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

**Note by the Secretariat**

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction . . . . .	1	2
II. Comments received from international organizations . . . . .		2
A. International Chamber of Commerce (ICC) — Commission on Arbitration and ADR . . . . .		2
B. International Council for Commercial Arbitration (ICCA) . . . . .		4
C. Arbitration Institute of the Stockholm Chamber of Commerce . . . . .		8



## I. Introduction

1. In preparation for the sixty-first session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to proceed with its consideration of the UNCITRAL Note on Organizing Arbitral Proceedings<sup>1</sup> and how they should be revised, international organizations have submitted comments for consideration by the Working Group. The comments are reproduced as an annex to this note in the form in which they were received by the Secretariat.

## II. Comments received from international organizations

### A. International Chamber of Commerce (ICC) — Commission on Arbitration and ADR

The ICC Commission discussed and responded to the following questions regarding the UNCITRAL Notes on Organizing Arbitral Proceedings (“UNCITRAL Notes”):

1. The Notes are most useful as a checklist, explaining and drawing attention to problems and issues without giving recommendations. Does the Commission wish to see any further Recommendation or Guidelines as to the best practice in international arbitration?

*The Commission recommends updating the Notes given the time that has elapsed since their publication, and the remarkable evolution of arbitration realities and practices.*

2. Should international commercial arbitration and investment arbitration be considered separately in the Notes to provide specific information in relation to investment arbitration or should specific information be addressed within certain specific Notes (such as confidentiality issues) only?

*The Commission does not recommend the elaboration of separate Notes for investment arbitration. The experience rather shows that the procedure for commercial and investment international arbitration is organized in a similar manner. The Commission, however, recommends that the UNCITRAL Notes refer to the ICC Commission Report on ICC Arbitration Involving States and State Entities, where some suggestions regarding arbitration involving public entities are made.*

3. Does the Commission wish to see, under the preliminary Note “Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings”, a reference to other well-known sets of arbitration rules which contain similar principles to conduct the arbitration in an expeditious and cost-effective manner (such as the ICC Rules)? Should reference also be made to the ICC Commission Report on Controlling Time and Costs in Arbitration?

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<sup>1</sup> Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 11-54 and Part II. *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

*In addition to the Commission's Report on ICC Arbitration Involving States and State Entities referred to above, the Commission also recommends that the UNCITRAL Notes refer to the ICC Commission's Report on Time and Costs in International Arbitration.*

4. In a more general sense, should the UNCITRAL Notes refer to other well-known Rules or Documents such as the IBA Rules on the Taking of Evidence in International Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration, ICC Rules and ICC Commission Reports?

*The Commission recommends that the UNCITRAL Notes refer to well-known and often used arbitration soft law such as the IBA Rules on the Taking of Evidence in International Arbitration, the IBA Guidelines on Conflicts of Interest in International Arbitration, the ICC Rules and ICC Commission Reports.*

5. Should the Notes address the active involvement of in-house counsel at the "pre-hearing conference"/"case management conference" and at the "hearing stage"?

*The Commission recommends that the Notes underline the importance of the involvement of in-house counsel at the "pre-hearing conference"/"case management conference" and at the "hearing stage" in order to organize more effective and cost-efficient arbitral proceedings.*

6. What are the Commission's views as to the extent an arbitral tribunal can or should take decisions without previous consultation of the parties on organizing arbitral proceedings, especially with respect to paragraph 7 of the Notes?

*The Commission recommends that the UNCITRAL Notes refer to the need for arbitral tribunals to make proposals to the parties so as to render arbitral proceedings more effective and cost-efficient. The Commission, however, recognizes that arbitral tribunals should respect agreements reached by the parties as to the conduct of the arbitral proceedings.*

7. In relation to the comments received on paragraph 15 of the Notes, does the Commission believe that the Notes should specify why the consideration of a set of arbitration rules might delay the proceedings or give rise to controversies? Additionally, should the Notes not also refer to reverse situations where agreeing on a set of arbitration rules can be done fairly quickly and might also accelerate proceedings?

