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### Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

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\* This document is submitted later than the required ten weeks prior to the start of the meeting because of the need to complete consultations.



## Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) (“the UNCITRAL Arbitration Rules” or “the Rules”).<sup>1</sup> The Commission previously discussed that matter at its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions.<sup>2</sup>

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1, in order to allow the Secretariat to prepare a draft of revised Rules taking account of such indications.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-fifth session and covers articles 1 to 14 of the UNCITRAL Arbitration Rules. Articles 15 to 41 are dealt with under A/CN.9/WG.II/WP.145/Add.1. All references to discussions and considerations by the Working Group in the note are to discussions and considerations made at the forty-fifth session of the Working Group.

### 1. General remarks

#### *Principles to be applied in revising the UNCITRAL Arbitration Rules*

4. It is recalled that, at the thirty-ninth session of the Commission (New York, 19 June-7 July 2006), in recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex.<sup>3</sup>

5. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group agreed that the UNCITRAL Arbitration Rules had been one of the most successful instruments of UNCITRAL and therefore cautioned against any unnecessary amendments or statements being included in the *travaux préparatoires* that would call into question the legitimacy of prior applications of the Rules in specific cases. It was considered that the focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years in arbitral practice (A/CN.9/614, para. 16). It is further recalled that broad support was expressed for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations (A/CN.9/614, para. 18).

#### *Harmonization of the drafting of the UNCITRAL Arbitration Rules with the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”)*

6. The Working Group agreed that harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the Model Law should not be automatic but rather considered only where appropriate (A/CN.9/614, para. 21).

*General remark on the reference to “parties” in the Rules*

7. Amendments have been proposed in the text of the Rules to replace words such as “both parties”, “either party”, “one of the parties” with more generic formulation, so as to encompass multi-party arbitration.

## 2. Notes on a draft of revised UNCITRAL Arbitration Rules

8. All suggested modifications to the UNCITRAL Arbitration Rules are marked up in the text below.

### Section I. Introductory rules

#### [Scope of application] [Applicability]

##### Article 1

1. *Option 1:* [Where ~~the parties to a contract~~ have agreed [in writing\*] that disputes ~~between them in relation to that contract~~ [in respect of a defined legal relationship, whether contractual or not] shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules] [*include text from Variants 1, 2 or 3*]

*Option 2:* [Where there is an agreement [in writing\*] to refer disputes to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules] [*include text from Variants 1, 2 or 3*]

*Variant 1:* [subject to such modification as the parties may agree [in writing].]

*Variant 2:* [as in effect on the date of commencement of the arbitration, subject to such modification as the parties may agree [in writing].]

*Variant 3:* [subject to such modification as the parties may agree [in writing]. Unless the parties have agreed to apply the Rules as in effect on the date of their agreement, the parties shall be deemed to have submitted to the Rules in effect on the date of commencement of the arbitration.]

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

#### Remarks

##### *Title*

9. The Working Group might wish to consider whether the title of article 1 should read “Applicability” instead of “Scope of application”, given that article 1

contains provisions on the principles of application of the Rules and is not limited to matters relating to the scope of application.

***Paragraph (1)***

*Options 1 and 2*

*“parties to a contract”*

10. Option 1 most closely corresponds to the current version of the Rules, by including a reference to “parties”, whereas option 2 implements a suggestion made in the Working Group to delete any reference to “parties” in the opening words of article 1, paragraph (1) (A/CN.9/614, para. 34). That suggestion was made to address the specific case of arbitration in the context of bilateral investment treaties, where the parties to an investment arbitration treaty containing an arbitration clause differ from the parties to the arbitration. The Working Group might wish to consider whether the deletion of any reference to “parties” could lead to misinterpretation as to which parties are bound by the application of the Rules, particularly in arbitration cases which do not relate to any investment treaty.

*“disputes in relation to that contract”*

11. If the Working Group decides to retain option 1, it might wish to further discuss the question whether the types of disputes that parties could submit to arbitration should be limited to “disputes in relation to that contract” (A/CN.9/614, paras. 32-34). It is recalled that the Working Group considered whether article 1, paragraph (1) should be widened to include words consistent with article 7 of the Model Law, which permitted arbitration of disputes “in respect of a defined legal relationship, whether contractual or not” (A/CN.9/614, paras. 32-33). Another option was to avoid limiting the scope of application of the Rules, and to omit any reference to a “contract” or “legal relationship” (A/CN.9/614, para. 33).

