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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat*

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* The submission of this note was delayed due to the close proximity of this Working Group session to the fortieth Commission session and the requirement to include details arising therefrom in this note.



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”).¹ 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.²

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 revision of the Rules taking account of such indications. The report of that session is contained in document A/CN.9/614. At its forty-sixth session (New York, 5-9 February 2007), the Working Group discussed articles 1 to 21 of the draft revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The report of that session is contained in document A/CN.9/619.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-sixth session and covers articles 1 to 14 of the UNCITRAL Arbitration Rules. Articles 15 to 21 are dealt with under A/CN.9/WG.II/WP.147/Add.1. Unless otherwise indicated, all references to deliberations by the Working Group in the note are to deliberations made at the forty-sixth session of the Working Group.

1. General remarks

Time-periods under the Rules

4. The Working Group agreed that there might be a need to revisit the various time periods provided in the Rules so as to ensure consistency (A/CN.9/619, para. 59).

Investor-state arbitration

5. A view was expressed that specific provisions might need to be included to ensure transparency of the procedure for arbitration involving a State (A/CN.9/619, paras. 61 and 62). The Working Group agreed to revisit the issue after it had completed its review of the revised provisions.

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

² *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.

2. Notes on a draft of revised UNCITRAL Arbitration Rules

6. All suggested modifications to the UNCITRAL Arbitration Rules are indicated in the text below. Where the original text has been deleted, the text is struck through and new text is indicated by being underlined.

Section I. Introductory rules

Scope of application

7. Draft article 1

Article 1

1. Where ~~the parties to a contract~~ have agreed ~~in writing*~~ that disputes ~~in relation to that contract~~ between them 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 subject to such modification as the parties may agree ~~in writing~~.

1 bis. [Option 1: 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.] [Option 2: Unless the parties have agreed to apply the Rules in effect on the date of commencement of the arbitration, the parties shall be deemed to have submitted to the Rules as in effect on the date of their agreement.]

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

Paragraph (1)

“parties to a contract” – “in writing” – “disputes in relation to that contract” – “in respect of a legal relationship, whether contractual or not”

8. Draft paragraph (1) is intended to reflect the revisions discussed in the Working Group (A/CN.9/619, paras. 19-31).

Applicable version of the UNCITRAL Arbitration Rules

9. Draft paragraph (1 bis) seeks to determine which version of the Rules applies to arbitrations after the Rules have been revised. Two options are proposed for the consideration of the Working Group. Both options address the observation made at the forty-fifth session of the Working Group 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 rules in existence at the time the arbitration agreement was made (A/CN.9/614, para. 23).

10. It was observed at the fifty-sixth session of the Working Group that text as now reflected in option 1 comprehensively set out the parties' choice to apply either the most recent version of the Rules to their dispute or the Rules in existence at the time the arbitration agreement was made (A/CN.9/619, para. 35). That approach received considerable support. At that session, an alternative proposal, as contained in option 2, was made which sought to avoid the situation where a default rule would apply retroactively to agreements made before the adoption of the revised Rules without sufficient regard for the principle of party autonomy (A/CN.9/619, para. 36).

11. 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, A/CN.9/619, para. 38).

References to previous UNCITRAL documents

"parties to a contract" – "disputes in relation to that contract" – "in respect of a legal relationship, whether contractual or not": A/CN.9/614, paras. 32-34; A/CN.9/WG.II/WP.143, paras. 24-25; A/CN.9/619, paras. 19-24; A/CN.9/WG.II/WP.145, paras. 10 and 11
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; A/CN.9/619, paras. 25-31; A/CN.9/WG.II/WP.145, paras. 12 and 13
Applicable version of the UNCITRAL Arbitration Rules: A/CN.9/614, paras. 22-26; A/CN.9/WG.II/WP.143, paras. 8-11; A/CN.9/619, paras. 32-38; A/CN.9/WG.II/WP.145, paras. 14-19

12. Draft model arbitration clause

***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~~.

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~~ and country);
- (d) The language(s) to be used in the arbitral proceedings shall be ...

