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Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

Note by the Secretariat

Contents

V.14-04816 (E)

I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993,[1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.[3]

2. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the Notes could be considered as a topic of future work.[4] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[5] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010.[6] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the draft convention.[7] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second session, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.

3. A conference was held in Vienna on 21-22 March 2013 in cooperation with the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber on the topic, inter alia, of the Notes and matters that could be considered in their revision. In addition, a questionnaire on whether and how the Notes should be revised was made available to practitioners, through various distribution channels,

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[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 291-296. For discussions at the session of the Commission, in 1994, of a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings", see Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 111-195; for discussions at the session of the Commission, in 1995, of a draft entitled "Draft Notes on Organizing Arbitral Proceedings", see Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 314-373. The Working Group may also wish to consult the drafts considered, namely documents A/CN.9/378/Add.2, A/CN.9/396, A/CN.9/396/Add.1, A/CN.9/410 and A/CN.9/423.

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II.

[3] Ibid., para. 13.

[4] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.

[5] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[6] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

[7] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

including on the website of UNCITRAL. Suggestions made by practitioners are reflected in this note. In addition, submissions communicated to the Secretariat on the revision of the Notes are contained in document A/CN.9/WG.II/WP.184.

4. Moreover, the Working Group may wish to have regard in its consideration of the Notes to guidelines and protocols published by various arbitral associations and institutions[8] and, bearing in mind the intended universal applicability of the Notes,[9] may wish to consider how best experience in different jurisdictions can be brought to bear on the multi-faceted approach taken by the Notes.

II. Proposals for revising the UNCITRAL Notes on Organizing Arbitral Proceedings

A. General remarks and possible additional topics

General Remark

5. The Working Group may wish to provide guidance on the structure and form of, and substantive amendments to the content of, the revised Notes, it being understood that the drafting adjustments will be prepared by the Secretariat (see para. 2 above).

Structure and form of the Notes

6. The Working Group may wish to consider whether the structure and form of the Notes, their style and overall content still fit the needs of practitioners, or whether a different model should be developed. In particular, it may be useful to consider whether the Notes should remain purely descriptive and non-directive as they are currently.

7. Moreover, some of the practices the Notes describe have become common, while others are now virtually unheard of. Likewise, the Notes frequently suggest that the arbitral tribunal "may" wish to consider a matter, when in fact an arbitral tribunal should consider that matter in almost every case. While avoiding that the Notes become a best practice guide, the Working Group may wish to consider whether to nevertheless highlight practices that are often used.

Possible additional topics

8. The following topics were identified by users of the Notes as areas in which the Notes currently lack any, or sufficient, guidance, and which ought to be addressed therein.

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[8] See e.g., CIArb, Practice Guidelines and Protocols, available at: www.ciarb.org/resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols/; and the IBA Rules on the Taking of Evidence in International Arbitration (2010), available at: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx; the ICC Revised Note on the Appointment, Duties and Remuneration of Administrative Secretaries, available at: www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Flash-news/Introduction-of-revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries/; The ICC Report on Issues to be Considered when Using IT in International Arbitration.

[9] See paragraph 11, Introduction to the Notes.

(a) Investment arbitration

9. The omission of information on issues specific to investment arbitration in the Notes has been highlighted by some users of the Notes as requiring redress. Should the Working Group determine that it would be desirable to include information in respect of investment arbitration proceedings, it will be necessary to determine whether such information would be best addressed as a discrete Note or included in existing Notes where relevant. Experts have considered that specific guidance might be needed on matters such as deadline for a State to respond, exercise of its discretion by the arbitral tribunal, interim measures, and assessment of evidence.

(b) Costs

10. It has been suggested that costs could be addressed in much more detail in the Notes, including in relation to guidance in determining the fees of the arbitrators, and the allocation of costs at the end of a hearing.

(c) Interim measures

11. It may be considered whether the Notes should provide guidance on interim measures ordered by arbitral tribunals in light of the relevant work previously done by UNCITRAL in that respect (see below, para. 79).

(d) Technology

12. Users of the Notes have suggested that including a separate section on the use of technology in arbitral proceedings, including for example guidance as to using technology during hearings, hearings conducted via video link and/or other means of data transmission, electronic disclosure and commonly accessible electronic sites for providing information electronically; as well as guidance on ancillary topics such as information security and data protection, might be warranted. Further it was suggested to include cautionary guidance or even a checklist in relation to the steps to undertake before engaging in a technology-heavy hearing for the first time. Terminology or guidance in that respect should be sufficiently general so as not to become quickly obsolete (see also below, paras. 25, 61, 64, 97 and 118).

Topics on which more guidance would be useful

Arbitral institutions

13. The role of arbitral institutions is mentioned frequently throughout the Notes. The Working Group may wish to consider re-visiting the references to institutions throughout the Notes, particularly when their role is described as “often” or “usually” undertaking certain roles (see for instance paras. 19, 24, 25 of the Notes).

Multi-party arbitration

14. Note 18 has been considered by users of the Notes insufficiently detailed to be of assistance in relation to providing guidance on multi-party arbitration (see below, paras. 134 and 135).

