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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat*

Contents

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

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I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").[1] At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.[2] At its forty-first session (New York, 16 June-3 July 2008), the Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.[3]

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1, in order to allow the Secretariat to prepare a revised draft of the Rules taking account of such indications. The report of that session is contained in document A/CN.9/614. At its forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group discussed a draft of revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. The reports of these sessions are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-sixth to forty-eighth sessions and on comments received by the Secretariat at the occasion of conferences and meetings organized to discuss the revision of the Rules. It has been prepared for the consideration of the Working Group for the second reading of the revised version of the Rules, in replacement of documents A/CN.9/WG.II/WP.147 and Add.1, and A/CN.9/WG.II/WP.149, as it seemed clearer to propose a complete draft of revised Rules, instead of adding annotations and comments to such previous documents. This note covers draft articles 1 to 17 of the revised version of the Rules. Draft articles 18 to 41, and draft additional provisions are dealt with under A/CN.9/WG.II/WP.151/Add.1.

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

[2] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 175.

[3] Ibid., *Sixty-third session, Supplement No. 17* (A/63/17), paras. 308-316.

II. Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree. **[1]**

1 bis. Unless the parties have agreed to apply another version of the Rules, the parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date. **[2]**

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail. **[3]**

Remarks on draft article 1

1. The Working Group did not modify the substance of paragraph (1) at its forty-eighth session (A/CN.9/646, para. 71).

2. The provisions of paragraph (1 bis) were not contained in the 1976 version of the Rules. That paragraph seeks to determine which version of the Rules applies to arbitrations. The proposed draft is based on discussions of the Working Group at its forty-eighth session (A/CN.9/646, paras. 72-77). It contains a presumption aimed at providing guidance to the arbitrators in case the parties have not expressly indicated which version of the Rules would apply. The presumption that parties have referred to the Rules in effect at the date of commencement of the arbitration applies only to arbitration agreements concluded after the adoption of the revised version of the Rules. That presumption does not apply where arbitration agreements are formed by one or more parties accepting an open offer to arbitrate made by other party or parties before the date of adoption of the revised version of the Rules (A/CN.9/646, paras. 75 and 76).

3. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646, para. 78).

*** MODEL ARBITRATION CLAUSE FOR CONTRACTS [4]**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note – Parties may wish to consider adding: **[5]**

(a) The appointing authority shall be ... (name of institution or person);

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town and country);

(d) The language to be used in the arbitral proceedings shall be ...

Remarks on the draft model arbitration clause

4. The draft model arbitration clause was adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646, para. 79).

5. The Working Group might wish to consider whether the words "might wish to" appearing in the chapeau of the note to the model arbitration clause should be replaced with the word "should", in order to indicate to the parties the importance of agreeing on the matters listed.

Notice, calculation of periods of time

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered. **[6]**

[1 bis. Any notice, including a notification, communication or proposal shall be delivered by registered post, delivery against receipt, courier service or transmitted by telex, telefax or other means of telecommunication, including electronic communication, that provide a record of its transmission.] **[7]**

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period. **[8]**

Remarks on draft article 2

6. Paragraph (1) reflects the decisions of the Working Group at its forty-eighth session to retain the word "physically" and to replace the reference to a mailing address by mention of a "designated address" (A/CN.9/646, paras. 80-82). The Working Group might wish to consider whether paragraph (1) should expressly address cases where attempts to deliver a notice have been made but were unsuccessful, by amending paragraph (1) as shown in bold: "For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address. **If** none of these can be found after making reasonable inquiry, **such delivery shall be made or attempted** at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day **of such delivery or attempted delivery**."

7. The provisions of paragraph (1 bis) were not contained in the 1976 version of the Rules. That paragraph seeks to reflect the decision of the Working Group to expressly include language which authorizes both electronic as well as other traditional forms of communication (A/CN.9/614, para. 39). The proposed draft, which corresponds to commonly adopted provision in other set of arbitration rules, does not however provide a fully satisfactory solution to the question of evidencing receipt or dispatch of communication. The Working Group might wish to consider whether such a provision should be added in the Rules, considering that paragraph (1) encompasses all sorts of communication, whether traditional or electronic, and that the absence of such a provision does not seem to have created difficulties in the past.

8. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646, para. 84).

Notice of arbitration and response

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party or parties (hereinafter called the "respondent") a notice of arbitration. **[9]**

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent. **[10]**

3. The notice of arbitration shall include the following: **[11]**

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

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

(a bis) A proposal for the appointment of a sole arbitrator referred to in article 6, paragraph 1;

(b) Notification of the appointment of an arbitrator referred to in article 7 or article 7 bis [;

(c) The statement of claim referred to in article 18.] **[12]**

5. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall [, to the extent possible,] include: **[13]**

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

(b) The name and contact details of each respondent;

(c) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraph 3 (c), (d), (e) and (f);

(d) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

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

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

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

(c) Notification of the appointment of an arbitrator referred to in article 7 or article 7 bis;

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

7. The constitution of the arbitral tribunal shall not be impeded by: (a) any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal; or (b) failure by the respondent to communicate a response to the notice of arbitration. In either circumstance, the arbitral tribunal shall proceed as it considers appropriate. **[14]**

Remarks on draft article 3

9. The words "or parties" have been added in paragraph (1) to encompass multi-party arbitration, as decided by the Working Group at its forty-sixth session (A/CN.9/619, para. 51).

10. Paragraph (2) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group.

11. Paragraph (3) includes modifications agreed by the Working Group at its forty-sixth session (A/CN.9/619, paras. 52 and 54).

12. The Working Group agreed at its forty-sixth session to further discuss whether the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in article 18 (A/CN.9/619, para. 57). If that option is retained, paragraph 4 (c) could be deleted, and the following provision could be added to article 18: "The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim" (see document A/CN.9/WG.II/WP.151/Add.1, para. 1). A similar solution would then be proposed in relation to the response to the notice of arbitration, where the respondent would be given the opportunity to decide whether its response to the notice of arbitration should be treated as a statement of defence, under article 19. The following paragraph would be added to article 19: "The respondent may elect to treat its response to the notice of arbitration in article 3, paragraph 5 as a statement of defence" (see document A/CN.9/WG.II/WP.151/Add.1, para. 2).

13. Paragraphs (5) and (6), which cover response to the notice of arbitration were not contained in the 1976 version of the Rules and the draft takes account of comments made in the Working Group that more precise language should be used (A/CN.9/619, paras. 58 and 60).

14. The provisions of paragraph (7) were not contained in the 1976 version of the Rule. That paragraph corresponds to the decision of the Working Group to add a provision indicating that an incomplete notice of arbitration or the failure by the respondent to communicate a response to the notice of arbitration should not prevent the constitution of the arbitral tribunal and that the consequences of such failures should be a matter to be determined by the arbitral tribunal (A/CN.9/619, paras. 55 and 56).

Representation and assistance

Article 4 [15]

The parties may be represented or assisted by persons chosen by them. The names and addresses of such persons must be communicated to all parties. Such communication must specify whether the appointment is being made for purposes of representation or assistance. [Where a person is to act as a representative of a party, the arbitral tribunal, itself or upon the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine].

Remarks on draft article 4

15. Article 4 includes the modifications agreed by the Working Group at its forty-sixth session to replace the words "of their choice" in the first sentence with the words "chosen by them" (A/CN.9/619, para. 63), and to delete the words "in writing" in the second sentence as the manner in which communication should be exchanged among the parties and the arbitral tribunal is already dealt with under article 2 (A/CN.9/619, para. 68). The Working Group might wish to consider whether the last sentence on the communication of proof of authority, which constitutes an addition compared to the 1976 version of the Rules, is needed (A/CN.9/619, paras. 64-67).

Designating and appointing authorities

Article 4 bis [16]

1. Unless the appointing authority has already been agreed, a party may at any time propose the name or names of one or more institutions or persons [including the Secretary-General of the Permanent Court of Arbitration (hereinafter called the "the PCA"),] one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the members of the arbitral tribunal within 30 days after it receives a party's request to do so under article 39, paragraph 4, any party may request the Secretary-General of the PCA to make that decision.