Remarks

Title and placement of the model arbitration clause

13. The Working Group may wish to consider whether to include the words "for contracts" in the title of the Model Arbitration Clause. The Working Group may wish to consider where to locate the reference to the model arbitration clause, in case its decision to delete the words "in writing*" in draft article 1, paragraph (1) is maintained (see above, paragraph 8).

Notes to the model arbitration clause

14. The Working Group agreed that the words “as at present in force” should be considered for deletion if a provision referring to the applicable version of the Rules is adopted in draft article 1, paragraph (1) (see above, paragraphs. 9-11) (A/CN.9/619, para. 39). In draft subparagraph (c), the word “place” is in brackets, as it may be amended at a later stage to reflect any revised language adopted under article 16 in respect of the legal place of arbitration (see A/CN.9/WG.II/WP.147/Add.1, paragraphs 10 and 11) (A/CN.9/619, para. 41 and paras. 137-144). The word “or” is replaced by the word “and”, thus requiring the parties to clarify in the arbitration clause the agreed place of arbitration and to address the concern that the designation of the location of the arbitration could have significant legal consequences (A/CN.9/619, para. 41). The deletion of the plural form for language in draft subparagraph (d) is in line with a decision of the Working Group to delete in article 17 the reference to “languages” (see A/CN.9/WG.II/WP.147/Add.1, paragraph 13) (A/CN.9/619, para. 145).

Reference to previous UNCITRAL documents

A/CN.9/614, paras. 36-38; A/CN.9/619, paras. 39-43; A/CN.9/WG.II/WP.145, paras.20-23

15. Draft article 2**Notice, calculation of periods of time****Article 2**

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is ~~physically~~ delivered to the addressee or if it is delivered at 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. Such delivery may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram, or by any other means of communication, including electronic communications that provide a record of dispatch and receipt thereof.

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

16. Draft paragraph (1) reflects the decision of the Working Group that paragraph (1) should not be amended in respect of deemed delivery, but that any accompanying material should include clarification to deal with the situation where delivery is not possible (A/CN.9/619, para. 49).

“Physically”, “Mailing”

17. As suggested in the Working Group, the words “physically” and “mailing” have been deleted to avoid any ambiguity concerning the possibility of delivery of notices by electronic means as proposed in draft paragraph (1 bis) (A/CN.9/614, para. 40 and A/CN.9/619, para. 47).

Paragraph (1 bis)

18. Draft paragraph (1 bis) reflects the decision of the Working Group to expressly include language which authorizes both electronic as well as other traditional forms of communication, keeping in mind the importance of effectiveness of delivery, the necessity to keep a record of the issuance and receipt of notices, and the consent of the parties to the means of communication used (A/CN.9/619, para. 50).

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; A/CN.9/619, paras. 45 and 46; A/CN.9/WG.II/WP.145, para. 24

“Mailing address”: A/CN.9/619, para. 47

Paragraph (1 bis) – Delivery of the notice: “Electronic communication”: A/CN.9/614, paras. 39 and 40; A/CN.9/WG.II/WP.143, paras. 27-29; A/CN.9/619, para. 50; A/CN.9/WG.II/WP.145, para. 25

19. Draft article 3

Notice of arbitration and response

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~~ contact details 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 the~~ Identification of any contract, or other legal instrument or, in the absence of any contract or other legal instrument, a brief description of the relationship 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 proposals for the appointment of an appointing authority referred to in ~~article 6, paragraph (1)~~ article 4 bis, paragraph 1;

(a bis) The proposal for the appointment 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 2;

(c) The statement of claim referred to in article 18].

5. Within 30 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 [, to the extent possible.] include:

(a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

(b) The full name and contact details of any respondent;

(c) The respondent's comments on the information set forth in the notice of arbitration, pursuant to article 3, paragraph 3 (c), (d) and (e);

(d) The respondent's response to the relief or remedy sought in the notice of arbitration, pursuant to article 3, paragraph 3 (f);

(e) The respondent's proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon, pursuant to article 3, paragraph 3 (g).

