties that, depending on the applicable law, the agreement to arbitrate might only be valid if made in writing and second, from the point of view of convenience, to provide a basis upon which an appointing authority could appoint arbitrators. It was stated that a requirement that the parties define their arbitration agreement in writing would promote good practices and would provide an opportunity for parties to clarify which version of the Rules would apply.

31. Subject to possible review at a future session, the Working Group expressed strong support for deletion of the writing requirement from article 1.

Applicable version of the UNCITRAL Arbitration Rules

32. It was noted that article 1 dealt with the scope of application of the UNCITRAL Arbitration Rules, without determining which version of the Rules would apply in case of revision. The Working Group considered variants 1, 2 and 3 as proposed in document A/CN.9/WG.II/WP.145.

33. Variant 1, which corresponded to the current wording of the UNCITRAL Arbitration Rules and did not include any indication as to the applicable version of the Rules in case of revision, did not receive support.

34. Support was expressed for variant 2, which provided that the applicable version of the Rules be the one "as in effect on the date of commencement of the arbitration, subject to such modification as the parties may agree". It was noted that that variant corresponded with the approach taken by a number of arbitration institutions when revising their rules.

35. Variant 3 received considerable support as providing a precise and simple rule, which put the parties on notice that, if they did not express their agreement to apply the Rules as in effect on the date of their agreement, then the Rules as in effect on the date of the commencement of the arbitration should be presumed to apply. In that respect, it was observed that variant 3 more comprehensively set out the options of parties to apply either the most recent version of the Rules to their dispute or the Rules in existence at the time the arbitration agreement was made.

36. However concern was expressed that variant 3 could lead to a situation where a default rule would apply retroactively to agreements made before the adoption of the revised Rules without sufficient regard for the principle of party autonomy. To avoid that situation, a proposal was made to reverse the presumption under variant 3 along the following lines: "Unless the parties have agreed to apply the Rules in effect on the date of commencement of the arbitration, the parties shall be deemed to have submitted to the Rules as in effect on the date of their agreement". Another proposal was made that: "Unless the parties have otherwise agreed, the parties shall be deemed to have submitted to the Rules in effect at the date of the arbitration agreement". Yet another proposal was made to retain variant 3 with a clarification that the revised Rules did not apply to agreements concluded before the revision of the Rules was adopted.

37. Some support was expressed for those proposals. However, it was recalled that the proposals might run contrary to the expectation that the most recent version of the Rules would apply, as illustrated by the practice of some arbitral institutions suggesting that parties often preferred using the updated rules. The view was

expressed that the preference for the most recent rules could also result from a parallel to be drawn between a revision of the rules and the adoption of new legislation on matters of procedure. In response, it was stated that the difference in nature between model contractual rules and a piece of legislation made it unadvisable to pursue such comparison. It was widely felt that, in case of disagreement or doubt regarding the chosen version of the Rules, it would be for the arbitral tribunal to interpret the will of the parties. In the view of some delegations, the provision on the applicable version of the Rules should apply only to future changes to the Rules.

38. After discussion, preference was expressed for variant 3. The Working Group agreed to revisit the question of the applicable version of the Rules once it had completed its review of the current text of the UNCITRAL Arbitration Rules and noted that the question of whether the provision on the applicable version of the Rules should apply to agreements concluded before the adoption of the revised Rules was a matter to be further considered.

Model arbitration clause

"*as at present in force*"

39. The Working Group agreed that the words "as at present in force" should be considered for deletion if a provision referring to the applicable version of the Rules was adopted in article 1, paragraph (1) (see above, paragraphs 32-38).

Note to the model arbitration clause

Subparagraph (a)

40. A proposal was made to delete the reference in brackets to "person" for the reason that it was preferable to name institutions as appointing authorities, instead of individuals. While that proposal received some support, it was noted that removal of the possibility to appoint a person would run contrary to existing practice, including that of the Secretary-General of the Permanent Court of Arbitration who, in appropriate cases, appointed individuals as the appointing authority.

Subparagraph (c)

41. The Working Group noted that the question whether that subparagraph should refer to the term "seat" instead of "place" should be considered in the context of article 16 on the place of arbitration (see below, paragraphs 137-144). A proposal was made to delete the words "town or country" appearing in brackets since they did not express all factual possibilities and were not sufficiently flexible. In addition, naming a country alone as a place of arbitration left unclear the determination of the place of arbitration and, in cases where a country had more than one legal systems governing the arbitral procedure, the formulation did not take appropriate account of the fact that the designation of the location of the arbitration within that country could have significant legal consequences. However, it was pointed out that parties might need guidance on the meaning of the determination of the place of arbitration, and a proposal was made to retain those words, and replace "or" with "and". The Working Group took note of those proposals.

Subparagraph (e)

42. The Working Group considered the proposal made at its forty-fifth session to add to the note to the model arbitration clause a reference to the law governing the arbitration agreement (A/CN.9/614, para. 37). Although that addition would have the benefit of raising awareness of the importance of defining the law applicable to the arbitration agreement, the widely shared view was that it would be misleading to retain it as it addressed only one aspect of the laws applicable in the context of arbitration. The Working Group considered whether the model arbitration clause should include a provision on the law applicable to the substance of the dispute, and whether the impact of the place of arbitration on the law applicable to the arbitral proceedings should also be clarified. The Working Group agreed that subparagraph (e) should not be retained and that the model arbitration clause should not contain any provision on applicable law.

Conciliation

43. The Working Group agreed that a reference to conciliation should not be added, in order to avoid unnecessarily complicating that model arbitration clause.

Notice, calculation of periods of time

Article 2

Paragraph (1)

44. The Working Group proceeded to consider paragraph (1), which regulated when a notice, including a notification, communication or proposal could be deemed to have been received.

