Update on the UNCITRAL Arbitration Rules Revision

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Abstract

The UNCITRAL Rules Revision process began in September 2006 – the first revision in 30 years. The revision process has been a complicated and difficult one. It is a process that cannot be rushed as one might reasonably expect the new edition of the UNCITRAL Rules needs to serve another 30 years. This article provides an insight into the conduct of the 50th session of Working Group II, the Working Group within UNCITRAL that has been charged with preparing draft rules for the Commission to consider and approve. It was a very interesting session in which a number of significant and controversial issues were considered. Our report focuses on three specific issues – the treatment of set-off; witnesses; and interim measures.

A. Introduction

It was during the 32nd session of the United Nations Commission on International Trade Law (UNCITRAL) in 1999 that the Commission observed "*the time had arrived*"[1] to re-examine both the UNCITRAL Model Law on International Commercial Arbitration ('the UNCITRAL Model Law') and the UNCITRAL Arbitration Rules[2] ('the Rules'). Work on the UNCITRAL Model Law took precedence and so it was not until 2006 and its thirty-ninth session, that the Commission again discussed the future work of the Working Group II. The Report of the Commission at that session noted that the revision of the UNCITRAL Arbitration Rules should be given priority, although given the achievement and standing of the UNCITRAL Rules, any amendment should not affect the structure, spirit, drafting style and flexibility of the text.[3] The Commission's Report also noted that the issue of arbitrability and whether this may be defined in a general fashion was also a central question to be addressed, perhaps with a relevant guide as to arbitral matter. Or whether matters that are in fact not arbitral should instead

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1 A/54/17, at 337.

2 United Nations Commission on International Trade Law (UNCITRAL) 1974, UNCITRAL Arbitration Rules.

3 A/61/17, at 184.

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be identified in any legislative provision. However the Commission cautioned that the issue of arbitrability raises public policy concerns, which always prove difficult to define uniformly, and that providing an exhaustive list may impede a State's ability to meet particular public policy concerns that would invariably change with time.[4] The Commission decided that Working Group II should begin discussions concerning arbitrability and a revision of the UNCITRAL Arbitration Rules. As a result, Working Group II has been revising the UNCITRAL Rules since September 2006.

The Working Group met in February 2009 for its 50th session. It had been the long standing desire of both the Commission and the Working Group that the revision process be completed by that session. Had that happened the Commission would then have had the opportunity to consider and perhaps approve the revised version of the UNCITRAL Rules at the Commission's 42nd session which will took place in June/July of 2009. Unfortunately that was not possible. The revision process had been a complicated and difficult one. It is a process that cannot be rushed as one might reasonably expect the new edition of the UNCITRAL Rules needs to serve another 30 years.

The authors of this article attend the Working Group as the delegation from APRAG. APRAG is the Asia Pacific Regional Arbitration Group, and has observer status at UNCITRAL.[5] In this article we report on the Working Group's deliberations in last February's session. It was a very interesting session in which a number of significant and controversial issues considered. Our report focuses on three specific issues – the treatment of set-off; witnesses; and interim measures.

B. Set-off

Previously at the 46th session (February 2007), the Working Group concluded that an additional sentence be added to Article 19(1) to allow a respondent to treat its response to the notice of arbitration provided for in Article 3(5) as its statement of defence. It was also concluded that Article 19 would be amended to be consistent with the amendment to Article 18 concerning the need for the respondent to provide notice in response to the notice of arbitration as set out in Article 3(5). At the 50th session, it was accepted that Article 19(3) will accommodate the possibility of a claim of set-off. As identified in the Secretariat Note, the Working Group agreed that subarticle 3 should contain a set-off provision which allows the arbitral tribunal under certain conditions to determine that counterclaims and set-offs should be extended beyond the contract from which the principal claim arose and apply to a wider range of circumstances.[6] To achieve such an addition,

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4 A/61/17, at 184-187.

