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

Note by the Secretariat

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I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993,[1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should commence work on the revision of the Notes and, in so doing, should focus on matters of substance, leaving drafting to the Secretariat.[3]

2. At its forty-eighth session, in 2015, the Commission had before it the draft revised Notes (contained in document A/CN.9/844), as it resulted from the work of the Working Group at its sixty-first[4] (Vienna, 15-19 September 2014) and sixty-second[5] (New York, 2-6 February 2015) sessions.

3. The Commission approved the draft revised Notes in principle, and requested the Secretariat to revise the Notes in accordance with its deliberations and decisions.[6] It was further agreed that the Secretariat could seek input from the Working Group on specific issues during its sixty-fourth session. The Commission further requested that the revised Notes be finalized for adoption at its forty-ninth session, in 2016.[7]

4. Accordingly, the Working Group considered the draft revised Notes (contained in document A/CN.9/WG.II/WP.194) at its sixty-fourth session (New York, 1-5 February 2016) and requested the Secretariat to prepare an updated draft of the Notes based on the deliberations and discussions for consideration by the Commission.[8] This note contains the draft revised Notes for finalization and approval by the Commission.

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

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

[3] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

[4] Report of the Working Group on the work of its sixty-first session (A/CN.9/826).

[5] Report of the Working Group on the work of its sixty-second session (A/CN.9/832), paras. 60-142.

[6] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 14-133.

[7] Ibid., para. 133.

[8] Report of the Working Group on the work of its sixty-fourth session (A/CN.9/867), paras. 15-89.

II. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

A. Specific issues for consideration

5. The Commission may wish to note the following:

(a) Note 5 (Costs of arbitration): At its sixty-fourth session, the Working Group agreed that the question whether in-house costs of the parties should be included in the list of arbitration costs should be further considered by the Commission as that question had not been discussed previously, and is not fully settled in practice (A/CN.9/867, paras. 41 and 42); provisions on in-house costs are contained in the draft below in paragraphs 40 and 41;

(b) Notes 14 to 18: At its sixty-fourth session, the Working Group heard suggestions which were not discussed due to lack of time with respect to Notes 14 to 18 (A/CN.9/867, paras. 68-89); those suggestions are reflected in the draft below for consideration by the Commission.

B. Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

6. The Commission may wish to consider the draft revised Notes below. References to discussions of the Working Group at its sixty-first, sixty-second and sixty-fourth sessions and of the Commission at its forty-eighth session are contained below.

"2016 UNCITRAL Notes on Organizing Arbitral Proceedings

"Preface

"The United Nations Commission on International Trade Law (UNCITRAL) adopted the first edition of the Notes at its twenty-ninth session, in 1996. UNCITRAL finalized a second edition of the Notes at its [forty-ninth] session, [in 2016]. In addition to representatives of the 60 member States of UNCITRAL, representatives of many other States and of international organizations participated in the deliberations. In preparing the second edition of the Notes, the Secretariat consulted with experts from various legal systems, national and international arbitration bodies, as well as international professional associations.

“List of matters for possible consideration in organizing arbitral proceedings

“Introduction

“**Purpose of the Notes** [*A/CN.9/826, paras. 13 to 15 and 28; A/CN.9/832, para. 61*]

“1. The purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings. The Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution.

“2. Given that procedural styles and practices in arbitration do vary and that each of them has its own merit, the Notes do not seek to promote any practice as best practice.

“**Non-binding character of the Notes** [*A/CN.9/832, para. 62; A/CN.9/867, para. 17*]

“3. The Notes do not impose any legal requirement binding on the parties or the arbitral tribunal. The parties and the arbitral tribunal may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes.

“4. The Notes are not suitable to be used as arbitration rules, since they do not oblige the parties or the arbitral tribunal to act in any particular manner. Various matters discussed in the Notes may be covered by applicable arbitration rules. The use of the Notes does not imply any modification of such arbitration rules.

“5. The Notes, while not exhaustive, cover a broad range of situations that may arise in arbitral proceedings. In many arbitrations, however, only a limited number of the matters addressed in the Notes will arise or need to be considered. The specific circumstances of the arbitration will indicate which matters it would be useful to consider and at what stage of the arbitral proceedings those matters should be considered. Therefore, it is advisable not to raise a matter unless and until it appears likely that the matter needs to be addressed.

“**Characteristics of arbitration** [*A/CN.9/826, paras. 30, 31 and 41 to 50; A/CN.9/832, paras. 76 to 79; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 27 to 34; A/CN.9/867, para. 18*]

“6. Arbitration is a flexible process to resolve disputes; the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, subject to mandatory provisions of the applicable arbitration law. The autonomy of the parties in determining the procedure is of special importance in international arbitration. It allows the parties to select

and tailor the procedure according to their specific wishes and needs, unimpeded by possibly conflicting legal practices and traditions.

"7. The parties exercise their autonomy usually by agreeing on a set of arbitration rules to govern the arbitral proceedings. The benefits of selecting a set of arbitration rules are that the procedure becomes more predictable and that the parties and the arbitral tribunal may save time and costs by using an established set of arbitration rules that may be familiar to the parties, that has been carefully drafted by experienced practitioners, and that has often been widely applied and interpreted by arbitral tribunals and courts and commented by practitioners and academics. In addition, the selected set of arbitration rules (as modified by the parties, to the extent permitted) usually prevails over the non-mandatory provisions of the applicable arbitration law and may better correspond to the objectives of the parties than the default provisions of the applicable arbitration law. Where the parties have not agreed at an earlier stage on a set of arbitration rules, they may still agree on such a set after the arbitration has commenced (see below, para. 10).

"8. To the extent that the parties have not agreed on the procedure to be followed by the arbitral tribunal or on a set of arbitration rules to govern the arbitral proceedings, the arbitral tribunal has the discretion to conduct such proceedings in the manner it considers appropriate, subject to the applicable arbitration law. Arbitration laws usually grant the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings, provided that a fair, equitable and efficient process is observed.[9] A set of arbitration rules selected by the parties would also shape the arbitral tribunal's discretion to conduct the arbitral proceedings, either by strengthening or limiting that discretion. Discretion and flexibility are useful as they enable the arbitral tribunal to make decisions on the organization of arbitral proceedings that take into account the circumstances of the case and the expectations of the parties, while complying with due process requirements. Where the parties did not agree on the procedure or on arbitration rules, the arbitral tribunal may nevertheless take guidance from, and use as a reference, a set of arbitration rules.

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[9] For example, article 19 of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) provides as follows: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

“Annotations

“**1. Consultation regarding the organization of arbitral proceedings; Procedural meetings** [*A/CN.9/826, paras. 27, 33 to 35 and 39; A/CN.9/832, paras. 66 to 75; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 22 to 26; A/CN.9/867, paras. 19 to 29*]

“(a) General principle of consultation between the parties and the arbitral tribunal

“9. It is usual for the arbitral tribunal to involve the parties in making decisions on the organization of the arbitral proceedings and, where possible, to seek their agreement. Such consultations are intrinsic to the consensual nature of arbitration and are normally undertaken with respect to most organizational decisions addressed in the Notes. However, in order to remain concise, the need for such consultation is not necessarily repeated in the Notes each time consultation is expected to occur.

“10. Likewise, it is usual for the parties to consult the arbitral tribunal whenever they agree between themselves on any issue that might affect the organization of the arbitral proceedings. When the agreement of the parties affects the planning of the arbitrators, the parties would usually also seek the agreement of the arbitral tribunal. Moreover, if the parties agree after the arbitral tribunal has been constituted that an arbitral institution will administer the arbitration, the parties would usually secure the agreement of both the arbitral tribunal and that institution.

“(b) Procedural meetings

“*(i) First procedural meeting*

“11. It is advisable for the arbitral tribunal to give the parties a timely indication as to the organization of the arbitral proceedings and the manner in which it intends to proceed. In particular, in international arbitrations, parties may be accustomed to differing styles of arbitral proceedings and, without such guidance, they may find certain aspects of the arbitral proceedings unpredictable and difficult to prepare for.

“12. As a method of consultation with the parties, the arbitral tribunal may consider holding, at the outset of the arbitral proceedings, a meeting or case management conference at which it determines the organization of the arbitral proceedings and a procedural timetable.

