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# Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009)

Contents



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# 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 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]

7. At its fortieth session (Vienna, 25 June-12 July 2007), 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

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

work.[8] The Commission 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.[10] 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. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect.[11]

# II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its fiftieth session in New York, from 9 to 13 February 2009. The session was attended by the following States members of the Working Group: Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Namibia, Nigeria, Norway, Pakistan, Poland,

[8] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 174.
[9] Ibid., para. 175.
[10] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.
[11] Ibid., para. 314.

Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Switzerland, Thailand, Uganda, 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: Angola, Argentina, Belgium, Brazil, Burkina Faso, Costa Rica, Croatia, Finland, Ghana, Haiti, Holy See, Indonesia, Kuwait, Libyan Arab Jamahiriya, Mauritius, Netherlands, Nicaragua, Peru, Philippines, Qatar, Romania, Saudi Arabia, Sweden, Togo, Tunisia, Turkey and Yemen.

11. The session was attended by observers from the following organizations of the United Nations System: the United Nations Office of Legal Affairs and the World Bank.

12. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), Central American Court of Justice (CCJ), European Commission (EC), International Cotton Advisory Committee (ICAC), MERCOSUR and Permanent Court of Arbitration (PCA).

13. 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 Association of Private International Law (ASADIP), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (ABCNY), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), *Centre pour l'Étude et la Pratique de l'Arbitrage National et International* (CEPANI), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), European Company Lawyers Association (ECLA), European Law Students' Association (ELSA), Forum for International Commercial Arbitration C.I.C. (FICACIC), Gulf Cooperation Council (GCC) Commercial Arbitration Centre, ICC International Court of Arbitration, Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Bar Association (IBA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, School of International Arbitration of the Queen Mary University of London, Swiss Arbitration Association (ASA) and *Union Internationale des Avocats* (UIA).

14. The Working Group elected the following officers:

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

*Rapporteur*: Mr. Abbas Bagherpour Ardekani (Islamic Republic of Iran).

15. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.153); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.151, A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.152 and A/CN.9/WG.II/WP.154).

16. 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

17. 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, A/CN.9/WG.II/WP.152 and A/CN.9/WG.II/WP.154). 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. The deliberations and decisions of the Working Group in respect of agenda item 5 are reflected in chapter V.

# IV. Revision of the UNCITRAL Arbitration Rules

18. The Working Group recalled that it had concluded a second reading of articles 1 to 17 at its forty-ninth session (A/CN.9/665) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.151/Add.1 and the proposed revisions to the Rules contained therein.

## Section III. Arbitral proceedings

**Statement of claim – Article 18**

***Paragraph (1)***

19. The Working Group considered the last sentence of paragraph (1) which had been added to deal with the situation where the claimant decided to treat its notice of arbitration as a statement of claim. The purpose of that sentence was to allow a claimant to postpone its decision on whether its notice of arbitration constituted a statement of claim until the time the arbitral tribunal required the claimant to submit its statement of claim, instead of having to make that decision at the time of the notice of arbitration. It was said that that provision was useful in practice, as it clarified that a party did not need to produce a statement of claim if it considered that its notice of arbitration already fulfilled that purpose.

20. It was observed that a notice of arbitration, treated as a statement of claim, should nonetheless comply with the requirements contained in article 18, paragraph (2) and it was proposed to clarify that matter by adding at the end of

paragraph (1) language along the following lines: “provided that it meets the requirements of paragraph (2)”. It was further observed that such a notice of arbitration should also meet the requirements contained in article 18, paragraph (3).

21. The necessity to provide such additional language was questioned. A view was expressed that it would be for the arbitral tribunal to deal with the general question of the consequences of an incomplete statement of claim, and that the Rules should not dwell into such details. That view was not supported.

22. After discussion, the Working Group generally agreed that a notice of arbitration treated as a statement of claim should comply with the provisions of article 18 and the Working Group requested the Secretariat to revise the last sentence of paragraph (1) to reflect that decision. The Working Group also took note of the remark that the provisions on the content of the notice of arbitration, as contained in article 3, and the provisions on the content of the statement of claim as contained in article 18 might overlap and that there might be a need to consider that question at a further stage of discussions on article 3.

***Paragraph (2)***

23. The Working Group adopted the substance of paragraph (2), without modifications.

***Paragraph (3)***

24. The Working Group agreed that the words “other evidentiary materials” under paragraph (3) should be replaced by the words “other evidence” as used in the 1976 version of the Rules, for the reason that it covered all evidence that could be submitted at the stage of the statement of claim, whereas the term “evidentiary materials” might be construed in a more limitative manner, for instance, excluding testimony or written witness statements.

**Statement of defence**

**Article 19**

***Paragraph (1)***

25. It was observed that the last sentence of paragraph (1) was added to deal with the situation where the respondent decided to treat its response to the notice of arbitration as its statement of defence. The Working Group agreed that that sentence should be revised to parallel the modifications adopted in respect of the last sentence of article 18, paragraph (1) (see paragraphs 19-22 above).

***Paragraph (2)***

26. The Working Group adopted paragraph (2) in substance with the modification to replace the words “other evidentiary materials” by the words “other evidence”, to be consistent with the change agreed upon in article 18, paragraph (3) (see paragraph 24 above).

***Paragraph (3)***

*Claims relied on for the purpose of a set-off and counterclaims*

27. The Working Group recalled its previous discussions that paragraph (3) should contain a provision on set-off and that the arbitral tribunal's competence to consider claims for the purpose of a set-off and counterclaims should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances (A/CN.9/614, paras. 93 and 94; A/CN.9/619, paras. 157-160). The Working Group noted that paragraph (3) contained two options. Under the first option, the respondent might rely on a claim for the purpose of a set-off or make a counterclaim "arising out of the same legal relationship, whether contractual or not". Under the second option, a claim for the purpose of a set-off or a counterclaim might be presented "provided that it [fell] within the scope of the arbitration agreement".

