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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1	2
II. General remark	2	2
III. Draft revised UNCITRAL Arbitration Rules	3-35	2
Section IV. The award (draft articles 33-43)	3-28	2
Draft model arbitration clause for contracts	29-30	10
Draft model statements of independence pursuant to article 11 of the Rules	31-33	11
Draft additional provision.	34-35	11

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



I. Introduction

1. This note contains an annotated draft of revised articles 33 to 43 of the UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth to fifty-first sessions. It has been prepared for the consideration of the Working Group for the third reading of the revised version of the Rules. The annotated draft of revised articles 1 to 16 of the Rules is contained in document A/CN.9/WG.II/WP.157 and the annotated draft of revised articles 17 to 32 of the Rules is contained in document A/CN.9/WG.II/WP.157/Add.1. The Working Group may wish to note that where this note refers to the previous draft revised Rules, it refers to the draft as contained in documents A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1.

II. General remark

Provisions to be considered for the third reading of the revised version of the Rules

2. The Working Group may wish to note that it decided at its forty-ninth to fifty-first sessions to give further consideration to the following draft provisions of the revised Rules contained in this addendum: draft article 34, paragraph (2) on waiver of recourse (see below, para. 5); draft article 36, paragraph (2) on termination of proceedings (see below, para. 9); draft article 39 on additional award (see below, para. 15); articles 40 to 43 on costs (see below, paras. 17, 19, 25 and 27); and the proposed additional draft provision on gap filling (see below, para. 34).

III. Draft revised UNCITRAL Arbitration Rules

Section IV. The award

Draft article 33

3. Draft article 33 reads as follows:

Decisions

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Remarks on draft article 33 [article 31 of the 1976 version of the Rules]¹

4. At the fifty-first session of the Working Group, due to the lack of consensus for changing draft article 33, paragraph (1), the Working Group agreed to retain that provision as it appeared in the 1976 version of the Rules with the replacement of the word “three” by the words “more than one” (A/CN.9/684, para. 61). The Working

¹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 108-112; A/CN.9/641, paras. 68-77 and A/CN.9/684, paras. 52-62.

Group approved paragraph (2) in substance, which is reproduced from the 1976 version of the Rules, with the replacement of the words “on his or her own” by the word “alone” (A/CN.9/684, para. 62).

Draft article 34

5. Draft article 34 reads as follows:

Form and effect of the award

1. The arbitral tribunal may make separate awards on different issues at different times.
2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out all awards without delay. By adopting these Rules, the parties waive their right to any form of appeal, review or recourse regarding an award to any court or other competent authority, except for an application for setting aside an award.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Remarks on draft article 34 [article 32 of the 1976 version of the Rules]²

6. The Working Group approved the substance of draft article 34, paragraphs (1) and (3) to (6) at its fifty-first session (A/CN.9/684, paras. 66, 87 and 89). The third sentence of paragraph (2) addresses the question of waiver of recourses and has been redrafted for further consideration by the Working Group, based on the discussions of the Working Group at its fifty-first session (A/CN.9/684, paras. 85 and 86).

Draft article 35

7. Draft article 35 reads as follows:

Applicable law, *amiable compositeur*

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the

² For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 113-121; A/CN.9/641, paras. 78-105 and A/CN.9/684, paras. 63-90.

parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so.

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

*Remarks on draft article 35 [article 33 of the 1976 version of the Rules]*³

8. The drafting modifications decided by the Working Group are reflected in draft article 35, and with those modifications, the Working Group approved draft article 35 at its fifty-first session (A/CN.9/684, paras. 91-100).

Draft article 36

9. Draft article 36 reads as follows:

Settlement or other grounds for termination

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

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 34, paragraphs 2, 4 and 5 shall apply.

*Remarks on draft article 36 [article 34 of the 1976 version of the Rules]*⁴

10. The Working Group approved paragraphs (1) and (3) in substance at its fifty-first session (A/CN.9/684, paras. 101 and 103). Paragraph (2) has been revised for the sake of consistency with the modification to draft article 28, paragraph (1) (a) to no longer limit the power of the arbitral tribunal to a dismissal order for termination in case the continuation of the arbitral proceedings becomes

³ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 122-124; A/CN.9/641, paras. 106-113 and A/CN.9/684, paras. 91-100.

⁴ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 114 and A/CN.9/684, paras. 101-103.

unnecessary or impossible (see document A/CN.9/WG.II/WP.157/Add.1, para. 39) (A/CN.9/684, para. 102).

Draft article 37

11. Article 37 reads as follows:

Interpretation of the award

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply.

Remarks on draft article 37 [article 35 of the 1976 version of the Rules]⁵

12. The Working Group approved the substance of draft article 37 at its fifty-first session (A/CN.9/684, paras. 104 and 105).