“13. A number of issues covered by the Notes would usually be addressed at the first procedural meeting, and thus create the basis for a common understanding of the procedure among the parties and the arbitral tribunal. If a procedural timetable is established, it may serve, for instance, to indicate time limits for the communication of written submissions, witness statements, expert reports and documentary evidence, so that the parties may plan early in the arbitral proceedings. A procedural timetable may include provisional dates for hearings. In preparing the procedural timetable, the parties and the arbitral tribunal may also wish to consider whether any statutory and/or mandatory

time limits on the duration of the arbitral proceedings are provided for in the applicable arbitration law or arbitration rules.

"*(ii) Subsequent procedural meetings*

"14. The arbitral tribunal usually holds additional procedural meetings (including what are sometimes referred to as 'preparatory conferences' or 'pre-hearing conferences') at subsequent stages of the arbitral proceedings. Procedural meetings are significant as they set the stage for the arbitral proceedings and aim at ensuring their efficiency. Procedural meetings may be used, for instance, for the arbitral tribunal to reassess whether further submissions are required or further evidence ought to be presented as well as to discuss matters relating to the organization of a hearing. The procedural timetable can be updated accordingly as the arbitral proceedings progress.

"*(iii) Modification of decisions on the organization of arbitral proceedings*

"15. Decisions on the organization of arbitral proceedings can be revisited and modified at relevant stages of the arbitral proceedings by the arbitral tribunal. However, the arbitral tribunal should exercise caution in modifying procedural arrangements, in particular where the parties have taken steps in reliance on those arrangements. Moreover, the arbitral tribunal may not be able to modify procedural arrangements to the extent that those arrangements result from an agreement between the parties. If a modification is required, the arbitral tribunal would usually seek the agreement of the parties thereon.

"*(iv) Record of the outcome of a procedural meeting*

"16. A record of the outcome of a procedural meeting can take various forms depending on its significance, such as a procedural order, summary minutes, or an ordinary communication among the parties and the arbitral tribunal. Usually, the arbitral tribunal records the rules of procedure that have been determined to apply to the arbitral proceedings in a procedural order. The outcome of a procedural meeting can be made in writing or first made orally and recorded in writing after the procedural meeting. The parties and the arbitral tribunal may consider whether to produce transcripts, which could provide a precise record of the procedural meeting (see below, para. 135).

"*(v) Attendance of the parties*

"17. It is usually advisable that the parties themselves, in addition to any representatives they may have appointed, be present at procedural meetings.

"18. If a party neither participates nor is represented in a procedural meeting, the arbitral tribunal should nevertheless ensure that the non-participating party has an opportunity to participate in the further stages of the arbitral proceedings and to present its case. The procedural timetable, if established, should provide for such opportunity.

"19. Procedural meetings can be held either in the physical presence of all participants, or remotely via technological means of communication. The arbitral tribunal may consider, in each case, whether it would be preferable to hold the meeting in-person, which may facilitate personal interaction, or to use

remote means of communication, which may reduce costs (see also below, para. 124).

"**2. Language or languages of the arbitral proceedings** [*A/CN.9/826, paras. 51 to 60; A/CN.9/832, paras. 80 to 86; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 35 to 37; A/CN.9/867, paras. 30 to 32*]

"**(a) Determination of the language**

"20. The parties may agree on the language or languages in which the arbitral proceedings will be conducted. Such agreement ensures that the parties have the capacity to communicate in the language or languages of the arbitral proceedings. In the absence of such agreement, the arbitral tribunal will usually determine the language or languages. Common criteria for that determination are the primary language of the contract(s) or other legal instruments under which the dispute arose, and the language commonly used by the parties in their communication. The parties and the arbitral tribunal usually choose a single language to conduct the arbitral proceedings (see below, para. 24).

"**(b) Possible need for translation and interpretation**

"21. The parties may rely on documentary evidence, judicial decisions and juridical writings ('legal authorities') that are not in the language of the arbitral proceedings. In determining whether to require translation of those documents in full or in part, the arbitral tribunal may consider whether the parties and the arbitral tribunal are able to understand the content of such documents without translation and whether cost-efficient measures are available in lieu of translation in full (such as translation of the relevant part of documents, or a single template translation for documents of similar or standardized content).

"22. Interpretation may be necessary where witnesses or experts appearing at a hearing are unable to testify in the language of the arbitral proceedings. Witnesses and experts familiar with the language of the arbitral proceedings might still require occasional interpretation, rather than full interpretation. If interpretation is necessary, it is advisable to consider whether the interpretation will be simultaneous or consecutive. While simultaneous interpretation is less time-consuming, consecutive interpretation allows for a closer monitoring of the accuracy of the interpretation.

"23. The responsibility for arranging translation and/or interpretation typically lies with the parties even in arbitrations administered by an arbitral institution.

"**(c) Multiple languages**

"24. Because of the logistical difficulties and considerable extra costs that often arise from conducting arbitral proceedings in more than one language, the parties and the arbitral tribunal usually choose to conduct the arbitral proceedings in a single language unless there are particular circumstances that would require the use of more than one language.

"25. When multiple languages are to be used in arbitral proceedings, the parties and the arbitral tribunal may need to decide whether the languages are to be used interchangeably without any translation or interpretation, or whether all communications and documents need to be translated and oral evidence interpreted into all the languages of the arbitration. As an alternative, the parties and the arbitral tribunal may decide that one of the languages will be designated as authoritative for the purpose of the arbitral proceedings (such that multiple languages could be used during the proceedings, but procedural orders and arbitral awards, for example, would be issued only in the authoritative language). In any case, where translation is required, the parties and the arbitral tribunal may need to consider whether, in the interest of economy and efficiency, it would be acceptable to limit translation to relevant sections of documents or to exempt certain types of documents, such as legal authorities (see above, para. 21), from translation.

"**(d) Costs of translation and interpretation**

"26. When making decisions about translation and interpretation, it is advisable for the arbitral tribunal to decide whether any or all of the costs are to be paid by the parties at the time the costs are incurred. Irrespective of who pays the costs when they are incurred, the arbitral tribunal may later have to decide how these costs, along with other costs, will ultimately be allocated between the parties, if the arbitral tribunal considers that these costs are to be included in the costs of arbitration (see below, paras. 39 and 47 to 49).

"**3. Place of arbitration** [*A/CN.9/826, paras. 61 to 66; A/CN.9/832, paras. 87 to 94; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 38 to 42; A/CN.9/867, paras. 33 to 37*]

"**(a) Determination of the place of arbitration**

"27. The parties may agree on the place (or 'seat') of arbitration. If the place of arbitration has not been agreed by the parties, typically the arbitral tribunal or the arbitral institution administering the arbitration will have to determine the place of arbitration at the outset of the arbitral proceedings. Arbitration rules of some institutions contain a default place of arbitration, applicable where the parties have not chosen one.

"**(b) Legal and other consequences of the place of arbitration**

"28. The place of arbitration normally determines the applicable arbitration law. Such determination has a legal impact on various matters, such as the requirements relating to the appointment and challenge of arbitrators, whether and on what grounds a party can seek judicial review or setting aside of an arbitral award, which court is competent with respect to the arbitral proceedings, as well as the conditions for recognition and enforcement of an arbitral award in other jurisdictions. It is advisable that the parties and the arbitral tribunal familiarize themselves with the arbitration law and any other relevant procedural law at the place of arbitration, including in particular any mandatory provisions.

"29. Selection of the place of arbitration is influenced by various legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are:

(i) The suitability of the arbitration law at the place of arbitration;

(ii) The law, jurisprudence and practices at the place of arbitration regarding (a) the nature and frequency of court intervention in the course of arbitral proceedings, (b) the scope of judicial review or of grounds for setting aside an award, and (c) any qualification requirements with respect to arbitrators and counsel representation; and

(iii) Whether the State where the arbitration takes place and hence where the arbitral award will be made is a Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, the 'New York Convention') and/or to any other multilateral or bilateral treaty on enforcement of arbitral awards.

