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Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

Note by the Secretariat

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I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993,[1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond existing laws, rules or practices, and in particular to ensure that the fact that the Notes, or any part of them, were disregarded, would not lead to a conclusion that a procedural principle had been violated or a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.[3]

2. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the Notes could be considered as a topic of future work.[4] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[5] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010.[6] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the draft convention.[7] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second session, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[8]

3. At its sixty-second session (Vienna, 15-19 September 2014), the Working Group identified areas where revision of the Notes would be necessary, and in doing so, it gave indications as to the substance or principles to be adopted in relation to

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[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 291-296. For discussions at the session of the Commission, in 1994, of a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings", see Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 111-195; for discussions at the session of the Commission, in 1995, of a draft entitled "Draft Notes on Organizing Arbitral Proceedings", see Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 314-373. The Working Group may also wish to consult the drafts considered, namely documents A/CN.9/378/Add.2, A/CN.9/396, A/CN.9/396/Add.1, A/CN.9/410 and A/CN.9/423.

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II.

[3] Ibid., para. 13.

[4] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.

[5] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[6] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

[7] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[8] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

the proposed revisions.[9] This note contains a draft of revised Notes, based on the deliberations and decisions of the Working Group.

II. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

A. General remarks and topics for consideration

4. The Working Group may wish to note that the overall drafting of the Notes has been revised in order to both update the Notes and reflect the decisions of the Working Group at its sixty-first session. The Working Group may wish to consider whether the drafting approach adequately addresses the decisions of the Working Group.

5. The Working Group may wish to note that specific issues for consideration at its current session (A/CN.9/826, para. 11) include the following:

(a) General applicability of the Notes: the Working Group considered at its sixty-first session whether the Notes should include specific references or guidance in relation to various types of arbitration (examples such as investment arbitration, commodity arbitration, maritime arbitration were suggested); after discussion, the Working Group considered that there were good grounds for maintaining the general applicability of the Notes (A/CN.9/826, paras. 18-21), a principle which is reflected in the draft of the revised Notes below;

(b) Confidentiality and transparency: the Working Group may wish to note that Note 6 of the draft below, which addresses confidentiality, includes a reference to the fact that different rules, treaties or laws might govern the matter of transparency as it relates to investment arbitration. That provision has been added in line with the decision of the Working Group that such an approach would preserve the general nature of the Notes, but would highlight that a specific issue might arise in relation to investment disputes (A/CN.9/826, para. 185);

(c) Technology and means of communication: the Working Group may wish to note that references to technology and means of communication in the Notes have been updated, and that the language used is not specific (A/CN.9/826, paras. 25, 38, 39, 91-102, 110, 125 and 159);

(d) Interim measures: the question of interim measures, which the Working Group considered useful to include in a draft of revised Notes, is addressed in Note 5 on fees, costs and deposits in respect of costs;

(e) Settlement: the Working Group may wish to consider whether Note 11 on settlement adequately addresses the various views expressed by the Working Group at its sixty-first session on that question (A/CN.9/826, para. 117-124);

(f) Joinder and consolidation: the Working Group may wish to consider whether Note 18 on Joinder and Consolidation adequately reflects practices in that area;

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[9] The report of the Working Group on the work of its sixty-first session is contained in document A/CN.9/826.

(g) As for matters of form, the Working Group may wish to consider (i) the proposal to include the "list of matters for possible consideration in organizing arbitral proceedings" before the introduction; and (ii) whether paragraphs 19 to 21 of the Notes, which deal with issues specific to translation and interpretation (rather than to choice of language(s) per se) should remain located under Note 2 on language(s) or be moved to provisions in the Notes that deal specifically with submissions of written documents and hearings.

B. Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

6. The Working Group may wish to consider the draft of revised Notes below. References to discussions of the Working Group at its sixty-first session are contained in the footnotes to the draft text below.

"**Preface**

"The United Nations Commission on International Trade Law (UNCITRAL) adopted the first edition of the Notes at its twenty-ninth session (New York, 28 May-14 June 1996). UNCITRAL finalized a second edition of the Notes at its [forty-eighth] session (Vienna, 29 June-16 July 2015). In addition to the 60 member States of the Commission, representatives of many other States and of a number of international organizations participated in the deliberations. In preparing the draft material, the Secretariat consulted with experts from various legal systems, national and international arbitration bodies, as well as international professional associations.[10]

"**List of matters for possible consideration in organizing arbitral proceedings**[11]

"**Introduction**

"**Purpose of the Notes**

"1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing matters relevant to the organization of arbitral proceedings. The Notes, prepared with a particular view to international arbitrations, are intended to have a general and universal application, and may be used whether or not the arbitration is administered by an arbitral institution.[12]

"2. However, given that procedural styles and practices in arbitration vary widely, the purpose of the Notes is not to promote any practice as best practice.

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10 The Working Group may wish to note that the text of the preface has been updated.

11 It is suggested to include the table of contents before the introduction; the text of the table of contents is not reproduced in that paper.

12 Paragraphs 1 and 11 of the 1996 version of the Notes have been merged, and their content is reflected under paragraphs 1 and 2 of the draft revised Notes (A/CN.9/826, para. 28).

"3. The Notes, while not exhaustive, cover a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters addressed in the Notes will arise. The circumstances of the particular arbitration will also dictate at what stage of the arbitral proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is required.[13]

"**Non-binding character of the Notes**[14]

"4. The Notes do not impose any legal requirement binding on the arbitrators or the parties. An arbitrator or arbitral tribunal may use or refer to the Notes at its discretion and to the extent it sees fit and need not adopt, nor provide reasons for not adopting, any particular element of the Notes.

"5. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation on the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes does not imply any modification of the arbitration rules that the parties may have agreed upon.

"**Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings**

"6. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings, provided that a fair, equitable and efficient process[15] is observed.(1) This flexibility is useful in that it enables the arbitral tribunal to make decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties, and the need for a just, fair and efficient resolution of the dispute.

(1) A prominent example of such rules are the UNCITRAL Arbitration Rules (as revised in 2010), which provide in article 17(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 a reasonable 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.'

