



**SYDNEY CENTRE
FOR INTERNATIONAL LAW**
FACULTY OF LAW, UNIVERSITY OF SYDNEY



**Developments in International Commercial
Arbitration: The Regulatory Framework**

Professor James Crawford SC FBA LLd

*Whewell Professor of International Law, University of Cambridge
Director, Lauterpacht Centre for International Law, University of Cambridge
Formerly Challis Professor of International Law and Dean, Sydney Law School*



**The University
of Sydney**

**Sydney Centre
Working Paper # 23
June 2009**



Faculty of Law

Presented at the University of Sydney Distinguished Lecture Series

Monday 4 May 2009

Synopsis

This lecture analyses current regulatory developments in the field of international commercial arbitration. At the international level it focuses on the nearly-completed review of the 1976 UNCITRAL Arbitration Rules; at the national level on the pending review of the International Arbitration Act 1974 and associated controversies.

I. Introduction

1. The regulatory framework of international commercial arbitration involves three instruments at the general multilateral level:

- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;
- The UNCITRAL Model Law on International Commercial Arbitration.
- The UNCITRAL Arbitration Rules of 1976.

2. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 forms Schedule 1 of the International Arbitration Act 1974 (Cth) which gives it the force of law. The New York Convention was in turn based on the Geneva Protocol on Arbitration Clauses of 1923¹ and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.² Being a widely ratified international convention there is no hope of amendment until after the next world war.

3. The UNCITRAL Model Law on International Commercial Arbitration is given the force of law by and forms Schedule 2 of the 1974 Act.³ The Model Law was first adopted in 1985; it was amended in several important respects in 2006.⁴ So

¹ 27 LNTS 157.

² 92 LNTS 301.

³ UN Doc. A/40/17, Annex I, adopted 21 June 1985, revised 2006.

⁴ Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, GAOR, Sixty-first session Supplement No. 17 (A/61/17), Annex 1.

far the 1974 Act does not incorporate the amendments, the most important of which are the following:

Article 2A. International origin and general principles

Article 7. Definition and form of arbitration agreement

CHAPTER IVA. INTERIM MEASURES AND PRELIMINARY ORDERS

4. The UNCITRAL Arbitration Rules of 1976 are a widely-used set of arbitration rules: they are the only major set of general arbitration rules not associated with a specific arbitration institution. Of course they do not have the force of law as such; they apply only if and to the extent they are incorporated in the agreement to arbitrate. An UNCITRAL Working Group is in the process of conducting a detailed revision of the 1976 UNCITRAL Arbitration Rules, with the purpose of updating the rules to reflect current arbitral practice.⁵ The amended rules, as adopted in first reading, are in consequence not particularly innovative. The Arbitration Rules remain general in scope, applicable to all sorts of arbitrations, having avoided including provisions dealing with specific types of arbitral proceedings, in particular, investor-state arbitrations.⁶

5. An inquiry as to when this revision would be completed elicited the following response from a well-informed insider:

“The process is unbelievably tedious, but the bottom line is: one year late, summer of 2010. The necessary corrections will be made – multiparty provisions, eliminating the assumption that every dispute is contractual, dealing with truncated tribunals, establishing an ultimate control of arbitrators’ setting of their own fees. But the text will be suboptimal, and useful improvements neglected. The majority of the participants, although they have never been within three light-years of an arbitration, tend to be foolishly opinionated or agree with delegations with which they have happened to

⁵ Working Group II held its most recent session in New York, in which it discussed and adopted Articles 18 to 26 in second reading: Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009), A/CN.9/669.

⁶ Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006), A/CN.9/614, paras. 18-19, pp. 5-6; Report of Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008), A/CN.9/646, para. 7, pp. 3-4; Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008), A/CN.9/665, para. 8, p. 4.

establish ephemeral and superficial sympathies. Transparency in treaty arbitration will not be incorporated into the Rules, but may be the subject of a separate subsequent exercise to think of model provisions... That's my crystal ball. I'm stubbornly going with this to the end, but then sincerely hope I never have another experience like it."

6. I should also refer to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 (the ICSID Convention),⁷ which forms Schedule 3 of the 1974 Act. This lecture will not deal with the special range of questions raised by ICSID arbitration, though I will comment in passing on the broader category of international investment arbitration, which partly overlaps with international commercial arbitration. About a third of investment arbitrations are conducted under the UNCITRAL Rules or similar sets of rules, and not under the ICSID Convention.

7. These and other overlaps raise the question of the relationship between the three components of the regulatory framework. In the *Eisenwerk* decision the Court held that by adopting the ICC Rules, the parties had opted out of the UNCITRAL Model Law.⁸ In the leading judgment, Pincus JA held that:

"by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law."⁹

The decision has been criticised on the ground that the adoption of a set of rules governing the procedure of the arbitration cannot be considered to have set aside the application of an arbitration law: the *lex arbitri* cannot be excluded by the parties.¹⁰

⁷ 575 UNTS 159.

⁸ *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461. The Attorney-General's Discussion Paper notes that the Singaporean Act on International Commercial Arbitration was recently amended to reflect this position, after a Court issued a decision following the *Eisenwerk* case. See: *John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262.

⁹ *Ibid.*, at 466.

