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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Compilation of comments by Governments and international organizations

Contents

* Submission of this note was delayed because of its late receipt.

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I. Introduction

1. In preparation for the forty-third session of the Commission (New York, 21 June-9 July 2010), the text of the draft revised UNCITRAL Arbitration Rules as it resulted from its third reading by the Working Group (contained in document A/CN.9/703 and its Addendum), was circulated at the request of Working Group II to all Governments and to international organizations for comment (see A/CN.9/688, para. 14).

2. The present document reproduces the comments received by the Secretariat on the draft revised UNCITRAL Arbitration Rules, in the form in which they were received by the Secretariat. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Governments and international organizations

A. Comments received from Governments

Czech Republic

[Original: English]
[Date: 30 April 2010]

The Delegation of the Czech Republic confirms that the UNCITRAL Arbitration Rules have been recognized as a very successful text and is generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex. The Delegation of the Czech Republic would like to stress that if there is no consensus the text should remain unchanged.

1. Draft article 2, paragraphs 1 and 2: The Delegation of the Czech Republic supports including in the first paragraph language which authorizes delivery of notice by any means of communication that provides a record of transmission, and to include in the second paragraph provisions addressing the situation where a notice could not be delivered to the addressee in person in the wording prepared by the Secretariat, by omitting the square brackets at the end of the text in the first paragraph lit. b) because a party should be presumed to have designated an address during the proceedings for the purpose of communication with the arbitral tribunal, along the lines: “Notice and calculation of periods of time - 1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is: (a) received if it is physically delivered to the addressee; (b) deemed to have been received if it is delivered at the habitual residence, place of business, or is otherwise capable of being retrieved at an address previously designated by the addressee for the purpose of receiving such a notice. 2. If, after reasonable efforts, delivery of the notice under paragraph 1 failed, the notice is deemed to have been received if it is sent to the addressee’s last known place of business or address. 3. Notice under paragraphs 1 (b) and 2 shall be delivered by any means of communication that provides a record of the information contained therein and of sending and receipt.

4. Notice shall be deemed to have been received on the day it is delivered under paragraph 1 or attempted to be delivered under paragraph 2. 5. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

2. Draft article 6, proposed additional paragraph 3: The Delegation of the Czech Republic supports the wording, which is mentioned in the material A/CN.9/703.

Proposed text of paragraph 4: The Delegation of the Czech Republic supports the wording, which is mentioned in the material A/CN.9/703. In the view of the Delegation of the Czech Republic, this provision should resolve the interplay between articles 6 and 41 and help to simplify article 41.

3. Draft article 34, paragraph 2: The Delegation of the Czech Republic supports the view that paragraph (2) should contain a waiver of all recourses which could be validly waived and be drafted in a manner that avoided any confusion as to the scope of the waiver. The third sentence of paragraph (2) should not contain bracketed language for the purpose of the most broadly stipulated wording of a waiver, with the exception of the right of a party to set aside an award, and execution and enforcement of an award.

4. Draft article 41: The Delegation of the Czech Republic supports the principle of providing a more transparent procedure for the determination of the arbitral tribunal's fees and expenses and supports the review of fees and expenses of the arbitrators to determine whether the fees sought by arbitrators were excessive.

Paragraph (3): The Delegation of the Czech Republic supports the wording, which is mentioned in the material A/CN.9/703/Add.1.

Paragraph (4): The Delegation of the Czech Republic supports that in case there is no appointing authority agreed upon or designated at this late stage of the procedure or if such an appointing authority fails, refuses, or is unable to fulfil its functions, the matter would then be referred to the Secretary-General of the PCA for determination and the Czech Delegation agrees with the proposal to include a provision in article 41 as follows: "The appointing authority shall act promptly and, in any event, must make its decision under paragraphs 3 and 4 within 45 days of receiving the referral", as well as deleting the reference to the time limit of 45 days where it appears in paragraphs 3 and 4.

The opinion of the Delegation of the Czech Republic is that the case where the Secretary-General of the PCA has authority under this paragraph, he should proceed promptly. For purposes of avoiding unnecessary duplication of reviews previously conducted under draft article 41, paragraph (3), the Delegation of the Czech Republic supports the proposal to amend the third sentence of paragraph (4) as follows: "If, after receiving such a referral, the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination of fees and expenses is manifestly excessive, taking into account the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or, to the extent that the determination of fees and expenses is inconsistent with the proposal, finds that the

determination does not satisfy paragraph 1, the appointing authority or the Secretary-General of the PCA shall make any necessary adjustments to the arbitral tribunal's determination, which shall be binding upon the arbitral tribunal."