B. Comments on the Notes

Preface

15. The Working Group may wish to note that a revised text for the preface will be proposed by the Secretariat.

Introduction to the Notes (*paras. 1-13*)

General

16. Given the objective of the Notes, namely to provide non-binding guidance to arbitration practitioners generally (and in particular to parties less familiar with arbitration), the Working Group may wish to consider whether to simplify the Introduction and in particular to clarify some of the paragraphs/paragraph headings.

17. The Working Group may wish to set out key procedural issues that the parties and/or arbitral tribunals should consider and prioritize at the outset of arbitral proceedings.

18. Certain substantive issues briefly addressed in the Introduction to the Notes, such as multi-party arbitration (also addressed in the body of the Notes), and information regarding the process of making decisions in arbitral proceedings, might be better addressed solely, and on occasion more comprehensively, within the body of the Notes. For example, the section on the "process", currently expressed in paragraphs 7 to 9 of the Introduction, may also have utility in the body of the Notes, following existing Note 1, and could be more comprehensive, for example by mentioning one common practice of preparing a written procedural calendar following the pre-hearing conference. The section on "Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings" expressed in paragraphs 4 and 5 would have utility in the body of the Notes.

19. In addition, general information regarding, for example, the desirability of consultations between the arbitral tribunal and the parties in relation to procedural matters, could be referred to, even where the arbitration rules do not necessarily require such consultation.

Paragraphs 1 and 11

20. The Working Group may wish to consider merging paragraphs 1 and 11 as paragraph 1 addresses the purpose of the Notes, and paragraph 11 observes that the purpose of the Notes is not to promote any practice as best practice. The Working Group may wish to confirm this understanding regarding the purpose of the Notes.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings (paras. 4-5)

21. Paragraph 4 of the Notes addresses the broad discretion and flexibility that laws and rules governing the arbitral procedure normally confer upon the arbitral tribunal (see, for instance, article 19 of the UNCITRAL Model Law on International Commercial Arbitration). In addition, most arbitration laws and rules promote fairness, equality, and efficiency as core principles to be adhered to in the conduct of arbitrations. The Working Group may wish to consider whether to emphasize that

the arbitral tribunal's discretion should be exercised in accordance with these principles, as well as the other factors listed in paragraph 4 of the Notes.

22. As an illustration of drafting matters, the Secretariat will consider:

- Updating footnote 1 in order to refer in addition to article 17(1) of the UNCITRAL Arbitration Rules (as revised in 2010); and adding references to other well-known sets of arbitration rules which contain a similar principle to underscore the universal character of the Notes;
- Replacing the word "just" appearing in the last sentence of paragraph 4 before the words "and cost-efficient" by the word "fair" to promote consistency with the terminology used for example in article 17(1) of the UNCITRAL Arbitration Rules (as revised in 2010);
- Replacing the statement in paragraph 5 of the Notes that observes that "participants may be accustomed to differing styles of conducting arbitrations" with the phrase "participants may be accustomed to different styles of dispute resolution", since users of the Notes may be familiar with a range of methods of dispute resolution;
- Replacing the opening words "Such discretion may make it …" by the words "Such discretion often makes it …", in order to indicate that communication between the arbitral tribunal and the parties on the organization of the proceedings is common practice.

Process of making decisions on organizing arbitral proceedings (paras. 7-9)

23. The Working Group may wish to consider whether paragraph 7 should be revised to indicate that, while there may be cases where an arbitral tribunal may decide to organize the proceedings without consulting the parties, the common practice is for the arbitral tribunal to seek comments from the parties and involve them in the process. Further, while emphasizing that procedural decisions remain at the discretion of the arbitral tribunal, paragraph 7 could also reflect the suggestion that parties may propose procedural steps which they consider the arbitral tribunal should endorse. More generally, the Working Group may wish to consider whether to include provisions aimed at encouraging consultation with, or agreement of, the parties prior to decisions of the arbitral tribunal on procedural issues.

24. The Working Group may wish to consider whether to remove the reference to "improving the procedural atmosphere" at the end of paragraph 7 as its meaning may be unclear.

25. As part of general amendments to emphasize the prevalence of electronic means of communication and to update outdated language or practice in the Notes (see also above, para. 12 and below, paras. 61, 64, 97 and 118), the reference to "telefax" in paragraph 8 should be removed and replaced with a reference to electronic means of communication.

26. As it may be common practice that any meeting to organize the proceedings would take place before a hearing on the merits, the first sentence of paragraph 9 could be revised to read: "It is not uncommon for a special meeting to be devoted exclusively to such procedural consultations."

27. Further, a section on the process of making decisions in relation to organizing arbitral proceedings may address the issue of whether or not the presiding arbitrator can be entrusted with the power to perform certain tasks on his or her own. For example, the presiding arbitrator could decide alone on routine procedural matters (i.e. to extend the time limits for the parties to file their briefs, if so requested by any of the parties, and to postpone the date of any hearing ex officio) or in case of urgency, if he/she cannot reach the co-arbitrators for consultation.

List of matters for possible consideration in organizing arbitral proceedings (paras. 10-13)

28. The heading ("List of matters for possible consideration in organizing arbitral proceedings") of paragraphs 10-13 of the Notes, which set out broad matters for consideration in the context of organizing arbitral proceedings, is the same as the heading of the Table of Contents of the Notes. It is suggested that one of the two headings be amended for the sake of clarity.

