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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

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

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I. Introduction

1. This note contains an annotated draft of revised articles 17 to 32 of the UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth to fifty-first sessions. It has been prepared for the consideration of the Working Group for the third reading of the revised version of the Rules, in replacement of documents A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1, as it seemed clearer to propose a complete draft of revised Rules, instead of adding annotations and comments to such previous documents. The annotated draft of revised articles 1 to 16 of the Rules is contained in document A/CN.9/WG.II/WP.157. The annotated draft of revised articles 33 to 43 of the Rules, as well as of the model arbitration clause, model statements of independence and the proposed additional provision on gap filling is contained in document A/CN.9/WGII/WP.157/Add.2. The Working Group may wish to note that where this note refers to the previous draft revised Rules, it refers to the draft as contained in documents A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1.

II. General remark

Provisions to be considered for the third reading of the revised version of the Rules

2. The Working Group may wish to note that it decided at its forty-ninth to fifty-first sessions to give further consideration to the following draft provisions of the revised Rules contained in this addendum: draft article 17, paragraph (5) on joinder (see below, para. 3); draft article 26, paragraphs (8) and (9) on interim measures (see below, para. 25); draft article 27, paragraph (2) on the definition of witnesses (see below, para. 30); proposal on the challenge of experts under draft article 29 (see below, para. 37); draft article 30, paragraph (1)(a) on the power of the arbitral tribunal in case the claimant fails to submit its statement of claim (see below, para. 38); and draft article 32 on waiver of right to object (see below, para. 42).

III. Draft revised UNCITRAL Arbitration Rules

Section III. Arbitral proceedings

Draft article 17

3. Draft article 17 reads as follows:

General provisions

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, 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.

4. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties[, except for communications referred to in article 26, paragraph 9].

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Remarks on draft article 17 [article 15 of the 1976 version of the Rules][1]

4. Paragraphs (1), (2) (numbered paragraph (1 bis) in the previous draft revised Rules) and (3) (numbered paragraph (2) in the previous draft revised Rules) were approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, paras. 119, 123, 125 and 126).

5. The Working Group may wish to note that the bracketed text at the end of paragraph (4) (numbered paragraph (3) in the previous draft revised Rules) should be further considered in light of the decision of the Working Group in relation to draft article 26, paragraph (9) on preliminary orders (A/CN.9/665, para. 127) (see below, para. 29).

6. The Working Group may wish to further consider the language in paragraph (5) on joinder (numbered paragraph (4) in the previous draft revised Rules) which seeks to reflect the decision made by the Working Group that the arbitral tribunal may decide that a party be joined in the arbitration without the consent of that party, but before making its decision, the tribunal should provide that party with an opportunity to be heard and decide on the prejudice (A/CN.9/665, paras. 128-135).

[1] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 76-86; A/CN.9/619, paras. 114-136 and A/CN.9/665, paras. 119-135.

Draft article 18

7. Draft article 18 reads as follows:

Place of arbitration

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to be made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Remarks on draft article 18 [article 16 of the 1976 version of the Rules][2]

8. Draft article 18 includes the drafting modifications adopted by the Working Group. With those modifications, the Working Group approved the substance of draft article 18 at its forty-ninth session (A/CN.9/665, paras. 136-139).

Draft article 19

9. Draft article 19 reads as follows:

Language

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 on draft article 19 [article 17 of the 1976 version of the Rules][3]

10. Draft article 19 is reproduced without modification from the 1976 version of the Rules, and was approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, paras. 140 and 141).

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[2] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 87-90; A/CN.9/619, paras. 137-144 and A/CN.9/665, paras. 136-139.

[3] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 91; A/CN.9/619, para. 145 and A/CN.9/665, paras. 140 and 141.

Draft article 20

11. Draft article 20 reads as follows:

Statement of claim

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

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

(a) The names and 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 grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Remarks on draft article 20 [article 18 of the 1976 version of the Rules][4]

12. Draft article 20 includes the drafting modifications adopted by the Working Group. With those modifications, the Working Group approved draft article 20 in substance at its fiftieth session (A/CN.9/669, paras. 19-24).

