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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Compilation of comments by Governments and international organizations

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A. Comments received from Governments

Belgium

[Original: French]
[Date: 26 May 2010]

Belgium thanks the Secretariat for the high-quality document that it has prepared with a view to the review and adoption by the Commission of the draft revised UNCITRAL Arbitration Rules.

The intensive efforts of the Working Group under the outstanding leadership of its Chair have led to the formulation of an excellent text, on which Belgium would like to submit the following comments, to be supplemented orally during the session.

(1) The clarification introduced in article 2, paragraph 3, to the effect that notice is to be delivered by a means of communication that provides, inter alia, a record of receipt is very apt and should satisfactorily ensure the legal certainty required in this area.

Taking into account the particular importance of this question at the stage of the initial notice, a further addition could be made in article 4, paragraph 3, or article 17, paragraph 2, with a new sentence specifying that, should the respondent fail to appear during the procedure for the constitution of the arbitral tribunal, the latter shall verify that the respondent received the notice of arbitration as provided for in article 3, paragraph 2.

(2) Article 27, paragraph 2, gives each party the right to present any individual as a witness and specifies that this right applies "not withstanding that the individual is a party to the arbitration".

As formulated, this last qualification means that parties have the right to present themselves as witnesses, which would be contradictory.

It is essential, however, to achieve the aim of this article — namely, to allow the chief executive officer of an enterprise or anyone else from within the enterprise to appear as a witness.

It is therefore proposed that the words "notwithstanding that the individual is a party to the arbitration or in any way related to a party" should be replaced by the words "even if this individual is the person through whom a party is acting or is mandated by, subordinate to or linked in any other way to a party".

This would make it possible to achieve the objective of this article while preserving the distinction in law between the legal person as such, a lone party to the arbitration, and any natural person involved in the representation or operations of the legal person, such natural persons not being themselves "parties" to the arbitration.

(3) In article 29, the new paragraph 2 introduces a useful new provision, the first sentence of which might be completed by the words "(...) impartiality and

independence from the parties, their legal advisers and the arbitral tribunal", as a delegation proposed during the last session of the Working Group.

(4) In article 34, the words in square brackets at the end of paragraph 2 should be kept so that the exact scope of the waiver is expressly stated, which seems essential in the interests of legal certainty.

In this same article 34, it would seem useful to maintain paragraph 7 of the former article 32.

(5) Lastly, in article 41, paragraph 4, the bracketed words "pursuant to article 6, paragraph 4" do not cover the hypothesis of the non-existence of an appointing authority referred to in the preceding sentence of article 41, paragraph 4.

It would therefore seem preferable to delete these words as well as the second sentence of article 6, paragraph 4, and to reformulate the preceding sentence of article 41, paragraph 4, as follows:

> "Within fifteen days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated or if the appointing authority refuses or fails to make any decision, to the Secretary-General of the PCA."

Colombia

[Original: Spanish]
[Date: 27 May 2010]

The respondent should not be required, as indicated in draft article 4, paragraph (1) (a), to provide the name and contact details of each respondent in the response to the notice of arbitration.

Lao People's Democratic Republic

[Original: English]
[Date: 18 May 2010]

We consider that the revised Rules still maintain the original structure of the text, its spirit and its drafting style. The original Rules (1976 version) consist of 41 articles while the revised version has 43 articles. We are aware that there remained some disagreement from the Working Group on some articles: draft article 2, draft article 6, draft article 34, paragraph 2, and draft article 41, paragraphs 3 and 4.

In general, we agree on the draft revised UNCITRAL Arbitration Rules, however, we would like to comment that the terms and language used in the Rules should be more understandable in order to facilitate countries other than the English speaking countries to accept and use these Rules in their arbitration process. For instance, our office considers that the language used in the UNCITRAL Conciliation Rules (1980 version) is more understandable than the UNCITRAL Arbitration Rules. Hopefully, the revised UNCITRAL Arbitration Rules will be simpler in terms of the complexity of the language used.

Senegal

[Original: French]
[Date: 21 May 2010]

Draft articles 20 and 21: The proposed drafting for these two new articles is more complete and more detailed than the 1976 version.

The major innovation to be welcomed is the possibility for the claimant to elect to treat its notice of arbitration as a statement of claim. Correspondingly, the respondent may treat its response as equivalent to a statement of defence. This allows time to be gained, because statements of claim and response are generally not recapitulations of claims and responses.

Draft article 23: Paragraph 2 concerns pleas that the arbitral tribunal does not have jurisdiction. The second sentence provides that "a party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator". The question arises whether what is referred to is a plea that the tribunal does not have jurisdiction or a plea involving an objection to an arbitrator. The text would benefit from being made clearer.

Draft article 26: The new version of article 26, in line with the importance of the matter covered, is more detailed and more complete than article 26 in the 1976 version.