29. The Working Group may wish to consider whether to clarify the meaning of the term "universal use" in paragraph 11, in particular whether that term is intended to refer to commercial and investment arbitrations or to refer to domestic and international arbitration.

Table of contents — List of matters for possible consideration in organizing arbitral proceedings

30. The Table of Contents, entitled a "list of matters for possible consideration in organizing arbitral proceedings" has been identified by users as a useful point of reference. The Working Group may wish to note that the list will have to be made consistent with any revision to the Notes.

Annotations

Note 1. Set of arbitration rules (paras. 14-16)

31. Note 1 could be complemented by further information regarding (i) the possibility of institutional support in the event parties select the UNCITRAL Arbitration Rules (as detailed in the 2012 Recommendations to assist arbitral institutions and other interested bodies with regards to arbitrations under the UNCITRAL Arbitration Rules (as revised in 2010)),[10] and the possibility of conducting an arbitration with the UNCITRAL Arbitration Rules ad hoc, as well as (ii) the selection of other institutional rules and the considerations relevant to selecting an arbitral institution to administer an arbitration in that context. In relation to point (i), it may be considered whether to also explain why the parties may consider adopting a set of arbitration rules (for instance, certainty, support of the arbitral institution, management of the arbitrators' fees and expenses).

32. In relation to the caution advised in the event of "consideration of" a set of arbitration rules in paragraph 15 of the Notes, it could be considered whether the intended meaning is "agreement in relation to a set of arbitration rules where none were previously agreed"; furthermore, it might be considered whether the

[10] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), Annex I.

advantages of using a set of ad hoc or institutional rules should also be highlighted in the interest of providing a balance (see also, in this regard, the *travaux préparatoires* of the 1996 Notes, A/CN.9/378/Add.2, para. 7; A/CN.9/396/Add.1, pp. 10-11).

33. A question for consideration would be whether the arbitrators should accept a choice of arbitration rules by parties after the dispute has arisen and the arbitrators have been appointed. The members of the arbitral tribunal have accepted their mandate on the basis of the relevant arbitration agreement, and the use of arbitration rules not included in the arbitration agreement can have a substantial impact also on the procedure, for instance as to the time for rendering an award or the application of rules for fees in the arbitration rules.

34. The Working Group may also wish to consider whether paragraph 16 provides sufficient information in relation to the limits of the *lex arbitri* on the arbitrators' ability to conduct proceedings in the absence of agreement on arbitration rules.

Note 2. Language of proceedings (paras. 17-20)

35. It may be considered whether the advisability of consulting the parties before the arbitral tribunal takes such or any other procedural decision should be mentioned.

(a) Possible need for translation of documents, in full or in part (para. 18)

36. It may be considered whether the words "or languages" should be added after the word "language" in paragraph 18 in order to keep open the possibility for proceedings to be in more than only one language, and for the sake of consistency with paragraph 17.

37. The Working Group may wish to consider whether the Notes should point out that in some arbitrations it may not be necessary or cost efficient to have all documents translated. Indeed parties may wish to consider at the outset of proceedings, that certain categories of documents need not be translated or whether excerpts may be sufficient.

38. It may also be considered whether to provide in the Notes, as a practical matter, for the possibility of translated documents to be submitted a brief period after the submission of original language documents.

39. The quality and the accuracy of translations is plainly important, and the Notes may wish to provide guidance as to when certification of translations might be appropriate as well as guidance as to the resolution of disputes in relation to the authenticity of translations.

(b) Possible need for interpretation of oral presentations (para. 19)

40. Paragraph 19 queries whether arrangements for interpretation should be the responsibility of a party or the arbitral tribunal. Users have indicated that in the majority of cases, the responsibility for arranging for interpretation during oral hearings should lie with the parties and not the arbitral tribunal. Likewise it may be notable that in administered arbitrations, the parties rather than the institution typically arrange for translation or interpretation services.

(c) Cost of translation and interpretation (para. 20)

41. For the sake of clarity, it may be considered to revise paragraph 20 of the Notes as follows: "In taking decisions about translations or interpretation, it is advisable to decide whether any or all of the costs are to be covered, as an initial matter, directly by a party or out of the deposits. Whenever these costs are covered initially, the arbitral tribunal often has the power to decide thereafter how these costs, along with the other arbitration costs, will ultimately be apportioned between the parties."

Note 3. Place of arbitration (paras. 21-23)

(a) Determination of the place of arbitration, if not already agreed upon by the parties (paras. 21-22)

42. The last sentence of paragraph 21 indicates that the arbitral tribunal "may" wish to consult the parties before taking a decision on the place of arbitration. It may be appropriate to revise this sentence to indicate that such consultations are in fact now customary.

43. No distinction is currently made in Note 3 as between the seat of an arbitration, which is likely to be determined by reference to legal factors such as those set out in points (a) and (b) of paragraph 22 of the Notes, and potentially by other factors such as neutrality; and the physical location or place of hearings, which is likely to be determined by non-legal or factual factors, such as those set out in points (c) to (e) of paragraph 22. A number of users have suggested making this distinction explicit, and moreover to clarify the relevance of the legal place as opposed to the physical location of an arbitration.

