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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

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I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").[1] At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[2] At its forty-first session (New York, 16 June-3 July 2008), the Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.[3]

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1, in order to allow the Secretariat to prepare a draft of revised Rules taking account of such indications. The report of that session is contained in document A/CN.9/614. At its forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group discussed a draft of revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The reports of these sessions are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively. At its forty-ninth session (Vienna, 15-19 September 2008), the Working Group commenced its second reading of draft articles 1 to 17 of the revised Rules on the basis of document A/CN.9/WG.II/WP.151. The report of that session is contained in document A/CN.9/665.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth session. Unless otherwise indicated, all references to deliberations by the Working Group in this note are to deliberations made at the forty-ninth session of the Working Group.

II. General remarks

(a) Numbering of articles

4. The Working Group may wish to consider whether the articles of the revised Rules should be renumbered as proposed in this note. The cross references

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

[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 175.

[3] Ibid., *Sixty-third session, Supplement No. 17* (A/63/17), paras. 308-316.

contained in the draft articles have been amended accordingly. If the Working Group decides that the articles should be renumbered, it may wish to consider whether to include in the revised Rules a table, as proposed in an annex to this note, showing the concordance between the articles of the 1976 version of the Rules and those of the revised version.

(b) Placement of the model arbitration clause and the statement of independence, and of additional provisions

5. The Working Group may wish to decide where to place the model arbitration clause and the statements of independence (A/CN.9/665, para. 22), as well as the additional provisions, if adopted, on general principles and liability of arbitrators (as contained in document A/CN.9/WG.II/WP.151/Add.1).

(c) Default rule on the role of the Secretary-General of the Permanent Court of Arbitration as appointing authority

6. It is recalled that, at the forty-sixth session of the Working Group, a proposal was made to provide as default rule that, if the parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration ("PCA") should act directly as the appointing authority, instead of designating an appointing authority (A/CN.9/619, para. 71). With a view to accommodating concerns expressed in relation thereto, the proposal was amended to provide that the parties should retain the right to request the Secretary-General of the PCA to appoint another appointing authority, and that the Secretary-General of the PCA itself should be empowered to designate another appointing authority, if it considered it appropriate (A/CN.9/619, para. 72). At the forty-ninth session of the Working Group, those proposals were reiterated (A/CN.9/665, paras. 46-50). The Working Group agreed that they might need to be re-examined after completion of the second reading of the draft revised Rules, on the basis of a written proposal to be submitted to the Secretariat in time for translation before the next session of the Working Group (A/CN.9/665, para. 50).

III. Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, 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.

2. Unless the parties have agreed to apply a particular version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration.

That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date.

3. 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.

Remarks on draft article 1

7. The Working Group adopted the substance of paragraph (1), without any modification (A/CN.9/665, para. 18).

8. The Working Group agreed to replace the word "another" by the words "a particular" in the first line of paragraph (2) (numbered paragraph (1 bis) in the former drafts of revised Rules) and with that modification, the Working Group adopted the substance of that paragraph (A/CN.9/665, para. 19).

9. The Working Group adopted the substance of paragraph (3) (numbered paragraph (2) in the 1976 version of the Rules), without any modification (A/CN.9/665, para. 20).

MODEL ARBITRATION CLAUSE FOR CONTRACTS

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.

Note – Parties should 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 and country);

(d) The language(s) to be used in the arbitral proceedings shall be ...

Remarks on the draft model arbitration clause for contracts

10. The Working Group agreed to replace the words "may wish to" appearing in the chapeau of the note to the model arbitration clause by the word "should", in order to indicate to the parties the importance of agreeing on the items listed. With that modification, the draft model arbitration clause was adopted in substance by the Working Group (A/CN.9/665, para. 21).

Notice and calculation of periods of time

Article 2

1. Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provide a record of its transmission.

2. 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 its habitual residence, place of

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

3. 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.

Remarks on draft article 2

11. Paragraph (1) (numbered paragraph (1 bis) in the former drafts of revised Rules) seeks to reflect the decision of the Working Group to expressly include language which authorizes delivery of notice by any means of communication that provide a record of transmission (A/CN.9/665, para. 29). It is placed as the first paragraph of that article to take account of the decision to describe the acceptable means of communication and only thereafter to provide for a presumption regarding receipt of notice delivered through such means of communication (A/CN.9/665, paras. 28 and 29).

12. At its forty-eighth session, the Working Group agreed to replace the word "mailing" appearing before the word "address" by the word "designated" in the first sentence of paragraph (2) (numbered paragraph (1) in the 1976 version of the Rules) (A/CN.9/646, para. 82), and this constitutes the only modification made to that paragraph compared to its original version. The Working Group may wish to consider whether additional language should be included in paragraph (2) to provide more guidance to parties, and in particular to limit the risk of communication in arbitration being made through general e-mail addresses that would not be expected to be used for such purposes. Such additional language could provide that any notice may also be delivered to any address agreed by the parties, or failing such agreement, according to the practice followed by the parties in their previous dealings.

