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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session (Vienna, 14-18 September 2009)

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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 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 arbitral 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 arbitral. 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 arbitral matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[5]

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

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

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

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

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

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take.[10] After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect.[11]

9. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted that the Working Group had discussed at its forty-ninth session a proposal aimed at expanding the role of the Secretary-General of the Permanent Court of Arbitration at The Hague ("the PCA") under the UNCITRAL Arbitration Rules (A/CN.9/665, paras. 47-50).[12] After discussion, the Commission agreed that the existing mechanism on designating and appointing authorities, as designed under the 1976 version of the Rules, should not be changed.[13] It was emphasized that the

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

[9] Ibid., para. 175.

[10] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.

[11] Ibid., para. 314.

[12] Report of the United Nations Commission on International Trade Law, Forty-second session (A/64/17), para. 292.

[13] Ibid., para. 293.

UNCITRAL Arbitration Rules should not contain a default rule, to the effect that one institution would be singled out as the default appointing authority and be identified in the Rules as a provider of direct assistance to the parties.[14]

10. The Commission further noted that the Working Group, at its fiftieth session, agreed to request the Commission for sufficient time to complete its work on the UNCITRAL Arbitration Rules in order to bring the draft text of revised Rules to the level of maturity and quality required (A/CN.9/669, para. 120). The Commission agreed that the time required should be taken for meeting the high standard of UNCITRAL, taking account of the international impact of the Rules, and expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-third session of the Commission, in 2010.[15]

II. Organization of the session

11. The Working Group, which was composed of all States members of the Commission, held its fifty-first session in Vienna, from 14 to 18 September 2009. The session was attended by the following States members of the Working Group: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Bolivia (Plurinational State of), Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Greece, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

12. The session was attended by observers from the following States: Argentina, Belgium, Brazil, Burundi, Croatia, Dominican Republic, Finland, Hungary, Indonesia, Iraq, Lithuania, Mauritius, Netherlands, Oman, Peru, Philippines, Portugal, Romania, Slovakia, Sudan, Sweden, Tajikistan, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, United Republic of Tanzania and Yemen.

13. The session was attended by observers from the following organization of the United Nations System: the United Nations Office of Legal Affairs.

14. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), MERCOSUR and Permanent Court of Arbitration (PCA).

15. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), Association of the Bar of the City of New York (ABCNY), Cairo

[14] Ibid., para. 297.
[15] Ibid., para. 298.

Regional Centre for International Commercial Arbitration (CRCICA), Center for International Legal Studies (CILS), *Centre pour l'Étude et la Pratique de l'Arbitrage National et International* (CEPANI), Construction Industry Arbitration Council – Singapore International Arbitration Centre (CIAC-SIAC), Council of Bars and Law Societies of Europe (CCBE), European Company Lawyers Association (ECLA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), ICC International Court of Arbitration, Inter-American Bar Association (IABA), International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Regional Centre for International Commercial Arbitration – Lagos (RCICAL), School of International Arbitration of the Queen Mary University of London, Swiss Arbitration Association (ASA) and *Union Internationale des Avocats* (UIA).

16. The Working Group elected the following officers:

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

Rapporteur: Mr. Iftikharuddin Riaz (Pakistan)

17. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.155); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1).

18. 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

19. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group.

IV. Revision of the UNCITRAL Arbitration Rules

20. The Working Group recalled that it had concluded a second reading of articles 18 to 26 of the draft revised Rules at its fiftieth session (A/CN.9/669) and

agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.151/Add.1 and the proposed revisions contained therein (to be complemented, as appropriate, by document A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP. 154/Add.1).

Section III. Arbitral proceedings

Experts appointed by the arbitral tribunal
Article 27

21. The Working Group decided that the substance of article 27, as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable. The Working Group took note that one delegation would make a proposal concerning article 27 with respect to challenge of experts at a future session.

Default
Article 28

Paragraph (1) (a)

22. The view was expressed that article 28, paragraph (1) (a), as contained in document A/CN.9/WG.II/WP.151/Add.1, which provided for an automatic termination of the proceedings in case of failure of a claimant to communicate its statement of claim, "unless the respondent has submitted a counterclaim", was too limited, as it failed to cover situations where, despite the failure to submit a statement of claim, the issues in dispute might still require a decision to be made by the arbitral tribunal, in particular in view of the interests of the other parties involved. It was also suggested that an arbitral tribunal might need to make a decision carrying value as *res judicata*, to take care of the fact that arbitration practice had shown that occasionally claimants made harassing claims. It was also pointed out that the reference contained in paragraph (1) (a) to a counterclaim "submitted" by the respondent might not be wide enough, and it should be clarified that a counterclaim mentioned in the response to the notice of arbitration might constitute a sufficient submission for the purpose of article 28, paragraph (1) (a). In that respect, it was proposed to replace the word "submitted" by the word "made". It was further suggested to add at the end of paragraph (1) (a) the words "or the respondent asks that the tribunal determine the claimant's claim on the merits and the tribunal determines that it is appropriate to do so under the current circumstances".

23. Concerns were expressed that a decision of the arbitral tribunal on the merits would be difficult to achieve, if no statement of claim had been submitted as stated in article 28, paragraph (1) (a). Further concerns were expressed that under some jurisdictions, a dismissal with prejudice where no statement of claim had been filed, would be subject to annulment. In response, it was explained that the submissions already made by the parties might be sufficient to allow the arbitral tribunal to decide certain issues, such as matters of jurisdiction or costs.

24. Various proposals were made to broaden article 28, paragraph (1) (a). It was suggested to broaden the mandatory contents of the notice of arbitration, so that a decision on the merits could be made by the arbitral tribunal even in the absence of a statement of claim. Another proposal was made to replace the words "unless the respondent has submitted a counterclaim" by the words "unless there remain other

issues to be decided". It was suggested to clarify that the arbitral tribunal would have the power to continue the arbitral proceedings only upon the request of the respondent, along the lines of "unless the respondent needs other issues to be considered" or "unless the respondent needs matters to be decided". In response, it was observed that that proposal excluded requests which could be brought by co-claimants and other interested parties and that it might be preferable to adopt wording preserving the flexibility of the provision. In that regard, it was proposed to insert words along the lines of "unless any party to the proceedings requests otherwise" or "unless there are any matters raised by the parties which may be decided." It was also suggested that the words "other issues" or "other matters" used in some of the above proposals might be too vague, and it was proposed to refer instead to wording along the lines of "with such *res judicata* effect as the tribunal may consider or other issues already joined".