4. In exercising its functions under these Rules, the appointing authority may require from any party the information it deems necessary and, to the extent it considers possible, it shall give the parties an opportunity to present their views. All communications between a party and the appointing authority or the Secretary-General of the PCA shall also be provided by the sender to all other parties.

5. When the appointing authority is requested to appoint an arbitrator pursuant to articles 6, 7, 7 bis, or 13, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

6. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Remarks on draft article 4 bis

16. Article 4 bis was not contained in the 1976 version of the Rules. Its purpose is to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration. The draft seeks to better clarify the role of the designating and appointing authorities, as discussed by the Working Group at its forty-sixth session (A/CN.9/619, paras. 69-78). The Working Group might wish to consider whether paragraph (1) should include a reference to the Secretary-General of the PCA as one institution which could serve as appointing authority.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 5 [17]

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

Option 2: [If the parties have not previously agreed on the number of arbitrators, one arbitrator shall be appointed, unless either the claimant, in its notice of arbitration, or the respondent, within 30 days after receipt of the notice of arbitration, requests that there be three, in which case three arbitrators shall be appointed.]

Remarks on draft article 5

17. Article 5 contains alternative proposals on the number of arbitrators, reflecting discussions at the forty-sixth session of the Working Group (A/CN.9/619, paras. 79-82).

Appointment of arbitrators (Articles 6 to 8)

Article 6 [18]

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority.

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

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

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

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

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

Remarks on draft article 6

18. Article 6 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/646, para. 84). Consistent with the recommendation of the Working Group to assess further possible simplification that could be made following the adoption of draft article 4 bis, article 6, paragraphs (1) and (2) of the 1976 version of the Rules have been merged and paragraph (4) deleted as its content is covered by draft article 4 bis, paragraph (6) (A/CN.9/619, para. 69).

Article 7 [19]

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

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

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

Remarks on draft article 7

19. Article 7 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/646, para. 85). Article 7, paragraph (2) (b) as contained in the 1976 version of the Rules has been deleted, for the same reason as mentioned under paragraph 18 above.

Article 7 bis [20]

1. For the purposes of article 7, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as

respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

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

3. In the event of any failure to constitute the arbitral tribunal under paragraphs 1 and 2, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Remarks on draft article 7 bis

20. Article 7 bis was not contained in the 1976 version of the Rules. The purpose of paragraph (1) is to address multi-party arbitration, and the draft seeks to clarify how arbitrators are to be appointed where there are multiple parties, as claimant or defendant, and the parties agreed to the appointment of three arbitrators. Paragraph (2) deals with situations where parties have agreed to appoint a number of arbitrators other than one or three, i.e. situations not covered by articles 6 and 7 (A/CN.9/619, para. 83). Paragraph (3) provides a solution in case of failure to constitute the arbitral tribunal in those situations, and includes the suggestions made in the Working Group (A/CN.9/619, paras. 88-91).

Remarks on article 8 of the 1976 version of the Rules

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

Challenge of arbitrators (Articles 9 to 12)

Article 9 [22]

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

Model statements of independence [23]

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

such circumstance that may subsequently come to my attention during this arbitration.

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

Remarks on draft article 9 and the model statements of independence

22. The Working Group adopted article 9 in substance at its forty-sixth session (A/CN.9/619, para. 95).

23. The model statements of independence were not contained in the 1976 version of the Rules. The purpose of including those statements in the Rules is to provide guidance on the required content of disclosure (A/CN.9/619, para. 96).

Article 10 [24]

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

Remarks on draft article 10

24. Article 10 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 100).

Article 11 [25]

1. A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to all other parties, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification [shall be in writing and] shall state the reasons for the challenge. **[26]**

3. When an arbitrator has been challenged by a party, [all other parties] [the party or parties that appointed the challenged arbitrator] may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6, 7 or 7 bis shall be used in full for the

appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise its right to appoint or to participate in the appointment. **[27]**

Remarks on draft article 11

25. Article 11 was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 101).

26. The Working Group might wish to consider whether the words "shall be in writing and" within brackets in paragraph (2) should be deleted, as the manner in which the information should be exchanged is already dealt with under article 2.