Draft article 38

13. Draft article 38 reads as follows:

Correction of the award

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.
2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
3. Such corrections shall be in writing, and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

Remarks on draft article 38 [article 36 of the 1976 version of the Rules]⁶

14. Paragraph (1) reflects the decision of the Working Group to include a time limit of 45 days for correction of awards, when the correction is made at the request of a party (and not at the initiative of the tribunal) (A/CN.9/684, para. 107) and to refer to “a party” instead of “any party” to align the language in article 36 with that in article 37 (A/CN.9/684, para. 108). Paragraph (2) reflects the decision of the Working Group that corrections would form part of the award (A/CN.9/684, para. 112). With those modifications, the Working Group approved the substance of draft article 38 at its fifty-first session (A/CN.9/684, paras. 106 to 112).

⁵ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 125 and 126; A/CN.9/641, para. 115 and A/CN.9/684, paras. 104 and 105.

⁶ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 127; A/CN.9/641, para. 116 and A/CN.9/684, paras. 106-112.

Draft article 39

15. Draft article 39 reads as follows:

Additional award

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

Remarks on draft article 39 [article 37 of the 1976 version of the Rules]⁷

16. Paragraph (1) reflects a proposal made at the fifty-first session of the Working Group to clarify that draft article 39 also applies in case the arbitral tribunal renders a termination order and a party wishes to request the tribunal to make an additional decision on claims presented during the arbitral proceedings, but omitted by the tribunal (A/CN.9/684, paras. 113-116). Paragraphs (2) and (3) have been amended accordingly. The Working Group agreed at its fifty-first session to give further consideration to that proposal (A/CN.9/684, para. 116).

Draft article 40

17. Draft article 40 reads as follows:

Definition of costs

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems it appropriate, in any other award.
2. The term “costs” includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) The reasonable travel and other expenses incurred by the arbitrators;
 - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

⁷ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 128 and 129; A/CN.9/641, paras. 117-121 and A/CN.9/684, paras. 113-116.

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Remarks on draft article 40 [article 38 of the 1976 version of the Rules]⁸

18. Draft article 40 has been modified to take account of the discussions of the Working Group at its fifty-first session (A/CN.9/684, paras. 117-119). Paragraph (1) clarifies that the arbitral tribunal may fix the costs of arbitration in more than one award (A/CN.9/684, para. 120). Paragraph (2) (e) has been modified to provide that the costs incurred by the parties may include legal costs as well as other costs related to the arbitration. Paragraph (3) contains an amended version of the provision contained in article 40, paragraph (4) of the 1976 version of the Rules. At its forty-eighth session, the Working Group agreed to further consider that provision (A/CN.9/646, paras. 31-36).

Draft article 41

19. Article 41 reads as follows:

Fees of arbitrators

1. The fees of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees, including any rates it intends to apply. Within 15 days of receiving that proposal, any party, which considers that the proposal does not satisfy the criteria in paragraph 1 may either refer the proposal to the appointing authority for review or, if no appointing authority has been agreed upon or designated, initiate the procedure for agreeing on, or designating an appointing authority and then, within 15 days of such agreement or designation, refer the proposal of the arbitral tribunal for review. Within 45 days of receipt of such a referral, the appointing authority shall determine whether the proposal of the arbitral tribunal satisfies

⁸ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 130-132; A/CN.9/646, paras. 18 and 19 and A/CN.9/684, paras. 117-121.

the criteria in paragraph 1 and, if not, may make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal. Throughout this procedure, the arbitral tribunal shall remain under its continuing duty to proceed with the arbitration, in accordance with article 17, paragraph 1.

4. When informing the parties of the arbitrators' fees [and expenses] that have been fixed pursuant to article 40, paragraphs 2 (a), (b) and (c), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated. Within 15 days of receiving the arbitral tribunal's determination of fees [and expenses], any party may refer such determination to the appointing authority or, if no appointing authority has been agreed upon or designated or if such an appointing authority fails, refuses, or is unable to fulfil its functions under this paragraph, to the Secretary-General of the PCA, for review. Within 45 days of receiving such a referral, the appointing authority or the Secretary-General of the PCA shall determine whether the arbitral tribunal's fees [and expenses] satisfy the criteria in paragraph 1 as applied in the arbitral tribunal's proposal according to paragraph 3 and, if not, may make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal. Any such adjustments either shall be included by the tribunal in its award or, if the award has already been issued, shall be treated as a correction to the award pursuant to article 38.

Remarks on draft article 41 [article 39 of the 1976 version of the Rules]⁹

20. Paragraph (1) remains unchanged from the 1976 version of the Rules.

21. Paragraph (2) contains the words "applies or has stated it will apply" to cover situations where an appointing authority, most probably an individual, would apply a schedule of fees defined by an institution (A/CN.9/684, para. 122). The Working Group may wish to note that the provision refers to the "method" for determining the fees in addition to the "schedule of fees".

22. Paragraphs (3) and (4) were not contained in the 1976 version of the Rules. They are included pursuant to the Working Group's decision to provide rules on control by the appointing authority or the Secretary-General of the PCA over the fees charged by arbitrators (A/CN.9/646, paras. 20, 21 and 24-27). Both paragraphs seek to address the concerns expressed by the Working Group at its fifty-first session (A/CN.9/684, paras. 123-126).

