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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-second session (New York, 1-5 February 2010)

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 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 or 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] The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.156, paragraphs 5-20.

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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.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifty-second session in New York, from 1 to 5 February 2010. The session was attended by the following States members of the Working Group: Armenia, Australia, Austria, Belarus, Bolivia (Plurinational State of), Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Madagascar, Malaysia, Mexico, Mongolia, Morocco, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Argentina, Belgium, Costa Rica, Croatia, Cuba, Finland, Indonesia, Iraq, Kuwait, Libyan Arab Jamahiriya, Mauritania, Mauritius, Netherlands, Panama, Peru, Philippines, Qatar, Romania, the former Yugoslav Republic of Macedonia, Turkey and United Arab Emirates.

6. The session was attended by observers from the following non-member States and entities: Holy See and Palestine.

7. The session was attended by observers from the following organization of the United Nations System: the International Centre for Settlement of Investment Disputes (ICSID) and the World Bank.

8. The session was attended by observers from the following invited international intergovernmental organizations: Asian-African Legal Consultative Organization (AALCO), International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA).

9. The session was also attended by observers from the following invited international non-governmental organizations: 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), *Associación Americana de Derecho Internacional Privado* (*ASADIP*), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Environmental Law (CIEL), *Centre pour l'Étude et la Pratique de l'Arbitrage National et International* (*CEPANI*), *Centro de Estudios de Derecho, Economía y Politica* (*CEDEP*), Chartered Institute of Arbitrators (CIARB), *Comité Français de l'Arbitrage* (*CFA*), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Gulf Cooperation Council (GCC) Commercial Arbitration Centre, ICC International Court of Arbitration, Institute of International Commercial Law, Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), International Arbitration Institute (IAI), International Bar Association

(IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Swaps and Derivatives Association (ISDA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL) and Swiss Arbitration Association (ASA).

10. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland)

Rapporteur: Ms. Susan Downing (Australia)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.156); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.157, A/CN.9/WG.II/WP.157/Add.1 and A/CN.9/WG.II/WP.157/Add.2).

12. 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

13. 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.157, A/CN.9/WG.II/WP.157/Add.1 and A/CN.9/WG.II/WP.157/Add.2). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

14. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group, noting those provisions that had not been fully discussed or where disagreement remained (draft article 2, paragraph (2), draft article 6, paragraph (3), draft article 34, paragraph (2) and draft article 41, paragraphs (3) and (4)). The Secretariat was requested to circulate the draft revised Rules to Governments for their comments, with a view to consideration and adoption of the draft revised Rules by the Commission at its forty-third session, scheduled to be held in New York, from 21 June to 9 July 2010.

IV. Revision of the UNCITRAL Arbitration Rules

15. The Working Group recalled that it had concluded a second reading of articles 27 to 39 of the draft revised Rules at its fifty-first session (A/CN.9/684) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.157 and its addenda 1 and 2.

Draft article 40
(corresponding to article 38 of the 1976 version of the Rules) - definition of costs

paragraph (1)

16. The Working Group agreed to replace, in paragraph (1), the words "and, if it deems it appropriate, in any other award" by the words "or, if it deems appropriate, in another decision", in order to clarify that the arbitral tribunal could fix the costs in any decision it might render at any stage of the proceedings. It was further said that article 40, paragraph (3) of the 1976 version of the Rules provided that the arbitral tribunal should fix the costs of arbitration in the text of a termination order or an award on agreed terms when it issued such decisions. It was said that if the Working Group intended to place the substance of article 40, paragraph (3) of the 1976 version of the Rules under draft article 40, paragraph (1), it might then be preferable, for the sake of clarity, to add a reference to "termination order" and "award on agreed terms" in draft article 40, paragraph (1).

17. After discussion, the Working Group agreed with the proposed modifications to paragraph (1), as contained above in paragraph 16 and requested the Secretariat to redraft paragraph (1) accordingly.

paragraph (2)

18. It was noted that the words "if such costs were claimed during the arbitral proceedings" as contained in article 38, paragraph (e) of the 1976 version of the Rules had been deleted in draft article 40, paragraph (2) (e). It was then questioned whether that deletion could be understood as empowering the arbitral tribunal to decide on its own initiative on legal and other costs incurred by the parties in relation to the arbitration, regardless of whether such costs were actually claimed. In response, it was clarified that no such deviation from article 38, paragraph (e) of the 1976 version of the Rules was intended.

19. After discussion, the Working Group agreed that the substance of paragraph (2) was generally acceptable.

Draft article 41
(corresponding to article 39 of the 1976 version of the Rules) - fees of arbitrators

mechanism for review of fees and expenses of the arbitrators

20. The Working Group considered draft article 41, which included revised provisions aimed at providing parties with an opportunity to obtain review by disinterested third persons of whether the fees sought by arbitrators were excessive, in line with the decisions made by the Working Group at its forty-fifth (A/CN.9/614, paras. 133 and 134), forty-eighth (A/CN.9/646, paras. 20 to 27) and fifty-first (A/CN.9/684, paras. 122 to 126) sessions.

21. The necessity of providing a neutral mechanism aimed at such a review of fees charged by arbitrators in the case of non-administered arbitration was underlined. It was said that such a mechanism for review was advisable as a precaution to guard against the rare situations where an arbitrator might seek excessive fees. It was also pointed out that the process for establishing the arbitrators' fees was crucial for the legitimacy and integrity of the arbitral process itself. It was further said that the revision of the provisions relating to the costs of arbitration, and in particular the fixing of the fees by the arbitrators without any control thereof, was one of the main reasons for undertaking a revision of the Rules.

22. However, concerns were raised on the risks that draft article 41 might also entail. It was said that, in certain jurisdictions, domestic law provided for challenge and appeal procedures which allowed a State court to make a decision on arbitrators' fees and therefore draft article 41 might create uncertainties as to the beginning of the time period to apply for such challenge or appeal. It was said that according to draft article 41, paragraph (4), the appointing authority or, failing such authority, the Secretary-General of the Permanent Court of Arbitration (PCA) was empowered to impose modifications to the part of the award relating to costs, which might give rise to challenge of the award. Furthermore, the fixing of the fees was said to be a matter of a contractual nature between the parties and the arbitrators, and therefore intervention of a third party in that process was not justified. It was also said that some appointing authorities might inject their own views about appropriate fee levels into the review process, regardless of the arbitrators' original proposal on fees. It was noted that draft article 41, paragraphs (3) and (4) introduced significant time periods for challenging the arbitrator's fees, thereby creating potential delays for the finality of the award.

