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on International Trade Law**  
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**Report of Working Group II (Arbitration and Conciliation)  
on the work of its sixty-first session  
(Vienna, 15-19 September 2014)**

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## I. Introduction

1. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)<sup>1</sup> (the “Notes”) could be considered as a topic of future work.<sup>2</sup> At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,<sup>3</sup> in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010 (“UNCITRAL Arbitration Rules 2010”).<sup>4</sup> At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the draft convention.<sup>5</sup> At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second sessions, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.<sup>6</sup>

2. At its forty-seventh session, the Commission further agreed that, in addition to the revision of the Notes, the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.<sup>7</sup> The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.<sup>8</sup>

3. At its forty-seventh session, the Commission also recalled that it had identified, at its forty-sixth session, in 2013, that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.<sup>9</sup> In relation to that item, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area. The Commission requested the Secretariat to report to the Commission, at a future

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<sup>1</sup> *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

<sup>2</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204.

<sup>3</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 205 and 207.

<sup>4</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 70.

<sup>5</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 130.

<sup>6</sup> *Ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 122 and 128.

<sup>7</sup> A proposal for future work in relation to enforcement of international settlement agreements considered by the Commission at its forty-seventh session is contained in document A/CN.9/822.

<sup>8</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)* paras. 123 to 125 and 129.

<sup>9</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 131 and 132.

session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.<sup>10</sup>

## II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-first session in Vienna, from 15-19 September 2014. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, Ecuador, El Salvador, France, Georgia, Germany, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kuwait, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bolivia (Plurinational State of), Chile, Costa Rica, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Egypt, Ethiopia, Finland, Latvia, Libya, Netherlands, Norway, Peru, Qatar, Romania, Senegal, Slovakia, Sweden, Ukraine and Viet Nam.

6. The session was also attended by observers from the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Educational, Scientific and Cultural Organization (UNESCO);

(b) *Invited intergovernmental organizations*: Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociación Americana de Derecho Internacional Privado (ASADIP), Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Centre for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), G.C.C. Commercial Arbitration Centre (GCCAC), German Institute of Arbitration (DIS), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), Queen Mary University of

<sup>10</sup> Ibid., *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 126, 127 and 130.

London, School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL), Swedish Arbitration Association (SAA) and Vienna International Arbitral Centre (VIAC).

8. The Working Group elected the following officers:

*Chairman:* Mr. Michael Schneider (Switzerland)

*Rapporteur:* Mr. Simon Greenberg (Australia)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.182); (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.183 and A/CN.9/WG.II/WP.184).

10. 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 Notes on Organizing Arbitral Proceedings.
5. Organization of future work.
6. Other business.
7. Adoption of the report.

### **III. Deliberations and decisions**

11. The Working Group commenced its deliberations on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.183 and A/CN.9/WG.II/WP.184). 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 notes on organizing arbitral proceedings, based on the deliberations and decisions of the Working Group, and in doing so, to identify specific issues for discussion at the next session of the Working Group. Delegations were invited to contribute proposals and comments to the Secretariat in view of the preparation of a revised draft version of the Notes.

## **IV. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings**

### **A. General remarks**

12. With respect to the working method to be followed at the current session, it was suggested that the Working Group should identify areas where a revision of the Notes might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for the next session of the Working Group the first tentative draft of the revised Notes. The Working Group agreed, on the basis of documents

A/CN.9/WG.II/WP.183 and A/CN.9/WG.II/WP.184, to identify the topics that might need to be addressed in a revised version of the Notes and to provide suggestions to the Secretariat for drafting such revisions but not to reach any conclusion at the current session.

## **1. General principles**

### *Principles underlying the Notes*

13. The Working Group recalled the mandate given by the Commission at its forty-seventh session and set out above (see para. 1) which provided that in revising the Notes, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.

14. The Working Group recalled that, further to initial discussions on the Notes at the twenty-sixth session of the Commission, in 1993, the Commission finalized the Notes at its twenty-ninth session, in 1996. At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.

15. The Working Group confirmed its understanding that the Notes should retain those characteristics and that the purpose of the Notes should not be to promote any practice as best practice. It was furthermore said that one of the great advantages of the Notes was their descriptive and non-directive nature that reflected a variety of practice.

### *Form and structure of the Notes*

16. The Working Group considered as a preliminary matter the form and structure of the Notes, and determined that the current form of the Notes ought to be retained but that that matter could be further considered having regard to the revisions to be agreed upon.

## **2. Possible additional topics**

17. As a general matter, the Working Group considered whether matters not currently addressed by the Notes ought to be included.

### *Other types of arbitration, including investment arbitration*

18. It was said that the Notes had not previously distinguished between different types of arbitration, and it was queried whether specific reference or guidance in relation to any type of arbitration (examples such as commodity arbitration and maritime arbitration were suggested), and in particular investment arbitration, ought to be included in a revised version of the Notes.

19. Views were expressed that guidance in relation to investment arbitration should not be addressed in the Notes, on the basis, inter alia, that the Notes should

retain their general applicability; that investment arbitration was a relatively small field, and that practitioners in investment arbitration tended to be sophisticated and have specific expertise in that field; and that such work would overly complicate the revision of the Notes. It was also said that although a number of issues tended to be specific to investment arbitration, those issues were largely substantive rather than procedural in nature.

20. Other views were expressed that guidance relating to investment arbitration should be addressed in the Notes, for the reasons that such arbitral practice has developed rapidly in the period since the Notes were first drafted; that investment arbitration implicated several areas of procedure, such as confidentiality and third-party submissions, that might differ from general commercial arbitration; and that distinguishing between investment and commercial arbitration in the Notes could also benefit public knowledge about the difference between those types of arbitration. It was also said that in light of the recent work of UNCITRAL in the field of transparency in treaty-based investor-State arbitration, and given the distinct procedural issues raised by investment arbitrations more generally, it would be advisable to address that specific type of arbitration within the revised version of the Notes.

21. After discussion, the Working Group agreed that there were good grounds for maintaining the general applicability of the Notes. Without prejudice to the aforementioned, the Working Group further agreed to identify during its deliberations on the Notes specific procedural issues that might arise in different types of arbitration, and in particular in investment arbitration, and to consider whether those ought then to be addressed in relation to certain topics of the Notes (see below, paras. 82, 83 and 182-186).

#### *Costs*

22. The view was expressed that, in light of the development of rules on fees and costs set out in the UNCITRAL Arbitration Rules 2010, it may be desirable that the Notes reflect guidance contained in that text, and particularly that the arrangements for setting the fees and expenses of the arbitral tribunal and their payment ought to be discussed at the beginning of an arbitration (see also below, para. 75).

23. In relation to the determination of costs, it was suggested that guidance might be provided in relation to whether in-house legal counsel costs ought to be included in the determination of costs, and if so, how those might be calculated. Another suggestion was made to draw parties' attention to the possible cost consequences of parties' conduct during proceedings. It was furthermore suggested that matters such as responsibility for costs, security for costs and failure to pay advances on costs might also be addressed in the Notes.

#### *Interim measures*

24. It was mentioned in respect of interim measures that the Notes could reflect modifications made in the UNCITRAL Model Law on International Commercial Arbitration, (1985, with amendments as adopted in 2006) ("Model Law on Arbitration"), and in the UNCITRAL Arbitration Rules 2010, as regards interim measures.

*Technology*

25. The Working Group agreed that the Notes ought to reflect changes in technology, and likewise to bear in mind that updates in relation to terminology should not be so specific so as to become quickly obsolete. One suggestion made in that regard was that the Secretariat should eliminate, where possible, any reference to specific means of communication and instead refer only to the functions that various technologies served. It was said in addition that different technologies might require different procedures, which could be addressed further in the Notes. The Working Group left open the possibility of whether a particular note on the subject of technology and its use in arbitration might be warranted (see also below, paras. 38, 39, 91-102, 110, 125 and 159).

