United Nations A/CN.9/WG.II/WP.143

General Assembly

Distr.: Limited
20 July 2006*

Original: English

United Nations Commission on International Trade Law
Working Group II (Arbitration)
Forty-fifth session
Vienna, 11-15 September 2006

Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

* The submission of this note was delayed due to the close proximity of this Working Group session to the thirty-ninth Commission session and the requirement to include details arising therefrom in this note.

V.06-55861 (E)

Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Rules").[1] The Commission previously discussed that matter at its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005).[2]

2. At the forty-fourth session of the Working Group (New York, 23-27 January 2006), in order to facilitate a review of the UNCITRAL Rules, it was proposed to undertake preliminary consultations with practitioners to develop a list of potential topics on which updating or revision might be necessary.[3] A conference was held in Vienna on 6 and 7 April 2006 in cooperation with the International Arbitral Centre of the Austrian Federal Economic Chamber. Suggestions were made to amend a number of articles of the UNCITRAL Rules in order to better align the Rules with current international arbitration practice and the relevant provisions of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law").

3. To facilitate discussions of the Working Group on that topic, the Secretariat has prepared an annotated list of possible areas of revision of the UNCITRAL Rules, as suggested by arbitration experts during that conference, and as detailed in writings of such experts.[4] This note covers articles 1 to 16 of the UNCITRAL Rules. Articles 17 to 41 are dealt with under A/CN.9/WG.II/WP.143/Add.1. This note and the addendum identifies areas of consensus as well as possible trends in modern arbitration and how those trends are reflected in arbitration rules with a view to extracting therefrom possible areas for revision of the UNCITRAL Rules. The annotated list is not intended to be exhaustive, and the Working Group might wish to raise additional issues.

4. It is suggested that the forty-fifth session of the Working Group be devoted to identifying areas where revisions of the UNCITRAL Rules might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for subsequent sessions the first tentative draft of revised UNCITRAL Rules.

Notes on a revision of the UNCITRAL Arbitration Rules

1. General remarks

Principles to be applied in revising the UNCITRAL Rules

5. At the thirty-ninth session of the Commission (New York, 19 June-7 July 2006), in recognition of the success and status of the UNCITRAL Rules, the Commission was generally of the view that any revision of the UNCITRAL Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to carefully consider the list of topics which might need to be addressed in a revised version of the UNCITRAL Rules.

Harmonization of the drafting of the UNCITRAL Rules with the Arbitration Model Law

6. The Working Group might wish to consider harmonizing the provisions of the UNCITRAL Rules with the corresponding provisions of the Arbitration Model Law, where appropriate.[5]

2. Notes on the provisions of the UNCITRAL Rules

7. Only articles on which substantive revisions are discussed are referred to below. The text of articles quoted in this note in italic is the original text of the UNCITRAL Rules.

Section I—Introductory rules

Scope of application—Article 1

> "*1. Where the parties to a contract have agreed in writing[*] that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.*
>
> *"2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*"
>
> [*] *Model Arbitration Clause*
>
> *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.*
>
> *Note—Parties may wish to consider adding:*
>
> *(a) The appointing authority shall be ... (name of institution or person); (b) The number of arbitrators shall be ... (one or three); (c) The place of arbitration shall be ... (town or country); (d) The language(s) to be used in the arbitral proceedings shall be ...*

Applicable version of the UNCITRAL Rules

8. Article 1 deals with the scope of application of the UNCITRAL Rules, without determining which version of the Rules would apply in case of revision. In that respect, it might be noted that the model arbitration clause appended to article 1, paragraph (1) refers to the Rules "as at present in force".

9. The Working Group might wish to note that many investment treaties include a provision on settlement of disputes which refers to the "arbitration rules of the United Nations Commission on International Trade Law", without determining which version of those Rules would apply in case of revision.[6] Some treaties expressly stipulate that, in the event of a revision of the UNCITRAL Rules, the applicable version will be the one in force at the time that the arbitration is commenced.[7]

10. The rules of several arbitration centres contain a clarification on the applicable version of the rules in case of revision. For instance, the International Chamber of Commerce Arbitration Rules ("ICC Rules") contain an express interpretative provision to the effect that the parties "shall be deemed to have submitted ipso facto to the Rules in effect on the date of the commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement" (article 6, paragraph (1)). The Arbitration Rules of the London Court of International Arbitration ("the LCIA Rules") contain in their preamble a statement clarifying that the applicable Rules are the current version of the Rules ("the following Rules") or, in case of a revision, "such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration".