44. An additional factor that may be relevant to a determination of the seat of arbitration (as distinct from the place of arbitration), possibly under subparagraph (a), is the relevant jurisprudence of that seat in relation to arbitral procedure, setting aside procedure and/or enforcement and recognition of arbitral awards or arbitration agreements.

45. Furthermore it may be helpful if the Notes were to explain that the weight accorded to the respective factors in determining seat and place of arbitration will differ depending on the arbitration.

(b) Possibility of meetings outside the place of arbitration (para. 23)

46. The final sentence of paragraph 23 refers to "The purpose of this discretion"; the Working Group may wish to consider whether the discretion to meet outside the place of arbitration might be for reasons other than purely economical ones, and if so, whether the opening words "The purpose" might be replaced with the words along the lines of "A key purpose".

Note 4. Administrative services that may be needed for the arbitral tribunal to carry out its functions (paras. 24-27)

47. As a matter of drafting, it may be useful to divide this Note into a section on (a) Administrative services for hearings, which could address the administrative arrangements for the proceedings such as those set out in paragraphs 24 and 25 (see also the list under para. 23 of the 2012 Recommendation to assist arbitral

institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010)), and (b) secretarial support, which could address the potentially more fraught issue of arbitral tribunal secretaries, and the different tasks that person is expected to perform.

48. In relation to the latter point, it may be considered whether to address specifically the disclosure of a secretary's involvement, as well as the question of the remuneration of secretaries and the bearer of a secretary's cost (arbitrator or party). The Working Group may also wish to consider including guidance in relation to the independence of secretaries; users of the Notes have suggested that it is increasingly common for statements of independence to be furnished by prospective secretaries.

49. The Notes (in para. 27) currently address the differences of views or expectations as regards the nature of the tasks a secretary ought to be entrusted to carry out, and possible limits of their involvement, but the Working Group may wish to consider this guidance further.

50. Paragraph 25 currently addresses the possibility for parties to take responsibility of the administrative arrangements. It may be useful for the Notes to suggest that parties should decide at an early stage of the proceedings which party should be responsible for which arrangements.

Note 5. Deposits in respect of costs (paras. 28-30)

(a) Amount to be deposited (para. 28)

51. In the second sentence of paragraph 28, the words "In other cases" might be replaced by the words "In other cases, including ad hoc arbitrations …".

52. It may be considered whether arbitrators' fees and the administrative costs and/or registration fees charged by an institution (in the case of an institutional arbitration), should be included in the list of items falling into the estimate of costs of proceedings set out in paragraph 28. The Working Group may wish to refer to articles 40-43 of the UNCITRAL Arbitration Rules (as revised in 2010) when considering this subject. Furthermore, the Working Group may wish to consider whether the inclusion of tax liabilities should be addressed in relation to guidance on costs.

53. It may also be considered whether to include guidance where arbitration rules do not specify if all parties or simply the claimant is to make the deposit, and also whether to address the consequences when the deposit is not made in full by one or more parties; further, it may be considered whether it is standard practice (by institutions and/or arbitral tribunals) that the non-defaulting party make up any shortfall in the advance deposit.

54. Similarly, it may be useful to address the question of how to split costs if additional claims and/or counterclaims are raised, and likewise, the possible consequences if a party does not pay its share.

(b) Management of deposits (para. 29)

55. It may be worth considering whether, particularly as regards to deposits made in arbitrations where no institution is providing support, issues as regards the

holding of money (e.g. the importance in some jurisdictions of having a client money account) ought to be addressed.

56. The Working Group may wish to consider including further information in relation to the description of the account set out in paragraph 29 of the Notes; for example, the specification of the holder of the account in addition to the type and location of the account. Issues such as whether interest will accrue on the account, and how any outstanding interest or monies will be returned at the end of proceedings, may also warrant consideration.

(c) Supplementary deposits (para. 30)

57. The Working Group may wish to consider including in the parenthetical in paragraph 30 of the Notes exigencies such as the proceedings extending beyond their estimated duration, for example because of their unanticipated increased complexity, or the joinder of additional parties to the dispute. As a matter of drafting, the parenthetical could be moved to precede the comma in that sentence.

Note 6. Confidentiality of information relating to the arbitration; possible agreement thereon (paras. 31-32)

58. Paragraph 31 (and in particular the first sentence thereof) could be amended to reflect better the intention of that paragraph to refer to commercial arbitration, as opposed to investment arbitration. Indeed, it may be that a separate provision on that matter in the context of investment arbitration is warranted in this section of the Notes, particularly in view of the coming into force of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration on 1 April 2014.[11]

59. The Working Group may wish to emphasize the need to address issues of confidentiality at an early stage of proceedings.

60. The Working Group may also wish to consider referring to the fact that various institutional rules or national arbitration laws include specific provisions on confidentiality.

Note 7. Routing of written communications among the parties and the arbitrators (paras. 33-34)

61. As with various other Notes, Note 7 may also be updated in relation to technological advances; for example, whether routing via a single e-mail copied to all party(ies) and the arbitrator(s) is a desirable means to serve documents simultaneously (see also above, paras. 12 and 25 and below, paras. 64, 97 and 118).

62. In addition to the practicalities of how written communications should be routed, it may be useful to note that the arbitral tribunal may wish to give guidance on whether unilateral communications between one party and the arbitral tribunal are permissible or whether, in all cases, communications to the arbitral tribunal should be shared with other disputing parties. Paragraph 34 could be revised to reflect that the usual practice now is for parties to correspond directly with the arbitral tribunal (with copy to all parties) and that the other arrangements mentioned are less common.