Deemed delivery of notice

45. The view was expressed that paragraph (1) should not be modified, for the reason that it had not created any difficulties in practice. It was also pointed out that article 2, paragraph (1) of the Rules was based on the 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods and that a similar provision was contained in article 24 of the United Nations Convention on the Contracts for the International Sale of Goods (Vienna, 1980). It was said that adoption of the proposed amendments could create unnecessary discrepancies among existing texts.

46. A suggestion was made to modify paragraph (1) to include a provision along the lines contained in article 3, paragraph 3 of the International Chamber of Commerce Arbitration Rules 1998 (“the ICC Rules”) which provided that: “A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph”. It was said that that modification would encompass situations where physical delivery of notices was not possible, for instance where an address provided was no longer in existence. The view was expressed that it was uncertain whether such situations would already be covered by the concept of “deemed receipt” of the notice by the defendant, as already contained in article 2, paragraph (1) of the Rules. However, it was indicated that, in the rules of other arbitration institutions, there were different provisions and

that, in any case, delivery to the last known place of business or residence under article 2, paragraph (1), provided an adequate solution for such situations.

"*Mailing address*"

47. The Working Group considered whether the terms "mailing address" contained in article 2, paragraph (1), could be understood as including new means of communication, such as delivery of notices by e-mail. Broad support was expressed in the Working Group for deletion of the term "mailing", so that the word "address" might be understood in a wider manner, as encompassing either a postal or electronic address.

Notice of arbitration

48. A question was raised whether the deemed delivery of notices should include delivery of the notice of arbitration. It was said that such a provision might deprive the defendant of a right to be properly notified of the commencement of the arbitration. To address that concern, a proposal was made to replace the notion of deemed receipt of notices, by the notion of proper service of notices. That proposal did not receive support.

49. After discussions, the Working Group agreed that paragraph (1) should not be amended as was proposed in document A/CN.9/WG.II/WP.145, but that any accompanying material should include clarification to deal with the situation where delivery was not possible.

Electronic communication – paragraph (1 bis)

50. The Working Group considered proposed new paragraph (1 bis) on delivery of notices by electronic means, as contained in document A/CN.9/WG.II/WP.145. Support was expressed for the view that the proposed new paragraph should include a reference to traditional ways of delivering notices, keeping in mind the importance of effectiveness of delivery, the necessity to keep a record of the issuance and receipt of notices, and the consent of the parties to the means of communication used. A proposal was made to add a provision along the following lines: "delivery pursuant to paragraph 1 may be made by facsimile, telex, e-mail or any other means of communication that provides a durable record of dispatch and receipt". That proposal received some support. The Working Group agreed that the new provision on that question should contain the words "electronic communication" as these words were used in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). The Working Group further agreed that these terms did not need to be defined, as definitions were already contained in the relevant UNCITRAL instruments. Caution was urged on the use of terms such as "durable records" which were not used in UNCITRAL instruments, and preference was expressed for the revised draft to be prepared being consistent with terminology used in the existing instruments. The Secretariat was requested to draft language for a paragraph (1 bis) that would authorize both electronic communication and traditional forms of communication.

Notice of arbitration and response to the notice of arbitration

Article 3

Paragraph (1)

Party [or parties]

51. The Working Group agreed that inclusion of the words "or parties" were useful to encompass multi-party arbitration and therefore should be retained.

Paragraph (3)

Subparagraph (b)

52. In order to take account of a suggestion that subparagraph (b), which required that the notice of arbitration contain the name and addresses of the parties, might also include additional contact details, the Working Group agreed to modify that subparagraph as follows: "(b) The names and contact details of the parties;". For the sake of consistency, article 3, subparagraph (5)(b) should be modified so as to read: "the full name and contact details of any respondent" (see also below, paragraph 148).

Subparagraph (c)

53. It was said that subparagraph (c), which required identification of the arbitration agreement being invoked, might not provide sufficient information, particularly if the Rules were extended to apply to multi-party arbitration, and therefore it was suggested that subparagraph (c) be modified to provide that the notice of arbitration set out the actual wording of the arbitration agreement. No support was expressed for the suggestion.

Subparagraph (d)

54. It was suggested that the reference in subparagraph (d) to "any contract, or other legal instrument" ought to be made consistent with the earlier decision by the Working Group that disputes of a non-contractual nature would also be covered by the Rules (see above, paras. 21-24). For that reason, it was proposed to seek a broader formulation to encompass non-contractual disputes. That proposal received some support.

Mandatory items to be included in the notice of arbitration

55. The Working Group recalled its discussions at its forty-fifth session where it was cautioned that imposing an obligation to include too much information in the notice of arbitration might give rise to the question of how to deal with an incomplete notice of arbitration, particularly in non-administered arbitration where no institution would oversee that issue (A/CN.9/614, para. 54). The Working Group agreed that it might be useful to address that issue in the revised Rules.

56. In that respect, a proposal was made to expressly provide that an incomplete notice of arbitration should not prevent the constitution of an arbitral tribunal and that the consequences of failing to include mandatory items in the notice of arbitration should be a matter to be determined by the arbitral tribunal. A proposal was made to add a provision along the following lines: "any controversy with

respect to the sufficiency of the notice of arbitration shall be finally resolved by the arbitral tribunal, the constitution of which should not be impeded by such a controversy". It was suggested that article 5.4 of the Arbitration Rules of the London Court of International Arbitration (LCIA) might provide a useful example on the question of the impact of an incomplete notice of arbitration, although the wording would need to be adapted for non-administered arbitration. It was also suggested that, in drafting a new provision, the Secretariat should consider whether the arbitral tribunal should be given express power to request rectification of a notice of arbitration so that, if the notice was rectified accordingly, the proceedings might, for the purposes of the relevant limitation period, be deemed to commence from the date that the notice was initially communicated. It was noted that rule 4.5 of the Australian Centre for International Commercial Arbitration Rules as well as the ICC Rules might provide useful models. The Working Group agreed to further consider that issue at a future session.

Paragraph (4)

Subparagraph (c)

57. The Working Group agreed that the option for the claimant to communicate its statement of claim should be retained. The Working Group agreed to further discuss at a future session whether the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in article 18.