28. The Working Group had also before it a proposal made by a delegation, contained in document A/CN.9/WG.II/WP.152. Under that proposal, a claim relied on for the purpose of a set-off should be admissible even if it did not fall within the scope of the arbitration agreement, was the object of a different arbitration agreement or of a forum selection clause, provided that the requirements for a set-off under the substantive law applicable to the main claim were fulfilled. It was explained that a claim for set-off was a defence and that in some legal systems, set-off extinguished the claim at the time when the set-off situation had arisen. In such situation, it was said that there was no need for an examination of the application of the arbitration agreement. A counterclaim, however, was viewed as a different claim going beyond a mere defence and would thus require to be within the scope of an arbitration agreement between the parties and to have a sufficient link to the main claim.

29. The proposal received some support on the ground that it offered different rules in relation to claims for set-off and counterclaims, and would therefore provide guidance to the arbitral tribunals on issues of jurisdiction. It was widely felt, however, that the proposal went too far and might not be easily accepted in all legal systems. It was observed that claims for set-off and counterclaims were matters of procedural domestic law, and it might not be appropriate to provide substantive universal rules on those questions. It was stated that in both cases, the arbitral tribunal would have to first decide on its competence, treating both claims for set-off and counterclaims alike. Further, it was observed that the proposal might invite challenges under the New York Convention with respect to the scope of the arbitration agreement even if the parties would have accepted such extension by agreeing on the application of the Rules.

30. The Working Group considered options 1 and 2 of article 19, paragraph 3 as contained in A/CN.9/WG.II/WP.151/Add.1. Some support was expressed for option 2. A proposal was made to replace the word "the" appearing before the words "arbitration agreement" in option 2 by the word "an" in order to clarify that the notion of arbitration agreement should be construed broadly, not being limited to the arbitration agreement on which the main claim was based. Another proposal was made to combine options 1 and 2 in order to better address the consequences of broadly drafted arbitration agreements on admissibility of claims for the purpose of a set-off and counterclaims. Another suggestion was made to allow claims for

set-off and counterclaims under the conditions that they fell within the scope of the arbitration agreement and had a sufficient link to the main claim. Though some support was expressed for that proposal, it was viewed as being too restrictive. In addition, it was noted that the term "sufficient link" might give rise to different interpretations.

31. It was observed that a better approach would be to avoid substantive rules on the determination of the arbitral tribunal's competence, which could be understood in a variety of manners under different legal systems. Towards that end, it was suggested to include in paragraph (3), in replacement of the two options, the following words: "provided that the tribunal has jurisdiction." Although some concern was expressed that such provision did not provide sufficient guidance for the determination of the arbitral tribunal's jurisdiction, the proposal found wide support. Further, it was found broad enough to encompass a wide range of circumstances and did not require substantive definitions of the notions of claims for set-off and counterclaims and could take account of the situation where the claim had been extinguished by the set-off.

32. After discussion, the Working Group agreed that paragraph (3) should be amended along the following lines: "In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the tribunal has jurisdiction over it."

***Paragraph (4)***

33. The Working Group adopted the substance of paragraph (4), without modifications.

**Amendments to the claim or defence – Article 20**

*"Scope of the arbitration agreement" – "Jurisdiction of the arbitral tribunal"*

34. The Working Group agreed that, following the revision adopted under article 19, paragraph (3) (see paragraph 32 above), the last sentence of article 20 should be amended accordingly, and the reference to the scope of the arbitration agreement should be replaced by a reference to the competence of the arbitral tribunal, so that a claim might be amended or supplemented provided that it fell within the jurisdiction of the arbitral tribunal.

*"Claim or defence"*

35. The Working Group further agreed that the words "or defence" should be added in the second sentence of article 20 to align it with the wording of the first sentence of that article.

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

***Paragraph (1)***

*"or a legal instrument"*

36. The Working Group recalled its earlier decision that paragraph (1) should be redrafted along the lines of article 16, paragraph (1) of the UNCITRAL Arbitration

Model Law in order to clarify that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97). For the sake of consistency with modifications adopted by the Working Group under articles 1, 3 and 18, it was suggested to add the words "or legal instrument" after the word "contract" in the second and third sentences of paragraph (1). Inclusion of those words was said to avoid limiting the types of disputes that parties could submit to arbitration, and could in particular usefully address disputes arising under international investment treaties.

37. Although consistency was viewed as important in the revision of the Rules, the Working Group agreed that the suggested modification might have far-reaching consequences in the field of public international law. It was stated that the separability principle contained in article 21, paragraph (1), which applied in the context of commercial contracts, was not intended to be transposed to international treaties by amending the UNCITRAL Arbitration Rules. The Working Group took no position as to whether the substantive rights conferred to investors by a treaty, including the right to refer a dispute to arbitration, would be extinguished when the treaty terminated. In that regard, it was emphasized that the principle of separability was not necessarily recognized in the context of international treaties. Further, it was widely felt that it would not be appropriate for an instrument as the Rules, to attempt regulating such matters of public international law.

*"admissibility of parties' claims" – "and the exercise of its jurisdiction"*

38. It was noted that article 21 dealt with the power of the arbitral tribunal to decide upon issues regarding the existence and scope of its own jurisdiction. For the purpose of clarity, it was suggested also to include a reference to the power of the arbitral tribunal to decide upon the admissibility of parties' claims. In that regard, a suggestion was made to insert in the first sentence of paragraph (1), after the words "may rule on its own jurisdiction", the words "and the exercise thereof". To the same end, another proposal was made to provide that the arbitral tribunal might "rule on the scope of its own jurisdiction". Those proposals did not receive support. It was pointed out that matters of jurisdiction and admissibility of claims were distinct issues that arose at different points in time of the arbitral proceedings. Therefore, it was stated that it would not be appropriate to deal with both issues in paragraph (1).

39. Although it was decided that no change should be made to the text of the Rules, the Working Group confirmed its understanding that the general power of the arbitral tribunal, referred to in paragraph (1), to decide upon its jurisdiction should be interpreted as including the power of the arbitral tribunal to decide upon the admissibility of the parties' claims or, more generally to exercise its own jurisdiction. The Working Group further confirmed its understanding that article 21 applied also to the objections made by a party that the tribunal should not exercise its jurisdiction to examine a claim on the merits.

