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# Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007)

Contents



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# I. Introduction

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

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

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[4]

4. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to define

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

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

[3] Ibid., para. 338.

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

whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a predefined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[5]

5. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the Convention on Electronic Contracts, already accommodated a number of issues arising in the online context. Another topic was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made to consider clarifying the notions used in article I, paragraph (1), of the New York Convention of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.[6]

6. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but, at least in an initial phase, deal with the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[7]

7. At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its

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

work.[8] The Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.[9]

# II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its forty-seventh session in Vienna, from 10 to 14 September 2007. The session was attended by the following States members of the Working Group: Algeria, Australia, Austria, Bahrain, Belarus, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Czech Republic, El Salvador, France, Germany, Honduras, Iran (Islamic Republic of), Italy, Japan, Latvia, Lebanon, Malaysia, Mexico, Morocco, Nigeria, Norway, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Argentina, Belgium, Brazil, Croatia, Cuba, Democratic Republic of the Congo, Dominican Republic, Finland, Indonesia, Ireland, Kazakhstan, Libyan Arab Jamahiriya, Mauritius, Netherlands, Panama, Philippines, Portugal, Qatar, Romania, Slovakia, Slovenia, Sweden, Tunisia and Turkey.

10. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: United Nations Conference on Trade and Development (UNCTAD) and Permanent Court of Arbitration (PCA).

11. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), Association for the Promotion of Arbitration in Africa (APAA), *Association Suisse de l'Arbitrage* (ASA), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), Chartered Institute of Arbitrators (CIArb), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Commercial Arbitration C.I.C. (FICACIC), Inter-Pacific Bar Association (IPBA), International Arbitral Centre of the Austrian Federal Economic Chamber, International Arbitration Institute (IAI), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Institute for Sustainable Development (IISD), International Swaps & Derivatives Association

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

(ISDA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, School of International Arbitration of the Queen Mary University of London, Singapore International Arbitration Centre – Construction Industry Arbitration Association (SIAC–CIAA Forum) and the *Union Internationale des Avocats* (UIA).

12. The Working Group elected the following officers:

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

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

13. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.146); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules to reflect deliberations of the Working Group at its forty-fifth (A/CN.9/WG.II/WP.145/Add.1) and forty-sixth (A/CN.9/WG.II/WP.147 and Add.1) sessions.

14. The Working Group adopted the following agenda:

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

# III. Deliberations and decisions

15. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.145/Add.1, A/CN.9/WG.II/WP.147 and Add.1). The deliberations and conclusions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and conclusions of the Working Group. The deliberations and conclusions of the Working Group in respect of agenda item 5 are reflected in chapter V.

# IV. Revision of the UNCITRAL Arbitration Rules

16. The Working Group recalled the mandate given by the Commission at its thirty-ninth session (New York, 19 June-7 July 2006) and set out above (see above, paragraphs 3-6) which provided, inter alia, that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit and drafting style and that it should respect the flexibility of the text rather than make it more complex. The Working Group recalled as well its decision that harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the UNCITRAL Arbitration Model Law should not be automatic but rather considered only where appropriate (A/CN.9/614, para. 21).

17. The Working Group recalled that it had concluded a first reading of articles 1 to 21 at its forty-sixth session (A/CN.9/619) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.145/Add.1 and the proposed revisions contained therein.

**Section III. Arbitral proceedings**

**Pleas as to the jurisdiction of the arbitral tribunal**

**Article 21**

*Paragraph (3)*

18. One delegation expressed doubts as to whether the proposed wording in paragraph (3) (as contained in A/CN.9/WG.II/WP.145/Add.1 and discussed at the forty-sixth session, A/CN.9/619, para. 164) was preferable to the text as contained in the original version of the Rules. The Working Group took note of that point and confirmed that it would consider again draft article 21 in the context of its second reading of the revised Rules.

**Further written statements**

**Article 22**

19. The Working Group agreed to adopt article 22 in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Periods of time**

**Article 23**

20. The Working Group agreed to adopt article 23 in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Evidence and hearings – Articles 24 and 25**

**Article 24**

*Paragraph (1)*

21. The Working Group agreed to adopt paragraph (1) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraph (2)*

22. The Working Group considered whether paragraph (2) should be deleted for the reason that it might not be common practice for an arbitral tribunal to require parties to present a summary of documents and therefore it might be desirable to promote a system according to which the parties would attach to their claims the evidentiary materials upon which they wished to rely (see A/CN.9/WG.II/WP.145/Add.1, para. 23).

23. Wide support was expressed for the deletion of paragraph (2), which was said to be rarely, if at all, used in practice. It was also stated that the retention of paragraph (2) would be inappropriate since that provision might be misread and create uncertainty regarding the optimal form in which evidence was expected to be

submitted by the parties under the Rules, given that articles 18 (2) and 19 (2) already established the possibility for the parties to provide documents or other evidence.

24. Some support was expressed for the retention of paragraph (2), as it could provide the arbitral tribunal with an opportunity to obtain from the parties an overview of the dispute, particularly in complex matters. Paragraph (2) could also assist in imposing a discipline on the parties to rationalize the evidence upon which they wished to rely. In response, it was said that article 15 already provided the arbitral tribunal with a discretion to conduct the proceedings as it sought fit. Should the need arise, article 15 thus offered the arbitral tribunal every opportunity to request a summary of documents and paragraph (2) was unnecessary. Since the arbitral tribunal could not content itself with a summary of the documents and other evidence but had to examine the evidence itself, the summary provided by paragraph (2) would even risk increasing the arbitral tribunal's work rather than simplifying it. However, the view was reiterated that the summary would assist the arbitral tribunal in better understanding the case and resolving the dispute.