¹⁰ See, among others, L Nottage and R Garnett, "The Top Twenty Things to Change in or around Australia's International Arbitration Act", Sydney Law School, Legal Studies Research Paper No. 09/19, April 2009, pp. 19-21, available at: <http://ssrn.com/abstract=1378722>; S Barrett-White and C Kee, "Enforcement of Arbitral Awards where the Seat of the Arbitration is Australia How the *Eisenwerk* Decision Might Still be a Sleeping Assassin", 24 *Journal of International Arbitration* 515 (2007). Also, the majority of the submissions presented to the Attorney-General in relation to the Review of the International Arbitration Act maintained this position: Australian Centre for International Commercial Arbitration (ACICA), ACICA's Submission – Attorney-General's Review of

Moreover, the consequence of the setting aside of the *lex arbitri* would entail that certain avenues for relief granted by the arbitration law, such as the possibility to apply for the setting aside of the award, would not be applicable to the parties in that arbitration.

8. There is at present a great deal of activity aimed at the revision of this regulatory framework, and this is mirrored in Australia by a current review of the 1974 Act undertaken by the Commonwealth AG's Department.¹¹ The modest purpose of this lecture is to review the current state of play with the various revisions and rescissions.

II. Key Issues

9. I propose to take a half dozen of the more interesting issues raised at the international level and in the course of the federal review. In this paper, I will deal with the following: (1) broader subject-matter jurisdiction; (2) requirement of an agreement in writing; (3) applicable law; (4) defences, counter-claims and set-offs; (5) joinder of parties; (6) provisional measures and (7) confidentiality and privacy and (8) the role of the PCA as default authority. Much has been done on issues such as the

the International Arbitration Act 1974, p. 10; Chartered Institute of Arbitrators (Australia) (CIArb), Comments and Submission upon a Review of the International Arbitration Act 1974, 23 January 2009, p. 8; Clifford Chance, Review of the International Arbitration Act 1974 Submission in response to the Discussion Paper of November 2008, 25 January 2009, pp. 15-19; R Garnett and L Nottage, The Top Twenty Things to Change In or Around Australia's International Arbitration Act - Final Submission to the AGD's Review of the International Arbitration Act, 23 March 2009, pp. 17-20; Hon. Neil Brown and Sam Luttrell, Submissions on Review of the International Arbitration Act 1974, 16 January 2009, pp. 8-9; International Chamber of Commerce Australia (ICC Australia), Review of the International Arbitration Act 1974, 13 January 2009, p. 2; John Rundell, Review of the International Arbitration Act 1974, 16 January 2009, pp. 4-5; Law Council of Australia, Review of the International Arbitration ACT 1974 Comments by the Law Council ADR Committee, 23 January 2008 [sic], pp. 6-7; Law Society of New South Wales, Review of the International Arbitration Act 1974. Discussion Paper November 2008, 15 January 2009, p. 2; New South Wales Bar Association, Review of the International Arbitration Act 1974 – Comments and Submissions by the New South Wales Bar Association, 14 January 2008 [sic], pp. 7-10; Victorian Bar, Submissions of the Victorian Bar in Response to the November 2008 Discussion Paper Reviewing the International Arbitration Act 1974, 24 December 2008, p. 13. All of the submissions may be found at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974

¹¹ Review of the International Arbitration Act 1974, Discussion Paper, November 2008. The discussion paper is to be found at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.DOC/\\$file/Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.DOC/$file/Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.DOC).

composition of the arbitral tribunal, disclosure by and challenge to arbitrators, etc, but there is no time to deal with these machinery issues.

(1) Subject-matter of Arbitration (UNCITRAL Article 1, as adopted on Second Reading)

10. UNCITRAL Rule 1(1) provides:

“1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.”

11. This has caused problems in non-contractual cases, as in *Larsen v Hawaiian Kingdom*.¹² *Larsen* involved allegations that the Hawaiian Government had breached multiple international treaties and “international comity” by virtue of continuously allowing American domestic laws to be applied on Mr Larsen him within the territorial jurisdiction of Hawaii. The arbitration, initially brought under the Permanent Court’s Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State, was eventually heard under the UNCITRAL Rules, for the applicability of the Optional Rules was doubted by the International Bureau.¹³ Nevertheless, issues of applicability of the UNCITRAL Rules were raised by the Tribunal itself for a number of reasons, among which the limitation in Article 1 of the UNCITRAL Rules to their application in contractual disputes.

12. The dispute between Larsen and the Kingdom of Hawaii was clearly not contractual. For the Tribunal:

“On the face of the pleadings, however, it appears that the dispute referred to arbitration is not a dispute ‘in relation to a contract’ between the parties, or a dispute that relates to any other contractual or quasi-contractual relationship between them, or that it falls within the field of ‘international commercial relations’ referred to in the preamble to the United Nations General Assembly resolution which adopted the Rules (General Assembly resolution 31/98, 15 December 1976).”¹⁴

In resolving the matter in favour of their applicability, the Tribunal emphasized the flexibility of the Rules and noted that they could be easily adapted by the parties to

¹² (2001) 119 ILR 566.

¹³ *Larsen v Kingdom of Hawaii*, para. 8.8.

¹⁴ *Ibid*, p. 13.

their particular dispute, even of a non-contractual nature.¹⁵ The decision of the Tribunal was praised by many,¹⁶ although it did not escape criticism.¹⁷

13. The subject-matter of the arbitrations to which the UNCITRAL Rules are applicable has been largely debated by the Working Group. It was decided that, without establishing a list of arbitrable subjects,¹⁸ arbitration should be extended to disputes arising out of “a defined legal relationship, whether contractual or not”.¹⁹

“1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.”