"7. The discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure. When an arbitration is

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13 The content of paragraph 12 of the 1996 version of the Notes, which addresses the purpose of the Notes, is reflected under paragraph 3 of the revised draft.

14 Paragraphs 4 and 5 of the draft revised Notes correspond to paragraphs 2 and 3 of the 1996 version of the Notes.

15 The notions of fairness, equality and efficiency have been included in paragraph 6 of the draft revised Notes, which corresponds to paragraph 4 of the 1996 version of the Notes (A/CN.9/826, para. 30).

administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.[16]

"**Process of making decisions on organizing arbitral proceedings**

"8. It is desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the arbitral tribunal intends to proceed. In particular, in international arbitrations, parties may be accustomed to differing styles of conducting arbitral proceedings and, without such guidance, may find aspects of the proceedings unpredictable and difficult to prepare for.[17]

"9. The arbitral tribunal may wish to hold, as soon as possible after the commencement of the proceedings, a preliminary meeting or case management conference at which it determines, in consultation with the parties, issues arising in the organization of arbitral proceedings and a procedural timetable for the proceedings.[18] Additional procedural meetings or case management conferences (sometimes also referred to as "preparatory conference", "pre hearing conference", "pre hearing review") may also be held at subsequent stages of the arbitral proceedings.

"10. Decisions made at a case management conference can be revisited with the parties later in the arbitral proceedings.

"11. Although there may be instances where an arbitral tribunal might decide on issues of the organization of arbitral proceedings without consulting the parties, it is more usual for the arbitral tribunal to involve the parties in the process, and where possible, seek their agreement. Likewise, it is usual that the parties consult the arbitral tribunal whenever they agree between themselves on an issue that might affect the organization of the proceedings.[19]

"12. Such consultations or meetings in relation to procedural matters can be held either in the physical presence of the parties, or remotely using means of communication that would not require parties to attend in person.[20] Consultations or meetings using remote means of communications may lead to cost savings for the parties and so the arbitral tribunal may wish to encourage this practice.

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16 For the sake of consistency, the substance of paragraph 13 of the 1996 version of the Notes has been included in a new paragraph 7 of the draft revised Notes.

17 Paragraph 8 (corresponding, in substance, to paragraph 5 of the 1996 version of the Notes) has been revised in accordance with the decision of the Working Group (A/CN.9/826, para. 31); paragraph 6 of the 1996 version of the Notes on multiparty arbitration has been deleted (A/CN.9/826, para. 32).

18 A/CN.9/826, paras. 27 and 33.

19 A/CN.9/826, paras. 34 and 35.

20 A/CN.9/826, para. 39.

"[**List of matters for possible consideration in organizing arbitral proceedings**][21]

"**Annotations**

"**1. Set of arbitration rules**

"*If the parties have not agreed on a set of arbitration rules*[22]

"13. Where the parties have not stipulated in an arbitration agreement that a set of arbitration rules will govern the arbitral proceedings, they may wish to agree, in consultation with the arbitral tribunal, on the use of ad hoc or institutional rules after the arbitration has commenced. In the absence of agreement on a set of arbitration rules, the arbitral tribunal usually has the power to determine how the proceedings will be conducted, within the limits of the law applicable to the arbitral procedure.

"14. The benefits of selecting a set of arbitration rules are that the procedure is then predictable and foreseeable for the parties. The parties and the arbitral tribunal may also be able to save time and potentially costs by using an established set of arbitration rules that is familiar to the parties, has been widely applied, and has been carefully drafted by experienced practitioners. If parties choose to proceed under a particular set of arbitration rules, these usually displace the applicable law on arbitral procedure (except for any mandatory provisions thereof) that might otherwise apply as default rules. Arbitration rules, as selected (and, to the extent permitted, possibly modified) by the parties may be better adapted to a particular case than the default provisions of an arbitration statute.

"15. It may be necessary to secure the agreement of the relevant arbitral institution in the event that, after the arbitral tribunal is constituted, the parties either select institutional rules, or adopt the UNCITRAL Arbitration Rules while also agreeing that an institution should administer the dispute.(2)

(2) For guidance on administration of arbitration cases by institutions under the UNCITRAL Arbitration Rules, see UNCITRAL Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules.

"**2. Language or languages[23] of proceedings**

"16. The parties may agree on the language or languages of the proceedings. Such agreement will ensure that the choice of language can be tailored to suit the common language of the parties, or that the parties are familiar with the language or languages in which the proceedings will be conducted.[24] In the absence of such agreement, the relevant procedural rules or the law applicable to the arbitral procedure may empower the arbitral tribunal to determine the language or languages to be used in the proceedings. A common practice is to

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21 Paragraphs 10 to 13 of the 1996 version of the Notes have been relocated in various sections of the introduction (as indicated under footnotes 12, 13 and 16); that section of the introduction has therefore been deleted.

22 See A/CN.9/826, paras. 41-50.

23 A/CN.9/826, para. 52.

24 A/CN.9/826, para. 51.

choose the primary language of the contract or other relevant documents under which the dispute arises, or the language commonly used by the parties in their correspondence.

"17. When considering whether to use multiple languages, the parties may wish to bear in mind issues of economy and efficiency, since additional costs and time are usually required for translation and interpretation where more than one language is selected. If more than one language is to be used, the parties may consider whether one of those languages might be designated the authoritative one (for example, the language in which the award might be rendered).[25]

"18. The parties may also wish to bear in mind practical matters such as which language or languages will be used by counsel during proceedings,[26] and whether documents produced will require translation to the authoritative language of the proceedings (addressed below in paragraph 19) and whether any potential witnesses may need to use interpreters if they are not fluent in the language chosen for the proceedings (addressed below in paragraph 20).