In support of this proposal, it was said that a review of "manifestly excessive" fees "taking account the arbitral tribunal's proposal" was intended to cover situations, for example, where an arbitrator had determined final fees that technically complied with his or her proposal for an hourly rate but that were based on a questionably high number of hours. That proposal was generally supported.

Proposed new paragraph (5): The Delegation of the Czech Republic has some concerns regarding additional delays with respect to the rendering of the final award that might result from the application of paragraph (4), so it supports the proposal to add a new paragraph (5) to draft article 41, as follows: "A referral under paragraphs (3) and (4) shall not affect the final nature of the arbitral tribunal's decisions on any matter contained in the award other than the amount of its fees and expenses."

The Delegation of the Czech Republic is of the opinion that this new paragraph should clarify that the finality of the award on decisions pertaining to the merits of the case would not be affected by the mechanism provided under paragraph (4).

Slovenia

[Original: English]
[Date: 30 April 2010]

General comments

The UNCITRAL Arbitration Rules are frequently used in commercial transactions entered into by Slovenian companies and we believe this is also the case in other regions of the world. We therefore consider that the work on the revision of the Rules is of great consequence for the foreign trade of Slovenia as well as international trade generally. Against that background, the Slovenian government has since the beginning of this project considered that it was desirable to revise the Rules in order to increase the efficiency of the arbitral process while at the same time preserve the basic philosophy, flexibility and the level of detail of the Rules. The Government of Slovenia considers that, on the whole, the Working Group has successfully met this goal and wishes to congratulate the Working Group and its Chairman for the important work they have accomplished.

As the work on the revision of the Rules nears its completion, it is important to recall that the UNCITRAL Rules have not been used only in ad hoc arbitrations, but that arbitral institutions in different parts of the world have extensively used the Rules as a model for their institutional rules, or, as has been the case with the Permanent Court of Arbitration attached to the Chamber of Commerce of Slovenia, have administered cases under the UNCITRAL Rules. In addition, many arbitral institutions offer to act as appointing authorities under the Rules. The Slovenian Government regards such use of the UNCITRAL Rules in institutional arbitrations as most useful in that it promotes modern and harmonized arbitration practices in various parts of the world and serves to facilitate international trade. For that

reason, the Government of Slovenia suggests that the use of the UNCITRAL Rules in institutional arbitration should be promoted and facilitated also after the revision of the Rules. One way of pursuing this goal would be for UNCITRAL to revise, and expand if necessary, the "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules", which the Commission adopted in 1982. A revision of the Recommendations appears to be all the more necessary in view of the fact that the new Rules will significantly extend and strengthen the functions and the powers of the appointing authority. Some explanation of the policies that guided the Commission in expanding the role of the appointing authority might usefully be added to the amended Recommendations. It is suggested that the work on the revision of the Recommendations be started at the level of experts immediately after the adoption of the new Rules and that the intergovernmental negotiations start as soon as the resources so permit.

Specific comments

Consistent use of expressions: The draft revised Rules use the expression "a party" and "any party" interchangeably (e.g. "a party" in draft articles 4 (2) (f), 8 (1), 26 (5), (7), (8), (10) and "any party" in draft articles 5, 6 (2), 26 (1) and (9)). Similarly, some draft provisions refer to "the parties" while some others to "all parties" ("the parties" is used generally while "all parties" is used e.g. in draft articles 5, 6 (2), 13 (3) and (4), 17 (5) and 34 (5)). Also with no apparent difference in meaning the draft Rules use the term "deems appropriate" and "considers appropriate" (the former in draft articles 40 (1), 42 (2) and 43 (3) and the latter in draft articles 17 (1), 18 (2), 26 (4) and 41 (2)). It would be useful to coordinate these terms, bearing in mind the possibility that the different expressions might be translated into other languages by words that could suggest a difference of meaning, which might cause uncertainties of interpretation.

