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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat*

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* The submission of this note was delayed due to the close proximity of this Working Group session to the 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 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 18 to 41 of the revised version of the Rules and includes draft additional provisions. Draft articles 1 to 17 are dealt with under A/CN.9/WG.II/WP.151.

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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 III – Arbitral proceedings

Statement of claim

Article 18 [1]

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim.

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

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

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

3. A copy of any contract, or other legal instrument, and of the arbitration agreement shall be annexed to the statement of claim. The statement of claim should, as far as possible, be accompanied by all documents and other evidentiary materials relied upon by the claimant, or contain references to them.

Remarks on draft article 18

1. Paragraphs (1), (2) and (3) reflect the modifications adopted by the Working Group at its forty-sixth session (A/CN.9/619, paras. 147-154). The last sentence of paragraph (1) is proposed to be added to deal with the situation where the claimant decides to treat its notice of arbitration as a statement of claim. Its purpose is to allow a claimant to postpone its decision on whether its notice of arbitration constitutes a statement of claim until the time the arbitral tribunal requires the claimant to submit its statement of claim, instead of having to make that decision at the time of the notice of arbitration. If that sentence is adopted by the Working Group, article 3, paragraph (4) (c) should then be deleted (see document A/CN.9/WG.II/WP.151, para. 12).

Statement of defence

Article 19

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration in article 3, paragraph 5 as a statement of defence. **[2]**

2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 18, paragraph 2). The statement

of defence should, as far as possible, be accompanied by all documents and other evidentiary material relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off [*option 1*: arising out of the same legal relationship, whether contractual or not.] [*option 2*: provided that it falls within the scope of the arbitration agreement.] **[3]**

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

Remarks on draft article 19

2. The last sentence of paragraph (1) is proposed to be added to deal with the situation where the respondent decides to treat its response to the notice of arbitration as its statement of defence (see document A/CN.9/WG.II/WP.151, para. 12).

3. The Working Group agreed that paragraph (3) should contain a provision on set-off and that the arbitral tribunal's competence to consider counterclaims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose and apply to a wider range of circumstances (A/CN.9/614, paras. 93 and 94; A/CN.9/619, paras. 157-160). To achieve that extension, in option 1 the words "arising out of the same contract", which were contained in the 1976 version of that paragraph are replaced with the words "arising out of the same legal relationship, whether contractual or not" (A/CN.9/619, para. 157). Option 2 reflects a proposal that the provision should not require that there be a connection between the claim and the counterclaim or set-off, leaving to the arbitral tribunal the discretion to decide that question (A/CN.9/619, para. 158).

Amendments to the claim or defence

Article 20 [4]

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

Remarks on draft article 20

4. The Working Group adopted draft article 20 in substance at its forty-sixth session (A/CN.9/619, para. 161). Consistent with a decision not to distinguish between arbitration "clause" and "agreement" (see article 3 (3) (c)), the words "arbitration clause" which appeared in the second sentence article 20 have been deleted. The words "or supplemented" are proposed to be added in the second

sentence for the sake of consistency with the wording adopted in the first sentence of article 20.

Pleas as to the jurisdiction of the arbitral tribunal

Article 21 [5]

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

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to a claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Remarks on draft article 21

5. Draft paragraph (1) reflects the view expressed in the Working Group that article 21, paragraphs (1) and (2), should be redrafted along the lines of article 16, paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") in order to make it clear that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction (A/CN.9/614, para. 97). Paragraph (2) was adopted by the Working Group in substance (A/CN.9/619, para. 163). Paragraph (3), which replaces article 21, paragraph (4) of the 1976 version of the Rules, contains a provision consistent with article 16, paragraph (3) of the Model Law, in accordance with the Working Group discussions (A/CN.9/614, paras. 99-102; A/CN.9/619, para. 164; A/CN.9/641, para. 18).

Further written statements

Article 22 [6]

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

Remarks on draft article 22

6. Article 22 is reproduced without modification from the 1976 version of the Rules and was adopted by the Working Group in substance at its forty-seventh session (A/CN.9/641, para. 19).

Periods of time

Article 23 [7]

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

Remarks on draft article 23

7. Article 23 is reproduced without modification from the 1976 version of the Rules and was adopted by the Working Group in substance at its forty-seventh session (A/CN.9/641, para. 20).