11. The Working Group might wish to consider whether to revise article 1, by providing as a default rule that the most recent version of the UNCITRAL Rules apply, subject to contrary agreement of the parties.

Paragraph (1)

The writing requirement for the agreement to arbitrate

12. Article 1, paragraph (1) requires that the agreement of the parties to refer disputes to arbitration under the UNCITRAL Rules be in writing.

13. The *travaux préparatoires* indicate that the purpose of the requirement that the arbitration agreement be in writing was to avoid uncertainty as to whether the UNCITRAL Rules have been made applicable. That requirement was also intended to ensure conformity with article II, paragraph (2), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention").[8]

14. It might be noted that there has been constant development of international arbitral practice on this question.

15. The Working Group might wish to note that the revised version of article 7 of the Arbitration Model Law on the definition and form of the arbitration agreement, as adopted by the Commission at its thirty-ninth session (New York, 19 June-7 July 2006), contains two options, the first one including a liberalized definition of the writing requirement, and the second deleting altogether that requirement. At that session, the Commission adopted a Recommendation on the interpretation of article II, paragraph (2), of the New York Convention, recommending "that article II, paragraph (2) be applied recognizing that the circumstances described therein are not exhaustive".[9]

16. The arbitration rules of several institutions do not require, as a condition for their applicability, an agreement in writing. For instance, the ICC Rules only require that the parties have agreed to submit to arbitration under the ICC Rules. The Swiss Rules of International Arbitration ("the Swiss Rules"), which are based on the UNCITRAL Rules, provides that "these Rules shall govern international arbitrations, where an agreement to arbitrate refers to these Rules (…)" (article 1, paragraph (1)). As well, the rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules") do not require any written arbitration agreement.

17. Other institutions, which still maintain the writing requirement, seek to adopt a flexible definition of that requirement. For instance, the preamble of the LCIA Rules states that: "where an agreement (…) provides in writing and in whatsoever manner for arbitration under the Rules of the LCIA (…), the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules (…)".

18. The Working Group might wish to consider whether the writing requirement should be retained.

The writing requirement for modification of the Rules

19. Article 1, paragraph (1) requires that the parties set out any modification they wish to make to the UNCITRAL Rules in writing.

20. According to the *travaux préparatoires*, the requirement that modification to the UNCITRAL Rules be in writing was intended to create certainty as to the ambit of such a modification.[10]

21. It might be noted that certain arbitration rules provide for a similar obligation. For instance, the preamble of the Arbitration Rules of the Singapore International Arbitration Centre ("the SIAC Rules") states that "where any agreement, submission or reference provides for arbitration under the (…) Rules, the parties thereto shall be taken to have agreed that the arbitration shall be conducted in accordance with the following Rules (…), subject to such modifications as the parties may agree in writing".

22. For instance, the Swiss Rules, the LCIA Rules, or the SCC Rules do not contain an obligation that modification by the parties to the Rules be in writing.

23. The Working Group might wish to consider whether the writing requirement should apply in respect of modifications.

"disputes in relation to that contract"

24. Article 1, paragraph (1) refers to disputes in relation to a contract. The Working Group might wish to consider whether the ambit of the UNCITRAL Rules should include such a limitation, or be widened and include words consistent with article 7 of the Arbitration Model Law, which permits arbitration of disputes "in respect of a defined legal relationship, whether contractual or not".[11]

25. It might be noted that other sets of arbitration rules (such as the ICC Rules and the LCIA Rules) do not contain such limitation.

Paragraph (2)

International law

26. The Working Group might wish to consider whether article 1, paragraph (2) should include an explicit reference to "international law" to better deal with cases where a State or an international organization is involved as an arbitrating party.

Notice, calculation of periods of time—Article 2

> "*1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered*

at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressees last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

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

Paragraph (1)

27. Article 2, paragraph (1) is based on the 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods and set forth default provisions, which the parties may vary. It regulates in useful detail when a notice, including a notification, communication or proposal is deemed to have been received. It includes a reference to a physical delivery of notices, which represents the "concept of effective delivery" as strongly supported in the *travaux préparatoires*.[12]

28. It might be noted that the Arbitration Rules of the American Arbitration Association ("AAA Rules") provide that "(…) all notices, statements and written communications may be served on a party by air mail, air courier, facsimile, transmission, telex, telegram or other written form of electronic communication addressed to the party or its representative at its last known address or by personal service" (article 18, paragraph (1)). The ICC Rules provide that all notifications or communications shall be made "by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof" (article 3, paragraph (2)). The LCIA Rules contain a similar provision (article 4.1).