*The writing requirement for the agreement to arbitrate and for modification of the Rules*

12. The Working Group noted that the purpose of the requirement that the arbitration agreement be in writing was to set out the scope of application of the UNCITRAL Arbitration Rules and, unlike the function of the form requirement under the Model Law, might be separate from the question of the validity of the arbitration agreement (which is left to the applicable law) (A/CN.9/614, para. 28).

13. If the Working Group decides to omit the reference to the writing requirement from article 1 (A/CN.9/614, paras. 27-31), the drafting proposal would be to delete the words “in writing” appearing in brackets in the text.

*Variants 1, 2 and 3*

*Applicable version of the UNCITRAL Arbitration Rules*

14. Variants 1, 2 and 3 include proposals on the applicable version of the Rules.

15. Variant 1 corresponds to the current version of article 1, which does not include any indication as to the applicable version of the Rules in case of revision.

16. Variant 2 takes account of the preliminary discussions in the Working Group that:

- Some arbitral institutions include an express interpretative provision to the effect that the Rules in force on the date of the commencement of the arbitration (as opposed to the Rules in force on the date of the arbitration agreement) should apply unless the parties have agreed to the contrary (A/CN.9/614, para. 23);
- Some treaties expressly stipulate that, in the event of a revision of the UNCITRAL Arbitration Rules, the applicable version would be the one in force at the time that the arbitration commences (A/CN.9/614, para. 24).

17. Variant 3 addresses the observation made in the Working Group (A/CN.9/614, para. 23) that, in practice, some parties preferred to apply the most up-to-date Rules to their dispute, whereas others preferred the certainty of agreeing on the applicable version of the Rules in existence at the time the arbitration agreement was made.

18. The Working Group might wish to recall the observation made in the Working Group that any provision on the applicable version of the Rules should be consistent with the principle of party autonomy and, if the parties had agreed to apply the former version of the Rules, any transitional provision should not have any retroactive implications for that agreement (A/CN.9/614, para. 25).

19. It is recalled that the Working Group agreed to revisit that question once it had completed its review of the current text of the Rules (A/CN.9/614, para. 26).

#### ***References to previous UNCITRAL documents***

*“disputes in relation to that contract”*

A/CN.9/614, paras. 32-34

A/CN.9/WG.II/WP.143, paras. 24-25

*The writing requirement for the agreement to arbitrate and for modification of the Rules*

A/CN.9/614, paras. 27-31

A/CN.9/WG.II/WP.143, paras. 12-23

*Applicable version of the UNCITRAL Arbitration Rules*

A/CN.9/614, paras. 22-26

A/CN.9/WG.II/WP.143, paras. 8-11

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#### **\*MODEL ARBITRATION CLAUSE [FOR CONTRACTS]**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules [as at present in ~~force~~ effect].

Note – Parties may wish to consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town or country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...
- (e) [The law governing the arbitration agreement shall be ...]

## **Remarks**

### *Placement of the model arbitration clause*

20. The Working Group might wish to consider the proposal to relocate the model arbitration clause if the proposal to modify article 1, paragraph (1), by deleting any reference to a contract, is adopted (A/CN.9/614, para. 38) (see above, paragraph 11).

### *Proposed modifications to the model arbitration clause*

21. The words “as at present in force” are proposed to be replaced by the words “as at present in effect” to better reflect that the Rules have a contractual rather than legislative nature. These words are in brackets, as they should be considered for deletion if a provision referring to the applicable version of the Rules is adopted in article 1, paragraph (1) (see above, paragraphs 16 and 17).

### *Proposed addition to the note to the model arbitration clause*

22. A proposal was made in the Working Group to add to the note to the model arbitration clause a reference to the law governing the arbitration agreement (A/CN.9/614, para. 37). Although that addition would have the benefit of raising awareness on the importance of defining the law applicable to the arbitration agreement, it addresses only one aspect of the laws applicable in the context of arbitration. In order to further assist the parties on that question, the Working Group might wish to consider whether the model arbitration clause should include a provision on the law applicable to the substance of the dispute, and whether the impact of the place of arbitration on the law applicable to the arbitral proceedings should also be clarified.