23. Paragraph (3) deals with the information to be provided at the beginning of the arbitral proceedings by the arbitrators to the parties on the manner in which fees will be determined. It provides an opportunity for the parties to control fee determination at an early stage of the proceedings. It includes specific time limits for referring the proposal of the arbitrators on the method for determining the fees to the appointing authority. It also includes a time limit for the appointing authority to make its determination. The Working Group may wish to note that reference is made to the arbitral tribunal's duty to proceed with the arbitration as provided for

⁹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 133 and 134; A/CN.9/641, paras. 122-126; A/CN.9/646, paras. 20-27 and A/CN.9/684, paras. 122-126.

under draft article 17, paragraph (1), so that the issue of fees do not delay the arbitral proceedings.

24. Paragraph (4) regulates the situation where the fees and expenses have been fixed. It establishes a duty for the arbitrators to explain the calculation of the fees in the interest of transparency. It includes time limits, so that the issue of fees do not delay the termination of the arbitral proceedings. For completeness, paragraph (4) addresses the situation where either no appointing authority has been designated or where such authority does not fulfil its functions under paragraph (4). In that case, paragraph (4) enables the decision of the arbitral tribunal on costs to be revised by the Secretary-General of the PCA (A/CN.9/684, para. 126). The words “and expenses” have been placed into brackets where they appear in paragraph (4), as the Working Group may wish to decide whether expenses should also form part of the control by the appointing authority and the Secretary-General of the PCA.

Draft article 42

25. Draft article 42 reads as follows:

Allocation of costs

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

Remarks on draft article 42 [article 40 of the 1976 version of the Rules]¹⁰

26. At its fifty-first session, the Working Group considered whether articles 38 and 40 of the Rules (corresponding to draft articles 40 and 42) would need to be restructured, to avoid any overlapping (A/CN.9/684, para. 119). Pursuant to that suggestion, paragraph (3) of article 40 of the 1976 version of the Rules has been deleted as its substance is reflected in draft article 40, paragraph (1). Paragraph (4) has been deleted and its substance placed under draft article 40, paragraph (3) (see above, para. 18). It is recalled that article 40, paragraph (2) of the 1976 version of the Rules has been deleted pursuant to the Working Group’s decision at its forty-eighth session (A/CN.9/646, paras. 28-36).

Draft article 43

27. Article 43 reads as follows:

Deposit of costs

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a), (b) and (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

¹⁰ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para.135 and A/CN.9/646, paras. 28-36.

3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.
4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Remarks on draft article 43 [article 41 of the 1976 version of the Rules]¹¹

28. Draft article 43 has been adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646/, para. 37). The Working Group may wish to note that the words “After the award”, which appeared in article 41, paragraph (5) of the 1976 version of the Rules have been replaced in draft article 43, paragraph (5) by the words “After a termination order or final award”.

Draft model arbitration clause for contracts

29. The model arbitration clause for contracts reads as follows:

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 to be used in the arbitral proceedings shall be

Remarks on the draft model arbitration clause for contracts¹²

30. The draft model arbitration clause was approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, para. 21).

¹¹ For discussions at previous sessions of the Working Group, see document A/CN.9/646, para. 37.

¹² For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 36-38, A/CN.9/619, paras. 39-42; A/CN.9/646, para. 79 and A/CN.9/665, paras. 21-22.

Draft model statements of independence pursuant to article 11 of the Rules

31. The model statements of independence pursuant to article 11 of the Rules read as follows:

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 arbitrators 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 confirm that those circumstances do not affect my independence and impartiality. I hereby undertake promptly to notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Remarks on the draft model statements of independence¹³

32. The model statements of independence seek to reflect the discussions of the Working Group at its forty-ninth session (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 draft article 11 (A/CN.9/665, paras. 77 and 80).

33. The Working Group may wish to consider whether the following statement could be added to the model statements of independence:

“Note — The parties may consider adding to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.”

Draft additional provision

34. The draft additional provision reads as follows:

[Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based].

¹³ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, paras. 96-99 and A/CN.9/665, paras. 75-80.

*Remarks on the proposed additional provision*¹⁴

35. The draft additional provision contains a general principle aimed at clarifying that matters governed by the Rules which are not expressly settled in them are to be settled in conformity with the general principles on which the Rules are based. The Working Group agreed, at its forty-eighth session, to further consider whether such a provision should be included in the Rules (A/CN.9/646, paras. 50-53). If the Working Group agrees on the inclusion of that provision in the text of the Rules, it may wish to decide on its placement and to further consider how the general principles on which the Rules are based are to be determined, as the draft provision leaves that question open.

¹⁴ For discussions on the proposed additional provision, see documents A/CN.9/614, paras. 120-121 and A/CN.9/646, paras. 50-53.