25. The widely prevailing view was that paragraph (2) should be deleted. In light of the remaining objection to deletion, the Working Group agreed that the issue could be revisited at a future session. It was emphasized that deletion of paragraph (2) should not be understood as diminishing the discretion of the arbitral tribunal to request the parties to provide summaries of their documents and evidence on the basis of article 15.

*Paragraph (3)*

26. The Working Group agreed to adopt paragraph (3) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Article 25**

27. A suggestion was made to clarify that article 25 applied to expert witnesses.

*Paragraph (1)*

28. The Working Group agreed to adopt paragraph (1) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraphs (2) and (2 bis)*

29. Paragraph (2 bis) as contained in A/CN.9/WG.II/WP.145/Add.1 confirmed the discretion of an arbitral tribunal to set out conditions under which it might hear witnesses. It also established that parties to the arbitration or officers, employees or shareholders thereof who testified to the arbitral tribunal should be treated as witnesses under the Rules.

30. It was observed that divergences existed between legal systems on the question whether a party or a representative of a party could be heard as a witness or in another capacity. Support was expressed for the inclusion of paragraph (2 bis) for the reason that it would provide an international standard to overcome these national differences. It was also noted that paragraph (2 bis) would ensure that government

officials were not precluded from giving evidence in investor-State arbitration cases. A number of suggestions were made to clarify paragraph (2 bis).

31. It was proposed that paragraph (2 bis) be redrafted along the following lines: "Witnesses may be heard under conditions set by the arbitral tribunal. For the purpose of these Rules, witnesses include any individual testifying to the arbitral tribunal on any issue of fact or expertise, whether or not that individual is a party to the arbitration or was or is an officer, employee or shareholder of any party." It was said that adding the words "for the purpose of these Rules" and avoiding the reference to an individual being "treated" as a witness provided a more neutral standard, particularly in States where parties were prohibited from being heard as witnesses.

32. It was further suggested that the reference to "officer, employee or shareholder of any party" was too restrictive and might exclude other possible categories of witnesses such as associates, partners or legal counsel of the parties. It was suggested that the provision be redrafted either to provide a non-exhaustive list or to omit examples altogether.

33. A question was raised as to whether the reference to an individual testifying on any issue of expertise could be interpreted as applying to tribunal-appointed experts. It was agreed that paragraph (2 bis) was intended to be limited in scope to witnesses and experts presented by a party. A suggestion was made that the words "or expertise" should be deleted to clarify that objective. In that respect, it was noted that article 27 already dealt with the question of experts generally.

34. It was suggested that it was preferable first to describe the conditions under which witnesses could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses as currently laid out in paragraph (2 bis), and only thereafter to expand on procedural details regarding witnesses. For that reason, it was proposed to merge paragraphs (2) and (2 bis) and reverse the order of sentences. It was further suggested that any such restructuring should also delete any time period during which parties should provide communication of details regarding witnesses. It was suggested that the 15-day time period might be too long in some cases. That proposal received some support.

35. Some opposition was expressed to the inclusion of paragraph (2 bis) for the reason that it was inconsistent with some existing national laws and could impact negatively on the enforcement of an award (including through an exception based on public policy) in jurisdictions where a party was prohibited from being heard as a witness. In response, it was observed that, to the extent such an inconsistency existed, article 1 (2) provided that, where the Rules conflicted with a provision of mandatory applicable law, the provision of that mandatory law prevailed. It was further observed that the principle expressed in paragraph (2 bis), which might be helpful in those jurisdictions that did not regulate who might act as a witness, was not novel since it was expressed in similar terms in article 4 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1 June 1999), article 25 (2) of the Swiss Rules of International Arbitration ("Swiss Rules") and article 20.7 of the Arbitration Rules of the London Court of International Arbitration ("LCIA Rules").

36. A suggestion was made that it might be possible to avoid referring in paragraph (2 bis) to the notion of "witness" altogether, thus avoiding the problems

that might arise from any distinction between hearing the testimony of a witness and hearing a party on an issue of fact. Broad support was expressed for the principle that any person could be heard on an issue of fact or expertise.

37. A view was expressed that a party should not be heard as a witness in its own case since it had ample opportunity to express itself as a party in the arbitration proceedings.

38. After discussion, the Working Group agreed to include a provision along the lines contained in paragraph (2 bis) and requested the Secretariat to reformulate the text in more neutral terms, taking account of the suggestions made, for consideration by the Working Group at a future session.

*Paragraph (3)*

39. The Working Group agreed to adopt paragraph (3) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraph (4)*

40. The view was expressed that the last sentence in paragraph (4), which referred to the discretion of the arbitral tribunal to determine the manner in which witnesses could be heard, might overlap with the principle expressed in paragraph (2 bis). In response, it was observed that paragraph (2 bis) related to the status of witnesses and general conditions under which witnesses might be heard, whereas paragraph (4) dealt with the procedure whereby witnesses would be examined.

41. It was observed that, if paragraph (2 bis) were adopted by the Working Group, the second sentence of paragraph (4) might need to be amended as the possibility to seek the retirement of a witness during the testimony of other witnesses might not always be applicable to a party appearing as a witness as it would affect a party's ability to present its case.