*"non-existent or invalid" – "null and void" [defects of a contract]*

40. A suggestion was made that the words "null and void" in the third sentence of article 21, paragraph (1) should be replaced by the words "non-existent or invalid". In support of that suggestion, it was stated that the terms "null and void" had given rise to particular difficulties of application, in particular in certain common law

jurisdictions. It was pointed out that there were situations that might not necessarily be captured by the term "null and void", for instance, a contract having expired with the passage of time. It was stated that the notions of a contract being "invalid" or "non-existent" would better reflect the general understanding that no defect in a contract should entail of itself the invalidity of the arbitration clause. Further, it was said that the words "non-existent or invalid" should be used to be consistent with the words "existence or validity" in the first sentence of article 21, paragraph (1).

41. In response, it was noted that the notion of "non-existence of a contract" gave rise to particular difficulties in some legal systems. It was further noted that the words "null and void" had not caused any problems in practice and that they were also found in article II, paragraph (3) of the New York Convention and article 8, paragraph (1) of the UNCITRAL Arbitration Model Law. It was also observed that the first sentence related to the question of existence or validity of the arbitration agreement, whereas the third sentence related to the validity of the contract in which the arbitration clause was contained. Therefore, no alignment of wording was viewed necessary.

42. After discussion, the Working Group agreed that the defects of a contract referred to in the third sentence of paragraph (1) should be construed as broadly as possible to cover all situations where a contract could be considered null, void, non-existent, invalid or non-effective. Towards that end, it was suggested to delete the words "and void" in the third sentence of paragraph (1), and retain the word "null". It was said that the term "null" was wide enough to cover all contractual defects. That deletion, it was further said, would align the English version with other language versions of that paragraph and promote a broad interpretation of the concept of defects of a contract. A delegation observed that the term "null" had been given a wider interpretation in case law than the term "null and void".

43. After discussion, the Working Group agreed that the words "and void" in the third sentence of paragraph (1) should be deleted.

*"ipso jure"*

44. The Working Group recalled the decision at its forty-sixth session to replace the words "ipso jure" with wording along the lines of "of itself" in the interests of simplicity (A/CN.9/619, para. 162). It was observed that the word "automatically" instead of the words "of itself" would better translate the Latin term "ipso jure". After discussion, the Working Group agreed that the words "ipso jure" would be replaced by "automatically". However, "ipso jure" should be retained in the Spanish version of the Rules. The appropriate words for the French version of the Rules would be "de plein droit".

***Paragraph (2)***

45. The Working Group adopted the substance of paragraph (2), without modifications.

***Paragraph (3)***

46. The Working Group adopted the substance of paragraph (3), without modifications.

**Further written statements – Article 22**

47. The Working Group adopted the substance of article 22, without modifications.

**Periods of time – Article 23**

48. The Working Group adopted the substance of article 23, without modifications.

**Evidence – Article 24**

***Paragraphs (1) and (3)***

49. The Working Group adopted the substance of article 24, with the modifications discussed under paragraphs 70 to 75 below.

***Proposed deletion of paragraph (2) as contained in the 1976 version of the Rules***

50. In response to a question whether article 24, paragraph (2), as contained in the 1976 version of the Rules should be deleted, it was recalled that the prevailing view in the Working Group was that paragraph (2) should be deleted, as it might not be common practice for an arbitral tribunal to require parties to present a summary of documents (A/CN.9/641, paras. 22-25). It was also recalled that paragraph (2) was predicated on an expectation that substantial evidence might not be introduced until the hearings, which was contrary to the provisions of revised articles 18 and 19, which encouraged parties "as far as possible" to submit with their statement of claim or of defence "all documents and other evidence relied upon by the [parties]".

51. It was further recalled that the deletion of paragraph (2) should not be understood as diminishing the discretion of the arbitral tribunal to request the parties to provide summaries of their documents and evidence on the basis of article 15. The Working Group confirmed its decision to delete paragraph (2) as contained in the 1976 version of the Rules.

**Hearings, witnesses and experts – Article 25**

***Comments on article 25***

52. The Working Group heard a number of comments on article 25 on the following issues.

*"Parties' appointed experts and expert witnesses" (title to article 25)*

53. It was suggested that experts appointed by the parties belonged to the more general category of witnesses, and that therefore the title of article 25 should be modified along the following lines: "Hearings, witnesses, including expert witnesses". It was also pointed out that the words "witnesses, including expert witnesses" were used in article 15, paragraph (2). It was further said that the same wording as proposed in the title should be used where relevant in the text of article 25. On the other hand, it was pointed out that experts would normally not provide testimony but opinions and that therefore the term "testify" might not be appropriate.

54. It was observed that the terminology to be used in the title and in the provision should make it clear that article 25 applied to witnesses and experts presented by a party, and not to tribunal-appointed experts. It was added that witnesses under article 25 included individuals testifying on an issue of fact or of expertise.

*General rule on the organization of hearings (paragraph (1))*

55. Paragraph (1) expressed the general principle that the arbitral tribunal should give parties adequate advance notice of oral hearings, whereas paragraphs (2) and (3) contained provisions on the organization of hearings. It was said that the arbitral tribunal should enjoy wide discretion in organizing hearings, and the provisions in paragraphs 2 and 3, which were said to be too detailed, were proposed to be deleted and replaced by a more generic provision placed in paragraph (1), so that paragraph (1) would read as follows: "In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof and shall organize the proceedings to ensure the parties have timely notice of witnesses and experts anticipated to appear, the languages of the hearings and the procedures to be employed therein."

56. A concern was expressed that such a generic provision, if it were to replace paragraphs (2) and (3) would not provide sufficient guidance to arbitral tribunals, and that paragraphs (2) and (3) served a useful educational purpose. In response, it was observed that the UNCITRAL Notes on Organizing Arbitral Proceedings provided for guidance on such matters, and that there was no need to insert detailed provisions in the Rules on organizational aspects of the hearings.

*Conditions for hearing witnesses (paragraph (1 bis))*

57. It was noted that paragraph (1 bis) expressed the general principle that the arbitral tribunal should set the conditions for hearing witnesses. It was observed that the first sentence of paragraph (1 bis) and the last sentence of paragraph (4) both provided a general rule on hearing witnesses, and it was suggested that both sentences should be merged along the following lines: "Witnesses and experts presented by the parties may be heard under conditions and examined in the manner set by the arbitral tribunal." That suggestion received support.

*Definition of witnesses (paragraph (1 bis))*

58. It was noted that the reference to "individual" in the second sentence of paragraph (1 bis) might be read as excluding legal persons, which might not be the intention of that phrase.