29. The Working Group might wish to consider whether that provision, which might be read as excluding electronic communications, should be amended to reflect contemporary practice.

Paragraph (2)

30. The Working Group might wish to consider whether paragraph (2) should provide that the arbitral tribunal might have an express power to extend or shorten the time-periods stipulated under the UNCITRAL Rules, as necessary for a fair and efficient process of resolving the parties' dispute. The granting of such power to the arbitral tribunal would be of practical value when the parties fail to agree on these matters.

31. Example of such provisions might be found in the LCIA Rules, which provide that "The arbitral tribunal may at any time extend (even where the period of time has expired) or abridge any period of time prescribed under these Rules or under the Arbitration Agreement for the conduct of the arbitration, including any notice or communication to be served by one party on any other party" (article 4.7). The Rules of Arbitration of the World Intellectual Property Organization ("the WIPO Rules") provide that "The tribunal shall ensure that the arbitral procedure takes

place with due expedition. It may, at the request of a party or on its own motion, extend in exceptional cases a period of time fixed by these Rules, by itself or agreed to by the parties. In urgent cases, such an extension may be granted by the presiding arbitrator alone" (article 38 (c)).

Notice of arbitration—Article 3

> "*1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.*
>
> *"2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.*
>
> *"3. The notice of arbitration shall include the following:*
>
> *"(a) A demand that the dispute be referred to arbitration;*
>
> *"(b) The names and addresses of the parties;*
>
> *"(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;*
>
> *"(d) A reference to the contract out of or in relation to which the dispute arises;*
>
> *"(e) The general nature of the claim and an indication of the amount involved, if any;*
>
> *"(f) The relief or remedy sought;*
>
> *"(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.*
>
> *"4. The notice of arbitration may also include:*
>
> *"(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;*
>
> *"(b) The notification of the appointment of an arbitrator referred to in article 7;*
>
> *"(c) The statement of claim referred to in article 18.*"

32. During the discussions on the preparation of the UNCITRAL Rules, the *travaux préparatoires* indicate that the Commission heard the views that article 3 constitutes a "bridge between the civil and common law systems" and a "reasonable compromise" between those who wished the statement of claim to be delivered at the outset and those who preferred a two-tier approach where the notice of arbitration is followed by the statement of claim.[13]

Notice of arbitration separated from statement of claim

33. Paragraph (3) requires the claimant's notice of arbitration to indicate the "general nature" of its claim (paragraph (3) (e)) as well as the "remedy or relief sought" (paragraph (3) (f)). As the statement of claim is only an optional element in the notice of arbitration, the arbitral tribunal might be constituted without the respondent having an opportunity (or being required) to state its position with respect to (i) jurisdiction, (ii) the claim, or (iii) any counterclaim. Article 18 of the

UNCITRAL Rules sets out the requirements for a statement of claim if it was not included in the notice of arbitration.

34. In that respect, the Working Group may wish to note that the Swiss Rules include the statement of claim as an optional element of the notice of arbitration (article 3, paragraph (4)). By contrast, the AAA Rules require that the notice of arbitration "shall contain a statement of claim" (article 2, paragraph (3)). The ICC Rules provide that the request for arbitration contain, inter alia, "a description of the nature and circumstances of the dispute giving rise to the claim(s);" (…) "a statement of relief sought, including, to the extent possible, any indication of the amount(s) claimed" (article 4, paragraph (3)). The LCIA Rules provide that the claimant's written request for arbitration should be accompanied by "a description of the nature and circumstances of the dispute and the specification of the claim" (article 1.1 (c)) as well as "a statement of any matters (…) on which the parties have already agreed in writing for the arbitration or in respect of which the claimant wishes to make a proposal" (article 1.1 (d)). The SCC Rules require that the request for arbitration include "a summary of the dispute" (article 5 (ii)) and "a preliminary statement of the relief sought by the Claimant" (article 5 (iii)). The Arbitration rules of the German Institution of Arbitration ("the DIS Rules") provide that arbitration is initiated by filing a statement of claim with the DIS Secretariat and the statement of claim must include, inter alia, the facts and circumstances, which give rise to the claim(s)" (Sec. 6.1). The Rules of Arbitration of the China International Economic and Trade Arbitration Commission ("the CIETAC Rules) provide that the request for arbitration shall include the claim of the claimant (article 10, paragraph 1 (a)).