42. The Secretariat was requested to reformulate paragraph (4) taking account of the comments made for consideration at a future session.

*Paragraph (5)*

43. A suggestion was made that paragraph (5) should also refer to the possibility of witnesses being heard by videoconference. In support of that proposal, it was suggested that paragraph (4), which required that the hearings be held in camera, when read in conjunction with paragraph (5), which referred to evidence by witnesses also being presented in the form of written signed statement, could be understood as excluding witness evidence presented in any other form. However, it was said that inclusion of a reference to videoconference delved into detail that could overburden the Rules and reduce their flexibility. Some hesitation was expressed to including a reference to a particularly technology, such as video conferencing, given the rapidly evolving technological advancements in means of communication. A suggestion was made to provide a more generic term such as "teleconference" to accommodate technological advancements. Broad support was expressed for a suggestion that paragraph (5) should state not only that evidence of witnesses might be presented in the form of a signed written statement but also that oral statements might be presented by means that did not require the physical

presence of witnesses. More generally, it was also noted that the arbitral tribunal had the authority under paragraph (6) to determine the weight of the evidence.

44. The Secretariat was requested to reformulate paragraph (5), taking account of the suggestions made, with possible variants, for consideration by the Working Group at a future session.

*Paragraph (6)*

45. The Working Group agreed to adopt paragraph (6) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Interim measures**

**Article 26**

*Inclusion of detailed provisions on interim measures*

46. The Working Group noted that article 26, as contained in A/CN.9/WG.II/WP.145/Add.1, mirrored the provisions on interim measures as contained in chapter IV A of the UNCITRAL Arbitration Model Law adopted by the Commission in 2006.

47. Support was expressed for the proposed updating of article 26 based on the most recently adopted international standard on interim measures.

48. A proposal was made that paragraph (2) (c) should be amended expressly to refer to security for costs through an addition of the words “or securing funds” after the word “assets”. Opposition was expressed to that proposal as it could connote that the corresponding provision in the UNCITRAL Arbitration Model Law was insufficient to provide for security for costs. The Working Group agreed that security for costs was encompassed by the words “preserving assets out of which a subsequent award may be satisfied.”

49. The view was expressed that the allocation of risk in paragraph (8) was unbalanced in that it held the party requesting an interim measure liable in situations where the party disclosed in good faith all the information and documents in its possession and where the arbitral tribunal later determined that, in the circumstances, it should not have granted the interim measure. In response, it was observed that the party requesting the measure took the risk of causing damage to the other party. If the measure was later determined not to have been justified, the requesting party should have to repair that damage. It was also observed that similar provisions were found in some national laws and arbitration rules, and served a useful purpose of indicating to the parties the risks associated with a request for an interim measure.

50. A suggestion was made that, instead of amending the text of article 26 as contained in A/CN.9/WG.II/WP.145/Add.1, it might be preferable to include a concise provision on interim measures based on the original text of the Rules, updated as necessary.

51. After discussion, the Working Group agreed that it would be preferable to maintain the text of article 26 as contained in A/CN.9/WG.II/WP.145/Add.1. In that context, it was considered desirable to avoid unnecessary departure from the provisions on interim measures as contained in chapter IV A of the UNCITRAL

Arbitration Model Law. It was observed that the words "whether in the form of an award or another form" which appeared in article 17 (2) of the UNCITRAL Arbitration Model Law had been deleted from the corresponding article in the revised Rules (article 26 (2)). It was explained that, while in the past some practitioners might have used the form of an award for interim measures with a view to enhancing their enforceability, this no longer had much purpose given that the UNCITRAL Arbitration Model Law now contained provisions permitting enforcement of interim measures regardless of the form in which they were issued. As well, it was noted that issuing an interim measure in the form of an award under the Rules could create confusion, particularly in light of article 26 (5) of the Rules, which permitted the arbitral tribunal to modify or suspend an interim measure.

*Paragraph (3) of original text of the Rules*

52. The Working Group agreed that the original text of article 26 (3) of the Rules, which provided that a request for an interim measure to a court was not incompatible with an arbitration agreement, was a useful provision and should be retained in the Rules.

*Inclusion of provisions on preliminary orders*

53. The Working Group recalled that, pursuant to the revised UNCITRAL Arbitration Model Law adopted by the Commission in 2006, preliminary orders might be granted by an arbitral tribunal upon request by a party, without notice of the request to any other party, in the circumstances where it considered that prior disclosure of the request for the interim measure to the party against whom it was directed risked frustrating the purpose of the measure. Provisions on preliminary orders had been discussed at length by the Working Group in the context of the revisions of the UNCITRAL Arbitration Model Law, and the Working Group agreed that discussion on the content of those provisions should not be repeated. The Working Group considered whether provisions on preliminary orders, as contained in section 2 of chapter IV A of the UNCITRAL Arbitration Model Law should be included in the Rules. Diverging views were expressed.

54. Against the inclusion of such provisions, it was stated that the Rules and the UNCITRAL Arbitration Model Law had different purposes in that the Rules were directed to parties, whereas the UNCITRAL Arbitration Model Law was directed to legislators. It was recalled that the notion of preliminary orders had been very controversial, and it was stated that there remained divisions in the international arbitration practice on the acceptability of such orders, regardless of the safeguards attached thereto in the revised UNCITRAL Arbitration Model Law. It was further clarified by those opposing inclusion of provisions on preliminary orders in the Rules that the intention was not to reject the corresponding provisions in the UNCITRAL Arbitration Model Law, but rather to acknowledge the difference in nature and function between the two instruments.

