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Settlement of commercial disputes: Proposal received from the Swiss Arbitration Association

Note by the Secretariat

1. In preparation for the forty-ninth session of the Commission, the Swiss Arbitration Association (“ASA”) submitted to the Secretariat a proposal with the aim of cooperating with UNCITRAL in promoting the revised UNCITRAL Notes on Organizing Arbitral Proceedings. The text received by the Secretariat on 30 May 2016 is reproduced as an annex to this note.



Annex

Proposal by the Swiss Arbitration Association (ASA)

1. Introduction and Scope of the ASA Arbitration Toolbox

In view of a potential cooperation with UNCITRAL, this Note is aimed at presenting a project pursued by the Swiss Arbitration Association (ASA) under the working title “ASA Arbitration Toolbox”.

ASA is a non-profit association with over 1,200 members, of whom a third are from outside Switzerland, all practitioners and academics engaged and/or interested in domestic and international arbitration. Membership to ASA is open to arbitration practitioners of all nationalities, irrespective of the level of experience. Since its creation in 1974, ASA has become one of the leading arbitration associations. ASA is not an arbitral institution and does not administer arbitral proceedings.

The essence of the “ASA Arbitration Toolbox” is to remind users that arbitration is a tailor-made process. There is no single “correct” or “usual” way to conduct arbitral proceedings, or even one single “best practice”. Indeed, the very essence of arbitration is its flexibility: different options are available for each step of the proceedings. The “ASA Arbitration Toolbox” is thus designed to remind users (parties, arbitrators, counsel) that they have considerable freedom to customize their proceedings for each case, as is also highlighted in the UNCITRAL Notes on Organizing Arbitral Proceedings (UNCITRAL Notes).

The “ASA Arbitration Toolbox” will provide guidance on how to best adapt the proceedings to the specific needs of each individual arbitration, making the process as efficient as possible. In order to achieve this, the “ASA Arbitration Toolbox” will detail the main steps in arbitral proceedings and outline the different possible approaches for each step. It will also provide guidance on which approach might be advisable in a specific situation, as well as the consequences of the approach chosen on subsequent steps in the proceedings. At all times, the “ASA Arbitration Toolbox” will emphasize that the procedural options corresponding to each option are merely suggestions. In line with the UNCITRAL Notes, the “ASA Arbitration Toolbox” also aims at assisting arbitration practitioners by outlining the issues on which appropriately timed decisions on organizing arbitral proceedings shall be made.

The end product will be an interactive electronic handbook available online, designed for the needs of arbitrators, counsel and in-house counsel alike. The electronic tool will contain descriptive and explanatory text and guidance on how to best address specific procedural issues. Hyperlinks will allow the user to easily switch from one issue to another. In addition, and this will be the unique feature of the “ASA Arbitration Toolbox”, the electronic tool will contain concrete drafting proposals for download and will show the user, by allowing him/her to make an interactive selection, how decisions made on one procedural issue may affect later options available. The details and information on how to access the prototype of the electronic tool established so far will be explained in more detail below (Section 4).

2. Background

The idea for the “ASA Arbitration Toolbox” project was aired in October 2013, when the ASA Board felt the need to remind arbitration practitioners of the flexibility of arbitration proceedings and the diversity of approaches available. At the same time, they also realized that this diversity requires guidance on which combination of approaches is recommendable. Board members pointed out that, in many cases, it was not advisable to simply employ the whole arsenal of available approaches. Instead, practitioners should be guided towards wise and efficient use of the available tools. In order to achieve this, the Board suggested the creation of a “toolbox”.

From the very outset, the ASA Board recognized that the “ASA Arbitration Toolbox” should address the same fundamental concern for appropriately timed decision on the organization of arbitral proceedings and diversity that is the basis of the UNCITRAL Notes. As the UNCITRAL Notes already provide useful guidance on organizing arbitral proceedings, the goal was not to merely replicate the Notes, but to take the spirit of the UNCITRAL Notes further. It was decided that this goal could best be achieved by means of an interactive electronic tool.