*The Commission recommends that the UNCITRAL Notes no longer state that attempting to agree on a set of arbitration rules might delay the arbitral proceedings. Experience shows that this is not true in most of the cases. Conversely, the Commission recommends that the UNCITRAL Notes underline the importance for the parties to choose a set of arbitration rules to govern the arbitral proceedings.*

8. In relation to paragraph 19 of the Notes, does the Commission agree that in practice, interpretation as well as translation services are often not arranged by the arbitral institution, but by the parties?

*The Commission members have so confirmed on the basis of their experience.*

9. Does the Commission agree that the arbitral practice has evolved in relation to the appropriateness of an arbitral tribunal recommending settlement as referred to in Note 12? In particular, does the Commission agree that an arbitral tribunal should only propose settlements when agreed between the parties and the arbitral tribunal?

*The Commission agrees that arbitral practice has evolved in relation to the involvement of an arbitral tribunal facilitating settlement. The Commission considers it appropriate for an arbitral tribunal to inform the parties that they are free to settle all or part of their dispute either by negotiation or through any form of alternative dispute resolution methods, such as, for example, mediation. Further, where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.*

10. Should the Notes address the arbitral tribunals' decisions as to costs in much more detail in the revised notes and address costs consequences as a way of sanctioning improper conduct of the parties and unjustified delays in the provision of evidence?

*The Commission recommends that the UNCITRAL Notes refer to the proposals relating to costs contained in the ICC Commission Report on Controlling Time and Costs in Arbitration (see in particular paragraph 82 entitled "Using allocation of costs to encourage efficient conduct of the arbitration"). The UNCITRAL Notes may also refer to the forthcoming ICC Commission's Report on Decisions as to Costs in Arbitration, to be published shortly.*

11. Does the Commission agree that the Notes should also address the possibility of the appointment of experts by arbitral institutions, such as the ICC International Centre for Expertise and that mention should be made to the ICC Rules on the Appointment of Experts?

*The Commission recommends that the UNCITRAL Notes address the possibility of the appointment of experts by arbitral institutions, such as the ICC International Centre for ADR, and that mention be made of the ICC Rules for the Appointment of Experts and Neutrals and the ICC Rules for the Proposal of Experts and Neutrals.*

## **B. International Council for Commercial Arbitration (ICCA)**

The International Council for Commercial Arbitration (ICCA) is a worldwide non-governmental organization. ICCA's object is "to promote knowledge about, and use of, arbitration and other forms of international dispute resolution, to enhance the effectiveness and legitimacy of such processes, and to harmonize best practices in international dispute resolution" (ICCA Constitution, Article 2). ICCA's activities include making submissions to international entities on matters relating to its object (ICCA Bylaws, Article 1(f)).

ICCA submits the following comments regarding the proposed revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (the Notes) (1996).<sup>2</sup> References are to the introductory paragraph numbers and numbered headings in the 1996 edition of the Notes.

### **Introduction — general**

ICCA agrees with the Secretariat's proposal that paragraphs 7 to 9 of the Introduction, which address consultations between parties and an arbitral tribunal on procedural matters, could be better dealt with in the body of the Notes, specifically under Note 1, "Set of arbitration rules". In addition, ICCA considers that within Note 1 it may be desirable to mention the practice of preparing a written "Procedural Calendar" following the pre-hearing conference.

### **Introduction — "Purpose of the Notes"**

ICCA proposes that paragraph 11, which appears under the heading "List of matters for possible consideration in organizing arbitral proceedings", should be consolidated with paragraph 1, which appears under the heading "Purpose of the Notes". Paragraph 1 addresses the purpose of the Notes from a positive perspective, noting that the purpose is "to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful." The point made in paragraph 11, that "the purpose of the Notes is not to promote any practice as best practice" could usefully be made in paragraph 1, thus giving context to all recommendations that follow.

### **Introduction — "Process of making decisions on organizing arbitral proceedings"**

Paragraph 7 suggests that it is a matter for the tribunal to decide whether in any particular case it would be useful to consult with the parties prior to making organizational decisions. ICCA considers that the Notes should rather encourage consultation with the parties on organizational decisions, perhaps stating that consultation is the default option, to be adopted except in those situations where the tribunal considers it unnecessary.

Paragraph 8 refers to "telefax" — ICCA proposes that this reference be eliminated and replaced with a more general term covering electronic communications that will be applicable even as technology advances.