"30. When it is expected that hearings will be held at the place of arbitration, other factors may become relevant in selecting the place of arbitration including:

(i) The convenience of the location for the parties and the arbitrators, including travel to the location;

(ii) The availability and cost of support services;

(iii) The location of the subject matter in dispute and proximity of evidence; and

(iv) Any qualification restrictions with respect to counsel representation.

"**(c) Possibility of holding hearings and meetings at a location different from the place of arbitration**

"31. The place of arbitration is not necessarily the place where hearings and/or meetings are held, although often the two are the same. In certain circumstances, it may be more expeditious or convenient for the parties and the arbitral tribunal to hold hearings and/or meetings at a location different from the place of arbitration, or remotely via technological means of communication. Many arbitration laws and arbitration rules expressly allow the arbitral tribunal to hold hearings and meetings elsewhere than at the place of arbitration.[10] Nonetheless, the parties and the arbitral tribunal may need to consider whether holding all hearings outside the place of arbitration may create difficulties at the stage of judicial review, setting aside or enforcement of the arbitral award.

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[10] See, for example, article 20(2) of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) and article 18(2) of the UNCITRAL Arbitration Rules (as revised in 2010).

"**4. Administrative support for the arbitral tribunal** [*A/CN.9/826, paras. 67 to 73; A/CN.9/832, paras. 95 to 102; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 43 to 48; A/CN.9/867, paras. 38 to 40*]

"**(a) Administrative support and arbitral institutions**

"32. The arbitral tribunal may need administrative support to carry out its functions. The arbitral tribunal and the parties should consider who will be responsible for arranging such support.

"33. When a case is administered by an arbitral institution, that institution may provide some administrative support to the arbitral tribunal. The availability and nature of such support vary greatly depending on the arbitral institution. Certain arbitral institutions offer administrative support even to arbitral proceedings not conducted under their institutional rules. Some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in supporting arbitral proceedings.

"34. Unless the administrative arrangements for the proceedings are made by an arbitral institution, they will usually be made by the parties or the arbitral tribunal. Hearing facilities, including related services, may be procured from specialized arbitration hearing centres which have been established in some cities and are sometimes linked to arbitral institutions. Otherwise, such hearing facilities and related services may be procured from other entities, such as chambers of commerce, hotels or specialized firms providing such support services. It may also be acceptable to leave some of the arrangements to one of the parties, subject to the agreement of the other party or parties.

"**(b) Secretary to arbitral tribunal**

"35. Administrative support might be obtained by engaging a secretary to carry out tasks under the direction of the arbitral tribunal. Such services may also be rendered by a registrar, clerk or administrator. Some arbitral institutions routinely assign secretaries to cases administered by them. Where this is not the case, some arbitrators frequently engage secretaries, particularly in large or complex cases, whereas other arbitrators do not.

"36. Functions and tasks performed by secretaries are broad in range. Secretaries may provide purely organizational support, such as making reservations for hearing and meeting rooms and providing or coordinating administrative services. Some arbitral tribunals wish to have secretaries carry out more substantive functions including legal research and other professional assistance, such as preparing a summary of the facts or the procedural history of the arbitral proceedings, collecting or summarizing case law or published commentaries on legal issues defined by the arbitral tribunal, and preparing draft procedural decisions. However, it is recognized that secretaries are not involved and do not participate in the decision-making of the arbitral tribunal, except in certain rare, specialized types of arbitration (for example, where the specific arbitral rules provide that secretaries are expected to provide legal advice in relation to the decision of the arbitral tribunal if and when the arbitral tribunal is composed only of non-lawyer, subject matter specialists).

"37. Secretaries are expected to be and remain impartial and independent during the arbitral proceedings. It is the arbitral tribunal's responsibility to ensure this. Some arbitral tribunals do this by requesting the secretary to sign a declaration of independence and impartiality.

"38. If the arbitral tribunal wishes to appoint a secretary, it would normally disclose this fact to the parties, along with the identity of the proposed secretary, the nature of the tasks to be performed by the secretary, and the amount and source of any proposed remuneration. The parties may wish to agree on the role and practices to be adopted in respect of the secretaries, as well as on the financial conditions applicable to their services. Institutional guidelines on secretaries may provide useful information to the parties.

"**5. Costs of arbitration** [*A/CN.9/826, paras. 22, 23 and 74 to 78; A/CN.9/832, paras. 103 to 112; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 49 to 56; A/CN.9/867, paras. 41 to 50*]

"**(a) Items of costs**

"39. The costs of arbitration usually include:

(i) The fees of the arbitral tribunal;

(ii) The expenses incurred by the arbitral tribunal, such as for (a) travel and accommodation, (b) administrative support, if not directly covered by the parties, and (c) tribunal-appointed experts (including their fees, travel and accommodation) and other assistance required by the arbitral tribunal;

(iii) The fees and expenses of the arbitral institution; and

(iv) The costs incurred by the parties, such as (a) legal fees and disbursements, (b) expenses relating to witnesses (including their travel and accommodation) and experts (including their fees, travel and accommodation), and (c) translation and interpretation costs (see above, para. 26).

"40. While it is widely accepted that costs incurred by the parties in respect of external legal counsel, witnesses and experts are recoverable, most arbitral rules are silent on internal legal, management and other costs (referred to as 'in-house costs') that parties may incur in pursuing or defending arbitral claims, leaving the issue of their recoverability to the discretion of the arbitral tribunal. Such in-house costs may represent a large portion of a party's total costs when in-house counsel, managing directors, experts and other staff members take a proactive role before and during the arbitral proceedings. There is no principle prohibiting the recovery of in-house costs incurred in direct connection with the arbitration. Some arbitral tribunals have awarded such costs insofar as they were necessary, did not unreasonably overlap with external counsel fees, were substantiated in sufficient detail to be distinguished from ordinary staffing expenses and were reasonable in amount.

"41. If not adequately addressed by the agreement between the parties, the applicable arbitration law or arbitration rules, it may be useful for the arbitral tribunal to identify whether in-house costs incurred by the parties will be

recoverable and, if so, what records will need to be submitted to substantiate such cost claims.

"42. The parties and the arbitrators may have to consider how to treat taxes on services, in particular value-added taxes, when determining costs.

"**(b) Deposit of costs**

"43. Unless the matter is handled by an arbitral institution, the arbitral tribunal usually requests the parties to deposit an amount as an advance for the costs referred to in subparagraphs (i), (ii) and (iii) of paragraph 39. Payment of such deposit by a party does not mean that such party has waived any objection it may have to the arbitral tribunal's jurisdiction. If, during the arbitral proceedings, it emerges that the costs will be higher than anticipated (for example, because of the prolongation of the arbitral proceedings, additional hearings, appointment of an expert by the arbitral tribunal), supplementary deposits may be requested. Deposits can be paid in full or in instalments, and bank guarantees can be a means to secure such deposits.

"44. Many arbitration rules have provisions regarding these matters, including whether the deposit should be made in equal amounts by the parties and the consequences of the failure of a party to make the payment.[11]

"45. Where the arbitration is administered by an arbitral institution, the institution's services may include fixing the amount of the deposit as well as holding, managing, and accounting for the deposits. If the arbitral institution does not offer such services, the parties or the arbitral tribunal will have to make necessary arrangements, for example, with a bank or other external provider. In any case, it is useful to clarify matters, such as the type and the location of the account in which the deposit will be kept, how the deposit will be managed and whether interest on the deposit will accrue.

"46. The parties, the arbitral tribunal and the arbitral institution should be aware of regulatory restrictions that may have an impact on the handling of deposits of costs, such as restrictions in bar regulations, financial regulations relating to the identity of beneficiaries and restrictions on trade or payment.

"**(c) Fixing and allocating the costs**

"47. The arbitral tribunal usually determines which costs incurred by the parties referred to in subparagraph (iv) of paragraph 39 and in-house costs referred to in paragraphs 40 and 41 will be recoverable. In arbitrations administered by an arbitral institution, some of the costs referred to in paragraph 39 may be set by the arbitral institution. In fixing the recoverable costs, the arbitral tribunal usually considers the reasonableness of the costs and decides whether to require evidence that the costs have actually been incurred.