This wording would encompass other types of arbitrations arising not necessarily under a contract, in particular, investor-state arbitrations over disputes arising for breaches of treaty.²⁰ This extension is in accordance with the 2006 Model Law and with the 1958 New York Convention.

AG’s consultation: Scope of Application of the Act

14. In relation to these amendments, the Attorney-General asked:

“Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?”

This proposal was agreed by the majority of the submissions which discussed it.²¹ In support of this amendment it was said that this clarification would exclude the

¹⁵ *Larsen v Kingdom of Hawaii*, p. 26, para. 10.7. The claim was eventually rejected on the basis that there did not exist a dispute between the parties, but between each one of them and the United States, disputes over which the Tribunal had no jurisdiction in the absence of US consent, at p. 39, para. 12.11.

¹⁶ P Dumberry, “The *Hawaiian Kingdom Arbitration Case* and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continuity as an Independent State under International Law”, *Chinese JIL* 656 (2002), p. 678; D Caron, L Caplan and M Pellonpää, *The UNCITRAL Arbitration Rules. A Commentary* (Oxford: Oxford University Press, 2006), p. 21.

¹⁷ DJ Bederman and KR Hilbert, “Lance Paul Larsen v. The Hawaiian Kingdom”, 95 *AJIL* 927 (2001), p. 933.

¹⁸ Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5-9 February 2007), A/CN.9/619, para. 4, pp. 2-3.

¹⁹ A/CN.9/614, para. 32, p. 8; A/CN.9/619, para. 22-24, p. 6; A/CN.9/665, para. 4, pp. 2-3.

²⁰ A/CN.9/614, para. 33, p. 8.

²¹ AA de Fina, p. 3; ACICA, p. 8; AFIA, p. 4; Bruno Zeller, p. 1; CIArb, p. 6; Clifford Chance, p. 11; David K S Lim JP, p. 1; Garnett and Nottage, Final Submission, p. 20; Hon. Neil Brown and Sam Luttrell, p. 7; ICC Australia, p. 2; ILSAC, p. 4; John Rundell, p. 4; Law Council of Australia, p. 5; Law Society of New South Wales, p. 2; New South Wales Bar Association, p. 3, para. C.1; New South

application to international commercial arbitrations of the States and Territories own Acts on commercial arbitration.²² This was viewed as particularly significant because the Commercial Arbitration Acts allow courts to conduct judicial review on questions of law arising out of the award, which is inconsistent with the Model Law and most international practice.²³

(2) Formal requirements for an arbitration agreement: “an agreement in writing”

15. The requirement that the arbitration agreement be in writing has been eliminated from the Rules,²⁴ although not unanimously.²⁵ The elimination of the requirement was based on the fact that domestic legislation on the subject varies, and many States do not require arbitration agreements to be in writing.²⁶ Moreover, it was indicated that the requirement of writing was not a formal one: it “might be separate from the question of the validity of the arbitration agreement (which was left to the applicable law) or from the question of enforcement under the New York Convention”.²⁷ In fact, the requirement of writing in the 1976 Rules was intended solely to avoid “uncertainty as to whether the Rules have been made applicable.”²⁸

16. This decision is in accordance with the Model Law on International Commercial Arbitration, as amended in 2006.²⁹ The 2006 Model Law contains a more flexible regulation as to the required form of the arbitration agreement, in light of current international arbitration practice. Article 7 contains two options and reads as follows:

“Option I

Wales Young Lawyers International Law Committee, p. 6, para. 9.2; Piper Alderman, p. 2; Victorian Bar, p. 12, para. 24.

²² *Commercial Arbitration Act 1984 (NSW), Commercial Arbitration Act 1984 (Vic), Commercial Arbitration Act 1985 (NT), Commercial Arbitration Act 1985 (WA), Commercial Arbitration Act 1986 (ACT), Commercial Arbitration Act 1986 (Tas) and Commercial Arbitration Act 1990 (Qld).*

²³ Clifford Chance, p. 13.

²⁴ A/CN.9/646, para. 71. The Model Arbitration Clause for Contracts was retained, with minor changes. Its placement within the document remains to be decided: A/CN.9/665, para. 22, p. 7.

²⁵ A/CN.9/646, para. 71, p. 16; A/CN.9/665, para. 18, p. 6.

²⁶ A/CN.9/619, para. 31, p. 8.

²⁷ A/CN.9/614, para. 28, p. 7.

²⁸ D Caron, L Caplan and M Pellonpää, *The UNCITRAL Arbitration Rules. A Commentary* (Oxford: Oxford University Press, 2006), p. 19-20.

²⁹ UNCITRAL, Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, with Explanatory Note by the UNCITRAL Secretariat, paras. 18-20, pp. 27-29

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

17. According to the Commentary to the 2006 Model Law:

“No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.”³⁰

18. To summarise, the 2006 Model Law:

³⁰

Ibid, para. 19.

“follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the ‘contents’ of the agreement ‘in any form’ as equivalent to traditional ‘writing’.”³¹

The word “follows” is evidently used in a loose sense – perhaps as meaning “comes after”, since in fact the requirement of an agreement in writing is being rewritten to mean “an agreement of which there is sufficient evidence”.

19. In connection with this decision, the Commission also adopted a Recommendation on the interpretation of Article II(2) of the 1958 New York Convention, where it recommended that:

“article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive.”³²

AG’s consultation: Writing requirement

20. The question put by the Attorney-General is as follows:

“(i) Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)) be amended?