23. In recognition of the benefit and value of conciliation as a means of alternative dispute resolution, the Working Group might wish to consider whether a reference to conciliation should be added, possibly in the form of an optional conciliation clause in order to encourage parties to first attempt to reach a settlement of their dispute with the assistance of a neutral third person.

### *Reference to previous UNCITRAL document*

A/CN.9/614, paras. 36-38

## Notice, calculation of periods of time

### Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, if not [personally][actually] received by the addressee, is deemed to have been received ~~if it is physically delivered to by~~ the addressee ~~or~~ if it is delivered at ~~his or her~~ its habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

1 bis. Any notice may be delivered by electronic communication.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day, which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

### Remarks

#### *Paragraph (1)*

##### *Deemed delivery*

24. The physical delivery of notices was listed in paragraph (1) as an option of delivery corresponding to the actual delivery of the notice. In order to clarify that meaning, it is proposed to replace the words “physical delivery” with the words “if not [personally][actually] received”. In addition, the proposed modification confirms the possibility of delivery of notices by electronic means as proposed in paragraph (1 bis).

#### *Paragraph (1 bis)*

##### *Delivery of the notice: “Electronic communication”*

25. The Working Group noted that a number of existing arbitration rules referred to delivery of notice by electronic means and it was suggested that article 2 should be amended to reflect contemporary practice (A/CN.9/614, para. 39).

#### *Paragraph (2)*

##### *Extend or shorten time periods*

26. The Working Group discussed whether paragraph (2) should be amended to provide that the arbitral tribunal might have an express power to extend or shorten the time periods stipulated under the UNCITRAL Arbitration Rules, as necessary for a fair and efficient process of resolving the parties' dispute (A/CN.9/614, paras. 41-46). A proposal was made to include in the Rules a general provision stating that: “In discharge of its duties under article 15, paragraph (1), the arbitral

tribunal may at any time extend or abridge any period of time prescribed under or pursuant to the Rules.”

27. During discussions on that matter, it was suggested that the power of the arbitral tribunal to modify time limits should be considered under article 15, which provided that the arbitral tribunal could conduct the arbitration in such manner as it considered appropriate. Whether or not that power was already provided under article 15 was subject to differing views (A/CN.9/614, paras. 43-44).

28. A question was raised whether the arbitrators should nevertheless be granted the power to modify time limits even where the parties had agreed on these matters (A/CN.9/614, para.46).

29. It is recalled that the Working Group agreed that the issue could be assessed once the Working Group had examined all provisions that stipulated a time period, and had determined whether expressly establishing the power of the arbitral tribunal to extend or abridge stipulated time periods was appropriate in each context(A/CN.9/614, para. 45).

### ***References to previous UNCITRAL documents***

#### *Paragraph (1) – Deemed delivery*

A/CN.9/614, para. 40

A/CN.9/WG.II/WP.143, paras.27-29

#### *Paragraph (1 bis) – Delivery of the notice: “Electronic communication”*

A/CN.9/614, para. 39

A/CN.9/WG.II/WP.143, paras. 27-29

#### *Paragraph (2)*

A/CN.9/614, paras. 41-46

A/CN.9/WG.II/WP.143, paras. 30-31

### **Notice of arbitration and response to the notice of arbitration**

#### **Article 3**

1. The party initiating recourse to arbitration (hereinafter called the “claimant”) shall give to the other party [or parties] (hereinafter called the “respondent”) a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
3. The notice of arbitration shall include the following:
  - (a) A demand that the dispute be referred to arbitration;
  - (b) The names and addresses of the parties;
  - (c) ~~A reference to the arbitration clause or the separate~~ Identification of the arbitration agreement that is invoked;
  - (d) ~~A reference to~~ Identification of any contract, or other legal instrument, out of or in relation to which the dispute arises;