35. The Working Group might wish to consider whether the notice of arbitration should be separated from the statement of claim.

Content of the notice of arbitration

36. The Working Group might wish to consider whether the content of the notice of arbitration should include all the elements necessary to permit the respondent to take a position on (a) the claimant's claim, (b) the validity and scope of the arbitration agreement invoked, (c) counterclaims, and (d) the constitution of the tribunal. Such a provision might be added to article 3, paragraph (3).

37. Consistent with the proposal to extend article 1, paragraph (1) to cover disputes that do not arise out of or in relation to a contract, the Working Group might wish to consider whether the notice of arbitration should require an indication of the document(s) or fact(s) out of or in relation to which the dispute arose.

38. As well, for disputes that arise out of a contract, the Working Group might wish to consider whether the notice of arbitration should require that a copy of that contract (rather than merely a reference to it) should be provided.

39. The Working Group might wish to note that, under the LCIA Rules (article 1.1 d)) and the ICC Rules (article 4, paragraph (3) (f)), the claimant is required to make proposals on the place (i.e., the legal seat) and language of the arbitration, if these matters have not already been agreed upon.

Response to the notice of arbitration

40. The Working Group might wish to consider whether the respondent should be given an opportunity to state its position before the constitution of the arbitral

tribunal, by responding to the notice of arbitration, and before the submission by the claimant of its statement of claim. This would, in turn, permit the claimant to articulate in its statement of claim both its positive case (on its claim) and its defensive case (on the respondent's claim). For instance, such opportunity is provided for in the SCC Rules (article 10), the ICC Rules (article 5), and the LCIA Rules (article 3).

41. Allowing the respondent to state its positions in a reply to the notice of arbitration might have the advantage of clarifying at an early stage of the procedure the main issues raised by the dispute. It might be noted however that the UNCITRAL Rules are meant to deal also with ad hoc arbitration cases. Therefore, it might be advisable that revised provisions of the UNCITRAL Rules on the notice of arbitration and its response by the respondent include a level of flexibility on the extent of information to be exchanged between the parties before the constitution of the arbitral tribunal.

Section II—Composition of the arbitral tribunal

Number of Arbitrators—Article 5

> "*If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.*"

42. The *travaux préparatoires* recalled that it was normal practice to have three arbitrators in the arbitration of disputes arising out of international trade transactions. The *travaux préparatoires* also indicate that the question had been examined whether this article should contain a provision stating that, even where the parties fail to reach an agreement on the number of arbitrators, the parties have the right to agree subsequently that there shall be a single arbitrator. It was considered, however, that no express provision to this effect was needed, since the desired result may be obtained by the parties agreeing in writing to modify this article in accordance with article 1.[14]

43. The Working Group might wish to note that, according to the LCIA Rules (article 5.4) and AAA Rules (article 5), when the parties have not agreed on the number of arbitrators, preference is given to the appointment of a sole arbitrator, unless the appointing authority determines otherwise in its discretion considering the circumstances of the case. The ICC Rules provide that, where the parties have not agreed upon the number of arbitrators, the court will appoint a sole arbitrator, except "where it appears to the ICC court that the dispute is such as to warrant the appointment of three arbitrators" (article 8, paragraph (2)). The Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber, Vienna ("Vienna Rules") state no preference but allow discretion on the part of the appointing authority in deciding whether to appoint one or three arbitrators (article 14 (2)).

44. The Working Group might wish to decide whether the default composition for arbitral tribunals of three members should be kept or modified.

Appointment of arbitrators—Articles 6-8

Multiparty arbitration

45. Articles 6 to 8 deal with the appointment of arbitrators, but they do not include provisions dealing with appointment of arbitrators in multi-party cases. When a single arbitration involves more than two parties (multi-party arbitration), proceedings can be more complicated to manage.