Draft article 9, paragraph (3): Draft article 9 (3) (pursuant to which the presiding arbitrator is to be appointed in the same way as a sole arbitrator would be appointed under article 8 (2)), appropriately refers to "article 8, paragraph 2". However, in order to capture in draft article 9 (3) also the important rule of draft article 8 (1), according to which the appointing authority should act "at the request of a party", the reference in the last sentence of draft article 9 (3) should be to article 8 and not only to article 8 (2).

Draft article 13, paragraph (4): Draft article 2 provides a general rule of interpretation, according to which periods of time stipulated in the Rules "begin to run on the day following the day when a notice, notification, communication or proposal is received". Draft article 13 (4), however, refers to the "date of the notice of challenge" rather than the date of its receipt as the starting point for the calculation of the time period. Assuming that the policy underlying draft article 13 (4) has been decided upon, it may be useful to highlight the exception in draft article 13 (4) so as to avoid misunderstandings.

Draft article 21, paragraph (4): It is suggested to consider whether draft article 21 (4) should also include a reference to draft article 20 (3), to cater for the situation where the counterclaim or claim for the purpose of a set-off would be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim.

Draft article 26, paragraph 10: It is proposed that the words "agreement to arbitrate" should be replaced by "arbitration agreement", the expression that is generally used in the draft Rules.

Proposed new interpretation provision: The Court of International Commercial Arbitration of Romania, which has more than 50 years of experience in international arbitration, has rules that contain the following provision: "Art. 89. - These Rules are to be construed together with the provisions of the ordinary rules of the Romanian civil procedure insofar as the same are compatible with the arbitration and the commercial and civil character of the disputes." While the Romanian Rules provide so expressly, many practitioners, in particular in Eastern Europe and Central Asia, regard such a gap-filling provision as implied in any arbitration rules. Such an understanding of arbitration rules can be encountered also elsewhere.

For many practitioners it is unclear how to deal with *lacunae* in the current text of the UNCITRAL Rules. At the beginning of the lifetime of the Rules this question was quite open and debated. One can remember one influential voice, that of Karl-Heinz Boeckstiegel, who early on, in the late 70's or early 80's, postulated and explained that Art. 15 [now draft Art. 17] must be understood as displacing the non-mandatory local law governing the conduct of the arbitral process and, *a fortiori*, also the general law of civil procedure. We remember him articulating this not as something self-evident but as the correct and purposeful interpretation of Art. 15. For these reasons it would be useful in our opinion to include within the UNCITRAL Rules the following provision: "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."

The UNCITRAL report should explain that the added Article is not a change but a clarification of how the original Rules should be understood and that the purpose of the addition is to put this question beyond doubt. With respect to the proposed provision, it has been said that it is not clear what the "general principles" are. To alleviate any difficulty of interpretation, an accompanying resolution or report could clarify, perhaps by giving examples, that the general principles are intended to mean the general procedural tenets underlying the UNCITRAL Rules such as the equality of the parties, due process, party autonomy, discretion of the tribunal, efficiency. In our view it is preferable to keep the wording as proposed, because its meaning in other texts has been settled, has generally been well understood and is in line with what is intended in the UNCITRAL Rules.

B. Comments received from international organizations

1. United Nations system

The World Bank

[Original: English]
[Date: 27 April 2010]

The revised Rules introduce important improvements, which we support. We have reviewed the draft revision and we confirm that we have no further comments.

2. International intergovernmental organizations

The Permanent Court of Arbitration (PCA)

[Original: English]
[Date: 29 April 2010]

1. Article 16 (Exclusion of liability): The new Article 16 on exclusion of liability, which is to be added to the Rules, mentions the Secretary-General of the PCA among those against whom parties waive liability under the revised Rules. As an intergovernmental organization, the PCA already enjoys immunity against legal process under various agreements and international conventions. Upon further reflection, I have decided that this provides sufficient protection against liability and that a specific waiver under the revised Rules is unnecessary as regards the PCA.

Furthermore, it has been drawn to my attention that some scholars and practitioners interpret the clause "[s]ave for intentional wrongdoing" that begins Article 16 of the revised Rules as an acknowledgment of liability in cases of intentional acts. The PCA does not in any way intend to waive its immunity against legal process by accepting to undertake the functions delegated to it under the UNCITRAL Rules. I would prefer to avoid the potential for parties to misunderstand that such a waiver has been effected. Consequently, unless the Commission decides to delete the phrase "[s]ave for intentional wrongdoing," I would respectfully request that specific mention of the Secretary-General of the PCA be removed from this article.

