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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Compilation of comments by Governments and international organizations

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

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A. Comments received from Governments

Mexico

[Original: Spanish]
[Date: 1 June 2010]

New article 4. Response to the notice of arbitration.

We consider it unnecessary to include the requirement of a response to the notice of arbitration, since it alters the structure of the Rules in the following ways:

1. It affects the procedure for the constitution of the arbitral tribunal as provided for in the Rules. Experience shows that a response to the notice of arbitration is not necessary in order to constitute the tribunal, and the Rules have functioned very well without that requirement.

2. The requirement of a response to the notice of arbitration will create uncertainty as to the consequences of not responding, not responding in time or responding in a manner that does not satisfy all of the proposed requirements. It will present particular difficulties as regards the information required in the notice of arbitration, as detailed in subparagraphs 3 (a) to (g) of article 3, which will, under subparagraph 1 (b) of new article 4, have to be included in the response.

3. The new time frame for communication of the response will increase the time needed to constitute the tribunal.

Article 7. Number of arbitrators (article 5 of the 1976 version of the Rules).

Mexico supports the text of paragraph 2 of draft article 7, which establishes that a sole arbitrator may be appointed in the event of failure to appoint three arbitrators, since it considers that the appointment of a sole arbitrator is likely to make the procedure cheaper and more expeditious, thus substantially reducing the duration of the arbitration proceedings.

However, we propose that the text of paragraph 1 of the draft article be amended to state that only one arbitrator, rather than three, should be appointed if the parties have not agreed on the number of arbitrators. Paragraph 2 would thus be amended in turn to provide that the sole arbitrator may, at the request of the parties, designate three arbitrators.

"Article 7. Number of arbitrators.

"1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed on the number of arbitrators, a sole arbitrator shall be appointed.

"2. The arbitrator that has been appointed may, at the proposal of any of the parties and having heard the opinion of the other parties, determine that the

arbitration proceedings should be conducted by a tribunal comprising three arbitrators. In such cases, the two additional arbitrators to be appointed shall be selected in accordance with the provisions of article 9 and, where appropriate, article 10."

Article 11. Disclosures by and challenge of arbitrators (article 9 of the 1976 version of the Rules).

It is often the case that the circumstances that an arbitrator is required to disclose in accordance with article 11 and that arise following his or her appointment are already known to one or all of the parties through means other than notification by the arbitrator.

We therefore propose that the final part of the draft article be amended by replacing the words "unless they have already been informed by him or her of these circumstances" by the words "unless they have already been informed of these circumstances".

Article 13. Challenge of an arbitrator (articles 11 and 12 of the 1976 version of the Rules).

In this article, it would be useful to clarify that it falls to the arbitrators to decide whether to suspend or continue with the proceedings. We therefore propose that the following paragraph be added:

"Until the challenge is resolved, the arbitrator or arbitrators may continue with the proceedings."

This would remove any uncertainty as to whether proceedings are suspended or continued.

Article 17 (article 15 of the 1976 version of the Rules) and articles 20, 21, 37 and 38.

We propose that the rule set out in paragraph 4 of article 17 should govern all communications relating to the arbitration proceedings and should be set out as a new paragraph under article 2. In that connection, we consider that the notification requirement contained in articles 20 (1), 21 (1), 37 (1) and 38 (1) is unnecessary and should therefore be deleted from those paragraphs, since the provisions set out in article 17 (4) are sufficient. This should be done regardless of where in the text the rule contained in article 17 (4) appears.

Article 20. Statement of claim (article 18 of the 1976 version of the Rules).

Paragraph 3 of article 20 stipulates that "A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim."

It is possible that the contract, the arbitration agreement or any other legal instrument from or as a result of which the dispute arises may not have been agreed upon, may not exist in writing or may not be recorded in a document of which a copy can be made. The recent amendments to article 7 of the UNCITRAL Model Law on International Commercial Arbitration pertaining to the provision that

agreements shall be in writing offer alternatives that provide for the possibility of oral arbitration agreements or do not specify the form required.

We therefore propose that the following phrase be added to paragraph 3 of article 20:

> "or an explanation shall be given of the reason for which such copy cannot be furnished."

Article 30. Default (article 28 of the 1976 version of the Rules).

We consider that the current text of article 28 has functioned well in practice and is in line with article 4 of the UNCITRAL Model Law on International Commercial Arbitration; consequently, its amendment is not warranted. We also consider that the introduction of new wording may give rise to problems of interpretation in the future.