"*(a) Possible need for translation of documents, in full or in part*

"19. Some documents annexed to the statements of claim and defence or submitted later may not be in the language or languages of the proceedings. In determining whether to order translations of all or part of those documents, the arbitral tribunal may wish to consider whether the parties and the arbitral tribunal are able to understand the content of the documents without translation and whether other practical measures, such as translation of part of documents, or a single template translation for similar documents with largely pictorial or numeric content, can be undertaken as a cost-efficient measure in lieu of comprehensive translation.[27]

"*(b) Possible need for interpretation of oral presentations*

"20. If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive. The responsibility for arranging for interpretation (as well as translation) typically lies with the parties, in most cases, even in arbitrations administered by an institution.[28]

"*(c) Cost of translation and interpretation*

"21. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid, as an initial matter, directly by the parties jointly. However these costs are covered initially, the arbitral tribunal may have to decide at a later stage how these costs, along with

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25 A/CN.9/826, paras. 52 and 60.
26 A/CN.9/826, para. 56.
27 A/CN.9/826, paras. 52 to 54.
28 A/CN.9/826, para. 58.

the other arbitration costs, will ultimately be apportioned between the parties.[29]

"**3. Place of arbitration**[30]

"*(a) Determination of the place of arbitration, if not already agreed upon by the parties*

"22. Arbitration rules usually allow the parties to agree on the place (or 'seat') of arbitration, subject to the requirement of some arbitral institutions that arbitrations conducted pursuant to that institution's rules be conducted at a particular place, usually the location of the institution. If the place of arbitration has not been agreed by the parties directly or by reference to institutional rules, typically the arbitral tribunal or the institution administering the arbitration is empowered to determine the place, in consultation with the parties. The place of arbitration should be determined at the outset of the proceedings if it has not already been agreed.

"23. The place of arbitration has various legal consequences — for example, it may determine the law governing the procedure of the arbitration, whether a party can seek judicial review of an award, the grounds on which a party can seek to set aside any arbitral award, as well as the extent to which the award may be subject to recognition and enforcement in other jurisdictions. The legal place of arbitration need not be the same as the physical location of the arbitral hearings (see section (b) below), although often the two are the same.

"24. Selection of the place of arbitration is influenced by various legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are: (i) the suitability of the law applicable to the arbitral procedure at the place of arbitration; (ii) the law and practices at the place of arbitration regarding court intervention in the course of the arbitral proceedings; (iii) the law and practices at the place of arbitration regarding recourse against an award, including the procedure for setting aside an award; (iv) the jurisprudence at the place of arbitration in relation to arbitral procedure; and (v) whether the State where the arbitration takes place and hence where the award will be made is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) or to another multilateral or bilateral treaty on enforcement of arbitral awards.

"25. When it is expected that the seat of arbitration will also be where the arbitral hearings will be held, other factors will become especially relevant in choosing the seat, including: (i) convenience of the location for the parties and the arbitrators, including the travel distances; (ii) availability and cost of support services; and (iii) location of the subject matter in dispute and proximity of evidence.

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29 A/CN.9/826, para. 59.

30 A/CN.9/826, paras. 61 to 66.

"*(b) Possibility of holding hearings and meetings at a place different than the place of arbitration*

"26. In certain circumstances, it may be more expeditious or convenient to the parties and the arbitral tribunal to hold hearings and/or meetings at a physical location different from the place of arbitration, or remotely via technological means of conferencing. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold hearings and meetings elsewhere than at the place of arbitration, including the UNCITRAL Model Law on International Commercial Arbitration (article 20(2)).

"**4. Administrative services that may be needed for the arbitral tribunal to carry out its functions**[31]

"*(a) Administrative services for hearings*

"27. Various administrative services (e.g. hearing rooms) may need to be procured for the arbitral tribunal to be able to carry out its functions. The arbitral tribunal and the parties should consider who will be in charge of organizing administrative services.[32]

"28. When the case is administered by an institution, the institution may provide some administrative support to the arbitral tribunal. Such support varies greatly, depending on the institution.

"29. When the case is not administered by an institution, or the involvement of the institution does not include the provision of administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which sometimes offer their facilities to arbitrations not governed by the rules of the institution; some institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings. Otherwise, some services and hearing facilities could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services. Specialized arbitration hearing centres exist in many cities. It may also be acceptable to leave some of the arrangements to one of the parties subject to agreement of the other party or parties.[33]

"*(b) Secretary to arbitral tribunal*

"30. Administrative or support services might be secured by engaging a secretary of the arbitral tribunal, who carries out tasks under the direction of the arbitral tribunal. These or similar services may also be rendered by registrar, clerk, administrator or rapporteur. Some arbitral institutions routinely assign such persons to cases administered by them. Alternatively, some arbitrators frequently engage such persons, at least in certain types of cases, whereas other arbitrators do not. If the arbitral tribunal wishes to appoint a secretary, it may disclose this fact to the parties, along with the identity of the

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31 A/CN.9/826, paras. 67-73.

32 A/CN.9/826, para. 68.

33 A/CN.9/826, para. 69.

proposed secretary, the tasks to be performed by him or her, and any proposed remuneration.

"31. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), the secretary's role is usually not controversial. However, different views are held and practices followed as to whether the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to or overlaps with the professional functions of the arbitrators. Such a role of the secretary is in the view of some users of arbitration inappropriate or is appropriate only under certain conditions, such as that such role is disclosed, the parties agree to such role, and the secretary signs a declaration of impartiality.[34] It is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.[35] Parties may wish to consult institutional guidelines in relation to the roles of arbitral secretaries or to agree at the outset of proceedings on the financial conditions applicable to the services rendered by secretaries, as well as the role and practices to be adopted in respect of such secretaries.

"**5. Fees, costs and deposits in respect of costs**[36]

"*(a) Fees and costs*

"32. Some arbitration rules, such as the UNCITRAL Arbitration Rules (as revised in 2010), provide a definition of costs, mandate that the fees and expenses of arbitrators be reasonable in amount, and provide that in principle the costs of the arbitration shall be borne by the unsuccessful party (articles 40-42 of the UNCITRAL Arbitration Rules, as revised in 2010).[37]

"33. Should the relevant rules under which the arbitration is conducted not set out provisions in respect of costs, fees and the allocation thereof, it is widely considered useful for the arbitral tribunal to identify at the outset of the proceedings how it intends to deal with these matters.[38]

"34. At an appropriate time of the proceedings, the arbitral tribunal may wish to give direction as to the claims for costs to be made by the parties. If submissions on costs are required, the parties and the arbitral tribunal should decide when those submissions should be made, the possibilities being before or after the arbitral tribunal renders its final award on the merits.[39]

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34 A/CN.9/826, paras. 71 and 73.
35 A/CN.9/826, para. 71.
36 A/CN.9/826, paras. 22, 23 and 74 to 78.
37 A/CN.9/826, para. 75.
38 Ibid.
39 A/CN.9/826, para. 174.