13. Paragraph (3) (numbered paragraph (2) in the 1976 version of the Rules) is reproduced without any modification from the 1976 version of the Rules, and was adopted in substance by the Working Group (A/CN.9/665, para. 31).

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party or parties (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 contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description 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, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

(a) A proposal for the appointment of an appointing authority referred to in article 6, paragraph (1);

(b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph (1);

(c) Notification of the appointment of an arbitrator referred to in article 9 or article 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal. In the event of such a controversy, the arbitral tribunal shall proceed as it considers appropriate.

Remarks on draft article 3

14. The Working Group adopted the substance of paragraphs (1), (2) and (3), without any modification (A/CN.9/665, paras. 34 and 35).

15. The Working Group agreed that the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in article 18. It therefore agreed to delete from paragraph (4) its last subparagraph, which read: “The statement of claim referred to in article 18” (A/CN.9/665, para. 36). With that modification, the Working Group adopted the substance of paragraph (4) (A/CN.9/665, para. 37).

16. The Working Group may wish to consider whether, as a result of the proposal to insert the provisions on the response to the notice of arbitration in a separate article (A/CN.9/665, para. 32), the provision formerly numbered article 3, paragraph (7), dealing with the consequences of an incomplete notice of arbitration or incomplete or missing response thereof, should be split into two paragraphs: article 3, paragraph (5) would deal with the consequences of an incomplete notice of arbitration, and article 4, paragraph (3) would deal with the consequences of a missing, incomplete or late response thereof (see below, para. 19).

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraph (3) (c), (d), (e), (f) and (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

(b) A proposal for the appointment of an appointing authority referred to in article 6, paragraph (1);

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph (1);

(d) Notification of the appointment of an arbitrator referred to in article 9 or article 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.

3. The constitution of the arbitral tribunal shall not be hindered by failure of the respondent to communicate a response to the notice of arbitration, or by an incomplete or late response to the notice of arbitration. In either event, the arbitral tribunal shall proceed as it considers appropriate.

Remarks on draft article 4

17. In the former drafts of the revised Rules, the provisions on response to the notice of arbitration were included in article 3. The Working Group noted that it may be preferable to insert those provisions in a separate article (A/CN.9/665, para. 32).

18. Paragraphs (1) and (2) (numbered article 3, paragraphs (5) and (6) in the former drafts of revised Rules) take account of comments made in the Working Group to:

- provide that any plea that an arbitral tribunal lacks jurisdiction be part of optional items under paragraph (2) (A/CN.9/665, para. 39);
- include in paragraph (1) (b) a reference to article 3, paragraph (3) (g) in order to put it beyond doubt that the respondent should provide a response to the claimant on the number of arbitrators (A/CN.9/665, para. 67).

19. The Working Group may wish to consider whether, as a result of the proposal to insert the provisions on the response to the notice of arbitration in a separate article (A/CN.9/665, para. 32), the provision formerly numbered article 3, paragraph (7) dealing with the consequences of an incomplete notice of arbitration

or incomplete or missing response thereto should be split into two paragraphs: article 3, paragraph (5) would deal with the consequences of an incomplete notice of arbitration, and article 4, paragraph (3) would deal with the consequences of a missing, incomplete or late response thereof (see above, para. 16).

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the members of the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, itself or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Remarks on draft article 5 [numbered article 4 in the 1976 version of the Rules]

20. Article 5 includes the drafting modifications agreed by the Working Group (A/CN.9/665, paras. 43-45).

Designating and appointing authorities

Article 6

1. Unless the appointing authority has already been agreed, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at the Hague (hereinafter called the "the PCA"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph (1) has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the members of the arbitral tribunal within 30 days after it receives a party's request to do so under article 39, paragraph (4), any party may request the Secretary-General of the PCA to make that decision.

4. In exercising its functions under these Rules, the appointing authority may require from any party the information it deems necessary and it shall give the parties an opportunity to present their views in any manner it considers appropriate. All communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided by the sender to all other parties.

5. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 15, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

6. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Remarks on draft article 6 [numbered article 4 bis in the former drafts of revised Rules]

21. Paragraphs (1) and (4) include the drafting modifications agreed by the Working Group (A/CN.9/665, paras. 51 and 54, respectively). With those modifications, article 6 was adopted in substance by the Working Group (A/CN.9/665, paras. 51-56).