23. A question was raised whether the decision made by the appointing authority in relation to the fixing of the arbitrators' fees should be of a binding nature. It was said that the appointing authority might not, in all instances, be properly qualified to make such decision. The criteria to be applied by the appointing authority or the Secretary-General of the PCA in paragraph (4) were said not to provide enough guidance to those bodies and might encourage time-consuming scrutiny even of fee determinations that were fully consistent with a fees proposal that had been reviewed and left unchanged under draft article 41, paragraph (3).

24. The length of draft article 41 was found cumbersome. It was observed that the drafting of that provision should be simplified to reflect policy decisions only.

25. After discussion, the Working Group agreed to further consider whether the concerns expressed in the Working Group could be addressed by revising the drafting of paragraphs (3) and (4).

paragraph (3)

26. With a view to simplifying paragraph (3), it was proposed to delete the text referring to the designation of an appointing authority in case no such authority had already been agreed by the parties, and to deal with that question more generally under draft article 6. That proposal was supported. It was further said that the provision to be included under draft article 6 should also clarify whether the designation of an appointing authority would suspend the running of the time period defined under paragraph (3) (see below, para. 127).

27. It was further proposed to simplify the last sentence of paragraph (3) by deleting the words "remain under its continuing duty to". That proposal received support. It was suggested that the last sentence of paragraph (3) should also be made applicable with respect to paragraph (4). That suggestion also received support.

paragraph (4)

"pursuant to article 40, paragraphs 2 (a), (b) and (c)"

28. It was said that it might not be necessary to include in the review undertaken by the appointing authority or the Secretary-General of the PCA the "costs of expert advice and of other assistance required by the arbitral tribunal". Accordingly, it was suggested that the reference to paragraph "2 (c)" in the first sentence of paragraph (4) be deleted.

"when informing the parties"

29. It was pointed out that the losing party might be tempted to challenge the decision of the arbitrators on fees, thereby delaying the rendering of the final award. It was suggested that paragraph (4) should therefore allow the arbitral tribunal to inform the parties of its decision on fees before a final award was made. To achieve that result, it was proposed to replace the words "when informing the parties of the arbitrators' fees [and expenses] that have been fixed pursuant to article 40, paragraphs 2 (a), (b) and (c)" by the following words: "On informing the parties of its determination of the fees [and expenses]". In response, it was said that draft article 40 already provided that the arbitral tribunal could determine the costs in any decision, and the proposed modification might not be necessary.

scope of review

30. In order to limit the scope of revision of costs by the appointing authority or the Secretary-General of the PCA, it was proposed to replace the words "satisfy the criteria in paragraph 1 as applied in" by the words "are consistent with". However, it was said that retaining a reference to paragraph (1) would be advisable as it referred to the notion of reasonableness of the amount of arbitrators' fees, an element to be taken into account by the appointing authority in its review. It was also said that such reference could prevent situations where, despite applying the agreed method for determining the fees, arbitrators would charge exaggerated amounts. In order to address the concern that the review process was too intrusive, it was suggested to modify the aforementioned proposal to "are manifestly inconsistent with".

"fees and expenses"

31. The Working Group considered whether the review mechanism by the appointing authority and the Secretary-General of the PCA should also apply to the expenses of the arbitrators. It was said that review of expenses could be a cumbersome exercise, in particular in complex cases, and that it would be difficult for such a review to be made within 45 days, as currently provided under paragraph (4). In response, it was said that exaggeration also occurred in the determination of expenses and therefore expenses should be covered by the review mechanism.

32. To address the concern regarding time limitation for such a review, several proposals were made. One proposal was to provide that the appointing authority or the Secretary-General of the PCA should simply endeavour to decide on necessary adjustments within 45 days, and not be under an obligation to do so. Another suggestion was that the time period for such review should start running from the date the appointing authority or the Secretary-General of the PCA received full information for making its decision.

33. After discussion, the inclusion of the expenses in the review to be undertaken by the appointing authority or the Secretary-General of the PCA was generally supported.

"treated as a correction to the award"

34. The Working Group agreed that the last sentence of paragraph (4), which provided that if the award had already been issued, any adjustment decided by the appointing authority or the Secretary-General of the PCA "be treated as a correction to the award pursuant to article 38", should be clarified. It was observed that a modification of the decision of the arbitral tribunal on costs did not constitute a mere correction. It was suggested to replace the words "be treated as" by the words "has a status equivalent to". That proposal did not receive support.

proposed new paragraph (5)

35. In order to address the concern regarding additional delays with respect to the rendering of the final award that might result from the application of paragraph (4), it was proposed to add a new paragraph to draft article 41, along the following lines: "A referral under paragraphs (3) and (4) shall not affect [the status] [the final nature] of the arbitral tribunal's decisions on any matter contained in the award other than the amount of its fees." It was said that that new paragraph usefully clarified that the finality of the award on decisions pertaining to the merits of the case would not be affected by the mechanism provided under paragraph (4). However, it was pointed out that such a provision might not be applicable in certain jurisdictions. Doubts were also expressed whether an award, which would leave out the decision on costs, could be enforced under the New York Convention. After discussion, the Working Group agreed to include the proposed new paragraph (5) in draft article 41.

proposal for a revision of draft article 41

36. After discussion, there was general support in the Working Group to modify draft article 41, to serve as a basis for the third reading of that article, as follows:

- Paragraph (1): the words "[and expenses]" would be added in square brackets after the word "fees".
- Paragraph (2) would remain unchanged.
- Paragraph (3) would read as follows: "Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees [and expenses], including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a

referral, the appointing authority finds that the proposal of the arbitral tribunal is [manifestly] inconsistent with the criteria in paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal."