"48. After fixing the costs of the arbitration, the arbitral tribunal determines how to allocate the costs between the parties. In so doing, the arbitral tribunal usually takes into account the allocation method agreed by the parties or provided in the applicable arbitration law or arbitration rules. There are

[11] See, for example, article 43 of the UNCITRAL Arbitration Rules (as revised in 2010).

various methods for allocating costs, the general rule being that costs follow the event, i.e., the costs of the arbitration should be borne by the unsuccessful party or parties in whole or in part. In allocating costs, the arbitral tribunal may also consider certain conduct of the parties. Conduct so considered might include a party's (i) failure to comply with procedural orders of the arbitral tribunal or (ii) procedural requests (for example, document requests, procedural applications and cross-examination requests), that are unreasonable, to the extent that such conduct actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings.

"49. At an appropriate time during the arbitral proceedings, the arbitral tribunal may request from the parties that they make submissions on costs. Decisions by the arbitral tribunal on costs and their allocation do not necessarily need to be made in conjunction with a final award. Decisions on costs may be made at any time during the arbitral proceedings (for example, when a partial award or a procedural decision is rendered) as well as after the award on the merits has been rendered.

"**6. Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration** [*A/CN.9/826, paras. 26, 79 to 89, 185 and 186; A/CN.9/832, paras. 114 to 121; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 57 to 60; A/CN.9/867, paras. 51 to 54*]

"**(a) Agreement on confidentiality**

"50. A widely held view is that there is an inherent requirement of confidentiality in commercial arbitration and that confidentiality is an advantageous and helpful feature of international commercial arbitration. Nevertheless, there is no uniform approach in domestic laws or arbitration rules regarding the extent to which the participants in an arbitration are under a duty to maintain the confidentiality of information relating to the arbitral proceedings.

"51. Should confidentiality be a concern or priority and should the parties not be satisfied by the treatment of that issue in the applicable arbitration law or arbitration rules, the parties may agree on the desired confidentiality regime to the extent not precluded by the applicable arbitration law.

"52. An agreement on confidentiality might cover one or more of the following matters: (i) the material or information that is to be kept confidential (for example, the fact that the arbitration is taking place, the identity of the parties and the arbitrators, pieces of evidence, written and oral submissions, the content of the award); (ii) measures for maintaining the confidentiality of such information and of the hearings and the duration of the obligation on confidentiality; (iii) circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right; and (iv) other circumstances in which such disclosure might be permissible (for example, information in the public domain, or disclosures required by law or a regulatory body). The parties may wish to consider how to extend the

obligation of confidentiality to witnesses and experts as well as to other persons associated with the party in the arbitral proceedings.

"53. Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.

"54. There are also circumstances in which certain information or material is deemed to be confidential to one of the parties in an arbitration (for example, commercial secrets, intellectual property, or information relating to national security in an arbitration involving a State or a government entity). Arrangements to protect such information or material may be made by the parties and, in certain circumstances, by the arbitral tribunal, for example, by restricting access to such information or material to a limited number of designated persons involved in the arbitration.

"**(b) Transparency in treaty-based investor-State arbitration**

"55. The specific characteristics of investor-State arbitration arising under an investment treaty have prompted the development of transparency regimes for such arbitrations. The investment treaty under which the investor-State arbitration arises may include specific provisions on publication of documents, open hearings, and confidential or protected information. In addition, the applicable arbitration rules referred to in those investment treaties may contain specific provisions on transparency.[12] Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.[13]

"**7. Means of communication** [*A/CN.9/826, paras. 25 and 91 to 102; A/CN.9/832, paras. 123 and 124; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 61; A/CN.9/867, para. 55*]

"**(a) Determination of the means of communication**

"56. It is useful for the parties and the arbitral tribunal to determine at the outset the means of communication to be used during the arbitral proceedings. Factors that might be considered in selecting the means of communication include ensuring that:

(i) Documents are accessible and easily retrievable by the parties and the arbitral tribunal, including through the use of a database for uploading and sharing documents;

(ii) Receipt of the communication can be ascertained;

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[12] See, for example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('the Rules on Transparency'); the Rules on Transparency may also have an impact on various aspects of the arbitral proceedings, for example, regarding submissions by third parties, and conduct of the hearings.

[13] For example, under article 1(2)(a) of the Rules on Transparency.

(iii) The means of communication is acceptable under the applicable arbitration law; and

(iv) The costs involved in the use of the selected means of communication are reasonable.

"57. Although more than one means of communication may be used (for example, paper-based as well as electronic means), the parties may wish to consider issues arising from the use of multiple means of communication, including which will be the authoritative means and, where time limits for submission apply, what action will constitute submission.

"**(b) Electronic means of communication**

"58. The use of electronic means of communication can make the arbitral proceedings more expeditious and efficient. However, it is advisable to consider whether all parties have access to, or are familiar with, such means. The parties and the arbitral tribunal may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication.

"**(c) Flow of communication**

"59. Communications are usually exchanged directly between the arbitral tribunal and the parties, unless an arbitral institution is acting as an intermediary. It is usual that all parties are copied on all communications to and from the arbitral tribunal.

"**8. Interim measures** [*A/CN.9/826, para. 24; A/CN.9/832, para. 113; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 62 to 74; A/CN.9/867, paras. 56 and 57*]

"**(a) Granting of interim measures**

"60. During the course of the arbitration, it is possible that a party may need to seek an interim measure, which is temporary in nature, either from the arbitral tribunal or a domestic court. Most arbitration laws and arbitration rules provide that the arbitral tribunal may, at the request of a party, grant interim measures.[14] Arbitration laws may also provide that courts may grant interim measures in relation to an arbitration. An established principle is that any request made by a party to a domestic court for an interim measure before or during the arbitral proceedings is not incompatible with an agreement to arbitrate.

"61. Depending on the applicable arbitration laws or arbitration rules, a party may be able to apply on an *ex parte* basis (i.e., without notice to any other party) for an interim measure and to apply, at the same time, for what is often referred to as a 'preliminary order', i.e. an order usually directing the parties not to frustrate the purpose of the requested interim measure while the arbitral

[14] See, for example, chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) and article 26 of the UNCITRAL Arbitration Rules (as revised in 2010).

tribunal decides whether to grant it. A party would normally only make such an *ex parte* request in circumstances where disclosing the request for the interim measure (prior to the arbitral tribunal's issuance of a preliminary order securing the status quo) may prompt the party against whom the requested measure is directed to take action that could frustrate the purpose of the measure (for example, sequestering assets or removing goods in dispute to another jurisdiction).[15]

"62. Issues to be considered by the parties and the arbitral tribunal in connection with application for interim measures include:

(i) The applicable law in relation to interim measures, including whether the granting of interim measures is within the scope of the arbitral tribunal's competence;

(ii) The type of measures that the arbitral tribunal may grant;

(iii) The conditions for requesting and granting interim measures;

(iv) The available mechanisms for enforcement of interim measures;

(v) The limitations in granting interim measures when a third party may be affected by the measures; and

(vi) The possible conflict between an arbitral tribunal's decision on an interim measure and a court-ordered interim measure.

"**(b) Costs and damages arising from interim measures; security for costs and damages**

"63. The party requesting an interim measure may be liable under the applicable law for costs and damages caused by the interim measure, if the arbitral tribunal later determines that, in the circumstances prevailing when the measure was ordered, the measure should not have been granted. The parties and the arbitral tribunal may determine a procedure for presenting claims on costs and damages arising from interim measures, indicating, for instance, at which point during the arbitral proceedings a party may make such claims and the arbitral tribunal may award such costs and damages.

"64. The party requesting an interim measure may be required by the arbitral tribunal to provide security for possible costs and damages arising therefrom.

"**9. Written submissions, witness statements, expert reports and documentary evidence ('submissions')** [*A/CN.9/826, paras. 103 to 109; A/CN.9/832, para. 125; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 75*]

"65. During the arbitral proceedings, the parties usually submit a wide range of documents: written submissions, witness statements, expert reports and documentary evidence (referred to generally as 'submissions'). Submissions are all written pleadings that are placed in the record of the proceedings, such as a statement of claim and a statement of defence and any second round of

[15] See, for example, section 2 of chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006).

rebuttal submissions that the parties and the arbitral tribunal may consider necessary.