55. It was also stated that introducing such provisions in the Rules could undermine their acceptability, particularly by States in the context of investor-State dispute. Concern was expressed that, where the applicable law prohibited such orders, inclusion of a provision that contradicted the applicable law could give the false impression to arbitrators that they were empowered to grant such measures. Furthermore, it was recalled that the mandate of the Working Group in respect of the

revision of the Rules was precise and required that the structure, spirit and drafting style of the Rules should not be altered. In that respect, it was said that inclusion of such lengthy provisions on preliminary orders might create the impression that such mechanism was one of the key aspects of the Rules, whereas preliminary orders were rarely used in practice. It was said that flexibility would be better achieved by keeping the Rules as short and simple as possible.

56. In favour of the inclusion of provisions on preliminary orders, it was said that the text formed part of an accepted compromise package which enabled the arbitral tribunal to prevent a party from frustrating the purpose of an interim measure, subject to carefully crafted safeguards. It was also suggested that the Working Group had learned during its revision of the UNCITRAL Arbitration Model Law that, in some cases, arbitrators were issuing preliminary orders in practice and thus that inclusion of the provisions would give useful guidance to arbitrators on a procedure which was far from settled in practice and would therefore contribute to harmonization of international commercial arbitral practice in relation to the granting of preliminary orders.

57. As well, it was said that failure to include provisions on preliminary orders could undermine the effectiveness of interim measures. In that respect, it was noted that the length of the provision should not constitute an argument against their inclusion in the Rules.

58. It was stated that, since the Rules would apply pursuant to an agreement of the parties, provisions in the Rules that would bestow on the arbitral tribunal the power to issue preliminary orders would not come as a surprise but as the result of a conscious decision of the parties to opt into such a legal regime.

59. After discussion, the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15 (1), the Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders.

60. A number of delegations expressed their willingness to continue the discussion at future sessions about the possible replication in the Rules of the provisions of the UNCITRAL Arbitration Model Law dealing with preliminary orders. The Working Group requested the Secretariat to prepare for consideration at a future session a short draft sentence expressing the notion that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure ordered by the arbitral tribunal. It was suggested that such a sentence should avoid terminology such as “preliminary order” to avoid having to define that term.

**Experts**

**Article 27**

61. A question was raised whether the title of article 27 should clarify that its focus was on tribunal-appointed experts. While it was noted that the article also mentioned expert witnesses, i.e., experts presented at the initiative of a party in the specific context of a hearing for the purpose of interrogating the tribunal-appointed experts, the article focused on experts appointed by the arbitral tribunal and that therefore such a clarification might be useful. In that connection, it was considered

that the Rules should not cast doubt on the right of a party to present expert evidence on its own initiative irrespective of whether the arbitral tribunal appointed an expert. The question was raised whether that principle was expressed sufficiently clearly in article 15 (2). The Secretariat was requested to prepare drafts for consideration by the Working Group at a future session, possibly also in the context of its deliberations regarding article 25 of the Rules, in particular paragraph (2 bis).

**Default**

**Article 28**

*Paragraph (1)*

62. The Working Group considered the proposed modification, as contained in A/CN.9/WG.II/WP.145/Add.1, to add the words "unless the respondent has submitted a counter-claim" in article 28 (1). It was suggested that a consequence of that modification could be that arbitral proceedings would not terminate even if the claimant after submitting the notice of arbitration did not submit the statement of claim or if the claim was withdrawn, provided that a counter-claim had been submitted. It was questioned whether in such a situation the arbitral tribunal should continue to deal only with the counter-claim. Given that some revisions proposed for article 19 would allow a counter-claim arising out of a different contract, paragraph (1) could raise the possibility that a counter-claim made in relation to one arbitration agreement could be decided by an arbitral tribunal established in relation to a claim under another arbitration agreement. While the question was raised whether such a result was advisable, it was widely considered that, if the counter-claim met the jurisdictional requirements under article 19, there was no reason to prevent it from being entertained by the arbitral tribunal in the interest of efficiency.

63. The Working Group considered the proposed modification to article 28 (1) as contained in A/CN.9/WG.II/WP.145/Add.1, to add the words "without treating such failure in itself as an admission of the claimant's allegations", so as to reflect the language contained in article 25 of the UNCITRAL Arbitration Model Law. The Working Group agreed that that provision should apply equally to the claim and the counter-claim and that the Secretariat should prepare a revised draft to make that clear.

*Paragraph (3)*

64. The Working Group agreed that the wording of paragraph (3) which referred to "documentary evidence" and article 24 (3) which referred to "documents, exhibits or other evidence" should be aligned.

**Closure of hearings**

**Article 29**

65. The Working Group agreed to adopt article 29 in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

**Waiver of rules**

**Article 30**

66. A proposal was made to amend the title of article 30 to refer to "waiver of right to object" for the sake of conformity with the corresponding provision contained in article 4 of the UNCITRAL Arbitration Model Law and to better reflect the content of article 30. That proposal was accepted.

67. A proposal was also made to align the language contained in article 30 with that in article 4 of the UNCITRAL Arbitration Model Law, by including a reference to the circumstance where a party knew that a requirement under the arbitration agreement had not been complied with. That proposal was also accepted.

