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

Note by the Secretariat

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I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993,[1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] 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 existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.[3]

2. 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.[4] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[5] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules (as revised in 2010).[6] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work.[7] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second sessions, the revision of the Notes and, in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[8]

3. At its sixty-first session (Vienna, 15-19 September 2014), the Working Group identified areas where revision of the Notes would be necessary and, in doing so, it gave indications as to the substance or principles to be adopted in relation to the proposed revisions. At its sixty-second session (New York, 2-6 February 2015), the

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[1] *Official Records of the General Assembly, 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. The Commission may also wish to consult the drafts considered, namely documents A/CN.9/378/Add.2, A/CN.9/396, A/CN.9/396/Add.1, A/CN.9/410 and A/CN.9/423.

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II.

[3] Ibid., para. 13.

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

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

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

[7] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[8] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

Working Group commenced its first reading of a revised text of the Notes.[9] Before the close of that session, the Working Group took note of suggestions in relation to draft Notes 7 and following, which were not considered in detail (A/CN.9/832, para. 122).

4. In accordance with the request of the Working Group at its sixty-second session, this note contains a draft of revised Notes, based on the deliberations and decisions of the Working Group (A/CN.9/832, para. 12).

II. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

A. General remarks

5. The Commission may wish to note that the overall drafting of the Notes has been revised in order to update the Notes, reflect the deliberations of the Working Group and take account of suggestions received by the Secretariat from international organizations and experts.

6. The Commission may wish to note the following matters:

(a) General applicability of the Notes: the Working Group considered at its sixty-first session whether the Notes should include specific references or guidance in relation to various types of arbitration (examples such as investment arbitration, commodity arbitration and maritime arbitration were suggested); after discussion, the Working Group considered that there were good grounds for maintaining the general applicability of the Notes (A/CN.9/826, paras. 18-21), a principle which is reflected in the draft below;

(b) Procedural meetings: the Commission may wish to consider whether the section on "procedural meetings" in the introduction to the Notes (paragraphs 13 to 16 of the draft below) should be placed under the annotations;

(c) Confidentiality and transparency: Note 6 of the draft below ("Information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration") includes a reference to the fact that investment treaties or rules might govern the matter of transparency as it relates to investment arbitration (see paragraph 53 of the draft revised Notes below). That paragraph has been added in line with the decision of the Working Group that such an approach would preserve the general nature of the Notes, and would also highlight a specific issue that might arise in relation to investment arbitration (A/CN.9/826, para. 185; A/CN.9/832, paras. 118 and 119);

(d) Technology and means of communication: references to technology and means of communication in the Notes have been updated, so that the language used is not specific (A/CN.9/826, paras. 25, 38, 39, 91 to 102, 110 and 125);

(e) New topics: Note 8 on Interim Measures and Note 19 on Joinder and Consolidation are new topics under the Notes.

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[9] The reports of the Working Group on the work of its sixty-first and sixty-second sessions are contained in documents A/CN.9/826 and A/CN.9/832, respectively.

B. Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

7. The Commission may wish to consider the draft of the revised Notes below. References to discussions of the Working Group at its sixty-first and sixty-second sessions are contained in the draft text below.

"Preface

"The United Nations Commission on International Trade Law (UNCITRAL) adopted the first edition of the Notes at its twenty-ninth session (New York, 28 May-14 June 1996). UNCITRAL finalized a second edition of the Notes at its [_____] session (_, _____). In addition to the 60 member States of the Commission, representatives of many other States and of a number of international organizations participated in the deliberations. In preparing the revised Notes, the Secretariat consulted with experts from various legal systems, national and international arbitration bodies, as well as international professional associations.

"List of matters for possible consideration in organizing arbitral proceedings

"Introduction

"Purpose of the Notes [*A/CN.9/826, paras. 13 to 15 and 28; A/CN.9/832, para. 61*]

"1. The purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings. The Notes, prepared with a particular view to international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution.

"2. Given that procedural styles and practices in arbitration vary widely, the Notes do not seek to promote any practice as best practice.

"Non-binding character of the Notes

"3. The Notes do not impose any legal requirement binding on the parties or the arbitral tribunal. An arbitral tribunal may use or refer to the Notes at its discretion and to the extent it sees fit and does not need to adopt, nor provide reasons for not adopting, any particular element of the Notes.

"4. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation on the parties or on the arbitral tribunal to act in a particular manner. Accordingly, the use of the Notes does not imply any modification to the arbitration rules that the parties may have selected.

“Conduct of the arbitral proceedings [*A/CN.9/826, paras. 30 and 31; A/CN.9/832, paras. 62 to 64*]

“5. Arbitration is a flexible and autonomous process to resolve disputes. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to mandatory provisions of the applicable arbitration law. Autonomy of the parties in determining the rules of procedure is of special importance in international arbitrations since it allows the parties to select and tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts.

“6. Failing agreement by the parties, the arbitral tribunal then conducts the arbitral proceedings in a manner it considers appropriate, subject to mandatory provisions of the applicable arbitration law. Arbitration laws as well as arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings, provided that a fair, equitable and efficient process is observed.[10] Discretion and flexibility are useful in that they enable the arbitral tribunal to make decisions on the organization of proceedings that take into account the circumstances of the case and the expectations of the parties, while complying with due process requirements. Moreover, they provide grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the applicable arbitration law.

“7. The Notes, while not exhaustive, cover a broad range of situations that may arise in arbitrations. In many arbitrations, however, only a limited number of the matters addressed in the Notes will arise or need to be considered. The circumstances of the particular arbitration will dictate which matters it would be useful to consider and at what stage of the arbitral proceedings such consideration should take place. Therefore, it is advisable not to raise a matter unless and until it is clear that the matter needs to be addressed.

“8. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules applied by that institution as well as by its practices.

“Consultation between the arbitral tribunal and the parties for decisions on organizing arbitral proceedings [*A/CN.9/826, paras. 33 to 35; A/CN.9/832, paras. 69 to 74*]

“9. It is desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the arbitral proceedings and the manner in which the arbitral tribunal intends to proceed. In particular, in international arbitrations, parties may be accustomed to differing styles of arbitral

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[10] “A prominent example of such rules are the UNCITRAL Arbitration Rules (as revised in 2010), which provide in article 17(1): ‘Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”

proceedings and, without such guidance, they may find aspects of the arbitral proceedings unpredictable and difficult to prepare for.