Paragraph (5)

Mandatory or optional provision

58. The Working Group agreed that the provisions referred to in document A/CN.9/WG.II/WP.145, para. 39 on the response to the notice of arbitration should be maintained. Questions were raised whether the response to the notice of arbitration should be made optional. A suggestion was made to replace the words "which shall include" in the chapeau of paragraph (5) with the words "which may include". The Working Group noted that paragraph (7) already contained provisions on the consequences of failure to communicate a response to the notice of arbitration. The Working Group agreed to further consider the wording of paragraphs (5) to (7) at a future session.

Time periods

59. It was observed that the thirty days time period for the communication of the response to the notice of arbitration might be too short in certain cases and did not appear to be synchronized with other time periods such as the fifteen day period for challenging an arbitrator as contained in article 11 of the Rules. The Working Group agreed that there might be a need to revisit the various time periods provided in the Rules so as to ensure consistency.

Subparagraph (a)

60. A suggestion was made that the words "any comment" might not be appropriate if understood to preclude subsequent comment and that more precise language be used. The Working Group agreed to consider the drafting of

paragraphs (5), (6) and (7) on the response to the notice of arbitration, at a later stage.

Investor-state arbitration

61. A view was expressed that specific provisions might need to be included to ensure transparency of the procedure for arbitration involving a State. Under that view, specific provisions should be included to deal with investor-State arbitration as follows: in article 3, a paragraph should be inserted to the effect that the notice of arbitration and the composition of the arbitral tribunal should be published on the UNCITRAL website; article 15, paragraph (3), should provide that all documents received or issued by the arbitral tribunal should be published by similar means; article 15, paragraph (4), should establish the discretion of the arbitral tribunal to allow persons or entities other than the parties to submit amicus curiae briefs; article 25, paragraph (4), should provide that hearings should be open to the public; and article 32, paragraph (5), should provide for the systematic publication of awards.

62. The Working Group recalled that, at its forty-fifth session, broad support had been 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 (A/CN.9/614, paras. 18-19). The Working Group reiterated its support for that approach. It was recalled 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 the current stage when the Working Group was still finalizing the common denominators that should be applied to all arbitrations. The Working Group agreed to revisit the issue after it had completed its first review of the revised provisions.

Representation and assistance

Article 4

"*persons of their choice*"

63. A proposal was made to replace the words "persons of their choice" appearing in the first sentence of article 4 with "persons chosen by them" in order to avoid the implication that the party had an unrestricted discretion, at any time during the proceedings, to impose the presence of any counsel (for example, a busy practitioner that would be unable to meet reasonable time schedules set by the arbitral tribunal). That proposal was broadly supported.

Existence/Scope of authority

64. The Working Group considered whether it would be useful to add language to article 4 to ensure that, when a person was empowered to represent a party, disclosure should be made to any party or the arbitral tribunal of the content of its representative's powers. A question was raised whether such disclosure should be limited to the existence of the representative's powers or should also extend to the scope of the representative's authority.

65. It was said that requiring disclosure of the scope of authority might prove difficult in certain circumstances, as it could have the consequence of forcing disclosure of certain communications between the party and its representative that should be kept confidential, such as for example, a power to settle a claim at a certain amount.

66. It was suggested that the provision should be drafted in a flexible manner, allowing the arbitral tribunal to determine on its own motion the extent to which it needed to be provided with information on the scope of authority. In that respect, a proposal was made to add at the end of article 4, language along the following lines: "At any time, the arbitral tribunal may require from any party proof of authority granted to its representative in such a form as the arbitral tribunal may determine." It was said that the intention of that provision was not to deprive a party of its right to choose a representative but rather to confirm to the other party that a person was actually the representative of a party to the arbitration.

67. It was pointed out that, while the arbitral tribunal had the right to request a party to provide information on that question, it might be more useful to empower a party to request from the other communication of such information. Support was expressed for providing that such information should be communicated at the request of the arbitral tribunal, including at the instance of a party. As well, it was clarified that communication on proof of authority did not exclude communication on the scope of the representative's power.

"*In writing*"

68. The Working Group agreed to delete the words "in writing" in article 4, as the manner in which communication should be exchanged among the parties and the arbitral tribunal was already dealt with under article 2.

Designating and appointing authorities

Article 4 bis

69. The Working Group considered the provision referred to in document A/CN.9/WG.II/WP.145, paras. 41 and 42, and tentatively numbered article 4 bis, which was intended to deal with designating and appointing authorities. That provision contained the principle that the appointing authority could be appointed by the parties at any time during the arbitration proceedings, and not only in circumstances currently provided for in the Rules. It also sought to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration. The Working Group agreed on the principle of including in the Rules a provision addressing the respective roles of the designating and appointing authorities. Taking account of the simplification that resulted from the adoption of article 4 bis, the Secretariat was requested to review the Rules, assessing further possible simplification that could be made elsewhere in the Rules.

70. As a matter of drafting, it was proposed that, after insertion of a proper definition, the words "Secretary-General of the PCA" be used instead of the full title "Secretary-General of the Permanent Court of Arbitration at The Hague". Support was expressed for that proposal.

Paragraph (1)

71. The Working Group noted that the draft revision of paragraph (1) clarified that the Secretary-General of the PCA was expressly entitled to act as appointing authority under the Rules. A proposal was made to modify the draft text to provide that, where the parties were unable to agree on an appointing authority, the Secretary-General of the PCA should act directly as the appointing authority, instead of designating an appointing authority. It was said that such a provision would preserve the freedom of the parties to select any other appointing authority but provide more predictability in the event they did not agree.