2. Articles 40 to 43 (Costs): I note that Article 40, paragraph (f) of the revised Rules currently includes in the definition of costs both "the fees and expenses" of the appointing authority, but only includes the "expenses" of the Secretary-General of the PCA. The PCA currently uses the term "administrative fee" for the amount charged to cover administrative and other expenses involved in processing an application for designation of an appointing authority. The same term is used for other amounts charged for acting as appointing authority when designated by the parties. In order to remove the potential ambiguity that is created by this difference in wording, we would like to suggest that Article 40 be amended as follows: "Article 40 - Definition of costs […] 2. The term "costs" includes only: […] (f) Any fees and expenses of the appointing authority ~~as well as the expenses~~ and of the Secretary-General of the PCA."

I further note that Articles 40 to 43 on costs foresee the possibility that the appointing authority or the PCA (pursuant to Article 6 (4) or 41 (4)) could intervene in cases of "manifestly excessive" fees and expenses of the arbitral tribunal, only (1) after the issuance of the award or other decision fixing said fees and expenses, and (2) upon a specific party request for review of a particular decision. The revised Rules thus do not foresee regulation of requests for deposits or interim payments made from those deposits. Nor do they envisage the possibility of general oversight by the appointing authority.

Although the cases in which oversight of tribunal decisions on their fees and expenses is needed are rare, the parties' protection from potential abuses would be more effective if the appointing authority could review the above-mentioned matters. Without such oversight, the parties would have no direct recourse under the revised Rules against requests for deposits and interim payments that they consider to be "manifestly excessive" or inconsistent with the method for determination of

fees and expenses set under Article 41 (3). Such abuses could thus go unchecked until the very end of the arbitral process, at which point remedies for such abuses may have become more difficult or complicated. We therefore propose the following amendment to Article 43: "Article 43 - Deposit of costs, […] 3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits or make payments of the arbitral tribunal's fees and expenses only after consultation with the appointing authority, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits, ~~and~~ supplementary deposits and payments. Within 15 days of receiving a request for a deposit or supplementary deposit, or being notified of any payment made or expected to be made from such deposits, any party may refer the request to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the deposit requested or payment made by the arbitral tribunal is manifestly excessive, it shall make such adjustments as it deems appropriate, which shall be binding upon the arbitral tribunal."

You may notice that the last sentence of the above proposed amendment uses the phrase "make such adjustments as it deems appropriate" in lieu of the phrase "make any necessary adjustments thereto" that is used in the analogous provisions found at Articles 41 (3) and (4). I believe that this wording removes a slight ambiguity about the scope of the appointing authority's discretion in adjusting deposit requests or payments. As such, I would suggest that the language of Articles 41 (3) and (4) be similarly modified.

Further, given the sensitivities involved in party objections to the arbitral tribunal's determinations of its fees and expenses, it would be useful to allow a party to make a general request that all matters of costs be reviewed by the appointing authority as a matter of course, rather than requiring the party to make individual requests for review following each individual decision. This offers a way to reduce the potential for animosity between a party and the tribunal that can arise from such requests for review. It would also be useful to allow the arbitral tribunal to delegate such matters to the appointing authority of its own initiative. The current text of the revised Rules does not explicitly provide for such possibilities. The following insertion of new paragraphs at the end of Articles 41 and 43 would provide for these possibilities: "Article 41 - Fees and expenses of arbitrators […] 7. A party may at any time request that all matters regarding the fees and expenses of the arbitral tribunal which the appointing authority or Secretary-General of the PCA has competence to review pursuant to paragraphs 3 and 4 be automatically reviewed by the appointing authority. On its own initiative, the arbitral tribunal may also refer any matter regarding the fees and expenses of the arbitral tribunal to the appointing authority for a determination. […] - Article 43 - Deposit of costs […] 6. A party may at any time request that all matters regarding deposits which the appointing authority has competence to review pursuant to paragraph 3 [as proposed to be inserted above] be automatically reviewed by the appointing authority. On its own initiative, the arbitral tribunal may also submit any matter regarding deposits for decision to the appointing authority for a determination."