*Confidentiality*

26. A suggestion was made that the Notes could address procedures in relation to dealing with confidential information within the arbitration proceedings (as opposed to the confidential nature of the proceedings itself), such as technological or commercial secrets for which disclosure to the other party was undesirable or explicitly prohibited by law or by other confidentiality undertakings (see also below, para. 88).

*Case management*

27. It was suggested that robust and early provision be made in the Notes in relation to the importance of an early case management conference to organize the proceedings, and indeed in complex matters the desirability of case management conferences to take place at multiple stages throughout the proceedings. It was suggested that the Notes were in some respect a checklist of issues that might be considered in all or in part for discussion at the case management conference (see also below, para. 33).

**B. Introduction (paras. 1-13)***Purpose of the Notes (para. 1); and paragraph 11*

28. The Working Group considered whether to consolidate paragraphs 1 and 11 of the Notes as suggested in the comments by the International Council for Commercial Arbitration (ICCA) in document A/CN.9/WG.II/WP.184 (see also para. 20 of document A/CN.9/WG.II/WP.183). It was pointed out that those two paragraphs were complementary, as paragraph 1 framed the positive purpose of the Notes (“to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings”), while paragraph 11 explained what the Notes did not intend to achieve (“the purpose of the Notes is not to promote any practice as best practice”). Merging those paragraphs was said to clarify that both propositions were relevant to the entirety of the Notes. It was also said that consolidating both paragraphs would enable users to better capture the nature and purpose of the Notes. Support was expressed for that proposal, with the precise drafting (such as whether those paragraphs should constitute one merged paragraph or separate paragraphs) to be left to the Secretariat.

29. As to the question whether additional provisions should be included in the section addressing the purpose of the Notes, a suggestion was made to clarify that (i) a reference to a specific practice in the Notes should not be interpreted to mean it was the only relevant practice, and practices mentioned in the Notes should be assessed on a case-by-case basis by the arbitral tribunal or the parties, as applicable, and (ii) the absence of a reference to a specific practice in the Notes should not be interpreted to mean that such practice would not be acceptable. The Working Group agreed to consider that matter further, as it was said that the lack of reference to “practices” in the Notes might render such guidance redundant.

*Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings (paras. 4 and 5)*

30. It was considered whether, in line with article 18 of the Model Law on Arbitration and article 17 of the UNCITRAL Arbitration Rules 2010, paragraph 4 of the Notes ought to include fairness, equality and efficiency as core principles to be adhered to in the conduct of arbitrations. Views were expressed that such principles were obligatory and typically derived from national law provisions, and consequently that including such principles in the Notes would be too prescriptive. After discussion, the Working Group agreed that if the principles could be expressed in a non-prescriptive way, it would be a beneficial complement to the principles already expressed in paragraphs 4 and 5 of the Notes in relation to “flexibility and discretion”.

31. The Working Group also considered a number of drafting matters set out in paragraph 22 of document A/CN.9/WG.II/WP.183. It was said that a reference to other arbitration rules in footnote 1 to paragraph 4 of the Notes would not be appropriate, not least as it would be difficult to determine which arbitration rules should be included. Another comment was made that the reference to “discretion” in paragraph 5 of the Notes might not be robust enough in emphasizing the desirability of working with the parties to develop procedural timelines in a timely manner. In all other respects, it was agreed to give the Secretariat discretion to incorporate the other drafting changes proposed in that document, in line with the discussions of the Working Group.

*Multiparty arbitration (para. 6)*

32. A suggestion was made to re-title paragraph 6, “Scope of application”, and to express in that provision that the Notes applied not only to multiparty arbitration, but also to, for example, domestic and international arbitration, arbitrations with both panel of arbitrators and sole arbitrator; complex and simple arbitrations; and ad hoc and institutional arbitrations. In response, it was said that such an enumeration would both broaden the scope in paragraph 6, but likewise would run the risk of not including certain types of arbitration. It was suggested after discussion to delete paragraph 6 altogether and, in the section of the “Introduction” addressing the “Purpose of the Notes”, to highlight their general application.

*Process of making decisions on organizing arbitral proceedings (paras. 7-9)*

33. In relation to the process of making decisions on the organization of arbitral proceedings, it was suggested that paragraphs 7-9 of the Notes ought to be reconsidered, and possibly, linked to provisions regarding the desirability of a case

management conference and of establishing a procedural calendar. It was said that the Notes embodied precisely the issues which ought to be discussed at a case management conference (see above, para. 27).

34. It was further considered that paragraph 7 of the Notes should be revised to indicate that, while there may be cases where an arbitral tribunal may decide to organize the proceedings without consulting the parties, the common practice was for the arbitral tribunal to involve the parties in the process and, to the extent possible, seek agreement. It was suggested that consultation between the arbitral tribunal and the parties should be encouraged, and attention should be drawn to the possible cost implications of excessive consultation.

35. The Working Group furthermore agreed that such consultation between parties and the arbitral tribunal — making clear that in the first instance, parties and the arbitral tribunal should agree on procedural points, failing which it would be for the arbitral tribunal to do so — could be contained in a distinct provision in the introduction to the Notes and superfluous references repeating that matter elsewhere in the Notes be deleted.

36. The Working Group considered whether the reference “to improving the procedural atmosphere” in paragraph 7 of the Notes should be deleted, clarified or replaced with wording such as “fostering a climate of trust”. After discussion, it was agreed that the sentiment those phrases expressed was valuable but that the Secretariat was invited to consider inserting modified language that would also reflect the desirability of having the parties input on the organization of the proceedings.

37. It was agreed that words in relation to “venue” (para. 8 of the Notes) should be made consistent further to discussion in relation to the place of arbitration (Note 3; see also below, para. 66).

38. The Working Group furthermore agreed to consider the wording in relation to means of technology as it appeared in this section (for example, in para. 8 of the Notes) and throughout the Notes. One suggestion was made to adopt terminology throughout the Notes such as “communication by electronic means”; another suggestion was made to refer to existing UNCITRAL texts that defined terms such as “electronic communication” (see above, para. 25 and below, paras. 91-102, 110, 125 and 159).

39. It was further suggested that paragraph 8 could provide that meetings can be held with the physical presence of the parties or through means of communication that did not require their physical presence (see art. 28(4) of the UNCITRAL Arbitration Rules 2010), thereby avoiding the need to refer to specific technology (see above, para. 25 and below, para. 159).

*List of matters for possible consideration in organizing arbitral proceedings  
(paras. 10-13)*

40. The Working Group requested the Secretariat to amend the headings (“List of matters for possible consideration in organizing arbitral proceedings”) of paragraphs 10-13 of the Notes, to differentiate it from the heading of the Table of Contents.

## **C. Annotations (paras. 14-90)**

### **1. Set of arbitration rules (paras. 14-16)**

41. It was considered whether the Notes provided sufficient guidance where parties had not selected applicable arbitration rules in the arbitration agreement.

42. A proposal was made that in such an instance, the Notes should advise that parties select, or that an arbitral tribunal should advise parties to select, arbitration rules, and that the Notes should enumerate the advantage of selecting rules to govern proceedings rather than proceeding ad hoc (see also para. 49 below).

43. It was also said that a list of options available to the parties, including agreeing on ad hoc or institutional rules, or administered arbitration, and the advantages of such options, could be enumerated. In such circumstance, depending on what option parties selected, it was said that it would be useful to highlight that the consent of an institution might be required.