5 Further information on APRAG can be found at its website – www.aprag.org. It has been the practice of these authors to prepare a report on each session, which is then published on the APRAG website. These reports are generally available within only a few weeks after the conclusion of each session. The authors also distribute their reports by direct email. Please contact the authors if you wish to be added to their email list.

6 A/CN.9/WG.II/WP.151/Add.1 (hereinafter 'Secretariat Note'), para. 3.

two primary alternatives were proposed. First; using the words "arising out of the same legal relationship, whether contractual or not," as opposed to the original 1974 version which featured "arising out of the same contact." Alternatively, it was suggested that Article 19 should not itself require a connection between the claim and the counterclaim or set-off, and instead leave the arbitral tribunal the discretion to determine whether the counterclaim or set-off falls within the scope of the arbitration agreement.

A third proposal was put that the arbitral tribunal should be able to hear a claim of set-off even where this was outside the scope of the arbitration agreement. This specific proposal was accompanied with the following drafting suggestion for Article 19(3):

> *Article 19, subarticle 3 – proposed amended version*
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> 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.
>
> The arbitral tribunal shall have jurisdiction to hear a set-off defence even if the claim on which the set off is based does not fall within the scope of the arbitration agreement, and even if such claim is the object of a different arbitration agreement or of a forum selection clause, provided that the requirements for a set-off under the substantive law applicable to the main claim are fulfilled.
>
> A counter-claim is admissible only if it falls within the scope of an arbitration agreement between the parties to arbitrate under these Rules and has a sufficient link to the main claim.

The Working Group also considered whether specific provision should be made for set-offs and counterclaims. In support for such a proposition, it was suggested that whilst set-off is always a defence, a counterclaim constitutes a new claim, accordingly there should be two different conditions. To this end, it was noted that whilst a counterclaim is only admissible in the scope of the arbitration agreement, a set-off defence does not require anything in terms of procedural law, rather it is a question of substance. In line with this, it was argued that a true off-set in fact extinguishes the principle claim. Consequently, it was suggested that the relevant question then became whether the proposed amended version of Article 19(3) was acceptable. If so, the effect of the provision would be to confer jurisdiction on an arbitral tribunal to decide the claim before including a set-off defence irrespective of whether the claim upon which the set-off is founded would have been within the scope of the arbitration agreement.

Despite receiving considerable support, the proposed amended version of Article 19(3) did raise some apprehension. Namely, that the position depends upon the effect of a set-off defence in the applicable substantive law. Concern was also raised regarding the prospect of subjecting all claims, set-off's, defences and counterclaims, to one arbitration regime. Such a prospect, it was suggested, would conflict with the fundamental principle that the arbitral tribunal is limited to jurisdiction conferred upon it by arbitration agreement. This concern was met with the suggestion that if the Rules provided for the jurisdiction of the arbitral

tribunal to extend the set-off, by virtue of an adoption of the rule, this extension would act as an agreement by the parties to extent the jurisdiction. Consequently at that stage, both the proposed amended version of Article 19(3) and the option 1 proposal as outlined in the Secretariat Note were rejected in favour of the option 2 proposal.[7]

However, following this discussion, a combination of option 1 and 2 as contained in the Secretariat Note was suggested as a new further alternative. A distinction was drawn between option 1 and 2. The latter provides for set-off defences given that they fall within the scope of the arbitration agreement. By contrast, the former may result in *problematic* restrictions on set-off defences. In addition it was expressed that some disputes may concern various separate contracts. As a result, it was suggested that the scope of the Arbitration agreement is wider than the "same legal relationship" because generally a series of contracts include a common arbitration agreement to cover disputes in one or more of the series of contract, not just one of them. It was argued that the terms "the same legal relationship" would restrict matters in dispute to those governed by a single contract.