- (e) ~~The general nature~~ A brief description of the claim and an indication of the amount involved, if any;
- (f) The relief or remedy sought;
- (g) A proposal as to the number of arbitrators, ~~(i.e. one or three)~~, language and place of arbitration, if the parties have not previously agreed thereon.
4. The notice of arbitration may also include:
- (a) The proposal for the appointment of an appointing authority referred to in article 4 bis;
- (a) bis The proposal for the appointments of a sole arbitrator ~~and an appointing authority~~ referred to in article 6, paragraph 1;
- (b) The notification of the appointment of an arbitrator referred to in article 7 or article 7 bis, paragraph 1;
- [(c) The statement of claim referred to in article 18.]
5. Within thirty days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:
- (a) Any comment on the demand that the dispute be referred to arbitration;
- (b) The full name and address of any respondent;
- (c) Any comment on the arbitration agreement, and on any contract or other legal instrument out of or in relation to which the dispute arises, that are invoked in the notice of arbitration;
- (d) Any comment on the claim and the amount involved, if any;
- (e) Any comment on the relief or remedy sought;
- (f) Any comment concerning the number of arbitrators, language and place of arbitration.
6. The response to the notice of arbitration may also include:
- (a) Any comment on the proposal for the appointment of an appointing authority referred to in article 4 bis;
- (b) Any comment on the proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;
- (c) Any comment on the notification of the appointment of an arbitrator referred to in article 7 or article 7 bis, paragraph 1;
- (d) A brief description of counter-claims, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.
7. Failure by the respondent to communicate a response to the notice of arbitration shall not prevent the arbitration from proceeding pursuant to these Rules.

**Remarks*****Paragraph (1)***

30. The Working Group might wish to consider whether paragraph (1) should contain provisions to deal with multi-party arbitration.

***Paragraphs (3) and (4)******Contents of notice of arbitration***

31. A suggestion was made by the Working Group that article 3, paragraphs (3) and (4), which dealt with the contents of the notice of arbitration should be amended to include more detailed or additional information in the interests of improving efficiency of the arbitral procedure (A/CN.9/614, paras. 50-55).

32. The Working Group might wish to consider deleting the words “arbitration clause” in paragraph (3) (c) as an arbitration clause might be understood as falling under the more generic definition of arbitration agreement.

33. The words “or other legal instruments” in paragraph (3) (d) have been added to deal with the case where a dispute did not arise out of or in relation to a contract (A/CN.9/614, para. 51).

34. The amendment under paragraph (3) (e) is in accordance with the proposal made in the Working Group to replace the words “general nature” with the words “brief description” (A/CN.9/614, para. 53).

35. A reference to the “language and place of arbitration” has been added in paragraph 3 (g) in line with suggestions made in the Working Group (A/CN.9/614, para. 53). The reference to one or three arbitrators has been deleted, for the reasons explained below (see below, paragraph 43 on the number of arbitrators).

36. Paragraph (4) (a) has been split in two subparagraphs, to take account of the proposal to include a provision dealing with the appointing authority (see below, paragraphs 41 and 42 on article 4 bis). Under paragraph (4) (b), a reference has been added to article 7 bis, which deals with the appointment of arbitrators in multi-party arbitration.

37. The Working Group might wish to consider whether the reference to the statement of claim should be maintained under paragraph (4) (c).

38. The Working Group might wish to further consider which items of the notice of arbitration should remain optional under paragraph (4), and whether the question of how to deal with an incomplete notice of arbitration should be addressed in the revised Rules or left to the discretion of the arbitral tribunal (A/CN.9/614, para. 54).

***Paragraphs (5), (6) and (7)******Response to the notice of arbitration; contents and consequences of the failure to respond***

39. The Working Group considered whether the respondent should be given an opportunity to state its position before the constitution of the arbitral tribunal, by responding to the notice of arbitration, and before the submission by the claimant of its statement of claim (A/CN.9/614, paras. 56-57). It was suggested that providing

such an opportunity or, as proposed by some delegations, a procedural obligation, would have the added advantage of clarifying at an early stage of the proceeding the main issues raised by the dispute. It was said that inclusion of a right for the respondent to reply to the notice of arbitration would provide an appropriate balance between the claimant and the respondent (A/CN.9/614, para. 57). The Working Group might wish to consider the possible contents of the response to the notice of arbitration as defined under paragraphs (5) and (6), as well as the consequences for not responding, as referred to under paragraph (7).