**Section IV. The award**

**Decisions – Article 31**

*Paragraph (1)*

68. It was recalled that, given the differing views expressed, the Working Group had requested the Secretariat to prepare various options for consideration by the Working Group (A/CN.9/614, para. 112). One option was to leave article 31 unchanged (the so-called "majority requirement") (A/CN.9/614, para. 111); another option was to revise that paragraph, in order to avoid a deadlock situation where no majority decision could be made, by providing that, if an arbitral tribunal composed of three arbitrators could not reach a majority, then the award would be decided by the presiding arbitrator as if he or she were a sole arbitrator (the so-called "presiding arbitrator solution") (A/CN.9/614, para. 108). The Working Group noted that, if that latter option were accepted, consequential amendments to article 32 (4), relating to the signing of the award might also need to be considered.

69. Against the majority requirement, it was suggested that that requirement had a number of negative implications. In practice, it was said that it allowed the possibility that the co-arbitrators could each defend unreasonable positions which would leave the presiding arbitrator with no alternative but to join one or other of the co-arbitrators in order to form a majority. The majority rule was said to offer no solution where there was a deadlock. It was suggested that, by comparison, the presiding arbitrator solution provided the presiding arbitrator with a possibility to break such deadlocks without modifying his or her position. In addition, the presiding arbitrator solution provided an incentive for party-appointed arbitrators to reach agreement with the presiding arbitrator.

70. In favour of retaining the majority requirement, it was observed that, given the rarity of deadlock situations in arbitral tribunals that could not be resolved, formulating a rule to cater to such situations was inadvisable. As well, it was said that the majority rule was a tried and tested feature of the Rules, which had been generally well received in practice. It was also suggested that an award made solely by the presiding arbitrator would be less acceptable to the parties. It was also suggested that the addition of the presiding arbitrator solution might render the Rules less attractive to States in investor-State disputes. In that respect, it was observed that the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes ("ICSID Rules") operated on the basis of the majority requirement. It was also observed that the

majority rule was not obsolete and that, in a recent review of the International Arbitration Rules of the American Arbitration Association ("AAA Rules"), a proposal to modify the majority requirement had been rejected. It was further stated that abandoning the majority rule would change the internal dynamics of an arbitral tribunal's deliberation, weakening the resolve to achieve a majority.

71. Considerable support was expressed for the presiding arbitrator solution. It was noted that the proposed revision to article 31 (1) contained in A/CN.9/WG.II/WP.145/Add.1 provided that the presiding arbitrator should only make a decision when there was no majority. It was said that such an amendment would conform to the approach taken in a number of arbitration rules. For example, article 25, paragraph (1) of the International Chamber of Commerce Arbitration Rules, 1998 ("ICC Rules") addressed the case where no majority existed and provided that: "When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone". Similar provisions were included in article 26.3 of the LCIA Rules, article 61 of the arbitration rules of the World Intellectual Property Organization ("WIPO Rules"), article 26, paragraph (2) of the rules of arbitration and conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber, Vienna ("Vienna Rules"), article 31 of the Swiss Rules and article 35 (1) of the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, as well as article 43 of the arbitration rules of the China International Economic and Trade Arbitration Commission ("CIETAC Rules"). It was said that the option contained in these rules for the presiding arbitrator had rarely, if ever, been exercised. In that respect, it was observed that the existence of that approach in these rules had not impacted negatively on their attractiveness to users. It was said that, in one jurisdiction that had enacted legislation that included the presiding arbitrator solution, that had not affected the attractiveness of that jurisdiction as a place for arbitration. In response to the argument that the majority requirement was a central feature of the Rules, it was said that users were often unaware of that provision. Rather, the reason why the Rules were chosen was that they were perceived to be the international benchmark for arbitration practice. It was said that the review offered the Working Group an opportunity to modernize the Rules to bring them in line with modern realities and expectations.

72. Against the presiding arbitrator solution, it was said that it could undermine party agreement that the decision be by a majority of arbitrators. It was said that that solution was based on the premise that party appointed arbitrators were less neutral than the presiding arbitrator. It was said that such a premise was unfounded given that all arbitrators were required to sign a statement of independence according to the proposed revised version of article 9. It was said that such a rule gave excessive powers to the presiding arbitrator and could be open to abuse. A question was raised as to how the presiding arbitrator rule would work, namely what standard should be met or due diligence would be required, in order to determine whether a majority decision could not be reached.

73. Given the absence of consensus on that issue, various proposals were made to directly involve the parties in resolving difficulties arising from a lack of a majority. One option could be to follow the language contained in article 29 of the UNCITRAL Arbitration Model Law by referring to the majority approach with an

opt-out provision for the parties. It was cautioned that such an option could be understood by the parties to limit their choice to either majority or unanimity decision-making. To address that concern, it was proposed to add to the model arbitration clause appended to article 1 of the Rules a provision referring to the presiding arbitrator solution. Some hesitation was expressed to that suggestion as it could complicate the conclusion of the arbitration agreement.

74. It was said that the opt-out approach, whilst needed in the UNCITRAL Arbitration Model Law as a legislative text, was unnecessary in the Rules, which by virtue of their contractual nature were subject to party autonomy. It was proposed that the operation of the presiding arbitrator solution should be preceded by a preliminary phase that could directly involve the parties at a point when the arbitral tribunal would inform them of the impossibility of reaching a majority decision.

75. An alternative suggestion was made to provide an opportunity for parties to opt in to the presiding arbitrator solution.