59. A proposal was made to simplify the second sentence of paragraph (1 bis) by replacing it with a sentence along the following lines: "For the purposes of these Rules, any person may be a witness or an expert witness". It was noted that a similar provision was found in article 25 (2) of the Swiss Rules of International Arbitration ("Swiss Rules").

60. On the question whether a party or a representative of a party could be heard as a witness as provided under paragraph (1 bis), it was observed that divergences existed between legal systems on that question, and for that reason, concerns were expressed with regard to the inclusion of a provision on that point in the Rules. In response, it was noted that such a provision was found expressed in similar terms in

article 4 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1 June 1999), article 25 (2) of the Swiss Rules and article 20.7 of the Arbitration Rules of the London Court of International Arbitration ("LCIA Rules").

*Cross-examination of witnesses (paragraph (2))*

61. It was suggested that paragraph (2) should include provisions on the procedure in relation to cross-examination of witnesses, and to that end, the following language should be added at the end of paragraph (2): "and the names of witnesses and experts which it proposes to examine." However, it was observed that the Rules did not preclude cross-examination of witnesses and the need to include such a provision was questioned.

*Contact details (paragraph (2))*

62. For the sake of consistency with the language used in articles 3 and 18 of the Rules, it was proposed to replace the word "addresses" appearing in paragraph (2) by the words "contact details".

*Detailed arrangements for the organization of hearings (paragraph (3))*

63. Paragraph (3) detailed the practical arrangements that the arbitral tribunal might make to organize oral hearings. That paragraph was proposed for deletion for the reason that it provided too many details, which were said to be seldom found in modern arbitration rules. Against deletion, it was pointed out that paragraph (3) might provide useful guidance to arbitral tribunals. If it were to be retained, it was suggested to replace the word "translation" by the word "interpretation" which was said to be more appropriate.

*"save when the witness is a party to the arbitration" (paragraph (4))*

64. In relation to the second sentence of paragraph (4), it was proposed to place the words "save when the witness is a party to the arbitration" appearing at the end of the second sentence of paragraph (4) before the words "during the testimony of other witnesses". Delegations which opposed the inclusion of a provision in the Rules permitting a party to be heard as a witness suggested deletion of those words.

*Videoconference (paragraph (5))*

65. It was noted that paragraph (5) permitted evidence of witnesses to be presented in the form of oral statements that did not require the presence of witnesses. It was further noted that paragraph (5) was drafted in generic terms and that it might be necessary to clarify that the intention of the provision was to allow hearings of witnesses by means of communication, such as videoconferences. To further clarify the meaning of that paragraph, it was proposed to add the word "physical" before the word "presence". Those proposals received support.

66. It was observed that the right of the parties to present witnesses by means that did not require their presence should be subject to the agreement of the tribunal. To that end, it was proposed to insert the words "unless the arbitral tribunal determines that it is not appropriate to do so" at the end of paragraph (5). Doubts were expressed regarding the need to add the proposed wording, as paragraph (4) already

expressed the general principle that the arbitral tribunal was free to determine the manner in which witnesses and experts were to be examined.

67. In that context, it was pointed out that communication of information by the parties in relation to witnesses proposed to be heard by means that did not require their physical presence should be expressly addressed in paragraph (2).

*Presentation of evidence (paragraph (6))*

68. It was observed that admissibility of evidence under paragraph (6) should be construed in a wide manner. It was suggested that paragraph (6) might need to be amended to include a determination of a period of time for the presentation of evidence. It was noted that the arbitral tribunal should have discretion to refuse evidence that was submitted late. It was further pointed out that such reference to that specific power of the arbitral tribunal might be helpful with regard to the principle of due process, in particular in civil law countries. It was also observed that the Rules were silent on the question of sanctions in case of non-compliance with the provisions on submission of evidence.

***Alternative proposal to article 25***

69. As a result of the extensive discussion on article 25, it was questioned in the Working Group whether that article presented the risk of over regulating the procedure for hearings and whether a different approach should be adopted. It was said that certain provisions, in particular paragraphs 2 and 3 of article 25 contained a number of details on the procedure for hearings that could overburden the Rules, reduce their flexibility and were not commonly found in modern international arbitration rules. A better approach, it was said, might be to establish a general framework leaving discretion to the arbitral tribunal to organize hearings in an appropriate manner taking account of the circumstances of the case. Many delegations suggested that provisions of article 25 that expressed fundamental principles should be retained, whereas provisions that included only details of a procedural nature should be deleted. But other delegations cautioned that existing provisions should not be deleted absent compelling reasons. A concern was expressed that retention of only the main principles would not provide sufficient guidance to arbitral tribunals in the conduct of hearings. In response, it was said that the Rules were not an instrument designed primarily for educational purpose.

70. After discussion, the Working Group agreed that article 25 should aim at establishing a general framework on the conduct of hearings, and that that article should be amended to reflect that goal. To that end, articles 24 and 25 were proposed to be modified along the following lines ("the new proposal"):

Article 24:

- Paragraph (1) would remain unchanged.
- It was proposed to insert as a second paragraph of article 24 the following sentence: "Unless otherwise directed by the arbitral tribunal, statements by witnesses and experts may be presented in writing and signed by them."
- Paragraph (3) would remain unchanged.

- The content of paragraph (6) of article 25 would be placed as a fourth paragraph under article 24.

Article 25:

- Article 25 would be titled “Hearings”.
- Paragraph (1) would remain unchanged.
- Paragraph (1 bis) would read: “Witnesses and party appointed experts may be heard under the conditions and examined in the manner set by the arbitral tribunal. Any individual admitted to testify to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under these Rules, notwithstanding that the individual is a party to the arbitration or in any way related to a party.”
- Paragraph (2) would read: “At least 15 days before the hearing, the arbitral tribunal, after having invited the parties’ views, shall draw up a list of persons, if any, who are to be examined at the hearing and the languages in which they are to do so.”
- Paragraph (3) would be omitted.
- Paragraph (4) would read: “Hearings shall be held in camera unless the parties agree otherwise.”
- Paragraph (5) would read: “The arbitral tribunal may direct that witnesses and experts be examined through means that do not require their physical presence at the hearing, such as videoconferencing.”
- Paragraph (6) would be omitted and its content be placed as a fourth paragraph under article 24.