- Paragraph (4) would read as follows: "When informing the parties of the arbitrators' fees [and expenses] that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated. Within 15 days of receiving the arbitral tribunal's determination of fees [and expenses], any party may refer for review such determination to the appointing authority or, if no appointing authority has been agreed upon or designated or if such an appointing authority fails, refuses, or is unable to fulfil its functions under this paragraph, to the Secretary-General of the PCA. If, within 45 days of receiving such a referral, the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is manifestly inconsistent with the arbitral tribunal's proposal (as may have been adjusted) under paragraph 3 or with the criteria in paragraph 1, the appointing authority or the Secretary-General of the PCA shall make any necessary adjustments to the arbitral tribunal's determination, which shall be binding upon the arbitral tribunal. Any such adjustments either shall be included by the tribunal in its award or, if the award has already been issued, shall be [reflected] [implemented] in a correction to the award pursuant to article 38."

- The following paragraphs would be added. Paragraph (5) would read: "Throughout the procedure under paragraph 3 or 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1." Paragraph (6) would read: "A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses."

Draft article 42
(corresponding to article 40 of the 1976 version of the Rules) — allocation of costs

37. The Working Group agreed that the substance of draft article 42 was generally acceptable.

Draft article 43
(corresponding to article 41 of the 1976 version of the Rules) — deposit of costs

38. The Working Group agreed that the substance of draft article 43 was generally acceptable.

Draft additional provision — Filling of gaps in the Rules

39. The Working Group considered a proposed draft additional article which established a gap-filling provision aimed at clarifying that matters governed by the Rules which were not expressly settled in them were to be settled in conformity with the general principles on which the Rules were based (A/CN.9/WG.II/WP.157/Add.2, para. 34). The Working Group had agreed, at its

forty-eighth session, to further consider whether such a provision should be included in the Rules (A/CN.9/646, paras. 50-53).

40. Some support was expressed in favour of retaining a provision on gap filling in a revised version of the Rules. It was considered useful to emphasize that the Rules constituted a self-contained system of contractual norms and that any lacunae in the Rules were to be filled by reference to the Rules themselves. It was pointed out that issues might arise that were not addressed in the Rules and it was preferable to provide guidance to the users of the Rules by referring to the general principles on which the Rules were based.

41. Some of the delegations that supported inclusion of a gap-filling provision considered that it might be useful to complement that text by adding language along the lines of article 2A, paragraph (1) of the UNCITRAL Model Law. It was said that referring to the international origin of the Rules, the need to promote their uniform interpretation and application, as well as the observance of good faith would be useful information on the applicable principles. That proposal received little support, as it was pointed out that article 2A, paragraph (1) of the UNCITRAL Model Law was aimed at providing guidance on the interpretation of legislative texts and not on instruments of a contractual nature such as the Rules.

42. In order to avoid referring to the notion of "principles", which might give rise to uncertainty as to their definition, it was proposed to replace the words "the general principles on which those Rules are based" by the words "the spirit of those Rules", thereby adopting language closer to article 35 of the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules of Arbitration") and article 32.2 of the Rules of the London Court of International Arbitration ("LCIA Rules"). That proposal received some support.

43. Those opposing inclusion of a gap-filling provision in the Rules said that since general principles referred to in that provision were not defined, complex issues of interpretation might ensue. It was said that the same concern applied to the use of "the spirit of the Rules", as proposed above, in paragraph 42. In addition, it was pointed out that the application of such a provision could lead to challenge of awards on the grounds that the procedure adopted by the arbitral tribunal differed from that agreed by the parties. Further, it was pointed out that draft article 17 of the Rules already provided guiding principles regarding the conduct of arbitral proceedings, due process and efficiency of arbitral proceedings. While it was recognized that draft article 17 provided sufficient basis for finding solutions to procedural questions that arose during the proceedings, it was pointed out that issues not related to the conduct of proceedings might arise that were not addressed in the Rules.

44. After discussion, in the absence of consensus, the Working Group agreed not to include a provision on gap filling in a revised version of the Rules.

Draft additional provision, tentatively numbered draft article 16
exclusion of liability

45. The Working Group considered a proposed draft provision on liability, tentatively numbered draft article 16 (A/CN.9/WG.II/WP.157, para. 41). Draft article 16 established immunity for the participants in the arbitration and sought to preserve exoneration in cases where the applicable law allowed contractual

exoneration from liability, to the fullest extent permitted by such law (A/CN.9/646, paras. 38-45).

46. The Working Group agreed that participants in the arbitration should in principle be granted immunity or limitation of liability for their acts or omissions in connection with the arbitration to the fullest extent permitted by the applicable law. It was said that such a provision would ensure that arbitrators were protected from the threat of potentially large claims by parties dissatisfied with arbitral tribunals' rulings or awards who might claim that such rulings or awards arose from the negligence or fault of an arbitrator.

47. It was explained that a waiver "to the fullest extent permitted under the applicable law" did not and should not extend to intentional wrongdoing. Therefore, it was suggested to expressly exclude from the scope of exemption of liability the case of "intentional wrongdoing". That proposal received support.

48. After discussion, the Working Group agreed to revise draft article 16 along the following lines: "Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority, the Secretary-General of the PCA and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."

Draft article 29
(corresponding to article 27 of the 1976 version of the Rules) — proposal for a new paragraph on objecting against experts appointed by the arbitral tribunal

principle of inclusion of a provision on challenge of, or on objections against, experts appointed by the arbitral tribunal

49. The Working Group considered whether a procedure for challenging, or objecting against, experts appointed by the arbitral tribunal should be provided for in draft article 29 on the basis of a draft provision contained in document A/CN.9/WG.II/WP.157/Add.1, paragraph 37 ("draft provision"), and of a proposal along the following lines: "1. Within ten days of their being notified of the designation of the expert or experts, the parties may, giving their reasons, challenge the expert or experts. 2. At the request — with reasons given — of the parties, the deadline for the challenging of experts may be extended by the arbitral tribunal. 3. Exceptionally, experts may, up until they are about to render their opinion, be challenged by the parties on the grounds that information casting doubt on their impartiality and independence has recently come to light. 4. The arbitral tribunal shall decide on the challenge, upholding it or confirming the appointment of the expert."