44. Were the parties to select an institution to administer the dispute, or to agree on a set of rules where none had previously been agreed, it was queried whether the consent of an arbitral tribunal that had already been appointed must be sought. Although it was said that it would be unusual not to seek the consent of the arbitral tribunal, it was also said that the Notes ought not to be prescriptive in that respect. It was also clarified that it was outside the scope of the Notes to provide guidance to arbitral tribunals as to whether or not to accept a choice of rules designated by the parties after the arbitrators had been engaged. A suggestion, that received support, was to include a more general provision such that whenever a decision affecting the arbitral tribunal was made between the parties, that the parties may wish to consult the arbitral tribunal. It was also said that the agreement of the arbitral tribunal would be required.

45. It was considered whether the Notes ought to mention the option of utilizing institutional rules without the arbitration being administered by that institution. It was said that such an approach must be treated with caution as such practice often led to confusion, delays and costs.

46. It was pointed out that the Notes should clarify that the option between ad hoc arbitration and institutional arbitration was not binary, but rather that ad hoc rules such as the UNCITRAL Arbitration Rules could be successfully administered by institutions. In that respect, it was suggested that the Notes could include a reference to the 2012 Recommendations to assist arbitral institutions and other interested bodies with regards to arbitrations under the UNCITRAL Arbitration Rules 2010.

47. In response to a query as to whether the selection by parties of a set of arbitration rules after arbitral proceedings had commenced, either before or after the constitution of the arbitral tribunal, was an exceptional situation, arbitral institutions confirmed to the contrary that such a situation could occur in practice.

48. After discussion, it was agreed that a general approach that could be taken in a revised draft of paragraph 14 would be as follows. First, the advantages of party agreement on a set of arbitration rules, whether institutional or ad hoc, should be highlighted. Second, if parties had not so agreed, the procedure might then be

determined in consultation with the arbitral tribunal. Should parties select institutional rules after the arbitration had been initiated, and in particular after the arbitral tribunal had been appointed, it was said to be advisable that the parties verify with the arbitral institution whether its rules could apply and the institution would be willing to administer the proceedings. It was further suggested that the revised draft of paragraph 14 could include a reference to the law at the place of arbitration and its implications for the procedure.

49. It was agreed that paragraph 15, which advised caution as to consideration of a set of arbitration rules when the parties' arbitration agreement had not so specified, was outdated and ought to be deleted (see also para. 42 above).

50. It was suggested that paragraph 16 of the Notes, which observed that agreement on arbitration rules was not necessary, could be moved to the beginning of Note 1 as it reflected the agreement of the parties and consequently should be treated in Note 1 as the starting point for consideration of the issue.

## **2. Language of proceedings (paras. 17-20)**

51. It was considered whether the chapeau language in paragraph 17 of the Notes, which observed that many rules and laws on arbitral procedure empowered the arbitral tribunal to determine the language or languages to be used in proceedings in the absence of agreement by the parties, should be revised to reflect the advantages of a party-selected choice of language or languages.

52. It was agreed to add the words "or languages" after the word "language" in paragraph 18 as it was said to be desirable to retain the option of having proceedings in multiple languages, and likewise to retain consistency with paragraph 17. It was suggested that, where multiple languages were selected, the Notes could highlight issues that might arise, such as the desirability of an authoritative language (for example, in which the award would be rendered), and additional costs and times necessary for translation and interpretation. It was explained that in some arbitrations, the use of multiple languages was possible without the need for translation and interpretation, for example where the parties were multilingual or from a region where languages were sufficiently similar so as to be understood by other parties from the same region.

53. It was further said that the issue of fairness ought to be raised in relation to matters of translation, and specifically, whether the Notes could or ought to sensitize arbitrators to the difficulties faced by non-native speakers of the lingua franca of the arbitration.

54. In terms of reducing the cost and time involved in translations, an additional suggestion was made to encourage the use of template or key word translations for repetitive documents such as large spreadsheets with alphabetic headings but mostly numeric content.

55. It was generally agreed that certification of translations was rarely required in respect of ensuring the quality of translations, and that advising on matters of certification was fraught insofar as the meaning of the concept itself gave rise to a number of questions. It was said that in any event certification of translations could be mentioned as a rarity and as necessary only in very specific situations.

56. Another issue considered by the Working Group was whether the Notes should indicate that counsel should be conversant in the language of the arbitration. It was suggested that the Notes could flag either that the parties could consider at the beginning of the arbitration which languages should be used by counsel, or alternatively the Notes could address the languages to be used by counsel as an issue arising more generally from the choice of language.

57. A suggestion was made to relocate paragraphs 18-20 of the Notes, in relation to issues specific to translation and interpretation rather than to choice of language(s) per se, to provisions in the Notes that dealt specifically with submissions of written documents and hearings. It was said in response that the advantage of the current location of those paragraphs after paragraph 17 on choice of language(s), was that they would highlight immediately the implications of a choice of language or languages. After discussion, it was suggested that both options could be considered further in a revised draft of the Notes.

58. In relation to the matter of consecutive or simultaneous interpretation, as provided for in paragraph 19 of the Notes, it was said that both practices were reasonably common. It was pointed out that consecutive interpretation had certain advantages, such as permitting immediate verification and, where necessary, correction of interpretations. It was also said that interpretation and translation services were very often arranged by parties and only rarely by institutions, and that that could be reflected in the Notes.

59. The proposed modifications to paragraph 20 of the Notes, as contained in paragraph 41 of document A/CN.9/WG.II/WP.183 were generally said to be acceptable.

60. After discussion, general agreement was expressed that the Notes should highlight the flexibility of the parties in selecting one or more languages, and underscoring that a choice of language or languages had certain consequences, including on the cost and duration of the proceedings.

### **3. Place of arbitration (paras. 21-23)**

61. By way of general matters in respect of the place of arbitration, addressed in Note 3, it was said that that Note could clarify that a choice of arbitration rules might imply a place of arbitration. It was furthermore observed that Note 3 should make clear that the place of arbitration should be determined at the outset of the proceedings if it had not already been agreed.

62. In terms of the difference between a legal place or seat of arbitration and the physical location where meetings or hearings might take place, it was said that the Notes made such a distinction (with paras. 21-22 setting out guidance in relation to the legal seat, and paragraph 23 in relation to the location of meetings or hearings), but it was suggested that such a distinction could be made more explicit.

63. It was said that making such a distinction more clearly, including for example setting out the difference between legal place and physical location at the beginning of the provision, would provide a great benefit to parties who might not otherwise know that such a difference existed. It was further suggested that the Notes could better address the question of the material and financial implications of the choice of a place of arbitration.

64. It was furthermore said that additional guidance could be included in Note 3 as to the legal reasons for selecting a certain legal seat, such as the relevant jurisprudence of that seat in relation to arbitral procedure, setting aside procedure and/or enforcement and recognition of arbitral awards or arbitration agreements. It was then suggested that the reasons for holding meetings or hearings at a location different from the place of arbitration could be provided for in that Note.

65. A suggestion was made that the Notes should be clear as to the fact that holding a meeting or hearing at a location different from the legal place of arbitration was not an automatic decision, but rather, that such a decision might be made in certain circumstances in relation to factors relevant to that meeting or hearing. It was further pointed out that the law at the place of arbitration in certain jurisdictions required arbitrations seated there to comply with obligations such as having at least one hearing in that place.

66. It was said that different words could be used in the Notes to make the distinction more clear, such as “place” for the legal seat of arbitration and “venue” for the geographic location where the hearings or activity in question was taking place. Other suggestions were made to refer to the place where the award was made, or to the seat of the arbitral tribunal to describe the legal place of arbitration and to refer to the place of the arbitration activities to describe the location where meetings and hearings could take place. Another suggestion was made to use wording consistent with article 20 of the Model Law on Arbitration (see above, para. 37).