An additional suggestion was made that Article 19(3) may merely state that "the respondent may make a counterclaim or rely on a set-off if the arbitral tribunal has jurisdiction to deal with it." It was considered that if this was not possible, there remains a need to change the existing rule which refers to contracts. Despite the use of the words in the Model Law and the New York Convention, it was however decided that examining the provision using the expression "arising out of the same legal relationship" was not beneficial as there remains no clear consensus as to the meaning of this expression. The Working Group observed that the phrase still causes ambiguity in the New York Convention's interpretation. Further dialogue resulted in simplifying the expression as "or acclaimed for the purpose of set-off provided the Tribunal has jurisdiction over it." However, there was some concern that this version was circular. It was noted that the motive behind this simplification was a decision not to expand the jurisdiction of the arbitral tribunal with respect to set off in the Rules themselves. The Working Group suggested that to avoid limiting jurisdiction, the Rules should not distinguish between counterclaims and set-off defences. By contrast, the Rules should leave any existing jurisdiction that already exists on alternative grounds.

Whilst it was initially thought that option 2, as set out in the Secretariat Note, proposed the most suitable resolution, this option raised alternative problematic proposals. Hence, it was suggested that the most appropriate solution was to apply the simplified version of the Secretariat proposal. It was noted that the proposed amended version of Article 19(3) was broader in relation to the arbitration agreement, referring to any arbitration agreement between the same parties, whilst narrower by requiring that any counterclaim have a "sufficient link to the main claim." It was suggested that this would invariably result in negatively restricting counterclaims under the main arbitration agreement. As such, the Working Group conceded that the simplified version was preferable.

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[7] Secretariat Note, *id.*, para 3.

Despite such a conclusion, the adoption of the simplified version did not occur without criticism. It was suggested that the simplified version failed to provide sufficient guidance and on this basis option 2 was in fact preferable. However, despite this criticism, the majority of the Working Group favoured the simplified proposal, resulting in:

> Article 19(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 *provided the arbitral tribunal has jurisdiction over it.*[8]

C. Witnesses

As a preliminary matter, but intimately related to the topic of witnesses, it appears likely that the Working Group will ultimately propose both a restructuring and retitling of the articles dealing with evidence and hearings. The Secretariat Note set out in detail, discussions concerning the structure and headings of Article 24 and Article 25 of the Rules.[9] The Secretariat Note described how the titles of article 24 and 25 are to be modified in an effort to make the title consistent with the Working Groups decision to clarify that article 25 deals with witnesses and experts appointed by the parties. While Articles 24 and 25 of the 1976 Rules are currently headed 'Evidence and Hearings', the Secretariat noted that perhaps the provisions would be less ambiguous if Articles 24 and Article 25 were titled separately. As a result the Working Group will propose that Articles 24 and 25's headings should be amended to 'Evidence' and 'Hearings, Witnesses, including Expert Witnesses' respectively.

The Working Group also considered that the structure of such provisions should be reviewed. It was suggested that the current Article 27 should become Article 26 and a new Article 27 should be inserted, dealing with the interim measure provisions currently contained in Article 26. The Working Group has suggested that the various headings should be changed to more accurately reflect their contents. Particularly, it was noted that Article 27 strictly contains provisions concerning arbitral tribunal appointed expert witnesses, however, the provisions heading "experts" implies that experts should be treated in a different manner (cf. Article 15).

The proposed Article 25(1) provides the arbitral tribunal with a discretion to specify conditions under which it might hear witnesses and experts. The Secretariat Note at paragraph 11 states that the words "For the purposes of these Rules" is inserted to provide a more neutral threshold, which would not cause problems in legal systems where party-witnesses are not permitted. Paragraph 11 also notes that in an effort to prevent restrictive interpretations of the article, the provision refrains from providing examples of categories of witnesses. Instead

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[8] Simplified wording indicated by italics.

[9] Secretariat Note, *supra* note 6, paras. 9-13.

the provision asserts that "any person, including a party to the arbitration who testified to the arbitral tribunal should be treated as a witness under the Rules." The Working Group suggested that Article 25(1 bis) be abbreviated as follows; "For the purposes of these Rules any person may be a witness or an expert witness." However it was suggested that perhaps this abbreviation might cause confusion insofar as a claimant or respondent is not obliged to appear in the capacity of a witness in an arbitration. The Working Group also proposed that the distinction between Article 25 and 27 be clarified, namely that Article 27 refers to arbitral tribunal appointed experts and Article 25 refers to party appointed witnesses.

