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Settlement of commercial disputes
**UNCITRAL Arbitration Rules: Designating and appointing
 authorities under the UNCITRAL Arbitration Rules**
Note by the Secretariat
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I. Introduction

1. At its thirty-ninth session (New York, 19 June–7 July 2006), the Commission agreed that Working Group II (Arbitration and Conciliation) should give priority to a revision of the UNCITRAL Arbitration Rules (1976) (“the UNCITRAL Arbitration Rules” or “the Rules”). At that session, the Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex.¹ The Working Group commenced its work on a revision of the Rules at its forty-fifth session (Vienna, 11-15 September 2006).

2. The 1976 version of the Rules included a mechanism whereby the Secretary-General of the Permanent Court of Arbitration at The Hague (PCA) shall, if so requested by a party, designate an appointing authority which will provide certain services in support of arbitral proceedings (see below, paras. 4 and 5). At the forty-sixth (New York, 5-9 February 2007) and forty-ninth (Vienna, 15-19 September 2008) sessions of the Working Group, a proposal was made to the effect that, where parties were unable to agree on an appointing authority, the Secretary-General of the PCA should act directly as the appointing authority, instead of designating an appointing authority. It was further proposed that that default rule be subject to the parties’ right to request the Secretary-General of the PCA to designate another appointing authority, and to the discretion of the Secretary-General of the PCA to designate another appointing authority, if it considered it appropriate.² It was questioned whether that proposal, if adopted, would constitute not a mere technical adjustment, but a change in the nature of the Rules.

3. The purpose of this note is to provide the Commission with information on the current discussion of the Working Group on this general matter, in order to allow the Commission sufficient time for consideration of that question before adoption of the revised version of the Rules.

II. Designating and appointing authorities under the UNCITRAL Arbitration Rules

A. Designating and appointing authorities under the 1976 version of UNCITRAL Arbitration Rules

4. Articles 6 and 7 of the 1976 version of the Rules envisage the possibility for the Secretary-General of the PCA, if so requested by a party, to designate an appointing authority. The appointing authority appoints members of an arbitral

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 184.

² A/CN.9/619, paras. 71-74 and A/CN.9/665, paras. 46-50.

tribunal and may also be called upon, under article 12, to rule on challenges to arbitrators. Under articles 39 and 41 (respectively) of the Rules, the appointing authority may also assist the parties in fixing the arbitrators' fees and the arbitral tribunal in fixing the deposit for costs.

5. It is recalled that the *travaux préparatoires* of the 1976 version of the Rules indicated that "the assistance of an arbitral institution functioning as a central administrative body may be very helpful, especially in international cases". However, at the time, it did not seem "feasible or advisable to restrict the choice of the parties to certain arbitration institutions".³ It was therefore proposed, in case "the parties have not reached agreement on the designation of an appointing authority", to authorize the claimant to "apply for such designation to the Secretary-General of the PCA" or, as suggested in a draft 1976 version of the Rules, to "an appropriate organ or body to be established under the United Nations auspices".⁴ The designating authority was meant to be an impartial person or institution not itself involved in managing private commercial cases. The Secretary-General of the PCA, despite the PCA being neither a United Nations body, nor a body created to deal with commercial, non-governmental disputes, agreed to act as the designating authority under the Rules and thus to play a role that is clearly more limited than, and qualitatively different from, that of an appointing authority.

B. Proposed revisions to the UNCITRAL Arbitration Rules regarding appointing authorities

1. Revisions agreed by the Working Group after its second reading of the provision on designating and appointing authorities

6. At its forty-sixth session, the Working Group agreed on the principle of including in the Rules a provision aimed at clarifying for the users of the Rules the importance of the role of appointing authority, particularly in the context of non-administered arbitration (A/CN.9/619, para. 69 and A/CN.9/665, para. 46). That provision preserves the functions of designating and appointing authorities as provided under the 1976 version of the Rules.

7. In addition, the revised provision as currently agreed by the Working Group indicates that the Secretary-General of the PCA, in addition to its traditional role as designating authority, may act itself as an appointing authority if the parties so agree (A/CN.9/619, para. 71).

8. The provision on designating authority and appointing authority, reflecting the discussions of the Working Group after its second reading of that provision, is contained in document A/CN.9/WG.II/WP.154 (article 6).

2. Additional proposed revision: Secretary-General of the PCA as default appointing authority under the Rules

9. A further proposal was made to modify the provision described above under paragraphs 6 to 8 to provide that, where the parties were unable to agree on an

³ A/CN.9/97, reproduced in UNCITRAL Yearbook 1975, Volume VI, Part Two, page 166.

⁴ A/CN.9/112, reproduced in UNCITRAL Yearbook 1976, Volume VII, Part Two, page 161.

appointing authority, the Secretary-General of the PCA should act directly as the appointing authority, instead of designating an appointing authority. It was said that such a provision would preserve the freedom of the parties to select any other appointing authority but provide more predictability in the event they did not agree (A/CN.9/619, para. 71).