25. Another proposal was made to leave discretion to the arbitral tribunal to decide whether to terminate or continue the proceedings and to include a provision along the following lines: "unless there are any matters that may be decided and the arbitral tribunal considers it appropriate to do so." It was proposed to add the word "remaining" before the word "matters" in that proposal, in order to clarify that the matters to be dealt with were those initially included by the parties in the notice of arbitration and response thereto. It was said that rules of some international arbitration centres, such as article 6.3 of the ICC Rules of Arbitration ("ICC rules"), provided for wide discretion of the arbitral tribunal to proceed in case of refusal or failure of any of the parties to take part in the arbitration. However, it was questioned whether it was appropriate to provide for broad discretion of the arbitral tribunal and it was said that guarantee should be given to the respondent that in case a counterclaim was made, the arbitral tribunal would still consider it. To address that concern, it was proposed to include words along the lines of "unless the respondent has submitted a response and there are any matters that need to be decided".

26. After discussion, the Working Group agreed that article 28, paragraph (1) (a), as contained in document A/CN.9/WG.II/WP.151/Add.1, should be redrafted, so that it would no longer limit the power of the arbitral tribunal in case the claimant failed to submit its statement of claim to a dismissal order for termination. The Working Group requested the Secretariat to reformulate the text, taking account of the suggestions made, for consideration at a future session.

Paragraph (1) (b)

27. It was observed that some inconsistency existed between the wording of article 28, paragraph (1) (b), as contained in document A/CN.9/WG.II/WP.151/Add.1, and the new article 4, paragraph (3), of the draft revised Rules, as contained in document A/CN.9/WG.II/WP.154, which both dealt with the failure of communication of a response to the notice of arbitration by the respondent. To align both articles, it was proposed to delete the last sentence of the new article 4, paragraph (3) or to add at the end of the new article 4, paragraph (3) the words "consistent with article 28, paragraph (1) (b)". Those proposals did not receive support, as it was considered self-understood that an arbitral tribunal would proceed as it considered appropriate in compliance with the Rules, including article 28 (1) (b).

Paragraph (2)

28. The Working Group decided that the substance of article 28, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (3)

Placement

29. A question was raised whether article 28, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, which dealt with the failure by a party to produce documents, exhibits or other evidence, should be located under article 27 of the draft revised Rules (numbered article 24 in the 1976 version of the Rules), as contained in document A/CN.9/WG.II/WP.154/Add.1 ("draft revised article 27"). It was said that draft revised article 27 covered the general matter of evidence, and paragraph (3) of article 28 dealt with the power of the arbitral tribunal to request a party to produce evidence. It would therefore be logical to place paragraph (3) of article 28 as a part of draft revised article 27. It was noted that a comparable provision was contained in article 34, paragraph (3) of the rules of procedure for arbitration proceedings of the International Centre for Dispute Settlement ("ICSID arbitration rules") which related to general principles on evidence.

30. Other views were expressed that, considering that paragraph (3) dealt with a default situation, it should remain under article 28. As a practical argument, it was said that it might cause confusion to move that paragraph under a provision on evidence since it was originally to be found under a provision on default. It was further said that there did not seem to be any compelling reasons to relocate paragraph (3).

31. After discussion, the Working Group agreed that there was no consensus for placing paragraph (3) of article 28, under draft revised article 27, and the Working Group agreed that paragraph (3) should remain located under article 28.

"without showing sufficient cause for such failure"

32. It was pointed out that article 28, paragraph (3) referred to the situation where a party failed to produce evidence, without showing sufficient cause for such failure, but that that paragraph was silent on the failure of a party to submit evidence when there was sufficient cause for such failure. It was proposed either to delete that paragraph or to complement it by adding a provision clarifying that the arbitral tribunal might draw adverse inferences in case of a party's failure to produce evidence without showing sufficient cause. It was said that it should be clearly stated whether the fact that a party failed to submit evidence might itself be used as evidence against that party. It was further said that there were differing approaches to that matter across various jurisdictions and the Rules could usefully provide more guidance in respect of that issue. Those proposals received little support. It was said that it would unnecessarily complicate the provision to spell out the consequences of a default to provide evidence. It was pointed out that the question of the assessment of the weight of evidence was already dealt with under draft revised article 27, as contained in document A/CN.9/WG.II/WP.154/Add.1. It was further said that the provision, as it stood, provided useful guidance to the arbitral tribunals, had not created any difficulties and reflected current practice.

33. After discussion, the Working Group decided that the substance of article 28, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Closure of hearings
Article 29

Paragraphs (1) and (2)

34. It was observed that the wording of article 29, paragraphs (1) and (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, created the impression that the arbitral tribunal could close the hearings only if there were no further offers of proof or submissions. It was clarified that that was not the intention of the provision as otherwise parties could delay the proceedings by unnecessary offers of proof or submissions. To address that situation, it was suggested to replace the words "if there are none" in paragraph (1) with an expression that would clearly refer to the arbitral tribunal's discretion to rule on the admissibility of the evidence or to add the words "accepted by the tribunal" after the word "none". In response, it was said that draft revised article 27, paragraph (4), as contained in document A/CN.9/WG.II/WP.154/Add.1, already provided for the arbitral tribunal's discretion to "determine the admissibility, relevance, materiality and weight of the evidence offered", and that there was therefore no need for further clarification under paragraph (1).

35. It was further said that article 29 did not reflect modern practice and it was suggested to delete article 29 entirely. That suggestion did not find support.

36. Another proposal for modification of article 29 was to replace the word "hearings" by the word "proceedings" where it appeared in that article. It was explained that such replacement in article 29 would not lead to inconsistencies with article 28, paragraph (1) (a), as contained in document A/CN.9/WG.II/WP.151/Add.1, as article 28, paragraph (1) (a) referred to "termination" of proceedings, whereas article 29, paragraph (1) would then refer to the "closure" thereof. Different views were expressed on that proposal.