46. Rules of various arbitration institutions have been amended so as to accommodate multi-party arbitration (article 10 of the ICC Rules, article 8.1 of the LCIA Rules, rule 9 of the SIAC Rules, article 18 of the WIPO Rules) and deal with that situation in the following manner: where there are multiple parties, whether as claimant or as respondent, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator; in the absence of such a joint nomination and where all parties are unable to agree on a method for the constitution of the arbitral tribunal, the appointing authority may appoint each member of the arbitral tribunal and designate one of them to act as chairperson.

47. The Working Group might wish to decide whether a revised version of the UNCITRAL Rules should include provisions on multi-party arbitration.

Challenge of Arbitrators—Articles 9-12

Article 9

> "*A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.*"

Disclosure

48. Article 9 sets forth a two-step disclosure process. The Working Group might wish to consider whether article 9 should make it explicit that the duty of impartiality and independence is a continuing one, as provided for under article 12, paragraph (1), of the Arbitration Model Law and under most of the provisions on disclosure of the rules of arbitration centres (article 7 (3) of the ICC Rules, articles 5.2, 5.3 of the LCIA Rules, article 7 (5) of the Vienna Rules). The Working Group might also wish to consider whether article 9 should contain a clarification that disclosure should be in the form of a written declaration.

Article 12

> "*1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:*
>
> *"(a) When the initial appointment was made by an appointing authority, by that authority;*
>
> *"(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;*

> *"(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.*
>
> *"2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.*"

49. Practitioners have noted that this provision, which does not contain time-limits by which the party making the challenge must seek a decision by the appointing authority (and, if necessary, seek the designation of an appointing authority) had on occasion led to delay and uncertainty on the part of the arbitral tribunal on whether the proceedings should be continued.

50. The Working Group might wish to decide whether time limits should be included in any revised version of that provision.

Replacement of an arbitrator—Article 13

> "*1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.*
>
> *"2. In the event that an arbitrator fails to act or in the event of the* de jure or de facto *impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.*"

Resignation of arbitrators

51. One of the questions raised by article 13 is whether the conditions for resignation of an arbitrator should be defined, in order to dissuade spurious resignations, or at least minimize their impact on the overall process.

52. During the discussions on the preparation of the UNCITRAL Rules, the *travaux préparatoires* show that the Commission heard the views that, although it was recognized that an arbitrator should resign only for exceptional "good reasons",[15] it was felt that such an obligation could not be effectively enforced.[16]

53. The Working Group might wish to consider the following proposals to address that question:

- In multi-member arbitral tribunals, a resignation could be approved by the other arbitrators. This would require an arbitrator to provide reasons for resigning and to submit to the other arbitrators' scrutiny and judgment, and might be an effective deterrent against ill-considered or plainly tactical resignations. This practice would be consistent with the general rule that the arbitral tribunal is responsible for the conduct of the proceedings.

- A resignation would take effect on a date decided upon by the arbitral tribunal: this rule would permit arbitral tribunals to continue with the proceedings in an orderly way.[17]

Nominating process in case of replacement of an arbitrator

54. Concerning the nominating process in case of replacement of an arbitrator, the Working Group might wish to note that rules of several arbitration centres provide for discretion to decide whether or not to follow the original nominating process (for example, article 11.1 of the LCIA Rules). The purpose of that provision is to deprive the party which has appointed an arbitrator whose resignation is not approved of the right to name his or her replacement. Article 13 of the Swiss Rules provides that the party having nominated the arbitrator concerned shall designate a replacement arbitrator within a prescribed time limit, failing which the Chambers shall appoint a replacement arbitrator. Such mechanism might however not easily fit in the context of ad hoc arbitration.

Truncated tribunals

55. An important question raised by article 13 is whether the language of article 13 ("shall be appointed", "the procedure in respect of the challenge and replacement (…) shall apply") precludes the remaining arbitrators from continuing with the proceedings and possibly issuing an award, without a replacement arbitrator being nominated.

56. A revised version of article 13 might include provisions to address the situation where the arbitral tribunal decides to proceed with the arbitration notwithstanding the absence of one of its members, for instance where the arbitral tribunal considers that one of its members is obstructing the progress of the case, including the arbitral tribunal's deliberations. The Working Group might wish to discuss the potential detrimental consequences of bad-faith withdrawals of arbitrators from arbitral proceedings on the practice of international commercial arbitration and, in that context, consider the extent to which the parties should be able, by agreement, to put beyond doubt the validity of an award issued by a tribunal composed of the remaining arbitrators constituting the majority of the members of the arbitral tribunal (a "truncated" arbitral tribunal).[18] In that respect, the Working Group might bear in mind the provisions of article 32, paragraph (4), which requires that the award state the reason for the absence of one arbitrator's signature from an award.