### ***References to previous UNCITRAL documents***

*Paragraphs (3) and (4): Contents of notice of arbitration*

A/CN.9/614, paras. 50-55

A/CN.9/WG.II/WP.143, paras. 36-39

*Paragraphs (5), (6) and (7): Response to the notice of arbitration; contents and consequences of the failure to respond*

A/CN.9/614, paras. 56-57

A/CN.9/WG.II/WP.143, paras. 40-41

### **Representation and assistance**

#### **Article 4**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to ~~the other all parties~~; such communication must specify whether the appointment is being made for purposes of representation or assistance [and where a person is to act as a representative of a party, the communication shall provide information on the scope of authority of such person].

*Representation of a party*

40. The Working Group might wish to consider whether it would be useful to add language to article 4 aimed at ensuring that when a person is empowered to represent a party, the other party or parties are informed of the content of its representation powers and whether it should be clarified that the absence of such information would not deprive the communication of its validity.

### **Designating and appointing authorities**

#### **Article 4 bis**

1. The parties may agree on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, to act as appointing authority under these Rules.
2. In the event that the parties have not agreed on the identity of an appointing authority, or the appointing authority refuses or fails to act in accordance with these Rules, any party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority may require from any party the information it deems necessary to exercise its functions. Copies of all requests or other communications between a party and the appointing authority or the Secretary-General of the Permanent Court of Arbitration at The Hague shall also be provided to all other parties.

4. When an appointing authority is requested to appoint an arbitrator pursuant to articles 6, 7 or 7 bis, the party which makes the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, the response to the notice of arbitration.

5. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

6. In all cases, the appointing authority may exercise its discretion in appointing an arbitrator.

#### **Remarks**

##### *Specific provision on the designating and appointing authorities*

41. The Working Group might wish to consider including in the Rules a provision along the lines contained in article 4 bis, which is intended to deal with the designation and role of the appointing authority, which could be appointed by the parties at any time during the arbitration proceedings, and not only in cases currently provided for in the Rules. Such a provision might clarify for the parties the importance of the role of an appointing authority, particularly in the context of *ad hoc* arbitrations. That provision simplifies articles 6 and 7 on the appointment of arbitrators, as it includes provisions applicable to both. Article 8 would then be deleted, as the provisions it contained would be placed in article 4 bis, paragraphs (3) and (5).

##### *Extension of the role of the designating and appointing authorities*

42. The Working Group might wish to consider whether the functions and roles of the designating authority and appointing authority should be modified.

## **Section II. Composition of the arbitral tribunal**

### **Number of arbitrators**

#### **Article 5**

1. *Option 1:* [If the parties have not previously agreed on the number of arbitrators (~~i.e. one or three~~), and if within [15][30] days after the receipt by the respondent of the notice of arbitration the parties have not agreed [*Variant 1:* that there shall be only one arbitrator, three

arbitrators shall be appointed.] [*Variant 2: on the number of arbitrators, three one arbitrators shall be appointed.*]]

*Option 2: [If the parties have not previously agreed on the number of arbitrators, the notice of arbitration shall contain a proposal on the number of arbitrators. If the Respondent has not agreed to that proposal by the time at which it is required to communicate its response, any party may request the appointing authority to decide whether one or three arbitrators shall be appointed.]*

2. If the parties decide that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the methods agreed upon by the parties.

## Remarks

### *Paragraph (1)*

43. The Working Group might wish to recall that diverging views were expressed on whether the default rule on the number of arbitrators should be modified (A/CN.9/614, paras. 59-60). Under option 1, if the parties are unable to agree on the number of arbitrators, a default rule is provided, with two variants for consideration by the Working Group. Under option 2, if the parties are unable to agree, the appointing authority shall decide on the number of arbitrators.

### *Paragraph (2)*

44. The purpose of the proposed paragraph (2) is to clarify that the Rules provide for methods to form either a one or a three member arbitral tribunal and if the parties wish to derogate from that rule (e.g., to have a two-member arbitral tribunal, which is allowed by the UNCITRAL Model Law), they should define their own method for the constitution of the arbitral tribunal.

