



# General Assembly

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**United Nations Commission  
on International Trade Law  
Working Group II (Arbitration)  
Forty-ninth session  
Vienna, 15-19 September 2008**

## **Annotated provisional agenda\***

### **I. Provisional agenda**

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

### **II. Composition of the Working Group**

1. The Working Group is composed of all States members of the Commission, which are the following: Algeria (2010), Armenia (2013), Australia (2010), Austria (2010), Bahrain (2013), Belarus (2010), Benin (2013), Bolivia (2013), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2010), Czech Republic (2010), Ecuador (2010), Egypt (2013), El Salvador (2013), Fiji (2010), France (2013), Gabon (2010), Germany (2013), Greece (2013), Guatemala (2010), Honduras (2013), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2013), Kenya (2010), Latvia (2013), Lebanon (2010), Madagascar (2010), Malaysia (2013), Malta (2013), Mexico (2013), Mongolia (2010), Morocco (2013), Namibia (2013), Nigeria (2010),

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\* The submission of this document was delayed until the deliberations of the United Nations Commission on International Trade Law (UNCITRAL) at its 41st session had taken place.



Norway (2013), Pakistan (2010), Paraguay (2010), Poland (2010), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Serbia (2010), Singapore (2013), South Africa (2013), Spain (2010), Sri Lanka (2013), Switzerland (2010), Thailand (2010), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2010), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

### **III. Annotations to agenda items**

#### **Item 1. Opening of the session**

3. The forty-ninth session of the Working Group will be held at the Vienna International Centre, from 15 to 19 September 2008. Meeting hours will be from 9.30 a.m. to 12.30 p.m. and from 2.00 to 5.00 p.m., except on Monday 15 September 2008, when the session will be opened at 10.00 a.m.

#### **Item 2. Election of officers**

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

#### **Item 4. Revision of the UNCITRAL Arbitration Rules**

##### **(a) Previous deliberations**

5. 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.<sup>1</sup>

6. 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 Arbitration Model Law”), as well as the use of the UNCITRAL Arbitration Rules

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

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.<sup>2</sup> 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).<sup>3</sup>

7. At its thirty-fifth session (New York, 17-28 June 2002), the Commission adopted the UNCITRAL Model Law on International Commercial Conciliation.<sup>4</sup>

8. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission adopted legislative provisions amending the Arbitration Model Law on the form of arbitration agreement and interim measures. The Commission adopted as well a recommendation on the interpretation of article II, paragraph (2) and article VII, paragraph (1), of the New York Convention.<sup>5</sup>

9. At that session, 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 add to its complexity. 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.<sup>6</sup>

10. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that 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.<sup>7</sup>

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<sup>2</sup> Ibid., *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

<sup>3</sup> Ibid., para. 338.

<sup>4</sup> Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 13-177.

<sup>5</sup> Ibid., *Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 87-181 and annexes 1 and 2 to the Report.

<sup>6</sup> Ibid., para. 184.

<sup>7</sup> Ibid., para. 185.

11. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the Convention on the Use of Electronic Communications, 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.<sup>8</sup>

12. 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.<sup>9</sup>

13. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group considered the question of a revision of the UNCITRAL Arbitration Rules, and defined the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules, on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.143 and A/CN.9/WG.II/WP.143/Add.1). The considerations of the Working Group at that session are reflected in document A/CN.9/614.

14. At its forty-sixth session (New York, 5-9 February 2007), the Working Group completed its first reading of articles 1 to 21 of the draft revised version of the UNCITRAL Arbitration Rules on the basis of notes prepared by the Secretariat (A/CN.9/WG.II/WP.145 and A/CN.9/WG.II/WP.145/Add.1). The considerations of the Working Group at that session are reflected in document A/CN.9/619.

15. 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

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<sup>8</sup> Ibid., para. 186.

<sup>9</sup> Ibid., para. 187.

in its deliberations to date and should continue to be a guiding principle for its work.<sup>10</sup>

16. At its forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group continued its first reading of the draft revised version of the UNCITRAL Arbitration Rules, on the basis of a note prepared by the Secretariat (A/CN.9/WG.II/WP.145/Add.1) and commenced its second reading of the draft revised version of UNCITRAL Arbitration Rules, on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.147, A/CN.9/WG.II/WP.147/Add.1 and A/CN.9/WG.II/WP.149). The considerations of the Working Group at its forty-seventh and forty-eighth sessions are reflected in documents A/CN.9/641 and A/CN.9/646, respectively.

17. 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 (A/CN.9/646, para. 69). 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. The Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.<sup>11</sup>

18. As to timing, the Commission agreed that the topic of transparency in investor-State treaty-based 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. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future

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<sup>10</sup> *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 175.

<sup>11</sup> *Ibid.*, *Sixty-third session, Supplement No. 17* (A/63/17) (in the process of being prepared for publication in September 2008).

session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.<sup>12</sup>

19. At its forty-ninth session, the Working Group is expected to continue its second reading of the draft revised version of the UNCITRAL Arbitration Rules on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1).

**(b) Documentation**

20. The Working Group will have before it notes by the Secretariat regarding the revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1).

21. A limited number of the following background documents will be made available at the session:

- UNCITRAL Arbitration Rules;
- UNCITRAL Notes on Organizing Arbitral Proceedings;
- UNCITRAL Model Law on International Commercial Arbitration;
- Reports of the United Nations Commission on International Trade Law on the work of its thirty-second session (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*); thirty-third session (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*); thirty-fourth session (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*); thirty-fifth session (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*); thirty-sixth session (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*); thirty-seventh session (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*); thirty-eighth session (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*); thirty-ninth session (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*); and fortieth session (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*);
- Reports of Working Group II (Arbitration) on the work of its forty-fifth (A/CN.9/614), forty-sixth (A/CN.9/619), forty-seventh (A/CN.9/641), and forty-eighth (A/CN.9/646) sessions;

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<sup>12</sup> Ibid.

- Settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules: note by the Secretariat (A/CN.9/WG.II/WP.143 and A/CN.9/WG.II/WP.143/Add.1);
- Settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules: note by the Secretariat (A/CN.9/WG.II/WP.145 and A/CN.9/WG.II/WP.145/Add.1);
- Settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules: note by the Secretariat (A/CN.9/WG.II/WP.147 and A/CN.9/WG.II/WP.147/Add.1);
- Settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules: note by the Secretariat (A/CN.9/WG.II/WP.149).

22. UNCITRAL documents are posted on the UNCITRAL website (<http://www.uncitral.org>) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

#### **Item 5. Organization of future work**

23. At its forty-ninth session, the Working Group might wish to consider organization of its work in respect of the matters referred to in paragraphs 10, 11, 12 and 18 above.

#### **Item 7. Adoption of the report**

24. The Working Group may wish to adopt, at the close of its session, a report for submission to the forty-second session of the Commission, scheduled to be held in Vienna, from 29 June to 17 July 2009. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting and subsequently incorporated into the report.

### **IV. Scheduling of meetings**

25. The Working Group's forty-ninth session will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,<sup>13</sup> the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

26. The Working Group may wish to note that its fiftieth session is scheduled to be held in New York, from 9 to 13 February 2009.

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<sup>13</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paragraph 381.