13. The Working Group may wish to note that the words “out of or in relation to which the dispute arises” have been added to clarify which contract or legal instrument should be annexed to the statement of claim. The provision in paragraph (4), which appeared as the second sentence of paragraph (3) in the previous draft revised Rules, are placed in a separate paragraph for the sake of clarity (see below, para. 15).

Draft article 21

14. Draft article 21 reads as follows:

Statement of defence

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be

[4] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 92; A/CN.9/619, paras. 146-155 and A/CN.9/669, paras. 19-24.

determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 20, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In 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 counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of article 20, paragraphs 2 and 4 shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

Remarks on draft article 21 [article 19 of the 1976 version of the Rules][5]

15. The last sentence of paragraph (1) addresses the situation where the respondent decides to treat its response to the notice of arbitration as a statement of defence. The words "provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article" have been added at the end of the last sentence of paragraph (1) (A/CN.9/669, para. 25) and that language mirrors the modification adopted in respect of draft article 20, paragraph (1). Paragraph (3) reflects the decision of the Working Group that the arbitral tribunal's competence to consider counterclaims and claims for the purpose of a 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.9/669, para. 27). To achieve that extension, the Working Group agreed to delete the words "arising out of the same contract" where they appear in the original version of paragraph (3) and to include at the end of paragraph (3) the following words: "provided that the arbitral tribunal has jurisdiction over it" (A/CN.9/669, paras. 27-32). In paragraph (4), a reference to the provision of article 20, paragraph (4) has been added to take account of the intention of the Working Group that, consistent with article 19, paragraph (4) of the 1976 version of the Rules, a counterclaim or a claim for the purpose of a set-off should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them. With those modifications, the Working Group adopted the substance of draft article 21 at its fiftieth session (A/CN.9/669, paras. 25-33).

[5] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 93-96; A/CN.9/619, paras. 156-160 and A/CN.9/669, paras. 25-33.

Draft article 22

16. Draft article 22 reads as follows:

> Amendments to the claim or defence
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> During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Remarks on draft article 22 [article 20 of the 1976 version of the Rules][6]

17. The Working Group agreed that, following the revision adopted under draft article 21, paragraph (3) (see above, para. 15), the last sentence of draft article 22 should be amended accordingly, and the reference to "the scope of the arbitration agreement" should be replaced by a reference to "the jurisdiction of the arbitral tribunal" (A/CN.9/669, para. 34). The Working Group further agreed that the words "or defence" should be added in the second sentence of draft article 22 to align it with the wording of the first sentence of that article (A/CN.9/669, para. 35). With those modifications, the Working Group approved the substance of draft article 22 at its fiftieth session (A/CN.9/669, paras. 34 and 35).

18. The Working Group may wish to note that, for the sake of consistency, the reference to "a claim for the purpose of a set-off" has been added after the words "a counterclaim [or]" in both sentences of draft article 22; the words "or supplement" have been added after the word "amendment" in the first sentence of draft article 22 and the words "or supplemented" have been added after the word "amended" in the second sentence of draft article 22.

Draft article 23

19. Draft article 23 reads as follows:

> Pleas as to the jurisdiction of the arbitral tribunal
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> 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 shall not entail automatically the invalidity of the arbitration clause.
>
> 2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the

[6] For discussions at previous sessions of the Working Group, see documents A/CN.9/619, para. 161 and A/CN.9/669, paras. 34 and 35.

claim for the purpose of a set-off. 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. The arbitral tribunal may rule on a plea referred to in paragraph 2 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 on draft article 23 [article 21 of the 1976 version of the Rules][7]

20. In accordance with the decisions of the Working Group, the words "and void", which appeared after the word "null" in the last sentence of paragraph (1) have been deleted (A/CN.9/669, paras. 40-43) and the word "automatically" is used in replacement of the words "ipso jure" (A/CN.9/669, para. 44). With those modifications, the Working Group approved the substance of draft article 23 at its fiftieth session (A/CN.9/669, paras. 36-46).