"10. Moreover, it is usual for the arbitral tribunal to involve the parties in making decisions on the organization of arbitral proceedings and, where possible, seek their agreement. This is generally the case for most matters addressed in the Notes. Likewise, it is usual that the parties consult the arbitral tribunal whenever they agree between themselves on an issue that might affect the organization of the arbitral proceedings and the planning of the arbitrators.

"11. There may, however, be instances during an arbitration where the arbitral tribunal decides on issues regarding the organization of arbitral proceedings without consulting the parties.

"12. Decisions of the arbitral tribunal on procedural arrangements can be revisited and modified at relevant stages of the arbitral proceedings. However, the arbitral tribunal should exercise caution in modifying procedural arrangements, in particular where the parties have taken steps in reliance with those arrangements. The arbitral tribunal may not be allowed to modify decisions on procedural arrangements if and when the decisions record an agreement between the parties.

"Procedural meetings [*A/CN.9/826, paras. 27, 33 and 39; A/CN.9/832, paras. 66 to 68 and 75*]

"13. The arbitral tribunal may consider holding, as soon as possible after the commencement of the arbitral proceedings, a preliminary meeting or case management conference ('procedural meeting(s)') at which it determines, in consultation with the parties, the organization of the arbitral proceedings and a procedural timetable. Additional procedural meetings (sometimes referred to as 'preparatory conferences' or 'pre-hearing conferences') may be held at subsequent stages of the arbitral proceedings. It is desirable that the parties themselves, in addition to any representative they may have appointed, are present at these procedural meetings.

"14. If a party has not participated in procedural meetings, the arbitral tribunal should nevertheless provide, possibly in the procedural timetable, the non-participating party with a sufficient opportunity to present its case in the arbitral proceedings.

"15. Decisions on matters addressed at procedural meetings can take various forms, such as the form of a procedural order. They can be made orally and recorded in writing at a later stage after the procedural meeting. Irrespective of their form, such decisions are significant as they set the stages for the arbitration and aim at ensuring its efficiency.

"16. Procedural meetings can be held either in the physical presence of all participants, or remotely via technological means of communication that would not require in-person participation. The arbitral tribunal may consider, in each case, whether it would be preferable to hold a given meeting in-person, which facilitates personal interaction, or to use remote means of communication, which may lead to cost saving.

“Annotations

“1. Set of arbitration rules [*A/CN.9/826, paras. 41 to 50; A/CN.9/832, paras. 76 to 79*]

“(a) Selection of a set of arbitration rules

“17. Usually, the parties agree on a set of arbitration rules to govern the arbitral proceedings. The benefit of selecting a set of arbitration rules is that the procedure becomes more predictable. The parties and the arbitral tribunal may also be able to save time and costs by using an established set of arbitration rules that is familiar to the parties, has been widely applied, and has been carefully drafted by experienced practitioners. If parties choose to proceed under a particular set of arbitration rules, these usually prevail over the non-mandatory provisions of the applicable arbitration law. The set of arbitration rules selected by the parties (and, to the extent permitted, modified by them) may be better adapted to a particular case than the default provisions of the applicable arbitration law.

“18. Where the parties have not stipulated in the arbitration agreement that a set of arbitration rules will govern the arbitral proceedings, they may still agree on a set of arbitration rules after the arbitration has commenced. If the parties agree that an arbitral institution will administer the dispute after the arbitral tribunal has been constituted, it may be necessary to secure the agreement of that institution, regardless whether the arbitration is administered under the arbitration rules of that institution or under the UNCITRAL Arbitration Rules,[11] or any other ad hoc rules.

“(b) Absence of an agreement on a set of arbitration rules

“19. In the absence of an agreement on a set of arbitration rules, the arbitral tribunal usually determines how the proceedings will be conducted, within the limits of the applicable arbitration law.

“2. Language or languages of the arbitral proceedings [*A/CN.9/826, paras. 51 to 60; A/CN.9/832, paras. 80 to 86*]

“(a) Determination of the language(s)

“20. The parties may agree on the language or languages of the arbitral proceedings. Such agreement ensures that the choice of language can be tailored to suit the common language of the parties, or at least that the parties are familiar with the language or languages in which the arbitral proceedings will be conducted. In the absence of such agreement, the language or languages have to be determined by the arbitral tribunal. Common criteria for that determination are the primary language of the contract(s) or other legal

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[11] For guidance on administration of arbitration cases by arbitral institutions under the UNCITRAL Arbitration Rules, see “UNCITRAL Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules”, *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), annex I.

instruments under which the dispute arises, and the language commonly used by the parties in their communication.

"21. The parties and the arbitral tribunal may consider practical matters such as which language or languages will be used in making oral and written submissions, whether documents produced will require translation into the language or languages of the arbitral proceedings (see below, para. 23), and whether any potential witnesses may need to use interpreters if they are not fluent in the language or languages of the arbitration (see below, para. 24).

"(b) Multiple languages

"22. When it is agreed or determined that multiple languages are to be used, the parties and the arbitral tribunal may consider whether:

(i) the languages would be used interchangeably without translation or interpretation;

(ii) all communication and documents would need to be translated, and interpretation would be required into all languages; in which case, the parties and the arbitral tribunal may have to consider issues of economy and efficiency related to translation and interpretation; or

(iii) one of those languages would be designated as authoritative for the purpose of the arbitral proceedings (while multiple languages would be used during the proceedings, procedural orders and arbitral awards, for example, would be rendered in one of the languages).

"(c) Possible need for translation of documents in full or in part

"23. Parties may wish to rely on documents that are not in the language or languages of the arbitral proceedings. In determining whether to provide for translation of all or part of those documents, the arbitral tribunal may consider whether the parties and the arbitral tribunal are able to understand the content of the documents without translation and whether other practical measures, such as translation of part of documents, or a single template translation for similar documents with largely pictorial or numeric content, can be undertaken as a cost-efficient measure in lieu of comprehensive translation.

"(d) Possible need for interpretation of oral presentations

"24. The responsibility for arranging for interpretation (as well as translation) typically lies with the parties even in arbitrations administered by an arbitral institution. Witnesses and experts familiar with the language or languages of the arbitration might still require occasional assistance with interpretation, rather than full interpretation. If interpretation is necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive. While simultaneous interpretation is less time-consuming, consecutive interpretation allows for a closer monitoring of the accuracy of the interpretation.