76. It was suggested that the words “three arbitrators” be replaced by “more than one arbitrator” if modifications to article 5 of the Rules as contained in A/CN.9/WG.II/WP.147 to accommodate tribunals consisting of more than three arbitrators were adopted.

77. After discussion, the Working Group requested the Secretariat to prepare alternative drafts based on the above proposals for consideration at a future session. To assist the Secretariat in its work, arbitral institutions were requested to provide the Secretariat with information about their experience.

**Form and effect of the award**

**Article 32**

*Paragraph (1)*

78. The Working Group considered whether there existed any practical need to list the various types of awards, and whether the list contained in paragraph (1) should be deleted.

79. Support was expressed for amending that paragraph as it was said that the words “interim” or “interlocutory” created confusion, as these types of awards were not known in all legal systems or might bear different meanings. It was said that the word “final” could be understood in different senses, i.e., as an award that could not be subject to appeal, as the last award in time rendered by the arbitral tribunal or as an award that the arbitral tribunal could not modify.

80. After discussion, the Working Group agreed that paragraph (1) should clarify that the arbitral tribunal might render awards on different issues during the course of the proceedings. It was suggested that in paragraph (1) qualifications regarding the nature of the award such as “final”, “interim” or “interlocutory” should be avoided. The view was expressed that article 26.7 of the LCIA Rules, which provided that “the Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal”, could constitute a useful model in that respect.

*Paragraph (2)*

*"final and binding"*

81. The Working Group considered whether the first sentence of paragraph (2) needed to be amended to clarify the words "final and binding". It was explained that one possible meaning of the word "final" in paragraph (2) was that the arbitral proceedings were terminated by that award. A similar meaning was accorded to that term in article 32 (1) of the UNCITRAL Arbitration Model Law. Whilst the term "final" was used to characterise the nature of the award, by contrast, the word "binding" was used to refer to the obligation on the parties to comply with the award. A similar meaning was accorded to the term binding in article 35 (1) of the UNCITRAL Arbitration Model Law. It was generally agreed that the "final and binding" character of the award should be envisaged at three levels: in respect of the arbitral tribunal, which could not modify the award after it was rendered; in respect of the parties, who were bound by the findings of the award; and in respect of the courts, which were under a duty not to entertain any recourse against the award, save in the exceptional circumstances that justified the setting aside of the award.

82. A proposal was made to delete the word "final" from paragraph (2), based on the following observations. One observation was that, given that article 26 of the Rules empowered the arbitral tribunal to modify, suspend or terminate an interim measure it had granted, it was uncertain whether an interim measure contained in an award could be considered as final. Another observation was that, if the arbitral tribunal decided to solve part of the issues addressed to it, the award rendered might not be considered as a final award. In response, it was stated that, while deletion of the word "final" might address those concerns, it could imply that the arbitral tribunal was empowered to revisit an award it had made. A proposal was made to amend the first sentence of paragraph (2) with wording along the following lines: "an award shall be made in writing and shall be binding on the parties. Once rendered, an award shall not be susceptible to revision by the arbitral tribunal". In response, it was pointed out that omission of the long-used term "final and binding" would raise questions in the minds of many users and that the term, therefore, should be retained.

83. Another proposal was made to clarify the meaning of the words "final and binding" by explicitly stating that an award was final for the arbitral tribunal, which was not empowered to revise an award rendered, save when the tribunal used its powers under article 26 (5) of the Rules.

84. After discussion, the Working Group requested the Secretariat to prepare options revising paragraph (2), taking account the above proposals.

*Waiver of recourse to courts*

*Scope of waiver*

85. The Working Group considered the proposed additional language inserted in paragraph (2) (as contained in A/CN.9/WG.II/WP.145/Add.1) which provided that: "[the parties] shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority, insofar as such waiver can be validly made".

86. There was general agreement on the principle that, under the Rules, the parties should be deemed to have waived any right they might have to appeal against the award or to use any other recourse to courts on the merits of the case or on any point of fact or law. However, it was observed that the proposed language, which referred to the waiver of "review or recourse to any court or other competent authority" could be understood as also deeming the parties to have waived their right to apply for setting aside of the award (for example, on matters such as lack of jurisdiction, violation of due process or any other ground for challenging the award as set out under article 34 of the UNCITRAL Arbitration Model Law). Clarification was sought from the Working Group as to whether the Rules should, where the applicable law so permitted, provide as a default rule for an automatic waiver of the right to apply for setting aside of awards.

87. A view was expressed that there was no reason to exclude the possibility for waiver in respect of setting aside in countries where the applicable law permitted such a possibility. However, it was observed that such a waiver could be interpreted as inconsistent with the policy expressed in article 34 (1) of the UNCITRAL Arbitration Model Law, which provided for recourse to a court for setting aside an arbitral award. Moreover, in countries where it was not yet settled whether the law allowed parties to waive their right to apply for setting aside of an award, the proposed language might introduce additional uncertainty. More generally, it was pointed out that the proposed language would promote forum shopping by parties. It was observed that the rules of arbitration institutions such as the ICC Rules (article 28 (6)) and the LCIA Rules (article 26 (9)) contained provisions comparable to those of the proposed revision. Despite the trend in those rules in favour of allowing waiver in respect of setting aside, it was widely agreed that the Rules operated in a different framework and should preserve the parties' rights as set forth under article 34 of the UNCITRAL Arbitration Model Law.