Draft article 24

21. Draft article 24 reads as follows:

Further written statements

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Remarks on draft article 24 [article 22 of the 1976 version of the Rules][8]

22. Draft article 24 is reproduced without modifications from the 1976 version of the Rules and was approved by the Working Group at its fiftieth session (A/CN.9/669, para. 47).

Draft article 25

23. Draft article 25 reads as follows:

Periods of time

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

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[7] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 97-102; A/CN.9/619, paras. 162-164; A/CN.9/641, para. 18 and A/CN.9/669, paras. 36-46.

[8] For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 19 and A/CN.9/669, para. 47.

Remarks on draft article 25 [article 23 of the 1976 version of the Rules][9]

24. Draft article 25 is reproduced without modifications from the 1976 version of the Rules and was approved by the Working Group at its fiftieth session (A/CN.9/669, para. 48).

Draft article 26

25. Draft article 26 reads as follows:

Interim measures

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to, including, without limitation:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

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[9] For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 20 and A/CN.9/669, para. 48.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in [view of all] the circumstances, the measure [should not have been granted] [was not justified]. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.

10. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Remarks on draft article 26 [article 26 of the 1976 version of the Rules][10]

26. As decided by the Working Group, draft article 26 on interim measures is placed before the provisions on evidence and hearings (A/CN.9/669, para. 85).

27. Paragraphs (1) to (8) are modelled on the provision on interim measures contained in chapter IV A of the Model Law. Paragraph (9) (numbered paragraph (5) in the previous draft revised Rules) addresses the question of preliminary orders and paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules (A/CN.9/641, para. 52). At the fiftieth session of the Working Group, the provision on interim measures was extensively discussed on the basis of different proposals. The current version reflects the changes agreed to by the Working Group on draft article 26 (A/CN.9/669, para. 85-119). With those modifications, the Working Group approved in substance paragraphs (1) to (7) and (10) of draft article 26, and agreed to give further consideration to paragraphs (8) and (9).

28. At the fiftieth session of the Working Group, it was said that paragraph (8) might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met but the requesting party lost the arbitration (A/CN.9/669, para. 116). This includes situations where the granting of interim measures was not justified with respect to the outcome of the case, in particular where the arbitral tribunal later finds that the claim for which the interim measure was sought is not valid. To address that concern, options in brackets are proposed for the Working Group's consideration. The Working Group will have before it a note prepared by the Secretariat (A/CN.9/WG.II/WP.127) to assist further discussion on how the different

[10] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 104 and 105; A/CN.9/641, paras. 46-60 and A/CN.9/669, paras. 85-119.

leges arbitri deal with the matter of liability for damages that might result from the granting of interim measures (A/CN.9/669, para. 118).

29. Paragraph (9), which deals with the power of the arbitral tribunal to grant preliminary orders, takes account of the discussions of the Working Group at its fiftieth session (A/CN.9/669, para. 112). That provision reflects a proposal made with the aim to reconcile the diverging views expressed in the Working Group on the question of preliminary orders, and the Working Group may wish to give further consideration to that provision.

Draft article 27

30. Draft article 27 reads as follows:

> Evidence
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> 1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
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> 2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.
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> 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.
>
> 4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Remarks on draft article 27 [article 24 of the 1976 version of the Rules][11]

31. The Working Group may wish to consider whether, in the interest of clarity, draft article 27 should be titled "Evidence" as it deals with evidence and the form in which the statements of witnesses and experts would be presented.

32. Paragraphs (1) and (3), which are reproduced from the 1976 version of the Rules, were adopted by the Working Group without modifications at its fiftieth session (A/CN.9/669, paras. 49, 70 and 75). In accordance with the decision of the Working Group to group under draft article 27 all provisions relating to evidence, the substance of article 25, paragraphs (5) and (6) of the 1976 version of the Rules has been placed under draft article 27 (as paragraph (2), second sentence and paragraph (4), respectively) (A/CN.9/669, para. 70, 72 and 73). The first sentence of paragraph (2) is based on drafting suggestions made in the Working Group and is proposed to be placed under draft article 27, instead of draft article 28, as it relates to the definition of the term "witnesses" (A/CN.9/669, paras. 57-60, 70, 76 and 77).