72. Concerns were expressed that that proposal would not sufficiently take account of the multi-regional applicability of the UNCITRAL Arbitration Rules, and would have the consequence of centralizing all cases where the parties had not designated an appointing authority in the hands of one organization. While the view was expressed that such a provision might be appropriate for investor-State disputes, a widely held opinion was that it would not be as appropriate in other instances. Reference was made to regional and domestic arbitration. It was said that the mechanism provided in the original version of the Rules was functioning well, and did not need to be modified. With a view to accommodating these concerns, the proposal was amended to provide that the parties should retain the right to request the Secretary-General of the PCA to appoint another appointing authority, and that the Secretary-General of the PCA itself should be empowered to designate another appointing authority, if it considered it appropriate.

73. In support of that proposal, it was recalled that the PCA was a unique inter-governmental organization with broad membership. It was said that the proposal would preserve the right of the parties to designate an appointing authority. It was also stated that, in expressing a default rule, the proposal provided the parties with a simple, streamlined and efficient procedure. In the context of that discussion, the Working Group recognized the expertise and the accountability of the PCA, as well as the quality of the services it rendered under the UNCITRAL Arbitration Rules.

74. The prevailing view, however, was the proposal constituted a major and unnecessary departure from the existing UNCITRAL Arbitration Rules. After discussion, it was decided that, with the amendments to article 4 bis as proposed in document A/CN.9/WG.II/WP.145, the existing mechanism on the designating and appointing authority should be preserved. The Working Group noted that the representative of the Permanent Court of Arbitration confirmed the agreement of its Secretary-General to perform the functions provided for in the draft revised Rules.

Paragraph (2)

75. In order to clarify the principle that the designation of the appointing authority could be sought by the parties at any time during the arbitration proceedings, the Working Group agreed to add the words “with the Notice of Arbitration or any time thereafter” after “any party” so that that part of the sentence read: “any party, with the Notice of Arbitration or any time thereafter, may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.” That proposal was adopted.

Paragraph (3)

76. The Working Group agreed that paragraph (3) should include a general principle that the parties should be given an opportunity to be heard by the appointing authority.

Paragraph (5)

77. The Working Group agreed that the words "the name of one or more" appearing in the last sentence of paragraph (5) should be deleted.

78. The Working Group agreed that paragraph (5) should clarify that it was for the proposed arbitrators (rather than the appointing authority) to provide information regarding their qualifications to the parties.

Section II. Composition of the arbitral tribunal

Number of arbitrators – Article 5

Paragraph (1)

79. The Working Group recalled that, at its forty-fifth session, diverging views were expressed on whether the default rule on the number of arbitrators should be modified (A/CN.9/614, paras. 59-60). It proceeded to consider the various options referred to in document A/CN.9/WG.II/WP.145, paras. 43 and 44 on that question.

Option 1, variant 1 and option 2

80. Preference was expressed for option 1, variant 1, which provided that if the parties were unable to agree on the appointment of one arbitrator, three arbitrators should be appointed. It was said that that option most closely reflected the current default rule set out in article 5. Option 2 provided that, if the parties were unable to agree on the number of arbitrators, that matter should be determined by the appointing authority. That option received limited support for the reason that involving an appointing authority at such an early stage of the arbitral proceeding could create unnecessary delays.

Alternative proposal

81. An alternative proposal was made to include text along the following lines: "If the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either the claimant in its notice of arbitration or the respondent, by the time for filing the response to the notice of arbitration, requests that there be three, in which case there shall be three arbitrators." It was suggested that that approach avoided imposing a three-person tribunal in arbitration involving small claims. The substance of that proposal received support as it included an additional level of flexibility. However, it was suggested that the drafting should be revised. It was also suggested that the fifteen day period granted to the respondent to request the appointment of three arbitrators might be too short, particularly in arbitrations involving State parties. In that respect, it was suggested to replace "within fifteen days" either by "within thirty days", as provided for in respect of the

response to the notice of arbitration or "within the time period for responding to the notice of arbitration".

82. The Working Group agreed to further consider the matter and requested the Secretariat to provide revised drafts reflecting the alternative proposal.

Paragraph (2)

83. The Working Group expressed support for draft paragraph (2), as contained in document A/CN.9/WG.II/WP.145. That paragraph clarified that the Rules provided for methods to form either a one or a three-member arbitral tribunal and if the parties wished to opt for another number (e.g., to have a two-member arbitral tribunal, which was allowed by the UNCITRAL Arbitration Model Law and was customary in some trades), the parties should define their own method for the constitution of the arbitral tribunal. It was noted that paragraph (2) did not contain a fallback rule and a suggestion was made that, in such situations, the appointing authority might need to be involved.

Appointment of arbitrators (articles 6 to 8)

Article 6

84. The Working Group adopted article 6 in substance, as contained in A/CN.9/WG.II/WP.145.

Article 7

85. The Working Group adopted article 7 in substance, as contained in A/CN.9/WG.II/WP.145.

Article 7 bis

Appointment of arbitrators in multi-party arbitration – Principle

86. The Working Group recalled that article 7 bis, as referred to in document A/CN.9/WG.II/WP.145, para. 47, had been inserted to deal with the appointment of arbitrators in multi-party cases, in accordance with its discussions at its forty-fifth session (A/CN/9/614, paras. 62 and 63). General support was expressed for the principle contained in article 7 bis that, in case of multiple claimants or respondents, subject to contrary agreement, the multiple claimants, jointly, and the multiple respondents, jointly should appoint an arbitrator. It was suggested that the article should be drafted broadly enough to encompass situations where one side involved multiple parties whilst the other had only one party.

Paragraph (1)

87. A proposal was made to add the word "each" or "each group" after the word "shall" in the first sentence of paragraph (1) to indicate that the multiple claimants on one part and the multiple respondents on the other would each appoint an arbitrator. Another proposal was that, in the second sentence of paragraph (1), the words "shall choose" should be replaced by more flexible wording along the lines of "shall endeavour to choose". Those proposals were adopted.

Paragraph (2)

Failure to constitute the arbitral tribunal

88. A suggestion was made that the words "In the event of a failure to constitute the arbitral tribunal" should replace the current opening words "In the absence of appointment pursuant to paragraph 1" for the reason that the power of the appointing authority to constitute the arbitral tribunal should be more broadly formulated to cover all possible failures to constitute the arbitral tribunal and not be limited to those circumstances covered by paragraph (1). That proposal was adopted.