The next relevant question concerned the arbitral tribunal's freedom to "determine the manner in which witnesses and experts are examined," as explained in Article 25(4). It was agreed that as per Article 25(6), the arbitral tribunal is authorized to consider and give whatever weight it decides to evidence produced by an independent or party witness. However, it was recommended that such power should be qualified by including the words "save where a party is a party to the arbitration" at the end of Article 25(4).

An inconsistency in the terminology of the Rules was identified concerning the use of the meaning of 'witness'. The Working Group suggested this could be overcome by Article 25 making reference to "witnesses including expert witnesses" and that the Rules should plainly specify where the word 'witness' includes experts appointed by the parties or arbitral tribunal. One possible solution put forward by the Working Group was that the words "witnesses and party appointed experts" could replace the words "witnesses and experts" at the end of Article 25(4). Article 25(1) and (4) were distinguished by noting that the former subarticle concerns extensive issues whilst the latter concerns the actual hearing process. While Article 25(1) should not differentiate between independent and party witnesses, the provision should be broadened to allow for witnesses that are a corporation. The Working Group cautioned that the power conferred on a party regarding the presentation of evidence by Article 25(5) is not absolute, and should be monitored by the arbitral tribunal.

There was some consideration of whether Article 25 should be removed altogether, however that proposal was short-lived and the Working Group reached a consensus that Article 25 be retained, albeit simplified. It was considered that subarticle (1) should remain with the addition of the words "and shall organize the procedure to ensure the parties have timely notice of witnesses and experts to be called the language of the hearing, and the procedures to be employed therein" at the end of the provision. It was opined that such an addition may eliminate the need for subarticles (2) and (3). Nonetheless, it was suggested that subarticle (2) if retained, should be simplified to be consistent with Article 18 which requires evidentiary materials to be produced before the hearing. It was also suggested that subarticle (2) should afford a party with an avenue for advising the other party which witnesses or expert witnesses will be used at the arbitration hearing. As is discussed below it was ultimately agreed that subarticle (2) should be omitted.

A new draft of Article 25 was proposed as follows:

Article 25 – Hearings [witnesses and experts omitted]

1. [Unchanged].
1 bis Witnesses and parties [appointed/presented/retains] experts may be heard under the conditions and examined in the manner set out by the arbitral tribunal. [Incorporates subarticle 4, last sentence]. In any individual admitted to testify to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under these Rules, notwithstanding that the individual as a party to the arbitration or any way related to any party. [Redrafted along the lines of LCIA 20.7].
2. At least 15 days before the hearing, the arbitral tribunal, after having invited the parties' views, shall draw up a list of the persons, if any, who are to be examined at the hearing and the languages in which they are to do so.
3. [Omitted].
4. Hearings shall be heard in camera unless the parties agree otherwise. [Remainder of this subarticle omitted or transferred to subarticle 1bis].
5. The arbitral tribunal may direct that witnesses and experts be examined through means that do not require their physical presence at the hearing, such as video transmission [conferencing/connection].
6. [Unchanged].

The Working Group agreed that the words "party appointed experts" should be used in the first sentence of proposed subarticle (1 bis) and that essentially the consequence of this subarticle is that a person will not be prevented from giving evidence on the basis that they are a party to the arbitral proceedings. But rather the relevance of such evidence will be determined by the authority of the arbitral tribunal pursuant to the power conferred on them in Article 25(5).