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[11] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 103; A/CN.9/641, paras. 21-26 and A/CN.9/669, paras. 49-51 and 70-75.

Draft article 28

33. Draft article 28 reads as follows:

> Hearings
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> 1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.
>
> 2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.
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> 3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.
>
> 4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Remarks on draft article 28 [numbered article 25 in the 1976 version of the Rules][12]

34. The Working Group agreed that draft article 28 be titled "Hearings" and approved the substance of draft article 28 at its fiftieth session, subject to the clarification in paragraph (3) that a party appearing as a witness (or expert) should not generally be requested to retire during the testimony of other witnesses (or experts) (A/CN.9/669, paras. 82 and 83). The phrase "except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire" is proposed to be added at the end of paragraph (3) to address that matter.

Draft article 29

35. Draft article 29 reads as follows:

> Experts appointed by the arbitral tribunal
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> 1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
>
> 2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
>
> 3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the

[12] For discussions at previous sessions of the Working Group, see documents A/CN.9/641, paras. 27-45 and A/CN.9/669, paras. 52-71, 73 and 76-84.

opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

4. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Remarks on draft article 29 [article 27 of the 1976 version of the Rules][13]

36. The Working Group found the substance of draft article 29 generally acceptable at its fifty-first session (A/CN.9/684, para. 21). The Working Group may wish to note that the word "independent" has been added in paragraph (1) before the word "expert".

37. At its fifty-first session, the Working Group took note that one delegation would make a proposal with respect to challenge of experts (A/CN.9/684, para. 21). The substance of that proposal is along the following lines: "Experts appointed by the arbitral tribunal may be challenged for the same reasons and in the same way as the arbitrators". That proposal may be elaborated upon in document A/CN.9/WG.II/LII/CRP.2. The Working Group may wish to note that another option may consist in adopting a provision along the lines article 6 of the IBA Rules on the taking of evidence in international commercial arbitration, which would then read: "The expert shall, before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her independence from the parties and the arbitral tribunal. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's independence. The arbitral tribunal shall decide promptly whether to accept any such objection." If the Working Group would decide to include a provision on challenge of experts, it may wish to consider including such a provision as a new paragraph (2) of draft article 29.

Draft article 30

38. Draft article 30 reads as follows:

Default

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

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[13] For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 106 and 107; A/CN.9/641, para. 61 and A/CN.9/684, para. 21.

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Remarks on draft article 30 [article 28 of the 1976 version of the Rules][14]

39. At its fifty-first session, the Working Group approved the substance of draft article 30, paragraphs (1)(b), (2) and (3) (A/CN.9/684, paras. 27, 28 and 33) and agreed to give further consideration to paragraph (1)(a), which has been redrafted to clarify that the power of the arbitral tribunal in case the claimant fails to submit its statement of claim is not limited to a dismissal order for termination (A/CN.9/684, paras. 22-26). The Working Group may wish to note that, for the sake of consistency, a similar amendment has been made to draft article 36, paragraph (2) (see document A/CN.9/WG.II/WP.157/Add.2, para. 10).

Draft article 31

40. Draft article 31 reads as follows:

Closure of hearings

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Remarks on draft article 31 [article 29 of the 1976 version of the Rules][15]

41. The Working Group approved the substance of draft article 31 at its fifty-first session (A/CN.9/684, paras. 34-40).

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[14] For discussions at previous sessions of the Working Group, see documents A/CN.9/641, paras. 62-64 and A/CN.9/684, paras. 22-33.

[15] For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 65 and A/CN.9/684, paras. 34-40.

Draft article 32

42. Draft article 32 reads as follows:

> Waiver of right to object
>
> A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Remarks on draft article 32 [numbered article 30 in the 1976 version of the Rules][16]

43. The Working Group agreed, at its fifty-first session, to give further consideration to draft article 32, which has been redrafted to capture constructive knowledge of non-compliance with any provision of the Rules or any requirement under the arbitration agreement (A/CN.9/684, paras. 49 and 51).

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[16] For discussions at previous sessions of the Working Group, see documents A/CN.9/641, paras. 66 and 67 and A/CN.9/684, paras. 41-51.