"66. Submissions may be made consecutively, i.e., where one party (usually the party making the application or seeking the relief) makes its submission after which the other party or parties make a counter submission. Alternatively, all parties may be required to make their submissions simultaneously. The approach used may depend on the type of issues to be addressed in the pleading, the stage of the arbitral proceedings, and the time provided to the parties to prepare their submissions. Most arbitration rules address this matter, sometimes detailing the sequences of submissions and required content.

"**10. Practical details regarding the form and method of submissions** [*A/CN.9/826, paras. 110 and 111; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 76 and 77*]

"67. Regarding the form and method of submissions, practical details including those mentioned in Note 7 need to be considered. Certain arbitration rules contain relevant provisions on the matter. Depending on the volume and kind of submissions to be handled, the parties and the arbitral tribunal may consider whether it would be helpful to agree on practical details concerning, for instance, the following:

(a) The form in which submissions will be made (for example, in hard copy, electronic form or through a shared platform), including their format (for example, specific electronic formats, such as original or native format where applicable, search features);

(b) The particulars of management of submissions; the system for organizing, labelling, identifying and referencing submissions, including whether they can be presented in an efficiently accessible way (for example, by using hyperlinks to cite documentary evidence or legal authorities);

(c) The organization of certain types of submissions (for example, whether large spreadsheets or diagrams, or other types of documents ought to be presented separately);

(d) The preservation and storage of submissions; in certain instances, the applicable law may require a specific procedure to preserve documentary evidence prior to the commencement of the arbitration; and

(e) The particulars of data protection (for instance, in relation to information on witnesses).

"**11. Points at issue and relief or remedy sought** [*A/CN.9/826, paras. 112 to 116; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 78; A/CN.9/867, paras. 58 to 61*]

"**(a) Preparation of a list of points at issue**

"68. It is often considered helpful for the arbitral tribunal to prepare, in consultation with the parties, an indicative list of points at issue (as opposed to those that are undisputed) based on the parties' submissions. Such a list, when prepared at an appropriate stage of the arbitral proceedings and updated as

necessary, can assist the parties in focusing their arguments on the issues identified as critical by the arbitral tribunal, thereby improving the efficiency of the arbitral proceedings and reducing costs.

"**(b) Determination of the order in which the points at issue will be decided; possibility of bifurcated proceedings**

"69. Subject to any agreement of the parties, the arbitral tribunal has the flexibility and discretion to determine the sequence of the arbitral proceedings and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration.

"70. Depending on the points at issue, the arbitral tribunal may consider the appropriateness of deciding on certain claims or issues (such as jurisdiction, liability or other discrete issues whose determination will likely advance the resolution of the case) before others. In contemplating such an approach, the arbitral tribunal may wish to consider whether, under the applicable arbitration law, partial awards or decisions on those prioritized claims or issues are subject to judicial review before the final award is rendered. Where the arbitral tribunal decides to adopt a bifurcated approach to resolving certain issues, the parties' submissions and, where applicable, their disclosure of documents may be organized in separate stages to reflect that staged organization of the arbitral proceedings. Such an approach may have an impact on the adjudicative process, and therefore, the arbitral tribunal may wish to consider carefully whether such a staged process is likely to save time and costs of the overall proceedings or to have the opposite effect.

"**(c) Relief or remedy sought**

"71. If the arbitral tribunal considers that the relief or remedy sought by a party is not sufficiently precise, for example, to ensure the enforceability of the arbitral award, the arbitral tribunal may consider informing the parties of its concerns, bearing in mind that the arbitral tribunal would usually avoid suggesting on its own initiative that a new relief be requested.

"**12. Amicable settlement** [*A/CN.9/826, paras. 117 to 124; A/CN.9/832, para. 126; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 79 to 81; A/CN.9/867, para. 62*]

"72. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.

"**13. Documentary evidence** [*A/CN.9/826, paras. 125 to 136; A/CN.9/832, paras. 127 to 129; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 82 to 94; A/CN.9/867, paras. 63 to 67*]

"**(a) Time limits for submission of documentary evidence by the parties; consequences of failure to submit or late submission**

"73. The arbitral tribunal usually fixes time limits for the submission of documentary evidence at the outset of the arbitral proceedings. The arbitral tribunal may direct the parties to submit evidence relied upon along with their written submissions or no later than a specified subsequent point in time.

"74. The arbitral tribunal may clarify the consequences of late submissions of evidence and how it intends to deal with requests to accept late submissions. It may require a party seeking to submit evidence after the time limit to provide reasons for the delay. The arbitral tribunal, in determining whether to accept late submissions, would need to consider the procedural efficiency achieved by refusing late submissions, the possible usefulness of accepting them, and the interests of the parties (for example, providing the other party an opportunity to comment or submit its own further evidence in response to the late submission).

"75. The arbitral tribunal may remind the parties that if a party makes submissions that were not scheduled, the arbitral tribunal may consider whether to accept such submissions. Also, if a party is requested to submit evidence to support its case but fails to do so within the time limit without showing sufficient cause for such failure, the arbitral tribunal may make the award solely on the evidence before it.

"**(b) Requests to disclose documents**

"76. Approaches of arbitration laws and practices vary on whether a party may request the other party or parties to disclose specified documents and to what extent the arbitral tribunal should order such disclosure (for possible submission as evidence), when the requested party refuses to disclose voluntarily. Therefore, it may be useful for the arbitral tribunal to clarify with the parties at an early stage of the proceedings whether a party may request the other party to disclose documents and, if so, to indicate the scope of such disclosure, and to set out the relevant time limits, the form of disclosure requests and the procedures for contesting requests, if relevant.

"77. Requests for disclosure of documents may be made in various ways but are typically recorded in a schedule that is provided to the other party and sets out not only the documents requested, but also the reasons for the request. The other party may then state in the schedule whether it agrees with the request and if not, the reasons. Usually, the parties first exchange the disclosed documents only among themselves and then they determine which of the disclosed documents to submit as evidence.

"78. Where requests for disclosure of documents are contested, the requesting party may decide to submit the contested requests to the arbitral tribunal for its determination whether to order either or both parties to disclose documents.

The arbitral tribunal, if necessary, may add to the schedule a record of its decision whether to order disclosure on any contested requests.

"**(c) Evidence obtained by the arbitral tribunal from third parties**

"79. Where necessary and permitted by applicable arbitration law and arbitration rules, the arbitral tribunal may itself take appropriate steps to obtain evidence from a third party after consulting the parties. This applies in relation to documentary evidence as well as other evidence (see below, Note 16).

"**(d) Assertions about the provenance and authenticity of documentary evidence**

"80. At an early stage of the arbitral proceedings, the arbitral tribunal will often specify that unless a party raises objections to any of the following conclusions within a specified period of time, it will be understood that: (i) documentary evidence is accepted as having originated from the source indicated in it; (ii) a dispatched communication is accepted without further proof that it has been received by the addressee; and (iii) a copy is accepted as a faithful reproduction of the original. A statement by the arbitral tribunal to this effect can simplify the introduction of evidence and discourage unfounded and dilatory objections.

"81. If there are issues regarding the provenance, authenticity or completeness of documentary evidence, the arbitral tribunal may require verification thereof; it may further require that the evidence in its original form remain accessible to the parties and the arbitral tribunal.

"**(e) Presentation of documentary evidence**

"82. In order to avoid duplicate submissions, it is usual for the parties to agree or for the arbitral tribunal to direct that, once a given piece of documentary evidence is submitted in the record by one party, it does not need to be resubmitted by the other party.

"83. After each party has submitted its documentary evidence, the arbitral tribunal may encourage the parties to prepare, before the hearing, a joint set of evidence. It may also be practical for the parties and/or the arbitral tribunal to select the frequently used pieces of evidence and establish a set of 'working' or 'core' documents, regardless of whether these have been submitted jointly or otherwise.

"84. The presentation of certain evidence may be facilitated given its volume or nature if its content is summarized by way of a report from counsel or from an expert (for example, a public accountant or a consulting engineer). The report may present the information in the form of summaries, tabulations or charts. Such presentation may be combined with arrangements that give the parties and the arbitral tribunal an opportunity to review the underlying data and the methodology used for the preparation of the report, as well as to verify any assumptions made in its preparation.