"35. Certain arbitral institutions have included in their guidance or rules examples of unreasonable parties' behaviour which may be taken into account by the arbitral tribunal when apportioning costs, such as excess document requests, excessive cross-examination, exaggerated claims and failure to comply with procedural orders.[40]

"*(b) Costs and security in connection to interim measures*[41]

"36. Depending on the law governing the arbitral procedure and the applicable rules and agreement governing the arbitration, an arbitral tribunal may grant an interim measure.(3) The party requesting the interim measure may then be required by the arbitral tribunal to provide security in connection with the measure, and to pay costs caused by the measure under certain circumstances.

(3) See for instance chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006); article 26 of the UNCITRAL Arbitration Rules (as revised in 2010).

"*(c) Amount to be deposited*

"37. Unless and to the extent the matter is handled by an arbitral institution,[42] the amount to be deposited as an advance for the costs of arbitration, and the request for such a deposit from the parties, may be estimated and undertaken by the arbitral tribunal. The estimate typically includes fees and expenses of the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and in some instances, value-added tax. Many arbitration rules have provisions regarding these matters, including on whether the deposit should be made in equal amounts by the parties, and the consequences of the failure of one party to pay (see article 43 of the UNCITRAL Arbitration Rules (as revised in 2010)).

"*(d) Management of deposits*

"38. When the arbitration is administered by an institution, the institution's services may include managing and accounting for, or holding, the deposited money. Irrespective of whether the institution does undertake that function, or where the parties and arbitral tribunal rely on an external provider to do so, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed, including matters such as interest payable.

"39. The parties, arbitral tribunal and arbitral institution should be aware of regulatory issues, including bar regulations, that may arise in the handling of deposits for costs, including regulation in relation to the identity of beneficiaries and issues arising from international sanctions.

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40 A/CN.9/826, para. 23.
41 A/CN.9/826, para. 24.
42 A/CN.9/826, para. 74.

"*(e) Supplementary deposits*

"40. If, during the course of proceedings, it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because of the prolongation of the proceedings, additional hearings, appointment of an expert by the arbitral tribunal).

"**6. Confidentiality of information relating to the arbitration; possible agreement thereon**[43]

"41. One widely held view is that there is an inherent requirement of confidentiality in commercial arbitration and that confidentiality is an advantageous and helpful feature of international commercial arbitration.[44] Nevertheless, there is no uniform approach in arbitration rules or in national laws as to the extent to which the participants in an arbitration are under a duty to maintain the confidentiality of information relating to the proceedings.[45]

"42. Thus, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected.

"43. One option the parties may wish to consider, should confidentiality be a priority, is to agree, in consultation with the arbitral tribunal, to record any agreed principles on the duty of confidentiality in the form of a contractual agreement.[46]

"44. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; circumstances in which confidential information may be disclosed in part or in whole to the extent necessary to protect a legal right;[47] or other circumstances in which such disclosure might be permissible (e.g. information in the public domain, or disclosures required by law or a regulatory body).

"45. There are also occasions where certain information or material within an arbitration is deemed to be confidential to one party in an arbitration, for example in the case of commercial secrets or intellectual property. In such circumstances, the arbitral tribunal may make arrangements in respect of that information, for example, by ordering disclosure only to a limited number of designated persons.

"46. Whereas the obligation of confidentiality imposed on the parties may vary with the circumstances of the case and the applicable rules and law, it is

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43 A/CN.9/826, paras. 79 to 89, 185 and 186.
44 A/CN.9/826, paras. 79 to 81.
45 A/CN.9/826, para. 84.
46 A/CN.9/826, paras. 87.
47 A/CN.9/826, paras. 85 and 86.

widely held that the arbitral tribunal should keep the proceedings confidential, and not disclose to the public information it received during the proceedings.

"47. In arbitration between an investor and a State arising under an investment treaty, the treaty may include specific provisions on publication of procedural documents or open hearings, and on the definition of confidential or protected information. Also, applicable rules may contain specific provisions on transparency.(4)[48]

(4) For instance, the 'Notes of Interpretation of Certain Chapter 11 Provisions' published by the NAFTA Free Trade Commission (FTC) on 31 July 2001 address the question of access to documents; a number of investment treaties include provisions on transparency in their chapter on investor-State dispute settlement. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in force since 1 April 2014 are a good example of rules applying specifically to treaty-based investor State arbitrations; similarly, the Rules of the International Centre for Settlement of Investment Disputes (ICSID) include provisions on transparency.

["**Routing of written communications among the parties and the arbitrators**][49]

"**7. Electronic means of communication**[50]

"48. It is useful practice for the mode or method of communication and document exchange to be decided by the parties in consultation with the arbitral tribunal or, failing such agreement by the parties, by the arbitral tribunal, at the outset of proceedings. Factors that might be considered in selecting a means of communication (including shared platforms on which to access documents) include ensuring that (i) documents are accessible and easily retrievable by parties to the arbitration, and the arbitral tribunal; and (ii) the means of communication is acceptable under the law applicable to the arbitral procedure.

"49. Although more than one method of communication and document transmission may be used (e.g. paper-based as well as electronic), the parties may wish to consider issues arising from such determination, including for example which is the authoritative means and, where time limits for submission are applicable, what action constitutes submission.

"50. The use of technological means of communication can lead to expediency and efficiency of proceedings, although the use of certain technologies is not universal. Moreover, the use of different technologies may give rise to issues of compatibility, storage, access and data security that parties may wish to consider at the outset of the proceedings and to revisit as necessary during the proceedings.

