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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

* This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to complete consultations.

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Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").[1] At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful.

2. This note contains an annotated draft of revised UNCITRAL Arbitration Rules based on the deliberation of the Working Group at its forty-fifth session and continues from article 15 of the Rules. Articles 1 to 14 are dealt with under A/CN.9/WG.II/WP.145. All references to discussions and considerations by the Working Group in the note are to discussions and considerations made at the forty-fifth session of the Working Group.

Notes on a draft of revised UNCITRAL Arbitration Rules

Section III. Arbitral proceedings

General provisions

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an~~y~~ appropriate stage of the proceedings each party is given an ~~full~~ opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings with a view to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. If, at an~~y~~ appropriate stage of the proceedings~~, either~~ any party so requests ~~at any appropriate stage of the proceedings~~, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to ~~the~~ all other parties.

4. The arbitral tribunal may, on the application of any party:

(a) assume jurisdiction over any claim involving the same parties and arising out of the same legal relationship, provided that such claims are subject to arbitration under these Rules and that the arbitration proceedings in relation to those claims have not yet commenced;

(b) allow one or more third persons to be joined in the arbitration as a party and, provided such a third person and the applicant party have consented, make an award in respect of all parties involved in the arbitration.

Remarks

Paragraph (1)

Avoidance of unnecessary delays

3. The proposed added language to paragraph (1) deals with the question of delays in arbitral proceedings. The Working Group heard the view that inclusion of such a principle was unnecessary, but that it might nevertheless be useful to provide leverage for arbitrators to take certain steps both vis-à-vis the other arbitrators and the parties (A/CN.9/614, para. 76).

Paragraphs (1) and (2)

"at the appropriate stage" – "an opportunity"

4. The replacement of the words "at any stage of proceedings" by "at an appropriate stage", and of the phrase "a full opportunity" with "an opportunity" reflects the discussions of the Working Group (A/CN.9/614, para. 77).

Paragraph (4)

Consolidation of cases before arbitral tribunals – joinder

5. Paragraph (4) seeks to address the question of consolidation of cases and joinder. The Working Group might wish to further discuss the workability of such provisions given that the Rules also often apply in non-administered cases (A/CN.9/614, paras. 79-83).

6. The Working Group might wish to note that paragraph (4) (b) on joinder is inspired by article 22.1 (h) of the LCIA Arbitration Rules.

Confidentiality of proceedings

7. The Working Group might wish to further consider whether it would be appropriate to include a general provision regarding confidentiality of proceedings, or of the materials (including pleadings) before the arbitral tribunal.

8. The Working Group noted that the matter of confidentiality was quite complex, that there were diverse views expressed on the importance of confidentiality and that practices and the law were still evolving. It was said that regulating that issue in too much detail could constitute a major departure from the UNCITRAL Arbitration Rules. It was observed that the scope of confidentiality needed could depend on the subject matter of the dispute and the applicable regulatory regimes. The opinion that a general confidentiality provision should not be included was expressed by many delegations. It was also suggested that the matter should be left to be addressed on a case-by-case basis by the arbitrators and the parties (A/CN.9/614, paras.84-86).

References to previous UNCITRAL documents

Paragraph (1) – Avoidance of unnecessary delays

A/CN.9/614, para. 76
A/CN.9/WG.II/WP.143, para. 62

Paragraphs (1) and (2) – "appropriate stage"

A/CN.9/614, para. 77

Paragraph (4) – Consolidation of cases before arbitral tribunals – joinder

A/CN.9/614, paras. 79-83
A/CN.9/WG.II/WP.143, paras. 66-71

Confidentiality of proceedings

A/CN.9/614, paras. 84-86
A/CN.9/WG.II/WP.143, paras. 72-74

Place of arbitration

Article 16

1. Unless the parties have agreed upon the [*option 1*: place] [*option 2*: seat] where the arbitration is to be held, such [*option 1*: place] [*option 2*: seat of arbitration] shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the [*option 1*: location] [*option 2*: place] of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any [place] [location] it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any [*option 1*: place] [*option 2*: location] it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be deemed to have been made at the [*option 1*: place] [*option 2*: seat] of arbitration.

Remarks

"Place of arbitration" – "seat of arbitration" – "location of arbitration"

9. It is recalled that the Working Group considered whether to clarify the term "place of arbitration" in article 16. The Working Group also considered, but did not reach a conclusion, whether the Rules should remain consistent with the Model Law (which currently uses the expression "place of arbitration") or whether a differentiated terminology should be used, such as "seat of arbitration" when dealing with the legal place of arbitration, or "location", when dealing with the place where meetings are actually held. Options are proposed for consideration by the Working Group (A/CN.9/614, paras. 87-89).