**4. Administrative services that may be needed for the arbitral tribunal to carry out its functions (paras. 24-27)**

67. It was suggested that a clearer distinction could be made in the Notes between (a) administrative services for hearings, which could address the administrative arrangements for the proceedings such as those set out in paragraphs 24 and 25, and (b) secretarial support, which could address the potentially more fraught issue of arbitral tribunal secretaries, and the different tasks that person was expected to perform.

68. In relation to services provided by arbitral institutions as addressed in paragraph 24 of the Notes, it was observed that those services varied greatly depending on the institution, and that that matter should be highlighted in the Notes. It was suggested to indicate that a number of administrative services would usually be organized firstly by the parties or, depending on the circumstances, by the arbitral tribunal, and then possibly by arbitral institutions. It was further suggested to refer in the Notes to services rendered by professional hearing centres which had recently been established in different parts of the world.

69. A suggestion to address in the Notes issues that may arise when hearings take place at the premises of a counsel of a disputing party received some support, but it was also said that such a practice should not be a default or presumptive practice. It was suggested that language could be included in square brackets in that respect for the consideration of the Working Group at its next session.

70. A question was raised as to whether, in relation to a tribunal secretary, issues such as costs, disclosure of participation, and independence should be addressed in the Notes. In relation to costs, it was said that costs might depend on the arbitral institution and the fee structure of arbitrators themselves, with for example ad

valorem fee structures possibly giving rise to different remuneration structures for secretaries than hourly fee structures for arbitrators.

71. As regards disclosure of possible conflict of interest, views were expressed that secretaries should in no circumstance be involved in decision-making, and consequently, it was queried whether such disclosure was necessary. A view was expressed that in different arbitrations, and depending on the practice of the arbitral tribunal, a tribunal secretary might undertake substantial work nonetheless falling short of decision-making, and consequently disclosure of possible conflict of interest and indeed of the scope of a secretary's function was desirable.

72. Another view was expressed that as a secretary was under the supervision of an arbitral tribunal, and the arbitral tribunal was in effect ultimately responsible for its output, disclosure of a secretary was not necessary.

73. In relation to issues of independence, it was clarified that a number of institutional guidelines existed in that respect. It was suggested that there was no common practice in relation to whether a declaration of independence was required on the part of arbitral tribunal secretaries. A view was expressed that because in practice an arbitral tribunal would select its own secretary, thus in effect imposing that choice on the parties, a declaration of independence from that secretary would be desirable.

#### **5. Deposits in respect of costs (paras. 28-30)**

74. It was suggested that paragraph 28 of the Notes be clarified, and that it might better commence by replacing the first sentence with the words, "Unless and to the extent the matter is handled by the institution", and then proceed with drafting modifications as appropriate, with the second sentence. It was clarified that different institutions addressed deposits in respect of costs differently.

75. It was also suggested to flag the desirability of the arbitral tribunal identifying from the outset of proceedings how it intended to deal with fees and costs. It was said that the Notes should reflect matters in relation to fees and costs, including a provision on deposits in respect of costs, as set out in articles 40-43 of the UNCITRAL Arbitration Rules 2010 (see also above, para. 22).

76. It was highlighted that deposits for costs ought to address fees and expenses of arbitrators. It was queried whether a provision on deposits for costs in the Notes should address practicalities such as bank guarantees and the increasing number of issues that arise in relation to regulation governing the identification of beneficiaries and issues in relation to international sanctions. It was considered that it might be useful to refer to such issues in the Notes.

77. A question was raised as to whether the practice of third party funding should be referred to in the Notes. A diversity of practice in relation to third party funding was expressed and it was queried whether, if the Notes were unable to provide guidance as a result of the still-evolving nature of topic, it would nonetheless be useful to flag the existence of the practice and the possible procedural issues it might entail. After discussion, it was agreed that the Notes should not address the subject.

78. Other issues raised for possible inclusion in Note 5 included: (i) a reference to the services provided by some arbitral institutions to hold funds for parties; (ii) issues raised by value-added tax; and (iii) the matter of interest on deposits.

**6. Confidentiality of information relating to the arbitration; possible agreement thereon (paras. 31 and 32)**

*Confidentiality in international commercial arbitration*

79. It was queried whether the first sentence of paragraph 31, which provided that “confidentiality is one of the advantageous and helpful features of arbitration” still constituted a general principle in international commercial arbitration, or whether uncertainty had emerged in that respect in practice. Some views were shared in relation to recent changes in national legislation which did not provide for confidentiality as a default principle in international commercial arbitration.

80. Other views were expressed that confidentiality was a key feature of international commercial arbitration and that the Notes should retain that principle as expressed in the first sentence of paragraph 31. It was suggested that in any event, the matter be treated with caution.

81. After discussion, it was agreed to retain the general content of the principle as contained in Note 6.

*Confidentiality as it relates to investment arbitration*

82. Views were expressed that investment arbitration ought to be raised as a separate issue in Note 6 in relation to confidentiality. In that respect, the Working Group recalled its recent works on transparency in treaty-based investor-State arbitration, including the revision to the UNCITRAL Arbitration Rules in 2013 in relation to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the “Rules on Transparency”).

83. After discussion, the Working Group recalled its earlier decision to highlight, throughout its consideration of the Notes, specific procedural issues arising in relation to certain types of arbitration, including investment arbitration, and to consider whether and how those issues should be addressed (see above, para. 21). Consequently the Working Group agreed to defer to a later stage of its deliberations a decision on whether Note 6 should specifically address investment arbitration, or refer specifically to the Rules on Transparency (see below, paras. 182-186).

*Addition of “rules”*

84. The Working Group agreed that a revised version of paragraph 31 of the Notes should indicate that there was no uniform approach to the duty to observe confidentiality in arbitration rules (in addition to national laws, as indicated in para. 31 of the Notes).

*Limits of confidentiality*

85. It was suggested that Note 6 should provide more information on the limits of confidentiality, and in particular whether any examples should be added to “information in the public domain” or “if required by law or a regulatory body”, at the end of paragraph 32 of the Notes. A suggestion to add language “in pursuit of a

right” was said to be too broad, and an alternative suggestion was made to add “in defence of a right”. Another suggestion was made to reflect the language in article 34(5) of the UNCITRAL Arbitration Rules 2010; in response, it was said that that language referred to an arbitral award, rather than to proceedings as a whole.

86. It was said that — in the context of providing examples of the possible limitations of confidentiality — there may not be a sufficient difference between pursuit of, and defence of, a right. After discussion, it was agreed to include the words “to the extent necessary to protect a legal right” after the words “in whole” in paragraph 32 of the Notes.

#### *Separate agreement on confidentiality*

87. In relation to the last sentence of paragraph 31 of the Notes, a suggestion was made to highlight the possibility for the parties to sign a separate confidentiality agreement that would survive the arbitration and would be separately enforceable.

#### *Confidentiality of information within the proceedings*

88. A distinction was made between the confidentiality of proceedings, and confidentiality of material, such as commercial secrets or intellectual property rights, which might be required or requested to be disclosed within the proceedings (see above, para. 26), but for which disclosure was not desirable or prohibited by law. It was suggested that the Notes should provide, in general language, the fact that the arbitral tribunal may make possible arrangements in respect of means of addressing or disseminating such confidential information (for example, to a limited number of designated persons) during the proceedings.