"85. Notes 7 and 10 address other practical details that the parties and the arbitral tribunal may wish to consider regarding the presentation of documentary evidence.

"**14. Witnesses of fact** [*A/CN.9/826, paras. 141 to 149; A/CN.9/832, paras. 130 to 135; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 94 to 111; A/CN.9/867, paras. 69 to 74*]

"**(a) Identification of witnesses of fact; contact with the parties and their representatives**

"*(i) Witness statements and advance notice*

"86. The arbitral tribunal may clarify with the parties whether witnesses of fact will be presented and if so, whether written witness statements will be submitted (see below, para. 88).

"87. The arbitral tribunal may also clarify how witnesses and the scope of their expected testimony will be identified in advance of any hearing. In particular, the arbitral tribunal may request from the parties the following information regarding the proposed witnesses in addition to their names and addresses:

(a) The subject and facts upon which the witnesses will testify;

(b) The language in which the witnesses will testify;

(c) The nature of the witnesses' relationship with any of the parties and the dispute;

(d) The qualifications and experience of the witnesses, if and to the extent these are relevant to the dispute or the testimony; and

(e) How the witnesses learned about the facts on which they will testify.

"88. A witness statement is a document that may serve as evidence from that witness and would usually include the information contained in paragraph 87. It is helpful if a witness statement identifies all documentary evidence upon which it relies. Where a witness statement is submitted, it is generally accepted that this statement need not be repeated orally at the hearing. Often it is accepted as the witness' full direct testimony and only a short oral statement that confirms (possibly highlighting certain points) or that updates the written statement is required at the hearing. A written witness statement may eliminate the need to hear a witness of undisputed facts, as not all witnesses who have submitted witness statements need to be heard at the hearing (see below, para. 125). The arbitral tribunal may require each party to identify which of the other party's or parties' witnesses it wishes to examine at the hearing.

"*(ii) Whether a party or persons related to a party may be heard as witnesses*

"89. International arbitration can differ from domestic court practice in respect of whether a party or certain persons related to a party may be heard as witnesses (for example, its executives, employees or agents). Under some legal systems, a party or such persons may not be permitted to testify as witnesses in court proceedings, but may be heard in a different capacity (such as a party or person having relevant information). Nonetheless, in international arbitration, such distinction is rarely observed and a party or such persons can typically be heard as witnesses.

"*(iii) Nature of the contact of a party or its representative with witnesses*

"90. The practice in international arbitration can differ from that in domestic courts as to the permissibility of pre-testimony contact between a party or its representative and the witnesses presented by that party, and the nature of such contact. In international arbitration, pre-testimony contacts are widely accepted, although some bar rules prohibit counsel from discussing the witness' testimony in advance of a court hearing or arbitration. The arbitral tribunal may consider clarifying at the outset of the arbitral proceedings the nature of the contact a party or its representative is permitted to have with its witnesses, when inquiring about the facts of the case, when preparing written witness statements and when a witness is preparing to give oral testimony. While one common practice is to permit parties or their representatives to interview their witnesses about the facts of the dispute and/or assist them in the preparation of their witness statements, there exist divergent views as to how far a party or its representative may assist witnesses in preparing for the hearing.

"*(iv) Non-appearance of a witness*

"91. The arbitral tribunal may consider informing the parties about the possible consequences of a witness who was invited to testify at the hearing not appearing. The arbitral tribunal usually has some flexibility in dealing with such non-appearances, including regarding whether that witness' written statement may still be considered and, if so, what weight is to be given to such statement.

"*(v) Invitation of a witness by the arbitral tribunal*

"92. The arbitral tribunal may have to take appropriate steps to invite a witness to testify, for instance, where the parties fail to call a witness that the arbitral tribunal wishes to examine. The arbitral tribunal may also lend support to the parties by securing the attendance of a witness not under their control.

"**(b) Manner of taking oral evidence of witnesses**

"93. While arbitration laws and arbitration rules typically grant the arbitral tribunal broad discretion concerning the manner of taking oral evidence of witnesses (oral testimony), practices vary in this respect. In order to facilitate the parties' preparation for a hearing, the arbitral tribunal may consider clarifying some or all of the issues referred to below in Note 17.

"**15. Experts** [*A/CN.9/826, paras. 150 and 151; A/CN.9/832, para. 136; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 112 to 122; A/CN.9/867, paras. 75 to 80*]

"**(a) Types of experts and selection**

"94. Many arbitration laws and arbitration rules provide for the participation of one or more experts in arbitral proceedings. Frequently, the parties will present a report of one or more experts engaged by them (referred to as 'party-appointed experts' or 'expert witnesses') to address points at issue. An arbitral tribunal may appoint its own expert (referred to as 'tribunal-appointed

expert') to present a report on issues requiring expert guidance or to assist it in matters requiring specialized knowledge or skills.

"95. Arbitral institutions, chambers of commerce and other specialized organizations may be of assistance to the parties and the arbitral tribunal in the selection of experts, if needed. Experts are usually required to provide information on their expertise and recent experiences in a résumé prior to being engaged or appointed.

"**(b) Party-appointed experts (expert witnesses)**

"96. Each party may instruct its own experts ('party-appointed experts' or 'expert witnesses') regarding the issues to be addressed in their reports or the parties may agree on a joint list of issues to be addressed by the experts.

"97. The arbitral tribunal may subsequently invite the party-appointed experts who are addressing the same topic to submit a joint report identifying the points on which they agree and disagree, which may narrow issues to be dealt with later in the proceedings.

"98. Where the party-appointed experts express conflicting opinions, the arbitral tribunal may consider requesting supplementary or responsive expert reports to address the points at issue.

"99. The arbitral tribunal may also request the party-appointed experts to exchange their reports, and then hold an informal meeting where the points on which the experts agree or disagree are discussed. With this approach, the experts may respond to each other's questions more effectively, find common ground and/or take the time to discuss any specific issues. The reports of the experts can then be modified accordingly or the outcome of such procedure can be communicated by the experts at the hearing.

"100. Occasionally, it may be possible for the parties to agree on a single joint expert or to agree that the experts appointed by them will issue a single joint report, on which the parties are entitled to comment. Such approaches may have the benefit of reducing costs and streamlining the arbitral proceedings. When agreeing on a single joint expert or the issuance of a single joint report, it may be necessary to clarify at the outset whether the parties would be bound by the conclusions of the joint expert or those contained in the joint report.

"101. The arbitral tribunal may consider addressing whether expert reports should be filed consecutively or simultaneously as well as the timing of their submission, particularly whether such submission should be made along with a statement of claim or of defence.

"102. In addition, the arbitral tribunal may wish to clarify the nature and extent of communication between the parties or their representatives and their experts, and whether a party might be requested to disclose such communications.

"**(c) Tribunal-appointed experts**

"*(i) Function of the tribunal-appointed expert*

"103. The function of an expert appointed by the arbitral tribunal usually consists in preparing a report on one or several specific points requiring specialized knowledge or assisting the arbitral tribunal in understanding certain technical issues. In deciding whether to appoint its own expert, the arbitral tribunal usually takes into account also the efficiency of the arbitral proceedings. In some instances, the arbitral tribunal may decide to appoint an expert at a later stage of the arbitral proceedings, for example, if the opinions of the party-appointed experts do not allow the arbitral tribunal to reach a conclusion.

"104. Before appointing an expert, the arbitral tribunal will normally ensure that the expert has the required qualification and obtain a statement of his or her impartiality and independence. The arbitral tribunal usually gives the parties an opportunity to comment on the expert's proposed mandate, qualification, impartiality and independence.

"105. It may be advisable for the arbitral tribunal to consult with the expert upon his or her appointment to clarify the scope of the report and the issues to be covered. The arbitral tribunal may also wish to consult with the expert before the completion of his or her report to ensure that the report is responsive to the proposed mandate.

"106. The arbitral tribunal may consider clarifying the nature and extent of communication its expert may have with the parties and their representatives, jointly or separately, and how to deal with communications on confidential matters.