88. In favour of clarifying the prevailing view that the intention of the provision was not to include waiver in respect of setting aside, it was proposed to make a distinction within the clause between two types of recourse: an appeal on the merits, which could be waived, and a challenge of the award in a setting aside procedure, which could not be waived. That proposal received limited support as it was said that such a distinction would require parties to examine the applicable law in every case in order to determine the applicability of the provision. In addition, it was observed that introducing such categories carried the risk that not all possible types of recourse were listed and that the understanding of such categories might not be universally agreed.

89. Another proposal was made to delete the word "recourse" for the reason that that word was used in the context of article 34 (1) of the UNCITRAL Arbitration Model Law, the title of which referred to "application for setting aside as exclusive recourse against an award". Some support was expressed for that proposal. Yet another proposal was made to include a generic word rather than listing the various forms of recourse that could be made against the award given the risk that such a list might not be comprehensive.

90. After discussion, the Working Group agreed that the provision should be redrafted to avoid creating the impression that it encompassed the waiver of the right to apply for setting aside of the award. In jurisdictions where such a waiver was possible, it could be exercised under the applicable legal regime but the Rules

should not result in such waiver being given automatically or merely (and possibly inadvertently) through the submission of a dispute to the Rules. The Secretariat was invited to revise the draft provision to reflect the deliberations of the Working Group.

*"insofar as such waiver can be made"*

91. A view was expressed that the words "insofar as such waiver can be made" should be deleted for the reason that the interaction of the Rules with national laws was already covered by article 1 (2) of the Rules. As well, it was said that these words would oblige parties to delve into the details of relevant applicable laws and would run counter to the harmonization objectives of the Rules.

92. After discussion, the Working Group agreed that that matter should be further considered at a future session.

**Form and effect of the award**

**Article 32**

*Paragraph (3)*

93. The Working Group agreed to adopt paragraph (3) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraph (4)*

94. The Working Group agreed that, for the sake of consistency, the words "three arbitrators" should be replaced by "more than one arbitrator".

*Paragraph (5)*

95. The Working Group proceeded to consider the two options on the question of publication of awards as contained in A/CN.9/WG.II/WP.145/Add.1. It was observed that option 1 corresponded to the existing text of the Rules providing that the award could be made public only with the consent of the parties. Option 2 provided for the additional situation where a party was under a legal duty of disclosure.

96. Support was expressed for option 1 as sufficiently dealing with the question. It was suggested that option 2 imported questions that were not appropriate in the context of the Rules given that they related to matters already covered by national laws. As well, it was said that option 2 might not cover all situations where disclosure might be required and that, for that reason, it would be better to leave that matter to national laws. However, it was observed that option 1 had been known to create practical difficulties as it might make it difficult for a party to use the award for the protection of its rights.

97. Wide support was expressed for option 2. In favour of that option, it was said that it provided greater protection to parties who might need to disclose an award in court or other proceedings, and greater clarity as to the extent of their rights. It was noted that option 2 was in similar terms to the approach taken in a number of rules including the LCIA Rules. It was suggested that option 2 could be shortened with the deletion of the words "to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority" as it was understood that

parties could not agree against a provision of mandatory law. However, it was explained that, in addition to the situation where a party was under a legal duty to produce an award, option 2 covered the two distinct situations where a party sought to protect or pursue a legal right and where a party sought to produce an award in relation to legal proceedings. With a view to better distinguishing those situations, it was suggested that a comma should be included after the word "duty". That proposal was found generally acceptable.

98. A proposal was made to delete paragraph (5) altogether and include instead an additional sentence in paragraph (6) along the following lines: "The arbitral tribunal shall not communicate the award to third parties." That solution was said to address the obligations of the arbitral tribunal while leaving the question of confidentiality to national laws. That proposal received little support.

99. It was questioned whether the words "made public" also encompassed the situation where a party sought to disclose the award only to one person or to a limited number of individuals (e.g., accountant, insurer, business partner). The Working Group requested the Secretariat to give further consideration to the issue and, if necessary, to propose revised language to clarify that disclosure of the award to a specific public for a legitimate purpose was intended to be allowed by option 2. The Working Group took note of the view that paragraph (5) might need to be revisited in the context of its discussions on the application of the Rules to investor-State disputes. It was also stated that, when a State was a party to arbitration, in the case of investor-State dispute under the Rules, awards should be made public, considering that States have to respond to public interest.

*Paragraph (6)*

100. The Working Group adopted paragraph (6) in substance, as contained in A/CN.9/WG.II/WP.145/Add.1.

*Paragraph (7)*

101. It was observed that paragraph (7) had been amended to avoid what was perceived as an onerous burden being placed on the arbitral tribunal which might not be familiar with the registration requirements at the place of arbitration, by including the words "at the timely request of any party".

102. Various proposals were made to modify paragraph (7). It was suggested that the obligation that the arbitral tribunal complied with the filing or registration requirement in a timely manner was ambiguous. It was suggested that that obligation was better expressed by wording such as "the tribunal shall make its best efforts to comply with the requirement within the time period required by law". It was said that that proposal transferred the obligation regarding the filing or registration to the arbitral tribunal whereas the current version of paragraph (7) appeared to require compliance with filing or registration requirements only if so requested by the party.

103. Another proposal was made that the filing or registration of the award and any associated costs should be borne by the party requesting such filing or registration. It was said that, in practice, an arbitrator would seek costs from both parties before filing or registering the award.

104. It was noted that a provision similar to paragraph (7) had not been included in the Swiss Rules.

105. After discussion, the Working Group agreed to delete paragraph (7) for the reason that it was unnecessary to the extent it provided that the arbitral tribunal should comply with a mandatory registration requirement contained in the relevant national law.