#### *Confidentiality of information disclosed electronically*

89. The Working Group agreed that the words in paragraph 32 “whether any special procedures (...) access)” should be deleted. The Working Group agreed to consider further that matter when addressing the content of Note 8 on “Telefax and other electronic means of sending documents” (see below, para. 101).

### **7. Routing of written communications among the parties and the arbitrators (paras. 33 and 34)**

90. It was said in respect of the routing of written communications among the parties and arbitrators that practice had evolved, and that Note 7 could be significantly simplified. After discussion, it was agreed to (i) redraft the principle embodied in Note 7 to reflect simply that it was usual practice that communications took place directly between the arbitral tribunal and the parties, unless an institution was acting as an intermediary; and (ii) relocate the redrafted provision in Note 9 on “Arrangements for the exchange of written submissions”.

### **8. Telefax and other electronic means of sending documents (paras. 35-37)**

91. It was agreed that the terminology and practice as set out in Note 8 was outdated, and it was considered how the Notes might address technology and technological means of communication in a way that would retain relevance and neutrality into the future (see above, paras. 25 and 38 and below, paras. 110, 125

and 159). It was furthermore agreed that the heading of that Note would need to be revised.

92. A suggestion was made to avoid, to the extent possible, descriptive detail in mentioning types of technology or communication, and rather, to state more generally that the arbitral tribunal should consider discussing with the parties the transmission of documents and other materials at the outset of proceedings, as well as the addressees of such communications.

93. Views were expressed that the revised text of Note 8 ought to be sufficiently flexible to allow for the emergence of new technologies, and that it might likewise be appropriate to refer to current technologies in use in the context of international arbitration, such as e-mail and shared sites for document access. In support of a general approach, the need for flexibility in the Notes' consideration of means of communication was emphasized.

94. A suggestion was made to incorporate a definition of communication or data message, pursuant to definitions in other UNCITRAL texts such as the Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts. It was furthermore suggested that Note 8 should indicate the importance of the chosen means of communication to provide certainty as to the place and timing of exchange of information.

95. After discussion, it was agreed that a general description of the means of communication would be preferable in the Notes, such as a reference to "electronic communication" or "communication made by electronic means." It was also said that the heading of Note 8 could reflect those changes.

96. It was furthermore suggested that requiring the parties' agreement for the use of electronic means, as currently specified in paragraph 36 of the Notes, was overly prescriptive and not appropriate. A view was expressed that there ought to be a positive emphasis on arbitral tribunals' use of electronic means of communication, and indeed that the arbitral tribunal ought to be invited or encouraged to adopt such means.

97. The Working Group also considered several issues raised by the function of technology in arbitral proceedings, as follows. First, it was considered whether electronic communication was always a preferred option, or whether hard copies were in some instances preferable. It was queried whether linking the means of communication to a record of transmission, as provided for in the UNCITRAL Arbitration Rules 2010, was desirable. After discussion, it was agreed that of primary importance was the selection of a means of communication that would be certain to reach the other disputing party, and that the Notes could clearly reflect that and highlight that the chosen means of communication should provide for a record of transmission. Further, the Notes could specify that the chosen means of communication should also be considered acceptable by courts of the country where the award was to be enforced.

98. In a similar vein, it was queried whether issues arising when both soft and hard copy documents were used in the proceedings ought to be addressed in the Notes. After discussion, it was said that several modes of transmission might be addressed in the Notes, but that that was an area where the issue might be flagged without further detail being necessary.

99. Second, the Working Group considered issues raised by the use of technology that may require a license or other restrictions and hence might not be accessible to all parties. After discussion, it was agreed that the Notes could confirm that the method of communication to be used in proceedings should be addressed at the outset of the proceedings, and that the technology to be used should be accessible to all parties.

100. Third, it was agreed that a common repository for documents (examples given included a cloud or dropbox function, or shared site or platform set up for the arbitration), was a useful tool, although it was said that the frequency of the use of such tools varied in international arbitration. After discussion, it was agreed that the Notes should highlight the existence and usage of such tools, doing so in a neutral and non-directive way.

101. It was also suggested that Note 8 might address matters of data security (see above, para. 89).

102. By way of conclusion, it was agreed that Note 8 could highlight some of the important issues raised by communications and technology, with an emphasis on the functions fulfilled by the means of communication, and at the same time, retain a technologically-neutral language that would not be rendered obsolete as the Notes aged.

#### **9. Arrangements for the exchange of written submissions (paras. 38-41)**

103. It was queried whether the language at the beginning of paragraph 38 of the Notes, limiting the paragraph to documents submitted after the statements of claim and defence, was too restrictive. It was agreed that the scope of Note 9 ought to refer to all written submissions.

104. In relation to the list of terms to designate submissions provided by way of example in paragraph 38 of the Notes, it was queried whether the list was helpful and complete. A view was expressed that in light of the different terminological uses, even in the same language, in different jurisdictions, such a list might not be useful. Another view was expressed that to the contrary, the list by its nature implied the use of different terminology and consequently was helpful.

105. A suggestion was made that after each round of submissions, it may be useful for the arbitral tribunal to consult with the parties about the status of the arbitration and the possibility to meet with the parties to consider further timetabling and whether additional evidence needed to be adduced, and that paragraph 39 could better reflect that possibility, in lieu of the final two sentences of that paragraph. It was considered on what matters evidence was required to be adduced, and whether in particular it be limited to points that had been identified as contested points. It was furthermore said that it might be useful to have a list of points at issue that could be prepared by the arbitral tribunal or jointly by the parties in order to narrow the contested points (see also Note 11, “Defining points at issue; order of deciding issues; defining relief or remedy sought”).

106. The Working Group considered paragraph 39 of the Notes, which provided that while ensuring the proceedings were not unduly protracted, the arbitral tribunal might wish “(...) to reserve a degree of discretion and allow late submissions if appropriate (...)”. In that respect, a proposal was made to add to that language that

in such a case, the parties ought to be treated fairly. Another view was expressed that most arbitration rules already permitted tribunals a degree of discretion in extending deadlines, and that such a discretion need not be exercised prior to the expiry of the deadline — in other words, it could be construed as allowing a late submission of a document. It was said that wording could be inserted to reflect a tribunal's discretion to permit late submissions and its discretion to extend deadlines.

107. It was also suggested, in relation to paragraph 40 of the Notes, that that paragraph did not adequately reflect a common practice of exchanging written submissions not only before, but also after, a hearing. It was agreed that the language should be modified accordingly (see also para. 69 of document A/CN.9/WG.II/WP.183).

108. In relation to paragraph 41 of the Notes (on consecutive or simultaneous submissions), it was suggested that that section be redrafted with a view to simplifying it.

109. In response to a question whether Note 9 ought to address the likelihood of submission after the proceedings are closed, the Working Group agreed to consider at a later stage of its deliberations whether that matter would deserve to be addressed in a separate Note.

**10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references) (para. 42)**

110. It was queried whether the list of potential practical arrangements in paragraph 42 of the Notes was accurate or complete. A view was expressed that it lacked reference to technology-based document management and production, and that such an omission ought to be rectified (see also above, paras. 25, 38 and 91-102, and below paras. 125 and 159). Likewise, it was said that reference in the final bullet point of that paragraph to “paper documents” was out-dated; and also that a reference to issues arising from the use of hyperlinks in documents (or technology-neutral expressions of hyperlinks) could be included.

111. It was also said that many of the considerations set out in paragraph 73 of document A/CN.9/WG.II/WP.183 might be applicable, although it was emphasized that the list in the Notes should not express a preference for hard copy or soft copy documents, but rather should remain neutral, given that depending on the circumstances, either form could be desirable.