71. It was explained that the new proposal aimed at clarifying the various stages of organizing hearings in respect of the time when witnesses and experts would be made known, as covered under article 18, the form in which the statements of witnesses and experts would be presented under article 24 and the organization of the hearings under article 25.

***Article 24, paragraph (2) of the new proposal***

72. It was questioned whether the word “expert” used in article 24, paragraph (2) of the new proposal referred to both party-appointed experts and tribunal-appointed experts as article 27 on tribunal-appointed experts already contained a provision on the presentation of statements by tribunal-appointed experts. It was clarified that the purpose of article 24, paragraph (2) of the new proposal was to deal with party-appointed experts. After discussion, the Working Group adopted the substance of article 24, paragraph (2) of the new proposal.

***Article 24, paragraph (4) of the new proposal***

73. A reservation on the placement of paragraph (6) of article 25 under article 24 was expressed on the ground that that paragraph did not constitute a general rule on evidence. Despite that reservation, the placement of paragraph (6) of article 25 as a fourth paragraph of article 24 received wide support.

74. The suggestion that that provision should clarify that the arbitral tribunal was expressly empowered to refuse late submission was reiterated. To that end, it was proposed to add at the end of article 24, paragraph (4) a sentence along the lines of "The arbitral tribunal may disregard evidence that is submitted late." In response to that suggestion, it was pointed out that that matter was already dealt with under article 24, paragraph (3), which provided that "at any time during the arbitral proceedings the arbitral tribunal may require the parties to produce (…) evidence within such a period of time as the tribunal shall determine." It was said that, for instance, the US-Iran Claims Tribunal that was functioning under the UNCITRAL Arbitration Rules had exercised the power to refuse late evidence on the basis of that provision.

75. After discussion, the Working Group agreed that it was not necessary to add a provision on late submission in the Rules. The Working Group confirmed its understanding that the power of the arbitral tribunal to refuse late submission was provided for under article 24, paragraph (3).

***Article 25, paragraph (1 bis) of the new proposal***

*"Expert witnesses"*

76. The Working Group agreed to further consider the question of expert witnesses and whether the word "expertise" used in the second sentence of paragraph (1 bis) of the new proposal should be further clarified. In that respect, concern was expressed that the word "expertise" had broader meaning than what might be intended to be captured in that provision. The Working Group requested the Secretariat to find appropriate wording, which would clarify the distinction between experts appointed by a party and by the arbitral tribunal.

*"Witness, being a party to the arbitration"*

77. Concerns were expressed on a provision allowing an individual which was a party to the arbitration to be heard as a witness, or even as an expert, in its own case. It was said that that provision might have as consequence that a party requested to be heard as a witness instead of producing evidence. It was also said that it would be contrary to procedural rules in certain jurisdictions according to which information provided by such individual should be received as information provided by the party and not as testimony of witness. With a view to addressing that concern, it was proposed to add as opening words of the second sentence of article (1 bis) of the new proposal the words "Subject to the provision of article 24, paragraph (4)". It was also suggested to replace the word "shall" appearing after the word "expertise" in the second sentence of paragraph (1 bis) by the word "may". Those suggestions received some support. It was said that the arbitral tribunal had full power to determine the weight of the evidence offered under article 24, paragraph (4) of the new proposal. It was also said that hearing parties as witnesses was a common practice in international commercial arbitration. However, it was observed that the provision was drafted in a very broad manner, allowing for instance, legal counsel of parties to testify as witness. The Working Group was reminded of its discussion at its forty-sixth session on the matter (A/CN.9/641, paras. 29-37) and its decision to empower the arbitral tribunal to hear a party as a witness (A/CN.9/641, para. 38). After discussion, it was agreed to replace the word "testifying" by the words "admitted to testify" in order to clarify that the Rules were

not intended to trump on the power of the arbitral tribunal to rule on the admissibility of witnesses.

*"Witness, being related to a party"*

78. It was explained that the words "or in any way relating to any party" in the second sentence of paragraph (1 bis) of the new proposal had been inserted as an encompassing term that avoided listing persons that acted on behalf of a legal person. It was further explained that such an encompassing term would also avoid the difficulties encountered with the different functions and descriptions of persons acting on behalf of a legal person in different legal systems. It was recalled that the Working Group had agreed to a more neutral formulation at its forty-seventh session (A/CN.9/641, para. 38).

79. After discussion, the Working Group agreed to adopt paragraph (1 bis), subject to further consideration of matters mentioned in paragraphs 76 and 77 above.

***Paragraph (2) of the new proposal***

80. With respect to paragraph (2) of the new proposal, it was noted that the requirement for the arbitral tribunal to send advance notice to the parties in the event of an oral hearing in paragraph (1) also covered the identification of persons who were to be examined at the hearing. It was further noted that the Rules already contained a provision on languages in article 17. Therefore, the Working Group agreed to delete paragraph (2).

***Paragraph (3)***

81. It was observed that article 25, paragraph (3) had been found too detailed to be included in modern arbitration rules. Consequently, the Working Group agreed that paragraph (3) should be deleted.

***Paragraph (4) of the new proposal***

82. It was noted that paragraph (4) of the new proposal did not mention the power of the arbitral tribunal to require the retirement of any witness or witnesses during the testimony of other witnesses as included in the second sentence of article 25, paragraph (4) (as contained in document A/CN.9/WG.II/WP.151/Add.1). As retaining the clause that referred to that power of the arbitral tribunal was viewed as very important, it was suggested to include the second sentence of article 25, paragraph (4) in paragraph (4) of the new proposal. In support of that suggestion, it was stated that the inclusion would provide the necessary guidance to the arbitral tribunal on its powers with respect to hearings. It was stated that requiring witnesses to retire might be seen as interfering with the right of a party and that, therefore, their method of examining deserved to be expressly mentioned, while other methods, equally acceptable, would not give rise to that concern. In response, it was explained that that sentence was intentionally omitted for two reasons. First, the arbitral tribunal could view it as important to have a representative of a party required to retire during the testimony of another representative of the same party, which was not possible under article 25, paragraph (4). Second, that method of examination might not be the most frequent one and the reference to it in the Rules would run the risk of implying that it was regarded as the preferred method. The

