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Settlement of commercial disputes

Possible future work in the field of settlement of commercial disputes

Note by the Secretariat

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I. Introduction

1. To facilitate discussions of the Commission on topics to be considered in priority by the Working Group after completion of its current work on the preparation of a legal standard in treaty-based investor-State arbitration, this note contains a brief outline on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[1] and on the matter of arbitrability. This note also includes a list of topics that have been raised by arbitration practitioners, including at the occasion of a round table organized jointly by the Secretariat and the International Arbitration Institute, Paris, in April 2012, as areas where the lack of solutions or harmonized solutions create difficulties in practice and may warrant further deliberations.

2. By way of historical background, it may be recalled that Working Group II (Arbitration and Conciliation) resumed its work in 2000, following a mandate given by the Commission to the Working Group at its thirty-second session, in 1999.[2] Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985)[3] ("the Model Law on Arbitration"), as well as the use of the UNCITRAL Arbitration Rules (1976)[4] and the UNCITRAL Conciliation Rules (1980),[5] and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[6]

3. The Commission considered a number of topics for possible future work in that regard, based on a note it had before it at that session entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).[7] The extensive list of possible topics set out in that note included matters that are the subject of current UNCITRAL projects, such as online dispute resolution or guidance on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[8] ("the New York Convention"), as well as topics that have been the subject of legislative work by the Working Group.

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[1] UNCITRAL Yearbook, vol. XXVII: 1996, part three, annex II.

[2] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[3] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; UNCITRAL Yearbook, vol. XVI: 1985, part three, annex I.

[4] *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57; UNCITRAL Yearbook, vol. VII: 1976, part one, chap. II, sect. A, para. 57.

[5] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), chap. V, sect. A, para. 106; UNCITRAL Yearbook, vol. XI: 1980, part three, annex II.

[6] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[7] Ibid., paras. 333-380.

[8] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3; Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations Conference on International Commercial Arbitration, New York, 20 May-10 June 1958 (United Nations publication, Sales No. 58.V.6).

4. In respect of the latter, since the Working Group resumed its work in 2000, the Commission has adopted the following texts in the field of dispute settlement: at its thirty-fifth session, in 2002, the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use;[9] at its thirty-ninth session, in 2006, legislative provisions amending the Model Law on Arbitration on the form of arbitration agreement and interim measures, as well a Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention;[10] and at its forty-third session, in 2010, the UNCITRAL Arbitration Rules (as revised in 2010).[11]

5. At its forty-third session, in 2010, the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration. The result of the work of the Working Group on that topic, the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration, will be before the Commission at its current session, for consideration and possible adoption (see A/CN.9/783). The Commission will also have before it draft instruments on the applicability of those rules to the settlement of disputes arising under existing investment treaties (see A/CN.9/784).

II. Topics noted by the Commission for future work

6. The topics which have been noted by the Commission for future work include the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) and the topic of arbitrability.

1. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

7. Further to initial discussions at its twenty-sixth session, in 1993,[12] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[13] At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond the existing laws, rules or practices, and in particular to ensure that the sole fact that the Notes, or any part of them, were disregarded would not lead to a conclusion that any procedural principle had been violated or was a ground for

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[9] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I (model law only); UNCITRAL Yearbook, vol. XXXIII: 2002, part three, annexes I and II.

[10] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 87-181 and annexes I and II to the Report.

[11] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 187 and annex I to the Report.

[12] Ibid., *Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 291-296. For discussions at the session of the Commission, in 1994, of a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings", see Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 111-195; for discussions at the session of the Commission, in 1995, of a draft entitled "Draft Notes on Organizing Arbitral Proceedings", see Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 314-373.

[13] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54.

refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend using any particular procedure.[14]

8. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the Notes could be considered as a topic of future work.[15] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[16] in 2011, that the Notes ought to be updated pursuant to the adoption of the 2010 UNCITRAL Arbitration Rules.[17] At its forty-fifth session, the Commission confirmed that the Secretariat should undertake the revision of the Notes as its next task in the field of dispute settlement, and that it would decide at a future session whether the draft revised Notes should be considered by the Working Group before being submitted to the Commission.[18]

9. A conference was held in Vienna on 21-22 March 2013 in cooperation with the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber on the topic, inter alia, of the UNCITRAL Notes on Organizing Arbitral Proceedings and matters that could be considered in their revision.[19] In addition, a questionnaire on whether and how the Notes should be revised was made available to practitioners, through various distribution channels, including on the website of UNCITRAL. To facilitate the discussion of the Commission on the matter of the revision of the Notes, the following comprises a brief and non-exhaustive overview of suggestions made by practitioners during that joint conference as well as in response to the questionnaire:

(a) General comment on the Notes: It was confirmed that the Notes are widely used, and constitute a useful tool to assist arbitrators and parties in the organization of arbitral proceedings. It was also underlined that the Notes are different from many existing guidelines, because they assist arbitration practitioners by listing and briefly describing questions on which decisions on organizing arbitral proceedings may be usefully made, without promoting one particular approach or practice;