**11. Defining points at issue; order of deciding issues; defining relief or remedy sought (paras. 43-46)**

112. A view was expressed that a list of points at issue should be prepared by the arbitral tribunal, based on the parties' submissions and presentations. It was said that an important element of a list of points at issue should be its evolutive nature, bearing in mind that if such a list were made at too early a stage in the process it might require a great deal of unnecessary revision than if its initial conception came later in proceedings.

113. It was also said that paragraph 43 of the Notes need not emphasize the disadvantage of a list of points at issue, since such a list, especially when prepared

at an appropriate stage of proceedings, provided a very beneficial opportunity, inter alia, to receive feedback from the arbitral tribunal.

114. In relation to the order in which points at issue should be decided (paras. 44 and 45 of the Notes), a suggestion was made to highlight the flexibility of the arbitral tribunal in determining the sequence of proceedings.

115. In relation to paragraph 45 of the Notes, a question was raised as to whether the terms “partial”, “interlocutory” or “interim” awards referred to decisions that were final with respect to the issues. It was said that the Working Group, when it had encountered the issue in relation to the UNCITRAL Arbitration Rules 2010, had determined that all awards were final and binding by their nature, and hence different terminologies could lead to confusion. It was said in response that in terms of a partial decision, it may have different consequences depending on the *lex arbitri*, and in particular that should be flagged in the Notes as a matter to be taken into account when considering bifurcation of proceedings (see also para. 78 of document A/CN.9/WG.II/WP.183). It was agreed that it would be useful to insert a new sentence in that paragraph, in order to flag two distinct consequences of a decision, first, whether it was final and binding on the parties and the arbitral tribunal, and second, whether it was open to appeal.

116. In relation to the matter of whether to define more precisely the relief or remedy sought (para. 46 of the Notes), it was said that in certain jurisdictions, the arbitrators would be expected to assist the parties in the manner (but not on the substance) in which they presented their case, so as to avoid that the case failed on reasons of form or similar reasons. Another view was expressed that the arbitral tribunal should not be perceived as giving advice to one party. It was said that in some instances, it would be acceptable for an arbitral tribunal to merely indicate to a party that its claim, or relief sought, was not sufficiently precise.

## **12. Possible settlement negotiations and their effect on scheduling proceedings (para. 47)**

117. The Working Group considered paragraph 47 of the Notes, which provided that the arbitral tribunal could bring up the possibility of settlement. Although it was generally agreed that an arbitral tribunal could raise the possibility of settlement to the parties, diverging views were expressed as to whether an arbitral tribunal should be involved in those negotiations.

118. Consequently a suggestion was made that that Note could more clearly express that the arbitral tribunal could suggest the possibility to the parties that they attempt settlement negotiations outside the context of the arbitration, for example by engaging the services of a third party mediator.

119. In relation to the separate but related point of whether the Notes should raise the possibility of an arbitrator or arbitral tribunal engaging in or facilitating settlement negotiations between the parties, different views were expressed.

120. Some views were expressed that Note 12 should not call attention to the possibility that an arbitrator could become involved in the brokering of a settlement, as that was not a practice that was widely undertaken or accepted in all legal cultures, but rather that the Note should be limited to expressing in narrow terms

that an arbitrator could suggest the possibility of settlement outside the context of the arbitration proceedings themselves.

121. Another view was expressed that a number of jurisdictions, and a number of international guidelines, suggested that where parties agreed — their agreement being critical in respect of both the principle and modalities of settlement discussions — and where applicable law permitted, facilitation of settlement by an arbitrator or arbitral tribunal exercising due caution and restraint, was deemed acceptable and even welcome. In that respect, it was also said that arbitrators should be given discretion to undertake the role of mediator should they be requested to do so by the parties.

122. It was suggested by a number of delegations that the second sentence of paragraph 47 of the Notes could be either deleted or worded in a more neutral manner.

123. A suggestion was made to delete paragraph 47, based on the diverging views expressed in relation to the role it suggested or implied regarding the arbitral tribunal's involvement in settlement, and on the fact that the discussions had little implication in any event to the scheduling of proceedings. A further suggestion was to retain the text without any amendment, as it was recalled that that Note did not raise any issue in practice, and had been considered at length when the Notes were initially prepared in 1996.

124. After discussion, the Working Group requested the Secretariat to redraft Note 12, including alternative language to take into account the issues raised in the discussions. It was stressed that the various views expressed in relation to Note 12 should not be interpreted as being accepted or endorsed by the Working Group given the exploratory nature of the discussion at this point (see above, para. 12).

**13. Documentary evidence (paras. 48-54)**

125. The Working Group agreed that information regarding electronic submission of documentary evidence would be appropriate for inclusion in Note 13 (see para. 83 of document A/CN.9/WP.183; see also above paras. 25, 38, 91-102 and 110, and below, para. 159).

**(a) Time limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission (paras. 48 and 49)**

126. It was observed that paragraphs 48 and 49 dealt with documentary evidence from the very narrow perspective of time limits for their submission, and it was suggested that additional aspects be addressed in that section. It was also suggested that paragraph 48 indicate that time limits for both document production and submission of evidence be discussed at the outset of the proceedings.

127. Further, it was said that paragraph 48 did not reflect the current practice of submitting evidence with written submissions, and it was suggested that the first sentence of that paragraph could be deleted or modified to reflect that practice.

128. In relation to the late submission of evidence addressed in paragraph 49 of the Notes, the Working Group agreed that the Notes ought to be less prescriptive about when late submissions could be accepted, as late evidence could in some instances be helpful to the arbitral tribunal but also might require that the other party be given

an opportunity to comment or produce further evidence (see paras. 90-91 of document A/CN.9/WG.II/WP.183). The Working Group further agreed that seeking prior permission of the arbitral tribunal might be one means to allay concerns in relation to the submission of late evidence, and could be inserted in the Notes as an illustration. It was suggested that the Notes could further indicate that in requesting permission for a late submission, a party could provide information on the reasons for late production.

129. In response to a question whether the Notes should include provisions dealing with the consequences where the party concerned did not show sufficient cause for late submission, it was said that the Notes should not provide directions on how documents submitted late should be handled. The Working Group agreed that the possible costs consequences of late submissions could be mentioned in the Notes.

**(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence (paras. 50 and 51)**

130. The Working Group considered that the Notes ought to provide additional information regarding the nature of document production and different means by which not only the arbitral tribunal might request it, whether it did so *sua sponte* or at the request of one party, but also, more explanatory information regarding how the parties might seek production of documents from another party. It was queried whether the Notes should provide for the possibility of the arbitral tribunal suggesting to the parties, or addressing in a procedural order, the matter of document production, and the timing at which that issue should be raised. A view was expressed that an arbitral tribunal should wait until it became apparent that the parties would request document production so as not to artificially provoke requests, and another view that for the arbitral tribunal to raise that issue required an element of judgment but typically should be raised as soon as possible. A suggestion was made that the Notes should mention that arbitral tribunals could provide at the outset of proceedings, where there was agreement between the parties to request production of documents, for a framework of document production, such as a Redfern schedule, rather than a procedural time frame *per se*.

131. It was suggested that paragraphs 51 and 52 could be revised taking into consideration the substance of the IBA Rules on the Taking of Evidence in International Arbitration.

132. Additional suggestions were made to include in Note 13 confidentiality issues that might specifically arise at the stage of providing documentary evidence; and the matter of preservation of evidence, or issues specific to production of evidence in an electronic format.

**(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate (para. 52)**

133. The Working Group discussed whether, in light of the increasing prevalence of electronic disclosure in international arbitration, any guidance should be added in relation to the provenance of documents disclosed only electronically, as well as any issues relating specifically to electronic disclosure — for example, guidance relating to meta-data and electronic tagging of documents.