57. Article 10 of the AAA Rules provides, inter alia, that the administrator shall determine whether there are sufficient reasons to accept the resignation of an arbitrator. Article 11 then provides that in case "an arbitrator on a three-person tribunal fails to participate in the arbitration for reasons other than those identified in article 10, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate". The ICC Rules provide that the ICC court has discretion, when an arbitrator is replaced, to decide whether or not to follow the original nominating process (article 12, paragraph (4)), and may decide, subsequent to the closing of the proceedings, when it considers appropriate, that the remaining arbitrators shall continue the arbitration (article 12, paragraph (5)).

Repetition of hearings in the event of the replacement of an arbitrator—Article 14

> "*If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.*"

58. Article 14 defines the procedure for repetition of hearings in the event of replacement of an arbitrator, and specifies that when the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated.

59. The *travaux préparatoires* indicate that, in recognition of the special role that is played in arbitral proceedings by the sole or presiding arbitrator, this paragraph provides that when such an arbitrator is replaced, all hearings that were held previously must be repeated.[19]

60. It might be noted that article 14 of the Rules of Procedure of the Iran-US Claims Tribunal and article 12, paragraph (4), of the ICC Rules leave this decision entirely to the arbitral tribunal without providing for any compulsory rules. As well, article 14 of the Swiss Rules provides that in case of replacement of an arbitrator, the proceedings shall resume at the stage where the arbitrator who was replaced ceased his or her functions, unless the arbitral tribunal decides otherwise.

61. The Working Group might wish to consider whether the UNCITRAL Rules should be revised so as to leave the decision on whether or not to repeat a hearing when the sole or presiding arbitrator is replaced to the arbitral tribunal.

Section III—Arbitral Proceedings

General Provisions—Article 15

> "*1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*
>
> *"2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.*
>
> *"3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.*"

Paragraph (1)

62. The Working Group might wish to decide whether paragraph (1) should spell out the general principle that arbitral proceedings should be dealt with by the arbitral tribunal without unnecessary delay. Such a rule has been included in arbitration rules of many arbitration institutions. For instance, article 14.1 (ii) of the LCIA Rules imposes the general duty on tribunals at all times "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or

expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute". Article 15, paragraph (3) of the Swiss Rules provides that "at an early stage of the arbitral proceedings and in consultation with the parties, the arbitral tribunal shall prepare a provisional time-table for the arbitral proceedings, which shall be provided to the parties and, for information to the Chambers". Article 16, paragraph (2) of the AAA Rules provides that "the tribunal, in exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute". Article 20, paragraph (3) of the SCC Rules and article 38 (c) of WIPO Rules contain provisions to the same effect.

Preparatory consultations or meetings

63. Preparatory consultations or meetings are increasingly viewed as serving a useful purpose, particularly in more complex international arbitration proceedings. The UNCITRAL Notes on Organizing Arbitral Proceedings provide guidance to both the arbitral tribunal and the parties on matters to be discussed in that context.[20]

64. Preparatory meetings are expressly provided for under the Iran-US Claims Tribunal Notes to article 15. The Iran-US Claims Tribunal adopted article 15 of the UNCITRAL Rules but provided in Note 4 to the article that "[t]he arbitral tribunal may make an order directing the arbitrating parties to appear for a pre-hearing conference. The pre-hearing conference will normally be held only after the Statement of Defence in the case had been received. The order will state the matters to be considered at the pre-hearing conference". Article 16, paragraph (2) of the AAA Rules provides that the arbitral tribunal "may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings". Under article 18 the ICC Rules, the arbitral tribunal must in all cases draw the terms of reference and a timetable for the proceedings.

65. While the general rule contained in current article 15, paragraph (1) does not preclude tribunals from holding preparatory consultations or meetings, the Working Group might wish to consider whether a provision should be included in the UNCITRAL Rules expressly conferring the power on the arbitral tribunal to hold such consultations or meetings "at an appropriate stage of the proceedings", whether following a request by the parties or at its own initiative.