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48 A/CN.9/826, paras. 82, 83 and 185.

49 Note 7 of the 1996 version of the Notes on "Routing of written communications among the parties and the arbitrators" has been located in Note 8 of the revised version on "Arrangements for the exchange of written submissions" (A/CN.9/826, para. 90).

50 Note 8 of the 1996 version of the Notes on "Telefax and other electronic means of sending documents" has been redrafted following the decision of the Working Group that that Note was outdated, and should address technology and technological means of communication in a way that would retain relevance and neutrality in the future (A/CN.9/826, paras. 91-102).

"**8. Arrangements for the exchange of written submissions**[51]

"51. Written submissions exchanged in the course of the arbitration[52] may include the claim, the statement of defence, and submissions known by different terminology in different jurisdictions,[53] including, for example, statements, memorials, counter memorials, briefs, counter briefs, replies, répliques, dupliques, rebuttals or rejoinders.

"52. It is usual practice that all written communications take place directly between the arbitral tribunal and the parties, unless an institution is acting as an intermediary.[54] Likewise, it is usual that all parties are copied on all correspondence to and from the arbitral tribunal.

"*(a) Scheduling of written submissions*

"53. It is advisable that the arbitral tribunal set time limits for written submissions. Although it is useful for the parties to be aware of such time limits early in the proceedings, it can also be useful for the arbitral tribunal to reassess whether further submissions are required or further evidence ought to be adduced, after each round of written submissions, in consultation with the parties.[55]

"54. Written submissions may be requested or required after a hearing.[56]

"*(b) Consecutive or simultaneous submissions*

"55. Written submissions on an issue may be made consecutively, i.e. one party (for example, the one principally bearing the burden of proof on the matter(s) being addressed) makes its submission and then the other party or parties are given a period of time in which to make a counter submission. Alternatively, submissions may be made by all parties simultaneously. The approach used may depend on the type of issues to be commented upon, the stage of the proceedings, and the time the parties have to comment.[57]

"**9. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)**[58]

"56. Depending on the volume and kind of documents to be handled, it might be considered whether it would be helpful to agree on practical arrangements concerning details such as the following:

- The form in which submissions will be made (e.g., hard copy, electronic, shared repository);

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51 A/CN.9/826, paras. 103 to 109.
52 A/CN.9/826, para. 103.
53 A/CN.9/826, para. 104.
54 The first sentence of paragraph 52 reflects the decision of the Working Group to simplify Note 7 of the 1996 version of the Notes, and include its substance under Note 8 (A/CN.9/826, para. 90).
55 A/CN.9/826, para. 105.
56 A/CN.9/826, para. 107.
57 A/CN.9/826, para. 108.
58 A/CN.9/826, paras. 110 and 111.

- The parameters in relation to technology-based document management and production;
- A system for organizing, labelling, identifying and referring to documents and evidence (including, for instance, indexes);
- Whether joint volumes of documents can be agreed and presented in an efficiently accessible way (including, for instance, hyperlinks);[59]
- The format and form of hard copy or electronic documents (for example, paragraph numbering, spacing, specific electronic formats such as original or native format if applicable);
- The organization of types of documents, for example, whether translations, large spreadsheets or diagrams, or other types of documents ought to be contained in separate volumes or presented in a manner different from other evidence.

"**10. Defining points at issue; order of deciding issues; defining relief or remedy sought**[60]

"*(a) Should a list of points at issue be prepared*

"57. It is often considered helpful for an arbitral tribunal to prepare, based on the parties' submissions, a list of the points at issue, as opposed to those that are undisputed. Such a list, when prepared at an appropriate stage of the proceedings, can provide an opportunity for parties to focus their arguments on the issues identified as critical by the arbitral tribunal, and thereby improve efficiency and reduce costs.

"58. A list of points at issue should be evolutive in nature, insofar as subsequent developments in the proceedings may require such a revision. However, such changes should only be made in consultation with the parties.[61]

"*(b) In which order should the points at issue be decided*

"59. Subject to any agreement of the parties, the arbitral tribunal has flexibility to determine the sequence of the proceedings, and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration.[62]

"60. Depending on the points at issue, the arbitral tribunal may wish to consider the appropriateness of making a determination on certain points (such as jurisdiction, preliminary determinations, liability or damages) earlier than on other points. Where the arbitral tribunal decides to adopt that approach, (i) document submission and production may be organized in separate stages to reflect that staged organization of proceedings; and (ii) the parties and arbitral tribunal may wish to consider whether, under the law at the place of

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59 A/CN.9/826, paras. 110 and 135.
60 A/CN.9/826, paras. 112 to 116.
61 A/CN.9/826, para. 112.
62 A/CN.9/826, para. 114.

arbitration, such determination by the arbitral tribunal is open to judicial review by national courts. Such approach may have an impact on the adjudicative process, and therefore, the arbitral tribunal should carefully consider with the parties the implications on the procedure, including on time and costs, of such a staged process.

"*(c) Is there a need to define more precisely the relief or remedy sought*

"61. If the arbitral tribunal considers that the relief or remedy sought by a party is insufficiently precise, in some circumstances, for instance, to ensure the enforceability of the arbitral award, it may be appropriate for the tribunal to inform the party of that perception.[63]

"**11. Settlement**[64]

"62. In appropriate circumstances, an arbitral tribunal may raise the possibility of settlement outside the context of the arbitration. In some jurisdictions, where parties agree on both the principle and the modalities of settlement, the applicable law permits facilitation of settlement by an arbitral tribunal exercising due caution and restraint; however, in many other jurisdictions it is not permissible for the arbitrator to do more than raise the prospect of settlement by a third party mediator outside the context of the arbitration.

"**12. Documentary evidence**[65]

"*(a) Time limits for submission of documentary evidence by the parties; consequences of late submission*[66]

"63. The arbitral tribunal should fix the time limits for the submission of evidence at the beginning of the proceedings, in consultation with the parties (see above para. 53).[67] The form of submission and exchange (for instance, electronic, hard copy, shared drive) as well as any requirements for the submission of documents (for example, where copies are presented, whether originals should be available for inspection; whether multiple copies of documents that are essentially identical are required) should also be determined by the tribunal in consultation with the parties (see above para. 56).