134. The Working Group agreed to include translations within the list set out in paragraph 52 of the Notes.

**(d) Are the parties willing to submit jointly a single set of documentary evidence (para. 53)**

135. The Working Group agreed that paragraph 53 of the Notes should differentiate between the issue of authenticity of documents, and the organization of documentary evidence. It was suggested that that section should provide more information on how parties could present their documents, such as the use of hyperlink indexes. It was suggested that presentation of documents played an important role in assisting the arbitral tribunal to better understand the issues at stake in a dispute.

136. It was suggested that the Notes, whether in that section or in Note 19 addressing requirements in relation to awards, could indicate that the arbitral tribunal might be entitled to disregard evidence filed but not referred to in the pleadings.

**14. Physical evidence other than documents (paras. 55-58)**

137. A suggestion was made to revise the title of Note 14, so that it read “Other evidence”, and to relocate it after Note 16.

138. It was said that Note 14 could better distinguish between the illustrative role of site visits, and the evidentiary value of such visits and that that should be clarified by the arbitrators. Technologies permitting virtual representations of sites were said to be useful, and should be referred to in Note 14.

139. It was said that the sites to be inspected were often under the control of one party, and paragraph 58 could underline the possibility for the other party to visit the sites in advance of the inspection by the arbitral tribunal.

140. It was suggested that Note 14 should include provisions on the cost implications and the allocation of expenses in consideration with the submission of physical evidence, and in particular the costs that might result from on-site inspections, as compared to other practices, such as virtual representations of the sites, or videoconferencing.

**15. Witnesses (paras. 59-68)**

**(b) Manner of taking oral evidence of witnesses (paras. 63-65)**

*(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted (para. 63)*

141. The Working Group agreed that common terminology (e.g., “direct examination”; “cross-examination”; “re-examination”; etc.) should be reflected in paragraph 63 of the Notes, as should the frequent practice of using witness statements in addition to hearing oral witness evidence.

142. In relation to paragraph 63, it was said that it should simply provide that the arbitral tribunal should discuss with parties how witnesses would be heard.

143. It was suggested that Note 15 should clarify that a written witness statement should refer to all documents relied upon, and should include both the practice of submitting those documents as attachments to the statement or as part of a single bundle for witness evidence and exhibits.

144. It was suggested that Note 15 should highlight the consequences of a witness' failure to attend a hearing to provide oral testimony, including inferences that could be drawn from unexcused absences or the arbitral tribunal's discretion to determine the weight to be accorded to that witness' written evidence or not to admit that evidence at all. It was also said that Note 15 could refrain from highlighting such consequences, but that if it included language on that matter, then Note 15 should also refer to the importance of advising the parties to that effect.

145. It was said that in some jurisdictions, common practice was that the arbitral tribunal should advise parties, in the interest of cost and time efficiency, whether a witness needed to appear at all. In response, it was said that different jurisdictions had different practices in that regard, and that in some jurisdictions, the view was that before hearing a witness it was difficult to judge the relevance of his or her testimony.

(ii) *Whether oral testimony will be given under oath or affirmation and, if so, in what form oath or affirmation should be made (para. 64)*

146. In relation to paragraph 64 of the Notes, which addressed oaths, it was said that the arbitrators might draw attention to the criminal consequences in some jurisdictions of lying under oath.

(c) **The order in which the witnesses will be called (para. 66)**

147. In relation to paragraph 66 of the Notes, the Working Group agreed that it would be useful to adopt the language suggested in paragraph 106 of document A/CN.9/WG.II/WP.183.

(d) **Interviewing witnesses prior to their appearance at a hearing (para. 67)**

148. It was said that language set out in paragraph 107 of document A/CN.9/WG.II/WP.183 provided a good basis for making clear that all parties should have the same information in relation to the possibility of contact between a party and a witness while a witness was giving evidence, but that it should be made clear from the beginning of paragraph 67 of the Notes that the arbitral tribunal should clarify at the outset of proceedings whether any contact would be appropriate prior to testimony being given; it was said that during testimony, it was common practice that no contact be had.

149. It was agreed to delete the phrase "In some legal systems" at the beginning of paragraph 67 of the Notes, which was said to draw inspiration from national jurisdictions in which pre-testimonial contact with witnesses was not permitted in either court practice or international arbitration. It was said that now, an increasing number of jurisdictions that have retained that rule for court practice were generally accepting pre-testimony contact between party and witness in international arbitration. It was suggested that these practices be better reflected in the Notes.

**16. Experts and expert witnesses (paras. 69-73)**

150. The Working Group observed that the question of participation of experts in arbitral proceedings had evolved. In line with the approach adopted by UNCITRAL when preparing the UNCITRAL Arbitration Rules 2010, it was suggested that more prominence be given to the question of party appointed experts. The Working Group agreed that section (b) of Note 16, “Expert opinion presented by a party (expert witness)”, be addressed as a first item under that Note, followed by the section on “Expert appointed by the arbitral tribunal”.

151. The Working Group further agreed that paragraph 69 of the Notes be redrafted as suggested in paragraph 108 of document A/CN.9/WG.II/WP.183, with the modification set out in paragraph 150 above, as well as a reflection that the presentation of expert witnesses was a right for the parties, so the word “permitted” should be replaced by a more appropriate wording; and that modifications should be made to reflect that the appointment of experts by the arbitral tribunal was a matter of efficiency rather than “power”.

**(a) Expert appointed by the arbitral tribunal (para. 70)**

152. It was said that paragraph 70 of the Notes should be revised to reorder the sequence of events where the arbitral tribunal was to appoint an expert. It was said that first the principle of a tribunal’s appointment of the expert should be discussed in consultation with the parties, and subsequently, the parties could be consulted in relation to the choice of the candidate itself.

*(i) The expert’s terms of reference (para. 71)*

153. In response to a suggestion that paragraph 71 of the Notes should indicate that the arbitral tribunal could appoint an expert to report on issues determined by the arbitral tribunal, on the basis of proposal made to the parties, it was said that it should be for the arbitral tribunal to determine the issues that it wished its appointed expert to report on.

154. The Working Group agreed that paragraph 71 could include provisions on the desirability of clarification by the arbitral tribunal regarding who could communicate with the expert (see para. 114 of document A/CN.9/WG.II/WP.183).

**(b) Expert opinion presented by a party (expert witness) (para. 73)**

155. In relation to paragraph 73 of the Notes, the Working Group agreed that consideration should be given to the list of items contained in paragraph 116 of document A/CN.9/WG.II/WP.183.

156. It was suggested that Note 16 could include provisions on (i) single joint experts; and (ii) on the practice of the concurrent expert evidence chaired by the arbitral tribunal, sometimes known as “expert conferencing” or “hot-tubbing”.

157. It was further agreed that Note 16 could refer to the possibility that an arbitral institution, a chamber of commerce or other similar bodies might be prepared to assist in the selection of experts.

158. It was suggested that, consistent with article 29(2) of the UNCITRAL Arbitration Rules 2010, Note 16 should include provision on the expert's qualifications, as well as its duties of impartiality and independence.

**17. Hearings (paras. 74-85)**

159. As a general matter it was said that reference be made to hearings that incorporated, or were held by virtue of, technical means — ranging from the use of visual aids for the presentation of documents, such as PowerPoint in hearings, to electronic bundles, to hearings held via videoconference (see also above, paras. 25, 38, 39, 91-102, 110 and 125).

160. Further, it was said that Note 17 could address the admissibility of evidence new to the arbitration at the hearing (see para. 119 of document A/CN.9/WG.II/WP.183). It was said that if a witness introduced through his or her testimony new documents and facts, that could create an undesirable situation.