(ii) If so, should elements of the amended writing requirement in article 7 (option 1) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?”³³

21. The majority of the submissions presented to the Attorney-General agreed with this proposal.³⁴ It was argued in its favour that such an amendment would put the International Arbitration Act in line with current practice in international trade and commerce,³⁵ and would “remove ambiguity and provide certainty”.³⁶

³¹ *Ibid.*

³² UNCITRAL, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, A/61/17, Annex 2, para. 1.

³³ *Ibid.*, Section A.

³⁴ See: AA de Fina, p. 3; AFIA, p. 3; ACICA, p. 2; Bruno Zeller, p. 1; CIArb, p. 5; Clifford Chance, p. 4; Hon. Neil Brown and Sam Luttrell, p. 1; ICC Australia, p. 1; ILSAC, p. 2; John Rundell, p. 3; Law Council of Australia, p. 4; Law Society of New South Wales, p. 1; New South Wales Bar Association, p. 1; Piper Alderman, p. 1; Technology Dispute Centre, p. 1; Victorian Bar, p. 6, para. 12.

³⁵ ACICA, p. 2; Hon. Neil Brown and Sam Luttrell, p. 2; ILSAC, p. 2

³⁶ ACICA, p. 2;

22. In general, there was strong support for the maintenance of the writing requirement. It was said that maintaining it would guarantee Australia's consistency with international standards and with the legal systems of many States, which require arbitration agreements to be in writing. Further, it would ensure the enforceability of Australian arbitration awards and it would ensure the existence of a record of the arbitration agreement, essential evidence for an efficient arbitral system.³⁷ Indeed, as was noted by other submissions, the reason for the requirement that the arbitration agreement be in writing responds to the need to clearly establish the parties' wish to exclude the jurisdiction of national courts.³⁸

23. Some submissions expressed their concerns for the provision as it currently stands, for in their opinion it was unclear and gave no guidance to courts or tribunals on the actual forms a particular arbitration agreement could take and failed to take into account modern means of communication. They recognized that some clarity was shed in this area by the judgment in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, where the Federal Court had clarified that the writing requirement was satisfied by a clear and mutual documentary exchange which showed the terms of the arbitration agreement to which the parties had consented, but maintained that it was insufficient for it still required a physical exchange of documents.³⁹

24. The majority of the submissions preferred the adoption of Option I.⁴⁰ Garnett and Nottage, though generally agreeing with the liberalisation of the writing requirement, warned against complete liberalisation. All in all, they seemed to support Option I, by expressing their agnosticism to Option II.⁴¹

(3) Applicable Law (Article 33, as adopted in First Reading)

25. UNCITRAL Model Law Article 28 provides:

³⁷ *Ibid*, p. 4.

³⁸ Clifford Chance, p. 4, Victorian Bar, p. 6, para. 12.

³⁹ Clifford Chance, pp. 4-5.

⁴⁰ AA de Fina, p. 3; AFIA, p. 3, although AFIA noted that some of its members supported Option II and that there were arguments in favour of rejecting the writing requirement altogether; CI Arb, p. 5; Clifford Chance, p. 6; Hon. Neil Brown and Sam Luttrell, p. 1; ILSAC, pp. 2-3; John Rundell, p. 3; Law Council of Australia, p. 4.; New South Wales Bar Association, p. 2; Piper Alderman, p. 1; Victorian Bar, p. 8, para. 15.

⁴¹ R Garnett and L Nottage, Final Submission, pp. 8-12.

“Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

This may be compared with Article 33 of the 1976 UNCITRAL Rules:

“Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” (emphasis added)

26. The UNCITRAL Working Group debated the use of the word “law” in the text of article 33, and decided to change it to “rules of law”,⁴² a term with a wider meaning. As the Committee explained in relation to the 2006 Model Law:

“by referring to the choice of ‘rules of law’ instead of ‘law’, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention.”⁴³

27. Two variants were proposed on second reading in relation to the situation where the parties have not agreed on the applicable rules of law.

“1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [variant 1: with which the case has the closest connection] [variant 2: which it determines to be appropriate].”

Variant 1 allows the tribunal to apply the “law with which the case has the closest connection”; variant 2 allows it to apply the law “which it determines to be

⁴² A/CN.9/614, para. 122, p. 25; Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session (Vienna, 10-14 September 2007), A/CN.9/641, paras. 106-112, pp. 21-22.

⁴³ UNCITRAL, Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, with Explanatory Note by the UNCITRAL Secretariat, para. 39, p. 33.

appropriate”. Broad support was expressed for variant 2 which was said to modernize the Rules by allowing the tribunal to decide directly on the applicability of international instruments such as the United Nations Convention on Contracts for the International Sale of Goods, the Unidroit Principles of International Commercial Contracts, texts adopted by the International Chamber of Commerce, such as the Incoterms and the Uniform Customs and Practices for Documentary Credit. Then there is that much discussed spectre, the *lex mercatoria* (familarly referred to by Lord Mustill as “the *lex*”: it is something to be on first name terms with the deity of international arbitration).⁴⁴ The matter, however, has not yet been decided.

28. In this context it is helpful also to refer to the possible transposition into the UNCITRAL Rules of the following new provision of the Model Law:

“Article 2A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.”

