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Settlement of commercial disputes: Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010

Note by the Secretariat

Addendum

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III. Arbitral institution acting as appointing authority

27. An institution (or a person) may act as appointing authority under the UNCITRAL Arbitration Rules. It is noteworthy that article 6 of the 2010 UNCITRAL Arbitration Rules highlights the importance of the role of the appointing authority.[1] Parties are invited to agree on an appointing authority if possible at the time they conclude the arbitration agreement. In addition, the appointing authority could be appointed by the parties at any time during the arbitration proceedings.

28. Arbitral institutions are usually experienced with fulfilling functions similar to those required from an appointing authority under the Rules. For an individual, who takes on that responsibility for the first time, it is important to note that, once designated as appointed authority, he or she must be and remain independent and be prepared to act promptly for all purposes under the Rules.

29. An institution that is willing to act as appointing authority under the UNCITRAL Arbitration Rules may indicate in its administrative procedures the various functions of an appointing authority envisaged by these Rules. It may also describe the manner in which it intends to perform these functions.

30. The 2010 UNCITRAL Arbitration Rules foresee six main functions for the appointing authority: (a) appointment of arbitrators, (b) decision on challenge of arbitrators, (c) replacement of arbitrators, (d) assistance in fixing the fees of arbitrators, (e) participation in the review mechanism on the costs and fees and (f) advisory comments regarding deposits. The following paragraphs are intended to provide some guidance on the role of the appointing authority under the 2010 UNCITRAL Arbitration Rules based on the *travaux préparatoires*.

1. Designating and appointing authorities (article 6)

31. Article 6 was included as a new provision in the 2010 UNCITRAL Arbitration Rules to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration.[2]

a. Procedure for choosing or designating an appointing authority (article 6, paragraphs (1) to (3))

32. Article 6, paragraphs (1) to (3), determines the procedure to be followed by the parties in order to choose an appointing authority or to have it designated, in case of disagreement. Paragraph (1) expresses the principle that the appointing authority can be appointed by the parties at *any* time during the arbitration proceedings, and not only in some limited circumstances.[3]

b. Failure to act — substitute appointing authority (article 6, paragraph (4))

33. Article 6, paragraph (4), addresses the situation where an appointing authority refuses or fails to act within a time period provided by the Rules, or fails to decide

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 42.

[2] Ibid., para. 42; A/CN.9/619, para. 46 and A/CN.9/665, para. 69.

[3] A/CN.9/619, para. 46 and A/CN.9/665, para. 69.

on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so. Then, any party may request the Secretary-General of the PCA to designate a substitute appointing authority. The failure to act of the appointing authority in the context of the fee review mechanism under article 41, paragraph (4) of the Rules, does not fall under article 6, paragraph (4) ("except as referred to in article 41, paragraph (4)"), but is dealt with directly in article 41, paragraph (4) (see below, paragraph 58).[4]

c. Discretion in the exercise of its functions (article 6, paragraph (5))

34. Article 6, paragraph (5), provides that, in exercising its functions under the Rules, the appointing authority may require from any party and the arbitrators the information it deems necessary. That provision was included in the 2010 UNCITRAL Arbitration Rules to explicitly provide the appointing authority with the power to require information not only from the parties, but also from the arbitrators. The arbitrators are explicitly mentioned in the provision, as there are instances, such as a challenge procedure, in which the appointing authority, in exercising its functions, may require information from the arbitrators.[5]

35. It further provides that the appointing authority shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner the appointing authority considers appropriate. During the deliberations on the revisions to the Rules, it was agreed that the general principle should be included that the parties should be given an opportunity to be heard by the appointing authority.[6] That opportunity should be given "in any manner" the appointing authority "considers appropriate", in order to better reflect the discretion of the appointing authority in obtaining views from the parties.[7]

36. Article 6, paragraph (5), determines that all such communications to and from the appointing authority shall be provided by the sender to all other parties. That provision is consistent with article 17, paragraph (4), of the Rules.

d. General provision on appointment of arbitrators (article 6, paragraphs (6) and (7))

37. Article 6, paragraph (6), provides that, when the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

38. Article 6, paragraph (7), provides that the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. To that end, paragraph 7 further recommends the appointment of an arbitrator of a nationality other than the nationalities of the parties (see also below, paragraph 44).

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[4] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 49.

[5] A/CN.9/WGII/WP.157, para. 22.

[6] A/CN.9/619, para. 76.

[7] A/CN.9/665, para. 54.