### **Introduction — "List of matters for possible consideration in organizing arbitral proceedings"**

Paragraph 12 specifically raises the risk of raising matters prematurely: "[g]enerally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed." While this risk is noted, ICCA considers that it should be weighed against the risk that, in an attempt to avoid discussions and delay at an early stage, delays may arise later in the proceeding, potentially putting hearing dates at risk.

<sup>2</sup> This Submission was prepared by the Drafting Committee for the ICCA Drafting Sourcebook for Organising International Arbitrations.

**Note 1. Set of arbitration rules**

ICCA agrees that some mention should be given to the possibility of utilizing institutional support for an arbitration under the UNCITRAL Rules, and of the relevant factors to be considered when deciding whether to opt for institutional or ad hoc arbitration, and, if institutional, which institution to select. ICCA considers that the inclusion of references to institutional rules is important in preserving the goal of the Notes “not to promote any practice as best practice”, as described in paragraph 11 of the Introduction.

**Note 4. Administrative services that may be needed for the arbitral tribunal to carry out its functions**

ICCA proposes that regard be had to ICCA Reports No. 1, Young ICCA Guide on Arbitral Secretaries (available for free download on the ICCA website, [www.arbitration-icca.org](http://www.arbitration-icca.org)), which addresses the issues of disclosure of an arbitral secretary’s involvement in a case and the arbitral secretary’s remuneration. In addition, it may be considered whether the possibility of requiring a statement of independence and impartiality from an arbitral secretary should be discussed, as it is increasingly common for such statements to be furnished by prospective arbitral secretaries (this issue is also discussed in the Young ICCA Guide on Arbitral Secretaries).

**Note 7. Routing of written communications among the parties and the arbitrators**

The UNCITRAL Secretariat proposes clarifications to this Note as regards electronic communications. ICCA would add that a part of this clarification could include a reference to making an agreement about applicable deadlines in the event that the parties and tribunal members are not all in the same time zone.

**Note 10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)**

ICCA proposes that in revising this Note, consideration could be given to actively encouraging the exchange of electronic, rather than hard copy, submissions in appropriate cases.

**Note 13. Documentary evidence**

While the current drafting of Note 13 provides that “[p]rocedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents”, ICCA suggests that it may be appropriate to refer to the relevant provisions of the IBA Rules on the Taking of Evidence in International Arbitration as evidence of an approach that is commonly adopted.

**Note 15. Witnesses**

ICCA notes the reference in paragraph 61 under Note 15 to the view of some practitioners that prepared witness statements are not appropriate to the extent that they result from what may, in some jurisdictions, be considered improper contact with the witness prior to the hearing. ICCA suggests that the Note could be revised to mention steps that can be taken to promote the credibility of the evidence provided in prepared witness statements: e.g. (i) by providing for cross examination

of the witness at the final hearing, and (ii) by requiring a clear statement from the witness attesting to the truth of the statement (“I confirm that the facts and matters I describe below are within my own knowledge and are true to the best of my recollection”).

Further, it could be considered whether to add a discussion as to the consequences of a witness’ failure to attend a hearing to provide oral testimony, having submitted a written witness statement. One possible consequence would be to require the striking of the written testimony from the record, while an alternative would be to leave a determination to the discretion of the arbitral tribunal on a case-by-case basis.

As regards paragraph 63 under Note 15, ICCA would propose amending the paragraph to include the commonly-used terminology for the questioning of witnesses — “direct examination” and “cross examination”. UNCITRAL may also wish to consider mentioning the possibility of allowing the parties to conduct “re-examination” and “re-cross examination”.

#### **Note 16. Experts and expert witnesses**

ICCA agrees with the UNCITRAL Secretariat’s proposed revision of paragraph 69. ICCA proposes that the paragraph could be further amended to refer to the situation in which an arbitral tribunal may appoint an expert later in the proceeding if the experts appointed by the parties vary greatly in their findings.

Regarding the possibility of adding new provisions to Note 16, as noted by the UNCITRAL Secretariat under subheading (b) of its comments on this note, ICCA would agree with the matters proposed for consideration by the Secretariat, and would further suggest that consideration be given to the idea of addressing how experts will present their testimony, and particularly to the possibility of expert conferencing.