27. The Working Group might wish to consider under paragraph (3) whether, when an arbitrator has been challenged by a party, all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator. The same question arises in relation to article 12, paragraph (1) (see below, paragraph 28).

Article 12

1. If, within 15 days from the date of the notice of challenge, [any other party] [the party or parties that appointed the challenged arbitrator] does not agree to the challenge and the challenged arbitrator does not withdraw, the party making the challenge may pursue the challenge. In that case, it shall seek a decision on the challenge by the appointing authority within 30 days from date of the notice of challenge. If no appointing authority has been appointed or designated, a decision may be sought within 15 days from the appointment or designation of the appointing authority. **[28]**

2. The appointing authority may reject the challenge if the challenging party ought reasonably to have known the grounds for challenge at an earlier stage of the procedure. **[29]**

Remarks on draft article 12

28. The bracketed texts in paragraph (1) reflect the question whether all parties should be given a right to oppose to the challenge, or whether that right should be limited to the party that appointed the challenged arbitrator (see above, paragraph 27). Paragraph (1) reflects the decision of the Working Group to shorten time limits for challenge (A/CN.9/619, para. 102). Article 12, paragraphs (1) (a) to (c) of the 1976 version of the Rules which referred to the appointing authority are deleted, as that matter is generally dealt with under article 4 bis (A/CN.9/619, para. 69).

29. Paragraph (2) was not contained in the 1976 version of the Rules. Its purpose is to provide guidance to the appointing authority, with a view to limiting dilatory tactics where a party has abused the challenge procedure repeatedly. Article 12, paragraph (2) of the 1976 version of the Rules on the appointment of a substitute arbitrator if the challenge is sustained has been placed under article 13, which deals with the replacement of an arbitrator (see below, paragraph 32).

Replacement of an arbitrator

Article 13

1. Subject to paragraphs 2 and 3, in the event that it is necessary to replace an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment. **[30]**

2. In the event that an arbitrator has resigned for invalid reasons or refuses or fails to act, the appointing authority may, if so requested by a party, either replace that arbitrator or authorize the other arbitrators to proceed with the arbitration and make any decision or award. **[31]**

3. In the event of successful challenge under article 12 or replacement of an arbitrator according to paragraph 2, the appointing authority shall decide whether to apply the procedure for the appointment of an arbitrator provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced or to proceed itself to the appointment of the substitute arbitrator. **[32]**

Remarks on draft article 13

30. Paragraph (1) establishes a general rule on the appointment of a substitute arbitrator, "when it is necessary to replace an arbitrator", regardless of the cause for such replacement. The specific situations of resignation for invalid reasons or successful challenge are dealt with under paragraphs (2) and (3). The last sentence of that paragraph is proposed to be added for the sake of consistency with article 11, paragraph (3).

31. The Working Group might wish to consider whether paragraph (2) reflects the observations made in the Working Group at its forty-sixth session (A/CN.9/619, paras. 107-112).

32. Paragraph (3) was formerly placed under article 12, paragraph (2) of the 1976 version of the Rules (see above, paragraph 29). It is proposed to locate that provision under article 13 as its content relates to the appointment of a replacement arbitrator. It is recalled that the Working Group agreed at its forty-sixth session that that provision should permit the appointing authority directly to appoint an arbitrator if it considered that the circumstances of the arbitration were such that a party should be deprived of its right to appoint a replacement arbitrator (A/CN.9/619, paras. 103 and 105).

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

Article 14 [33]

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

Remarks on draft article 14

33. Article 14 has been adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 113). The reference to articles 11 to 13 which was contained in the 1976 version of that article has been deleted, as it might not be necessary to limit the application of that provision.

Section III. Arbitral proceedings

General provisions

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at 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. **[34]**

1 bis. The arbitral tribunal may, at any time, extend or abridge: (a) any period of time prescribed under the Rules; or (b) after inviting the parties to express their views, any period of time agreed by the parties. **[35]**

2. 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.

3. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties. **[36]**

[4. The arbitral tribunal may, on the application of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement and has consented to be joined. The arbitral tribunal may make an award in respect of all parties so involved in the arbitration.] **[37]**

Remarks on draft article 15

34. Paragraph (1) was adopted in substance by the Working Group at its forty-sixth session (A/CN.9/619, para. 114).

35. Paragraph (1 bis) was not included in the 1976 version of the Rules. It reflects the decision of the Working Group that the Rules should establish the authority of the arbitral tribunal to modify the periods of time prescribed in the Rules but not to alter the general time frames that might be set by the parties in their agreements without prior consultation with the parties (A/CN.9/619, para. 136).

36. Paragraphs (2) and (3) were adopted in substance by the Working Group at its forty-sixth session. The word "communication" in paragraph (3) is proposed in

replacement of the words "documents and information supplied", for the sake of consistency with the terminology used in the Rules.

37. The Working Group agreed that a provision on joinder would constitute a major modification to the Rules, and noted the diverging views, which were expressed on that matter (A/CN.9/619, paras. 121-126). The Working Group agreed to consider that matter at a future session, on the basis of information to be provided by arbitral institutions to the Secretariat on the frequency and practical relevance of joinder in arbitration (A/CN.9/619, para. 126). Following consultations, the Secretariat received comments from the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA") and the Swiss Arbitration Association ("ASA"). In an article entitled "Multiparty and Multicontract Arbitration: Recent ICC Experience",[4] the ICC briefly outlines certain aspects of the ICC's experience in relation to joinder. The ICC has generally taken a conservative view that, under the rules, only the claimant is entitled to identify the parties to the arbitration.[5] However a more moderate approach has been reflected in three recent cases in which the ICC joined a new party to the arbitral proceedings at the request of a respondent. It appears that the ICC may only allow a new party to be joined in the arbitration at the respondent's request if two conditions are met. First, the third party must have signed the arbitration agreement on the basis of which the request for arbitration has been filed. Second, the respondent must have introduced claims against the new party. The LCIA informed the Secretariat that applications for joinder under article 22.1 (h) of the LCIA Rules of Arbitration[6] have been made in approximately ten cases since that provision was introduced in the Rules in 1998, and those applications have rarely been successful. ASA reported that it favours a liberal solution such as the one contained in article 4 (2) of the Swiss rules,[7] which gives the arbitral tribunal the discretion to decide on the joinder of a third party after consulting with all the parties and taking into account all the relevant and applicable circumstances. The Swiss rules do not require that one of the parties to the

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[4] Multiparty and Multicontract Arbitration: Recent ICC Experience, by Anne Marie Whitesell and Eduardo Silva-Romero, published in the ICC International Court of Arbitration bulletin, 2003 Special Supplement – Publication 688 Complex Arbitration.

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

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

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

arbitration gives its consent to the participation of the third party to the arbitration. No decision on joinder under article 4 (2) of the Swiss rules has yet been reported.

Place of arbitration

Article 16 [38]

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, including the convenience of the parties. The award shall be deemed to be made at the place of arbitration.

2. Notwithstanding the provisions of paragraph 1, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any location it considers appropriate for consultations, hearings, meetings and deliberations.

Remarks on draft article 16

38. It was suggested in the Working Group that it might be necessary to distinguish between the legal and physical places of arbitration, and that modification of the terminology used would promote clarity (A/CN.9/619, para. 138). The proposed draft seeks to distinguish between the place of arbitration (meaning the legal seat) and the location where meetings could be held, in terms similar to those adopted under article 20 of the UNCITRAL Model Law on International Commercial Arbitration.

Language

Article 17 [39]

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 17

39. The deletion of the reference to “languages” in plural from the Rules, which was discussed by the Working Group during its forty-sixth session (A/CN.9/619, para. 145) might be understood as indicating that arbitrators should choose one language to be used in the arbitration proceedings. The Working Group might wish to consider whether it is advisable to delete that reference as parties from different countries are usually involved in international commercial arbitration and they may not necessarily all be familiar with one language. The use of several languages

therefore may be, under certain circumstances, a solution by which the arbitral tribunal may overcome the difficulties arising from the failure of the parties to choose a single language for the arbitration.