6. The response to the notice of arbitration may also include:

(a) The respondent's proposal for the appointment of an appointing authority referred to in article 4 bis, paragraph (1);

(b) The respondent's proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;

(c) The respondent's designation of an arbitrator referred to in article 7 or article 7 bis, paragraph 2;

(d) A brief description of counter-claims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.

7. [Option 1: The arbitral tribunal may proceed, notwithstanding that the notice of arbitration is incomplete, or that the response to the notice of arbitration is missing, late or incomplete and shall finally resolve any controversy in relation thereto. [In respect of an incomplete notice of arbitration, the arbitral tribunal may request the claimant to remedy the defect within an appropriate period of time, and may delay the date of commencement of the arbitral proceedings until such defect is remedied.]]

[Option 2: The constitution of the arbitral tribunal shall not be impeded by: (a) any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal; or (b) failure by the respondent to communicate a response to the notice of arbitration.]

Remarks

Notice of arbitration

Paragraph (3)

Subparagraph (b)

20. The replacement of the word “address” with the words “contact details” in draft paragraphs (3) (b) and (5) (b) reflects the decision of the Working Group to provide for a more generic language (A/CN.9/619, para. 52).

Subparagraph (d)

21. It was suggested that the reference in draft subparagraph (d) to “any contract, or other legal instrument” ought to be made consistent with the earlier decision by the Working Group that disputes of a non-contractual nature would also be covered by the Rules (A/CN.9/619, para. 54). For that reason, a broader formulation to encompass non-contractual disputes is proposed for the consideration of the Working Group.

Paragraph (4)

Subparagraph (c)

22. The Working Group may wish to further discuss whether the decision by the claimant that the notice of arbitration would constitute the statement of claim should be postponed until the stage of proceedings reflected in article 18 (A/CN.9/619, para. 57).

Response to the notice of arbitration

Paragraphs (5) and (6)

23. Draft paragraphs (5) and (6) have been modified to take account of comments made in the Working Group that more precise language should be used (A/CN.9/619, paras. 58 and 60).

Incomplete notice of arbitration – Missing, late or incomplete response to the notice of arbitration

Paragraph (7)

24. In order to deal with an incomplete notice of arbitration, the Working Group agreed to indicate that an incomplete notice of arbitration should not prevent the constitution of an arbitral tribunal and that the consequences of failing to include mandatory items in the notice of arbitration should be a matter to be determined by the arbitral tribunal (A/CN.9/619, paras. 55 and 56). Various options are proposed for the consideration of the Working Group. Option 1 takes account of the suggestions that article 5.4 of the Arbitration Rules of the London Court of International Arbitration (“LCIA Rules of Arbitration”) and rule 4.5 of the Australian Centre for International Commercial Arbitration Rules might provide useful models on the question of the impact of an incomplete notice of arbitration. Option 2 corresponds to a suggestion made in the Working Group that the constitution of the arbitral tribunal shall not be impeded by any controversy on the response to the notice of arbitration or by any failure to communicate such response (A/CN.9/619, para. 56).

References to previous UNCITRAL documents

Separation of the notice of arbitration from the statement of claim: A/CN.9/614, paras. 48 and 49; A/CN.9/WG.II/WP.143, paras. 33-35; A/CN.9/619, para. 57; A/CN.9/WG.II/WP.145, para. 37

Paragraphs (3) and (4): A/CN.9/614, paras. 50-55; A/CN.9/WG.II/WP.143, paras. 36-39; A/CN.9/619, paras. 52-57; A/CN.9/WG.II/WP.145, paras. 31-38

Paragraphs (5), (6) and (7): A/CN.9/614, paras. 56 and 57; A/CN.9/WG.II/WP.143, paras. 40 and 41; A/CN.9/619, paras. 55 and 56; paras. 58-60; A/CN.9/WG.II/WP.145, para. 39

25. Draft article 4

Representation and assistance

Article 4

The parties may be represented or assisted by persons chosen by them ~~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. [Where a person is to act as a representative of a party, the arbitral tribunal, itself or upon the request of any party, may at any time, require proof of authority granted to the representative in such a form as the arbitral tribunal may determine].