(b) Place of arbitration (see section 3 of the Notes): It was suggested that the Notes should provide more information to users on the legal implications of the choice of the place of arbitration in differentiating the physical place of arbitration (determined by factual factors such as convenience, proximity of evidence, and so on) and the seat of arbitration (determined by legal factors);

(c) Costs (see section 5 of the Notes): It was proposed that a revised draft of the Notes address issues of costs, and cost control. The existing Notes address only deposits in relation to costs;

(d) Use of electronic means (see e.g. section 8 of the Notes): The terminology in the Notes addressing communication needs to be updated. In

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[14] Ibid., para. 13.

[15] Ibid., *Fifty-eighth session, Supplement No. 17* (A/58/17), para. 204.

[16] Ibid., *Sixty-sixth session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[17] Ibid., *Sixty-seventh session, Supplement No. 17* (A/67/17), para. 70.

[18] Ibid., *Sixty-seventh session, Supplement No. 17* (A/67/17), para. 70.

[19] For the presentations made at the occasion of the joint annual UNCITRAL-VIAC-YAAP Conference, see www.viac.eu/en/news-events/news-en/9-nicht-kategorisiert/127-presentations-viac-seminar (available on 12 April 2013).

addition, the Notes could include suggestions regarding whether electronic means of communication and electronic submissions are appropriate and cost-effective in the circumstances, and the obstacles as well as the benefits posed by electronic means of communication. More radical proposals, including creating an online "wiki" page for the Notes, such that practitioners could provide comments in relation to each paragraph of the Notes, thereby creating a living document, were also made;

(e) Document production and disclosure (see sections 10 and 13 of the Notes): It was suggested that the Notes could better identify issues for the parties' and tribunal's consideration in the standards to be applied in the production of documents, and in the matters of e-disclosure and e-production of documents;

(f) Experts (see section 16 of the Notes): It was proposed to complement the Notes with more recent developments in relation to experts, such as expert teaming or expert conferencing. Guidance was requested regarding advantages and disadvantages of party-appointed or tribunal-appointed experts;

(g) Multi-party proceedings (see section 18 of the Notes): It was said that information on how to address issues specific to multi-party arbitration that may arise at various stages of the proceedings would be useful, and that that matter should be covered in more detail in the Notes. It was suggested that an update in this regard might include providing notes on the question of mass claims;

(h) The refusal of a respondent to participate in proceedings and dilatory tactics: It was suggested that the Notes could provide possible solutions available to parties and tribunals where a respondent refuses to participate in proceedings, or uses dilatory tactics. In particular, it was said that the Notes ought to provide more information on how to ensure efficiency of proceedings in such situations and on any steps that could be taken to ensure that any award would be enforceable;

(i) Impact of arbitration on third parties: Third parties can be affected by arbitral proceedings, including for instance when interim measures are granted, and it was proposed that the Notes provide information in that context;

(j) Investment treaty arbitration: It was suggested that some separate guidance on existing practices in the field of treaty-based investor-State arbitration may be warranted in relation to some areas covered by the Notes.

10. Should the Commission decide that a revision of the Notes ought to be considered by the Working Group as a matter of priority, a more detailed annotated list of possible areas of revision would be presented by the Secretariat to the Working Group.

2. Arbitrability

11. Since its thirty-sixth session, in 2003, the Commission has mentioned on a number of occasions that the topic of arbitrability was an important issue that should be given priority as a topic for future work.[20]

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[20] Ibid., *Fifty-eighth session, Supplement No. 17* (A/58/17), para. 204; *Fifty-ninth session, Supplement No. 17* (A/59/17), para. 60; *Sixtieth session, Supplement No. 17* (A/60/17), para. 178; *Sixty-first session, Supplement No. 17* (A/61/17), para. 187; *Sixty-second session, Supplement No. 17* (A/62/17, Part I), para. 177; *Sixty-third session, Supplement No. 17* (A/63/17), para. 316; *Sixty-sixth session, Supplement No. 17* (A/66/17), para. 203.

12. Various issues relating to arbitrability, including the arbitrability of intra-corporate disputes, arbitrability in the fields of immovable property, insolvency or unfair competition have been identified by the Commission as areas for possible consideration.[21] It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly by way of an illustrative list, or whether a legislative provision should be prepared in respect of arbitrability, identifying topics not considered arbitrable.