"(e) Cost of translation and interpretation

"25. When taking decisions about translation and interpretation, it is advisable to decide at the outset whether any or all of the costs are to be paid jointly by the parties. The arbitral tribunal may have to decide at a later stage how these costs, along with the other arbitration costs, will ultimately be allocated between the parties (see below, para. 45).

"3. Place of arbitration [*A/CN.9/826, paras. 61 to 66; A/CN.9/832, paras. 87 to 94*]

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

"26. The parties may agree on the place (or 'seat') of arbitration. If the place of arbitration has not been agreed by the parties, typically the arbitral tribunal or the arbitral institution administering the arbitration will have to determine the place of arbitration at the outset of the proceedings. Arbitration rules of some institutions contain a default place of arbitration, applicable where the parties have not chosen one.

"(b) Legal and other consequences of the place of arbitration

"27. The place of arbitration normally determines the applicable arbitration law. It has various legal consequences, such as whether and on what grounds a party can seek judicial review or setting aside of an arbitral award, as well as the conditions for recognition and enforcement of an arbitral award in other jurisdictions.

"28. Selection of the place of arbitration is influenced by various legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are: (i) the suitability of the applicable arbitration law at the place of arbitration; (ii) the law and practices at the place of arbitration regarding court intervention in the course of the arbitral proceedings; (iii) the law and practices at the place of arbitration regarding judicial review or setting aside of an award; (iv) the jurisprudence at the place of arbitration in relation to arbitral procedure and other relevant matters; and (v) whether the State where the arbitration takes place and hence where the arbitral award will be made is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, the 'New York Convention') or to another multilateral or bilateral treaty on enforcement of arbitral awards.

"29. When it is expected that the hearings will also be held at the place of arbitration, other factors may become relevant in selecting the place of arbitration including: (i) convenience of the location for the parties and the arbitrators, including the travel distances; (ii) availability and cost of support services; (iii) location of the subject matter in dispute and proximity of evidence; and (iv) qualification restrictions with respect to counsel representation.

“(c) Possibility of holding hearings and meetings at a place different from the place of arbitration

“30. The place of arbitration is not necessarily where the hearings and/or meetings are held, although often the two are the same. In certain circumstances, it may be more expeditious or convenient for the parties and the arbitral tribunal to hold hearings and/or meetings at a location different from the place of arbitration, or remotely via technological means of communication. Many arbitration laws and rules expressly allow the arbitral tribunal to hold hearings and meetings elsewhere than at the place of arbitration.[12]

“4. Administrative support that may be needed for the arbitral tribunal to carry out its functions [*A/CN.9/826, paras. 67 to 73; A/CN.9/832, paras. 95 to 102*]

“(a) Administrative support and arbitral institutions

“31. Administrative support (for example, reserving hearing rooms) may need to be procured to the arbitral tribunal. The arbitral tribunal and the parties should consider who will be in charge of organizing such support.

“32. When a case is administered by an arbitral institution, the arbitral institution may provide some administrative support to the arbitral tribunal. The availability and nature of such support vary greatly, depending on the arbitral institution.

“33. When a case is not administered by an arbitral institution, the administrative arrangements for the proceedings will usually be made by the parties or arbitral tribunal. Even in such cases, some administrative support might be obtained from arbitral institutions, which offer their facilities to arbitrations not conducted under their rules. Some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in supporting arbitral proceedings. Otherwise, some services and hearing facilities could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services. Specialized arbitration hearing centres have been established in some cities. It may also be acceptable to leave some of the arrangements to one of the parties, subject to the agreement of the other party or parties.

“(b) Secretary to arbitral tribunal

“34. Administrative support might be obtained by engaging a secretary of the arbitral tribunal, who carries out tasks under the direction of the arbitral tribunal. These or similar services may also be rendered by a registrar, clerk or administrator. Some arbitral institutions routinely assign secretaries to cases administered by them. Some arbitrators frequently engage secretaries, at least in certain types of cases, whereas other arbitrators do not. If the arbitral tribunal wishes to appoint a secretary, it would normally disclose this fact to

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[12] See, for example, article 20(2) of the UNCITRAL Model Law on International Commercial Arbitration and article 18(2) of the UNCITRAL Arbitration Rules (as revised in 2010).

the parties, along with the identity of the proposed secretary, the nature of the tasks to be performed by the secretary, and any proposed remuneration.

"35. Functions/tasks performed by secretaries are broad in range. Secretaries may provide purely organizational support (for example, making reservations for hearing and meeting rooms and providing or coordinating secretarial services). Some arbitral tribunals wish to have secretaries carrying out substantive functions including legal research and other professional assistance to the arbitral tribunal (for example, preparing a summary of the facts or the procedural history of the arbitral proceedings, collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries of case law and publications, and preparing draft procedural decisions). In any event, secretaries would normally not be involved in the arbitral tribunal's decision-making functions.

"36. Secretaries are expected to be and remain impartial and independent during the arbitral proceedings. It is the arbitral tribunal's responsibility to ensure this. Some arbitral tribunals do this by requesting the secretary to sign a declaration of independence and impartiality.

"37. The parties may wish to agree at the outset of the arbitral proceedings on the role and practices to be adopted in respect of such secretaries, as well as on the financial conditions applicable to their services. Institutional guidelines on secretaries may provide useful information to the parties.

"5. Cost of arbitration [*A/CN.9/826, paras. 22, 23 and 74 to 78; A/CN.9/832, paras. 103 to 112*]

"(a) Items of cost (fees and other expenses)

"38. The cost of arbitration is determined by the arbitral tribunal, which should ensure that the cost is reasonable. It normally includes (i) the fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators, the cost of expert advice and of other assistance required by the arbitral tribunal, (ii) the travel and other expenses of witnesses, the legal and other costs incurred by the parties in relation to the arbitration, and (iii) value-added tax, if applicable.

"39. Should the agreement between the parties or the applicable arbitration law or rules not address the cost of arbitration and the allocation thereof, it is useful for the arbitral tribunal to identify at the outset of the proceedings how it intends to deal with those matters.

"40. At an appropriate time during the proceedings, the arbitral tribunal may request submissions on costs. If submissions on costs are required, the parties and the arbitral tribunal should decide when those submissions will have to be made.

"(b) Deposit of costs

"41. Unless the matter is handled by an arbitral institution, the arbitral tribunal will have to estimate the amount to be deposited as an advance for the costs referred to under paragraph 38 (i) and (iii) above. The arbitral tribunal will have to request the parties to deposit an amount as an advance for such

costs. If, during the proceedings, it emerges that the costs are higher than anticipated (for example, because of the prolongation of the proceedings, additional hearings, appointment of an expert by the arbitral tribunal), supplementary deposit may be requested. Deposit can be paid in full or in instalments, and bank guarantees can be a means to secure such deposits.