Persons “of their choice” – “chosen by them”

26. Draft article 4 takes account of the suggestion to replace the words “of their choice” appearing in the first sentence of article 4 with “chosen by them”. The Working Group might wish to consider whether any additional wording is necessary to avoid the implication that a party has an unrestricted discretion, at any time during the proceedings, to impose the presence of any counsel (A/CN.9/619, para. 63).

“in writing”

27. The Working Group agreed to delete the words “in writing”, as the manner in which information should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (A/CN.9/619, para. 68).

Representation of a party

28. The Working Group considered whether it would be useful to add language to article 4 to clarify that, when a person is empowered to represent a party, the other party or parties are informed of the content of those representation powers. Draft article 4 reflects the suggestion that proof of the representation powers should be communicated at the request of the arbitral tribunal itself or at the request of a party. The Working Group may wish to consider whether the provision should clarify that communication on proof of authority does not exclude communication on the scope of the representative’s power (A/CN.9/619, paras. 64-67). The Working Group may wish to consider whether such clarification could be contained in any accompanying material.

References to previous UNCITRAL documents

A/CN.9/619, paras. 63-68; A/CN.9/WG.II/WP.145, para. 40

29. Draft article 4 bis

Designating and appointing authorities

Article 4 bis

1. The parties may agree, with the notice of arbitration or at any time thereafter, on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, (“Secretary-General of the PCA”) to act as appointing authority under these Rules.
2. If, within 30 days of the receipt of a party’s request therefore, 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 PCA to designate an appointing authority.
3. The appointing authority may require from any party the information it deems necessary to exercise its functions under these Rules and, in doing so, it shall give the parties an opportunity to be heard [if so requested by a party]. Copies of all requests or other communications between a party and the appointing authority or the Secretary-General of the PCA 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 persons are

proposed for appointment as arbitrators, the proposed arbitrators shall communicate to the parties their full names, addresses and nationalities, together with a description of their qualifications.

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

Remarks

Paragraph (1)

30. In the interest of simplicity, the words “Secretary-General of the PCA” are proposed to be used instead of the full title “Secretary-General of the Permanent Court of Arbitration at The Hague” (A/CN.9/619, para. 70). Draft paragraph (1) clarifies that the designation of the appointing authority may be sought by any party at any time during the arbitration proceedings (A/CN.9/619, para. 75).

Paragraph (2)

31. In articles 6 and 7 of the current version of the Rules, if no appointing authority has been agreed upon by the parties, or if the appointing authority refuses or fails to act, within 60 or 30 days from its request (depending on whether it is a sole arbitrator or three-member tribunal), a party may refer the matter to the Secretary-General of the PCA. Consistent with the recommendation of the Working Group to assess simplifications which could be made in the Rules (A/CN.9/619, para. 69), draft article 4 bis provides for a general time limit of 30 days before a party may request the Secretary-General of the PCA to designate an appointing authority, and draft articles 6 and 7 have been simplified accordingly (see below, paragraphs 38 and 40).

Paragraph (3)

32. Draft paragraph (3) includes the principle that the parties, if they so wish, should be invited to be heard by the appointing authority (A/CN.9/619, para. 76).

Paragraph (5)

33. Draft paragraph (5) clarifies that it is for the proposed arbitrators (rather than the appointing authority) to provide information regarding their qualifications to the parties (A/CN.9/619, para. 78).

References to previous UNCITRAL documents

A/CN.9/619, paras. 69-78; A/CN.9/WG.II/WP.145, paras. 41 and 42

Section II. Composition of the arbitral tribunal

34. Draft article 5

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 ~~fifteen~~ thirty days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.]

Option 2: [If the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either the claimant, in its notice of arbitration, or the respondent, within thirty days after its receipt of the notice of arbitration, requests that there be three, in which case three arbitrators shall be appointed.]