Paragraph (4)

"shall be deemed"

10. Paragraph (4) has been amended to take account of a proposal made to provide that an award should be deemed to have been made at the place of arbitration to avoid the uncertainty as to the jurisdiction of courts regarding the award if it was signed in a place other than the seat of arbitration. This wording is consistent with the wording used in article 31, paragraph (3), of the Model Law (A/CN.9/614, para. 90). Article 32, paragraph (4), of the Rules has been changed to take account of that proposed modification (see below, paragraph 34).

References to previous UNCITRAL documents

"Place of arbitration" – "seat of arbitration" – "location"

A/CN.9/614, paras. 87-89
A/CN.9/WG.II/WP.143, paras. 75-76

Paragraph (4) – "shall be deemed"

A/CN.9/614, para. 90

Language

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Remarks

11. No proposals for modification have been made in relation to article 17.

References to previous UNCITRAL documents

A/CN.9/614, para. 91
A/CN.9/WG.II/WP.143/Add.1, para. 3

Statement of claim

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate ~~his or her~~ <u>its</u> statement of

claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may annex to its statement of claim all documents ~~he or she~~ it deems relevant or may add a reference to the documents or other evidence ~~he or she~~ it will submit.

Remarks

Paragraph (2)

12. The Working Group might wish to consider whether paragraph (2) (b) should be reformulated to read "a statement of the facts and legal principles supporting the claim" in order to encourage the parties to substantiate their claims from a legal point of view. As well, the Working Group might wish to consider whether that provision should address the question of statement of claim in multi-party arbitration.

13. The Working Group might wish to consider whether the last paragraph of article 18 (2) should be reworded so that the claimant would have an obligation, to the extent feasible, to submit together with its statement of claim documents and evidence which are relevant to the claim. That paragraph could read: "The statement of claim shall, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant or by references to them."

References to previous UNCITRAL documents

A/CN.9/614, para. 92
A/CN.9/WG.II/WP.143/Add.1, paras. 4-7

Statement of defence

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to its statement the documents on which it relies for its defence or may add a reference to the documents or other evidence it will submit.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified

under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off arising out of the same ~~contract~~ legal relationship, whether contractual or not. ~~or rely on a claim arising out of the same contract for the purpose of a set-off.~~

4. The provisions of article 18, paragraph 2, shall apply to a counter claim and a claim relied on for the purpose of a set-off.

Paragraph (1)

14. The Working Group might wish to consider whether that provision should address the question of statement of defence in multi-party arbitration.

Paragraph (2)

15. If the modification proposed in relation to article 18, paragraph (2), is adopted (see above, paragraph 13), article 19, paragraph (2), should then be modified accordingly, and could read: "The statement of defence shall, as far as possible, be accompanied by all documents and other evidentiary material relied upon by the respondent or by references to them."

Paragraph 3

Raising claims for the purpose of set-off

16. Article 19, paragraph (3), of the UNCITRAL Arbitration Rules provides that the respondent might make a counter-claim or rely on a claim for the purpose of a set-off if the claim arose "out of the same contract". Views were expressed in the Working Group that the arbitral tribunal's competence to consider counter-claims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose and apply in a wider range of circumstances (A/CN.9/614, para. 93). To achieve that extension, it was proposed to replace the words "arising out of the same contract" with the words "arising out of the same legal relationship, whether contractual or not" (A/CN.9/614, para. 94).

References to previous UNCITRAL documents

A/CN.9/614, paras. 93-96
A/CN.9/WG.II/WP.143/Add.1, paras. 8-10.

Amendments to the claim or defence

Article 20

During the course of the arbitral proceedings ~~either~~ a party may amend or supplement ~~his or her~~ its claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to ~~the~~ all other parties or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

Remarks

17. No proposals for modification have been made in relation to article 20.

Pleas as to the jurisdiction of the arbitral tribunal

Article 21

1. ~~The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.~~

2. ~~The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.~~

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter- claim, in the reply to the counter-claim. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. ~~In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.~~ The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Remarks

Paragraph (1)

18. Paragraph (1) reflects the view expressed in the Working Group that the existing version of article 21, paragraphs (1) and (2), should be redrafted along the lines of article 16, paragraph (1), of the Model Law in order to make it clear that the

arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97).