37. In favour of that proposal, it was stated that the word "proceedings" was broader than the word "hearings". In that regard, it was noted that the content of article 29 actually referred to the closing of the arguments. It was further noted that using the word "proceedings" instead of the word "hearings" would solve any inconsistency between the English and the French versions of the Rules, as the latter referred to the closure of arguments ("clôture des débats"). It was also said that such modification would constitute a useful revision of the Rules in conformity with the terminology used in, for instance, the Swiss Rules of International Arbitration ("Swiss rules") and the ICC rules.

38. Against that proposal, it was said that such modification could create inconsistencies with other provisions of the Rules which referred to "proceedings" in a wider sense as well as difficulties in practice due to the broader notion of the word "proceedings". As a matter of example, it was questioned whether article 41, paragraph (2) of the Rules, which referred to the arbitral tribunal's power to request supplementary deposit from the parties "during the course of the arbitral proceedings" would still be read as applying after closure of the hearings, in case article 29 would refer to the closing of the proceedings. It was said that the word

"proceedings" had a broader meaning under the Rules than the word "hearings". It was also said that the distinction between the words "closure" and "termination" might not be clear to all potential users of the Rules. The Working Group was reminded of its mandate that the Rules should only be changed if there was a compelling reason therefor.

39. A question was raised whether the word "hearings" was limited to oral hearings or would also include presentation of testimony in written form. In that regard, it was noted that the Model Law differentiated in article 24 between "oral hearings" and "written proceedings". It was proposed to amend the title of article 28 of the draft revised Rules (numbered article 25 in the 1976 version of the Rules), as contained in document A/CN.9/WG.II/WP.154/Add.1, ("draft revised article 28") to clarify that that article only referred to oral hearings, whereas the word "hearings" as used in article 29 was meant to encompass both written evidence as well as hearings of witnesses. It was said that such modification to the title of the draft revised article 28 would deserve more consideration. On the other hand, it was also noted that the scope of what the tribunal might "close" under article 29 was clearly indicated in the current text, which referred to whether there was "further proof to offer or witnesses to be heard or submissions to make."

40. After discussion, the Working Group agreed that the substance of article 29, as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable, and that no change should be made in the title of draft revised article 28, as contained in document A/CN.9/WG.II/WP.154/Add.1.

Waiver of right to object
Article 30

Proposal to change into affirmative language

41. A proposal was made to clarify and simplify the language of article 30, as contained in document A/CN.9/WG.II/WP.151/Add.1, so that it would be drafted in the affirmative and would read:

> "A party which knows:
>
> 1. that there has been a failure to comply with any provision of these Rules; or
>
> 2. that there has been a failure to comply with any requirement under the arbitration agreement, and proceeds with the arbitration without making, within a reasonable time, any objection shall be deemed to have waived its right to make such objection."

42. The proposal did not find broad support. It was stated that it constituted an unnecessary deviation from the approach adopted under the original version of article 30 and also from the corresponding article in the Model Law. In addition, it was said that the proposal did not only change the language into the affirmative but also used different terms such as "within a reasonable time" instead of "without undue delay", as well as merely "and" instead of "and yet". It was said that those differences might have practical impacts which would require further assessment.

43. After discussion, the Working Group agreed that the drafting of article 30, in the negative did not create difficulties and should be retained.

Actual – Constructive knowledge

44. It was observed that the waiver of the right to object in article 30, as contained in the 1976 version of the Rules and its proposed revision was based on actual knowledge of the failure to comply with a provision of the Rules or a requirement under the arbitration agreement. It was said that it was difficult in practice to prove actual knowledge of a failure and that in some jurisdictions, actual knowledge was interpreted restrictively, requiring specific proof of a positive knowledge. Therefore, it was proposed to add the words "or ought to have known" after the words "a party which knows", in order to also capture constructive knowledge of non-compliance with any provision of the Rules or any requirement under the arbitration agreements. It was said that constructive knowledge would allow application of the provision in instances of procedural manoeuvring, and intentional bad faith behaviour of a party. It was also said that the proposed added wording would allow application of the provision in cases where actual knowledge could not be proven.

45. Some views were expressed that such additional wording would create problems and was not commonly found in other arbitration rules. It was said that it could be difficult to evaluate deemed knowledge of non-compliance with any provision of the Rules, and even more difficult concerning requirements under an arbitration agreement. Constructive knowledge in that provision was said to be problematic in regard to the drastic consequences provided in that article, i.e. that a party would lose its right to object to non-compliance. It was said that the proposed modification introduced subjectivity and possibly different standards for parties in the same proceedings, depending upon the level of arbitration experience of parties or their counsel. It was further stated that, if accepted, the revision could lead to arguments at the enforcement stage of the award. It was pointed out that the Model Law included in its article 4 a similar provision, based on actual knowledge of the non-compliance, and any modification to the corresponding provision in the Rules might be confusing for those countries that had enacted legislation based on the Model Law. It was further observed that the Case Law on UNCITRAL Texts (CLOUT) database showed that there were very few cases relating to article 4, and that the reported cases on article 4 did not relate to the question under consideration.

46. Broad support, however, was expressed for the proposal to address constructive knowledge in article 30, as it was found desirable to allow appropriately dealing with situations of mischief and procedural manoeuvres. It was reiterated that actual knowledge was a highly restrictive concept, difficult to interpret and prove in many different jurisdictions. The deemed waiver of right as provided in article 30 was in any case not automatic, and there should be sufficient safeguards to ensure that the circumstances in which a party failed to object to non-compliance would be taken into account by the tribunal.

47. In order to address concerns expressed by those who favoured limiting waiver of the right to object based on actual knowledge, various proposals were made. Wording along the lines of "taking into account that circumstances indicate that a party was aware of …" was proposed as a possible compromise for inclusion in article 30. Another proposal was to add language addressing the case where the party had "legitimate grounds" or "valid reasons" for not objecting. Those proposals did not receive support.

48. Article 33 of the ICC arbitration rules was quoted as an example of international arbitration rules that contained a similar provision on waiver, and avoided any reference to knowledge. With the same objective to avoid a reference to knowledge, it was proposed to redraft article 30 as follows: "Any failure to comply with any provision of these Rules or any requirement under the arbitration agreement shall be objected to by the other party without undue delay." That proposal was objected to on the ground that it would unfairly exclude any extenuating circumstances explaining the failure to object.