Draft article 28: The last sentence of paragraph 3 provides that a witness who is a party to the arbitration shall not be asked to retire. To avoid problems in understanding this provision, the text should somewhere provide for the possibility of witnesses being parties to an arbitration.

Draft article 32: The term "promptly" may give rise to a problem of interpretation in the application of the waiver rule in that it implies a time limit; the text should therefore be more precise.

Draft article 34: Paragraph 1 of article 34 provides that the arbitral tribunal may make separate awards on different issues at different times. The 1976 wording was better because it classified awards in different types that are generally accepted. Non-classification may give rise to difficulties in understanding the nature of an award made by the tribunal.

B. Comments received from international organizations

1. International non-governmental organizations

Comité Français de l'Arbitrage (CFA)

[Original: French]
[Date: 17 May 2010]

In the context of its role as an observer, the Comité Français de l'Arbitrage established a working group tasked with following the revision by UNCITRAL of its Arbitration Rules. The following comments are the fruit of the efforts undertaken by the working group.

The draft revised UNCITRAL Arbitration Rules were studied attentively. The amendments proposed correspond to the objective set by the Commission: to achieve greater precision, while maintaining the flexibility and spirit of the text. The challenge of modernizing the text without detracting from the qualities that account for its success has, we believe, been answered and fully met.

The amendments contained in the draft revised Rules promote greater predictability and efficiency in arbitral proceedings. We noted with particular satisfaction the large number of measures aimed at rendering such proceedings faster and more efficient. This is the case, for example, of the obligation placed on the respondent to communicate a response prior to the constitution of the arbitral tribunal; the reduction of the various time limits for the constitution of the arbitral tribunal; the recourse by default to a sole arbitrator; and the authority conferred on the president of the tribunal to decide alone when there is no majority. In addition, the fact that the text takes account of advances in arbitral procedure, notably by giving greater attention to the principle of equality and to the rights of the defence, is, in our view, a particularly positive development.

The Comité Français de l'Arbitrage therefore supports unreservedly the excellent draft produced by the UNCITRAL Working Group. The comments made below are thus selective and are intended merely as suggestions.

(1) Appointment of the president of the arbitral tribunal

In accordance with draft article 9, paragraph (1), the president of the arbitral tribunal is chosen by the two arbitrators appointed by the parties. The revised version of the text does not provide for the arbitrators to consult with the parties prior to making their choice. Article 9 could therefore be construed as precluding such consultation. Yet the usual practice is for the arbitrators to consult with the parties prior to choosing the president.[1]

It seems preferable, nevertheless, to specify that the arbitrators may elect to consult with the parties, in order to avoid rendering the procedure for the constitution of the arbitral tribunal cumbersome in situations where such consultation would prove difficult.

Article 9 could be amended to read as follows: "1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall, after consultation with the parties should they so decide, choose the third arbitrator who will act as presiding arbitrator of the arbitral tribunal."

(2) Multiple party arbitration

The issue of multiple party arbitration also drew our attention.

Revised article 10 takes account of certain laws that require respect for the equality of the parties in the constitution of the arbitral tribunal. The practice whereby the appointing authority appoints the arbitrator of parties that have failed to make such appointment, while retaining any arbitrator appointed by the other party, may

[1] See, for example, article 37, paragraph (2) (b), of the International Centre for the Settlement of Investment Disputes (ICSID) Convention, which stipulates that the president of the tribunal must be appointed by agreement of the parties.

contravene public policy. The French Court of Cassation[2] has found that the principle of equality demands that the appointing authority appoint not only the arbitrator of parties that refuse to make a joint appointment, but also the arbitrator of the other party, if need be revoking the appointments already made.

Article 10 takes account of this requirement, while leaving it to the discretion of the appointing authority to decide whether it will revoke the appointments already made. The freedom of decision accorded in this instance can be explained by the fact that not all national legal systems interpret the principle of equality in the same manner. However, whichever national legislation is applicable, it might be desirable to point out that the principle of equality must be respected in the constitution of the arbitral tribunal.

A phrase to that effect could be added to article 10, paragraph (3): "In the event of any failure to constitute the arbitral tribunal under these Rules, 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, while respecting the equality of the parties."

(3) Procedure in respect of the challenge of an arbitrator: statement by the appointing authority of the grounds on which its decisions are based

It might be advisable to require the appointing authority to state the grounds on which its decisions on challenges of arbitrators are based. Such a measure would respond to the legitimate concern of the parties to know the reasons for a decision that may prove crucial in determining the conduct of the dispute.[3] The non-statement by the appointing authority of the reasons for its decisions implies that it enjoys a high degree of trust on the part of the parties. However, in some cases, the appointing authority is not known to the parties ahead of time; this does not warrant its being accorded such a degree of trust a priori.

It also seems pertinent to specify that such decisions should be taken within a reasonable period, in order to avoid the needless prolongation of the proceedings should the appointing authority prove not to be sufficiently responsive.

Draft article 13: "4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of the challenge, it shall seek a reasoned decision on the challenge by the appointing authority within a reasonable time."