Paragraph (2)

19. A view was expressed in the Working Group that the existing version of article 21, paragraph (3), of the Rules should contain a provision similar to article 16, paragraph (2), of the Model Law, which provided that a party was not precluded from raising a plea as to jurisdiction by the fact that it had appointed, or participated in the appointment of, an arbitrator, and that the arbitral tribunal might, in either case, admit a later plea if it considered the delay justified (A/CN.9/614, para. 98).

Paragraph (3)

20. Paragraph (3), which replaces the existing version of article 21, paragraph (4), of the Rules contains a provision consistent with article 16, paragraph (3), of the Model Law, in accordance with the Working Group discussions (A/CN.9/614, paras. 99-102).

References to previous UNCITRAL documents

A/CN.9/614, paras. 97-102
A/CN.9/WG.II/WP.143/Add.1, paras. 11-14.

Further written statements

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Remarks

21. No proposals for modification have been made in relation to article 22.

Periods of time

Article 23

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.

Remarks

22. No proposals for modification have been made in relation to article 23.

Evidence and hearings (Articles 24 and 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support ~~his or her~~ its claim or defence.

[2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to ~~the~~ all other parties, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in ~~his or her~~ its statement of claim or statement of defence.]

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time, as the tribunal shall determine.

Remarks

Paragraph (2)

23. The Working Group might wish to consider whether paragraph (2) should be deleted, as it might not be common practice for an arbitral tribunal to require parties to present a summary of documents and as it may be desirable to promote a system according to which the parties would attach to their claims the evidentiary materials they are relying on.

References to previous UNCITRAL documents

A/CN.9/614, para. 103
A/CN.9/WG.II/WP.143/Add.1, paras. 15

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to ~~the~~ all other parties the names and addresses of the witnesses ~~he or she~~ it intends to present, the subject upon and the languages in which such witnesses will give their testimony.

2bis [Witnesses may be heard under conditions set by the arbitral tribunal. Any individual testifying to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under these Rules notwithstanding that the individual is a party to the arbitration or was or is an officer, employee or shareholder of any party.]

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Remarks

Paragraph (2)

24. The Working Group might wish to note that the reference to "witnesses" might be problematic in some legal systems, where the parties themselves, and their senior officers or employees cannot be characterized as witnesses. Paragraph 2bis proposes a definition of "witness" and sets out in more detail the power of the arbitral tribunal.

Interim measures

Article 26

~~1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.~~

~~2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.~~

~~3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.~~

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraph 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

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

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

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

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

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

Remarks

25. Article 26 has been amended to take account of the suggestion made in the Working Group that the revised provision on interim measures might clarify the circumstances, conditions and procedure for the granting of interim measures, consistent with Chapter IV A of the Model Law, or be drafted in such a way that they would give effect to the party autonomy provided by Chapter IV A (A/CN.9/614, para. 105).

26. The Working Group might wish to consider whether provisions on preliminary orders should be included in article 26.

References to previous UNCITRAL documents

A/CN.9/614, paras. 104-105
A/CN.9/WG.II/WP.143/Add.1, para. 16

Experts

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the experts' terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the experts report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

4. At the request of ~~either~~ any party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing ~~either~~ any party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

Remarks

27. No proposals for modification have been made in relation to article 27.

References to previous UNCITRAL documents

A/CN.9/614, paras. 106-107
A/CN.9/WG.II/WP.143/Add.1, paras. 17-20

Default

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate its statement of claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the respondent has submitted a counter-claim. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate its statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations.

2. If ~~one of the~~ a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If ~~one of the~~ a party, duly invited by the arbitral tribunal to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Remarks

28. The Working Group might wish to consider the proposed modifications to article 28, which are made for the sake of clarity. The addition at the end of paragraph (1) reflects the provisions in article 25 of the Model Law.

Closure of hearings

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

Remarks

29. No proposals for modification have been made in relation to article 29.

Waiver of rules

Article 30

A party, who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating ~~his or her~~ its objection to such non-compliance, shall be deemed to have waived ~~his or her~~ its right to object.

Section IV. The award

Decisions

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. [When there is no majority, any award or other decision shall be made by the presiding arbitrator alone.]

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide ~~on his or her own~~ alone, subject to revision, if any, by the arbitral tribunal.