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[11] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), Annex I.

Note 8. Telefax and other electronic means of sending documents (paras. 35-37)

63. The Working Group may wish to consider amending the title of Note 8 to "Means of Communication".

64. It could be considered how to amend Note 8 to include technologically-neutral language that both reflects current technological practice whilst accommodating future changes in technology that might render certain terms obsolete. For example, the Working Group may wish to refer to "means of communication that provides or allows for a record of its transmission" (consistent with the UNCITRAL Arbitration Rules as revised in 2010) without seeking to list different means of communication. Note 8 should be updated to reflect current practice in relation to the exchange of submission of soft copy documents in addition to or in lieu of hard copy documents (see also above, paras. 12, 25 and 61 and below, paras. 97 and 118).

Note 9. Arrangements for the exchange of written submissions (paras. 38-41)

65. In paragraph 38, it may be useful to include language such as "or to prepare for meetings and discussions which might precede evidentiary hearings" at the end of the first sentence; and to add a sentence at the end of the paragraph to set out the practice in some complex proceedings of requiring the parties to file skeleton arguments that identify issues of law and fact and briefly state the parties' respective positions. More generally, the Working Group may wish to consider whether to revise paragraph 38 of the Notes to reflect that written submissions have now evolved as the principal method by which parties usually present their case. Indeed, it is not uncommon for arbitral tribunals to require parties to submit in writing all of their factual and legal arguments, as well as the evidence (e.g., documents, witness statements, expert reports) and legal authorities on which they rely.

(a) Scheduling of written submissions (paras. 39-40)

66. It may be desirable for the Notes to clarify in paragraph 39 that where the arbitral tribunal "might prefer not to plan the written submissions in advance", it may nonetheless want to schedule a procedural hearing at stated intervals in order to create foreseeable deadlines and/or for the arbitral tribunal to set, or the parties to agree, to a procedural schedule at the outset. Paragraph 39 also sets out that an arbitral tribunal may wish to permit itself discretion to allow late submissions if appropriate under the circumstances; the Notes may wish to provide for the arbitrators to clarify whether the time limits to be set are final, or whether they could be extended, and if extension is permitted, how requests therefor will be managed.

67. Likewise it could be indicated that the arbitral tribunal has the discretion to require or request supplementary or further submissions, where the relevant rules are silent on that matter.

68. In paragraph 40, concerning post-hearing submissions, the arbitral tribunal may be advised to clarify before, during or immediately after the close of oral arguments whether it will accept further written submissions, and any criteria that those submissions must satisfy (e.g. limited to certain topics, or limited by length).

69. Some users have indicated that the final sentence of paragraph 40 is not in line with current practice; the Working Group may wish to consider that matter.

70. As a matter of drafting, in paragraph 40, the words “are still acceptable” could be replaced by the words “may still be accepted”.

(b) Consecutive or simultaneous submissions (para. 41)

71. The Working Group may wish to consider replacing the first sentence of paragraph 41 with a suggestion that written submissions on an issue may be made consecutively or otherwise as ordered by the arbitral tribunal, and to remove references to a party being given a period of time to “react” with a counter-submission.

72. As a matter of drafting, the phrase “within the same time period” in paragraph 41 could be replaced with “at the same time” or “simultaneously”.

Note 10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references) (para. 42)

73. The Working Group may wish to consider whether other details ought to be added to the list set out in paragraph 42 of the Notes, including issues such as (i) possible agreement to produce joint or key sets of documents (see paragraph 53 of the Notes, to which a cross-reference could be made); (ii) whether to submit electronic copies of documents in the first instance, and hard copies a brief period thereafter; (iii) whether all documents accompanying the submission (e.g., bulky legal authorities, data spreadsheets, etc.) must be provided in paper form or may be provided in electronic form only; (iv) the desired format of certain electronic documents (for example, whether PDF documents should be text searchable or data spreadsheets should be provided in original format), bearing in mind the need to ensure technological advancements do not render the terminology obsolete; and (v) whether to characterise documents in ways additional to those set out in paragraph 42, for example differentiating between factual exhibits and legal authorities.

74. It may be useful for the Notes to set out in general terms the timing of the decisions to be made in respect of format, for example the utility of making such determinations in advance of the submission of statements of case.

Note 11. Defining points at issue; order of deciding issues; defining relief or remedy sought (paras. 43-46)

(a) Should a list of points at issue be prepared (para. 43)

75. The Notes currently observe that either the parties or the arbitral tribunal may prepare a list of issues. It may be useful to consider highlighting the differences between a party-agreed list and a tribunal-drafted list of issues. Furthermore it might be suggested that the arbitral tribunal may wish to conduct an initial preparatory meeting with the parties at the outset of the proceedings in order to determine key issues which need to be considered. The Working Group may wish also to clarify that “points at issue” can be factual or legal in nature.

76. It may also be considered whether the Notes ought to address explicitly, in addition to a list of points at issue, whether a party-agreed list of undisputed issues should be addressed in the Notes. Such a list might have the benefit of saving time

and cost insofar as it ensures that parties need not adduce evidence relating to certain facts or matters of law.