Consolidation of cases before arbitral tribunals

66. In situations where several distinct disputes arise between the same parties under separate contracts (e.g., related contracts or a chain of contracts) containing separate arbitration clauses, one of the parties might object to all the disputes being resolved in the same proceedings. A party might also initiate a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage. Consolidation in such situations might provide a more efficient resolution of the disputes between the parties consistently with the general principle in article 15, paragraph (1), and also reduce the possibility of inconsistent awards in parallel arbitrations.

67. The Working Group might wish to note that consolidation is permitted under the ICC Rules when all proceedings relate to the same "legal relationship", on the premise that the parties have consented to consolidate claims by choosing to arbitrate in accordance with the ICC Rules. Article 4, paragraph (6), of the

ICC Rules provides: “When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of article 19”.

68. Under the UNCITRAL Rules, consolidation is possible only where the parties specifically so agree.[21] The Working Group might wish to consider whether, bearing in mind the fact that the UNCITRAL Rules often apply in non-administered cases, additional provisions on that matter should be inserted in a revised version of the UNCITRAL Rules.

Third party intervention in arbitral proceedings

69. Third parties, for example non-governmental organizations, may request for an opportunity to explain their positions, particularly in investment treaty arbitrations. Article 15, paragraph (1), of the UNCITRAL Rules, which provides that “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate”, could be interpreted as encompassing power of the arbitral tribunal to accept such interventions, for example in the form of *amicus curiae* briefs.

70. The Swiss Rules, for instance, expressly provide, under article 4, paragraph (2), that: “Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable”.

71. The Working Group might wish to consider whether an express provision on third party intervention should be included in any revised version of the UNCITRAL Rules.

Confidentiality of proceedings

72. Articles 25, paragraph (4), and 32, paragraph (5), of the UNCITRAL Rules deal with the confidentiality of hearings and awards respectively, but do not contain rules regarding the confidentiality of the proceedings as such, or of the materials (including pleadings) before the arbitral tribunal.

73. The Working Group might wish to note that following substantial controversy on whether arbitral proceedings should be confidential, the ICC considered including an express provision on confidentiality in its Rules when it most recently revised them in 1998. After extensive consideration, it was decided that a general confidentiality provision should not be included, and that the matter should be left to be addressed on a case-by-case basis by the arbitrators and the parties (for example, in the Tribunal’s Terms of Reference).

74. The Working Group might wish to consider whether an express provision to that effect should be included in a revised version of the UNCITRAL Rules, and, if so, how to define the scope of application of the confidentiality obligation, the persons concerned, and the exceptions to that obligation.

Place of arbitration—Article 16

> "*1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.*
>
> *"2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.*
>
> *"3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.*
>
> *"4. The award shall be made at the place of arbitration.*"

Legal nature of the place of arbitration

75. The Working Group might wish to note that arbitration rules of certain arbitration centres clarify the legal nature of the place of arbitration by referring to it as:

- The seat of the arbitration (article 16, paragraph (1) of the Swiss Rules), as opposed to the places where the arbitral tribunal may meet (article 16, paragraph (3) of the Swiss Rules);
- The seat, defined as the legal place of arbitration (article 16.1 of the LCIA Rules), as opposed to the convenient geographical place for holding hearings, meetings and deliberations (article 16.2 of the LCIA Rules).

76. This terminology clarifies that the choice of the place of arbitration imports the application of the national law governing the arbitral proceedings, including the jurisdiction of the State courts of that place to intervene in the arbitral process (see, for example, article 5 of the Arbitration Model Law). The Working Group might wish to consider whether the UNCITRAL Rules should clarify, by appropriate wording, the legal nature of the place of arbitration.

Notes

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

[2] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 178.

[3] A/CN.9/592, paras. 90 and 93.

[4] *The work of UNCITRAL on Arbitration and Conciliation*, by Prof. Pieter Sanders, Second and Expanded Edition, Kluwer Law International; *Has the moment come to revise the Arbitration Rules of UNCITRAL?* by Prof. Pieter Sanders, Arbitration International, Vol. 20, No. 3, 2004. Unpublished and informal report: *Revision of the UNCITRAL Arbitration Rules*, by Jan Paulsson and Georgios Petrochilos, prepared for the UNCITRAL Secretariat.