inclusion of that sentence was further viewed as unnecessary, because there was sufficient jurisprudence to turn to for guidance. It was also noted that arbitral tribunals had broad discretion to deal with those matters and that there was existing practice in international arbitration to guide the exercise of that discretion. The first two explanations were not disputed in themselves but nevertheless were not considered sufficient to support the deletion of the second sentence of article 25, paragraph (4). It was said that requiring the retirement of a witness during the testimony of other witnesses in article 25, paragraph (4) was not prescriptive, which could be seen from the use of the word "may", and could, thus, not be taken as the preferred method of examination. The argument of jurisprudence used against inclusion of the sentence was not supported, as any jurisprudence had been developed under the provisions of article 25, paragraph (4) as contained in the 1976 version of the Rules. It was further said that there was no reason to burden the arbitral tribunal with searching for relevant case law for guidance. In addition, it was stated that the omission of any reference to that method of examination in the Rules would create legal uncertainty, because users of the Rules would be led to think that that method should not be applied. The Working Group was recalled of its mandate only to modify the 1976 version of the Rules if necessary.

83. After discussion, the Working Group agreed to keep the second sentence of paragraph (4) as contained in the 1976 version of the Rules and request the Secretariat to include a sentence to the effect that a party appearing as a witness should not generally be requested to retire during the testimony of other witnesses, which would also address the concerns expressed in the discussion (see paragraph 82 above).

***Paragraph (5) of the new proposal***

84. The Working Group adopted paragraph (5) of the new proposal in substance and requested the Secretariat to find appropriate wording to cover the example of examination by video transmission.

**Interim measures – Article 26**

*Placement of article 26*

85. The Working Group agreed that article 26 on interim measures should be placed after article 23, or alternatively after either articles 27 or 29, in order to group together the articles relating to evidence, hearings, and tribunal appointed experts.

*Alternative proposal*

86. The Working Group noted that article 26 mirrored the provisions on interim measures of chapter IV A of the UNCITRAL Arbitration Model Law. The Working Group had before it an alternative proposal made by a delegation contained in document A/CN.9/WG.II/WP.152 ("the alternative proposal"). Under that alternative proposal, article 26 was simplified and shortened. It did not contain paragraphs (2), (3) and (4) of article 26. It was explained that the proposed deletion of paragraph (2) was based on the assumption that a definition of interim measures was not necessary in the Rules, as such a definition would normally be found in applicable domestic law. It was further explained that paragraphs (3) and (4) were proposed for deletion,

because the alternative proposal sufficiently covered the conditions under which the arbitral tribunal could grant interim measures by adding the words “that it considers necessary for a fair and efficient resolution of the dispute” at the end of the first sentence in paragraph (1).

87. The alternative proposal received support from some delegations for the reason that its drafting style corresponded to the style of the Rules and it adopted a simplified approach to the question of interim measures, leaving to applicable domestic law matters of definition of interim measures and conditions for granting such measures. It was observed that the Rules should not be overloaded by provisions as contained in article 26, designed initially for use in a legislative context and aimed at establishing in detail the power for an arbitral tribunal to grant interim measures, so that such measures could be recognized and enforced by State courts. It was said that the Rules served a different purpose, and the alternative proposal appropriately summarized the core rules on interim measures. It was also observed that the definition of interim measures in article 26 might limit the power of arbitral tribunals to grant interim measures in jurisdictions that adopted a more liberal approach to the granting of interim measures than the UNCITRAL Arbitration Model Law. In that regard, it was observed that the provisions of the UNCITRAL Arbitration Model Law on interim measures had been recently adopted, and there was no experience with issues that might arise in the application of those provisions.

88. Although it was widely felt that article 26 might be considered too long, in particular in view of the length of the other provisions of the Rules, reservations were expressed on the alternative proposal. It was observed that the details included in article 26 did not serve only an educational purpose, but were intended to provide necessary guidance and legal certainty to the arbitrators and the parties. That purpose, it was emphasized, was particularly important in respect of many legal systems, which were unfamiliar with the use of interim measures in the context of international arbitration. In line with that proposal, it was also stated that a definition of interim measures was needed. It was recalled that the definition in article 26 consisted in a generic and exhaustive list intended to cover all instances in which an interim measure might need to be granted. Reservations on the alternative proposal were further expressed on the ground that it did not include a provision on conditions for granting such measures, which could lead to difficulties of interpretation and application.

89. The view was expressed that the alternative proposal constituted an unnecessary departure from the provisions on interim measures contained in chapter IV A of the UNCITRAL Arbitration Model Law, and that a better approach would be to duplicate the provisions of the UNCITRAL Arbitration Model Law so as to encourage development of practice in that area, in accordance with the standards developed by UNCITRAL. To address the concern regarding the length of article 26, it was proposed to divide article 26 into two separate articles, one establishing the power of arbitral tribunals to grant interim measures and the other defining the manner in which arbitral tribunals might grant such measures.

90. After discussion, the Working Group agreed to continue its deliberations on interim measures on basis of article 26 (as contained in document A/CN.9/WG.II/WP.151/Add.1), taking into consideration whether possible simplifications as contained in the alternative proposal could be made.

***Paragraph (1)***

91. The Working Group noted that paragraph (1) provided the right for an arbitral tribunal to grant interim measures and adopted the paragraph without modifications.

***Paragraph (2)***

*"includes, without limitation"*

92. A proposal was made to combine article 26, paragraph (1) of the alternative proposal and article 26, paragraph (2) (as contained in document A/CN.9/WG.II/WP.151/Add.1) in order to make it clear that the definition of interim measures in the Rules would be construed widely. It was proposed to insert the words "that it considers necessary for a fair and efficient resolution of the dispute" in the chapeau of paragraph (2). Another proposal was made to add to the list contained in paragraph (2) an additional item along the following lines: "(e) any other interim measure that the tribunal considers necessary for the fair and efficient resolution of the dispute." Although reservations were expressed on the latter proposed amendment to paragraph (2) because the definition of interim measures had been the subject of extensive discussion in the Working Group when revising the UNCITRAL Arbitration Model Law and was therefore believed to be comprehensive, it was found advisable to adopt in the Rules wording that contemplated the possibility of other types of interim measures not identified in the list.