"42. Many arbitration rules have provisions regarding these matters, including whether the deposit should be made in equal amounts by the parties and the consequences of the failure of one party to make the payment.[13]

"43. When the arbitration is administered by an arbitral institution, the institution's services may include holding, managing and accounting for the deposit. If the arbitral institution does not offer such services, the parties or the arbitral tribunal would have to make necessary arrangements, for example with a bank or other external provider. Irrespective of whether the arbitral institution undertakes that function or the parties and the arbitral tribunal rely on an external provider to do so, it might be useful to clarify matters such as the type and the location of the account in which the money will be kept and how the deposit will be managed, including matters such as interest on the deposit.

"44. The parties, the arbitral tribunal and the arbitral institution should be aware of regulatory issues that may arise in the handling of deposit of costs, including bar regulations, regulations relating to the identity of beneficiaries and issues arising from restrictions on trade or payment.

"(c) Cost allocation

"45. The cost of arbitration referred to under paragraph 38 above shall be allocated between the parties. Subject to any requirements in the applicable arbitration law, the parties may agree on any cost allocation method.

"46. In allocating the cost of arbitration, the arbitral tribunal may also wish to consider the conduct of the parties (for example, failure to comply with procedural orders) and/or procedural requests by the parties (for example, document requests, procedural applications and cross-examination requests) to the extent that they actually had a direct impact on the cost of arbitration.

"47. Decisions by the arbitral tribunal on cost allocation do not need to be made when the final award on the merits is rendered. Rather, they may be made at any time during the proceedings, particularly given that the proceedings may terminate without a final award being rendered.

"6. Information relating to the arbitration; possible agreement on confidentiality; transparency in treaty-based investor-State arbitration
[*A/CN.9/826, paras. 26, 79 to 89, 185 and 186; A/CN.9/832, paras. 114 to 121*]

"(a) Agreement on confidentiality

"48. A widely held view is that there is an inherent requirement of confidentiality in commercial arbitration and that confidentiality is an advantageous and helpful feature of international commercial arbitration.

[13] See, for example, article 43 of the UNCITRAL Arbitration Rules (as revised in 2010).

Nevertheless, there is no uniform approach in domestic laws or arbitration rules as to the extent to which the participants in an arbitration are under a duty to maintain the confidentiality of information relating to the proceedings.

"49. Should confidentiality be a concern or priority and in the absence of provisions on the matter in the applicable arbitration rules, the parties may wish to provide for confidentiality in the form of an agreement.

"50. An agreement on confidentiality might cover one or more of the following matters: the material or information that is to be kept confidential (for example, the fact that the arbitration is taking place, identity of the parties and the arbitrators, pieces of evidence, written and oral submissions, content of the award); measures for maintaining confidentiality of such information and of the hearings; circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right; and other circumstances in which such disclosure might be permissible (for example, information in the public domain, or disclosures required by law or a regulatory body). The obligation of confidentiality may further extend to experts and witnesses.

"51. There are also circumstances where certain information or material within an arbitration is deemed to be confidential to one party in an arbitration, for example commercial secrets or intellectual property. Arrangements may be made by the parties and, in certain circumstances, by the arbitral tribunal in respect of that information, for example, by restricting access to such information to a limited number of designated persons.

"52. Whereas the obligation of confidentiality imposed on the parties may vary with the circumstances of the case as well as the applicable arbitration law and rules, arbitrators are generally expected to keep the proceedings, including any information related to or obtained during those proceedings, confidential.

"(b) Transparency in treaty-based investor-State arbitration

"53. In arbitration between an investor and a State arising under an investment treaty, the treaty may include specific provisions on publication of documents, open hearings, and confidential or protected information. Also, applicable rules referred to in those investment treaties may contain specific provisions on transparency from which the parties may not derogate.[14]

"7. Means of communication [*A/CN.9/826, paras. 25 and 91 to 102; A/CN.9/832, paras. 123 and 124*]

"(a) Determination of the means of communication

"54. It is useful for the parties and the arbitral tribunal to determine the means of communication (including transmission of documents) at the outset of the proceedings. Factors that might be considered in selecting the means of communication include ensuring that (i) documents are accessible and easily

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[14] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are an example of rules applying specifically to treaty-based investor-State arbitration.

retrievable by the parties and the arbitral tribunal; (ii) a receipt can be ascertained; and (iii) the means of communication is acceptable under the applicable arbitration law (see also below, paras. 65 and 79).

"55. Although more than one means of communication may be used (for example, paper-based as well as electronic means), the parties may consider issues arising from using multiple means of communication, including which would be the authoritative means and, where time limits for submission apply, what action would constitute submission.

"(b) Electronic means of communication

"56. The use of electronic means of communication can make the proceedings more expeditious and efficient. However, not all parties might have access to, or are familiar with, such means. The parties and the arbitral tribunal may consider issues of compatibility, storage, access and data security when selecting electronic means of communication.

"(c) Flow of communication

"57. It is recommended that communications are exchanged directly between the arbitral tribunal and the parties, unless an arbitral institution is acting as an intermediary. It is usual that all parties are copied on all communications to and from the arbitral tribunal.

"8. Interim measures [*A/CN.9/826, para. 24; A/CN.9/832, para. 113*]

"(a) Granting of interim measures

"58. During the course of the arbitration, a party may need to seek an interim measure, either from the arbitral tribunal or a domestic court. Arbitration laws vary in their approach on whether a party is to apply initially to the arbitral tribunal rather than to domestic court for an interim measure or domestic court only may grant an interim measure.

"59. An established principle is that a request for an interim measure may be made by a party to a domestic court before or during the arbitral proceedings, and that such a request would not be incompatible with an agreement to arbitrate. Further, most arbitration laws and rules address the power of the arbitral tribunal to grant interim measures and provide that the arbitral tribunal may, at the request of a party, grant interim measures.[15] An interim measure is usually temporary in nature and can take the form of an award or any other form.

"60. Where relevant, the arbitral tribunal may consider informing the parties about (i) the applicable legal framework in relation to interim measures, including the extent to which the applicable law limits party autonomy in that respect, (ii) whether the granting of interim measures is within the scope of its competence, (iii) the type of measures that it may grant, (iv) the conditions for

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[15] See, for example, and chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) and article 26 of the UNCITRAL Arbitration Rules (as revised in 2010).

requesting an interim measure, and (v) the available mechanisms for enforcement of interim measures. The arbitral tribunal may also consider informing the parties about the limitations in granting an interim measure when a third party is involved.