[5] For instance, the following articles of the UNCITRAL Rules might be aligned, to the extent relevant, with corresponding provisions of the Arbitration Model Law: article 2, paragraph (1), of the UNCITRAL Rules with article 3, paragraph (1), of the Arbitration Model Law; article 9 of the UNCITRAL Rules with article 12 of the Arbitration Model Law; article 13 of the UNCITRAL Rules with article 14 of the Arbitration Model Law; article 15 of the UNCITRAL Rules with article 24 of the Arbitration Model Law; article 16 of the UNCITRAL Rules with article 20 of the Arbitration Model Law; article 21 of the Arbitration Rules with article 16 of the Arbitration Model Law; article 28 of the UNCITRAL Rules with article 25 of the Arbitration Model Law; article 31 of the UNCITRAL Rules with article 29 of the Arbitration Model Law; article 33 of the UNCITRAL Rules with article 28 of the Arbitration Model Law; article 34 of the UNCITRAL Rules with article 32 of the Arbitration Model Law; article 37 of the UNCITRAL Rules with article 33 of the Arbitration Model Law.

[6] NAFTA Rules, article 1120 (1) (c); and article 10 (3) (b) of the Greek Model BIT (2001), reprinted in UNCTAD, International Investment Instruments: A Compendium vol. VIII (2003) 273; United States of America-Uruguay BIT (2004); article 1 (k) of the United States of America Model BIT (1994) reprinted in UNCTAD, International Investment Instruments: A Compendium vol. III (1996) 195.

[7] Hong Kong SAR-Italy BIT (1995); United Kingdom of Great Britain and Northern Ireland-Bosnia and Herzegovina BIT (2002); article 8 (2) (c) of the United Kingdom Model BIT (1991) reprinted in UNCTAD, International Investment Instruments: A Compendium vol. III (1996) 185.

[8] Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), Section I, Commentary on article 1, UNCITRAL Yearbook, Volume VII: 1976, Part Two, III, 2.

[9] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), Annex II.

[10] Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), Section I, Commentary on article 2, UNCITRAL Yearbook, Volume VII: 1976, Part Two, III, 2.

[11] Options 1 and 2 of article 7 of the Arbitration Model Law, as adopted by the Commission at its thirty-ninth session: *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), Annex I; the same phrase was contained in the 1985 version of article 7 of the Arbitration Model Law.

[12] Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), Section I, Commentary on article 3, UNCITRAL Yearbook, Volume VII: 1976, Part Two, III, 2.

[13] UNCITRAL, Ninth Session, Committee of the Whole II, Summary Records of the Second Meeting, A/CN.9/9/C.2/SR.2 (1976), paras. 35-36.

[14] Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), Section I, Commentary on article 6, UNCITRAL Yearbook, Volume VII: 1976, Part Two, III, 2.

[15] UNCITRAL, Ninth Session, Committee of the Whole II, Summary Records of the Fifth Meeting, A/CN.9/9/C.2/SR.5 (1976) 5, para 31.

[16] UNCITRAL, Ninth Session, Committee of the Whole II, Summary Records of the Fifth Meeting, A/CN.9/9/C.2/SR.5 (1976) 5, para 32.

[17] Article 13(5) of the Iran-US CTR Rules (the "Mosk Rule"), which requires an arbitrator who has resigned to "continue to serve ... with respect to all cases in which he had participated in a hearing on the merits".

[18] A/CN.9/460, paras. 80-91.

[19] Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1), Section I, Commentary on article 12, para. 5, UNCITRAL Yearbook, Volume VII: 1976, Part Two, III, 2.

[20] These are, in particular, defining the points at issue, the order in which issues are to be decided and defining any relief or remedy sought; possible settlement negotiations and their effect on scheduling proceedings; the language to be used in the proceedings; the place of arbitration and the possibility of meeting outside that place; administrative services that may be needed for the arbitral tribunal to carry out its functions (e.g. hearing arrangements or secretarial assistance); deposits in respect of costs; confidentiality of information relating to the arbitration; arrangements for the exchange of written submissions; other practical details concerning written submissions and evidence (e.g. copies, numbering, references); issues relating to documentary evidence, including time-limits for their submission; disclosure; joint submission of a single set of documentary evidence and the possibility of submitting summaries of voluminous documentary evidence; physical evidence other than documents; issue regarding witnesses (e.g. the manner of taking oral evidence, the order in which the witnesses will be called); experts and expert witnesses; matters relating to the holding of hearings; and possible requirements concerning the filing or delivery of the award.

[21] Article 19(3) of the UNCITRAL Rules states that the respondent can bring a counterclaim arising out of the same contract.