Remarks

Paragraph (1)

30. It is recalled that, given the differing views expressed, the Working Group requested the Secretariat to prepare various options for consideration by the Working Group (A/CN.9/614, para. 112). One option was to leave article 31 unchanged (A/CN.9/614, para. 111); another option was to revise that paragraph in order to avoid a deadlock situation where no majority decision could be made and to provide that if an arbitral tribunal composed of three arbitrators could not reach a majority, then the award would be decided by the presiding arbitrator as if he or she were a sole arbitrator (A/CN.9/614, para. 108).

31. If the added words are retained, consequential amendments to article 32, paragraph (4), relating to the signing of the award might also need to be considered.

References to previous UNCITRAL documents

A/CN.9/614, paras. 108-112
A/CN.9/WG.II/WP.143/Add.1, paras. 21-24

Form and effect of the award

Article 32

1. [In addition to making a final award, the arbitral tribunal shall be entitled to make interim or interlocutory~~, or partial~~ awards.]

2. ~~The~~ An award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay and shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority, insofar as such waiver can be validly made.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of

arbitration. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. [*Option 1*: The award may be made public only with the consent of ~~both~~ the parties.] [*Option 2*: The award may be made public with the consent of the parties or where and to the extent disclosure is required of a party by legal duty to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.]

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement at the timely request of any party, ~~within the period of time required by law.~~

Remarks

Paragraph (1)

Form of the award

32. The Working Group might wish to consider whether the types of awards should be left to the practice, and whether paragraph (1) should be deleted.

Paragraph (2)

Waiver of recourse to courts

33. In accordance with a proposal made in the Working Group, the language inserted in paragraph (2) seeks to make it impossible for parties to use recourse to courts that could be freely waived by the parties (for example, in some jurisdictions, an appeal on a point of law), but not to exclude challenges to the award (for example, on matters such as lack of jurisdiction, violation of due process or any other ground for setting aside the award as set out under article 34 of the Model Law), inasmuch as the parties could not exclude them by contract (A/CN.9/614, para. 114).

Paragraph (4)

34. The modification is proposed to be made for the sake of consistency with the modification under article 16, paragraph (4), which deals with the place where the award is deemed to be made (see above, paragraph 10).

Paragraph (5)

35. As agreed by the Working Group, paragraph (5) offers options on the question of publication of awards. Option 1 corresponds to the existing text of the Rules, whereas option 2 covers the situation where a party is under a legal obligation to disclose.

Paragraph (7)

36. Paragraph (7) has been amended so as to avoid an onerous burden being placed on an arbitral tribunal which might not be familiar with the registration requirements at the place of arbitration.

References to previous UNCITRAL documents

A/CN.9/614, paras. 113-121
A/CN.9/WG.II/WP.143/Add.1, paras. 25-29

Applicable law, amiable compositeur

Article 33

1. The arbitral tribunal shall apply the [*option 1*: law][*option 2*: rules of law] designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the [*option 1*: law] [*option 2*: rules of law] [*variant 1*: determined by the conflict of laws rules which it considers applicable][*variant 2*: with which the case has the closest connection].

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Remarks

Paragraph (1)

Law – Rules of law

37. The first set of options in paragraph (1) reflects the diverging views expressed in the Working Group on whether the words "rules of law" currently used in article 28 of the Model Law should also be used in a revised version of article 33 of the UNCITRAL Arbitration Rules to replace the term "law" (A/CN.9/614, para. 122).

Conflict of laws rules

38. The second set of variants addresses the proposal made to replace the conflict of laws rules with a direct choice of the rules of law most closely connected to the dispute (A/CN.9/614, para. 123).

References to previous UNCITRAL documents

Paragraph (1)

A/CN.9/614, paras. 122-123.
A/CN.9/WG.II/WP.143/Add.1, para. 30.

Paragraph (2)

A/CN.9/614, paras. 124
A/CN.9/WG.II/WP.143/Add.1, paras. 31

Settlement or other grounds for termination

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, 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.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

Remarks

39. No proposals for modification have been made in relation to article 34.

Interpretation of the award

Article 35

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

Remarks

40. No proposals for modification have been made in relation to article 35.

References to previous UNCITRAL documents

A/CN.9/614, paras. 125-126
A/CN.9/WG.II/WP.143/Add.1, para. 32

Correction of the award

Article 36

1. Within 30 days after the receipt of the award, ~~either~~ any party, with notice to the other ~~party~~ parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors or omissions of a similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

Remarks

Paragraph (1)

41. The word "omissions" has been added to take account of the proposal made in the Working Group to broaden the scope of article 36 to include correction of the award to cover situations such as arbitrator omitting to sign the award or to state the date or place of the award.