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph (1), if no party has responded to a proposal to appoint a sole arbitrator within the time limit provided for in paragraph (1) and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or article 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8 if it determines that, in view of the circumstances of the case, this is more appropriate.

Remarks on draft article 7 [numbered article 5 in the 1976 version of the Rules]

22. Paragraph (1) reflects the decision of the Working Group to maintain the default rule, as contained in article 5 of the 1976 version of the Rules, with the adjustment that the three-arbitrator default rule would apply if the parties failed to reach an agreement on the number of arbitrators, and did not agree that there should be only one arbitrator within the 30-day time limit provided for responding to the notice of arbitration under article 4, paragraph (1) (A/CN.9/665, paras. 57-61, 65-67).

23. Paragraph (2) provides for a corrective mechanism involving the appointing authority in case a party (or parties in case of multi-party arbitration), more likely the respondent, does not participate in the determination of the composition of the arbitral tribunal, and the arbitration case does not warrant the appointment of a three-member arbitral tribunal (A/CN.9/665, paras. 62-64).

Appointment of arbitrators (Articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Remarks on draft article 8 [numbered article 6 in the 1976 version of the Rules]

24. The Working Group agreed to add the words “at the request of a party” in paragraph (1) and to delete them from both the first sentence of the chapeau to paragraph (2), and paragraph (2) (a). With those modifications, the Working Group adopted the substance of article 8 (A/CN.9/665, para. 68).

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party’s notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator. [The first party may also request the appointing authority to appoint a sole arbitrator in accordance with article 7, paragraph (2).]

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the

presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Remarks on draft article 9 [numbered article 7 in the 1976 version of the Rules]

25. The Working Group adopted the substance of article 9, without any modification (A/CN.9/665, para. 69). The Working Group may wish to decide whether the words in square brackets in paragraph (2) should be added, for the sake of consistency with article 7, paragraph (2).

Article 10

1. For the purposes of article 9, paragraph (1), 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.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under paragraphs (1) and (2), the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator. [The appointing authority may also decide, at the request of a party, to appoint a sole arbitrator pursuant to article 7, paragraph (2).]

Remarks on draft article 10 [numbered article 7 bis in the former drafts of revised Rules]

26. The Working Group adopted the substance of article 10, without any modification (A/CN.9/665, para. 71). The Working Group may wish to decide whether the words in square brackets in paragraph (2) should be added, for the sake of consistency with article 7, paragraph (2).

Remarks on article 8 of the 1976 version of the Rules

27. The Working Group agreed to the deletion of article 8 of the 1976 version of the Rules (A/CN.9/665, para. 72). The substance of article 8, paragraph (1) has been placed in article 6 on the designating and appointing authorities. The Working Group might wish to decide whether article 8, paragraph (2) of the 1976 version of the Rules should be retained, and if so, under which article that paragraph should be placed. One option could be to place that paragraph under article 11 below. That paragraph reads as follows: “Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.”

Disclosures by and challenge of arbitrators (Articles 11 to 14)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other members of the arbitral tribunal unless they have already been informed by him or her of these circumstances.

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement] I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Remarks on draft article 11 [numbered article 9 in the 1976 version of the Rules] and the model statements of independence

28. The Working Group agreed to add the words “disclosures by” in the title of article 11 and the words “and the other members of the arbitral tribunal” after the word “parties” in the second sentence of article 11. With those modifications, the Working Group adopted article 11 in substance (A/CN.9/665, paras. 73 and 74).

29. The model statements of independence seek to reflect the discussions of the Working Group (A/CN.9/665, paras. 75-80). The purpose of the second statement of independence is to allow parties to decide whether there are actually circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality or independence. The modifications made to the second statement of independence aim at ensuring consistency of the statement with article 11.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

Remarks on draft article 12 [numbered article 10 in the 1976 version of the Rules]

30. The Working Group adopted the substance of article 12, without any modification (A/CN.9/665, para. 81).

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the replacement of the arbitrator shall be made in accordance with the procedure provided in article 15.

Remarks on draft article 13 [numbered article 11 in the 1976 version of the Rules]

31. The Working Group adopted the substance of article 13, with the following modifications:

- in paragraph (2), deletion of the words “shall be in writing and” (A/CN.9/665, para. 84);
- in the first sentence of paragraph (3), inclusion of the words “all parties” (A/CN.9/665, paras. 85-88);
- in paragraph (3), deletion of the last sentence, as it was considered redundant with article 15 (1) (formerly numbered article 13 (1)), and reference to the procedure in article 15 for the replacement of the arbitrator (A/CN.9/665, para. 91).

32. The Working Group may wish to note that, for the sake of consistency with the language used in paragraph (1), paragraph (2) has been modified as follows: the words “The challenge shall be notified” have been replaced by the words “The notice of challenge shall be communicated” in the first sentence, and the words “The notification” have been replaced by the words “The notice of challenge” in the second sentence.