"(b) Security in connection with interim measures

"61. The party requesting an interim measure may be required by the arbitral tribunal to provide security in connection with the measure. [The party requesting an interim measure may be liable for any costs and damages caused by the measure if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.]

"9. Written submissions [*A/CN.9/826, paras. 103 to 109; A/CN.9/832, para. 125*]

"62. Written submissions in the course of the arbitration may include the statement of claim, the statement of defence and submissions, sometimes referred to by different terminology such as, statements, pleadings, memorials, counter memorials, briefs, counter briefs[, or] replies[, répliques, dupliques, rebuttals or rejoinders]. The parties and the arbitral tribunal may consider whether more than one round of written submissions is necessary.

"(a) Scheduling of written submissions

"63. It is advisable that the arbitral tribunal, when it determines the procedural timetable (see above, para. 13) set time limits for written submissions, so that the parties are aware of such time limits early in the proceedings. It can also be useful for the arbitral tribunal to reassess whether further submissions are required or further evidence ought to be adduced.

"(b) Consecutive or simultaneous written submissions

"64. Written submissions may be made consecutively, i.e. where one party (usually the party making the application or seeking the relief) makes its submission after which the other party or parties make a counter submission. Alternatively, all parties may be required to make their submissions simultaneously. The approach used may depend on the type of issues to be commented upon, the stage of the proceedings, and the time the parties have to comment.

"10. Practical arrangements concerning written submissions and evidence [*A/CN.9/826, paras. 110 and 111*]

"65. Depending on the volume and kind of documents to be handled, the parties and the arbitral tribunal may consider whether it would be helpful to agree on practical arrangements concerning the following details:

- The form in which written submissions will be made (for example, hard copy, electronic documents or through shared platform) (see below, para. 79);

- The particulars of technology-based document management and production;
- The system for organizing, labelling, identifying and referring to documents and evidence (for example, indexes);
- Whether joint sets of documents can be agreed and presented in an efficiently accessible way (for example, hyperlinks) (see below, para. 81);
- The format and form of hard copy or electronic documents (for example, paragraph numbering, spacing, specific electronic formats such as original or native format where applicable, search features); and
- The organization of certain types of documents (for example, whether translations, large spreadsheets or diagrams, or other types of documents ought to be contained in separate volumes or presented separately or differently from other evidence).

"11. Defining points at issue; order of deciding issues; defining relief or remedy sough [*A/CN.9/826, paras. 112 to 116*]

"(a) Preparation of a list of points at issue

"66. It is often considered helpful for the arbitral tribunal to prepare, based on the parties' submissions, a list of points at issue (as opposed to those that are undisputed). Such a list, when prepared at an appropriate stage of the proceedings and updated as necessary, can provide the parties with an opportunity to focus their arguments on the issues identified as critical by the arbitral tribunal, thereby improving the efficiency of the proceedings and reducing costs.

"(b) Determination of the order in which the points at issue will be decided

"67. Subject to any agreement of the parties, the arbitral tribunal has the flexibility and discretion to determine the sequence of the proceedings and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration.

"68. Depending on the points at issue, the arbitral tribunal may consider the appropriateness of making a determination on certain points (such as jurisdiction, liability or other discrete issues whose resolution will likely advance the resolution of the case) before deciding on other points and, in doing so, the arbitral tribunal may consider whether, under the law at the place of arbitration, such determination is open to judicial review. Where the arbitral tribunal decides to adopt that approach, document submission and production may be organized in separate stages to reflect that staged organization of the proceedings. Such approach may have an impact on the adjudicative process, and therefore, the arbitral tribunal has to carefully consider the implications of such a staged process on the procedure, including on time and costs.

[**“(c) Is there a need to define more precisely the relief or remedy sought**

“69. If the arbitral tribunal considers that the relief or remedy sought by a party is not sufficiently precise, for example to ensure the enforceability of the arbitral award, it may be appropriate for the tribunal to inform the parties of its concerns.]

“12. Amicable settlement [*A/CN.9/826, paras. 117 to 124; A/CN.9/832, para. 126*]

“70. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of settlement by an arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement by a third party mediator. Where the applicable law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of settlement by the arbitral tribunal.

“13. Documentary evidence [*A/CN.9/826, paras. 125 to 136; A/CN.9/832, paras. 127 to 129*]

“71. At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits and other evidence. While the arbitral tribunal will usually determine the admissibility and relevance of the evidence offered, it may be advisable for the arbitral tribunal to consult the parties if there is a concern in relation thereto. After consulting the parties, the arbitral tribunal itself may take appropriate steps to obtain evidence from a third party.

“(a) Time limits for submission of documentary evidence by the parties; consequences of late submission

“72. The arbitral tribunal usually fixes time limits for the submission of evidence at the outset of the proceedings.

“73. The arbitral tribunal may clarify the consequences of late submissions and how it intends to deal with requests to accept late submissions. For example, the arbitral tribunal may require a party seeking to file evidence after the time limit to provide reasons for the delay.

“74. The arbitral tribunal may remind the parties that if a party ordered to produce documentary evidence fails to do so within the time limit without showing sufficient cause for such failure, the arbitral tribunal is free to draw inferences from the failure and may make the award solely on the evidence before it.

“(b) Requests to produce documentary evidence

“75. It may be useful for the arbitral tribunal to clarify with the parties whether a party may request the other party to produce documentary evidence, and if so, to set out the relevant time limits, the form of such document production (see below, para. 79), and the procedures for contesting requests by

the other party, if relevant. In certain circumstances, there may be informal exchange of documents among the parties on a voluntary basis, who will then decide which documents to submit as evidence without necessarily involving the arbitral tribunal.

"76. When considering requests and ordering production of documents, the arbitral tribunal should be mindful that approaches of arbitration laws and practices vary regarding document production. For example, there are various ways by which such document production can take place. A party may request documents from the other party or parties. Such requests may be made in various ways but are typically recorded in a schedule, which sets out not only the documents or category of documents requested, but also the reasons for the request. The other party may then state in the schedule whether it agrees to the request or the reasons why it does not agree with the request. The requesting party may decide whether to submit one or more of the contested requests to the arbitral tribunal for its consideration. The arbitral tribunal, if necessary, may add to the schedule its decision on any contested requests.