3. International non-governmental organizations

Arab Association for International Arbitration (AAIA)

[Original: English]
[22 April 2010]

The Arab Association for International Arbitration would like to make some succinct comments on some provisions of the revised UNCITRAL Arbitration Rules as follows:

I-New Article on the response to the Notice of Arbitration: the new Article 4 of the draft revised Rules adds to the 1976 version of the Rules provisions regarding the Response to the Notice of Arbitration. We are in favour of adding this article especially that it fixes a time limit of 30 days within which the respondent shall communicate a response to the notice of arbitration. We find this solution very efficient for the expedition of the arbitration proceedings thereby facilitating the duties of the arbitrators.

II-The appointment of arbitrators: Concerning the appointment of arbitrators dealt with by draft articles 6 to 10, we suggest to add that the appointing authority or the Secretary-General of the Permanent Court of Arbitration shall take into account in appointing the arbitrators the law applicable to the substance of the dispute in order to avoid the appointment of arbitrators not conversed with such laws which may require the appointment of experts in the applicable laws leading to the increase of the costs of arbitration and to the decrease of efficiency of arbitration.

III-New Article on multi-party arbitrations: As for the new draft article 10 on multi-party arbitrations, we are in favour of adding this article particularly due to the increase in the number of multi-party arbitrations and the difficulties in appointing the arbitrators. The provisions of this article facilitate the constitution of the Arbitral Tribunal notwithstanding the existence of several Respondent or Claimant parties and especially when the Group of Claimants on one side and the Group of Respondents on the other side do not agree on the appointment of each of their co-arbitrators.

IV-Disclosures: Draft article 11 deals with the disclosures made by the arbitrators as it compels any prospective arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence from the time of his or her appointment and throughout the arbitral proceedings. Moreover, model statements of independence were annexed to the Rules. However, we suggest that such disclosure be required to be made “in writing” since it constitutes a conclusive proof that the disclosure has been duly signed by the arbitrators in order to guarantee the issuance of the arbitral award by impartial and independent arbitrators, in support of the award’s credibility.

V-Replacement of arbitrators and repetition of hearings: As for draft article 15 concerning the repetition of hearings in the event of replacement of an arbitrator, and for the sake of expedition of the arbitration proceedings, we agree on the provisions of the above draft article reading that the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless the Arbitral Tribunal decides otherwise. Therefore, the rule is that the hearings shall not be repeated and the exception is that in case the arbitral tribunal finds that the hearings should be repeated, it shall be entitled to decide that. Hence,

this solution is deemed appropriate for the sake of expedition and efficiency of the arbitral proceedings.

VI-New Article on the exclusion of liability: The new article 16 on the exclusion of liability established immunity for the arbitrators, the appointing authority, the Secretary-General of the Permanent Court of Arbitration and any person appointed by the Arbitral Tribunal against any claim based on any act or omission in connection with the arbitration as long as the applicable law allowed contractual exoneration from liability. The only exception to such immunity would be the intentional wrongdoing which is according to us very hard to prove. We agree that these provisions would ensure protection in favour of the arbitrators to the fullest extent from any potential claims by parties dissatisfied with the arbitral awards under the pretext of negligence or fault of arbitrators.

VII-The place of arbitration: Regarding the place of arbitration provided for in draft article 18, we agree on the provision that the award shall be deemed to have been made at the place of arbitration, and we suggest to add the term "regardless of the place of signature of the award". The above provision confirm that the place of arbitration is no more a geographical place intended for holding hearings and meetings but it is a seat intended to give rise to legal consequences resulting from or related to the arbitration process and to the enforcement of the arbitral awards. Therefore, we are in favour of the provisions set for the place of arbitration, providing that notwithstanding the appointment of the seat of arbitration, hearings and meetings may be physically held elsewhere.

VIII-The language of Arbitration: As for the language of arbitration, draft article 19 stipulates that the Arbitral Tribunal shall determine the language or languages to be used in the proceedings, subject to an agreement by the parties. However, for practical reasons, we propose to add the following terms to the above provisions "… and taking into account the language of the law applicable to the merits of the dispute", given that adopting the language of the law applicable to arbitration makes it easier on the parties and the arbitrators to quote legal provisions and case law and doctrine without any need for translation, or appointment of legal experts … etc. In addition, the award would be in harmony with the texts of the laws applicable to arbitration.