Article 14

1. If, within 15 days from the date of the notice of challenge, any party does not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought within 15 days from the appointment or designation of the appointing authority. In case of successful challenge, the

replacement of the arbitrator shall be made in accordance with the procedure provided in article 15.

2. In the event that an arbitrator fails to act or in the event of de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge of an arbitrator as provided in the preceding articles and in paragraph 1 shall apply.

Remarks on draft article 14 [numbered article 12 in the 1976 version of the Rules]

33. The Working Group adopted the substance of article 14, with the following modifications (A/CN.9/665, para. 98):

- inclusion of the words "any party" after the words "notice of challenge" in the first sentence (A/CN.9/665, para. 93);
- replacement in the first sentence of the word "and" by the word "or", in order to clarify the applicable procedure (A/CN.9/665, para. 97);
- reference to the procedure in article 15 for the replacement of the arbitrator in case of successful challenge (A/CN.9/665, para. 91).

Replacement of an arbitrator

Article 15

1. Subject to paragraph (2), in the event that it is necessary to replace 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 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties, the arbitrators, and the arbitrator being replaced to express their views: (a) appoint the substitute arbitrator; or (b) if the same occurs after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Remarks on draft article 15 [numbered article 13 in the 1976 version of the Rules]

34. Paragraph (1) establishes a general rule on the appointment of a substitute arbitrator, "when it is necessary to replace an arbitrator", regardless of the cause for such replacement. Paragraph (1) was adopted in substance by the Working Group (A/CN.9/665, para. 103).

35. Paragraph (2) corresponds to a proposal made in the Working Group to address the situation where a party, in exceptional circumstances, has to be deprived of its right to appoint the substitute arbitrator. The Working Group agreed to give further consideration to that proposal (A/CN.9/665, paras. 104-117).

Repetition of hearings in the event of the replacement of an arbitrator

Article 16

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Remarks on draft article 16 [numbered article 14 in the 1976 version of the Rules]

36. The Working Group adopted the substance of article 16, without any modification (A/CN.9/665, para. 118).

Section III. Arbitral proceedings

General provisions

Article 17

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

2. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under the Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, 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.

4. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except for communication under article [26, paragraph (5)].

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties including the person or persons to be joined the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Remarks on draft article 17 [numbered article 15 in the 1976 version of the Rules]

37. Paragraph (1) was adopted in substance by the Working Group, without any modification (A/CN.9/665, para. 119).

38. Paragraph (2) (numbered paragraph (1 bis) in the former drafts of revised Rules) includes the modifications agreed by the Working Group A/CN.9/665, paras. 123 and 125).

39. Paragraph (3) (numbered paragraph (2) in the former drafts of revised Rules) was adopted in substance by the Working Group, without any modification (A/CN.9/665, para. 126).

40. In paragraph (4) (numbered paragraph (3) in the former drafts of revised Rules), the words "except for communication under article [26, paragraph (5)]" are proposed to be included for the sake of consistency with that article, should the Working Group decide to include a provision on preliminary orders in article 26, paragraph (5) (A/CN.9/665, para. 127).

41. The Working Group may wish to further consider the language in paragraph (5) on joinder (numbered paragraph (4) in the former drafts of revised Rules) which seeks to reflect the decision made by the Working Group that the arbitral tribunal may decide that a party be joined in the arbitration without the consent of that party, but before making its decision, the tribunal should provide that party with an opportunity to be heard and decide on the prejudice (A/CN.9/665, paras. 128-135).

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to be made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may meet at any location it considers appropriate for hearings and meetings.

Remarks on draft article 18 [numbered article 16 in the 1976 version of the Rules]

42. The Working Group adopted the substance of paragraph (1), with the deletion of the words "including the convenience of the parties" (A/CN.9/665, para. 136).

43. Paragraph (2) is split into two sentences, to reflect the decision of the Working Group to clarify that the arbitrators may deliberate at any location they consider appropriate (A/CN.9/665, para. 137). As decided by the Working Group, the words "consultations" and the words "Notwithstanding the provisions of paragraph (1)" have been deleted (A/CN.9/665, paras. 138 and 139).

Language

Article 19

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

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

Remarks on draft article 19 [numbered article 17 in the 1976 version of the Rules]

44. The Working Group agreed to maintain the references to "languages" in plural and adopted the substance of article 19 (A/CN.9/665, paras. 140 and 141).

Annex

Table of concordance

Revised version of the UNCITRAL Arbitration Rules	*1976 version of the UNCITRAL Arbitration Rules*
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Scope of application (article 1) [and model arbitration clause for contracts]	Scope of application (article 1) and model arbitration clause
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