"(c) Accuracy of assertions about the provenance of documents

"77. In the absence of a specific objection, it is normally understood that (i) a document, including any translation thereof is accepted as having originated from the source indicated in the document; (ii) a dispatched communication is accepted without further proof as having been received by the addressee; and (iii) a copy is accepted as correct. A statement by the arbitral tribunal to this effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections.

"78. Documents disclosed only electronically or documents generated electronically and disclosed in hard copy (such as e-mails) may raise certain issues in relation to their provenance and authenticity. If such issues arise, the arbitral tribunal may require that the authenticity of the documents and the integrity of the information they contain are ascertained, as well as a confirmation that the documents are accessible to the parties and the arbitral tribunal.

"(d) Practical aspects of the presentation of evidence

"79. The arbitral tribunal determines the form of submission and exchange (for example, electronic, hard copy, through shared platform) as well as any requirements for the submission of documents (for example, where copies are presented, whether originals should be available for inspection; whether multiple copies of documents that are essentially identical are required) (see above, paras. 54, 55 and 65).

"80. In order to avoid duplicate submissions, it is usual for parties to agree that, once a given document is submitted in the record by one party, it will not be resubmitted by the other party.

"81. The arbitral tribunal may encourage the parties to prepare a joint set of documentary evidence, either at the outset of the proceedings or in preparation of the hearing, after each party has produced its documentary evidence (see above, para. 65).

"82. It can often be practical for the parties and/or the arbitral tribunal to select a number of frequently used documents and establish a set of 'working' or 'core' documents, whether these have been submitted jointly or otherwise.

"83. Depending on the nature and volume of documents, it may facilitate the arbitral tribunal's understanding of the issues if certain evidence is presented by way of a report from a counsel or an expert (for example, a public accountant or a consulting engineer). The report may present the information in the form of summaries, tabulations or charts. Such presentation of evidence can be combined with arrangements that give the parties and the arbitral tribunal an opportunity to review the underlying data and the methodology used for the preparation of the report, as well as to verify the assumptions made in its preparation.

"14. Witnesses of fact [*A/CN.9/826, paras. 141 to 149; A/CN.9/832, paras. 130 to 135*]

"(a) Identification of witnesses; contact with the parties

"84. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may consider requiring that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present for oral testimony and whether it intends to submit written witness statements. It is advisable to address those matters at the outset of the arbitral proceedings.

"85. As to the content of the advance notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; (c) the nature of the relationship with any of the parties; (d) the qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony; and (e) how the witnesses learned about the facts on which they will testify. However, an advance notice may not be necessary, in particular where the thrust of the testimony can be clearly ascertained from the party's allegations.

"86. Where written witness statements are presented, it is generally accepted that these statements need not be repeated orally. Often they are accepted as the witnesses' testimony and only short direct testimony or merely a confirmation of the written statement is required. Further, written witness statements may serve to eliminate the need for oral testimony by uncontroversial witnesses, as not all witnesses who have been named or who have submitted written statements need to be heard at a hearing. The arbitral tribunal may decide that certain witnesses do not need to be heard; as well the parties may waive the examination of certain witnesses at the hearing.

"87. Written witness statements should refer to all documents upon which they rely.

"88. The arbitral tribunal may wish to clarify at the outset of the proceedings the nature of the contact a party or its representative is permitted to have with a witness. This applies to contacts in relation to the preparation for hearings and of witness statements. International arbitration can differ from domestic

court practice in respect of the permissibility of pre-testimony contact between a party and its witness. In international arbitration, it is widely accepted that pre-testimony contacts with witnesses are permitted. One common practice is to permit parties or their representatives to interview witnesses prior to their oral testimony and/or assist them in the preparation of their witness statements, if submitted.

"(b) Manner of taking oral evidence of witnesses

"89. While arbitration laws and rules typically allow broad discretion to the arbitral tribunal concerning the manner of taking witness evidence, practices vary. In order to facilitate the parties' preparation for hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of hearings, some or all of the following issues.

"(i) Manner in which witnesses will be heard

"90. Differences exist as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to ask questions freely and directly to the witness, but may disallow a question if another party objects. Other arbitrators tend to exercise more control and may disallow a question by the parties on their own initiative or even require that questions from the parties be asked through the arbitral tribunal.

"(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

"91. Practices and laws differ as to whether or not oral testimony must be given under oath or similar affirmation of truthfulness. In some legal systems, the arbitral tribunals may put witnesses under oath, but it is usually within their discretion whether they want to do so. In other legal systems, oral testimony under oath is either unknown in arbitration or may even be considered improper, as only an official such as a judge or a notary is empowered to administer oaths. In such circumstances, the witness may simply be asked to affirm that he or she will testify truthfully. It may be necessary to clarify who will administer the oath or affirmation. The arbitral tribunal may draw the witnesses' attention to potential criminal sanctions for giving false testimony.

"(iii) Whether witnesses may be in the hearing room when they are not testifying

"92. Some arbitrators consider, as a general rule, that witnesses should not be allowed in the hearing room except when they are testifying and thereafter. The purpose is to prevent the witness from being influenced by other statements and to prevent the possibility of the witness' presence influencing another witness. Other arbitrators consider that it is useful for witnesses to be present when other witnesses are testifying in order to deter untrue statements and clarify or reduce contradictions between witnesses. Other possible approaches include that witnesses remain absent from the hearing room before their testimony but stay in the room after they have testified, or that the arbitral tribunal decides that question for each witness individually. A separate

rule may, for example, be appropriate for witnesses who also appear as internal representatives of a party (for example an in-house legal counsel). Laws and practices may be different regarding whether such witnesses may remain in the hearing room after having testified.

"93. The arbitral tribunal may leave questions of witness presence in the hearing room to be decided during the hearings, or may give guidance on the question in advance of the hearings, for example, where it may affect the organization of the hearings.

"(c) Order in which the witnesses will be called

"94. When several witnesses are to be heard and longer testimony is expected, it is useful to determine in advance the order in which they will be called. This is likely to reduce costs and facilitate scheduling. Each party might be invited to suggest the order, in which it proposes the witnesses to be examined, and the arbitral tribunal may discuss with the parties and ask them to agree on the timetable and sequence of witness examination, and the amount of time anticipated for each witness or for all of a party's witnesses collectively.