Discretionary right of the appointing authority – Revocation of appointments already made

89. It was questioned whether the discretionary term "may" in relation to power of the appointing authority to constitute the arbitral tribunal at the request of a party was appropriate. Concern was expressed that, as drafted, paragraph (2) appeared to permit the appointing authority, in case of failure to appoint arbitrators, to constitute the arbitral tribunal and revoke appointments already made. It was suggested that that approach might bear the consequence of depriving parties of the right to appoint their own arbitrator and give the multiple parties who failed to appoint an arbitrator the ability to cause all arbitrators to be appointed anew by the appointing authority.

90. Support was expressed for maintaining the principle in paragraph (2) permitting the appointing authority to constitute the arbitral tribunal, including the right to revoke already appointed arbitrators. It was said that the principle in paragraph (2) that the appointing authority should appoint the entire arbitral tribunal when parties on the same side in a multi-party arbitration were unable jointly to agree on an arbitrator was an important principle that should be maintained, in particular in situations like the one which had given rise to the case Dutco v. BKMI and Siemens, which had led to revisions of a number of international arbitral rules, including the ICC Rules (Article 10) and the LCIA Arbitration Rules (Article 8.1). It was stated that the decision in Dutco was based on the requirement that parties receive equal treatment, a principle that would apply in all countries bound by article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as in many other jurisdictions. It was also stated that, to accommodate the wide variety of situations arising in practice, it was important to maintain a flexible approach, granting discretionary powers to the appointing authority.

91. A widely held view was that the right of parties to appoint their arbitrator should nevertheless be preserved and, in order to clarify that the appointing authority was unambiguously entitled to reappoint an arbitrator agreed upon by one side, the Working Group discussed whether the mechanism of designation by the parties of arbitrators under the Rules should be modified, so as to provide a two-step procedure. According to a proposal made to that effect, a distinction should be made between the stage when parties would nominate their arbitrator and the stage when the arbitrator would be appointed. It was widely felt that such a two-step procedure, while consistent with the rules of a number of arbitral institutions, might lead to unnecessary modifications in the current provisions of the Rules dealing with

appointment and revocation of arbitrators. It was suggested that the issue could be settled more simply by inserting the words "or reappoint" after the word "appoint" in paragraph (2) and deleting the reference to the confirmation of an appointment. That proposal received support, and the Working Group agreed to further consider the matter at a future session.

Right of the parties to be heard by the appointing authority

92. It was further suggested that paragraph (2) should expressly recognize the right of all parties to be heard by the appointing authority on the question of constitution of the arbitral tribunal (see above, paragraph 76). That proposal received support.

Time limit

93. It was suggested that time limits could be defined under paragraph (2). The Working Group agreed to further consider that matter at a later stage.

Article 8

94. The Working Group agreed to the deletion of article 8, the substance of which had been placed in article 4 bis on the designating and appointing authorities.

Challenge of arbitrators (Articles 9 to 12)

Article 9

95. The Working Group adopted article 9 in substance, as contained in A/CN.9/WG.II/WP.145.

Model Statement of Independence

96. The Working Group considered whether 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 and in the form set out in paragraph 50 of A/CN.9/WG.II/WP.145.

97. Concern was expressed that the language used in the two statements differed. It was suggested that, to ensure equivalence between the statements, the words "there are no circumstances, past or present likely to give rise to justifiable doubts as to my impartiality" in the first statement be replaced by words such as "I have no past and present professional, business and other relationships with the parties and there are no other circumstances that might cause my reliability for independent and impartial judgement to be questioned by a party." It was noted that the language contained in the model statement corresponded with the IBA Rules of Ethics for International Arbitrators (1987). It was noted that the Model Statement of Independence was intended to be contained in the revised Rules as a footnote to article 9.

98. A suggestion was made that the point in time when the arbitrator should provide a statement should be clarified. That suggestion did not receive support.

99. After discussion, the Working Group agreed to adopt in substance the text of the Model Statement of Independence, as contained in A/CN.9/WG.II/WP.145.

Article 10

100. The Working Group adopted the text of article 10 as contained in A/CN.9/WG.II/WP.145.

Article 11

101. The Working Group adopted the text of article 11 as contained in A/CN.9/WG.II/WP.145.

Article 12

Paragraph (1)

Time limits for challenge

102. A suggestion was made that the time limits provided under paragraph (1) might need to be shortened. After discussion, it was agreed that if, within 15 days from the date of the notice of challenge, any other party did not agree to the challenge and the challenged arbitrator did not withdraw, the party making the challenge could seek a decision on the challenge within thirty days rather than sixty.

Paragraph (2)

103. The Working Group noted that the modified text in paragraph (2) permitted the appointing authority directly to appoint an arbitrator if it considered that the circumstances of the arbitration were such that a party should be deprived of its right to appoint a replacement arbitrator.

104. A proposal was made that that power should be limited to cases where a party had abused the challenge procedure repeatedly. That proposal was objected to on the grounds that the circumstances in which an appointing authority might proceed directly to appoint an arbitrator might extend to various other circumstances. It was thus preferable to formulate the power of the appointing authority in more general terms.

105. The Working Group agreed to maintain the text in general terms but requested the Secretariat to consider preparing, for possible inclusion in any explanatory material, an illustrative list of possible circumstances in which the appointing authority could exercise its power under paragraph (2).

Replacement of an arbitrator

Article 13

Paragraph (1)

106. The Working Group approved the substance of paragraph (1), as contained in A/CN.9/WG.II/WP.145.

Paragraph (2)

107. The Working Group noted that paragraph (2) provided two different ways for an appointing authority to deal with an unapproved resignation of an arbitrator or failure by an arbitrator to perform his or her functions, being either to appoint directly a substitute arbitrator or allow the proceedings to continue without a substitute arbitrator (A/CN.9/614, para. 70).