49. A view was expressed that the effect of the presumption provision in article 30 was to reverse the burden of proof. In order to avoid departing from article 30, and still address the concerns expressed in relation to actual knowledge, the following drafting proposals were made: "A failure to comply with any provision of these Rules or any requirement of the arbitration agreement may not be invoked by a party that has failed to object without undue delay. This provision does not apply if the party invoking the failure had no knowledge of it." That proposal, inspired from article 1027 of the German code of civil procedure (ZPO) was said to have the advantage of reversing the burden of proof and to contain safeguards necessary to avoid that a party, acting in good faith, be deprived of its right to object. The provision referred to actual knowledge, as in the 1976 version of the Rules, but placed the burden of proof on the party that relied on lack of knowledge as an excuse. An alternative proposal was presented along the following lines: "A failure by any party to timely object to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can prove that, under the circumstances, its failure to object was [justified] [excusable]". It was said that the difference between the two alternative proposals was whether the party that failed to object could invoke the absence of knowledge or circumstances justifying failure to object.

50. It was felt that those proposals contained in paragraph 49 above could achieve the purpose of dealing with problems of proving actual knowledge in a manner that provided clarity and useful guidance to the parties as well as the arbitral tribunal, and deserved consideration.

51. After discussion, the Working Group agreed that a revised version of article 30, along the lines of the proposals referred to in paragraph 49 above should be proposed for consideration by the Working Group at a future session. The Secretariat was requested to reformulate the text, taking account of the suggestions made.

Section IV. The award

Decisions
Article 31

Paragraph (1)

52. It was explained that article 31, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, stated various options for consideration by the Working Group, in accordance with the discussions at its forty-seventh session (A/CN.9/641, paras. 68-77). Option 1 followed the language contained in article 29 of the Model Law by referring to the majority approach (the so-called "majority

requirement") with an opt-out provision for the parties. Option 2, variant 1 provided that when there was no majority, the award would be decided by the presiding arbitrator alone. Option 2, variant 2 reflected the proposal that the presiding arbitrator solution should only apply if the parties had previously agreed to opt into that solution (both variants addressed the so-called "presiding arbitrator solution").

53. It was observed that options 1 and 2 were not mutually exclusive. It was therefore proposed to structure paragraph (1) in such way that a first subparagraph would express the majority requirement, as provided in the 1976 version of the Rules. In case of failure to reach a decision through the majority requirement, the presiding arbitrator solution would then be provided for.

54. It was said that in case one of the variants in option 2 would be retained, the words "on the substance of the dispute" appearing in both variants of option 2 should be deleted, as when read in conjunction with paragraph (2) of article 31, it might create uncertainties as to whether matters of jurisdiction of the tribunal or admissibility of the claim would be covered.

Option 1

55. Option 1 received broad support. It was said that the majority requirement should be the general rule. It was further said that the majority requirement was the one adopted in the 1976 version of the Rules, and had contributed to the universal applicability of the Rules so that there was no need for modification. It was also said that option 1 met the expectation of parties that all views would be duly taken into consideration by the arbitral tribunal. The Working Group was cautioned that any change to the majority requirement in the 1976 version of the Rules would be a major departure and might also change the dynamics of the decision-making process of the arbitral tribunal. It was questioned whether a problem that arose infrequently justified such a change. It was also pointed out that by the very nature of the problem, it would be difficult to know how frequently it occurred.

56. As a matter of drafting, it was observed that the words "unless otherwise agreed by the parties" in option 1, which were not included in the 1976 version of the Rules, were superfluous as parties could always deviate from the Rules.

57. The supporters of the majority requirement as taken in option 1 expressed the concern that the presiding arbitrator solution, as envisaged in the two variants in option 2, would leave the power in the hands of one person, which was unwise particularly in case of an authoritarian presiding arbitrator. In addition, parties would be put in a delicate position if they had to affirmatively object to the proposal of a decision by the presiding arbitrator, as proposed under option 2, variant 2. Further, it was said that option 2 only offered one solution for a deadlock situation, although there could be many other solutions, as, for example, the appointment of an additional arbitrator.

Option 2, variant 1

58. Option 2, variant 1 also received support. It was said that option 2, variant 1 would provide a good incentive for the arbitrators to reach a unanimous decision. It was further said that the majority requirement often obligated the presiding arbitrator to align itself with the least unreasonable arbitrator. In that respect, it was observed that the perception of increased legitimacy of the decision by the tribunal

through the majority requirement was a false perception. Variant 1 was said to have the advantage of providing for a solution in case there was no decision by majority, instead of leaving that choice to be made by the parties. The solution provided by variant 1 was said to be commonly found in international arbitration rules, such as article 25.1 of the ICC rules, article 26.3 of the LCIA rules and article 61 of the arbitration rules of the World Intellectual Property Organization. In response to the concern raised with respect to the concentration of decision-making power in the hands of the presiding arbitrator, it was said that the need for a decision by the presiding arbitrator rarely occurred.

Option 2, variant 2

59. In support of option 2, variant 2, it was said that it constituted a good compromise provision that expressed as a general principle the majority rule, but was still open to the presiding arbitrator solution. It was observed that that approach more truly reflected the spirit of the Rules. Another advantage of option 2, variant 2 was that, as understood by the Working Group, the parties would already know the composition of the arbitral tribunal when reaching agreement on the presiding arbitrator solution. It was suggested that if that variant were to be retained in the revised version of the Rules, parties' decision on the presiding arbitrator solution could be added as an agenda item in the UNCITRAL Notes on Organizing Arbitral Proceedings.

60. A proposal was made to combine variants 1 and 2 along the lines of "an award or other decision shall be made by the presiding arbitrator unless objected to by one party". That proposal did not receive support, as it was said that such a provision would require a number of clarifications, for example, as the time when the objection could be raised.

61. After discussion, due to the lack of consensus for changing article 31, paragraph (1), the Working Group agreed to retain paragraph (1) as it appeared in the 1976 version of the Rules with the replacement of the word "three" by the words "more than one". Many delegates who supported dealing in a revised version of the Rules with a situation where the majority requirement would result in a deadlock, along the lines of option 2, suggested that that should be presented to the Commission as an alternative to retaining the current text of article 31. However, that proposal was not agreed to, as the Working Group considered it preferable to present the Commission with a single text without offering alternatives. In reaching that decision, the Working Group emphasized that the parties had the ability in such situations to agree to another method of decision-making.