13. In the context of previous deliberations of the Commission on that matter, it was also cautioned that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[22] To the extent that the issue should be considered, the purpose should not be to strive for uniformity, but to highlight in a transparent manner different views on that topic.[23] At its forty-fourth session, in 2011, the Commission affirmed that the issue of arbitrability should be maintained by the Working Group on its agenda.[24]

14. The Commission may wish to note that the form and content of any future work on arbitrability would need to be further defined. In that respect, the Commission may wish to consider whether that topic could adequately be addressed as part of the project of the guide on the New York Convention currently under preparation by the Secretariat; for example, guidance on arbitrability and information regarding the treatment of arbitrability of certain matters in various jurisdictions could be provided in the section relating to article V(2)(a) of the Convention. At its current session, the Commission will have before it excerpts of the guide (see A/CN.9/786).

15. In the event the Commission considers that the outcome of any future work on arbitrability should result in a legislative text amending the Model Law on Arbitration, it may wish to decide whether it would be appropriate for consideration at a later stage, as part of a possible general revision of the Model Law on Arbitration, which is currently silent on that matter.

III Issues raised as topics for possible future work

16. The Commission may wish to note the following topics that have been raised by arbitration practitioners as areas where the lack of solutions or harmonized solutions create difficulties in practice and may warrant further deliberation as topics of possible future work.

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[21] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204; *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; *Sixtieth Session, Supplement No. 17* (A/60/17), para. 178; (see also the reports of the Working Group on the work of its forty-second session (A/CN.9/573, para. 100) and forty-fourth session (A/CN.9/592, paras. 90)).

[22] Ibid., *Sixty-first session, Supplement No. 17* (A/61/17), para. 185.

[23] Ibid., *Fifty-fourth session, Supplement No. 17* (A/54/17), para. 352.

[24] Ibid., *Sixty-sixth session, Supplement No. 17* (A/66/17), para. 203.

1. Multiple, concurrent proceedings in the field of investment arbitration

17. It has been suggested that the subject of concurrent proceedings is increasingly important, particularly in the field of investment arbitration, and may warrant further consideration by UNCITRAL. In particular, it has been suggested that it is not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, requesting, in whole or in part, the same relief. In certain investment arbitration proceedings, this is said often to involve a parent company invoking the benefit of a treaty against a given State while its subsidiary, with a different legal domicile, invokes the benefit of another treaty against the same State on the basis of the same facts. In other cases, practitioners have observed a difficulty where a foreign company launches an arbitration on the basis of the investment treaty corresponding to its legal domicile while a local subsidiary initiates a separate claim on the basis of the same facts pursuant to the same contract and under the same investment treaty.

18. Addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. In order to further consider the concrete proposals to avoid multiple recovery in relation to the same facts in the context of international arbitration, the Commission may wish to note that the Secretariat will organize jointly with other interested institutions a conference on that topic, in November 2013, and will report to the Commission on matters raised at that conference.

2. Dispute boards

19. Dispute boards first came to prominence internationally in 1995 when the World Bank introduced the concept into its procurement regime. The purpose of a dispute board is to pre-empt issues as they arise between the parties to a contract and then make recommendations as to their resolution. These recommendations need not be contractually binding, unless the parties mandate that they should be so. If the parties to the contract are not willing to accept the recommendation of the board or give effect to a binding decision, then the matter will proceed to formal resolution via arbitration or litigation. Originally, dispute boards were confined to the field of construction contracts. Now, dispute boards are to be found in wide ranging sectors of activity, such as space agency procurement, ship construction and IT contracts.[25]

20. It was suggested that that matter would greatly benefit from a harmonized text that could be promoted and widely used by parties to contracts, as dispute boards have proven to be a useful dispute resolution mechanism.

3. Other topics

21. Other topics mentioned as worthy of consideration included:

(a) Guidance on the role of the home State of the investor in an investment arbitration: It was suggested that it would be beneficial to have some guidance in respect of the home State of the investor in an investment arbitration. One proposal

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[25] The International Chamber of Commerce, adopted a set of Dispute Board Rules in 2004 (see www.iccwbo.org/). The Forum for International Conciliation and Arbitration (FICACIC) adopted its Dispute Board Rules in 2008 (see www.ficacic.com).

was to draft guidelines on good practices for the home State in an investment arbitration, in particular as that State has access to the travaux préparatoires of international instruments;

(b) Mass claim arbitration: In the light of the great variety of mass claims being processed in international arbitration, work on mass claim arbitration has been suggested as a possible topic for harmonization;

(c) Enforcement of settlement agreements: In support of embarking on future work regarding issues relating to the enforcement of settlement agreements arising in conciliation and mediation, the Commission may wish to note that the UNCITRAL Congress in 2007 addressed that topic, as did the Working Group in its preparation of the UNCITRAL Model Law on International Commercial Conciliation;

(d) Power to conclude arbitration agreements: The question of which law applies to the authority of a person to bind a party to an arbitration agreement, and to the form and content a proxy must have, was seen as a matter that created difficulties in practice as national laws are silent on that issue;

(e) Third party funding: Third party funding is a practice which consists in an arrangement between a professional funder and a party to the arbitration to finance all or part of a party's legal costs and expenses. The Commission may wish to consider whether the issues raised by that practice should be further studied.