50. The Working Group generally agreed that, as a matter of principle, a procedure for objecting against experts appointed by the arbitral tribunal should be included in the revised Rules. The Working Group took note that the draft provision followed article 6 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") and general support was expressed for adopting the approach reflected in the draft provision.

impartiality and independence

51. The Working Group agreed to include the words "impartiality and" before the word "independence" where that word appeared in the draft provision.

52. It was agreed that objections could be made to an expert's qualifications as well as to his or her independence or impartiality.

53. To align the wording of the draft provision with article 6 of the IBA Rules, it was suggested to provide that the expert should be impartial and independent not only from the parties and the arbitral tribunal but also from the legal advisers. However, it was pointed out that the purpose of broadening application of the provision would be better achieved by deleting the words "from the parties[, their legal advisers] and the arbitral tribunal" at the end of the first sentence of the draft provision. That proposal found broad support.

"before accepting the appointment"

54. It was said that the draft provision did not permit the arbitral tribunal to appoint an expert before he or she submitted his or her statement of independence and impartiality. It was suggested that some level of flexibility should be introduced by including the words "or, as soon as practical" before the word "submit" in the first sentence of the draft provision to accommodate situations in which the arbitral tribunal found urgent need of an expert, such as to evaluate perishable evidence. It was suggested that that objective could also be achieved by including the words "in principle" before the words "before accepting appointment" to highlight the exceptional character of that procedure. Those proposals received support.

"within the time ordered by the arbitral tribunal"

55. It was pointed out that the draft provision enabled the parties to object to the choice of an expert within the time limit provided by the tribunal and that that provision could be understood as prohibiting parties from raising objections thereafter. It was proposed that parties should expressly be allowed to challenge experts anytime and that experts be subject to a continuing duty of disclosure throughout the proceedings. Concern was expressed that allowing parties to challenge experts at any time might give rise to dilatory tactics. It was said that since draft article 27, paragraph (4) provided the arbitral tribunal with the discretion to determine the relevance and weight of the evidence offered, and draft article 29 allowed parties to submit their opinion on the expert's report, it might not be necessary to specifically address that matter in the draft provision.

additional paragraph to draft article 29

56. After discussion, the Working Group agreed that a new paragraph would be added in draft article 29, after paragraph (1), along the following lines: "The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualification, impartiality or

independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take."

Draft model arbitration clause for contracts

57. The Working Group agreed that the substance of the draft model arbitration clause for contracts was acceptable.

Draft model statement of independence pursuant to article 11 of the Rules

58. The Working Group approved the draft model statement of independence and took note of the proposed additional statement regarding declaration of availability by the arbitrators. The Working Group agreed that the sentence introducing that statement should read: "Note — The parties may require the arbitrators to also make the following statement:"

Section I. Introductory rules

59. The Working Group commenced its third reading of the draft revised Rules on the basis of document A/CN.9/WG.II/WP.157 and its addenda 1 and 2. The Working Group focused on provisions listed by the Secretariat in the aforementioned document that the Working Group had, in previous sessions, indicated should be further considered, and also on provisions that delegations had identified for additional consideration.

60. Under section I, introductory rules, the Working Group approved the substance of draft articles 1, 3 and 5 without any change.

Draft article 2
notice and calculation of periods of time

paragraphs 1 and 2

61. The Working Group considered paragraphs (1) and (2), which sought to reflect the decision of the Working Group at its forty-ninth session to expressly include in the first paragraph language which authorized delivery of notice by any means of communication that provided a record of transmission and to include in the second paragraph provisions addressing the situation where a notice could not be delivered to the addressee in person (A/CN.9/665, paras. 28 and 29).

62. Various concerns were expressed in relation to those paragraphs. It was said that paragraph (1) only provided that a notice should "be delivered by any means of communication that provides a record of its transmission", thereby not requiring confirmation of delivery of notices. The term "designated address" in paragraph (2) was found ambiguous and it was said that a better approach would be to replace those words by wording along the lines of "postal address or e-mail address designated by a party for receipt of such notice".

63. It was further said that the concept of deemed delivery of notice in paragraph (2) might not receive application in those jurisdictions which required actual delivery of notice. It was suggested that draft article 2 should make a clear

distinction between delivery and sending of notices, depending on whether the addressee could actually be reached. It was further proposed to clarify the last sentence of paragraph (2) by replacing it by wording along the following lines: "Such notice shall also be deemed to have been received if received via an address or method as agreed to by the parties or according to the practice followed by the parties in previous dealings."

64. To address the aforementioned concerns expressed in the Working Group, a proposal was made to replace paragraph (2) by a provision along the following lines: "For the purposes of these Rules, any notice is deemed to have been received if: (a) it is physically delivered to the addressee, or if it is delivered at its habitual residence, place of business, the postal address, or at electronic address or telefax number previously designated by the addressee for this purpose, in each case by means which provide the record of the [actual] delivery, or (b) if none of these can be found after making reasonable inquiry, or if delivery otherwise failed under subparagraph (a), then notice is deemed to have been received if it is sent to the addressee's last known address or place of business by registered letter or any other means which provides a record of the attempt to deliver it. Notice shall be deemed to have been received on the day it is so delivered."

65. Concerns were raised that the structure of the proposed amendment to paragraph (2) might be confusing as the chapeau referred to "deemed delivery", whereas subparagraph (a) referred to actual delivery. It was questioned whether the listing of means of delivery was needed. A proposal was made to amend paragraph (2) along the following lines: "For the purposes of these Rules, any notice is deemed to have been received if (a) it is delivered to the addressee personally, or it is delivered at its place of business, habitual residence, postal address, or (if so designated) electronic address or telefax number, [in each case, by means which provide a record of delivery]; or (b) notwithstanding reasonable efforts, delivery cannot be effected under any of the methods in paragraph (a), it is sent to the addressee's last known place of business, habitual residence, or postal address, by means which provide a record of the attempt [under subparagraph (a)] to deliver it [under subparagraph (b)]. Notice shall be deemed to have been received on the date it is so delivered or attempted to be delivered." Some views were expressed that the bracketed text "in each case, by means which provide a record of delivery" was necessary to ensure that the means used provided a record of delivery. In response, it was said that the bracketed language would apply to all transmissions, which might be excessive. The following other matters were raised in the Working Group for future discussion: the list of communications of a particular importance requiring report of receipt, and relying on the burden of proof in the context of notification.

66. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 2 based on the discussions of the Working Group, for further consideration by the Commission.

Draft article 4
(new article) — response to the notice of arbitration

inclusion of a third party before constitution of the arbitral tribunal

67. It was noted that draft article 17, paragraph (5), which allowed third parties to be joined in the arbitration as a party, only applied after the constitution of the arbitral tribunal. It was further noted that the most appropriate time for a party to be joined in arbitration proceedings was at the early stage of the procedure, before the arbitral tribunal was constituted. In that regard, it was agreed to add in draft article 4, paragraph (2) a new subparagraph along the following lines: "(f) in so far as the respondent formulates claims against a party to the arbitration agreement other than the claimant, its response shall include a notice of arbitration in accordance with article 3."

paragraph (3)

68. It was noted that, while the arbitral tribunal was expressly authorized to resolve any controversy regarding the sufficiency of the notice of arbitration under draft article 3, paragraph (5), no corresponding provision could be found in relation to controversy regarding the response to the notice of arbitration in draft article 4, paragraph (3). Therefore, the Working Group agreed to modify draft article 4, paragraph (3) as follows: "The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal".

69. With that modification to paragraph (3), the Working Group approved draft article 4 in substance.

Section II. Composition of the arbitral tribunal

70. Under section II, composition of the arbitral tribunal, the Working Group approved the substance of draft articles 8, 9, 11, 12, 15 and 16 (as article 16 appeared above in para. 48) without any change.

Draft article 7
(corresponding to article 5 of the 1976 version of the Rules) — number of arbitrators

paragraph (2)

71. For the sake of clarity, the Working Group agreed to include in the first line of paragraph (2) the word "other" before the word "party" and the word "party's" before the word "proposal".

72. With that modification, the Working Group approved draft article 7 in substance.

Draft article 10 (new article)

paragraph (3)

73. The Working Group recalled its decision at its forty-sixth session to include in draft article 10, paragraph (3), as a matter of principle, a provision authorizing the appointing authority to constitute the arbitral tribunal, including the right to revoke already appointed arbitrators (see A/CN.9/619, paras. 89-91). Although one concern was expressed regarding the use of the word "revoke" in paragraph (3), that paragraph was generally found acceptable.

74. After discussion, the Working Group approved draft article 10 in substance.

Draft article 13
(corresponding to articles 11 and 12 of the 1976 version of the Rules)

paragraph (4)

75. It was suggested to replace the words "all parties do not agree" contained in the first line of draft article 13, paragraph (4) by the words "not all parties agree", in order to clarify that the disagreement by one party sufficed to trigger the procedure in draft article 13, paragraph (4). In response, it was said that the current wording clearly conveyed that meaning.

76. After discussion, the Working Group approved draft article 13 in substance. The Working Group took note that paragraph (4) would be amended following inclusion in draft article 6 of a general provision regulating the situation where the Rules provided for a period within which a party should act before the appointing authority, and no appointing authority had been agreed upon or designated (see below, para. 127).

Draft article 14
(corresponding to article 13 of the 1976 version of the Rules) - replacement of an arbitrator

paragraph (2)

role of the appointing authority

77. The Working Group considered paragraph (2), which referred to situations where a party, in exceptional circumstances, had to be deprived of its right to appoint the substitute arbitrator. A suggestion was made that the arbitrators themselves, rather than just the appointing authority should be given the power to decide to proceed as a truncated tribunal. In response, it was said that allowing the arbitrators to decide whether to proceed as a truncated tribunal might not provide sufficient safeguards for the parties, in particular in the case of collusion between arbitrators. It was also said that in rules of other international arbitral institution, that decision was in the hands of a third party and not of the arbitrators. Article 12 (5) of the ICC Rules of Arbitration was quoted as an illustration. After discussion, the aforementioned suggestion did not receive support.

"in view of the exceptional circumstances of the case"

78. It was suggested to replace the words "exceptional circumstances" appearing before the words "of the case" in paragraph (2) by wording along the lines of

"circumstances that lead to the replacement of the arbitrator", to better define the circumstances that might give rise to the decision by an appointing authority to deprive a party of its right to appoint a substitute arbitrator. However, it was felt that a broader approach might be preferable and a reference to "the circumstances of the case" would allow the appointing authority to take account of all circumstances or incidents which might have occurred during the proceedings.

79. After discussion, the Working Group agreed to retain the words "in view of the exceptional circumstances of the case".

"if the same occurs"

80. For the sake of clarity, it was proposed to delete the opening words "if the same occurs" in paragraph (2) (b). In response, it was said that those words should be kept as they clarified that an appointing authority might only permit an arbitral tribunal to proceed as a truncated tribunal after the closure of the hearings. In support for the proposal, it was said that those words were likely to create confusion, as it was unclear which occurrence the word "same" was meant to refer to. Further, it was pointed out that those words might be understood as limiting the assessment of the exceptional circumstances by the appointing authority to those circumstances which would have occurred after the closure of the hearings.

81. The Working Group agreed to delete the words "if the same occurs" from paragraph (2) (b).

82. The Working Group approved draft article 14 in substance, with the modifications mentioned above in para. 81.

Section III. Arbitral proceedings

83. Under section III, arbitral proceedings, the Working Group approved the substance of draft articles 18 to 25, 28, 29 (with the inclusion of a new paragraph, as reflected above, in para. 56), 30 and 31 without any change.