### *References to previous UNCITRAL documents*

A/CN.9/614, paras. 59-61

A/CN.9/WG.II/WP.143, paras. 42-44

## **Appointment of arbitrators (Articles 6 to 8)**

### **Article 6**

1. If a sole arbitrator is to be appointed, ~~either a party may propose to the other: (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and~~

~~— (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.~~

2. If within 30 days after receipt by a party of a proposal made in accordance with paragraph (1) the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing

authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefor, article 4 bis, paragraph (2) shall apply. ~~either party may request the Secretary General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.~~

3. The appointing authority shall, at the request of a party, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list procedure is not appropriate for the case:

(a) At the request ~~of one of the~~ of a parties the appointing authority shall communicate to ~~both~~ the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. ~~In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.~~

### Remarks

45. The modifications to article 6 result from the inclusion of article 4 bis on the designating and appointing authorities. The provisions of paragraph (4) have been placed under article 4 bis, paragraph (5).

### Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator ~~he or she~~ it has appointed:

(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within 30 days after receipt of a party's request therefor, article 4 bis, paragraph (2) shall apply, and the first party may request the Secretary General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. ~~In either case, the appointing authority may exercise its discretion in appointing the arbitrator.~~

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

## Remarks

### *Paragraph (2)*

46. The modifications to paragraph (2) are consequential amendments arising from the inclusion of article 4 bis on the designating and appointing authorities. The last sentence of paragraph (2) (b) has been placed under article 4 bis, paragraph (6).

### **Article 7 bis**

1. Where there are multiple claimants or respondents, unless the parties have agreed to another method of appointment of arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. In the absence of appointment pursuant to paragraph 1, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint each of the arbitrators and designate one of them as the presiding arbitrator; or confirm any appointment already made and make any further appointment.

## Remarks

### *Appointment of arbitrators in multi-party arbitration*

47. Article 7 bis has been inserted to deal with the appointment of arbitrators in multi-party cases, in accordance with the discussions of the Working Group (A/CN.9/614, paras. 62 and 63). The Working Group might wish to consider whether time limits should be defined under paragraph (2).

### *References to previous UNCITRAL documents*

A/CN.9/614, paras. 62-63

A/CN.9/WG.II/WP.143, paras. 45-47

#### **Article 8**

~~1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information, as it deems necessary to fulfil its function.~~

~~2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.~~

#### **Remarks**

48. The substance of article 8 has been placed under article 4 bis on the designating and appointing authorities.

### **Challenge of arbitrators (Articles 9 to 12)**

#### **Article 9**

~~A prospective arbitrator shall disclose to those who approach him or her. When a person is approached in connexion with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once appointed or chosen from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed by him or her of these circumstances.~~

#### **Remarks**

##### *On-going nature of the duty to disclose*

49. The proposed amendments to article 9 reflect a suggestion made in the Working Group that the ongoing nature of the duty to disclose be clarified by using similar language to that used in article 12, paragraph (1), of the Model Law (A/CN.9/614, para. 64).

##### *Model statement of independence*

50. The Working Group might wish to consider whether guidance should be provided on the required content of the disclosure, in the form, for instance of a model statement of independence attached as a footnote to article 9 or in any accompanying material. Such model statement of independence could read as follows:



No circumstances to disclose: I am independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality. I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such circumstance that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am independent of each of the parties and intend to remain so. Attached is a statement of (a) my past and present professional, business and other relationships with the parties and (b) any other circumstance that might cause my reliability for independent and impartial judgment to be questioned by a party.[include statement] I hereby undertake promptly to notify the parties and the other members of the arbitral tribunal of any such further relationship or circumstance that may subsequently come to my attention during this arbitration.

### **References to previous UNCITRAL documents**

A/CN.9/614, paras. 64-65

A/CN.9/WG.II/WP.143, para. 48

### **Article 10**

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by ~~him or her~~ it only for reasons of which ~~he or she~~ it becomes aware after the appointment has been made.