108. Concern was expressed with the wording "a party considers that an arbitrator has resigned for invalid reasons or is failing to perform his or her functions". It was suggested that the original text which referred to an arbitrator who "refuses or fails to act" was preferable to "failing to perform his or her functions". That suggestion received support.

109. The Working Group also considered whether there were circumstances in which the arbitrators themselves, rather than just a party, should be given the power either to decide to proceed as a truncated tribunal or seek approval from the appointing authority for so proceeding. Support was expressed for that suggestion as it would encompass situations where an arbitrator was failing to act and none of the parties were aware of that fact. However, it was said that granting the power to the arbitral tribunal to proceed as a truncated tribunal might not provide sufficient safeguards for the parties, in particular in case of collusion between arbitrators. As well, it was said that allowing the arbitral tribunal to seek approval of the appointing authority might be problematic in cases where the parties had not chosen such an appointing authority. It was said that that difficulty could be overcome by providing that the arbitral tribunal should in such cases refer the matter to the parties, who would then proceed with the designation of an appointing authority. It was suggested that a time limit should be introduced for parties to raise objections to an inactive arbitrator.

110. A suggestion was made that the arbitral tribunal should in all cases be involved in the process of replacement of an arbitrator.

111. A view was expressed that the provision on replacement of arbitrators should clearly distinguish the revocation of an arbitrator who failed to act from the resignation of an arbitrator for invalid reasons. It was said that those two circumstances had to be subject to different procedures as each might have different consequences in terms of liability.

112. After discussion, the Working Group requested the Secretariat to prepare alternative formulations, taking account of the suggestions made.

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

Article 14

113. The Working Group adopted the text of article 14 in substance, as contained in A/CN.9/WG.II/WP.145.

Section III. Arbitral proceedings

General provisions – Article 15

Paragraph (1)

114. The Working Group considered the provision in paragraph (1), which spelled out the general principle that arbitral proceedings should be dealt with by the arbitral tribunal without unnecessary delay. A proposal was made to include an express provision conferring on the arbitral tribunal the power to hold preliminary consultations or meetings either at the request of the parties or at its own initiative. That proposal did not receive support, and the Working Group adopted the substance of paragraph (1), as it appeared in document A/CN.9/WG.II/WP.145/Add.1.

Paragraphs (2) and (3)

115. Paragraphs (2) and (3) were adopted in substance without modification.

Paragraph (4)

Consolidation of cases before arbitral tribunals

116. The Working Group noted that, in some cases, under the Rules, consolidation of cases was only possible where the parties specifically so agreed and proceeded to consider whether a provision on that matter should be added to the Rules, as proposed under document A/CN.9/WG.II/WP.145/Add.1.

117. Some support was expressed for inclusion of such a provision. It was said that such a provision could be useful in situations where several distinct disputes arose between the same parties under separate contracts (e.g., related contracts or a chain of contracts) containing separate arbitration clauses or to avoid a situation where a party initiated a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage. Consolidation in such situations might provide an efficient resolution of the disputes between the parties, and also might reduce the possibility of inconsistent awards in parallel arbitrations.

118. It was said however that such a provision should be carefully drafted in order to clarify that consolidation would only be possible if either the claim was already subject to UNCITRAL Arbitration Rules, or the parties expressly agreed that the claim should be subject to consolidation.

119. However, doubts were expressed as to the workability of such a provision particularly when the Rules applied in non-administered cases. As well, it was said that either the provision was intended to deal with new claims under the same contract, and that situation would be better dealt with under provisions on amendment of the statement of claim, or that provision was intended to cover several distinct disputes arising between the same parties under separate contracts containing separate arbitration clauses. In that latter situation, the application of the provision might subject parties to arbitration proceedings under terms, which differed from those, agreed in their arbitration agreement. It was said that that situation raised complex issues, and might result in unfair solutions.

120. After discussion, the Working Group agreed that it might not be necessary to provide for consolidation under the Rules and deleted subparagraph (a) (see below, paragraphs 157-160).

Joinder

121. The Working Group considered a proposed provision on joinder, as it appeared in document A/CN.9/WG.II/WP.145/Add.1, and noted that the provision was inspired by article 22.1 (h) of the LCIA Arbitration Rules, which provided that the arbitral tribunal could: "allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration".

122. Some support was expressed for inclusion of such a principle in the Rules, as it was said to fulfil the useful purpose of allowing interested third parties to join an arbitration in circumstances where the other party objected to such joinder. However, concerns were expressed that such a provision would run counter to the fundamental principle of consent of parties in arbitration, and that such a provision would be acceptable only if it either contained an opt-in or opt-out proviso or if it were modified so that joinder would only be possible if all parties to the arbitration agreed thereto. It was pointed out that securing agreement of all parties would avoid possible difficulties at the stage of recognition and enforcement of the arbitral award, as it would put the agreement of all parties to the arbitration beyond doubt. In response, it was said that, as parties to arbitration always retained the right to agree on joinder without the need for a specific provision to that effect, requiring consent of all the parties would render the provision unnecessary. It was also noted that, insofar as parties agreed to arbitration under Rules containing the proposed joinder provision, they would have consented to the voluntary joinder of a third party.

123. It was suggested that the provision should clarify that the third party should in the first place agree to be joined in the arbitration, as was provided for under article 22.1 (h) of the LCIA Arbitration Rules.

124. A question was raised whether that provision should clarify on which side the third party should join the arbitration. In response, it was said that the provision might need to remain as flexible as possible to accommodate the varying circumstances in which a third party might seek joinder.

125. A suggestion was made to delete the reference to the making of an award in respect of all parties involved in the arbitration. It was observed that if the third party joined as a party, then there might be no need for such a provision. It was considered preferable to retain a reference to the making of the award, in order to put beyond doubt that the arbitration would be binding on all parties, whether they were the original parties to the arbitration or joined later in the process. As well, it was said that such an express provision in the Rules might serve a useful purpose at the stage of recognition and enforcement of the arbitral award.