Draft article 17
(corresponding to article 15 of the 1976 version of the Rules) - general provisions

paragraph (1)

84. It was pointed out that the first and the second sentences of paragraph (1) might be inconsistent, as the first sentence provided that the arbitral tribunal "may conduct the arbitration in such manner as it considers appropriate", whereas the second sentence could be read as imposing on the tribunal an obligation to conduct the proceedings in accordance with certain principles. It was therefore proposed to replace the words "in exercising its discretion, shall" by the words "should conduct the proceedings in the manner it considers appropriate". That proposal did not receive support as it was felt that the existing wording sufficiently reflected the arbitral tribunal's discretion.

paragraph (2)

85. It was proposed to include as a first sentence in paragraph (2) a provision along the following lines: "As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration". An objection was made that that attempted to regulate the conduct of proceedings in a way that might not be appropriate in all cases. However, the proposal found broad support on the basis that it would enhance efficiency of the proceedings and reflected good practice.

86. The Working Group agreed to include that proposal in paragraph (2).

paragraph (4)

87. The Working Group considered the words in square brackets in paragraph (4) which read "[except for communications referred to in article 26, paragraph 9]". The Working Group agreed that those words should be retained in the revised Rules as they usefully clarified the exception to simultaneous communication in the case of preliminary orders.

paragraph (5)

88. It was pointed out that the term "prejudice" contained in paragraph (5) might be understood differently. It was proposed to replace the words "because of prejudice to any of those parties" by the words "taking into consideration fairness to each of the parties". It was said that the reasons to be taken into account by the arbitral tribunal to refuse joinder of a third person might not be limited to consideration of fairness and should be wider, including the principles in draft article 17, paragraph (1). In addition, it was said that prejudice was only one of those principles, and the reference to it could be understood as excluding application of other principles. Therefore, another proposal was made to include in paragraph (5) a reference to paragraph (1). Those proposals did not find support as the principles in paragraph (1) were viewed to be applicable in any case.

89. After discussion, the Working Group agreed that paragraph (5) should not be amended.

proposed additional provision

90. A proposal was made to include a new provision in draft article 17 along the following lines: "The arbitral tribunal may hold one or more procedural conferences with the parties at any appropriate stage in the arbitral proceedings". That proposal was not supported, since it was said to overregulate the matter.

91. The Working Group approved draft article 17 in substance, with the modifications mentioned above in para. 85.

Draft article 26
(corresponding to article 26 of the 1976 version of the Rules) - interim measures

paragraph 8

92. The Working Group recalled that, at its fiftieth session, it was considered that paragraph (8) might have the effect that a party requesting an interim measure be

liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met, but the requesting party lost the arbitration (A/CN.9/669, para. 116). That included situations where the granting of interim measures was not justified in light of the outcome of the case, in particular where the arbitral tribunal later found that the claim for which the interim measure was sought was not valid. To address that concern, options were proposed for the Working Group's consideration.

93. The options were that the party requesting an interim measure might be liable for any costs and damages caused by the measure if the arbitral tribunal determined that the measure "should not have been granted" or "was not justified". Some support was expressed for the inclusion of the words "should not have been granted" at the end of the first sentence of paragraph (8), for the sake of consistency with the approach taken in article 17 G of the UNCITRAL Model Law. Other views supported the second option in paragraph (8) that the measure "was not justified", as it was found to better cater for the situation were a measure was granted in compliance with all conditions, but was later found to cause damages.

94. After discussion, the Working Group agreed to modify the first sentence of paragraph (8), so that it would read as follows: "The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted".

95. With that modification, the Working Group agreed that the substance of draft article 26 was acceptable.

Draft article 27
(corresponding to article 24 of the 1976 version of the Rules) — evidence

paragraph (1)

96. It was observed that paragraph (1), which provided that each party should have the burden of proving the facts relied on to support its claim or defence, might conflict with applicable law on evidence, since there were a variety of legislative approaches to that matter. Therefore, it was proposed to include at the beginning of paragraph (1) the words: "Save as otherwise provided by applicable law". That proposal found some support on the basis that it expressed a legitimate concern, and would clarify which provision would prevail in circumstances where applicable domestic law would contain a regulation different from paragraph (1). Another view expressed was that paragraph (1) might not serve a useful purpose and could be deleted.

97. Against deletion or modification of paragraph (1), it was said that the purpose of that paragraph was to clarify that the parties should be expected to provide evidence to support their allegations. Arbitrators would in any case have the ability to determine the applicable law, including to the question of evidence and burden of proof. It was also said that the general principle in paragraph (1) had proven useful in the context of treaty-based investor-State arbitration and was found in a number of arbitration rules of arbitral institutions.

98. After discussion, the Working Group agreed to maintain paragraph (1) without any change on the understanding that it did not prevent application of regulations on the burden of proof in the applicable law.

paragraph (2)

99. The Working Group found the reference to "witnesses, including expert witnesses" in paragraph (2) acceptable and approved draft article 27 in substance.

Draft article 32
(corresponding to article 30 in the 1976 version of the Rules) — waiver of right to object

100. The Working Group noted that draft article 32 had been redrafted pursuant to its deliberation at its fifty-first session (A/CN.9/684, paras. 49 and 51).

101. The Working Group approved draft article 32 in substance.

Section IV. The award

102. Under section IV, the award, the Working Group approved the substance of draft articles 33, 35, 37, 38, 40 and 43 without any change.

Draft article 34
(corresponding to article 32 of the 1976 version of the Rules) - form and effect of the award

paragraph (2)

"shall" — "undertake"

103. The Working Group agreed to replace in the second sentence of paragraph (2) the word "undertake" appearing before the words "to carry" by the word "shall". The Working Group clarified that, by adopting that revised language, it did not intend to modify the substance of that provision, and only wished to address a concern expressed regarding the meaning attributed to that term in certain jurisdictions. The Working Group requested the Secretariat, for the sake of consistency, to replace the word "undertake" by the word "shall", where that word appeared in the Rules.

"except for an application for setting aside an award"

104. The Working Group considered the third sentence of paragraph (2), which addressed the question of waiver of recourses against an award by the parties. As a matter of principle, the Working Group agreed that paragraph (2) should contain a waiver of all recourses which could be validly waived and be drafted in a manner that avoided any confusion as to the scope of the waiver. Diverging views were expressed regarding the manner in which the scope of the waiver should be determined.