"95. Unless the witnesses are first examined by the arbitral tribunal, a general practice is for witnesses to be examined first by the party calling that witness, and then cross-examined by the other party or parties. After the cross-examination, the witness might be re-examined by the party calling that witness.

"(d) Hearing representatives of a party

"96. International arbitration can differ from domestic court practice in respect of whether certain persons in any way related to a party may be heard as witnesses. While under some legal systems, such persons can only be heard as representatives and not as witnesses, arbitration rules may provide otherwise.[16] Therefore, it may be necessary to consider ground rules for determining which persons may or may not testify as witnesses (for example, certain executives, employees or agents), whether statements from such persons may be submitted and considered, and the weight that may be given to such statements.

"(e) Non-appearance of witnesses

"97. The arbitral tribunal may consider addressing the consequences of a witness not appearing at the hearing, including whether that witness' written statement may still be considered and, if so, under what circumstances.

"15. Experts and expert witnesses [*A/CN.9/826, paras. 150 and 151; A/CN.9/832, para. 136*]

"98. Many arbitration laws and rules address the participation of experts in arbitral proceedings. Frequently, the parties will present the opinion of experts

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[16] Article 27(2) of the UNCITRAL Arbitration Rules (as revised in 2010) provides that "Witnesses […] may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. […]".

engaged by them (often described as ‘expert witnesses’ or ‘party appointed experts’) to address points at issue. An arbitral tribunal may also appoint its own expert(s) to report on issues requiring expert guidance.

“99. Arbitral institutions and chambers of commerce may be of assistance to the parties and the arbitral tribunal in relation to the selection of an expert, if needed.

“(a) Expert opinion presented by a party (expert witness)

“100. If the parties to a dispute intend to present an expert opinion, each party may instruct its own expert regarding the issues to be addressed in his or her report or the parties may agree on a joint list of issues to be addressed by the experts. In addition or alternatively, the arbitral tribunal may consider requesting the experts to clarify the points at issue that they intend to address. The arbitral tribunal may also require the parties’ experts to submit a joint report identifying the points on which they agree and disagree.

“101. Occasionally, it may be possible for the parties to agree on a single joint expert. Such a selection has the benefit of reducing costs and streamlining the proceedings. Where a single joint expert has presented evidence, the parties normally are entitled to comment on the report.

“102. The arbitral tribunal may consider addressing the timing of the submission of expert evidence and, in particular, whether such submission should be made simultaneously with a statement of case and/or witness statements or after, and whether expert reports should be filed consecutively or simultaneously.

“103. Where the parties’ respective experts express conflicting opinions, the arbitral tribunal may need to provide for the possibility of supplementary or responsive expert witness statements to address issues raised.

“104. If hearings are to be held for the purpose of presenting expert evidence, the procedures in relation thereto should also be set out in advance by the arbitral tribunal. For example, where the parties present their own expert witnesses, the arbitral tribunal may consider determining whether the experts should be heard separately or together. In the latter case, the questioning is often led by the arbitral tribunal.

“(b) Expert appointed by the arbitral tribunal

“105. The function of the expert appointed by the arbitral tribunal usually consists in preparing a report on one or several specific points requiring specialized knowledge. It may also consist in assisting the arbitral tribunal in understanding certain technical issues or accomplishing certain tasks. In some instances, if the respective experts appointed by the parties diverge widely in their findings, the arbitral tribunal may appoint an expert later in the proceedings.

“106. Before appointing an expert, the arbitral tribunal normally will require a description of his or her qualifications and a statement of his or her impartiality and independence. The arbitral tribunal may also give the parties

an opportunity to comment on the expert's qualifications, impartiality or independence.

"107. It may be advisable for the arbitral tribunal to consult with the expert before the completion of the report, in particular when more than one expert is appointed by the arbitral tribunal

"108. The arbitral tribunal may consider clarifying the nature and extent of communication its expert may have with the parties, jointly or separately, including for instance access to physical evidence or to a site under the control of one of the parties.

"109. Where a tribunal-appointed expert has presented evidence, the parties normally are entitled to comment on the report.

"(c) The expert's terms of reference

"110. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, thereby avoiding opinions on points that are not for the expert to assess, and to commit the expert to a time schedule.

"111. The terms of reference might also be useful in setting out details of how the expert will receive any relevant information or have access to any relevant documents, goods or other property necessary to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at his or her conclusions and the factual assumptions made in preparing the report.

"16. Other evidence [*A/CN.9/826, paras. 137 to 140; A/CN.9/832, para. 137*]

"112. In some arbitrations, the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting goods or property, or visiting a specific site. Physical or virtual site inspections may be evidentiary in nature or may serve an illustrative function for the arbitral tribunal.

"(a) Physical evidence

"113. If physical evidence will be submitted, the arbitral tribunal may fix the time schedule for presenting the evidence, make arrangements for the other party or parties to prepare for the presentation of the evidence and take measures for safekeeping the items of evidence.

"(b) Inspections of site, property or goods

"114. The arbitral tribunal may first consider whether, for evidentiary purposes or for improving its understanding of the case, inspection of a site, property or goods is useful or required. If that is the case, it may consider whether the inspection requires the arbitrators' physical presence or whether a virtual inspection might be possible or desirable in the interest of efficiency or cost savings.

"115. If a physical inspection of a site, property or goods takes place, the arbitral tribunal may consider matters such as timing, cost allocation, and arrangements necessary both to provide the opportunity for the parties to be present and to avoid communications between the arbitrators and a party about points at issue without the presence of the other party or parties. Prior to the inspection, it may be useful for the parties and the arbitral tribunal to agree on an inspection protocol and on the scope of the inspection.

"116. The site, property or goods to be inspected are often under the control of one of the parties. If so, it may be advisable to allow the other party to visit the place of inspection before the arbitral tribunal does, in order to provide that party with the opportunity to acquaint itself with the state and condition of the site, property or goods and to request that the arbitral tribunal view additional or different evidence at the place of inspection.

"117. Where an employee or a representative of a party controlling the site, property or goods gives guidance or explanations, it should be borne in mind that such statements, in contrast to statements those persons might make as witnesses in a hearing, are usually not treated as evidence in the proceedings.

"17. Hearings [*A/CN.9/826, paras. 159 to 174; A/CN.9/832, paras. 138 and 139*]

"(a) Decision whether to hold hearings; submissions in relation to hearings

"118. Arbitration rules often allow any party to request a hearing for the presentation of evidence by witnesses, including expert witnesses, and/or for oral argument. Where none of the parties requests a hearing, the arbitral tribunal will determine whether to hold a hearing.

