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**United Nations Commission on  
International Trade Law  
Working Group II (Arbitration)  
Forty-seventh session  
Vienna, 10-14 September 2007**

**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”).<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 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 from article 15 to article 21 of the Rules. Articles 1 to 14 are dealt with under A/CN.9/WG.II/WP.147. 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

4. 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.

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<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.

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

### Section III. Arbitral proceedings

#### 5. Draft article 15

##### General provisions

##### Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any appropriate stage of the proceedings each party is given an ~~an~~ full opportunity of presenting ~~his~~ its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings with a view to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. The arbitral tribunal may, at any time, extend or abridge: (a) any period of time prescribed under the Rules; or (b) after inviting consultation with the parties, any period of time agreed by the parties.

2. If, at any appropriate stage of the proceedings, ~~either~~ any party so requests at any appropriate stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to ~~the~~ all other parties.

4. The arbitral tribunal may, on the application of any party, allow one or more third persons to be joined in the arbitration as a party and, provided such a third person and the applicant party have consented, make an award in respect of all parties involved in the arbitration.

##### Remarks

##### *Paragraph (1)*

##### *Power to extend or shorten time periods*

6. The Working Group discussed whether the Rules should 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/CN.9/619, paras. 134-136). The last sentence of draft paragraph (1) reflects the decision of the Working Group that the Rules should establish the authority of the arbitral tribunal to modify the periods of time prescribed in the Rules but not to alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties (A/CN.9/619, para. 136).

**Paragraph (4)**

*Consolidation of cases before arbitral tribunal*

7. Draft paragraph (4) as it appears in document A/CN.9/WG.II/WP.145/Add.1 contains a provision on consolidation of cases which provided that “the arbitral tribunal may, on the application of any party assume jurisdiction over any claim involving the same parties and arising out of the same legal relationship, provided that such claims are subject to arbitration under these Rules and that the arbitration proceedings in relation to those claims have not yet commenced”. It is recalled that the Working Group considered that it might not be necessary to provide for consolidation under the Rules (A/CN.9/619, para. 120).

*Joinder*

8. The Working Group agreed that a provision on joinder would constitute a major modification to the Rules, and noted the diverging views, which were expressed on that matter (A/CN.9/619, paras. 121-126). The Working Group agreed to consider that matter at a future session, on the basis of information to be provided by arbitral institutions to the Secretariat on the frequency and practical relevance of joinder in arbitration (A/CN.9/619, para. 126). Following consultations, the Secretariat received comments from the International Court of Arbitration of the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”) and the Swiss Arbitration Association (“ASA”). In an article entitled “Multiparty and Multicontract Arbitration: Recent ICC Experience”,<sup>3</sup> the ICC briefly outlines certain aspects of the ICC’s experience in relation to joinder.<sup>4</sup> The ICC has generally taken a conservative view that, under the rules, only the claimant is entitled to identify the parties to the arbitration. However a more moderate approach has been reflected in three recent cases in which the ICC joined a new party to the arbitral proceedings at the request of a respondent. It appears that the ICC may only allow a new party to be joined in the arbitration at the respondent’s request if two conditions are met. First, the third party must have signed the arbitration agreement on the basis of which the request for arbitration has been filed. Second, the respondent must have introduced claims against the new party. The LCIA informed the Secretariat that applications for joinder under article 22.1(h) of the LCIA Rules of Arbitration<sup>5</sup> have been made in approximately

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<sup>3</sup> *Multiparty and Multicontract Arbitration: Recent ICC Experience*, by Anne Marie Whitesell and Eduardo Silva-Romero, published in the ICC International Court of Arbitration bulletin, 2003 Special Supplement – Publication 688 Complex Arbitration.

<sup>4</sup> ICC mentioned that their Rules do not contain a provision on the joinder of parties and that article 4(6) of the ICC Rules, which is sometimes referred to as a “joinder” provision, does not concern the joinder of parties, but rather the consolidation of claims where multiple arbitrations have been filed and all of the parties in all of the arbitrations are identical. ICC Court has developed a practice whereby, under certain circumstances, the ICC Court will allow the joinder of new parties at the request of a respondent.

<sup>5</sup> Article 22.1(h) of the LCIA Rules reads: “Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: (h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;”

ten cases since that provision was introduced in the Rules in 1998, and those applications have rarely been successful. ASA reported that it favours a liberal solution such as the one contained in article 4(2) of the Swiss rules<sup>6</sup>, which gives the arbitral tribunal the discretion to decide on the joinder of a third party after consulting with all the parties and taking into account all the relevant and applicable circumstances. The Swiss rules do not require that one of the parties to the arbitration gives its consent to the participation of the third party to the arbitration. No decision on joinder under article 4(2) of the Swiss rules have yet been reported.