126. After discussion, the Working Group agreed that the provision on joinder would constitute a major modification to the Rules, and noted the diverging views, which were expressed on that matter. The Working Group agreed to consider that

matter at a future session, on the basis of information to be provided by arbitral institutions to the Secretariat on the frequency and practical relevance of joinder in arbitration.

Confidentiality of proceedings

127. The Working Group considered whether it would be appropriate to include a general provision regarding confidentiality of proceedings, or of the materials (including pleadings) before the arbitral tribunal. The Working Group recalled that, at its forty-fifth session, many delegations expressed the opinion that a general confidentiality provision should not be included. It was also suggested that the matter should be left to be addressed on a case-by-case basis by the arbitrators and the parties (A/CN.9/614, para. 86).

128. Some support was expressed for inclusion of a general provision regarding confidentiality, particularly in light of decisions such as that of the English Court of Appeal in City of Moscow v. Bankers Trust, which was said to highlight the importance of including a provision in the Rules. It was said that a number of existing international arbitral rules such as the LCIA Arbitration Rules and WIPO rules contained specific provisions on confidentiality. The attention of the Working Group was drawn to article 9 of the UNCITRAL Model Law on International Commercial Conciliation as a possible reference for drafting a provision on confidentiality.

129. However, it was cautioned that drafting a general provision on confidentiality would be extremely problematic, since it would require addressing questions such as when the duty of confidentiality arose and ended, whether that duty extended to persons other than the parties, such as witnesses or experts, and what exceptions should be made to that duty.

130. Against inclusion of a general provision of confidentiality, it was suggested that inclusion of such a general provision would run counter to the current trend toward greater transparency in international proceedings. It was also said that the underlying aim of the revision of the Rules was to provide flexibility so as to accommodate evolving law and practices. In that respect, it was noted that confidentiality was an area where law and practices were still developing.

131. In addition, drafting a general provision on confidentiality might not be appropriate in view of the fact that the importance of confidentiality in any given arbitration would depend on the nature of the relationship in question. For example, contracts relating to intellectual property demanded a high degree of confidentiality. For these reasons, it was suggested that the question of confidentiality be left to be addressed by the arbitrators and the parties on a case-by-case basis.

132. A concern was expressed that there might be a large number of users of the Rules who expected the Rules to guarantee confidentiality. To address that concern, a suggestion was made to include a footnote to the model arbitration clause appended to article 1 of the Rules drawing the parties' attention to the possibility of adding a provision on confidentiality including its scope, duration and to whom the duty was addressed. It was said that such a footnote could serve as a reminder that the matter was one which the parties needed to address and was not dealt with in the Rules.

133. After discussion, the Working Group agreed that no provision on confidentiality of proceedings should be included in the Rules.

Extend or shorten time periods

134. The Working Group recalled that a proposal had been made at its forty-fifth session to include in the Rules a general provision in article 15, along the lines of "In discharge of its duties under article 15, paragraph (1), the arbitral tribunal may at any time extend or abridge any period of time prescribed under or pursuant to the Rules" (A/CN.9/614, paras. 41-46).

135. While various views were stated as to whether the arbitral tribunal had an inherent power to change procedural time limits, support was expressed for expressly dealing with that matter in the Rules. However, concern was expressed that it might be inappropriate to permit the arbitral tribunal to modify the parties' agreement, for example an agreement that the arbitration should be completed within a certain period of time. A suggestion was made the arbitral tribunal should be required to provide reasons justifying any change to the procedural time periods, in line with the approach taken in article 23 of the Rules. That proposal was not supported. A question was raised as to any power given to the arbitral tribunal to extend time-limits should also be given to the appointing authority pending the constitution of the arbitral tribunal. It was pointed out that conferring such power on the arbitral tribunal could create a risk of delaying the constitution of the arbitral tribunal.

136. After discussion, the Working Group agreed that the Rules should establish the authority of the arbitral tribunal to modify the periods of time prescribed in the Rules but not to alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties.

Article 16

Place of arbitration

137. The Working Group considered whether to include terminology differentiating between the "seat of arbitration" (when referring to the legal place of arbitration that determined the applicability of the law governing the arbitration as well as court jurisdiction) and "location" or "venue" (when referring to the place where meetings were actually held). The Working Group also considered whether specific language should be added to article 16 regarding the consequences attaching to the legal place of arbitration.

Use of differentiated terminology

138. It was suggested that it might be necessary to distinguish between the legal and physical places of arbitration, and that modification of the terminology used would promote clarity. It was observed that the modification might also serve an educational purpose, given that users were often unaware of the legal consequences that attached to the term "place of arbitration". Diverging views were expressed as to how best to achieve distinction between the legal and physical places of arbitration.

139. A proposal was made to replace the words "place of arbitration" in article 16, paragraphs (1) and (4) with words such as the "seat", "legal seat" or "juridical seat" of arbitration. It was proposed that a term such as "location" be used when dealing with the purely physical or geographical place of arbitration, under paragraphs (2) and (3).

140. Another proposal was made that article 16 might be amended along the lines of article 16 of the LCIA Arbitration Rules, which referred in its paragraph (1) to the "the seat (or legal place)" of the arbitration, and which provided under its paragraph (2) that "the Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion and, if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration (…)." That proposal received some support.

141. However, it was cautioned that the use of new terminology might lead to unintended consequences to existing contractual drafting practices that used different expressions, including the "place of arbitration", with the intention of referring to the legal seat of arbitration. In response, it was said that the word "place" had a generic connotation that could encompass either the legal or physical place depending on the context in which it was used. The Working Group further considered but did not reach a conclusion as to whether the Rules should remain consistent with the UNCITRAL Arbitration Model Law (which currently used the expression "place of arbitration") or whether a different terminology should be used.

142. In order to clarify that matter, proposals were made to restructure article 16 by merging paragraphs (1) and (4) (which dealt with the legal place of arbitration) and paragraphs (2) and (3) (which dealt with the physical place of arbitration). As well, it was proposed to relocate paragraph (4) under article 32 of the Rules, which dealt with awards.