29. As to paragraph (1) a provision on the character of the Rules was eliminated from the text as presented to the Working Group by the UNCITRAL Secretariat.⁴⁵ The Secretariat had included a provision confirming the international character of the rules, and the need for their uniform interpretation.⁴⁶ The provision was objected to in particular as regards the uniformity of interpretation: uniformity was not a primary goal in the context of contractual arbitration rules.⁴⁷

30. As to paragraph (2) there was no majority, let alone consensus, on the inclusion of a provision on general principles. However, some delegations considered the issue of gap filling of particular importance, and the Working Group agreed to discuss the issue again at a future session. The proposed text reads:

⁴⁴ A/CN.9/641, para. 110, p. 21.

⁴⁵ A/CN.9/646, paras. 46-49, pp. 11-12.

⁴⁶ Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat, A/CN.9/WG.II/WP.145/Add.1, para. 48, pp. 23-24.

⁴⁷ A/CN.9/646, paras. 47-49, p. 12.

“Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.”

31. The Working Group considered it useful to emphasize that the Rules constituted a “self-contained system of contractual norms” and that *lacunae* should be filled by reference to the Rules themselves. However support for the inclusion of one such provision was not unanimous. Some delegations considered that it could be difficult to distil general principles from the Rules, and that therefore a better solution was to empower the parties and the tribunal to decide how to fill the gaps. Others, instead, considered the provision to be superfluous in view of the broad powers granted to the tribunal in under Article 15, which should provide a sufficient basis for filling the gaps.⁴⁸

(4) Defences, counterclaims and set-off

32. There are a number of points here.

Response to the Notice of Arbitration (Article 4, as adopted in Second Reading)

32. This is a new provision which allows respondent parties to present a response to the notice of arbitration. The purpose of this response is to give the respondent a chance to state its position in respect of matters such as jurisdiction, the claim and possible counterclaims or set-off claims before the arbitral tribunal is constituted. The advantage brought by this possibility was that of clarifying at an early stage the main issues of the dispute.⁴⁹

Counterclaims and set-off (Article 4, as adopted in Second Reading)

33. In relation to the UNCITRAL Rules, there has been discussion of the scope for defendants to raise counterclaims and claims by way of set-off. Article 19(3) currently provides:

“In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.”

⁴⁸ *Ibid*, paras. 50-53, pp. 12-13.

⁴⁹ A/CN.9/614, paras. 56-57, pp. 12-13.

34. During the revision process, suggestions were made that counterclaims and set-off claims should extend beyond the contract or legal relationship that forms the basis of the principal claim. In relation to set-off claims, it was suggested that they could be unrelated to the principal claim, and in relation to counterclaims, it was suggested that they should be allowed as long as they were not substantially unconnected to the principal claim.⁵⁰

35. Article 19(3) as adopted in first reading provided:

“3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off [*option 1*: arising out of the same legal relationship, whether contractual or not.] [*option 2*: provided that it falls within the scope of the arbitration agreement.]”

36. During the debates at the fiftieth session of Working Group II, some support was expressed for option 2, but eventually the participants agreed that it would be better to avoid substantive rules on the determination of the arbitral tribunal’s competence, for they could be understood in different manners in different legal systems. A third option was agreed upon, according to which:

“In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the tribunal has jurisdiction over it.”

37. Some criticized this wording for failing to provide sufficient guidance on the scope of the tribunal’s jurisdiction. Others, however, supported it on the ground that it was sufficiently broad, would avoid the adoption of substantive definitions of counterclaims and claims for set-off, and would take account of the situation where the claim had been extinguished by the set-off.⁵¹

⁵⁰ A/CN.9/614, paras. 93-96, p. 20; A/CN.9/619, para. 157-160, pp. 29-30.

⁵¹ Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009), A/CN.9/669, paras. 27-32, pp. 8-9.

(5) Joinder and consolidation

38. UNCITRAL Rules Article 15 [new 17]⁵² has been redrafted in order to incorporate the general powers of the arbitral tribunal. The Working Group considered that practice showed that under the 1976 Rules, tribunals had allowed third party interventions, and that express mention of such a power would be redundant.⁵³ At a later stage, however, the Working Group preferred to include express provision for joinder of third parties. New Rule 17(5) provides:

“The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties including the person or persons to be joined the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration”

39. No provision was included in relation to the consolidation of arbitrations. It was said that consolidation could be a particularly difficult matter to handle, especially in cases of non-administered arbitrations.⁵⁴

(6) Provisional measures and preliminary awards (UNCITRAL Rules Article 26, as adopted on First Reading)

40. UNCITRAL Model Law (2006) Chapter IVA contains no fewer than 11 new provisions on this subject, as follows:

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

Article 17 A. Conditions for granting interim measures

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

Article 17 C. Specific regime for preliminary orders

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

⁵² A/CN.9/WG.II/WP.151, para. 37, p. 16 [as paragraph 4]; Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat, A/CN.9/WG.II/WP.154, para. 37, p. 15.

⁵³ A/CN.9/614, para. 82, p. 18.

⁵⁴ A/CN.9/614, paras. 79-80, p.18; A/CN.9/619, para. 116-120, pp. 23-34.

Article 17 E. Provision of security

Article 17 F. Disclosure

Article 17 G. Costs and damages

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

Article 17 I. Grounds for refusing recognition or enforcement³

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

41. The tribunal's power to order interim measures was addressed in detail by the Working Group. The debates resulted in the adoption of a very long and detailed article clarifying the circumstances, conditions and procedure for the indication of interim measures, which more closely follows Chapter IVA of the 2006 UNCITRAL Model Law.⁵⁵ Given the nature of the Rules and the nature of the Model Law, the provisions of the latter were not replicated in Article 26 of the Rules.⁵⁶

42. Draft Article 26 provides:

“Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraph 2 (a), (b) and (c) or a temporary order referred to under paragraph 5 shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm

⁵⁵ A/CN.9/614, para. 105, p. 22; A/CN.9/641, para. 47, p. 10.