"119. It is a widely accepted practice to have written evidence and written arguments presented before the hearings. This may assist in focusing the issues that have to be dealt with at the hearings. In order to facilitate the parties' preparations and avoid any misunderstanding, the arbitral tribunal may discuss these matters with the parties at the outset of the arbitral proceedings as well as in advance of any hearing. The need for a hearing might be subject to reconsideration at a later stage in light of the submissions by the parties.

"120. Before or during the hearings, a decision will have to be taken whether any additional submissions are to be made by the parties and, if so, a corresponding schedule will have to be established. Such submissions may be necessary in order to allow the parties to address a specific issue that arose during the hearings, or to provide them with a final opportunity to present their case in light of the evidence that emerged during the hearings.

"121. Hearings can be held in-person or remotely via technological means. The decision whether to hold hearings in-person or remotely is likely to be influenced by factors such as the importance of the issues at stake (for example, substantive or procedural issues) and the cost and possible delay of holding hearings in-person.

"(b) Scheduling of hearings

"122. Dates for hearings are normally set at the earliest possible opportunity so as to ensure availability of the participants. A common practice is to hold

hearings in a single, consecutive period. However, holding hearings over separate periods is, in some instances, necessary in order to accommodate the different schedules of the parties and the arbitral tribunal.

"123. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration.

"124. It may be useful to limit the aggregate amount of time each party has for any of the following: (i) making oral statements; (ii) questioning its witnesses; and (iii) questioning the witnesses of the other party or parties. In general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers, after having heard the parties, that a different allocation is justified.

"125. Such planning of time, provided it is realistic, fair and subject to supervision by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and argument, reduce the likelihood of running out of time towards the end of the hearings and avoid any actual or perceived unfairness resulting from the parties having unequal time.

"126. The arbitral tribunal usually sets aside time for its deliberations before and shortly after the close of the hearings and before the close of the proceedings.

"(c) The order in which the parties will present their arguments and evidence

"127. The arbitral tribunal has broad latitude to determine the order of presentations at hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their sequence and duration, and which of the parties has the last word; this also applies with respect to the manner and sequence in which witnesses and experts are heard and other issues are addressed at the hearings.

"(d) Arrangements for a record of the hearings

"128. The arbitral tribunal may consider the method of preparing a record of oral statements and testimony during hearings as well as who will be responsible for making the necessary arrangements. Commonly used methods include audio recording and transcription services. The parties and the arbitral tribunal may consider whether audio recording should be transcribed, and clarify whether the audio recording would constitute the official record of the hearings.

"129. If transcripts are to be produced, the arbitral tribunal may consider how the parties will be given an opportunity to check the transcripts. For example, it may be determined that any changes to the record must be approved by the parties or, failing their approval, referred to the arbitral tribunal for decision.

"18. Multiparty arbitration [*A/CN.9/826, paras. 175 and 176*]

"130. When a single arbitration involves more than two parties (multiparty arbitration), many procedural issues remain the same as in two-party

arbitration. However, caution may need to be exercised where the parties have divergent interests or seek different relief.

"131. The Notes, which aims at pointing out matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions in multiparty arbitration as compared to two party arbitration. Those matters may be addressed under arbitration rules.[17]

"19. Joinder and Consolidation [*A/CN.9/826, paras. 175 and 176; A/CN.9/832, para. 140*]

"(a) Joinder

"132. Joinder means adding a new party into an existing arbitration. Not all joinder applications necessarily require the contemporaneous consent of all parties (i.e. the parties to the arbitration and the new party). The new party may already be bound by the arbitration agreement and the joinder process might be foreseen by the arbitration agreement, the applicable rules and/or the applicable arbitration law.

"133. Parties may wish to join a new party to the arbitration in situations where they would be unable to fully present their claims without that new party's participation. Certain arbitration rules have addressed this issue by providing that the arbitral tribunal may, at the request of a party, allow one or more third persons to be joined in the arbitration, provided that such person is bound by the arbitration agreement.[18] Other arbitration rules do not require that the party to be joined be bound by the arbitration agreement under which the claim arises.

"134. It is recommended that any third party be joined as early as possible in the proceedings and many arbitration rules restrict the ability to seek joinder after the initial stage of the proceedings. For example, a party may request the joinder when filing its response to the notice of arbitration.[19] In such a case, the third party should be joined to the procedure before the arbitral tribunal is appointed. Depending on the applicable arbitration law and arbitration rules, a third party may also be joined after the appointment of the arbitral tribunal if all parties agree.

"(b) Consolidation

"135. Consolidation refers to the merging of separate arbitrations, regardless of whether or not the related arbitrations have been commenced pursuant to the same or a different arbitration agreement. Therefore, the question of consolidation arises in situations where several distinct arbitrations are

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[17] See, for example, article 10(1) of the Arbitration Rules (as revised in 2010), which provides that "(…) where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator."

[18] See, for example, article 17(5) of the UNCITRAL Arbitration Rules (as revised in 2010).

[19] See, for example, article 4(2)(f) of the UNCITRAL Arbitration Rules (as revised in 2010).

initiated under the same or different arbitration clauses. Consolidation can increase efficiency and avoid inconsistent outcomes on related issues. However, one or several parties may have a justified interest in having several disputes dealt with separately, for example because one of the disputes may have priority or the consolidation of several cases would render the proceedings more complex and time consuming.

"136. An increasing number of arbitration rules address consolidation. Arbitration rules that expressly permit consolidation of two or more pending arbitrations do so upon consideration of various factors such as whether (i) consolidation has been requested by a party, (ii) all the parties agree to consolidation, (iii) the disputes arise in connection with the same legal relationship or under the same or different arbitration agreements and, in the latter case, whether those agreements are compatible, and (iv) an arbitral tribunal has been appointed in the most recently initiated arbitration.

"20. Possible requirements concerning the award [*A/CN.9/826, paras. 177 to 181*]

"137. The parties and the arbitral tribunal should bear in mind the relevant applicable law at the place of arbitration and at the potential place(s) of enforcement of the award, as well as the applicable arbitration rules, in considering any requirements as to the form, content and filing or delivering of the award.

"138. In respect to filing or delivering the award, some laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (for example, to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); and consequences for failing to comply with the requirement (which might lead to difficulties in its enforcement).

"139. If such requirements exist, it is useful, before the issuance of award, to plan who will take the necessary steps to meet the requirements and to decide how the costs are to be allocated."