#### **Note 17. Hearings**

ICCA proposes that consideration be given to adding a reference to the use of the evidence at the hearing. In particular, (i) whether one party, the parties or the arbitral tribunal will be responsible for making the entire (pre-hearing) evidentiary record available at the hearing; and (ii) whether, and, if so, in what circumstances, evidence presented for the first time at the hearing will be admissible.

With regard to paragraph 78 of the Notes, for completeness it could be considered whether to include a reference to the time taken for the examination of experts (whether party- or tribunal-appointed), and to the time to be taken by the arbitral tribunal for its questioning of fact witnesses and expert witnesses.

#### **Note 19. Possible requirements concerning filing or delivering the award**

It may be considered whether a note could usefully be added to the effect that, in the interests of efficiency and predictability, even absent statutory requirements in a particular country, the parties may wish to consider asking the arbitral tribunal to agree to deliver a final award within a set period.

**Additional topics**

ICCA considers that it may be desirable, whether in the Notes or in a discrete note, to consider logistical and confidentiality issues arising from the participation of non-disputing parties/amici in investment treaty cases, whether arising from their making of submissions, or their attendance at hearings.

In addition, in Note 17 on Hearings, it may be considered appropriate to add a specific reference to the possibility of holding a pre-hearing meeting of the tribunal in order to discuss the case and prepare a list of questions and issues that it would like the parties to address at the hearing.

**C. Arbitration Institute of the Stockholm Chamber of Commerce****UNCITRAL Notes on Organizing Arbitral Proceedings**

The SCC comments are focusing on issues where an explicit edit of the text is proposed. In addition, SCC comments focus on issues where the arbitral institution would typically be involved, or where a certain situation is typically addressed by institutional rules.

**UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS****Annotations****INTRODUCTION****General**

In addition to the Secretariat's proposal to include in the introduction a general remark regarding the desirability of consultations between the arbitral tribunal and the parties, the introduction may also bring to the attention of the reader that procedural issues may be governed by 1) *lex arbitri* (sometimes mandatory), 2) the applicable arbitration rules, and 3) the agreement between the parties. For reasons of clarity, the introduction may also clearly state that the Notes are not rules but serve as guidelines in regard to procedural matters in the absence of such rules and/or agreements by the parties (in lieu of the reference to this effect in Section 13).

*Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings*

A reference to Article 19 of the SCC Rules could be included in footnote 1, as suggested by the Secretariat.

*Process of making decisions on organizing arbitral proceedings*

The SCC supports the Secretariat's proposal to mention in the introduction that it is desirable that the arbitral tribunal hold consultations with the parties concerning procedural matters. This is also in line with the principle of party autonomy.



## ANNOTATIONS

### Note 1. Set of arbitration rules

It could be considered to re-phrase Section 14 in such a way that should the arbitral tribunal find reasons to bring the issue to the attention of the parties, it may do so.

### Note 2. Language of proceedings

#### (b) Possible need for interpretation of oral presentations

The SCC notes that the last sentence of Section 19, “In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution”, may not apply to many institutions (including the SCC), and therefore suggests a re-phrasing of this text to reflect this circumstance.

### Note 3. Place of arbitration

#### (a) Determination of the place of arbitration, if not already agreed upon by the parties

In line with the principle of party autonomy, it is proposed that the arbitral tribunal consult the parties before deciding on the place of arbitration, as a default rule. It may be noted, however, that this issue is also addressed directly by some institutional rules.

### Note 4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

The SCC appreciates the approach taken by the Secretariat to divide this Note into two sections, one addressing the matter of administrative services for hearings, and one addressing secretarial support.

For reference, the questions regarding the appointment and the remuneration of an administrative secretary for the arbitral tribunal are addressed in the SCC Arbitrator’s Guidelines (available at [www.sccinstitute.com](http://www.sccinstitute.com)). Arbitrators are requested to adopt the following procedure for the appointment and remuneration of an administrative secretary in a SCC arbitration:

*“If the arbitral tribunal wishes to appoint an administrative secretary, the SCC should be informed of whom the arbitral tribunal wishes to appoint. The SCC will then proceed to ask the parties whether they agree to the appointment. If any party disagrees, the arbitral tribunal may not appoint the suggested individual as secretary.*

*The fee of the secretary is borne by the arbitral tribunal. The arbitral tribunal decides how the fee should be allocated. Any expenses that the secretary incurs are borne by the parties. The same applies to social security contributions. The fee of the secretary should be stated in the final award.”*

The current wording of Sections 24 and 25 suggesting that arbitral institutions “usually provide all or good part of the required administrative support to the arbitral tribunal” may need redrafting as this practice may vary greatly between different institutions.