105. A view was expressed that the reference to the setting aside of awards as a recourse to be expressly excluded from the scope of the waiver would give rise to a number of difficulties. That term, it was further said, was not defined in the Rules.

Despite being referred to in the context of article V (1) (e) of the New York Convention and article 34 of the UNCITRAL Model Law, the notion of "setting aside" encompassed a variety of procedures and, depending on the jurisdictions, was applied differently. In addition, it was observed that article V (1) (e) of the New York Convention allowed State courts to refuse recognition and enforcement of awards in cases where the award had been set aside or suspended by a competent authority. Therefore, highlighting that particular recourse might have the unintended effect of increasing the number of applications for setting aside, thereby affecting finality of awards.

106. It was proposed to replace the words "except for an application for setting aside an award" by the words "insofar as such waiver can be validly made", thereby adopting a more general formulation along the lines of corresponding provisions that could be found in rules of other arbitral institutions such as in article 28 (6) of the ICC Rules of Arbitration and article 26.9 of the LCIA Rules. Another proposal was made to limit the waiver to recourse regarding revision of the award on the merits.

107. Against the approach reflected in those proposals, it was observed that there was doubt on the part of practitioners as to the scope of the waiver and, given that the Working Group did not intend the waiver to extend to actions for setting aside, the revised language should remove such doubt. It was also recalled that the reference in draft article 34, paragraph (2) to an express agreement of the parties regarding waiver of the right to apply for setting aside an award was intended to avoid the situation where parties could be deprived automatically of an exclusive recourse through the submission of a dispute to the Rules. Therefore, it was felt necessary to maintain an express exclusion from the scope of the waiver of that specific recourse, and keep paragraph (2) as it appeared in draft article 34. Some of those in favour of retaining such express exclusion proposed to slightly amend the second sentence of paragraph (2) by replacing the words "for setting aside an award" appearing at the end of paragraph (2) by the words "requesting a setting aside".

right to resist enforcement of an award

108. With the aim of clarifying the scope of the waiver, the Working Group considered whether additional language should be provided in order to put it beyond doubt that the right to resist enforcement of an award as provided under article V of the New York Convention and article 36 of the UNCITRAL Model Law was to be understood as excluded from the waiver of recourse. Following that approach, it was suggested to insert language modelled on paragraph 45 of the Explanatory Note by the UNCITRAL secretariat on the Model Law, along the lines of: "In regulating recourse, this paragraph does not preclude a party from seeking court control by way of defence in enforcement proceedings." Towards the same aim, another proposal was made to replace the word "regarding" appearing after the word "recourse" in the third sentence of paragraph (2) by the word " against" so that it would no longer be necessary to include a proposal on enforcement.

proposed revised version of the provision on waiver of recourses

109. In order to reconcile the diverging views, it was proposed to add as the opening words of the third sentence of paragraph (2) wording along the lines of:

"Insofar as they may validly do so,". Further, it was proposed to add a sentence providing that nothing in paragraph (2) should prejudice enforcement of an award. That proposal was supported.

110. After discussion, the following proposal was made: "Insofar as they may validly do so by adopting these Rules, the parties waive their right to [initiate] any form of appeal [or] review [or recourse] against an award to any court or other competent authority [, except for an application requesting a setting aside, and proceedings regarding execution and enforcement of an award]". That proposal received support. It was suggested that if an exception to the waiver was to be provided, it should then encompass all recourses that were intended to be excluded from the waiver. However, the desirability of expressly listing the exceptions to the general provision on waiver of recourse was questioned, as the two first sentences of draft paragraph (2) made clear that the awards were final and binding on the parties, and parties were under an obligation to carry out all awards without delay.

111. After discussion, the Working Group decided that the proposal should be submitted to the Commission for further consideration.

Draft article 36
(corresponding to article 34 of the 1976 version of the Rules) — settlement or other grounds for termination

112. The Working Group noted that paragraph (2) had been revised for the sake of consistency with the decision made under draft article 30, paragraph (1) (a) to no longer limit the power of the arbitral tribunal to a dismissal order for termination in case the continuation of the arbitral proceedings became unnecessary or impossible. The Working Group found the substance of draft article 36 acceptable.

Draft article 39
(corresponding to article 37 of the 1976 version of the Rules) — additional Award

113. The Working Group noted that paragraph (1) reflected a proposal made at the fifty-first session of the Working Group to clarify that draft article 39 also applied in case the arbitral tribunal rendered a termination order and a party wished to request the tribunal to make an additional decision on claims presented during the arbitral proceedings but omitted by the tribunal (A/CN.9/684, paras. 113-116). The Working Group further noted that paragraphs (2) and (3) had been amended accordingly. The Working Group found the substance of draft article 39 acceptable.

Draft article 41
(corresponding to article 39 of the 1976 version of the Rules) — fees and expenses of arbitrators

114. The Working Group proceeded with its consideration of draft article 41, on the basis of the revised draft discussed by the Working Group at its current session and contained above in paragraph 36.

period of time

115. With a view to removing doubt on the application of time limitation with respect to the determination by the appointing authority of the arbitral tribunal's proposal regarding its fees and expenses, it was suggested to modify the last

sentence of draft article 41, paragraph (3) along the following lines: "If, after receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is [manifestly] inconsistent with the criteria in paragraph 1, it shall within 45 days of receipt of the proposal make any necessary adjustments thereto, which shall be binding upon the tribunal." It was noted, that for the sake of consistency, the same modifications should be made in paragraph (4).