93. To that end, a suggestion was made to replace the word "is" in the first line of paragraph (2) by the word "includes". It was further proposed to insert after the word "includes" the words "without limitation", to emphasize the non-exclusive nature of paragraph (2).

94. After discussion, the Working Group agreed to include in the first sentence the words "includes, without limitation", and adopted paragraph (2) in that form.

***Paragraph (2) (b)***

95. Concerns were expressed that the actions to be prevented or refrained from in paragraph (2) (b) could be understood as referring only to prejudice to the arbitral process. To clarify the meaning intended by the drafters of the UNCITRAL Arbitration Model Law, it was suggested to introduce an editorial change to paragraph (2) (b) by inserting "(i)" before the word "current" and "(ii)" before the word "prejudice" so that the situation of "prejudice to the arbitral process" would appear as distinct from "current or imminent harm".

***Paragraphs (3) and (4)***

96. It was noted that the conditions for granting interim measures in paragraph (3) applied equally to different kinds of interim measures. A view was expressed that such approach might be problematic in certain jurisdictions which adopted specific criteria in relation to measures granted for the preservation of assets out of which a subsequent award might be satisfied, as referred to under paragraph (2) (c). It was thus suggested to delete paragraph (3). An alternative suggestion was to delete the reference to paragraph (2) (c) in paragraph (3) and to place it into paragraph (4).

97. Support was expressed for the deletion of paragraphs (3) and (4) on the ground that those paragraphs might conflict with applicable domestic law. Opposition was expressed to the deletion of those paragraphs. It was said that paragraph (3) was helpful, as it provided guidance to the arbitral tribunals on the conditions under which they could order interim measures. It was further stated that subparagraphs (a) and (b) were key provisions, which were useful for resolving issues which arose in practice. The balancing of harm proposed under paragraph (3) (a) was an important provision and it was said that since it was less rigid than the criterion of irreparable harm, it was important that it be set out specifically.

98. To reconcile both positions, a proposal was made to change the wording of paragraph (3), so that it would be non-mandatory in nature, along the lines of paragraph (4). Another proposal was made to include at the end of the chapeau of paragraph (3) the words "unless the tribunal determines that other criteria are applicable". It was said that those words would provide a gap-filling device in case the domestic law would require application of other conditions for the granting of interim measures. The proposals received some support. The Working Group was also reminded of its decision to retain paragraph (3) at a previous session (A/CN.9/641, para. 52).

99. After discussion, the Working Group adopted paragraphs (3) and (4) without modifications.

***Paragraph (5)***

*General discussion*

100. The Working Group recalled that, pursuant to the revised UNCITRAL Arbitration Model Law adopted by the Commission in 2006, preliminary orders might be granted by an arbitral tribunal upon request by a party, without notice of the request to any other party, in the circumstances where it considered that prior disclosure of the request for the interim measure to the party against whom it was directed risked frustrating the purpose of the measure. The Working Group considered whether paragraph (5), which dealt with preliminary orders, should be included in the Rules. Diverging views were expressed.

101. Against the inclusion of paragraph (5), it was stated that the Rules were of a contractual nature and directed to the parties whereas the UNCITRAL Arbitration Model Law was an instrument of a legislative nature, directed to legislators, and the need to provide detailed regulation as existed in the context of the revision of the UNCITRAL Arbitration Model Law did not apply in the context of the revision of the Rules. It was pointed out that the characteristics of preliminary orders ran counter to the consensual nature of arbitration and that many legal systems did not permit such orders under their arbitration law. It was observed that, of the States having enacted legislation based on the UNCITRAL Arbitration Model Law as amended in 2006, some had chosen or were considering not to include the section of chapter IV A of the UNCITRAL Arbitration Model Law dealing with preliminary orders. In that regard, the Working Group was cautioned not to deviate from the general approach to the revision of the Rules to retain their universal applicability, which was one of the main factors for their success. It was also said that, in some

jurisdictions, granting preliminary orders could give rise to objections based on violation of the principle of due process.

102. It was argued that not inserting any provision on preliminary orders in the Rules would best accommodate the different approaches to the issue in different legal systems. The view was also expressed that preliminary orders, in certain jurisdictions, were within the competence of State courts, and the procedure for granting such orders contained many safeguards that might not be present to the same extent as in the arbitration procedure. Such court orders could be enforceable against both the parties to an arbitration and third parties. For instance, the judge in a State court deciding over a preliminary order was not necessarily the same deciding subsequently on the merits of the case. In arbitration, however, the same arbitrator would make both decisions, which could lead to a prejudiced outcome of the proceedings. In response, it was stated that in some legal systems, judges rendered decisions on both preliminary orders and the merit of the dispute, and that such practice had not caused any concern. It was also stated that it would be inconsistent to allow parties to agree on arbitration, and at the same time to oblige them to turn to the State court system for obtaining preliminary orders.

103. In further support of paragraph (5), it was stated that paragraph (5) only reflected existing practice. In that regard, it was noted that the removal of paragraph (5) from article 26 would not necessarily prevent arbitrators from issuing preliminary orders. It was considered desirable to provide useful guidance to arbitrators in relation to the possible granting of such preliminary orders. It was also said that inclusion of provisions on preliminary orders was necessary for the sake of consistency with the UNCITRAL Arbitration Model Law. In response to the argument that inclusion of paragraph (5) could lead to conflicts with applicable arbitration law, it was stated that, in any event, arbitration law would, if it did not allow preliminary orders to be granted by an arbitral tribunal, supersede the Rules. It was further stated that the deletion of paragraph (5) could give rise to an undesired interpretation of the Rules, as generally disallowing preliminary orders.

104. Concern was expressed that introducing paragraph (5) in the Rules could undermine their acceptability, particularly by States in the context of treaty-based investor-State dispute resolution. In response, it was observed that the question of treaty-based investor-State disputes was to be discussed as a matter of priority after completion of the revision of the Rules, and that the question of preliminary orders in the context of treaty-based investor-State disputes could be further considered at that stage. The Working Group was reminded that the mandate given to the Working Group by the Commission at its forty-first session was limited to the question of transparency in treaty-based investor-State disputes (see paragraph 8 above).