2. Appointment of arbitrators

a. Appointment of a sole arbitrator (article 7, paragraph (2) and article 8)

39. The UNCITRAL Arbitration Rules envisage various possibilities concerning the appointment of an arbitrator by an appointing authority. Under article 8, paragraph (1), the appointing authority may be requested to appoint a sole arbitrator, in accordance with the procedures and criteria set forth in article 8, paragraph (2). The appointing authority shall appoint the sole arbitrator as promptly as possible, and shall intervene only at the request of a party. The appointing authority may use the list-procedure as defined in article 8, paragraph (2). It should be noted that the appointing authority has discretion pursuant to article 8, paragraph (2) to determine that the use of the list-procedure is not appropriate for the case.

40. Article 7, dealing with the number of arbitrators, provides, as a default rule, that in case parties do not agree on the number of arbitrators, three arbitrators should be appointed. However, article 7, paragraph (2) includes a corrective mechanism so that, if no other parties have responded to a party's proposal to appoint a sole arbitrator and the party(ies) concerned have failed to appoint a second arbitrator, the appointing authority may, at the request of a party, appoint a sole arbitrator, if it determines that, in view of the circumstances of the case, this is more appropriate. That provision has been included in the Rules to avoid situations where, despite the claimant's proposal in its notice of arbitration to appoint a sole arbitrator, a three-member arbitral tribunal has to be constituted due to the respondent's failure to react to that proposal. It provides a useful corrective mechanism in case the respondent does not participate in the process and the arbitration case does not warrant the appointment of a three-member arbitral tribunal. That mechanism is not supposed to create delays, as the appointing authority is requested to intervene in the appointment process. The appointing authority should have all relevant information or require information under article 6, paragraph (5), to make its decision on the number of arbitrators.[8] Such information would include, in accordance with article 6, paragraph (6) copies of the notice of arbitration, and if it exists, any response thereto.

41. When an appointing authority is requested under article 7, paragraph (2) and article 8 to determine whether a sole arbitrator is more appropriate for the case, circumstances to be taken into consideration include the amount in dispute and the complexity of the case (including the number of parties involved),[9] as well as the nature of the transaction and of the dispute.

42. In some cases, the respondent might not take part in the constitution of the arbitral tribunal, so that the appointing authority has before it the information received from the claimant only. Then, the appointing authority can make its assessment only on the basis of that information, being aware that it might not reflect all aspects of the proceedings to come.

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[8] Ibid., paras. 62-63.

[9] For example, if one party is a State, whether there are (or will potentially be) counterclaims, or set-off claims.

b. Appointment of a three-member arbitral tribunal (article 9)

43. The appointing authority may be requested by a party, under article 9, paragraph (2), to appoint the second of three arbitrators in case of a three arbitrator panel. If the two arbitrators cannot agree on the choice of the third (presiding) arbitrator, the appointing authority can be called upon to appoint the third arbitrator under article 9, paragraph (3). That appointment would take place in the same manner as a sole arbitrator would be appointed under article 8. In accordance with article 8, paragraph (1), the appointing authority should act only at the request of a party.[10]

44. When an appointing authority is asked to appoint the presiding arbitrator pursuant to article 9, paragraph (3), factors to take into consideration include the experience of the arbitrator as well as his or her nationality, which is recommended to be different from that of the parties (see above, paragraph 38 on article 6, paragraph (7)).

c. Multiple claimants or respondents (article 10)

45. Article 10, paragraph (1) provides that, in case of multiple claimants or respondents, unless otherwise agreed, the multiple claimants, jointly, and the multiple respondents, jointly, should appoint an arbitrator. In the absence of such a joint nomination and where all parties were unable to agree on a method for the constitution of the arbitral tribunal, the appointing authority shall, upon the request of any party pursuant to article 10, paragraph (3), constitute the arbitral tribunal and designate one of the arbitrators to act as the presiding arbitrator.[11] An illustration of a case where parties on either side could be unable to make such an appointment is where the number of either claimants or respondents is very large or does not form a single group with common rights and obligations (for instance, cases involving a large number of shareholders).[12]

46. The power of the appointing authority to constitute the arbitral tribunal is broadly formulated in article 10, paragraph (3) in order to cover all possible failures to constitute the arbitral tribunal under the Rules,[13] and is not limited to multiparty cases. Also, it is noteworthy that the appointing authority has the discretion to revoke any appointment already made and to appoint or reappoint each of the arbitrators.[14] The principle in paragraph (3) that the appointing authority should appoint the entire arbitral tribunal when parties on the same side in a multiparty arbitration were unable to jointly agree on an arbitrator was included in the Rules as an important principle, in particular in situations like the one that had given rise to the case *BKMI and Siemens v. Dutco*.[15] The decision in the *Dutco* case had been based on the requirement that parties receive equal treatment, which paragraph (3)

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[10] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 59.