The Working Group next considered the meaning of the word 'expert' in Article 25(1) and (5). These provisions raised concerns as to whether the term is restricted to party appointed experts, or whether the term is broad enough to encompass all experts. It was suggested that the phrase "any issue of fact or expertise" in the second sentence of the proposed subarticle (1 bis) also raises issues as to interpretation. To this, it was noted that the word "expert" used in Article 24(2) clearly differentiates between party and arbitral tribunal appointed experts and that these proposed provisions apply to situations concerning party appointed experts. Regarding the expression "related to a party," it was suggested that such a broad expression was appropriately used as a result of the difficulty in defining a party when it is a corporation. This generic terminology is intended to encompass all possible forms of legal persons. While it may appear that the arbitral tribunal must recognise a party as a witness, the Working Group confirmed that such a proposition is not true, as all witnesses must satisfy the admissibility provisions proposed Article 24(4).

The Working Group questioned whether the arbitral tribunal should be permitted to exclude party witnesses from the hearing at various times, as provided for in Article 25(4). It was noted that the proposal for Article 25, hearing witnesses in the absence of other witnesses should not be treated as the only means of approaching such witness related issues. By contrast, the best approach would be to make clear that this issue was a discretional managerial matter to be dealt with by the arbitral tribunal. It was also suggested that Article 25(1) could be used as a mechanism to identify persons to be heard as witnesses. Thus the issue of prior notice should be dealt with in Article 25(1) and the proposed

Article 25(2) could therefore be removed. The Working Group also agreed that the proposed subarticle (1 bis) should not be removed, and instead where a party witness is involved, a general discretion should be included.

Finally, agreement was reached that future drafts of the revised Rules should purport to clearly distinguish between party and arbitral tribunal appointed witnesses. Although it was acknowledged, that it may not be feasible to adequately define the term 'expertise' as various arbitral and legal systems treat expert evidence in different ways.

D. Interim Measures

The proposed Article 26, as seen in Secretariat Note 14 to 16, was considered disproportionately long when compared to the remaining Rules. Consequently, a short version of Article 26 was proposed.[10] During discussions regarding the proposed short version, it was noted that the existing detailed provisions of Article 26 are modelled on interim measures and preliminary orders in Chapter IVA of the Model Law as adopted by UNCITRAL at the 39th session of the Commission in 2006. The objective of the extensive version of Article 26 was to provide the arbitral tribunal with direction as to the types of interim measures that could be granted.

Notably it was observed that the proposed short form of Article 26 did not include subarticle (2) and (3). There was a great deal of continued support for subarticles (2) and (3) as a result of the additional guidance they provided to the arbitral tribunal. The Working Group also considered that if the provisions of the Rules in Article 26 were notably dissimilar to those of the Model Law in Chapter IVA, there may be inconsistent interpretation of the Rules and Model Law. However, supporters of the proposed short form of Article 26 suggested that such differences between the Rules and the Model Law were unimportant as the Model Law would not always necessarily be applicable law, and that even if such were the case, to the extent that the Model Law was mandatory, the Model Law would take priority over any provisions in the Rules.

Despite significant support for the proposed short form of Article 26, such support did not amount to consensus. As a result, it was considered more appropriate to follow the more detailed Article 26 proposed in the Secretariat Note. Consequently, the Working Group then turned its attention to other concerns. To prevent subarticle (2) from being read in a restrictive manner, it was recommended that the subarticle be re-drafted to read that: "an interim measure includes any temporary measure ...." In addition, it was suggested that to prevent a limited interpretation, "includes" should instead read "includes without limitation." To this end, it was also suggested that to ensure the flexibility of subarticle (2), an additional subarticle (e) be inserted reading "(e) any other measure that the arbitral tribunal considers necessary for a fair and efficiencies

[10] A/CN.9/WG.II/WP.152 (Annex). We have not extracted the short form as it was not ultimately accepted.

resolution of the dispute." The Working Group concluded that Article 26(2), as set out in the Secretariat Note should be retained with the addition of "includes without limitation" in the first sentence after the words "an interim measure."