**(a) Decision whether to hold hearings (paras. 74 and 75)**

161. In relation to paragraph 75 of the Notes, it was queried whether it could be clarified in respect of other factors militating for and against holding an oral hearing (see para. 120 of document A/CN.9/WG.II/WP.183). A view was expressed that both paragraphs 74 and 75 should be completely revised because their general tone was no longer in line with international practice. It was generally accepted that pursuant to common practice, including under the UNCITRAL Arbitration Rules 2010, where the parties requested a hearing, that request could not be rejected by the arbitral tribunal. It was said that discussion between the arbitral tribunal and the parties remained highly relevant, and consequently that the last sentence of paragraph 75 should be included more prominently in that paragraph. Another view was expressed that in some instances, it would be at the discretion of the arbitral tribunal as to whether to hold a hearing, for example in the event of proceedings where the respondent was not participating.

162. It was said that, in relation to paragraphs 75 and 76, the Notes could make a clearer distinction between evidentiary hearings and hearings on procedural matters.

**(b) Whether one period of hearings should be held or separate periods of hearings (para. 76)**

163. In relation to paragraph 76 of the Notes, a view was expressed that consecutive hearings were preferable to separate hearings, and moreover that continuous hearings were much more prevalent in practice, and therefore that paragraph could be modified. Another view was expressed that separate hearings could be unavoidable in accommodating parties' and arbitral tribunal's schedules, and that it would thus be useful to retain that paragraph.

**(c) Setting dates for hearings (para. 77)**

164. It was agreed to reformulate paragraph 77 of the Notes to reflect that setting "target dates" was not usual practice, but rather that dates for hearings were normally fixed, at the earliest opportunity for doing so, and that the length of the hearings or even the need for a hearing might be subject to later reconsideration.

**(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses (paras. 78 and 79)**

165. In relation to whether there should be a limit on the aggregate amount of time each party should have for oral arguments and questioning witnesses (paras. 78 and 79 of the Notes), a view was expressed that parties should not be allocated the same amount of time, given that the number of witnesses a party planned to present might vary considerably with the number presented by another party. In response it was said that the statement in paragraph 78 providing for a general principle of giving equal time to each party, unless justification existed for differentiated treatment, provided the proper general rule and provision for exception.

**(e) The order in which the parties will present their arguments and evidence (para. 80)**

166. It was said in relation to paragraph 80 of the Notes that it ought to be flagged that there were different practices as to which party was permitted to present its evidence and arguments first or last, depending on the circumstances.

**(g) Arrangements for a record of the hearings (paras. 82 and 83)**

167. A suggestion was made to highlight in paragraphs 82 and 83 of the Notes that the arbitral tribunal could decide on the appropriate means of recording the hearings, in consultation with the parties.

168. It was said that references in those paragraphs to the arbitral tribunals' notes should be removed. Views were expressed that audio and video recordings and transcripts were very commonly used in practice, although it was acknowledged that in simple proceedings or for procedural hearings, a different or more cost-effective practice could be adopted.

169. Another suggestion was made to provide in that Note for the opportunity for both parties to review the transcripts, rather than, as currently expressed in paragraph 83 of the Notes, for only the person who made the statement to do so.

170. In relation to the suggestion contained in paragraph 131 of document A/CN.9/WG.II/WP.183 that the pros and cons of certain practical issues, such as the provision of interpretation and the remote attendance of witnesses be added, it was suggested that such provisions would be useful, and would be better located under Note 15 on "Witnesses".

171. After discussion, the Secretariat was requested to redraft section (g) of Note 17, bearing in mind the diversity of views that had been expressed.

**(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments (paras. 84 and 85)**

172. It was suggested that the Notes' indication that some legal counsel were accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and other parties no longer reflected current practice.

173. It was said, however, that there was a distinct need to address post-hearing briefs, and to highlight that it could be desirable for the arbitral tribunal to give indications to the parties regarding specific issues to be addressed that had been

identified by the arbitral tribunal as relevant to their decision, as well as more logistical issues such as page length.

174. A proposal was made to include in the Notes a provision suggesting that at the end of a hearing or of proceedings, the arbitral tribunal should give direction as to the claims for costs to be made by the parties. It was further suggested that the Notes should reflect that the arbitral tribunal should set aside time for its deliberations after the closing of the hearings, and before the closing of the proceedings.

#### **18. Multiparty arbitration (paras. 86-88)**

175. It was observed that Note 18 could present the matter of multi-party arbitration with a different tenor, as it was said that in practice, problems only tended to arise in such arbitrations where a plurality of parties had different interests or sought different relief. It was said that guidance could be provided in the Notes in that respect.

176. A suggestion was made to address issues of joinder and consolidation either under Note 18 or elsewhere in the Notes (see para. 135 of document A/CN.9/WG.II/WP.183, and the comments of the Arbitration Institute of the Stockholm Chamber of Commerce in document A/CN.9/WG.II/WP.184).

#### **19. Possible requirements concerning filing or delivering the award (paras. 89 and 90)**

177. A question was raised whether Note 19 should be deleted, as it addressed issues that would arise after the award was rendered, and therefore was outside the scope of the Notes. In response, it was said that Note 19 was useful in reminding parties and arbitrators of the formalities required in certain jurisdictions regarding the filing of awards, and the potential legal consequences attached to non-compliance. It was suggested however that paragraph 89 of the Notes should most probably not refer to the notion of “invalidity of the award”.

178. It was said that Note 19 ought to highlight requirements not only for filing and delivering the award, but also in respect of the content of or formalities in respect of an award. It was said that the law that should be considered in that respect was both the relevant applicable law at the place of the award, as well as the law at the place where the award was sought to be enforced. It was suggested that arbitration rules might also stipulate requirements for an award and thus should also be mentioned.

179. It was suggested that the title of Note 19 could be amended to reflect that broader understanding of what the Note might address.

180. Furthermore, it was suggested that Note 19 could provide some guidance as to which party should take the initiative in filing and delivering the award.

181. A suggestion was made that a provision could be added whereby the Notes could remind arbitral tribunal that it should, at the outset of the proceedings, identify the relevant governing laws, including the *lex arbitri* but also the law governing the arbitration agreement as well as the law governing the merits of the disputes. It was also said that the Notes should not contain any provision on the content or drafting of the arbitral award.

**20. Specific types of arbitration; investment arbitration**

182. The Working Group considered, at the close of its session, how to address the matter of investment arbitration in the Notes (see above, paras. 18-21, 82 and 83).

183. One approach suggested was to indicate in the introduction to the Notes that the guidance set out in the Notes applied exclusively to international commercial arbitration, and not to investment arbitration. It was said in response that the practices and guidance outlined in the Notes applied equally to investment arbitration and to limit the Notes' application to commercial arbitration would be an overly narrow description. It was also stressed that the Notes had, and it was desirable that they continue to have, a general application, such that they could be used as a guidance document in a range of different types of arbitration.

184. A further suggestion was made to include in the "Introduction" to the Notes a provision calling attention of the readers to the various types of arbitrations that exist in practice, including a specific reference to investment arbitration.

185. It was further suggested to address in Note 6, either in the text itself, in a footnote or in a separate Note, that different rules, treaties or law might govern the matter of transparency as it related to investment arbitration. It was said that such an approach would preserve the general nature of the Notes, but would highlight that a specific issue might arise in relation to investment disputes.

186. It was said in relation to whether guidance ought to be provided in the Notes on the practice of investment treaty arbitration pursuant to the UNCITRAL Rules on Transparency, that no practice had yet developed in respect of those Rules and consequently to give guidance on the conduct of arbitration pursuant to those Rules would be premature.

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