[11] A/CN.9/614, paras. 62-63 and A/CN.9/619, para. 86.

[12] A/CN.9/614, para. 63.

[13] A/CN.9/619, para. 88.

[14] Ibid., para. 89.

[15] *BKMI and Siemens v. Dutco*, French Court of Cassation, 7 January 1992 (see *Revue de l'Arbitrage*, 1992, p. 470).

addresses by shifting the appointment power to the appointing authority.[16] The *travaux préparatoires* of the 2010 UNCITRAL Arbitration Rules show that emphasis had been given to maintaining a flexible approach, and granting discretionary powers to the appointing authority in article 10, paragraph (3), in order to accommodate the wide variety of situations arising in practice.[17]

d. Successful challenge and other reasons for replacement of an arbitrator (articles 12 and 13)

47. The appointing authority may be called upon to appoint a substitute arbitrator under articles 12, paragraph (3), 13 or 14 (failure or impossibility to act, successful challenge and other reasons for replacement, see below, paragraphs 49-54).

e. Note for the institutions acting as an appointing authority

48. For each of these instances where an institution may be called upon under the UNCITRAL Arbitration Rules to appoint an arbitrator, the institution may indicate details as to how it would select the arbitrator. In particular, it may state whether it maintains a list of arbitrators, from which it would select appropriate candidates, and may provide information on the composition of such list. It may also indicate which person or organ within the institution would make the appointment (for example, the president, a board of directors, the secretary-general or a committee) and, in case of a board or committee, how that organ is composed and/or its members are elected.

3. Decision on challenge of arbitrator

a. Articles 12 and 13

49. Under article 12 of the UNCITRAL Arbitration Rules, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. When such a challenge is contested (i.e., if the other party does not agree to the challenge or the challenged arbitrator does not withdraw within 15 days of the notice of the challenge), the party making the challenge may seek a decision on the challenge by the appointing authority pursuant to article 13, paragraph (4). If the appointing authority sustains the challenge, it may also be called upon to appoint the substitute arbitrator.

b. Note for the institutions acting as an appointing authority

50. The institution may indicate details as to how it would make the decision on such a challenge in accordance with the UNCITRAL Arbitration Rules. The institution may also wish to identify any code of ethics of its institution or other written principles which it would apply in ascertaining the independence and impartiality of arbitrators.

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[16] *Official records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 60.

[17] A/CN.9/619, para. 90.

4. Replacement of an arbitrator

a. Article 14

51. In the event that an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced under article 14, paragraph (1). That procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

52. This procedure is subject to article 14, paragraph (2). Paragraph (2) provides the appointing authority with the power to determine, at the request of a party, whether it would be justified for a party to be deprived of its right to appoint a substitute arbitrator. If the appointing authority makes such a determination, it may, after giving an opportunity to the parties and the remaining arbitrators to express their views, (a) appoint the substitute arbitrator or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

53. It is noteworthy that the appointing authority should only deprive a party of its right to appoint a substitute arbitrator in exceptional circumstances. To that end, the wording "*the exceptional circumstances of the case*" in article 14, paragraph (2) was chosen to allow the appointing authority to take account of all circumstances or incidents which might have occurred during the proceedings.[18] The *travaux préparatoires* of the 2010 UNCITRAL Arbitration Rules show that depriving a party of its right to appoint an arbitrator is a serious decision, which should be taken based on the faulty behaviour of a party to the arbitration, on a fact-specific inquiry, and should not be subject to defined criteria. Rather, the appointing authority should determine, in its discretion, whether the party has the right to appoint another arbitrator.[19] Such exceptional circumstances could include cases of improper conduct of a party,[20] for example, if a party used dilatory tactics with respect to the replacement procedure of an arbitrator, or of an arbitrator in case the improper conduct of the arbitrator is clearly attributable to the party.

54. In determining whether to permit a truncated tribunal to proceed with the arbitration under article 14, paragraph (2)(b), the appointing authority must take into consideration the stage of the proceedings. If the hearings are already closed, it might be more appropriate for the sake of efficiency, to allow a truncated tribunal to make any decision or final award, than to proceed with the appointment of a substitute arbitrator. Other factors to be taken into consideration, to the extent feasible, in deciding whether to allow a truncated tribunal to proceed include the relevant applicable law (i.e. whether the law would permit or restrict such a procedure) as well as relevant case law on truncated tribunals.