### **Remarks**

51. No proposals for modification have been made in relation to article 10.

### **Article 11**

1. A party who intends to challenge an arbitrator shall send notice of ~~his or her~~ its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.
2. The challenge shall be notified to ~~the~~ all other parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
3. When an arbitrator has been challenged by ~~one a~~ a party, ~~the~~ all other parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full

for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise ~~his or her~~ its right to appoint or to participate in the appointment.

#### Remarks

52. No proposals for modification have been made in relation to article 11.

#### Article 12

1. If, within [15] [30] days from the date of the notice of challenge, ~~the any~~ other party does not agree to the challenge and the challenged arbitrator does not withdraw, the party making the challenge may seek, within 60 days from date of the notice of challenge, a decision on the challenge, which will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article ~~6~~ 4 bis.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, or if the appointing authority considers that the circumstances of the arbitration so warrant, the appointment of the arbitrator shall be made by the appointing authority ~~which decided on the challenge.~~

#### Remarks

##### *Paragraph (1)*

##### *Time limits for challenge*

53. The Working Group might wish to further consider revising article 12 so as to introduce time limits by which the party making a challenge should seek a decision by the appointing authority (A/CN.9/614, para. 66).

##### *Paragraph (2)*

54. The modification proposed indicates that the appointing authority may directly appoint an arbitrator if the circumstances of the case are such that a party should be deprived of its right to appoint a replacement arbitrator. This could apply in the situation, for example, where a party repetitively used the challenge procedure to delay the arbitral process.

**References to previous UNCITRAL documents**

A/CN.9/614, para. 66

A/CN.9/WG.II/WP.143, para. 49

**Replacement of an arbitrator****Article 13**

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that a party considers that an arbitrator has resigned for invalid reasons or is failing to perform his or her functions, it may apply to the appointing authority to request either the replacement of that arbitrator or the authorization for the other arbitrators to proceed with the arbitration and make any decision or award. If the appointing authority considers that the circumstances of the arbitration warrant a substitute arbitrator to be appointed, it shall decide whether to apply the procedure for the appointment of an arbitrator provided for in articles 6 to 9 or to appoint the substitute arbitrator. ~~an arbitrator refuses or fails to act, or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.~~

**Remarks****Paragraph (2)***Unapproved resignation or failure to perform*

55. In accordance with discussions of the Working Group, paragraph (2) provides two different ways of dealing with an unapproved resignation of an arbitrator or failure by an arbitrator to perform his or her functions: the appointing authority may decide either to appoint directly a substitute arbitrator, depriving the party having initially appointed such arbitrator to proceed with the appointment of its replacement, or to allow the proceedings to continue without a substitute arbitrator (A/CN.9/614, para. 70). The appointing authority shall determine, by reference to the relevant facts and circumstances, whether the resignation or non-performance was acceptable or not (A/CN.9/614, para. 69). The Working Group might wish to consider whether there are circumstances in which the arbitrators themselves, rather than just a party, should be given the power either to decide to proceed as a truncated tribunal or to seek approval for so proceeding.

**References to previous UNCITRAL documents***Resignation of an arbitrator*

A/CN.9/614, paras. 67-69

A/CN.9/WG.II/WP.143, paras. 51-53.

*Consequences of a bad faith resignation*

A/CN.9/614, paras. 70-72

A/CN.9/WG.II/WP.143, para. 54

*Truncated tribunals*

A/CN.9/614, paras. 73-74

A/CN.9/WG.II/WP.143, paras. 55-57

**Repetition of hearings in the event of the replacement of an arbitrator**

**Article 14**

If under articles 11 to 13 an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

**Remarks**

56. Article 14 has been revised to take account of the suggestion made in the Working Group that article 14 should be drafted along the lines of article 14 of the Swiss Rules of International Arbitration, which provided that in case of replacement of an arbitrator, the proceedings should resume at the stage where the arbitrator who was replaced ceased his or her functions, unless the arbitral tribunal decided otherwise (A/CN.9/614, para. 75).

**References to previous UNCITRAL documents**

A/CN.9/614, para. 75

A/CN.9/WG.II/WP.143, paras. 58-61

*Notes*

<sup>1</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

<sup>2</sup> *Ibid.*, *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *ibid.*, *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178.

<sup>3</sup> *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 184.