Paragraph (2)

62. The Working Group agreed to the replacement of the words "on her or his own" in article 31, paragraph (2) of the 1976 version of the Rules by the word "alone" and the Working Group decided that the substance of article 31, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Form and effect of the award
Article 32

Paragraph (1)

63. The Working Group recalled its decision at a previous session that there did not exist any practical need to list the various types of awards and it agreed that the first sentence of article 32, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, was useful to clarify that the arbitral tribunal might render awards on different issues during the course of the proceedings.

"issues" – "aspects"

64. A concern was expressed that the word "issues" in the first sentence of paragraph (1) might not properly convey the idea that the arbitral tribunal might render partial awards, dealing only with certain aspects of an issue. In order to avoid ambiguity, it was suggested to replace the word "issues" by the words "aspects of the dispute". Although some support was expressed for that proposal, the prevailing view was that the word "issues" should remain for the main reasons that that word, which was for instance used in article 26.7 of the LCIA rules, did not seem to have given rise to difficulties and that, in practice, the contents of an award usually clarified whether it dealt with certain aspects of an issue only. After discussion, the Working Group agreed to maintain the word "issues" as contained in paragraph (1).

"same status and effect"

65. It was questioned whether the second sentence of paragraph (1), which provided that "such awards shall have the same status and effect as any other award made by the arbitral tribunal", was needed. The prevailing view was that that sentence should be deleted, as awards might not necessarily all have the same status and effect. For instance, an award terminating the proceedings would not have the same effect as an award on interim measures. In addition, it was said that the usage of the word "all" before the word "awards" appearing in the first two sentences of paragraph (2) guaranteed that all awards would be final, binding and carried out by the parties without delay.

66. After discussion, the Working Group agreed to delete the second sentence of paragraph (1), so that paragraph (1) would read: "The arbitral tribunal may make separate awards on different issues at different times."

Paragraph (2)

"final and binding"

67. The Working Group considered whether the first sentence of article 32, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, should be amended to clarify the meaning of the words "final and binding". The view was expressed that using the word "final" could create ambiguity and the award being "final" could be understood in different ways. For example, it was stated that it could mean that the award finally disposed of some, but not all, claims, that the award terminated the proceedings, or that the arbitral tribunal was no longer entitled to revise it. To avoid such ambiguity, it was proposed to delete the word "final". It

was also suggested to replace it by wording along the lines of the proposal contained in paragraph 24 of document A/CN.9/WG.II/WP.151/Add.1, which read: "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, except as provided in article 26, paragraph 6 for interim measures rendered in the form of an award, article 35 and article 36."

68. Those proposals did not find support. The Working Group was reminded that, at its forty-seventh session, it had agreed that the "final and binding" character of the award should be envisaged 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 as of the time it was rendered, 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 (A/CN.9/641, para. 81). It was said that the term "final and binding" was widely found in other arbitration rules and had not created any problems in practice. It was pointed out that omission of the word "final" from the long-used term "final and binding" would raise questions in the minds of many users and would thus lead to confusion.

69. It was also suggested to replace the word "all" before the word "awards" in the first and second sentences of paragraph (2) with the word "the". Against that proposal, it was stated that the modification to the plural had been inserted in order to avoid any ambiguity in case more than one award had been rendered. The Working Group was reminded that it had previously agreed to delete the last sentence of paragraph (1), on the basis that its content was already captured by the use of the word "all" before the word "awards" in the first and second sentences of paragraph (2) (see above, para. 65).

70. After discussion, the Working Group agreed to maintain the words "final and binding" in the first sentence of paragraph (2). It was noted that the word "final" in the English, French and Spanish language versions differed insofar as the Spanish version provided that the award could not be appealed ("*inapelable*") and the French version provided that the award could not be appealed before any arbitral tribunal ("*n'est pas susceptible d'appel devant une instance arbitrale*"). It was agreed that the different language versions should be aligned.

Waiver of recourse

General principle

71. The Working Group recalled that, at its forty-fifth and forty-seventh sessions, 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 or other competent authority on the merits of the case or on any point of fact or law (A/CN.9/614, para. 114 and A/CN.9/641, paras. 85-90). The effect of a new provision on that matter would be to make it impossible for parties to use those types of recourse that could be freely waived by the parties (for example, in some jurisdictions, an appeal on a point of law), but not to exclude challenges to the award (for example, on matters such as lack of jurisdiction, violation of due process or any other ground for setting aside the award as set out under article 34 of the Model Law). It was also recalled that

provisions on waiver of recourse were found in other international arbitration rules, such as the ICC rules (article 28 (6)) and the LCIA rules (article 26 (9)).

72. At its forty-seventh session, the Working Group had agreed that the provision on waiver of recourse by parties to arbitration should 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 (A/CN.9/641, para. 90).

73. At its current session, the Working Group agreed that the right to resist enforcement of an award as provided under article V of the New York Convention and article 36 of the Model Law was to be understood as excluded from the waiver of recourse. The Working Group confirmed that the term "recourse" used in the third sentence of article 32, paragraph (2) was never intended to refer to a ground for resisting enforcement under the New York Convention or under article 36 of the Model Law, and referred on that matter to the explanations contained under paragraph 45 of the Explanatory Note by the UNCITRAL secretariat on the Model Law. In regulating recourse (i.e., the means through which a party might actively "attack" the award), article 34 of the Model Law did not preclude a party from seeking court intervention by way of defence in enforcement proceedings. It was further said that article 32, paragraph (2) of the draft Rules included a reference to the setting aside of an award, for the reason that the word "recourse" was used in the context of article 34 of the Model Law, the title of which referred to an "application for setting aside as exclusive recourse against arbitral award". It was said that parties could not be deprived automatically of an exclusive recourse through the submission of a dispute to the Rules, which explained the reference in article 32, paragraph (2) to an express agreement of the parties regarding waiver of the right to apply for setting aside an award.

74. It was further confirmed that the Working Group did not intend the term "recourse" used in the third sentence of paragraph (2) to refer to a ground for resisting execution of the award such as a defence of sovereign immunity.