Remarks

35. The Working Group decided to further consider alternative proposals on the number of arbitrators. Option 1, which provides that if the parties are unable to agree on the appointment of one arbitrator, three arbitrators should be appointed, most closely reflects the current default rule set out in article 5. Option 2 includes an additional level of flexibility, by providing that if the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either party requests that there be three (A/CN.9/619, paras. 79-82).

36. Draft article 5, as contained in document A/CN.9/WG.II/WP.145, included a second paragraph to address the situation where parties decided to appoint a number of arbitrators other than 1 or 3. This paragraph has been placed under article 7 bis because, as revised, it contains a fallback rule dealing with methods for appointing arbitrators, and therefore relates more to the section on appointment of arbitrators (see below, paragraph 42) (A/CN.9/619, para. 83).

References to previous UNCITRAL documents

A/CN.9/614, paras. 59-61; A/CN.9/WG.II/WP.143, paras. 42-44; A/CN.9/619, paras. 79-83; A/CN.9/WG.II/WP.145, paras. 43 and 44

37. Draft article 6

Appointment of arbitrators (Articles 6 to 8)

Article 6

~~1. If a sole arbitrator is to be appointed, either 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 thirty 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, either party may request the Secretary General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.~~

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within thirty days after the receipt by a party of the proposal for the appointment of a sole arbitrator, all parties have not agreed on the identity of the sole arbitrator, the sole arbitrator shall be appointed by the Appointing Authority.

2. The appointing authority shall, at the request of ~~one of the~~ a parties, 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 ~~he~~ it objects and numbered the remaining names on the list in the order of ~~his~~ 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

38. Paragraphs (1) and (2) of the current version of the Rules have been merged, as draft article 4 bis already incorporates the rules previously contained in paragraph (2), consistent with the recommendation of the Working Group to assess further possible simplification that could be made following the adoption of draft article 4 bis (A/CN.9/619, para. 69). Paragraph (4) has been deleted as its content is covered by draft article 4 bis, paragraph (5).

References to previous UNCITRAL documents

A/CN.9/619, para. 84; A/CN.9/WG.II/WP.145, para. 45

39. Draft article 7

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 ~~appointment of an 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, 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

40. Draft paragraph (2) has been simplified, given that draft article 4 bis already contains the rules which were previously under paragraph (2) (b), consistent with the recommendation of the Working Group to assess further possible simplification that could be made following the adoption of draft article 4 bis (A/CN.9/619, para. 69).

References to previous UNCITRAL documents

A/CN.9/619, para. 85; A/CN.9/WG.II/WP.145, para. 46

41. Draft article 7 bis**Article 7 bis**

1. 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.
2. 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 each appoint an arbitrator. The two arbitrators thus appointed shall endeavour to choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.
3. In the event of failure to constitute the arbitral tribunal, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Remarks***Paragraph (1)***

42. The purpose of draft paragraph 1 is to clarify that articles 6 and 7 establish the rules for forming either a one or a three member arbitral tribunal and if the parties wish to derogate from that rule (for example, by opting for a two-member arbitral tribunal, which is allowed by the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”), they should define their own method for the constitution of the arbitral tribunal (A/CN.9/619, para. 83).

Paragraph (2)

43. Draft paragraph (2) has been revised in accordance with suggestions made in the Working Group (A/CN.9/619, para. 87).

Paragraph (3)*Right to be heard*

44. Draft paragraph (3) provides a fallback rule in the event of failure to constitute the arbitral tribunal involving the appointing authority and has been revised in accordance with suggestions made in the Working Group (A/CN.9/619, paras. 88-91). A suggestion was made that, in case of failure to constitute the arbitral tribunal, the appointing authority should give the parties the right to be heard (A/CN.9/619, para. 92). A general principle has been added to that effect under draft article 4bis, paragraph (3) (see above, paragraph 32), and the Working Group may wish to consider whether there is a need to restate that principle under draft paragraph (3).