"107. Where a tribunal-appointed expert has presented his or her report, the parties are normally entitled to comment on the report either through formal or informal submissions (including through a report by their own experts), and to question the tribunal-appointed expert at a hearing.

"*(ii) Terms of reference of the tribunal-appointed expert*

"108. The purpose of the terms of reference of a tribunal-appointed expert is to indicate the questions on which the expert is to provide his or her opinion, thereby avoiding opinions on points that are not for the expert to assess, and to commit the expert to a time schedule. The terms of reference also ensure transparency regarding the relation between the arbitral tribunal and the tribunal-appointed expert.

"109. The terms of reference usually set out details regarding the documents and sites, property or goods that the expert can access, and how the expert will receive such information to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report the terms of reference as well as information on the method used in arriving at his or her conclusions, the sources of information relied upon, and the factual assumptions made in preparing the report. The remuneration of a tribunal-appointed expert is usually indicated in the terms of reference.

"**16. Inspection of a site, property or goods** [*A/CN.9/826, paras. 137 to 140; A/CN.9/832, para. 137; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 123 and 124; A/CN.9/867, para. 81*]

"110. In some arbitrations, the arbitral tribunal may need to assess physical evidence other than documentary evidence, for example, by inspecting goods or property, or visiting a specific site. Physical or virtual site inspections may be evidentiary in nature or may serve an illustrative function, improving the arbitral tribunal's understanding of the case.

"**(a) Physical evidence**

"111. If physical evidence will be submitted, the arbitral tribunal may fix the time schedule and the manner for presenting such evidence, make arrangements for the other party or parties to prepare for the presentation of the evidence and take measures for safekeeping the items of evidence.

"**(b) Inspections of site, property or goods**

"112. The arbitral tribunal may consider whether inspection of a site, property or goods is useful or required. If so, it may consider whether the inspection requires the arbitrators' physical presence or whether a virtual inspection might be possible or adequate in the interest of efficiency or cost savings.

"113. If a physical inspection of a site, property or goods takes place, the arbitral tribunal will need to consider various issues. These include timing, cost allocation, arrangements necessary to ensure that all parties are able to be present or represented at the inspection and an indication of who will guide the inspection and provide explanations. Prior to the inspection, it may be useful for the parties and the arbitral tribunal to agree on an inspection protocol and on the scope of the inspection.

"114. The site, property or goods to be inspected are often under the control of one of the parties. If so, it may be advisable to allow the other party to visit the place of inspection before the arbitral tribunal does, in order to provide that party with the opportunity to acquaint itself with the state and condition of the site, property or goods and to request that the arbitral tribunal view additional or different evidence at the place of inspection.

"115. Where an employee or a representative of a party controlling the site, property or goods gives guidance or explanations to the arbitral tribunal, this is usually done in the presence of the other party or its representative. It should be borne in mind that such explanations, in contrast to statements those persons might make as witnesses of fact in a hearing, are usually not treated as evidence in the arbitral proceedings.

"**17. Hearings** [*A/CN.9/826, paras. 159 to 174; A/CN.9/832, paras. 138 and 139; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 125; A/CN.9/867, paras. 82 to 88*]

"**(a) Decision whether to hold hearings**

"116. Arbitration laws and arbitration rules often allow any party to request a hearing for the presentation of evidence by witnesses and experts and/or for oral argument. Where none of the parties requests a hearing, the arbitral tribunal may determine whether to hold a hearing. The need for a hearing might be reconsidered at a later stage in light of the parties' submissions.

"117. It is a widely accepted practice to have written submissions, witness statements, expert reports and other documentary evidence submitted prior to the hearing. This may assist in focusing the issues that have to be dealt with at the hearing and avoid a lengthy hearing. In order to facilitate the parties' preparations, to avoid any misunderstanding and to prevent unexpected issues being raised, the arbitral tribunal may discuss this matter with the parties at the outset of the arbitral proceedings as well as in advance of any hearing.

"**(b) Scheduling of hearings**

"118. Dates for hearings are normally set at the earliest possible opportunity so as to ensure availability of the participants. A common practice is to hold hearings in a single, consecutive period. However, holding hearings over separate periods is, in some instances, necessary in order to accommodate the different schedules of the parties, witnesses, experts and the arbitral tribunal.

"119. The length of a hearing primarily depends on the complexity of the issues and evidence as well as the number of witnesses and experts to be heard. The length also depends on the procedural style used in the arbitration.

"120. It may be useful to limit the aggregate amount of time each party has for making oral statements, questioning witnesses and experts it presents and questioning witnesses and experts of the other party or parties. In general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers that a different allocation is justified. It is useful to determine the manner in which time would be kept throughout the hearing.

"121. Such time allocation, provided that it is realistic, fair and subject to supervision by the arbitral tribunal, will make it easier for the parties to plan their presentation of the various items of evidence and argument, reduce the likelihood of running out of time towards the end of the hearing and avoid any actual or perceived unfairness resulting from the parties' having unequal time.

"122. The arbitral tribunal usually sets aside time for its deliberations throughout the duration of the arbitral proceedings as well as before and shortly after the close of the hearings.

"**(c) Manner of conducting hearings**

"*(i) Different practices*

"123. In view of the broad latitude of the arbitral tribunal in the conduct of hearings and of the different practices in relation thereto, it may foster

efficiency of the arbitral proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad terms.

"*(ii) Holding of a hearing in-person or remotely*

"124. Hearings can be held in-person or remotely via technological means (see also above, para. 19). The decision whether to hold a hearing in-person or remotely is likely to be influenced by various factors, such as the importance of the issues at stake, the desirability of interacting directly with the witnesses, the availability of parties, witnesses and experts as well as the cost and possible delay of holding a hearing in-person. The parties and the arbitral tribunal may need to consider technical matters, such as the compatibility of the technological means to be used at different locations.

"*(iii) Deciding which witnesses of fact and expert witnesses ('witnesses') will provide oral testimony*

"125. Where the parties have already submitted written statements or reports from their witnesses, the arbitral tribunal may ask each party, prior to the hearing, which of the other party's or parties' witnesses it wishes to examine at the hearing (see above, para. 88). A party is normally responsible for making available any of its own witnesses at the hearing if another party or the arbitral tribunal has indicated that it wishes to examine that witness. If no other party wishes to examine the witness and the arbitral tribunal itself does not wish to do so, the arbitral tribunal may decide that the witness need not testify at the hearing. For the sake of efficiency, the arbitral tribunal may make a similar decision even when another party has requested the opportunity to cross-examine a witness, while this may raise concerns about the requesting party's opportunity to present its case. A decision not to hear oral testimony from a witness in these circumstances should not alter the weight that would otherwise be given to that witness' written statement.

"*(iv) Whether oral testimony will be given under oath or affirmation and, if so, in what form*

"126. Arbitration laws and practices differ as to whether oral testimony must be given under oath or similar affirmation of truthfulness. In some legal systems, the arbitral tribunal may in its discretion require witnesses to take an oath. In other legal systems, oral testimony under oath is either unknown in arbitration or may even be considered improper, as only an official such as a judge or a notary is empowered to administer oaths. In such circumstances, the witnesses may simply be asked to affirm that they will testify truthfully. It may be necessary to clarify who will administer any oath. Where applicable, the arbitral tribunal may draw the witnesses' attention to potential criminal sanctions for giving false testimony.

"*(v) Order of presentations at hearings*

"127. The arbitral tribunal has broad latitude to determine the order of presentations at hearings. Within that latitude, practices differ, for example, as

to whether opening or closing statements are heard and if they are, their sequence and duration, and which of the parties has the last word.

"128. The broad latitude of the arbitral tribunal also applies to the manner and sequence in which witnesses are heard and to other issues addressed at any hearing. When several witnesses are to be heard and longer testimony is expected, it is useful to determine in advance the order in which they will be called. In certain circumstances, it may be desirable to hear collectively several witnesses on the same subject matter. This is likely to reduce costs and facilitate scheduling. Each party might be invited to suggest the order in which it proposes to have its own witnesses testify.