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[18] A/CN.9/688, para. 78.
[19] A/CN.9/688, para. 78; A/CN.9/614, para. 71.
[20] A/CN.9/665, para. 112.

5. Assistance in fixing fees of arbitrators

a. Articles 40 and 41

55. Pursuant to article 40, paragraphs (1) and (2)(a) of the 2010 UNCITRAL Arbitration Rules, the arbitral tribunal fixes its fees and expenses. Pursuant to article 41, paragraph (1), the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. In this task, the arbitral tribunal may be assisted by an appointing authority: if the appointing authority applies or has stated that it will apply a schedule or particular method for determining the fees of arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case (article 41, paragraph (2)).

b. Note for the institutions acting as an appointing authority

56. An institution willing to act as appointing authority may indicate, in its administrative procedures, any relevant details in respect of assistance in fixing the fees. In particular, it may state whether it has issued a schedule or particular method for determining the fees for arbitrators in international cases as envisaged under in article 41, paragraph (2) (see also above, [in document A/CN.9/746] paragraph 19).

6. Review mechanism

a. Article 41

57. Article 41 addresses the fees and expenses of arbitrators and foresees a review mechanism of the fees by a neutral body, the appointing authority. Notwithstanding that an institution might have its own rules on fees, it is recommended that the institution acting as appointing authority, should follow the rules embodied in article 41.

58. The review mechanism consists of two stages. At the first stage, article 41, paragraph (3) requires the arbitral tribunal to inform the parties promptly after its constitution on its proposal to determine its fees and expenses. Any party then has 15 days in order to request the appointing authority for review of that proposal. If the appointing authority considers the proposal of the arbitral tribunal to be inconsistent with the requirement of reasonableness in article 41, paragraph (1), it shall within 45 days make any necessary adjustments which are binding upon the arbitral tribunal. At the second stage, article 41, paragraph (4) provides that, after receiving the arbitrators' fees and expenses, any party has the right to request the appointing authority to review that determination. If the appointing authority fails to act, the review shall be made by the Secretary-General of the PCA. Within 45 days of the receipt of such referral, the reviewing authority shall make any adjustments to the arbitral tribunal's determination that are necessary to meet the criteria in paragraph (1) if the tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph (3) or is otherwise manifestly excessive.

59. The *travaux préparatoires* of the 2010 UNCITRAL Arbitration Rules show that the process for establishing the arbitrators' fees was regarded as crucial for the legitimacy and integrity of the arbitral process itself.[21]

60. The criteria and mechanism set out in article 41, paragraphs (1) to (4) had been chosen to provide sufficient guidance to an appointing authority and to avoid time-consuming scrutiny of fee determinations.[22] Article 41, paragraph (4)(c) includes a reference to the notion of reasonableness of the amount of arbitrators' fees, an element to be taken into account by the appointing authority in its review. In order to clarify that the review process should not be too intrusive, the words "are manifestly inconsistent with" had been included in article 41, paragraph (4)(c).[23]

7. Advisory comments regarding deposits

61. Under article 43, paragraph (3), of the 2010 UNCITRAL Arbitration Rules, the arbitral tribunal shall fix the amounts of any initial or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal it deems appropriate concerning the amount of such deposits and supplementary deposits, if a party so requests and the appointing authority consents to perform this function. The institution may wish to indicate in its administrative procedures its willingness to do so. Supplementary deposits may be required, if during the course of proceedings, it appears that the costs will be higher than anticipated, for instance if the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert. Though not explicitly mentioned in the UNCITRAL Arbitration Rules, appointing authorities have in practice also commented and advised on interim payments.

62. It should be noted that, under the UNCITRAL Arbitration Rules, this kind of advice is the only task relating to deposits which an appointing authority may be requested to fulfil. Thus, if an institution offers to perform any other functions (such as holding deposits, or rendering an accounting thereof), it should be pointed out that this would constitute additional administrative services, not included in the functions of an appointing authority (see above, paragraph 30).

(In addition to the information and suggestions set forth herein, assistance may be obtained from the Secretariat of UNCITRAL (International Trade Law Division, Office of Legal Affairs, United Nations, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria, email: uncitral@uncitral.org). The Secretariat could, for example, if so requested, assist in the drafting of institutional rules, administrative provisions or make suggestions in this regard.)

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[21] A/CN.9/646, para. 20.
[22] A/CN.9/688, para. 23.
[23] Ibid., para. 30.