### References to previous UNCITRAL documents

*Paragraph (1) – Avoidance of unnecessary delays:* A/CN.9/614, para. 76; A/CN.9/WG.II/WP.143, para. 62; A/CN.9/619, para. 114; A/CN.9/WG.II/WP.145/Add.1, para. 3

*Paragraph (1) – Extend or shorten time periods:* A/CN.9/614, paras. 41-47; A/CN.9/WG.II/WP.143, paras. 30 and 31; A/CN.9/619, paras. 134-136; A/CN.9/WG.II/WP.145, paras. 26-29

*Paragraphs (1) and (2) – “appropriate stage”:* A/CN.9/614, para. 77

*Paragraphs (2) and (3):* A/CN.9/619, para. 115; A/CN.9/WG.II/WP.145/Add.1, para. 4

*Paragraph (4) – Consolidation of cases before arbitral tribunal – joinder:* A/CN.9/614, paras. 79-83; A/CN.9/WG.II/WP.143, paras. 66-71; A/CN.9/619, paras. 116-126; A/CN.9/WG.II/WP.145/Add.1, paras. 5 and 6

*Confidentiality of proceedings:* A/CN.9/614, paras. 84-86; A/CN.9/WG.II/WP.143, paras. 72-74; A/CN.9/619, paras. 127-133; A/CN.9/WG.II/WP.145/Add.1, para. 7 and 8

## 9. Draft article 16

### Place of arbitration

#### Article 16

~~1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.~~

~~2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.~~

~~3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.~~

~~4. The award shall be made at the place of arbitration.~~

#### *Option 1:*

1. Unless the parties have agreed upon the ~~[[legal] place]~~ ~~[seat]~~ where the arbitration is to be held, such ~~[[legal] place]~~ ~~[seat]~~ shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration. The

<sup>6</sup> Article 4(2) of the Swiss Rules reads: “Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.”

award shall be deemed to have been made at the [[legal] place] [seat] of arbitration.

2. The arbitral tribunal may determine the [[geographical] place] [location] of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any [[geographical] place] [location] it deems appropriate, having regard to the circumstances of the arbitration. The arbitral tribunal may meet at any [[geographical] place] [location] it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

*Option 2:*

1. Unless the parties have agreed upon the seat (legal place) where the arbitration is to be held, such seat shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration. The award shall be deemed to have been made at the seat of arbitration.

2. The arbitral tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion and, if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration.

## **Remarks**

*Use of differentiated terminology*

10. It was suggested that it might be necessary to distinguish between the legal and physical places of arbitration, and that modification of the terminology used would promote clarity (A/CN.9/619, para. 138).

11. The Working Group agreed that it might be useful to consider alternative drafts in relation to that matter (A/CN.9/619, para. 144). Option 1 corresponds to the proposal made to restructure article 16 by merging paragraphs (1) and (4) (which deal with the legal place of arbitration) and paragraphs (2) and (3) (which deal with the physical place of arbitration) (A/CN.9/619, para. 142). Option 2 is modelled upon article 16 of the LCIA Rules of Arbitration (A/CN.9/619, para. 140).

## **References to previous UNCITRAL documents**

*“Place of arbitration” – “seat of arbitration” – “location”*: A/CN.9/614, paras. 87-89; A/CN.9/WG.II/WP.143, paras. 75 and 76; A/CN.9/619, paras. 137-144; A/CN.9/WG.II/WP.145/Add.1, para. 9

*Paragraph (4) – “shall be deemed”*: A/CN.9/614, para. 90; A/CN.9/WG.II/WP.145/Add.1, para. 10

12. Draft article 17

## **Language**

### **Article 17**

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language ~~or languages~~ to be used in the proceedings. This determination shall apply to the statement of claim,

the statement of defence, and any further written statements and, if oral hearings take place, to the language ~~or languages~~ to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language ~~or languages~~ agreed upon by the parties or determined by the arbitral tribunal.

### Remarks

13. The modifications made to article 17 take account of the suggestion made in the Working Group to delete the words “or languages” in on the basis that, in situations where more than one language is required to be used in arbitral proceeding, the parties are free to agree upon that (A/CN.9/619, para. 145).

### References to previous UNCITRAL documents

A/CN.9/614, para. 91; A/CN.9/WG.II/WP.143/Add.1, para. 3; A/CN.9/619, para. 145; A/CN.9/WG.II/WP.145/Add.1, para. 11

### 14. Draft article 18

#### Statement of claim

#### Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate ~~his or her~~ its statement of claim in writing to the respondent and to each of the arbitrators. A copy of ~~the any~~ any contract, or other legal instrument, and of the arbitration agreement ~~if not contained in the contract~~, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and ~~addresses~~ contact details of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought-;
- (e) The legal [arguments] [grounds] supporting the claim.

~~The claimant may annex to its statement of claim all documents he or she it deems relevant or may add a reference to the documents or other evidence he or she it will submit. The statement of claim should, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant or by references to them.~~

## Remarks

### *Paragraph (1)*

15. Draft paragraph (1) has been amended in accordance with proposals made in the Working Group to align the wording used in draft articles 3 and 18 concerning the reference to the contract and the deletion of the words “if not contained in the contract” (A/CN.9/619, para. 147).