3. Content of the “ASA Arbitration Toolbox”

The relevant phases in the arbitral proceedings to be covered by the “ASA Arbitration Toolbox” have been identified as follows:

- (i) Regulatory and institutional framework and arbitration clauses;
- (ii) Commencement of arbitration and formation of the arbitral tribunal;
- (iii) Terms of Reference, financing the procedure, organization of the procedure, arbitrator’s possible role as conciliator; secretary to the arbitral tribunal;
- (iv) Written submissions, documentary evidence (including document production);
- (v) Interim measures, emergency arbitrators, assistance from the courts;
- (vi) Experts, issues of confidentiality;
- (vii) Witnesses;
- (viii) Hearing(s), oral opening arguments, oral closing arguments;
- (ix) Post-hearing briefs, the arbitral tribunal’s decisions.

4. Format and main features of the “ASA Arbitration Toolbox”

As explained, the end product will be an electronic interactive handbook available online. The electronic tool is designed as a three-layer-tool:

- The first layer features a menu showing the relevant phases in the arbitral proceedings as defined above (Section 3).
- The second layer focuses on one particular phase in the arbitral proceedings (for the time being limited to the phase “Organization of the Procedure”). It features a menu showing the topics that are relevant at the respective stage of the proceedings and the issues the parties and the arbitral tribunal may wish to

consider. With regard to each topic, the second layer contains explanatory text, options and recommendations for when to choose which option. For example, in the prototype section on the “Organization of the Procedure”, it is explained that the responsibility for organizing the procedure is divided between the parties and the tribunal and that different scenarios can be distinguished, e.g. that the parties can determine the procedure themselves, that the arbitral tribunal can determine the procedure after consultation with the parties, or without consulting the parties. For each scenario, the “ASA Arbitration Toolbox” provides guidance on when best to use this approach. Once the electronic tool is fully developed, the explanatory text will also contain hyperlinks to other sections of the electronic tool allowing the user to navigate easily and quickly between sections. As a unique feature, the electronic tool will also show to the user how decisions made on a procedural issue may affect later options or decisions available. This will be implemented by interactive choices (for the time being called “Red flags”) which can be activated and have the effect that the “ASA Arbitration Toolbox” will be adapted to the choice made.

- The third layer offers drafting proposals for specific documents that may be needed at any given stage. These documents will be available for download. For example, in the section on the “Organization of the Procedure”, users will be able to download samples of a letter of introduction sent by the arbitral tribunal to the parties, an agenda for the organizational conference, Terms of Reference, Procedural Order No. 1 etc. In addition, arbitration rules, explanatory notes, checklists etc. will be available for download to the extent they are relevant.

For the time being, a prototype is available, but limited to the topic “Organization of the Procedure” (phase (iii) as outlined in Section 3 above), i.e. the phase in an arbitration where the arbitration proceedings have been commenced and the arbitral tribunal has been constituted. The documents for download, hyperlinks and interactive choices are not yet fully implemented. Furthermore, the explanatory text is a draft version and does not yet reflect the final wording.

The current status of the prototype can be accessed using the following links:

Title page: <http://org.arbitration-ch.toolbox.u-x.ch/de/home/index.html>

Section on “Organization of the proceedings”: <http://org.arbitration-ch.toolbox.u-x.ch/de/organization/index.html>

In view of the progress made on the IT aspects of the project and the status of the substantive work completed so far, it is expected that the necessary content to the electronic tool will be added in the course of 2016. This would allow the “ASA Arbitration Toolbox” to be finalized hopefully early 2017.

5. Cooperation with UNCITRAL

Since the “ASA Arbitration Toolbox” is guided by the same spirit as reflected in the UNCITRAL Notes, and aspires at taking this spirit further and beyond, it would be beneficial to the project if it could gain the support of UNCITRAL. Cooperation with UNCITRAL would mean that the “ASA Arbitration Toolbox” could reach out to the arbitration community on a global level. UNCITRAL’s support will

undoubtedly provide the “ASA Arbitration Toolbox” with credibility and visibility around the world.

Cooperation with UNCITRAL will help avoid duplication of efforts in promoting flexibility but also efficiency of arbitration proceedings thereby securing consistency and coherence of approaches undertaken. In fact, it is of particular importance to have coherent guidance in an area where a multitude of approaches are available, as is the case with the organization of arbitral proceedings.