"*(vi) Manner in which witnesses of fact and expert witnesses ('witnesses') will be heard*

"129. Witnesses may be first examined by the arbitral tribunal. Otherwise, the general practice is for witnesses to be examined first by the party calling that witness (to the extent permitted and if required, see above, paras. 88 and 125) and then cross-examined by the other party or parties. In this context, the question may arise whether cross-examination shall be restricted to the scope of the witness statement and oral testimony. The parties and the arbitral tribunal may wish to clarify this issue in advance of the submission of witness statements and the hearing. After cross-examination, the witness might be re-examined by the party calling the witness with questions limited to issues raised during the cross-examination. Thereafter, the cross-examining party or parties may further question the witness. The arbitral tribunal may normally ask questions at any time.

"130. Arbitration laws and practices differ as to the degree of control the arbitral tribunal exercises over the questioning of witnesses by the parties. For example, some arbitrators permit the parties to ask questions freely and directly to the witnesses. Other arbitrators apply stricter rules and limitations concerning the form of direct or cross-examination similar to those applied in court proceedings.

"*(vii) Whether witnesses of fact may be in the hearing room when they are not testifying*

"131. Practices vary in relation to the presence of witnesses of fact in the hearing room before and after they have testified. Some arbitrators consider, as a general rule, that witnesses of fact should not be allowed in the hearing room except when they are testifying. The purpose is to prevent the witnesses of fact from being influenced by statements of other witnesses and to prevent the possibility of one witness' presence influencing another witness' testimony. When witnesses of fact are not allowed in the hearing room, measures would usually be taken to avoid that they have access to any contemporaneous transcripts of the hearings. Other arbitrators consider that it is useful for witnesses of fact to be present when other witnesses are testifying in order to deter untrue statements and to clarify or reduce contradictions between witnesses. As a general rule, witnesses of fact should refrain from discussing their testimony during any breaks in their testimony. The arbitral tribunal may

wish to give guidance on these questions in advance, as it may affect the organization of the hearing.

"132. The arbitral tribunal may decide what approach to follow for each witness of fact. For example, a separate rule may be appropriate for witnesses of fact who also appear as representatives of a party (for example, managing directors, executives or in-house counsel), as such representatives may need to be present throughout the hearing in order to oversee the presentation of their case.

"*(viii) Submission of new evidence*

"133. The arbitral tribunal may wish to emphasize to the parties that new evidence will usually not be accepted during a hearing. In exceptional circumstances where the arbitral tribunal admits such new evidence, it may have to consider whether to permit further submissions so that the other party may respond.

"**(d) Arrangements for a record of the hearings**

"134. The arbitral tribunal may consider the method of preparing a record of oral statements and testimony during hearings as well as who will be responsible for making the necessary arrangements. Audio recording and transcription services are commonly used.

"135. The parties and the arbitral tribunal may consider whether audio recording should be transcribed, and clarify whether the audio recording would constitute the official record of the hearings (see also above, para. 16). If transcripts are to be produced, the arbitral tribunal may consider whether and how the parties will be given an opportunity to check the transcripts. For example, it may be determined that any change to the record must be approved by the parties and, failing their approval, referred to the arbitral tribunal for determination.

"**(e) Post-hearing submissions**

"136. Before or during the hearings, the parties and the arbitral tribunal usually decide whether any additional submissions are to be made by the parties after the hearing and, if so, a corresponding timetable is usually established. Such post-hearing submissions may be necessary in order to allow the parties to provide a summary of the case, to address specific issues that arose during the hearing, or to address the impact on their case of the evidence that emerged during the hearing.

"**18. Multiparty arbitration** [*A/CN.9/826, paras. 175 and 176; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 126 and 127; A/CN.9/867, para. 89*]

"137. When a single arbitration involves more than two parties (multiparty arbitration), many procedural issues remain the same as in two-party arbitration. However, difficulties may arise in multiparty arbitration. For example, the arbitral tribunal should be mindful not to assume that parties

grouped together as claimants or respondents will necessarily have the same interest, will make similar submissions, or will seek the same relief.

"138. In addition, a further difficulty is ensuring the fairness of the proceedings and that the various parties have an equal opportunity to participate in the appointment of the arbitral tribunal. The Notes, which identify matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of arbitration agreements or the constitution of the arbitral tribunal. Those matters give rise to special questions in multiparty arbitration as compared to arbitration involving only two parties, and are addressed under certain arbitration rules.[16]

"**19. Joinder and consolidation** [*A/CN.9/826, paras. 175 and 176; A/CN.9/832, para. 140; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 126 and 127*]

"**(a) Joinder**

"139. Joinder means adding a new party or parties into an existing arbitration. Not all joinder applications necessarily require the contemporaneous consent of all parties (i.e. the parties to the arbitration and the new party). The new party may already be bound by the arbitration agreement and the joinder process might be authorized by the arbitration agreement, the applicable arbitration laws and/or the applicable arbitration rules.

"140. Parties may wish to join a new party to the arbitration in situations where they would be unable to fully present their claims without that new party's participation or wish to avoid conflicting decisions with respect to different parties. Certain arbitration rules have addressed joinder by providing that the arbitral tribunal may, at the request of a party, allow one or more new parties to be joined to the arbitration, provided that the new party is bound by the arbitration agreement.[17] Other arbitration rules do not require that the party to be joined be bound by the arbitration agreement under which the claim arises, provided that it is bound by another relevant arbitration agreement that also binds the existing parties. In deciding whether to accept joinder, the arbitral tribunal may consider the procedural efficiency that may result therefrom, fairness to existing parties, or prejudice to any party. The arbitral tribunal may also consider its powers and the manner in which it was constituted.

"141. It is recommended that any new party be joined as early as possible in the arbitral proceedings. Many arbitration rules that address joinder restrict the ability to seek joinder after the arbitral tribunal has been appointed. For example, a party may request the joinder when filing its response to the notice of arbitration.[18] In such a case, the new party could be joined to the procedure

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[16] See, for example, article 10(1) of the UNCITRAL Arbitration Rules (as revised in 2010), which provides that "(…) where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator."

[17] See, for example, article 17(5) of the UNCITRAL Arbitration Rules (as revised in 2010).

[18] See, for example, article 4(2)(f) of the UNCITRAL Arbitration Rules (as revised in 2010).

before the arbitral tribunal is appointed. Depending on the applicable arbitration law and arbitration rules, a third party may also be joined after the appointment of the arbitral tribunal if certain conditions are fulfilled.

"**(b) Consolidation**

"142. The question of consolidation arises in situations where several distinct arbitrations are initiated under the same or different arbitration agreements. Consolidation refers to the merging of separate arbitrations, regardless of whether or not the related arbitrations have been commenced pursuant to the same or a different arbitration agreement. Consolidation can increase efficiency and avoid inconsistent outcomes on related issues. However, one or more parties may have a justified interest in having several disputes dealt with separately, for example because one of the disputes has priority or the consolidation of several cases would render the arbitral proceedings more complex and time-consuming. It may not always be feasible to consolidate arbitrations if an arbitral institution is not involved.

"143. An increasing number of arbitration rules address consolidation. Arbitration rules that expressly permit consolidation of two or more pending arbitrations do so upon consideration of various factors, such as whether (i) consolidation has been requested by a party, (ii) all the parties agree to consolidation, (iii) the disputes arise in connection with the same legal relationship or under the same arbitration agreement and, if not, whether those agreements are compatible, and (iv) an arbitral tribunal has been appointed in any of the arbitrations.

"**20. Possible requirements concerning form, content, filing, registration and delivery of the award** [*A/CN.9/826, paras. 177 to 181; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 128 to 132*]

"144. The parties and the arbitral tribunal should bear in mind the applicable arbitration law and the law at the potential place(s) of enforcement of the award, as well as the applicable arbitration rules, in considering any requirements as to the form, content, filing, registering or delivering of the award.

"145. Some laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a competent authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (for example, to all awards or only to awards not rendered under the auspices of an arbitral institution); the time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); and the consequences of failing to comply with such requirements.

"146. If such requirements exist, it is useful, before the issuance of an award, to determine who will take the necessary steps to meet the requirements and to decide how the costs are to be allocated. The failure to comply with such requirements might affect the validity and/or enforceability of the award."