105. It was proposed that, failing an agreement on a revised version of article 26, the version of that article as contained in the 1976 version of the Rules should be retained. In response, it was observed that the need to update the provision on interim measures was one of the important reasons why it was felt that the UNCITRAL Arbitration Rules should be revised. Consequently, the proposal to retain the 1976 version of that article received little support.

106. Some opponents to the inclusion of provisions on preliminary orders in the Rules indicated their willingness to accept the inclusion of paragraph (5) in the Rules, if the paragraph was either modified to clarify that it would not be possible

for an arbitral tribunal to grant preliminary orders in legal systems that did not allow them, or if a commentary to the Rules would clarify that the power to grant preliminary orders had to be derived from legislation. In that regard, a view was expressed that the explanation given to that provision in the second sentence of paragraph 15, of document A/CN.9/WG.II/WP.151/Add.1 (which could also be found in document A/CN.9/641, para. 59) would more correctly express the understanding of the Working Group if it stated that "if permitted by the applicable law, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15, paragraph (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders."

*Revised draft – alternative proposal*

107. Reservations were expressed by those favouring full adoption of an ex parte regime in the Rules both in relation to paragraph (5) and to paragraph (2) of the same article contained in document A/CN.9/WG.II/WP.152 ("the alternative proposal") which were said to insufficiently mirror the text of the UNCITRAL Arbitration Model Law.

108. Although the alternative proposal was considered to express in a simplified and unambiguous manner a right for an arbitral tribunal to grant preliminary orders, the text of that proposal received limited support. Some preference was expressed in the Working Group for the provision on preliminary orders as contained in paragraph (5). However, it was pointed out that paragraph (5) contained ambiguous wording, and that it was drafted in a negative manner, which did not reflect the approach adopted under the UNCITRAL Arbitration Model Law.

109. With a view to reconciling the diverging views expressed in the Working Group on the question of preliminary orders, the proposal was made to replace paragraph (5) by a wording along the following lines: "Nothing in these Rules shall have the effect of creating, (where it does not exist), or limiting, (where it does exist), any right of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, an interim measure without prior notice to a party."

110. A view was expressed that the proposed new wording could be inserted in the explanatory material accompanying the Rules, while retaining the text of paragraph (5). In response, it was however stated that it might not be good practice to rely on explanatory material to express an essential clarification that could be expected to be found in a self-contained instrument such as the Rules.

111. After discussion, the Working Group was generally of the view that the proposed wording mentioned in paragraph 109 above constituted an acceptable solution, because it promoted a neutral approach to the question of preliminary orders. Various drafting comments were made on that proposed wording. It was observed that not all users of the UNCITRAL Arbitration Rules would be familiar with the term "preliminary order" and therefore a better approach might be to clarify its meaning by a descriptive phrase, which was proposed to be added after the word "issue" and would read as follows: ", in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure." That suggestion received support. Another suggestion was made that, in order to avoid the bracketed text contained in the proposal in paragraph 109 above, the bracketed text be deleted, and that the words "which existed outside

these Rules" be inserted after the words "any right". That suggestion received support.

112. After discussion, the Working Group adopted paragraph (5) and agreed that it would read as follows: "Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure." The Working Group agreed that references to paragraph (5) in the remainder of article 26, namely in paragraphs (3), (6) to (9) and (10), should be amended to ensure consistency of those paragraphs with the new text adopted on preliminary orders.

***Paragraph (6)***

113. The Working Group adopted paragraph (6) in substance, subject to the adjustment referred to in paragraph 112 above.

***Paragraph (7)***

114. The Working Group adopted paragraph (7) in substance, subject to the adjustment referred to in paragraph 112 above.

***Paragraph (8)***

115. The Working Group adopted paragraph (8) in substance, subject to the adjustment referred to in paragraph 112 above.

***Paragraph (9)***

116. It was observed that paragraph (9) might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of article 26 had been met but the requesting party lost the arbitration. To address that concern, it was suggested to add a provision to the effect that the determination of the arbitral tribunal under paragraph (9) should be made "in light of the outcome of the case". That proposal did not receive support.

117. It was further observed that the alternative proposal for a paragraph (5) contained in document A/CN.9/WG.II/WP.152 provided a preferable solution in that it did not deal with the conditions triggering liability for costs and damages, and left those aspects to be dealt with under applicable law. That proposal read as follows: "The arbitral tribunal may rule at any time on claims for compensation of any damage wrongfully caused by the interim measure or preliminary order." The suggestion to delete the word "wrongfully" was supported for the reason that that word could receive a variety of interpretations and created legal uncertainty. It was proposed that the explanatory material should clarify the meaning of the words "at any time", as referring to any point in time during the proceedings, and not to the period immediately following the measure.

118. After discussion, the Working Group requested the Secretariat to prepare a note to assist further discussion on how the different leges arbitri dealt with the matters of liability for damages that might result from the granting of interim measures.

***Paragraph (10)***

119. The Working Group adopted paragraph (10) in substance, subject to the adjustment referred to in paragraph 112 above.

# V. Organization of future work

120. At the close of its deliberations, the Working Group noted that it had dealt successfully with a number of difficult points. It further noted that it could not complete its review of the Rules at its current session in a manner that would bring the draft text to the level of maturity and quality required for submission to the next session of the Commission in 2009. While the session of the Working Group had been conducted bearing in mind the hope expressed by the Commission at its forty-first session[12] and the encouragement provided by the General Assembly (A/RES/63/120) that the revised text of the Rules be finalized in 2009, the Working Group was generally of the view that it should complete its reading of the text before submitting it to the Commission. Since the Rules in their new version should remain in use for many years, the Working Group believed that the time required should be taken for meeting the high standard of UNCITRAL. The Working Group agreed to request the Commission for sufficient time to complete its work on the Rules.

121. It was clarified that, under the mandate received from the Commission at its forty-first session, the question of transparency in treaty-based investor-State arbitration was to be considered by the Working Group as a matter of priority after completion of its work on the revision of the Rules. The Working Group further considered whether it would be advisable to adopt a broader approach to the question of treaty-based investor-State arbitration. It was anticipated that additional issues might arise in the context of a discussion on transparency. However, it was also considered important not to suggest opening a broad discussion of treaty-based investor-State arbitration to preserve the general applicability of the generic Rules.

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[12] Ibid., para. 315.