⁵⁶ *Id.*

that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraph 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from issuing a temporary order that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the requested measure.

6. The arbitral tribunal may modify, suspend or terminate an interim measure or an order referred to in paragraph 5 it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

7. The arbitral tribunal may require the party requesting an interim measure or applying for an order referred to in paragraph 5 to provide appropriate security in connection with the measure or the order.

8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or the order referred to in paragraph 5 was requested or granted.

9. The party requesting an interim measure or applying for an order referred to in paragraph 5 may be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

10. A request for interim measures or an application for an order referred to in paragraph 5 addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

43. The article begins by establishing that the tribunal may order provisional measures requested by an interested party. It then proceeds to define interim measures as "any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally settled, the arbitral tribunal orders a party to" follow certain conduct. The article then sets out the 4 types of interim measures that the tribunal can order:

- Maintenance or restoration of the status quo pending the determination of the dispute;

- Taking to prevent, or refraining from taking action likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- Provision of a means of preservation of the assets out of which a subsequent award may be satisfied; and,
- Preservation of evidence that may be relevant and material to the resolution of the dispute.

44. The party requesting them must show that harm not likely to be reparable by the award could occur if the measure is not ordered, and that this harm substantially outweighs the harm suffered by the party against whom the measure is indicated, and that there is a reasonable possibility that the requesting party will succeed on the merits. It is further clarified that, the indication of provisional measures by virtue of the requesting party's fulfilment of these two conditions does not, in any way, affect the eventual decision of the tribunal on the merits. In addition, the tribunal may require the requesting party to provide appropriate security for the granting of the measure.

45. The article further regulates the circumstances of disclosure of a request to the party against whom it is being requested, the tribunal's powers to modify, suspend or terminate interim measures ordered, at the request of any party, or *proprio motu* in exceptional circumstances.

46. On second reading, several proposals were heard in relation to the simplification of the bulky text of Article 26. In the end, however, the Working Group adopted the text of the article with minor changes (in relation to the definition of interim measures, which was modified to recognize its wide and inclusive meaning)⁵⁷ and with a suggestion for the Secretariat for the drafting of a note on how the various *leges arbitri* dealt with the liability for damages that could result from the issuing of interim measures.⁵⁸

47. A suggestion was presented to the Working Group for the inclusion of provisions on preliminary orders in the text of Article 26. The Working Group

⁵⁷ A/CN.9/669, paras. 85-99, pp. 19-22.

⁵⁸ *Ibid*, paras. 116-118, p. 25.

decided against the inclusion of specific provisions on preliminary orders on the basis that the notion of preliminary orders is itself a very controversial subject, that international arbitral practice remained divided in relation to the acceptability of such orders, that a lengthy and complicated procedure for their indication may undermine the spirit, structure and flexibility of the Rules.⁵⁹ In any event, the Working Group considered that, given the broad discretion given to the tribunal for the conduct of the arbitral proceedings, the failure to include a specific provision on preliminary orders did not prevent the arbitral tribunal from issuing them if so required.⁶⁰

48. The issue was taken up again during the fiftieth session of Working Group II, where the matter was debated at length. Several arguments were advanced for and against the inclusion of a rule on preliminary orders. Against the inclusion of such a rule the differences between the nature of the Model Law and the Arbitration Rules were stressed. Similarly, it was suggested that preliminary orders run against the consensual nature of arbitration and that in some jurisdictions preliminary orders could be seen to counter principles of due process.⁶¹

49. Delegates more favourable to the inclusion of the provision maintained that the text of paragraph 5 simply reflected arbitral practice and that removal of said provision would not necessarily prevent arbitrators from granting preliminary orders. Under these circumstances it was thought best to provide useful guidance to the arbitrators in relation to the issuing of these orders. The inclusion would, additionally, guarantee consistency between the Model Law and the Rules.⁶²

50. The matter was eventually settled with the adoption of a compromise provision, which expressed a “neutral approach” to preliminary orders, according to which:

“Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside of these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either

⁵⁹ A/CN.9/641, paras. 54-55, pp. 11-12.

⁶⁰ *Ibid*, para. 59, p. 12.

⁶¹ A/CN.9/669, paras. 100-106, pp. 22-24.

⁶² *Id.*

case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.”⁶³

AG’s consultation: incorporation of UNCITRAL Model Law Part IVA

51. In the context of the revision of the 1974 International Arbitration Act, the Attorney-General asked:

“(i) Should the International Arbitration Act be amended to adopt recent amendments to the UNCITRAL Model Law?”

52. In the discussion paper the Attorney-General focused on four of the amendments adopted by UNCITRAL for its Model Law on International Arbitration in 2006, among which, the question of interim measures and preliminary orders.