116. Questions were raised whether a period of 45 days regarding the determination by the appointing authority of the arbitral tribunal's proposal on its fees and expenses, as contained in paragraphs (3) and (4), was appropriate. Diverging views were expressed on whether a shorter period should be provided. In relation to the timing issue, it was said that the consequences of an appointing authority not responding within the time period prescribed in paragraph (3) were not addressed. Its silence could either be interpreted as an approval of the arbitrators' proposal or, on the contrary, as a failure to act by the appointing authority, thereby allowing a party to seek appointment of a substitute appointing authority in accordance with the mechanism defined under draft article 6. It was felt that some flexibility should be introduced in paragraphs (3) and (4) by providing that the authority should act "promptly and, save for exceptional circumstances, within 45 days,". That proposal found some support. However, it was pointed out that that provision might be too vague and procedural matters required clear rules.

mechanism

117. It was suggested that if the Secretary-General of the PCA was requested by the parties to designate a replacement appointing authority under paragraph (3), he should be given the discretion to extend the time period within which the existing appointing authority should make its determination. It was also said that it might be simpler to duplicate in paragraph (3) the procedure provided under paragraph (4), and authorize the Secretary-General of the PCA to decide the matter, should the appointing authority fail to act.

118. The Working Group agreed that the proposed revised draft article 41, paragraphs (3) and (4) might need to be revised to provide flexibility in their application and consistency with the general provision on the designating and appointing of authorities contained in draft article 6. Under paragraph (3), at the very early stage of the procedure, promptly after the constitution of the arbitral tribunal, the parties might request the appointing authority chosen or designated in accordance with draft article 6 to decide whether the proposal of the arbitral tribunal on its fees or expenses was consistent with paragraph (1). In case the appointing authority did not reply to the parties within a period of 45 days, the parties might consider that it constituted a failure to act and, under, draft article 6, either agree on the appointment of a substitute appointing authority or request the Secretary-General of the PCA to make that designation. Under paragraph (4), at the late stage of the procedure, when the arbitral tribunal informed the parties of its fees and expenses, any party might refer such determination to the appointing authority for review. In case there was no appointing authority agreed upon or designated at that late stage of the procedure or if such an appointing authority failed, refused, or was unable to fulfil its functions, the matter would then be referred to the Secretary-General of the PCA for determination.

119. Concern was expressed that such provision might be too detailed and create difficulties in practice.

drafting

120. The Working Group considered draft article 41, as modified by the Working Group at its current session (see above, in para. 36). The Working Group reaffirmed its decision (see above para. 33) that the review mechanism by the appointing authority should apply to both the fees and expenses of the arbitrators and agreed to include the words "and expenses" after the word "fees" where it appeared in draft article 41. The Working Group found that the standard of review under paragraph (3) for a proposal for determining fees and expenses of the arbitrators to be "manifestly" inconsistent with paragraph (1) was too high and it agreed to delete the word "manifestly" from paragraph 3. The Working Group further agreed to delete the words "the criteria in" before the word "paragraph" where those words appeared in draft article 41. The Working Group considered proposed alternatives for words in the last sentence of paragraph (4), and expressed preference for the word "implemented".

121. With a view to focusing the review function on cases in which abuse might occur and avoiding unnecessary duplication of reviews previously conducted under draft article 41, paragraph (3), it was proposed to amend the third sentence of paragraph (4) as follows: "If, after receiving such a referral, the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination of fees and expenses is manifestly excessive, taking into account the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or, to the extent that the determination of fees and expenses is inconsistent with the proposal, finds that the determination does not satisfy paragraph 1, the appointing authority or the Secretary-General of the PCA shall make any necessary adjustments to the arbitral tribunal's determination, which shall be binding upon the arbitral tribunal." In support of that proposal, it was said that a review for "manifestly excessive" fees "taking account the arbitral tribunal's proposal" was intended to cover situations, for example, where an arbitrator had determined final fees that technically complied with his or her proposal for an hourly rate but that were based on a questionably high number of hours. That proposal was generally supported.

122. After discussion, it was felt that a revised draft of that provision should be considered at a later stage and, in view of the difficulty of reaching a consensus on that provision, the Working Group decided to submit it to the Commission for further consideration.

Draft article 42
(corresponding to article 40 of the 1976 version of the Rules) - allocation of costs

123. It was noted that, although the revised Rules regulated the fixing (draft article 40), allocation (draft article 42) and deposit of costs (draft article 43), it did not contain a provision on the reimbursement of parties. It was also noted that difficulties with the execution of the decision on costs had frequently arisen in certain jurisdictions, where the final order or award had not made specific reference to the amount that one party had to pay to the other party. Consequently, the Working Group agreed to include in the revised Rules a second paragraph to draft article 42 along the following lines: "The arbitral tribunal shall in the final award or,

if it deems appropriate, in any other award determine any amount that a party may have to pay to another party as a result of the decision on allocation."

124. The Working Group approved draft article 42 in substance, with the modifications mentioned above in para. 123.

Placement of the draft model arbitration clause for contracts and the model statements of independence pursuant to article 11

125. The Working Group recalled that it approved the draft model arbitration clause for contracts and draft model statements of independence pursuant to article 11 as contained in A/CN.9/WG.II/WP.157/Add.2, paragraphs 29, 31 and 33 (see above, paras. 57 and 58). The Working Group agreed to place the draft model arbitration clause for contracts and the draft model statements of independence pursuant to article 11 in an annex to the revised Rules and to include a reference to them in the table of contents of the revised Rules, as well as in a footnote to the corresponding articles referring to that annex.

Table of concordance

126. The Working Group, taking note that the articles of the revised Rules would be renumbered, considered whether to include in the revised Rules a table, as proposed in an annex to the document A/CN.9/WG.II/WP.157, showing the concordance between the articles of the 1976 version of the Rules and those of the revised version. Concerns were expressed that that could be misleading in cases where provisions contained in one article of the 1976 version of the Rules had been distributed between two or more articles of the revised Rules. The Working Group did not take any decision in that respect and took note of the fact that the Secretariat would insert such a table as part of publications to be prepared for the revised version of the Rules.

Draft article 6

proposed additional paragraph

127. Before the close of its session, the Working Group agreed that the new following paragraph should be included in draft article 6 along the lines of "Where these Rules provide for a period within which a party must refer a matter to an appointing authority and no appointing authority has been agreed upon or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation." The Working Group requested the Secretariat to make the necessary adjustments and simplifications to provisions dealing with that matter in its preparation of the draft revised Rules to be considered by the Commission.