Remarks on the drafting of the provision on waiver of recourse

75. The Working Group considered the provision on waiver of recourse in article 32, paragraph (2), as contained in A/CN.9/WG.II/WP.151/Add.1, which provided that "insofar as such waiver can be validly made, 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. The right to apply for setting aside an award may be waived only if the parties so expressly agree."

76. Various concerns were expressed regarding that provision. It was said that the waiver was expressed in too broad a manner, which might create ambiguity, as to the determination of the scope of, and exceptions to, the waiver.

77. It was said that the four sentences of paragraph (2) under consideration were not linked together, a fact that created confusion. To address that concern, it was proposed to redraft the last two sentences as follows: "Insofar as such waiver can be validly made, 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. However, this

deemed waiver of right to recourse shall not extend to an application for setting aside an award which may be waived only if the parties so expressly agree." Another proposal was made to provide: "Insofar as such waiver can be validly made, 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, save that the right to apply for setting aside an award may be waived only if the parties specifically agree." Yet another proposal was made to link the second and third sentences of paragraph (2) along the lines of: "The parties undertake to carry out all awards without delay and insofar as such waiver can be validly made, 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."

78. 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, paragraph (2) of the Rules (numbered article 1, paragraph (3) in the draft revised Rules contained in document A/CN.9/WG.II/WP.154).

79. Concerning the last sentence of article 32, paragraph (2), it was said that a reference to "setting aside" might not be understood in the same manner in all jurisdictions. For instance, in certain jurisdictions, there would be difficulties in applying the provision as the setting aside was a possible remedy under an application to a State court on the merits. It was also said that it was unclear whether jurisdictional challenges would be excluded from the waiver. Thus, it was proposed to expressly exclude decisions on jurisdiction from the scope of the waiver.

Proposal to delete the draft provision on waiver of recourse

80. In view of the ambiguities and the potential confusion that might result from the adoption of a provision on waiver, as pointed out in paragraphs 75 to 78 above, it was proposed to delete that provision, as it was clear from the remainder of article 32, paragraph (2) that the parties were under an obligation to carry out the award without delay, and in case of appeal or other recourse, the applicable law would apply. That approach was objected to on the ground that the Working Group had already taken a decision of principle to modify the Rules by including a provision on waiver.

Limited scope of waiver: waiver of appeals on merits

81. It was proposed to make a distinction within the provision 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 in many jurisdictions could not be waived. In line with that proposed approach, the parties would be deemed to have waived their right to "any form of appeal on the merits", and the words "review or recourse" would be deleted for the reason that those words conveyed a broad meaning and the word "recourse" was used in the context of article 34, paragraph (1) of the Model Law.

82. That proposal received some support. It was said that it would clarify the intent of the Working Group, which was to provide for a waiver of any form of appeal on the merits but to exclude from the waiver recourse on setting aside an

award, and enforcement proceedings. It sought to differentiate between the waiver, which should be limitatively defined and the exceptions thereto. An alternative to that approach was to refer to "any appeal or any recourse on the merits", as the word "appeal" might not be understood in the same manner in all jurisdictions and the word "recourse" conveyed a broader meaning.

83. However, it was observed that that proposal focused on various types of recourse, which might not be understood in the same manner in different countries. Introducing categories carried the risk that not all possible types of recourse were listed and the understanding of such categories might not be universally shared. In addition, it was said that appeals or recourses on matters of procedure were not clearly covered under that proposal.

Broad content of waiver of recourse

84. The Working Group agreed that paragraph (2) should contain a waiver of appeal, review and recourse, and be drafted in a manner that avoided any confusion as to the scope of the waiver. To avoid listing recourses excluded from the waiver, it was proposed to adopt a provision along the lines of: "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 that may be waived and the waiver of which does not require express agreement". It was objected to that proposal, as it would oblige parties to delve into the details of relevant applicable laws and would run counter to the harmonization objectives of the Rules. It was said that a preferable approach would be that the scope of the waiver be clearly defined in the Rules themselves, without the parties having to determine whether and under which conditions the applicable law permitted such waiver to be made. It was further said that that proposal put the emphasis on whether applicable law would require express agreement of the parties for recourse to be validly waived, a matter that was not necessarily settled in all jurisdictions.

85. In keeping with the approach to define broadly the types of recourse waived, and to clarify the exceptions, a proposal was made along the following lines: "By adopting these Rules, the parties waive their right to any form of appeal, review or recourse to any court or competent authority except for an application for setting aside an award." That proposal received broad support. The proposed wording was said to address the concerns raised in the course of the discussion that the scope be clearly and concisely defined, and that there were no interference with applicable laws. It removed the reference to a deemed waiver, which was considered to be unnecessary.

86. After discussion, the Working Group agreed that the proposal contained in paragraph 84 above should be included in a revised version of the Rules for consideration by the Working Group at a future session, on the understanding, however, that a few delegations formally objected to amending the Rules on that matter and one delegation requested that it be placed in square brackets.

Paragraphs (3), (4) and (6)

87. The Working Group decided that the substance of article 32, paragraphs (3), (4), and (6), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (5)

88. It was suggested that paragraph (5) could be complemented with provisions aimed at reminding the parties that they might agree on the modalities of the publication of the award. That proposal did not receive support.

89. The Working Group decided that the substance of article 32, paragraph (5), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (7)

90. The Working Group confirmed its decision taken at its forty-seventh session that article 32, paragraph (7) as contained in the 1976 version of the Rules should be deleted (A/CN.9/641, para. 105).

Applicable law, *amiable compositeur*
Article 33

Paragraph (1)

91. The Working Group noted that it had 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" in the first sentence of article 33, paragraph (1) (A/CN.9/641, para. 107). In the absence of such designation by the parties, the Working Group agreed that paragraph (1) should refer to the arbitral tribunal applying the "law" and not the "rules of law" it determined to be applicable, consistent with article 28, paragraph (2) of the Model Law (A/CN.9/641, paras. 108 and 109).

rules of law designated by the parties

92. A suggestion was made to clarify that any designation of law or legal system of a given State by the parties should be construed as referring to the substantive law of that State and not to its conflict-of-law rules. It was said that a similar provision could be found in article 28, paragraph (1) of the Model Law. After discussion, the Working Group considered that such addition was not necessary under the Rules.

Law applied by the arbitral tribunal

93. Concerning the law that an arbitral tribunal should apply to the substance of the dispute, the Working Group considered two options, failing determination by the parties, as contained in document A/CN.9/WG.II/WP.151/Add.1. It was said that both options constituted substantive conflict-of-law rules.