77. As matters of drafting, the second sentence of paragraph 43 may read better if the words "it chooses" were to be replaced by "it shall determine". Likewise the words "preparing such a list" — which imply that the arbitral tribunal, rather than the arbitral tribunal or the parties, will prepare the list — might be replaced by "the preparation of such a list." Further, it may be considered whether the word "unnecessary" should be removed from the penultimate sentence in paragraph 43, as that word implies a judgement that may not be appropriate in this type of document.

(b) In which order should the points at issue be decided (paras. 44-45)

78. The Working Group may wish to consider whether a reference to bifurcating proceedings when one decision (e.g. on jurisdiction) is preliminary to another (e.g. on merits), should be included in subparagraph (b).

79. The Working Group may wish to consider addressing the matter of interim measures in paragraph 45 of the Notes, or thereafter (see above, para. 11).

(c) Is there a need to define more precisely the relief or remedy sought (para. 46)

80. The Working Group could consider whether paragraph 46 of the Notes could be re-drafted such that emphasis is placed on the need for the arbitral tribunal to act impartially and not in a way that could be perceived as giving advice to one party.

81. The Working Group may also wish to consider whether the need for separate awards might be addressed in this section.

Note 12. Possible settlement negotiations and their effect on scheduling proceedings (para. 47)

82. It may be considered whether a different approach should be promoted in Note 12 as international commercial arbitral practice has evolved in relation to the appropriateness of an arbitral tribunal recommending settlement.

Note 13. Documentary evidence (paras. 48-54)

83. It may be considered whether information regarding electronic submission of documentary evidence would be appropriate for inclusion in this section; for example, the possibility of submitting disclosure via a shared drive/party- and tribunal-accessible website or sharepoint; and the desirability and/or disadvantages of so doing.

84. It may also be considered whether the Notes ought to provide additional information regarding the nature of document production and different means by which not only the arbitral tribunal might request it (para. (b)), but also, more explanatory information regarding how the parties might seek production of documents from another party. For example, the Notes might be amended to include the practice of producing a collaborative form of document request to which the claimant(s), respondent(s) and arbitral tribunal contribute (for example, a Redfern Schedule; see also the *travaux préparatoires* of the 1996 Notes, A/CN.9/396/Add.1, pp.16-17).

85. The Notes might also describe possible limits on party document requests, i.e. that they not be unreasonably burdensome (as provided for in the IBA Rules on the Taking of Evidence in International Arbitration). Users have indicated in particular that arbitral tribunals ought to be careful to define clearly the page limits for documents submitted electronically, foreseeing for example that embedded documents or hyperlinked documents could add to page counts.

86. Indeed it may be advisable to suggest that the parties consider agreeing on the manner or form of requests for documents and the minimum requirements that such request should meet.

87. It could be indicated in the Notes that, if a party objects to the production of documents, the parties may want to agree to refer such objections to the arbitral tribunal for determination. The Notes might also indicate the instances in document production when arbitral tribunal assistance might be called for (e.g. if a request is not complied with).

(a) Time limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission (paras. 48-49)

88. The Working Group may consider referring to the practice of asking the parties to agree on a timetable for the submission of evidence, which the arbitral tribunal can then confirm or amend as it sees fit.

89. The Notes might usefully clarify that if the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the arbitral tribunal may, after consultation with the parties, schedule the submission of documents and request document production separately for each issue or phase.

90. It may be considered whether, in relation to the late submission of evidence (para. 49), the Notes ought to be less prescriptive about when late submissions could be accepted, as users have indicated that late evidence can in some instances be helpful to the arbitral tribunal. Seeking prior permission of the arbitral tribunal may be one means to allay concerns in relation to the submission of late evidence.

91. The possible costs consequences in the event evidence is submitted late without sufficient cause could also be considered for inclusion in the Notes.

92. The common practice of requiring the parties to submit evidence concurrently with the written submissions could also be referred to.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence (paras. 50-51)

93. It may be considered whether this section could also include requests by parties to produce documents, and the form in which this might be done.

94. The Notes could set out what the request might contain: e.g. a description of the document(s) requested, a brief explanation as to a document's relevance and materiality and the reasonableness of the request.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate (para. 52)

95. In particular in light of the increasing prevalence of electronic disclosure in international arbitration, it may be considered whether any guidance should be added in relation to the provenance of documents disclosed only electronically, as well as any issues relating specifically to electronic disclosure — for example, guidance relating to meta-data and electronic tagging of documents.

96. The Working Group may wish to include translations within the list set out in subparagraph (c) of Note 13.

(d) Are the parties willing to submit jointly a single set of documentary evidence (para. 53)

97. It may be considered whether the latter half of paragraph 53, beginning "When a single set of documents would be too voluminous" is applicable to jointly submitted documents only, or whether it would be equally suited to the entire set of documentary evidence produced by all parties. In any event, in relation to a possible table of contents, and in line with amendments suggested throughout the Notes in relation to technological updates, the Notes could refer to certain practices that are possible with electronic disclosure, including hyperlinked indexes (see also above, paras. 12, 25, 61 and 64, and below, para. 118).