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[2] Cour de cassation, Première chambre civile, 7 January 1992, *Sociétés BKMI et Siemens c. société Dutco, Revue de l'Arbitrage*, 1992, pp. 473-482.

[3] See, for example, the strategy adopted by the parties in *National Grid c. Argentine*, which, although the arbitration between them was subject to the UNCITRAL Arbitration Rules, agreed to submit their request for the refusal of an arbitrator to the London Court of International Arbitration (LCIA) because the Court gives the reasons for its decisions on such requests: cf. "The conduct of the arbitration", in *International Arbitration and Mediation: A Practical Guide*, M. McIlwrath and J. Savage (Alphen aan den Rijn, Netherlands, Kluwer Law International, 2010), § 5-097.

(4) Regime of interim measures

The clarifications made to the regime of interim measures are particularly welcome, since they provide the parties with a precise framework for the application of these procedures. This is true notably of the information on the types of measure that may be adopted (art. 26, para. (2)) and on the criteria prompting the granting of these measures (art. 26, para. (3)).

It might also be helpful to indicate that the decision ordering interim measures may take the form of an arbitral award, as is stated, for example, in the UNCITRAL Model Law (art. 17, para. (2)) and in the International Chamber of Commerce (ICC) Rules of Arbitration (art. 23, para. (1)).[4] Such a provision could facilitate the enforcement of interim measures before certain national tribunals.

Article 26 could be amended to read as follows: "1. The arbitral tribunal may, at the request of a party, grant interim measures. The interim measures may take the form of an arbitral award or of a reasoned procedural decision."

(5) Decisions of the arbitral tribunal

Draft article 33, paragraph (1), provides that the decisions of the arbitral tribunal must be made by a majority of the arbitrators. Nevertheless, it might be helpful to emphasize that the president has the authority to decide alone when the tribunal is unable to reach a majority,[5] with a view to preventing the possibility of unwarranted delay on the part of one of the arbitrators or, quite simply, a disagreement that precludes a decision from being made.

Draft article 33: "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, subject to the authority of the presiding arbitrator to decide alone in cases where there is no majority."

(6) Review by the appointing authority of the fees and expenses of arbitrators

The review by the appointing authority of the fees and expenses of arbitrators is an innovation of the revised text, which seeks to prevent possible abuses and also to ensure greater predictability in respect of the method for determining arbitrators' fees and the amount of such fees. The Comité Français de l'Arbitrage supports this measure. However, the revised text, which is somewhat complex, could be simplified, as follows:

With regard to the authority responsible for reviewing fees: Article 41, paragraph (3), does not stipulate who should review the fee proposal where there is no appointing authority, whereas, under article 41, paragraph (4), that task is entrusted either to the appointing authority or, if no appointing authority has been designated, to the Secretary-General of the Permanent Court of Arbitration (PCA). It might be desirable to harmonize the two provisions by also stipulating in article 41,

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[4] The Working Group may have considered it unnecessary to retain this provision. However, the rationale for such a view is not made clear: cf. A. J. van den Berg, "Annex I: Status of the Working Group regarding the revision of the UNCITRAL Arbitration Rules", in *Years of the New York Convention: ICCA International Arbitration Conference*, A. J. van den Berg, ed., ICCA Congress Series (Dublin, Kluwer Law International, 2009), p. 569.

[5] See, for example, article 26, paragraph (3), of the Arbitration Rules of the London Court of International Arbitration (LCIA).

paragraph (3), that, where there is no appointing authority, it will fall to the Secretary-General of the PCA to review the arbitrators' initial proposal.

With regard to the criteria for reviewing fees: Article 41, paragraph (3), sets the appointing authority the task of verifying that the initial fee proposal is consistent with the criteria specified in article 41, paragraph (1), while article 41, paragraph (4), makes the appointing authority responsible for verifying that the fees are not manifestly excessive (taking into account the initial proposal) and that they are consistent with the criteria specified in article 41, paragraph (1) (where they are inconsistent with the initial proposal). It might be advisable to simplify the wording of article 41, paragraph (4), by stipulating that the appointing authority must verify that the fees fixed by the arbitrators are consistent with both the criteria specified in article 41, paragraph (1), and the arbitrators' initial proposal.

Draft article 41: "3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review, or if no appointing authority has been agreed upon or designated, the Secretary-General of the PCA. If, within 45 days of receipt of such a referral, the appointing authority or the Secretary-General of the PCA finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

"4. When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), 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 for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated, the Secretary-General of the PCA. If the appointing authority or [, pursuant to article 6, paragraph 4,] the Secretary-General of the PCA finds that the arbitral tribunal's determination of fees and expenses is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 and/or that the determination does not satisfy paragraph 1, the appointing authority or the Secretary-General of the PCA shall, within 45 days of receiving such a referral, make any necessary adjustments to the arbitral tribunal's determination, 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 implemented in a correction to the award pursuant to article 38."