94. Option 2, which provided broad discretion for the arbitral tribunal to apply the law it determined appropriate, received broad support. It was said that that option provided for a flexible solution, and, if adopted, would modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of the appropriate law.

95. A suggestion was made that the discretion of the arbitral tribunal in determining the more appropriate law to be applied should be limited, or that more guidance should be provided to the tribunal. The suggestion was made to refer to

conflict-of-laws rules. It was also proposed to include language which would indicate that the determination should be made by the arbitral tribunal objectively and reasonably. For that purpose, it was suggested to add language along the lines of "based on objective criteria" at the end of paragraph (1), or possibly to merge both options 1 and 2. In response, it was pointed out that the broad discretion left to the arbitral tribunal in the determination of the appropriate law to be applied came into play within the boundaries of the obligation of the arbitral tribunal to render a reasoned award, as provided under article 32, paragraph (3) of the Rules. It was generally felt that there were sufficient safeguards in the Rules in that respect.

96. It was suggested that the provision, by referring to the application of "the law" determined to be appropriate, could be understood as limiting the choice of the arbitral tribunal to one law only. It was pointed out that that might have an impact on the enforceability of the award. However, in international arbitration, it was not unusual that more than one law had to be applied to deal with different issues, such as capacity or corporate matters. After discussion, the Working Group was of the view that the provision was drafted in sufficiently broad terms and it was understood that the tribunal might apply different laws, depending on the issues at stake.

Paragraph (2)

97. The Working Group decided that the substance of article 33, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (3)

"any"

98. It was pointed out that article 33, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, had been amended to clarify applicability of the Rules in a situation where a contract was not necessarily the basis of the dispute by referring to the words "any applicable" in relation to a "contract" and "any" in relation to "usages of the trade". It was said that the language in paragraph (3) might not achieve the objective of clarifying the provision. A better approach, it was said, was to draft paragraph (3) with language along the following lines: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usages of trade applicable to the transaction." That proposal received support.

"agreement" – "contract"

99. A question was raised whether the word "contract" was broad enough to encompass all types of agreements which might form the basis of a transaction. With a view to broadening the scope of that provision, it was proposed to replace the word "contract" by the word "agreement". It was explained that, in some jurisdictions, the term "contract" was strictly defined, whereas the term "agreement" was understood as including contracts, as well as other forms of agreements on which commercial transactions would usually be based. However, it was objected to that proposal that in some jurisdictions a contract was legally enforceable, which would not necessarily be the case of an agreement. It was also said that the term "contract" was used under the corresponding provision of the Model Law as well as

in the European Convention on International Commercial Arbitration of 1961, and using a different language might create difficulties for countries having enacted arbitration law based on the Model Law or countries that were parties to the Convention. In addition, it was said that the term "contract" was used consistently in the Rules, and it might not be appropriate to use a different term under article 33, paragraph (3). Another proposal was made to add the words "or any other legal instrument" after the word "contract" in order to reflect the language adopted by the Working Group when revising the Rules under articles 3 and 18. That proposal did not find support, as the term "legal instruments" would be understood to include, among others, investment treaties, the application of which was not intended to be regulated by that paragraph.

100. After discussion, the Working Group agreed that article 33, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, should be amended along the lines of the proposal contained in paragraph 97 above.

Settlement or other grounds for termination
Article 34

Paragraph (1)

101. A proposal was made to include in the last sentence of article 34, paragraph (1), the words "or for refusing to issue it", in order to capture situations where the tribunal would refuse to issue an award on legitimate grounds, for example, if rendering the award would violate public policy. That proposal did not receive support. After discussion, the Working Group decided that the substance of article 34, paragraph (1) as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (2)

102. The Working Group agreed that the language contained in article 34, paragraph (2), as reflected in document A/CN.9/WG.II/WP.151/Add.1, might need to be amended so as to ensure consistency of that provision with the decision adopted by the Working Group in relation to article 28, paragraph (1) (a) to no longer limit the power of the arbitral tribunal to a dismissal order for termination (see paragraphs 22 to 26 above). The Working Group requested the Secretariat to reformulate article 34 paragraph (2), for consideration at a future session.

Paragraph (3)

103. The Working Group agreed that the last sentence of article 34, paragraph (3), should refer to article 32, paragraphs 2 and "4 to 5", instead of "4 to 6" as the provision of article 32, paragraph (6) were already reflected in paragraph (3). With that modification, the Working Group decided that the substance of article 34, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Interpretation of the award
Article 35

Paragraph (1)

104. A suggestion was made to add language in article 35, paragraph (1), to clarify that the tribunal might give an interpretation of part of the award only, along the lines of the corresponding provision of the Model Law. That proposal did not receive support and the Working Group decided that the substance of article 35, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (2)

105. The Working Group decided that the substance of article 35, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Correction of the award
Article 36

Time limit

106. The Working Group considered whether article 36, should include a time limit within which the arbitral tribunal should correct an award after having been requested to do so by a party. It was said that such a time limit was provided for under article 35, paragraph (2), of the Rules, when the tribunal was requested to make an interpretation of an award. The Working Group generally agreed that the same principle should apply when the tribunal was requested to make correction to an award. Different views were expressed on whether a time limit for allowing a party to request corrections should comprise 45 days as was provided in article 35, paragraph (2) of the Rules or 30 days as provided in article 33, paragraph (2) of the Model Law.

107. After discussion, the Working Group agreed that article 36 should be modified with the inclusion of a time limit for corrections of 45 days. It was clarified that such time limit only applied when a party requested a correction, and not when the arbitral tribunal made such correction at its own initiative. The Working Group requested the Secretariat to prepare a revised version of article 36 taking account of the above discussion.

"a party"

108. The Working Group agreed that article 36, paragraph (1), would refer to "a party" instead of "any party" in order to align the language in article 36 with that in article 37, as contained in document A/CN.9/WG.II/WP.151/Add.1.

scope of omissions

109. A question was raised whether the wording of article 36, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, sufficiently clarified the scope of omissions that could be corrected. The Working Group was reminded that the word "omissions" had been added, in order to cover situations such as the arbitrator omitting to sign the award or to state the place of the award. It was not intended to cover omissions on the substance, and it was questioned whether that

matter would need clarification. It was also observed that under article 32, paragraph (4), an award should contain the date on which the award was made as well as the place of arbitration. To a question on the interplay between article 32, paragraph (4) and article 36 of the Rules, it was said that, in certain jurisdictions, an award that would not include the date and place would not be considered an award, and in that case, article 36 would not find application. It was said that matters regarding qualification of an award were dealt with under applicable law.