53. In the submissions presented to the Attorney-General, it was noted that the provisions on enforcement and recognition of interim measures would overcome two potential hurdles in Australia’s legal framework for enforcing interim measures: (i) enforcement could then occur under the Model Law, rather than under the Convention, which requires the order to be made in the form of partial award to be enforceable; and (ii) it would make the provision in Section 23 superfluous.⁶⁴

54. Most doubts expressed related to the provisions on preliminary orders, which according to the majority of the submissions should not be adopted.⁶⁵ One submission suggested that preliminary orders be allowed only if a fair opportunity to be heard was given to the other party,⁶⁶ whereas many rejected their inclusion arguing that preliminary orders would not be enforceable by Australian Courts and may be contrary to public policy,⁶⁷ were inconsistent with basic procedural fairness⁶⁸ and with the consensual nature of arbitration.⁶⁹ According to one submission:

“an *ex parte* order is not inconsistent with a consensual contractually recorded submission to arbitration any more than is an *ex parte* order based on a

⁶³ *Ibid*, paras. 107-112, pp. 24-25.

⁶⁴ ACICA, pp. 15-16.

⁶⁵ AA de Fina, p. 4; ACICA, pp. 14-16; CIArb, p. 9; ICC Australia, p. 3; Law Council of Australia, p. 8; Law Society of New South Wales, p. 3; New South Wales Bar Association, p. 11, para. F.3; Piper Alderman, p. 3; Victorian Bar, p. 14, para. 30.

⁶⁶ Toby Shnookal, p. 2.

⁶⁷ ACICA, p. 15.

⁶⁸ CIArb, p. 9; Law Council of Australia, p. 8

⁶⁹ CIArb, p. 9; Law Council of Australia, p. 8; Law Society of New South Wales, p. 3; New South Wales Bar Association, p. 11, para. F.3.

consensual contractually recorded submission to a foreign court or any other jurisdiction. A consent given at the time of contract is a binding submission to the full panoply of the arbitral processes agreed to. That consent does not need to be repeated before an arbitral tribunal can exercise jurisdiction. The position is different if the submission to arbitration is inchoate, such as where the parties to a dispute have not yet agreed on the details of the arbitral regime to apply.”⁷⁰

55. Clifford Chance dedicated a lengthy section of its submission to defend the desirability of the inclusion in the Act of provisions allowing for *ex parte* preliminary orders. In favour of preliminary orders Clifford Chance argued that by including said provisions the Arbitration Act would be in line with the parties’ agreement to arbitrate. In their view, by consenting to arbitrate a dispute, the parties have made two critical choices: first, they have selected a forum, and second, they have excluded the jurisdiction of national courts. The Act’s silence on preliminary orders frustrates both these choices for it would require a party to have recourse to national courts to obtain the mentioned orders. In addition, their inclusion in the Act would be a guarantee of Australia’s suitability as a centre for dispute settlement. In their view, preliminary orders could be included together with “carefully drafted safeguards” intended to avoid abuse.⁷¹

56. AFIA argued that the provisions on preliminary orders could be included on an opt-in basis. In their view, this would offer the parties the opportunity to agree on their application and would bring the provisions in line with the consensual nature of arbitration.⁷²

(7) Confidentiality and privacy

57. No topic in the field is more prone to generating heat and e-mail traffic than confidentiality. Despite the fact that neither the UNCITRAL Rules nor the Model Law deal with the matter,⁷³ it is commonly assumed that both confidentiality and privacy are of the essence of international commercial arbitration.⁷⁴ The High Court

⁷⁰ Technology Dispute Centre.

⁷¹ Clifford Chance, pp. 25-26.

⁷² AFIA, p. 6.

⁷³ In particular Article 24. Hearings and written proceedings is silent.

⁷⁴ See, *inter alia*, Expert report of Stephen Bond, *Esso/BHP v Plowman*, (1995) 11 *Arbitration International* No. 8, at 273, cited in: A Redfern and M Hunder, *Law and Practice of International Commercial Litigation* (4th ed., London: Sweet and Maxwell, 2004), para. 1.53, p. 27.

is often criticised for not taking that view in *Esso Australia Resources Ltd v Plowman*.⁷⁵

58. In the process of revision of the UNCITRAL Rules, however, no provision has been included in relation to the confidentiality of proceedings.⁷⁶ Several reasons were adduced against the inclusion of any provision on confidentiality: practice was not settled on this field; the inclusion of a provision on confidentiality would not allow the rules to have the flexibility to adapt to the developments of practice; a general provision on confidentiality could be inappropriate given that, generally, issues of confidentiality are strictly related to the subject matter of the dispute.⁷⁷ The best approach, it was suggested, should be one based on a case-by-case analysis by the parties and the arbitral tribunal.⁷⁸

59. In their submission to the AG's Review, Professors Garnett & Nottage suggest that the Act should reverse the High Court's rejection of an implied term of confidentiality, to follow the worldwide trend towards guaranteeing confidentiality in international commercial arbitration (as distinguished from investor-state arbitration). They recommended the adoption of a provision along the lines of the analogous provision in the New Zealand Arbitration Act.⁷⁹

60. My own view is that the UNCITRAL Working Group has got it right. Ultimately arbitration depends on public power to recognise and enforce the award, and there are numerous situations where absolute confidentiality is neither desirable nor achievable. In *Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184, the Court of Appeal upheld a decision authorising disclosure of documents generated in English arbitration proceedings. The documents were required for the purposes of related court proceedings in New South Wales (NSW) and the British Virgin Islands (the BVI). As regards the extent of confidentiality in arbitration proceedings, confidentiality (of documents, of the existence of the arbitration and the identities of the arbitrators) should be distinguished from the privacy of arbitral

⁷⁵ (1995) 183 CLR 10, 68 ALJR 404, 128 ALR 391.

⁷⁶ A/CN.9/619, para. 133, p. 26.

⁷⁷ *Ibid*, paras. 127-133, pp. 25-26.