IX-The plea as to the jurisdiction of the Arbitral Tribunal: Regarding the plea as to the jurisdiction of the Arbitral Tribunal, draft article 23 includes both the principles of "competence-competence" and "autonomy of the arbitration clause". Moreover, it granted the Arbitral Tribunal the right to rule on its own jurisdiction in the absence of any plea as to its jurisdiction. We are in favour of adding the provisions on the Arbitral Tribunal's right to rule on its jurisdiction by itself. We agree on the above draft and also on the addition containing the provision of paragraph 2 of draft article 23 that the fact of appointing or participating in the appointment of an arbitrator does not preclude any party from raising a plea as to the Arbitral Tribunal's jurisdiction, thereby reserving the parties' right to raise any plea concerning the Arbitral Tribunal's jurisdiction even after having appointed their arbitrators.

X-Interim measures of protection: As regards the interim measures, paragraph 8 of draft article 26 provides that the party requesting an interim measure may be liable for any costs and damages caused by that measure to any party if the Arbitral

Tribunal later determines that the measure should not have been granted. The above added terms are consistent with the approach taken by the UNCITRAL Model Law (article 17G) in case the Arbitral Tribunal later finds that such interim measures were not justified or have caused damages to any of the parties. We are in favour of this addition that prevents the parties from acting in bad faith and requesting measures that would turn out to be unjustified. As regards the interim measures requested before the constitution of the Arbitral Tribunal, the national courts shall have jurisdiction to grant these measures and the parties would not be precluded from referring the dispute to arbitration or from continuing the arbitration proceedings.

XI-Confidentiality: On the subject of confidentiality, paragraph 3 of draft article 28 simply provided for the confidentiality of the hearings unless the parties agreed otherwise. As for draft article 34, paragraph 5 reads that an award may be made public with the consent of all parties or where it is required by legal duty. However, once the arbitral award was submitted to judicial courts, it shall become public. However the above provisions did neither mention any confidentiality regarding the arbitration proceedings, communications, documents or evidence submitted, nor any provisions on the confidentiality of the arbitrators' deliberations. Therefore, we propose to add provisions in this regard on the confidentiality of the whole arbitration process to be more consistent with the confidential nature of arbitration.

XII-Decisions: Draft article 33 reads that any award or other decision of the Arbitral Tribunal shall be made by a majority of the arbitrators and that solely in the case of questions of procedure, due to a lack of majority or if the Arbitral Tribunal so authorizes, the presiding arbitrator shall decide alone. Accordingly, we believe that the presiding arbitrator shall be entitled to decide alone in all cases not only in case of questions of procedure but also in all cases including rendering the final award and that could be similar to the approach of the ICC Rules which proved to be very efficient. In our view, this proposed amendment would prevent the issuance of an award by means of a compromise between a co-arbitrator and the presiding arbitrator which makes the award less in compliance with justice and equity. As for the resignation of the arbitrator before the issuance of the arbitral award, we suggest to draft a provision that: "if the arbitrator resigns during the period between the closure of hearings and before the award issuance, the award shall be issued notwithstanding such resignation and no replacement procedure shall take place. However, if such resignation takes place before the closure of hearings, the appointing authority shall decide whether to replace the resigned arbitrator or not, based on its consideration that his or her resignation was an abuse of his or her right to resign". This provision would prevent a "bad faith" arbitrator from causing damages to any of the parties by his or her resignation whenever the arbitrator feels that the outcome of the arbitration would not be in the interest of the party that nominated him or her. These provisions would lead to considering the awards rendered by a truncated tribunal valid and binding.

XIII-Form and effect of the award: waiver of right to appeal or recourse: As for paragraph 2 of the draft article 34 on the finality of the awards, we agree on the provision that the parties, "insofar as they may validly do so by adopting these Rules", waive their right to initiate any form of appeal or recourse against the award except for the application for setting aside such award and proceedings regarding execution and enforcement thereof, for the reason that this waiver constitutes one of

the basic characteristics which distinguishes recourse to arbitration from that to the national courts and protects the arbitral awards from any appeal or recourse other than an application for setting aside or proceedings regarding their enforcement. However, there are national laws that allow appeals and recourses against the award. In this case, the national judges shall decide on these appeals in light of their national laws. Therefore, the purpose of such waiver is not guaranteed in all cases.