98. Moreover it may be helpful for the Notes to clarify that the provision of a set of documents submitted jointly may not be the exclusive process for the submission of documents, and that there may be situations where both a joint set of documents and separate lists by the parties might be submitted.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples (para. 54)

99. The Working Group may wish to consider amending the title of this subparagraph "Voluminous and complex documentary evidence".

Note 14. Physical evidence other than documents (paras. 55-58)

(a) What arrangements should be made if physical evidence will be submitted (para. 56)

100. It may be useful for the Notes to consider cost implications and the allocation of expenses in consideration with the submission of physical evidence.

(b) What arrangements should be made if an on-site inspection is necessary (paras. 57-58)

101. It may be useful for the Notes to indicate the possibility of an agreed or tribunal-appointed expert to visit a site, and/or the possibility of facilitating electronic communications (e.g. videoconferencing) instead of physical site visits, in the interest of cost and time efficiency.

Note 15. Witnesses (paras. 59-68)

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements (paras. 60-62)

102. The Working Group may wish to consider whether the content of paragraphs 61-62 remains up to date, and moreover to consider how information on written witness evidence might fit with section (b)(i).

(b) Manner of taking oral evidence of witnesses (paras. 63-65)

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted (para. 63)

103. In addition, the Working Group may wish to consider including common terminology (e.g., "direct examination"; "cross-examination"; "re-examination"; etc.) and also to refer directly to the common practice of using witness statements in addition to hearing oral witness evidence. In relation to written witness evidence, it may be useful for the Notes to clarify that a written witness statement should include all documents relied upon as exhibits.

104. The Working Group may wish to consider whether the Notes should address the matter of whether the parties may re-examine their own witnesses after they have been questioned by the arbitral tribunal, and if so, what matters might be addressed in such a re-examination (for example, whether matters of substance previously raised may be addressed or whether only new matters arising after the date of a witness' most recent written statements, updated calculations contained in his or her written statement, and/or corrections to his or her testimony may be addressed). Likewise the Notes may indicate that a direct examination might be limited to topics raised in the witness statement.

105. The Working Group may wish to consider adding to the Notes a discussion on the consequences of a witness' failure to attend a hearing to provide oral testimony, including inferences that could be drawn from unexcused absences or the arbitral tribunal's discretion to determine the weight to be accorded to that witness' written evidence or not to admit that evidence at all.

(c) The order in which the witnesses will be called (para. 66)

106. The Notes may benefit from the insertion of the following language after the phrase "present the witnesses" in the second sentence of paragraph 66: "and the tribunal may ask the parties to try to agree on the timetable and sequence of witness examination, and the amount of time anticipated for each witness", and the deletion of the following phrase: "while it would be up to the arbitral tribunal (...) departures from it."

(d) Interviewing witnesses prior to their appearance at a hearing (para. 67)

107. It may be useful to add the following text to the end of paragraph 67: "and in particular the preparation of written statements. The arbitral tribunal may also wish to clarify what kind of contact a party can have with a witness while he or she is giving evidence in the arbitration."

Note 16. Experts and expert witnesses (paras. 69-73)

108. It is suggested that paragraph 69 could be redrafted as follows, to improve clarity: "Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. In some instances, the arbitral tribunal may appoint a single expert on issues in relation to which the arbitral tribunal has determined it requires expert guidance. Alternatively (or in addition), the parties may be permitted to present expert evidence. In some instances, if the respective experts appointed by the parties diverge widely in their findings, an arbitral tribunal may appoint an expert later in the proceedings."

109. It may be considered whether a single joint expert might be addressed in this paragraph or elsewhere in Note 16, and whether to include a reference to the practice of the giving of concurrent evidence by experts, chaired by the arbitral tribunal (also known in some jurisdictions as "hot-tubbing").

110. In addition, the Notes might refer to the possibility that an arbitral institution may be prepared to assist in the selection of experts.

(a) Expert appointed by the arbitral tribunal (paras. 70-72)

111. In paragraph 70, it is suggested that deleting the phrase "without mentioning a candidate" may add clarity; such a contingency is provided for later in the sentence.

(i) The expert's terms of reference (para. 71)

112. It may be useful to reconsider subparagraph (a)(i), in order to address the terms of reference for both tribunal-appointed as well as party-appointed experts.

113. Users of the Notes have also indicated that terms of reference might highlight that the role of the expert is to assist the arbitral tribunal and not to act as advocate for his or her instructing party. It may be useful for the Notes to refer to various jurisdictions' code of conduct in relation to the giving of evidence in courts.

114. Furthermore the Notes might indicate the desirability of clarification by the arbitral tribunal regarding who can communicate with the expert and whether communications between an expert and an expert's instructing party should be copied to the parties.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony (para. 72)

115. As with subparagraph (a)(i), the Working Group might consider redrafting subparagraph (a)(ii) to render it applicable to the reports of both tribunal- and party-appointed experts.

(b) Expert opinion presented by a party (expert witness) (para. 73)

116. It may be considered useful to include new provisions in Note 16 in relation to:

(i) The determination of issues to be addressed by experts in the context of party-appointed experts (currently addressed in part in paragraph 71, in relation to tribunal-appointed experts), in particular where the claimant(s) and respondent(s) intend to appoint respective experts;

(ii) Whether the arbitral tribunal might find it appropriate to request the expert witnesses to submit a joint report before the hearing, to specify the points where they agree or disagree;

(iii) Where both the claimant(s) and respondent(s) appoint different experts to address the same topics, guidance for the provision of any supplementary or responsive expert reports in relation to the same issues, or additional issues; and

(iv) Whether expert evidence should be submitted at the same time as a statement of case and/or witness statements, or after.