"64. The arbitral tribunal may wish to clarify how it intends to deal with requests for the late submission of evidence; for example, it may wish to advise that parties requesting late submission will be required to provide reasons for requesting an extension.[68]

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63 A/CN.9/826, para. 116.
64 A/CN.9/826, paras. 117 to 124.
65 A/CN.9/826, paras. 125 to 136.
66 A/CN.9/826, paras. 126 to 129.
67 A/CN.9/826, para. 126.
68 A/CN.9/826, para. 128.

"*(b) Requests to produce documentary evidence*[69]

"65. The arbitral tribunal might consider it useful to clarify with the parties whether and, if so, how documentary evidence may be requested by one party of another, the relevant time limits, the form of document production (as provided above under para. 63) and the procedures for contesting requests by the other party, if relevant.

"66. If document production is needed, there are various ways by which such production can be requested or required. First, provision is often made for parties to request documents from the other party or parties. Such requests may be made in various ways but typically requests are recorded in a schedule which sets out not only the document or category of documents requested but also the reasons for the request; the other party may then add to the schedule whether it agrees to the request or reasons why it does not agree with the request, and the arbitral tribunal may then add to the schedule its decision on any contested requests. Second, the arbitral tribunal may require, at its own initiative, a party or parties to produce certain evidence. Third, after consulting the parties, the arbitral tribunal may itself take appropriate steps to obtain documents from any person or organization. Approaches and attitudes vary regarding document production and the arbitral tribunal should be mindful of that fact when considering requests and ordering production of documents.

"67. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

"*(c) Should assertions about the provenance of documents be assumed as accurate*[70]

"68. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (i) a document, including any translation thereof is accepted as having originated from the source indicated in the document; (ii) a copy of a dispatched communication is accepted without further proof as having been received by the addressee; and (iii) a copy is accepted as correct. Documents disclosed only electronically, or documents generated electronically and disclosed in hard copy (such as e-mails) may raise certain issues in relation to provenance and authenticity, and the arbitral tribunal may wish to consider requiring the disclosure of means of identifying such documents. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents.

"69. It is advisable to provide that the time limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

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[69] A/CN.9/826, paras. 130 to 132.

[70] A/CN.9/826, para. 133.

"*(d) Joint sets of documentary evidence*[71]

"70. The parties may consider submitting a joint set of documentary evidence, to avoid duplicate submissions and streamline references to documents. Additional documents may be inserted at a later stage of the proceedings if the parties agree. It can often be practical to select a number of frequently used documents and establish a set of 'working' or 'core' documents, whether these have been submitted jointly or otherwise.

"*(e) Should certain documentary evidence be presented through summaries, tabulations, charts, extracts or samples*

"71. Depending on the nature and volume of documents, it may save time and costs if certain evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

"**13. Witnesses of fact**

"72. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices vary. In order to facilitate the preparations of the parties for hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of hearings, some or all of the following issues.

"*(a) Advance notice about a witness whom a party intends to present; written witnesses' statements*[72]

"73. One frequent practice is to submit written witness statements in addition to hearing oral witness evidence. Written witness statements should refer to all documents that they rely upon.

"74. Typically the arbitral tribunal will provide a time frame in which oral witness testimony will be heard.

"75. In providing either witness statements or a notice of the witnesses it intends to present, a party may be required to provide in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; (c) the nature of the relationship with any of the parties; (d) the qualifications and experience of the witnesses; and (d) how the witnesses learned about the facts on which they will testify. It may not be necessary to require this information, depending on the circumstances of the arbitration and in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

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[71] A/CN.9/826, para. 135.

[72] The Working Group may wish to note that modifications have been made to that section to harmonize it with the remaining parts of the Note on witnesses.

"*(b) Manner of taking oral evidence of witnesses*

"*(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted*[73]

"76. The arbitral tribunal can decide, in consultation with the parties, the order of witnesses and the manner in which witnesses will be heard. For example, witnesses may be examined by the arbitral tribunal, then examined by the party calling that witness, and then cross-examined by the other party or parties. Another possibility is for the witness to be examined by the party presenting the witness and then cross-examined by the other party or parties, and re-examined by the party calling that witness and/or the arbitral tribunal.

"77. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to ask questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their own initiative or even require that questions from the parties be asked through the arbitral tribunal. If a written witness statement is presented in addition to hearing the oral witness evidence, the testimony in chief of that witness is then usually limited to the confirmation and updating of the written statement.

"*(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made*[74]

"78. Practices and laws differ as to whether or not oral testimony is to be given under oath or similar affirmation of truthfulness. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown in arbitration or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths. In such circumstances, the witness may simply be asked to affirm that he or she will testify truthfully. It may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal. The arbitral tribunal may wish to draw witnesses' attention to potential criminal sanctions for giving false testimony.

"*(iii) May witnesses be in the hearing room when they are not testifying*

"79. Some arbitrators favour, as a general rule, that the presence of a witness in the hearing room be limited to the time the witness is testifying, except that a witness, who also represents a party to the arbitration, should not, in principle, be excluded from the hearing room. The purpose of such rule is to prevent the witness from being influenced by other statements, or to prevent the possibility of that witness's presence influencing another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be

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[73] A/CN.9/826, paras. 141 to 145.

[74] A/CN.9/826, para. 146.

readily clarified, or may act as a deterrent against untrue statements. Other possible approaches include that witnesses remain absent from the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides that matter for each witness individually. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

"*(c) The order in which the witnesses will be called*[75]

"80. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs and facilitate scheduling if the order in which they will be called is known in advance. Each party might be invited to suggest the order in which it intends to present its witnesses, and the tribunal may discuss with the parties, and ask them to agree on the timetable and sequence of witness examination, and the amount of time anticipated for each witness.