XIV-Time limit to render the awards: On the topic of form and effect of the award, draft article 34 does not mention any time limit to render the award. Therefore, we suggest that the Rules include a time limit of six months subject to extension only once by the Arbitral Tribunal for valid and justifiable reasons, in order to prevent any delay in the issuance of the award.

Corporate Counsel International Arbitration Group (CCIAG)

[Original: English]
[22 April 2010]

Article 1.1: A concern was expressed that the omission of the requirement that an agreement to arbitrate be in writing or in some other reproducible form may cause confusion.

Article 7: No change is proposed, although one member suggested that the default case be for one arbitrator on the basis that there is little sense in having three in most cases, and those cases should be agreed by the parties. (This was based on that member's experience that the problem of a "terrorist" co-arbitrator is a more serious problem in UNCITRAL cases). Other members believed that for larger cases three arbitrators is a more appropriate default case, and that parties could agree to one arbitrator where they felt it appropriate.

Article 8: Concerns were expressed that the time periods are still unnecessarily long and could be shortened by at least half. It is not clear why it should it take such a long time to agree or appoint an arbitrator (although it is recognized that in practice it does take a long time, but much of that is dead time). Members pointed out that the delay in the appointment process is one of the biggest complaints about the arbitral process, and it is not even addressed.

Article 9: A similar comment applies here — again, the time periods are long and we would suggest shortening this to one third of the total current time period.

Article 10.3: There is a concern that the revisions here may be over aggressive and may unnecessarily undermine party autonomy in the appointing process. While we understand the basis for the change, consideration should be given to revising it so it would only apply in the case of multi-party arbitrations where there is no agreement on the parties' rights in appointment.

Article 14.2 (b): As drafted, this wording would, "in exceptional circumstances", permit an appointing authority to (i) deny a party the right to appoint a substitute arbitrator and (ii) allow the chair and the other party-appointed arbitrator to decide the case. Is the Secretariat aware of any other set of rules that has such a provision? We know of other rules that provide that the remaining arbitrators can decide the case where an arbitrator refuses to participate, but the changes here contemplate a slightly different situation.

Article 17.5: It is clear that this provision permits a tribunal, upon the request of a single party, to join a third party to the arbitration; however, the power is limited in that the third party must be a party to the arbitration agreement. The new rule would therefore permit a tribunal to force a third party into an arbitration at any stage of the proceedings, and the third party's fate would be decided by a tribunal chosen by the other parties to the dispute. It is therefore suggested that consideration be given to requiring that the joinder occur at the pleading stage, before the tribunal is appointed.

Article 16: The proposed waiver of arbitrator liability provoked a strong reaction from some members, who suggested that this provision alone would prevent their using the new UNCITRAL rules. Other members recognized the need for arbitrators to be able to act robustly and independently in their conduct of the arbitration, and felt that a reasonable balance had been found between the statutory restrictions on such waivers and the needs of the arbitrators themselves.

Article 17.6: The CCIAG still feels the need for greater direction in the rules regarding active case management. An additional provision is therefore suggested as follows: "Within 15 days from the confirmation of the arbitral tribunal or its last member, the Tribunal shall organize one or more procedural hearings with the parties in order to identify any issues capable of early disposition and the means by which such issues should be resolved, establish the timetable for the reasonably prompt conclusion of the arbitration (including the application by either party for a hearing on identified discrete issues), and raise and address any other matters conducive to the efficient conduct of the proceedings. The Tribunal may, after consulting with the parties, adopt such procedural measures as it considers appropriate, provided that such measures are not contrary to the agreement of the parties."

Article 23.3: This article appears unnecessary.

Article 25: Here we would suggest a new 25 (1) and move the existing text to become 25 (2) so the provisions would read as follows: "(1) The arbitral tribunal shall endeavour to conclude the arbitration within 6 months (180 days) from the date of having been constituted, and shall seek the consent of the parties for any circumstances that may warrant a longer period of time. (2) The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified, consistent with article 25 (1) above."