117. If not addressed in amendments to preceding paragraphs of the Notes, it may also be useful to include information on the type of guidance parties may give experts to assist with the drafting of the report, and whether expert's terms of reference and fees, where not already agreed by the arbitral tribunal, must be disclosed.

Note 17. Hearings (paras. 74-85)

118. It could be considered whether to include information in Note 17 regarding hearings assisted or conducted by technological means, or whether such issues relating to technological advances might be better expressed in a discrete note (see also above, paras. 12, 25, 61, 64 and 97).

119. Note 17 might also helpfully describe the admissibility of evidence new to the arbitration at the hearing.

(a) Decision whether to hold hearings (paras. 74-75)

120. It may be considered whether paragraph 75 could be clarified in respect of the factors mitigating for and against holding an oral hearing. For example, it is not clear why "a direct confrontation of arguments" need be an oral hearing rather than written advocacy; as presently drafted, the reference to "correspondence" in lieu of an oral hearing may be misleading.

121. Moreover, it may be useful to consider including, under this section, a differentiation between the decision to hold procedural hearings (which may be influenced by factors such as travel) and to hold substantive hearings on the merits (which may be less influenced by such factors).

122. In paragraph 75, it is suggested to amend the phrase in the final sentence from "may wish" to "ought", to reflect the principle that the determination of whether or not oral hearings would be required is a matter in which the parties might be well placed to provide input.

(b) Whether one period of hearings should be held or separate periods of hearings (para. 76)

123. As a matter of drafting, it may be preferable to refer to "hearings" in the singular ("hearing"), as whether to divide a "hearing" into separate periods might thus be clearer.

124. It may also be considered whether this section should be divided into hearings on procedural issues, which typically take place at specified intervals or when a need arises, and substantive hearings on the merits. Likewise the Notes might

include common case management practices such as holding hearings in a single period, but over four rather than five days per week.

125. It is suggested to delete the phrase "and it is unlikely that people representing a party will change", in the fifth sentence, which might be confusing, and in any event, not related to whether there are separate periods of hearings.

(c) Setting dates for hearings (para. 77)

126. It is suggested that the Notes address the desirability, as a preliminary matter, of encouraging the arbitral tribunal and the parties to fix a date for the hearing as early as possible.

(e) The order in which the parties will present their arguments and evidence (para. 80)

127. In line with general amendments to reflect technological changes, the arbitral tribunal may wish to consider whether the parties' representatives should be able to use presentation aids (such as PowerPoints) and whether they should provide a copy of their slides to the other party and/or arbitral tribunal.

(g) Arrangements for a record of the hearings (paras. 82-83)

128. It may be considered whether this section should be updated to reflect current practice, both in terms of substantive matters and technological ones.

129. It might be useful to include guidance as to the purpose or proposed use of a record of proceedings prepared by the arbitral tribunal or the secretary of the arbitral tribunal; for example, whether such a record is for the benefit of the arbitral tribunal alone, or whether it is discloseable to the parties or subject to their approval.

130. Moreover, it might be considered whether to add that the parties and the arbitral tribunal may agree to establish a time frame for the parties to approve or amend the changes to the transcript, so that there is no substantial delay between the date of the hearing and the date of the approved and correct transcript of the same.

131. It might furthermore be useful for the Notes to address the pros and cons of certain practical issues such as the provision of interpretation (whether simultaneous or consecutive) and the remote attendance of witnesses (e.g. by video link).

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments (paras. 84-85)

132. Subparagraph (h) could consider, in the event post-hearing briefs or notes summarizing oral arguments are permitted, whether to limit their length or content and whether they should be submitted simultaneously or consecutively.

133. The Notes might furthermore clarify that at the end of a hearing, the arbitral tribunal will probably request the parties to submit their notes on costs and fees in a fixed time frame. The time frame as well as the format, and the question as to whether and in what time frame the other party is entitled to make comments on the cost and fee submission, should be clarified.

Note 18. Multi-party arbitration (paras. 86-88)

134. Note 18 has been considered by some users of the Notes insufficiently detailed. It may be useful to consider setting out specific guidance on elements of proceedings that would require modification in the context of a multi-party arbitration, and clarification as to the primary procedural differences between multi-party and two-party arbitration. Such guidance could be included in Note 18, or in subparagraphs as addenda to the relevant Notes (see also above, para. 14).

135. It may also be considered whether issues in relation to joinder and consolidation ought to be addressed, and if so, whether information in that respect should be included in this Note or in a separate Note.

Note 19. Possible requirements concerning filing or delivering the award (paras. 89-90)

136. It might be useful to include information in relation to the rendering of the award; some users of the Notes have suggested that before closing proceedings, the arbitral tribunal should ensure that time has been reserved in each of the arbitrators' diaries for deliberation promptly thereafter; or that, even absent statutory requirements in a particular country, that the parties may wish to consider asking the arbitral tribunal to agree to deliver a final award within a set period. If such topics are covered in Note 19, the title of that Note would need to be amended.