⁷⁸ A/CN.9/614, para. 86, p. 19; A/CN.9/619, para. 131, p. 25.

⁷⁹ Garnett & Nottage, p. 28. See Section 14A-I, substituted by s6 of the Arbitration Amendment Act 2007 (NZ) (2007 No 94).

hearings, which is adopted universally. MWP commenced arbitration in England pursuant to an arbitration clause in Mr Emmott’s employment agreement. However, simultaneous court proceedings arising out of similar facts (and against respondents closely associated with Mr Emmott) were instigated in NSW and the BVI. The Court of Appeal held that the “interests of justice” required disclosure of documents generated in the arbitration proceedings in the proceedings in NSW and the BVI in order to prevent those courts from being misled. In the court proceedings, allegations of fraud were made against Mr Emmott, which had been withdrawn in the arbitration. Lawrence Collins LJ clarified that the obligation of non-disclosure of documents generated in the course of arbitration may depend on the nature of the information and the context in which it arises. He provided a useful summary of the circumstances where disclosure of such documents is permissible:

- (a) with express or implied consent of the parties;
- (b) with leave of the court;
- (c) where it is necessary to protect the legitimate interests of the arbitrating party; and
- (d) if it is in the interests of justice or in the public interest to do so (a distinction which has not been completely clarified).

61. In the context of investor-state arbitration, the issue of confidentiality seems to be developing in the opposite direction. The emphasis has been on transparency and accountability, in view of public interest considerations.⁸⁰ The need to balance the private interest of the parties in the confidentiality of the proceedings and the public interest in their disclosure has been particularly evident in NAFTA Arbitrations.⁸¹

62. A proposal for a general provision on confidentiality in the amended UNCITRAL Rules was rejected on the basis that it would run counter to the current trend for greater transparency in international proceedings,⁸² including investor-state arbitration. In a subsequent meeting of the Working Group, he delegates agreed with

⁸⁰ A/CN.9/646, para. 57, p. 13; C McLachlan, L Shore and M Weiniger, *International Investment Law – Substantive Principles* (Oxford: Oxford University Press, 2007), para. 3.40, p. 57.

⁸¹ A Redfern and M Hunter, paras. 1.61-1.63, pp. 32-33. The ICSID Rules on Arbitration Proceedings were amended in 2006 to incorporate greater transparency and the possibility of public participation in the proceedings, by allowing the presentation of *Amicus* Briefs (Rule 37), open hearings (Rule 32) and publication of awards (Rule 48).

⁸² A/CN.9/619, para. 130, p. 25.

the desirability to deal with the issue of transparency of investor-state arbitral proceedings. For the Working Group investor-state arbitration:

“differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good-governance, government activities might be subject to basic requirements of transparency and public participation.”⁸³

(8) The role of the PCA as default authority

63. The Secretariat proposed, after the first meeting of the Working Group, the inclusion of an article dealing specifically with the designation and role of the appointing authority.⁸⁴ This proposal was accepted by the Working Group which considered it as a simplification of the current rules and an important clarification, especially in the context of non administered arbitrations.⁸⁵ In the article adopted, the parties may designate an appointing authority. Under certain circumstances (failure to agree or failure of the appointing authority to act), either party could appeal to the Secretary General of the Permanent Court of Arbitration to designate the appointing authority.

64. Thus new Article 6 provides:

“If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph (1) has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.”

65. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the members of the arbitral tribunal within 30 days after it receives a party’s request to do so under article 39, paragraph (4), any party may request the Secretary-General of the PCA to make that decision.

⁸³ A/CN.9/646, para. 57, p. 13.

⁸⁴ A/CN.9/WG.II/WP.145, paras. 41-42, p. 12.

⁸⁵ A/CN.9/619, para. 69, p. 15; A/CN.9/WG.II/WP.145, para. 16, p. 9.

66. The default role of the Secretary General of the PCA was the subject of important debates: some delegations considered that the Secretary General of the PCA should be made the default appointing authority, to guarantee to the parties a “simple, streamlined and efficient procedure”.⁸⁶ Other delegations viewed such a role as an unnecessary major departure from the original rules.⁸⁷ The question was left open for re-examination after completion of the second reading of the rules.⁸⁸ The Working Group also suggested that it be made clear that the Secretary General of the PCA was an example of an institution that could serve as an appointing authority.⁸⁹

67. An extension of the function of the appointing authority was suggested by the Working Group. It noted that in practice, difficulties had arisen in relation to the control over the fees charged by arbitral tribunals. There had been instances in which arbitral tribunals had charged exaggerated fees, and the parties were left with no other solution but recourse to State courts, which could entail the domestic court reviewing the merits of the award. It was suggested that control over the determination of fees be exercised by the appointing authority, and failing its designation, by the PCA.⁹⁰

III. Conclusion

68. The UNCITRAL review exercise may be modest in scope, but it is nonetheless useful – as the 2006 reforms of the Model Law were. It shows the value of optional rules and model laws as an international legislative technique, at a time when major multilateral conventions have become in practice unamendable.

⁸⁶ A/CN.9/665, para. 47-48, pp. 10-11.

⁸⁷ *Ibid*, para. 49, p. 11.

⁸⁸ *Ibid*, para. 50, p. 11.

⁸⁹ *Ibid*, para. 51, p. 11; A/CN.9/WG.II/WP.145, para. 16, p. 9.

⁹⁰ A/CN.9/646, paras. 20-21, p. 6.