Article 26.9: As drafted the current proposed wording is incomprehensible. Language along the following lines might be more comprehensible: "Nothing in these Rules shall create a right, or limit a right that may exist outside these Rules, for a party to apply to the arbitral tribunal, without prior notice to any other party, for a preliminary order that a party not frustrate the purpose of a requested interim measure, and nothing in these Rules shall grant power, or limit power that may exist outside these Rules, for the arbitral tribunal to issue such an order without prior notice to the other party or parties."

Article 27.2: We are concerned that the wording of the first sentence of proposed Article 27.2 may go too far. If read literally, the provision allows "any individual" to be an expert witness. Normally an expert witness has to have some special

training or experience to qualify as an expert. The apparent intent of the provision is to make clear that parties or people related to a party are qualified to testify, and that their testimony will not be discounted solely because of the relationship to the party. (We are aware that in some civil law jurisdictions, party witnesses are not sworn and their testimony is not given the same weight as non-party witnesses.) Wording along the following lines would be preferable: "Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may include the party or persons related to the party."

Article 28.4: The revisions to Article 28 (4) are a good attempt at modernization but don't bring the provision fully up to date. The point about teleconference and videoconference should be extended to all aspects of hearings, not just the hearing of witnesses and experts. Perhaps we could introduce a new term "telepresence" in addition to videoconference, as this technology is bound to become more common and render physical presence at hearings unnecessary in coming years.

Article 30: Article 30 on defaults should provide for respondents to proceed in the event of a default by the claimant, as there may be situations in which the respondent will want the claim decided, and other situations where the claimant will simply withdraw its claim in order to get a better tribunal. The current rules do not address either concern in an effective way, and there is no reason to privilege claimants over respondents (as the current versions (a) and (b) do).

Article 31: Proceedings need to be closed on a fixed date, and it would be better if the language were revised to make it automatic that, unless the parties agree otherwise, the proceedings are deemed to be closed either at the conclusion of the hearing or upon submission of the last post-hearing submission.

Article 33: There should be an affirmative obligation on the tribunal to issue the award within 30 days of the close of the proceedings, unless expressly modified by the parties (not the arbitrators).

Article 34.2: The language of the final two sentences of proposed Art. 34.2 is confusing as drafted. Language along the following lines would better express the intent of the proposed language: "Insofar as they may validly do so, by adopting these Rules, the parties waive their right to contest the award on grounds other than those set forth in Article V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards."

Article 36.2: The current Art. 36.2 provides that: "If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible …, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection." The proposed Art. 36.2 would change the final sentence to provide: "The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so."

The current language makes more sense than the proposed modification. The premise of the provision is that continuation of the arbitration has become "unnecessary or impossible". The current language recognizes that under those conditions, a party might have justifiable ground for asking the tribunal to suspend rather than terminate the proceedings. The proposed new language states that when

continuation of an arbitration becomes unnecessary or impossible, the tribunal shall have power to terminate the proceedings unless there are matters that (i) "need to be decided" and (ii) "the arbitral tribunal considers it appropriate to [issue such an order]." If matters "need to be decided" and deciding them would be "appropriate," continuation of the proceedings would not "unnecessary," and it would not likely be "impossible."

Articles 41.3, 41.4: The addition of greater control over the determination of arbitrators' fees and expenses is one of the key improvements of the revised rules. During the last session of the Working Group in New York, efforts were made to soften the strength of these provisions. The CCIAG believes the current provisions are key to the successful adoption of the rules and the future management of arbitrators' expectations and practice. Although instances of abuse are fortunately fairly infrequent, the current rules provide no protection to users and the arbitration community must address this to protect the reputation and integrity of the system and its practitioners. We would be very concerned if any further diminution in these provisions were to be adopted before the rules were finalised, indeed our preference would be for them to be strengthened further.

One further administrative point in relation to these articles: several arbitration providers offer to act as the appointing authority for arbitrations under the UNCITRAL Rules, e.g. PCA, ICC, AAA, and SIAC, and they have established fees for providing this service; however, as far as we are aware, none of those providers contemplates that their duties as an appointing authority would include resolving fee disputes between parties and arbitrators. We suggest UNCITRAL consult all of these bodies, before adopting proposed Arts. 41.3 and 41.4, to confirm whether they are willing to include fee dispute resolution as part of their appointing authority services and this could be confirmed in the explanatory notes to the revised rules.