In addition, it may be noted that in recent years hearing centres have opened in many cities which offer full-service-support for arbitral hearings, i.e. organizing accommodation, administrative support, interpretation, court reporters, meals, etc. Parties and tribunals may be well advised to explore such possibilities at the seat of arbitration, or other venue chosen for the hearing. As reference, see [www.sihc.se](http://www.sihc.se).

**Note 5. Deposits in respect of costs**

**(a) Amount to be deposited**

The SCC supports the Secretariat's suggestion to include guidance where arbitration rules do not specify if all parties or simply the claimant is to make the deposit, as well as to address circumstances where the deposit is not made in full by all parties.

**Note 6. Confidentiality of information relating to the arbitration: possible agreement thereon**

For the purpose of clarification, it could be considered to mention the distinction between "private" and "confidential" in this regard, as meetings in commercial arbitral proceedings are always private but are confidential only if the parties have agreed thereon.

A reference to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration may be well placed, and briefly explained, in this section, unless addressed in a separate Note.

**Note 7. Routing of written communications among the parties and the arbitrators**

The SCC supports the suggestion of the Secretariat to amend Note 7 to better correspond with technological advances. It could also be considered to mention in this Note that ex-parte communications should be refrained from as well as indicating that the arbitral tribunal should consider to what extent formal services are required.

**Note 8. Telefax and other electronic means of sending documents**

The SCC supports the suggestion of the Secretariat to amend Note 8 to correspond with technological advances. Provisions on communications are best served by not specifically targeting certain means of communication, as this tends to continuously change over time, but rather focus on information integrity. The potential need to specifically target information security measures may also be addressed in this context, i.e. encryption or similar measures.

**Note 10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)**

The SCC agrees with the Secretariat's proposal to amend the Note to correspond with technological advances. Again, however, if possible it would be preferred if the text could be as neutral as possible in relation to certain types of technical tools and/or solutions.

**Note 18. Multi-party arbitration**

The SCC supports the Secretariat's suggestion to address the issues of joinder and consolidation in a separate Note. It may be noted that this situation to an increasing extent is addressed by institutional rules, from which additional guidance may be sought on this potentially complex issue.

**Note 19. Possible requirements concerning filing or delivering the award**

It is advisable to clarify in Section 89 that the applicable law of the seat of arbitration or applicable arbitration rules may contain requirements as regards the delivering of the award. For reference purposes, see also the recommendations made by the SCC in the SCC Arbitrator's Guidelines in this regard:

*"The arbitral tribunal should promptly send an original of the award to the parties. The SCC does not notify the parties of the award, final or separate, or of any other decision made by the arbitral tribunal. A copy of proof of dispatch of the award to the parties should be sent to the SCC. In addition, the arbitral tribunal is recommended to request that the parties confirm receipt of the award and that the original of the award is distributed by courier or registered mail."*

**COMMENTS ON POSSIBLE ADDITIONAL TOPICS****(a) Investment arbitration**

The SCC supports the proposal that issues specific to investment arbitration be addressed in a separate Note and would be prepared to share the SCC experience from investor-State disputes for the purpose of such separate Note.

**(b) Costs**

Practical experience regarding the issue of allocation of costs in international arbitration has been addressed by institutional initiatives, which could provide useful input in this context. The SCC is also currently finalizing two reports on the allocation of costs in SCC commercial arbitration cases and investor-State arbitrations under the SCC Rules, which will be available later this year.

**(c) Interim measures**

Decisions on interim measures may to a large extent be subject to the applicable law, as well as specific arbitration rules. General practical guidance, as foreseen in these Notes, may therefore be difficult to provide.

**(d) Technology**

The use of modern technology may come into play throughout the arbitration, and therefore reference to issues of technology may be best served by continuous references throughout the text, rather than a specific chapter on this topic. However, we concur completely with the opinion expressed in the Secretariat's note that any reference or guidance relating to technology should be sufficiently general so as to not become quickly obsolete.