Time limits

45. The Working Group may wish to further consider whether time-limits should be included under draft paragraph (3) (A/CN.9/619, para. 93).

References to previous UNCITRAL documents

A/CN.9/614, paras. 62 and 63; A/CN.9/WG.II/WP.143, paras. 45-47

Paragraph (1): A/CN.9/619, para. 83; A/CN.9/WG.II/WP.145, para. 44

Paragraph (2): A/CN.9/619, paras. 86-87; A/CN.9/WG.II/WP.145, para. 47

Paragraph (3): A/CN.9/619, paras. 88-93

A/CN.9/WG.II/WP.145, para. 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

46. The Working Group agreed to the deletion of article 8, the substance of which has been placed under draft article 4 bis on the designating and appointing authorities (A/CN.9/619, para. 94).

References to previous UNCITRAL documents

A/CN.9/619, para. 94; A/CN.9/WG.II/WP.145, para. 48

Challenge of arbitrators (Articles 9 to 12)

47. Draft article 9

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.~~

Model statement of independence

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.

Remarks

48. The substance of draft article 9 as well as of the model statements of independence were approved by the Working Group (A/CN.9/619, paras. 95-99).

References to previous UNCITRAL documents

A/CN.9/614, paras. 64-65; A/CN.9/WG.II/WP.143, para. 48; A/CN.9/619, paras. 95-99; A/CN.9/WG.II/WP.145, paras. 49 and 50

49. Draft article 10

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~~it only for reasons of which ~~he~~it becomes aware after the appointment has been made.

Remarks

50. The substance of draft article 10 was approved by the Working Group (A/CN.9/619, para. 100).

51. Draft article 11

Article 11

1. A party who intends to challenge an arbitrator shall send notice of ~~his~~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 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 ~~or 7 bis~~ 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~~its right to appoint or to participate in the appointment.

Remarks

52. The substance of draft article 11 was approved by the Working Group (A/CN.9/619, para. 101).

53. The following modifications are proposed for the consideration of the Working Group:

- the words “shall be in writing and” in draft paragraph (2) are proposed to be deleted, consistent with the view that the manner in which information should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (see above, paragraph 27);
- a reference in draft paragraph (2) to article 7 bis is proposed to be added given that it relates to procedure for the appointment of arbitrators.

54. Draft article 12

Article 12

1. If, within 15 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 30 days from date of the notice of challenge, the 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

55. Draft paragraph (1) reflects the decision of the Working Group to shorten time-limits for challenge (A/CN.9/619, para. 102).

References to previous UNCITRAL documents

A/CN.9/614, para. 66; A/CN.9/WG.II/WP.143, paras. 49 and 50
Paragraph (1): A/CN.9/619, para. 102; A/CN.9/WG.II/WP.145, para. 53;
Paragraph (2): A/CN.9/619, paras. 103-105; A/CN.9/WG.II/WP.145, para. 54

56. Draft article 13**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 or the arbitral tribunal considers that an arbitrator has resigned for invalid reasons or refuses or fails to act, the party or the arbitral tribunal 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)***

57. Draft paragraph (2) takes account of a suggestion that the arbitrators themselves, rather than the parties, should be given the power to decide to proceed as a “truncated” tribunal, or seek approval from the appointing authority to proceed as a truncated tribunal (A/CN.9/619, para. 109).

References to previous UNCITRAL documents

A/CN.9/614, paras. 67-74; A/CN.9/WG.II/WP.143, paras. 51-57; A/CN.9/619, paras. 107-112;
A/CN.9/WG.II/WP.145, para. 55

58. Draft article 14**Repetition of hearings in the event of the replacement of an arbitrator****Article 14**

~~If under articles 11 to 13 the sole arbitrator or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.~~

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

59. Draft article 14 has been approved in substance by the Working Group (A/CN.9/619, para. 113).

References to previous UNCITRAL documents

A/CN.9/614, para. 75; A/CN.9/WG.II/WP.143, paras. 58-61; A/CN.9/619, para. 113; A/CN.9/WG.II/WP.145, para. 56.