**Article 33**

*Paragraph (1)*

106. The Working Group considered two sets of options concerning the law that an arbitral tribunal should apply to the substance of the dispute, as contained in A/CN.9/WG.II/WP.145/Add.1.

107. In relation to the first set of options, the Working Group agreed that the arbitral tribunal should apply the rules of law designated by the parties and that therefore the words “rules of law” should replace the word “law”.

108. In relation to the second set of options, diverging views were expressed as to whether the arbitral tribunal should be given the same discretion to designate “rules of law” where the parties had failed to make a decision regarding the applicable law. It was recalled that article 28 (2) of the UNCITRAL Arbitration Model Law referred to the arbitral tribunal applying the “law determined by the conflict of laws rules which it considers applicable”.

109. For reasons of consistency with the UNCITRAL Arbitration Model Law, it was suggested that the same approach should be adopted in the Rules. The discussion focused on whether, where the parties had not designated the applicable law, the arbitral tribunal should refer to conflict-of-laws rules or whether direct designation of substantive law or rules of law by the arbitral tribunal was possible.

110. Some support was expressed for variant 1, which referred to conflict-of-laws rules, could only result in the application of a national law and placed the arbitral tribunal in the same situation as a State court having to determine which law should govern a dispute in the absence of designation by the parties, with the additional obligation for the arbitral tribunal to choose the conflict-of-laws rules to be used for that determination. It was emphasised that variant 1 did not provide guidance to the arbitral tribunal in its determination of the conflict-of-laws rules. Broader support was expressed for variant 2, which was said to offer the opportunity to modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of such instruments as e.g., the United Nations Convention on Contracts for the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, texts adopted by the International Chamber of Commerce, such as the Incoterms and the Uniform Customs and Practices for Documentary Credit, or *lex mercatoria*.

111. A proposal was made to modify variant 2 to provide the arbitral tribunal with a broader discretion in the determination of the applicable law by adopting wording along the lines of article 17 of the ICC Rules as follows: “In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate”.

112. The Secretariat was requested to revise paragraph (2) to reflect the above discussion.

*Paragraph (3)*

113. It was suggested that paragraph (3) should be amended to ensure broader applicability of the Rules in situations where a contract was not necessarily the basis of the dispute (e.g., investor-State disputes), by referring to the word "any" in relation to "terms" and "usages of trade". The Working Group agreed that that proposal should be considered in the context of discussions on the application of the Rules in the context of investor-State disputes.

**Article 34**

*Paragraph (1)*

114. Consistent with its decision to encompass multi-party arbitrations, the Working Group agreed to replace the word "both parties" by "the parties".

**Article 35**

*Paragraph (1)*

115. The Working Group agreed to replace the words "either party" by "a party" for the reasons set out in paragraph 114 above.

**Article 36**

116. The Working Group agreed to adopt the substance of article 36 as contained in A/CN.9/WG.II/WP.145/Add.1.

**Article 37**

*Paragraph (2)*

117. The Working Group considered whether the words "without any further hearings or evidence" should be deleted, and whether or not paragraph (2) could be understood as already allowing the arbitral tribunal to make an additional award after holding further hearings and taking further evidence.

118. The Working Group agreed that paragraph (2) was intended to be limited to claims presented during the course of arbitral proceedings. Diverging views were expressed on the question of whether the arbitral tribunal should be permitted to hold further hearings or seek further evidence.

119. Support was expressed for allowing the arbitrators to hold further hearings and seek further evidence where necessary. Various proposals were made. As a matter of drafting, it was proposed to redraft paragraph (2) to define conditions applicable when further hearings or evidence were necessary. One proposal was to include a reference to article 15 (1), along the following lines: "Where the arbitral tribunal determines that subsequent hearings or evidence are required in order to issue an additional award, article 15 (1) shall apply." Support was expressed for that proposal. It was observed, however, that the reference in revised article 15 (1) to the arbitral tribunal's discretion to conduct proceedings was intended to apply generally.

Therefore, it was not necessary to include an express reference to article 15 (1) in paragraph (2).

120. Another proposal was made to clarify paragraph (2) by adding to paragraph (1) the words "which ought to have been but were not decided" after the words "claims". It was said that that addition would better indicate that paragraph (2) was intended only to address unintentional omissions. In response, it was said that this proposal was neither practically workable nor really necessary since parties were not in the best position to judge that a claim had intentionally been omitted from an award and since the arbitrators could readily determine that an additional award on a claim they intentionally omitted was not "justified" under the language of paragraph (2).

121. It was observed that article 33, paragraphs (3) and (4) of the UNCITRAL Arbitration Model Law dealt with the same issue addressed in paragraph (2) and could therefore provide a useful model in that respect.

# V. Other business

122. The Working Group noted that, at its fortieth session, the Commission was informed that 2008 would mark the fiftieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (the "New York Convention") and that conferences to celebrate that anniversary were being planned in different regions, which would provide opportunities to exchange information on how the New York Convention had been implemented around the world. At that session, the Commission requested the Secretariat to monitor the conferences and make full use of events associated with that anniversary to encourage further treaty actions in respect of the New York Convention and promote a greater understanding of that instrument.[10] The Working Group noted that a one-day conference organized by the International Bar Association in cooperation with the United Nations was scheduled to be held in New York on 1 February 2008.

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[10] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 178.