110. It was also said that the words "of a similar nature" included in the first sentence of paragraph (1) after the word "omissions" clarified that intended meaning of the provision, and was a sufficient and appropriate means to implement the decision of the Working Group to include the word "omissions" in paragraph (1) of article 36.

"form part of the award"

111. It was observed that article 35, paragraph (2) of the Rules, provided that "the interpretation shall form part of the award". A question was raised whether a similar provision should be included in article 36, paragraph (2) to clarify that correction of an award also formed part of the award. It was said that such a provision would create difficulties, in particular with deadlines for recourse, depending on what the date of the corrected award was determined to be. In response, it was pointed out that the applicable national arbitration law would govern the matter and that it was not for the Rules to address it. It was also observed that rules of a number of international arbitration institutions included a similar provision.

112. After discussion, the Working Group agreed, despite one delegation opposing, to provide in article 36 that corrections would also form part of the award.

Additional award
Article 37

113. The attention of the Working Group was drawn to the fact that article 37, was restricted to "additional awards". It was said that that provision would therefore not find application in case the tribunal would render a termination order and a party wished to request the arbitral tribunal to make an additional decision on claims presented during the arbitral proceedings, but omitted by the tribunal.

114. Various proposals were made to address that matter. A suggestion was made to include in article 40, paragraph (3), language providing that article 37 would apply by analogy. That suggestion received little support.

115. It was suggested to modify the wording of article 37, paragraph (1) along the following lines: "Within 30 days after the receipt of the award or termination order, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal." That proposal received support as it provided a solution for parties in case the arbitral tribunal failed to address all issues in a termination order. Another proposal was made to address that concern by adopting a more general approach providing in article 34, paragraph (2) that the termination order would have the legal effect or character of an award. It was suggested to insert in article 34, paragraph (2) wording along the lines of "For purposes of article 37, a termination order should be treated as an award." That approach was also supported.

116. Both proposals contained in paragraph 113 above received support and the Working Group requested the Secretariat to include both proposals in a revised version of the Rules within brackets for consideration by the Working Group at a future session. International arbitral institutions having experience in the manner in which termination orders had been dealt with and of issues arising in that context were invited to provide information to the Secretariat.

Costs
Article 38

117. A question was raised whether the first sentence of article 38, as contained in document A/CN.9/WG.II/WP.151/Add.1, should also include a reference to "termination orders and awards on agreed terms". It was pointed out that article 40, paragraph (3), already dealt with that matter The Working Group considered whether articles 38 and 40 would need to be restructured, in order to avoid any overlapping.

118. It was said that article 38 provided the arbitral tribunal with the power to issue an award on costs and defined the term "costs", whereas article 40 dealt with questions of allocation of costs, fixing of costs under a termination order or award on agreed terms and fees in the context of interpretation or correction of an award. The concern was expressed that regulating costs in the context of awards, termination orders and awards on agreed terms in one provision might create uncertainty and ambiguity.

119. After discussion, the Working Group agreed that there might be a need for considering to which extent both provisions might overlap, and agreed that that matter might need to be further considered when the Working Group had completed its review of articles 38 to 40.

"an award – any award"

120. It was observed that the arbitral tribunal might fix the costs of the arbitration in more than one award, and the Working Group agreed that a revised version of article 38, should clarify that matter.

"fees stated separately"

121. The question was raised whether the fees of the arbitral tribunal should be stated separately as to each arbitrator as provided currently in article 38, subparagraph (a). In response, it was said that that approach, which was included in the 1976 version of the Rules, had proven useful in particular in disciplining arbitrators and avoiding exaggerated costs.

Article 39

Paragraph (2)

122. The Working Group agreed to replace the words "has issued or endorsed" by the words "has stated it will apply" in article 39, paragraph (2), as that formulation was found to better cover situations where an appointing authority applied a schedule of fees defined by other authorities or rules.

Paragraph (3)

123. The concern was expressed that the reference to the word "methodology" used in article 39, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, might not be sufficiently clear, and it was proposed to modify the first sentence of that paragraph as follows: "Promptly after its constitution, the arbitral tribunal shall inform the parties how it proposes to determine the fees of its members." That proposal was supported.

124. It was further proposed to amend the second sentence of article 39, paragraph (3) by replacing the words "set forth the computation of the amounts due consistent with that methodology" by the words "state how it has computed the fees". It was said that that proposal aimed at avoiding parties' allegation that a calculation of fees was inconsistent with the agreed methodology, and to limit the risk of frivolous litigation that might result from the existing wording. It was also observed that the methodology agreed upon after the constitution of the tribunal might not necessarily apply at the end of the proceedings, in particular in case a party referred the matter to an appointing authority or to the Secretary-General of the PCA, as provided for under article 39, paragraph (4). To address that concern, it was proposed to add at the end of article 39, paragraph (3) the words "fixed by the parties or any other authority having taken a decision on this matter." The Working Group agreed that further consideration should be given to that question at a future session.

125. It was observed that paragraph (3) should be amended so that the reference contained in its second sentence to article 38 be limited to article 38 (a) and the words "costs of arbitration" be replaced by the words "fees of the arbitral tribunal". A question was raised whether costs of travels as contained in article 38 (b), or of expert advice as contained in article 38 (c) should also be included as they might be the subject of an agreement between the arbitral tribunal and the parties. The Working Group agreed to give further consideration to that question at a future session.

Paragraph (4)

126. Various concerns were expressed regarding article 39 and different matters were raised for further consideration at a future session. It was said that the chronology of events mentioned in paragraph (4) might need to be revisited. It was questioned whether modification of fees should be deemed part of the award, as that might have consequences in terms of delaying potential recourse. It was pointed out that the decision of the tribunal on costs should be made in a form that could be revised. It was also questioned whether any decision on costs should be made in a separate award. Other issues were proposed for consideration such as the manner in which to address requests for deposit and interim payments.