"*(d) Interviewing witnesses prior to their appearance at a hearing*[76]

"81. The arbitral tribunal may wish to clarify at the outset of proceedings what kind of contact a party or its representative is permitted to have with a witness in preparations for the hearings (as well as in relation to the preparation of witness statements). International arbitration can differ from national court practice in respect of the permissibility of pre-testimony contact between a party and its witness, and one common practice is to permit parties or their representatives to interview witnesses prior to their oral testimony.

"*(e) Hearing representatives of a party*

"82. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. Therefore, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) for hearing statements of those persons and for determining the probative value of their statements.

"**14. Experts and expert witnesses**

"83. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. Frequently, the parties may be permitted to present expert witnesses to address points at issue. In other cases, the arbitral tribunal might propose that the parties agree on a single joint expert to address points at issue. In the alternative, an arbitral tribunal may appoint its own expert(s) to report on issues it considers to require expert guidance. In some instances, if the respective experts appointed by the parties diverge widely in their findings, an arbitral tribunal may appoint an expert later in the proceedings.[77]

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75 A/CN.9/826, para. 147.
76 A/CN.9/826, paras. 148 and 149.
77 A/CN.9/826, paras. 150 and 156.

"84. Should the parties or arbitral tribunal require assistance or suggestions in relation to the selection of an expert, arbitral institutions and chambers of commerce may be willing to assist in such selection.[78]

"*(a) Expert opinion presented by a party (expert witness)*[79]

"85. If one or more parties to a dispute is presenting an expert opinion, each party may prepare a list of issues for its expert to consider in his or her report or the parties may agree on a joint list of issues for their experts to address. Alternatively, the arbitral tribunal might consider requesting the experts to clarify the points at issue that each expert intends to address. The arbitral tribunal might also require respective parties' expert witnesses to submit a joint report before the hearing, to specify the points on which they agree or disagree.

"86. The arbitral tribunal may also wish to address the timing of the submission of expert evidence, and in particular whether such submission should be made at the same time as a statement of case and/or witness statements, or after, and whether expert reports should be filed consecutively or at the same time.

"87. Where the parties intend to present their own expert witnesses, the arbitral tribunal may wish to determine whether testimony should be heard separately or together, often, in the latter case, with questioning led by the arbitral tribunal. The parties should carefully consider the impact on the procedure of hearing testimony of expert witnesses together.

"*(b) Single joint expert*[80]

"88. Occasionally, it may be possible and cost-effective for the parties to agree on a single joint expert. Such selection has the benefit of reduced costs and streamlined proceedings.

"*(c) Expert appointed by the arbitral tribunal*

89. If the arbitral tribunal considers it necessary, it should decide, in consultation with the parties, whether it intends to appoint a tribunal's expert. If the arbitral tribunal proceeds with such an appointment, it may wish to consult the parties in relation to the choice of the candidate, for example by presenting to the parties a list of candidates, soliciting proposals from the parties, or discussing with the parties the 'profile' of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.[81]

"90. Arbitration rules may require the expert, in principle before accepting appointment, to submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence (whether in the report or in a separate document). The arbitral

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78 A/CN.9/826, para. 157.
79 A/CN.9/826, para. 155.
80 A/CN.9/826, para. 156.
81 A/CN.9/826, para. 152.

tribunal may wish to set a time frame within which parties shall inform the arbitral tribunal of any objections to the expert's qualifications, impartiality or independence, and a time frame in which the arbitral tribunal shall decide upon any such objections.[82]

"*(i) The expert's terms of reference*[83]

"91. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule.

"92. The terms of reference might also be useful in setting out details of how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

"93. The arbitral tribunal may wish to clarify the nature and extent of a party's permissible communication with its expert. The arbitral tribunal may also wish to consider providing guidance on whether the expert's terms of reference and fees ought to be disclosed.

"*(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony*

"94. Where parties' respective experts express conflicting opinions, the arbitral tribunal may need to make provision for the possibility of supplementary or responsive expert witness statements to address issues raised. Likewise, where a single joint expert or tribunal-appointed expert has presented evidence, the parties normally are entitled to comment on the report.

"95. If hearings are to be held for the purpose of expert evidence, the procedures for examining or cross-examining the expert or for the participation of the expert should also be set out in advance by the arbitral tribunal.

"**15. Other evidence**[84]

"96. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods or visiting or viewing (either physically or remotely via technological means) a specific site, property or goods. Physical or virtual site inspections may be evidentiary in nature, or may serve an illustrative function for the arbitral tribunal.[85]

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82 A/CN.9/826, para. 158.

83 A/CN.9/826, paras. 153 and 154.

84 As agreed by the Working Group, Note 14 of the 1996 version of the Notes on "Physical evidence other than documents" has been relocated after the Note on "Experts and expert witnesses"; its title has been revised (A/CN.9/826, para. 137).

85 A/CN.9/826, para. 138.

"*(a) Physical evidence*

"97. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

"*(b) Site inspections*[86]

"98. The arbitral tribunal may wish to decide, in the first instance, whether a physical site inspection is required, or whether a virtual inspection might be possible or desirable in the interest of efficiency or cost savings.

"99. If a physical inspection of site, property or goods takes place, the arbitral tribunal may wish to consider matters such as timing, location of meeting, arrangements necessary to provide the opportunity for all parties to be present, cost allocation, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties. Prior to the inspection, it may be useful to agree on an inspection protocol between the parties and the arbitral tribunal.

"100. The site to be inspected is often under the control of one of the parties. In such a circumstance, it can be advisable to provide the other party the possibility to visit the site in advance of the inspection by the arbitral tribunal, in order, for example, to provide that party with the opportunity to request that the arbitral tribunal sees additional or different evidence at the site. The parties should seek to agree on the scope of the site inspection.

"101. Where an employee or representative of a party controlling the site gives guidance or explanations in respect of the site, it should be borne in mind that such statements, in contrast to statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

"**16. Hearings**

"*(a) Decision whether to hold hearings; distinction between evidentiary and procedural hearings*[87]

"102. Arbitration rules often provide that parties can request hearings for the presentation of evidence by witnesses, including expert witnesses, and/or for oral argument. Where none of the parties requests a hearing, it is common practice for an arbitral tribunal to decide whether nevertheless to hold such hearings, in consultation with the parties.