### *Paragraph (2)*

#### *Subparagraph (a)*

16. The word “addresses” has been replaced by the words “contact details” to ensure consistency with the revisions made to draft article 3, paragraphs (3) (b) and (5) (b) ” (A/CN.9/619, para. 148).

#### *Subparagraph (e)*

17. The Working Group agreed to add a new subparagraph (e) providing that the statement of claim should include a reference to the legal arguments or grounds supporting the claim (A/CN.9/619, paras. 149-151).

#### *Last sentence of paragraph (2)*

18. The modification to the last sentence of draft paragraph (2) reflects the decision of the Working Group to reword that sentence and to establish a standard for the contents of the statement of claim without imposing rigid consequences for departure from that standard (A/CN.9/619, paras. 152-154).

## References to previous UNCITRAL documents

A/CN.9/614, para. 92; A/CN.9/WG.II/WP.143/Add.1, paras. 4-7; A/CN.9/619, paras. 146-155; A/CN.9/WG.II/WP.145/Add.1, paras. 12 and 13

### 19. Draft article 19

#### **Statement of defence**

#### **Article 19**

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate ~~his~~ its statement of defence in writing to the claimant and to each of the arbitrators.
2. The statement of defence shall reply to the particulars (b), (c) ~~and (d)~~ and (e) of the statement of claim (article 18, para. 2). ~~The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit. The statement of defence shall, as far as possible, be accompanied by all documents and other evidentiary material relied upon by the respondent or by references to them.~~
3. In ~~his~~ its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, ~~the respondent may make a counter claim or arising out of~~

~~the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.]~~ the respondent may make a counter-claim or rely on a claim for the purpose of a set-off [*option 1*: arising out of the same ~~contract~~ legal relationship, whether contractual or not.] [*option 2*: provided that it falls within the scope of an agreement between the parties to arbitrate under these Rules.]

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

### ***Paragraph 2***

20. The modification to the last sentence of draft paragraph (2) seeks to align the drafting of draft article 19 with the revisions adopted in respect of draft article 18 (A/CN.9/619, para. 156).

### ***Paragraph 3***

#### *Raising claims for the purpose of set-off and counter-claims*

21. The Working Group agreed that article 19 should contain a provision on set-off and that the arbitral tribunal's competence to consider counter-claims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances (A/CN.9/614, paras. 93 and 94; A/CN.9/619, paras. 157-160). To achieve that extension, the revised provision as contained in document A/CN.9/WG.II/WP.145/Add.1 replaced the words "arising out of the same contract" with the words "arising out of the same legal relationship, whether contractual or not" (A/CN.9/157). That approach is reflected in option 1. Option 2 reflects a proposal that the provision should not require that there be a connection between the claim and the counter-claim or set-off, leaving to the arbitral tribunal the discretion to decide that question (A/CN.9/619, para. 158).

22. The Working Group may also wish to consider the approach taken in article 21, paragraph (5) of the Swiss Rules which provides that "the arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause."

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

A/CN.9/614, paras. 93-96; A/CN.9/WG.II/WP.143/Add.1, paras. 8-10; A/CN.9/619, paras. 156-160; A/CN.9/WG.II/WP.145/Add.1, paras. 14-16

23. Draft article 20

**Amendments to the claim or defence**

**Article 20**

During the course of the arbitral proceedings ~~either a party may amend or supplement his—its claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the all other parties or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.~~

**Remarks**

24. The Working Group approved draft article 20 in substance (A/CN.9/619, para. 161). Consistent with a decision not to distinguish between arbitration “clause” and “agreement”, (see article 3 (3)(c)), the words “arbitration clause” are proposed for deletion.

25. Draft article 21

**Pleas as to the jurisdiction of the arbitral tribunal**

**Article 21**

~~1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.~~

~~2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.~~

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail of itself the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a ~~preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.~~

## **Remarks**

### ***Paragraph (1)***

26. Draft paragraph (1) reflects the view expressed in the Working Group that the existing version of article 21, paragraphs (1) and (2), should be redrafted along the lines of article 16, paragraph (1), of the Model Law in order to make it clear that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97). In the interests of simplicity, the Working Group agreed to replace the words “*ipso jure*” with wording such as “of itself” (A/CN.9/619, para. 162).

### ***Paragraph (2)***

27. The Working Group adopted draft paragraph (2) in substance (A/CN.9/619, para. 163).

### ***Paragraph (3)***

28. Draft paragraph (3), which replaces the existing version of article 21, paragraph (4), of the Rules contains a provision consistent with article 16, paragraph (3), of the Model Law, in accordance with the Working Group discussions (A/CN.9/614, paras. 99-102; A/CN.9/619, para. 164).

## **References to previous UNCITRAL documents**

A/CN.9/614, paras. 97-102; A/CN.9/WG.II/WP.143/Add.1, paras. 11-14; A/CN.9/619, paras. 162-164

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