The Working Group identified some uncertainty as to whether the application of Article 26(2)(b) is limited to the arbitration process only. To avoid such ambiguity, it was suggested the provision be re-worded as follows:

> (b) take action that would prevent, or refrain from taking action that is likely to cause:
> (i) current or imminent harm; or
> (ii) prejudice to the arbitration process itself;

The Working Group then turned their attention to subarticle (3), which it was suggested might be deleted. It was observed that disregarding subarticle 3(a) may lead to the mistaken inference that the Working Group did not think that the test was appropriate and that without such provisions, the arbitral tribunal may incorrectly apply the "irreparable harm" test instead of the "balance of inconvenience" test as employed in the Model Law. The application of the irreparable harm test may not be consistent with any applicable law which does not provide for a test. As a result, it was acknowledged that subarticle (3) essentially provides a qualification to the power conferred in subarticle (1). Thus, after much dialogue, it was conceded that the expansive Article 26(3), as proposed in the Secretariat Note should remain. However, it was suggested that subarticle (3) should acknowledge that another test or tests required under the applicable law may be applied. The proposed subarticle 26(4) as set out in the longer form version of Article 26 of the Secretariat Note was adopted without change.

The Working Group then considered the extremely contentious subarticle (5) of the proposed longer form of Article 26. As proposed it provided for the granting of temporary orders *ex parte*. However it was observed that the proposal was not identical to the 'equivalent' provisions of Articles 17B and 17C of the Model Law which deal with the granting of preliminary orders *ex parte*. It was suggested that a more appropriate approach would be to make the terminology between the Rules and the Model Law consistent by referring to a "temporary order" in the Rules as a "preliminary order."

The inclusion of subarticle (5) faced much scrutiny as many contended that *ex parte* preliminary orders defy the consensual context of arbitration, and therefore it would be more appropriate to hear *ex parte* applications in a court. For this reason, only a limited number of countries have adopted Chapter IVA of the Model Law. It was also opined that the adoption of subarticle (5) would impede on the universality of the Rules.

It was proposed that subarticle (5) of the longer form of Article 26 should be substituted with the following:

> Nothing in these Rules shall have the effect of creating (where it does not exist) or of limiting (where it does exist) any right a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, an interim measure without notice to a party.

After further discussion it was also agreed that this proposal be further amended to include the words "in either case without prior notice to a party, a temporary order that the party not frustrate the purpose of a requested preliminary order" should be inserted after the words "any power of the arbitral tribunal." Additionally, it was suggested that the words "which exists outside these rules" after the words "any right" be added, and the two sets of prior brackets should be deleted.]

The agreed result was:

> Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.

The Working Group agreed to subarticles (6), (7), (8) and (10) of the proposed longer form Article 26. During discussion regarding subarticle (9), it was suggested that the Working Group would need to consider whether subarticle (9) needs to become a substantive provision of the Rules or whether the whole issue can be left to the applicable law. The proposed short version of Article 26 had addressed the issue in subarticle (9) of the longer form in more general terms stating that the "arbitral tribunal may well at any time on claims for compensation that any damage wrongfully caused by the interim measure or preliminary order."

However, it was considered contentious to adopt this proposal and delete the words "wrongfully caused," as there was some ambiguity as to whether if "wrongfully" was removed, an additional objective standard would have to be applied. This concern was overcome by preference being given to the longer, rather than shorter form subarticle (9), with the addition of the following statement: "in light of the outcome of the case" – a provision which does not have the effect of providing that the award of costs and damages depends on the outcome of the case but means, in effect, that "in light of the outcome of the case it turns out to have been an undue measure." This addition makes clear that there is *a* substantive standard to assist determinations on this issue.

E. Conclusion

As we noted in the introduction to this piece the Working Group sessions are extremely interesting. They are particularly informative as many international arbitration experts participate and contribute views and suggestions guided by their collectively immense experience. However, it is also a very difficult and demanding task. Drafting arbitral rules can be difficult in an institutional context, but that difficulty is noticeably multiplied where the rules have to be capable of being used in *ad hoc* arbitration. When combined with the general importance attached to the UNCITRAL Rules, the revision is therefore not a process to be rushed. The Working Group now expects to send its final recommendations for consideration by the Commission at its 2010 session.