"103. Hearings can be held in person or remotely via technological means. The decision as to whether to hold hearings in person or remotely via technological means is likely to be influenced by factors such as whether the hearing is intended to address evidentiary matters, or whether the hearing is likely to deal with procedural matters only.

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[86] A/CN.9/826, paras. 139 and 140.

[87] A/CN.9/826, paras. 161 and 162.

"*(b) Whether one or separate periods of hearings should be held*[88]

"104. A common practice is to hold hearings in a single, consecutive period. However, holding hearings over separate periods can in some instances be unavoidable in order to accommodate the different schedules of the parties and arbitrators.

"*(c) Setting dates for hearings*[89]

"105. Dates for hearings are normally set at the earliest possible opportunity so as to ensure availability of the participants. The length of hearings or even the need for a hearing might be subject, if needed, to reconsideration at a later date, in light of the submissions by the parties.

"*(d) Whether there should be a limit on the aggregate amount of time each party will have for oral argument and questioning witnesses*[90]

"106. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements; (b) questioning its witnesses; and (c) questioning the witnesses of the other party or parties. In general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal should consult the parties as to how much time they think they will need.

"107. Such planning of time, provided it is realistic, fair and subject to supervision by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and argument, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use a disproportionate amount of time.

"*(e) The order in which the parties will present their argument and evidence*[91]

"108. Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, argument, witnesses and other evidence; and whether the respondent or the claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings.

"*(f) Length of hearings*

"109. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The

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88 A/CN.9/826, para. 163.
89 A/CN.9/826, para. 164.
90 A/CN.9/826, para. 165.
91 A/CN.9/826, para. 166.

length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written argument presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than practitioners who prefer that most if not all evidence and argument are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

"*(g) Arrangements for a record of the hearings*[92]

"110. The arbitral tribunal should decide, after consultation with the parties, on the method of preparing a record of oral statements and testimony during hearings. Commonly used methods include audio recording and transcription services.

"111. If transcripts are to be produced, it may be considered how the parties will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

"*(h) Post-hearing submissions*[93]

"112. After the hearings, it is usual for the arbitral tribunal to determine whether additional written submissions are necessary, and if so, to establish a schedule accordingly. This may be necessary for the purposes of receiving briefs on a specific issue that may have come up during the hearing, or allowing the parties a final opportunity to argue their positions in writing.

"113. The arbitral tribunal should set aside time for its deliberations after the close of the hearings and before the close of proceedings.

["*(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments*][94]

"**17. Multiparty arbitration**[95]

"114. When a single arbitration involves more than two parties (multiparty arbitration), many procedural issues remain the same as in a two-party arbitration. However, caution may need to be exercised where the parties have multiple interests or seek different relief. Parties to complex transactions involving different contracts may wish to consider drafting arbitration agreements that are compatible, or drafting an arbitration clause that would be binding on all parties to the transaction.

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92 A/CN.9/826, paras. 167 to 171.

93 A/CN.9/826, para. 109.

94 The Working Group may wish to note that section (h) in Note 17 of the 1996 version of the Notes has been deleted (see A/CN.9/826, paras. 172 and 173).

95 A/CN.9/826, paras. 175 and 176.

"**18. Joinder and Consolidation**[96]

"*(a) Joinder*

"115. Joinder refers to the possibility of involving consenting third parties in the proceedings and binding them to the results of these proceedings. The development of multiparty transactions has made joinder a more frequent occurrence. Joinder may result from the facts that there are more than two parties to a contract, or multiple contracts related to a single transaction.

"116. Parties may be willing to join a third party to the arbitration in situations where, for instance, they would be unable to fully present their claims without those third parties' participation. Certain arbitration rules have addressed that topic by providing that the arbitral tribunal may, at the request of a party, allow one or more third persons to be joined in the arbitration, provided that such person is a party to the arbitration agreement.(5) Other arbitration rules do not require that the party to be joined be bound by the arbitration agreement under which the claim arises.

(5) See for instance article 17(5) of the UNCITRAL Arbitration rules, (as revised in 2010).

"117. It is recommended that the third party be joined as early as possible in the proceedings. For instance, a party may, at the stage of the notice of arbitration or its response, formulate a claim to that effect.(6) In such a case, the third party would be joined to the procedure before the arbitral tribunal is appointed. Depending on the law applicable to the arbitral procedure and arbitration rules, a third party may also be joined after the appointment of the arbitral tribunal if all the parties agree.

(6) See for instance article 4(2)(f) of the UNCITRAL Arbitration Rules, as revised in 2010).

"*(b) Consolidation*

"118. Consolidation refers to the merging of separate arbitrations, whether or not the related arbitration has been commenced pursuant to the same or a different arbitration agreement. Therefore, the question of consolidation is raised in situations where several distinct arbitration are commenced under the same or different arbitration clauses in the interests of efficiency and avoiding inconsistent outcomes on related issues.

"119. An increasing number of arbitration rules address consolidation. The arbitration rules that expressly permit consolidation of two or more pending arbitrations include various considerations such as whether (i) consolidation has been requested by a party, (ii) all the parties agree to consolidation, (iii) the disputes arise under the same arbitration or different agreements, and in the latter case whether those agreements are compatible, and (v) the disputes arise in connection with the same legal relationship.

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[96] Ibid.

"**19. Possible requirements concerning the award**[97]

"120. The parties and arbitral tribunal may wish to have regard to the relevant applicable law at the place of arbitration and at the potential place(s) of enforcement of the award, as well as to the applicable arbitration rules, in considering any requirements as to the form, content and filing or delivering of the award.

"121. In respect of filing or delivering the award, some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might lead to difficulties in its enforcement).

"122. If such a requirement exists, it is useful, before the award is to be issued, to plan who should take the necessary steps to meet the requirements and how the costs are to be borne."

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[97] A/CN.9/826, paras. 177 to 181.