References to previous UNCITRAL documents

A/CN.9/614, para. 127
A/CN.9/WG.II/WP.143/Add.1, para. 33

Additional award

Article 37

1. Within 30 days after the receipt of the award, ~~either~~ a party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified [without any further hearings or evidence], it shall complete its award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

Remarks

42. The Working Group might wish to further consider whether the words "without any further hearings or evidence" should be deleted, and whether or not paragraph (2) could be understood as already allowing the arbitral tribunal to make an additional award after holding further hearings and taking further evidence (A/CN.9/614, para. 128).

References to previous UNCITRAL documents

A/CN.9/614, paras. 128-129
A/CN.9/WG.II/WP.143/Add.1, paras. 34

Costs (Articles 38 to 40)

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for [legal] representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary General of the Permanent Court of Arbitration at The Hague.

Remarks

43. The modifications to subparagraphs (b)-(d) reflect the view expressed in the Working Group that the costs and expenses referred to under those subparagraphs should be qualified by the word "reasonable" (A/CN.9/614, para. 132). The Working Group might wish to determine whether the word "legal" in subparagraph (e) should be deleted.

References to previous UNCITRAL documents

A/CN.9/614, paras. 130-132
A/CN.9/WG.II/WP.143/Add.1, paras. 35-36

Article 39

1. The fees of the arbitral tribunal 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.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Remarks

44. The Working Group might wish to further discuss whether the appointing authority should be given a wider role for the determination of the fees or whether it would be preferable to provide a more transparent procedure for agreeing on the method of calculating the arbitral tribunal's fees from the outset.

45. The Working Group might wish to note that the Permanent Court of Arbitration in the Hague has been approached on that matter and agreed to be involved to a greater extent in practical issues relating to the fixing of the fees, in accordance with a provision which could read along the following lines, and which would replace paragraphs (3) and (4): "The arbitral tribunal shall make a proposal setting out the principles according to which its fees are to be fixed, and shall subsequently specify the amounts established by applying those principles. At any stage, (a) the arbitral tribunal, or (b) any party, no later than 15 days after the proposal was made, may ask that the principles or the amounts of the fees, and, if applicable, the deposit, be established by the appointing authority or, if no appointing authority has been agreed upon or if the agreed appointing authority does not decide within thirty days of a party's request, by the Secretary-General of the Permanent Court of Arbitration at The Hague."

References to previous UNCITRAL documents

A/CN.9/614, paras. 133-134
A/CN.9/WG.II/WP.143/Add.1, para.37

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party [parties]. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of [legal] representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party [parties] shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

Remarks

46. Article 40 has been modified so as to be consistent with the proposed modifications to article 38 (e) (see above, paragraph 43).

References to previous UNCITRAL documents

A/CN.9/614, paras. 135
A/CN.9/WG.II/WP.143/Add.1, para. 38

Deposit of costs

Article 41

1. The arbitral tribunal, on its establishment, may request ~~each~~ the part~~y~~ies to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary General of the Permanent Court of Arbitration at The Hague, 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 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.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Proposed additional provisions

Liability of arbitrators

Neither the arbitrators nor the appointing authority shall be liable to any person for any act or omission in connection with the arbitration, save for the consequences of conscious and deliberate wrongdoing.

Remarks

47. The Working Group might wish to consider whether the question of liability of arbitrators and institutions performing the function of appointing authority under the UNCITRAL Arbitration Rules should be addressed. In the affirmative, the Working Group might wish to consider the proposed draft provision, according to which arbitrators and appointing authorities should in principle be granted immunity, except in extreme case of "conscious and deliberate wrongdoing".

References to previous UNCITRAL documents

A/CN.9/614, para. 131
A/CN.9/WG.II/WP.143/Add.1, paras. 39-40

General Principles

In the interpretation of the Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith. 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.

Remarks

48. The provision seeks to address the suggestion made in the Working Group to include a provision on the interpretation of the Rules in accordance with their international origin in line with the new article 2A of the Model Law (A/CN.9/614, para. 121). The second sentence of that paragraph seeks to clarify that the Rules constitute a self-contained system of contractual norms and that any lacuna in the

Rules is to be filled by an interpretation of the Rules themselves, without reference to any non-mandatory provision of applicable procedural law.

References to previous UNCITRAL documents

A/CN.9/614, paras. 120-121
A/CN.9/WG.II/WP.143/Add.1, para. 29

Notes

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 182-187.