Consequences arising from the legal place of arbitration

143. A question was raised whether paragraph (1) should clarify that the legal place of arbitration determined the law applicable to the arbitral procedure and court jurisdiction. After discussion, the Working Group agreed that the legal consequences arising from the choice of a seat of arbitration might differ in different legal systems, and that the Rules were not the appropriate instrument to codify that matter.

144. After discussions, the Working Group agreed to further consider that matter at a future session, and requested that the Secretariat provide alternative drafts, based on the discussion in the Working Group. It was agreed that attention should be given to further distinguishing hearings and other meetings held with the parties from meetings held exclusively for the tribunal's deliberations.

Language

Article 17

145. The Working Group agreed to delete the reference to "or languages" in article 17 (as well as in the note to the Model Arbitration Clause) on the basis that,

in situations where more than one language was required to be used in arbitral proceeding, the parties were free to agree upon that.

Statement of claim – Article 18

Paragraph (1)

146. A question was raised whether the reference to "a copy of the contract and of the arbitration agreement" was still needed in light of the Working Group's earlier considerations in respect of whether or not to retain the writing requirement (see above, paragraphs 25-31). The view was expressed that, where a written contract and arbitration agreement existed, the obligation to communicate a copy needed to be maintained.

147. After discussion, the Working Group agreed that the drafting of the provision on the communication of the contract and arbitration agreement under articles 3 and 18 should be aligned. A further suggestion was made to simplify that sentence by deleting the words "if not contained in the contract". That proposal generally supported. The Working Group requested the Secretariat to revise these provisions accordingly.

Paragraph (2)

Subparagraph (a)

148. A suggestion was made that the reference to "addresses of the parties" could be revised in accordance with the earlier discussions of the Working Group concerning article 3, paragraphs (3)(b) and (5)(b) to replace the word "addresses" by the words "contact details" (see above, paragraph 52). That proposal was adopted.

Subparagraph (b)

149. The Working Group considered whether paragraph (2)(b) should be reformulated to read "a statement of the facts and legal principles supporting the claim" in order to encourage the parties to substantiate their claims from a legal point of view. Concern was expressed that the words "legal principles" were too vague and suggestions were made to replace those words with words such as "legal arguments" or "legal grounds".

150. It was suggested that the proposed change was unnecessary as it would eliminate the existing flexibility in that provision and would not accommodate the various practices that existed in different legal systems. In response, it was said that the fact that there were differing legal practices underscored the importance of addressing that issue in the Rules. Strong support was expressed for adding a reference to the "legal grounds".

151. After discussion, the Working Group agreed to add a new subparagraph (e) providing that the statement of claim should include a reference to the legal arguments or grounds supporting the claim.

Last sentence of paragraph (2)

152. Support was expressed for the proposal that the last sentence of article 18 (2) be reworded along the following lines: "The statement of claim shall, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant or by references to them."

153. Concern was expressed that the use of the word "shall" suggested that the claimant would be obliged to communicate a comprehensive statement of claimant and would be precluded from providing subsequent materials. To address that concern, it was suggested that the word "shall" be replaced by "should" in order to establish a standard for the contents of the statement of claim without imposing rigid consequences for departures from that standard.

154. After discussion, the Working Group requested the Secretariat to prepare a revised text taking account of the discussion.

Statement of claim in multi-party arbitration

155. The Working Group agreed that it was not necessary to amend article 18 to address the question of statement of claim in multi-party arbitration.

Statement of defence

Article 19

156. The Working Group agreed that, where applicable, the drafting of article 19 should be aligned with the revisions adopted in respect of article 18.

Raising claims for the purpose of set-off and counter-claims

157. The Working Group agreed that article 19 should contain a provision on set-off and that the arbitral tribunal's competence to consider counter-claims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances. To achieve that extension, the revised provision as contained in document A/CN.9/WG.II/WP145/Add.1 replaced the words "arising out of the same contract" with the words "arising out of the same legal relationship, whether contractual or not". Some support was expressed for that proposal.

158. A suggestion was made that the provision should be modified so as to allow counter-claims that were substantially connected to (or arose out of) the initial claim. Another suggestion was either to omit the words "arising out of the same legal relationship, whether contractual or not" or that the provision should not require that there be a connection between the claim and the counter-claim or set-off, leaving to the arbitral tribunal the discretion to decide that question. In that context, the view was expressed that removal of any connection between the claim and the counter-claim or set-off might accommodate the needs of specific situations such as investment disputes involving States but might not sufficiently meet the needs of more general commercial disputes.

159. It was suggested that articles 3 (6)(d), 15 (4)(a), 19 (3), and 28 (1) should consistently refer to "counter-claims or claims for the purpose of a set-off."

160. After discussion, the Working Group agreed that the present wording of article 19 was too narrow and requested the Secretariat to prepare alternative versions taking account of the discussions on that matter, including through a possible revision of article 15 on consolidation.

Amendments to the claim or defence

Article 20

161. The Working Group agreed to adopt article 20 in substance, as contained in A/CN.9/WG.II/WP.145.

Pleas as to jurisdiction of the arbitral tribunal

Article 21

Paragraph (1)

162. In the interests of simplicity, the Working Group agreed to replace the words "ipso jure" with wording as along the lines of "of itself".

Paragraph (2)

163. The Working Group adopted paragraph (2) in substance, as contained in A/CN.9/WG.II/WP.145.

Paragraph (3)

164. The Working Group noted that paragraph (3) had been revised so as to be consistent with article 16, paragraph (3) of the UNCITRAL Arbitration Model Law, in accordance with the Working Group discussions at its forty-fifth session. A suggestion was made that the provision should allow the parties to request the arbitral tribunal to rule on its jurisdiction as a preliminary question. A question was raised whether the provision should encompass any pending dispute before a court on the arbitration. The Working Group agreed to further consider that matter.