10. In support of that proposal, it was said that: the PCA was a unique intergovernmental organization with broad membership; the proposal would preserve the right of the parties to designate an appointing authority; and in expressing a default rule, the proposal provided the parties with a simple, streamlined and efficient procedure (A/CN.9/619, para. 73).

11. Concerns were expressed and it was also said that: that proposal would not sufficiently take account of the multiregional applicability of the UNCITRAL Arbitration Rules, and would have the consequence of centralizing all cases where the parties had not designated an appointing authority in the hands of one organization; while the view was expressed that such a provision might be appropriate for investor-State disputes, a widely held opinion was that it would not be as appropriate in other instances; it was said that the mechanism provided in the original version of the Rules was functioning well, and did not need to be modified (A/CN.9/619, para. 72).

12. With a view to accommodating these concerns, the proposal was amended to provide that the parties should retain the right to request the Secretary-General of the PCA to designate another appointing authority, and that the Secretary-General of the PCA should have discretion to designate another appointing authority, if it considered it appropriate (A/CN.9/619, para. 72). It may be noted that the proposed wording leaves unanswered the question whether the designation of another appointing authority should be requested jointly by all parties or whether any party would preserve its individual right to have another appointing authority designated.

13. The prevailing view, however, was that the proposal constituted a major and unnecessary departure from the existing UNCITRAL Arbitration Rules. After discussion, it was decided that the existing mechanism on the designating and appointing authorities should be preserved (A/CN.9/619, para. 74).

14. At the forty-ninth session of the Working Group, the above proposals were reiterated but not discussed in detail (A/CN.9/665, paras. 47 to 49). The Working Group agreed that that question might need to be re-examined after completion of the second reading of the Rules. The view was also expressed that, whether or not consensus could be reached in the Working Group regarding a possible default rule, the matter was of political nature and could only be settled by the Commission (A/CN.9/665, para. 50).

C. Questions for consideration by the Commission

15. The Commission might wish to note that the mechanism regarding designating and appointing authorities under the 1976 version of the Rules was not considered to be a problematic area by the Working Group, when defining matters for revision at its forty-fifth session. That mechanism was generally not reported as having created delays for the parties or difficulties in the functioning of the Rules. The

Secretary-General of the PCA in its report to the Commission, in 2007, confirmed that “the PCA Secretary-General seeks to make the procedure as efficient as possible, and generally designates an appointing authority within two weeks of receipt of a request that contains all required documents” (A/CN.9/634, para. 7).

16. As a matter of general policy, UNCITRAL texts are negotiated with universal participation and reflect a careful balance of national, regional, economic, legal and other interests. In particular, they are drafted with a view to ensuring their compatibility with the various legal traditions. Since they contribute to building an open trading and financial system that is rule-based, predictable and non-discriminatory, supporting good governance, development and poverty reduction, UNCITRAL texts are also instrumental to achievement of the United Nations Millennium Development Goals, and, in particular, of Goal 8, fostering a global partnership for development.

17. In line with those principles, UNCITRAL’s approach in the field of international commercial arbitration has been to provide instruments to encourage modernization and harmonization of either legislation or practices, depending on the nature of the instrument, respecting always the diversity in application of the instrument itself so as to take into account the particular features and needs of international commercial arbitration. The UNCITRAL Arbitration Rules have strongly contributed to the development of arbitration activities of many arbitral institutions in all parts of the world. As was noted by the Working Group at its forty-fifth session devoted to the determination of the guiding principles for the revision of the Rules (A/CN.9/614, paras. 15-20), the UNCITRAL Arbitration Rules were originally intended to be used in a broad range of circumstances and therefore a generic approach was taken in drafting the Rules (A/CN.9/614, para. 17). The Rules were easily adapted to be used in a wide variety of circumstances covering a broad range of disputes and the Working Group agreed that this quality should be retained (A/CN.9/614, para. 18). Indeed, one measure of the UNCITRAL Arbitration Rules’ success in achieving broad applicability and in their ability to meet the needs of parties in a wide range of legal cultures and types of disputes has been the significant number of independent arbitral institutions that have declared themselves willing to administer (and that do administer) arbitrations under the UNCITRAL Rules, in addition to proceedings under their own rules. At its fortieth (Vienna, 25 June–12 July 2007) and forty-first sessions (New York, 16 June–3 July 2008), 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.⁵

18. In light of those policy principles, the Commission may wish to consider whether the UNCITRAL Arbitration Rules should contain a default rule, to the effect that one institution would be singled out as the default appointing authority as described in section B.2 above and would be identified in the Rules as a provider of direct assistance to the parties. The Commission may also wish to consider whether the establishment of such a central administrative authority under the Rules would create a need for providing (in the Rules or in an accompanying document)

⁵ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 174; *ibid.*, *Sixty-third Session, Supplement No. 17 (A/63/17)*, para. 310.

guidance on the conditions under which the central authority would perform its functions.

19. In case the Commission would consider that such a central authority should be established in a revised version of the Rules, it may wish to further consider whether the function of default appointing authority should be carried out by an organization outside the United Nations system, taking account of the fact that the Rules constituted one of the major successful United Nations instruments in the field of international commercial arbitration.