Evidence

Article 24 [8]

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. [Deleted]

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Remarks on draft article 24

8. Paragraphs 1 and 3, which are reproduced without modification from the 1976 version of the Rules, were adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, paras. 21 and 26). Article 24, paragraph (2) of the 1976 version of the Rules has been deleted in accordance with a widely prevailing view in the Working Group that it was not common practice for an arbitral tribunal to require parties to present a summary of documents (A/CN.9/641, paras. 22-25).

Hearings, witnesses and experts [9]

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof. **[10]**

1 bis. Witnesses and experts presented by the parties may be heard under conditions set by the arbitral tribunal. For the purposes of these Rules, witnesses include any individual testifying to the arbitral tribunal on any issue of fact, whether or not that individual is a party to the arbitration. **[11]**

2. If witnesses and experts are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to all other parties the names and addresses of the witnesses and experts it intends to present, the subject upon and the languages in which such witnesses and experts will present their statements.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing. **[10]**

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses, save when the witness is a party to the arbitration. The arbitral tribunal is free to determine the manner in which witnesses and experts are examined. **[12]**

5. Evidence of witnesses and experts may also be presented in the form of written statements signed by them and oral statements by means that do not require their presence at the hearing. **[13]**

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered. **[10]**

Remarks on draft article 25

9. In order to reflect the decision of the Working Group to clarify that article 25 deals with witnesses and experts appointed by the parties, the title of articles 24 and 25 are proposed to be modified (A/CN.9/641, paras. 27 and 61). In the 1976 version of the Rules, articles 24 and 25 are titled “Evidence and hearings”. The Working Group might wish to consider whether, in the interest of clarity, article 24 could be titled “Evidence”, and article 25 “Hearing, witnesses and experts”. The reference to experts is proposed to be inserted where appropriate in article 25 to clarify that it applies to expert witnesses, as suggested by the Working Group at its forty-seventh session (A/CN.9/641, para. 27).

10. Paragraphs (1), (3) and (6) are reproduced without modification from the 1976 version of the Rules and were adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, paras. 28, 39 and 45).

11. Paragraph (1 bis) reflects the decision of the Working Group to include a provision confirming the discretion of an arbitral tribunal to set out conditions under which it might hear witnesses and experts and establishing that any person, including a party to the arbitration who testified to the arbitral tribunal should be treated as a witness under the Rules (A/CN.9/641, para. 38). This paragraph is placed before paragraph (2) to take account of the observation that it is preferable first to describe the conditions under which witnesses and experts could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses and experts as currently laid out in paragraph (1 bis), and only thereafter to expand on procedural details regarding witnesses and experts (A/CN.9/641, para. 34). The words “For the purposes of these Rules” are inserted to provide a more neutral standard, particularly in States where parties are prohibited from being heard as

witnesses (A/CN.9/641, paras. 31 and 38). The provision does not include examples of categories of witnesses, in order to avoid the risk of restrictive interpretation (A/CN.9/641, para. 32).

12. The words "save when the witness is a party to arbitration" are proposed to be added to the last sentence of paragraph (4) to take account of the fact that a party, appearing as a witness should not be requested to retire during the testimony of other witnesses as it might affect that party's ability to present its case (A/CN.9/641, para. 41).

13. The Working Group might wish to consider whether the proposed modification to paragraph (5) addresses the suggestion that paragraph (5) should state not only that evidence of witnesses and experts might be presented in the form of a signed written statement but also that oral statements might be presented by means that did not require their physical presence (A/CN.9/641, para. 43).

Interim measures

Article 26 [14]

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

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

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

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

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

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

3. The party requesting an interim measure under paragraph 2 (a), (b) and (c) or a temporary order referred to under paragraph 5 shall satisfy the arbitral tribunal that:

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

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

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

5. If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from issuing a temporary order that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the requested measure. **[15]**

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

7. The arbitral tribunal may require the party requesting an interim measure or applying for an order referred to in paragraph 5 to provide appropriate security in connection with the measure or the order.

8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure or the order referred to in paragraph 5 was requested or granted.

9. The party requesting an interim measure or applying for an order referred to in paragraph 5 may be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

10. A request for interim measures or an application for an order referred to in paragraph 5 addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement. **[16]**

Remarks on draft article 26

14. Paragraphs 1 to 4 and 6 to 9 are modelled on the provisions on interim measures contained in chapter IV A of the Model Law. The Working Group adopted in substance those paragraphs (A/CN.9/641, paras. 46-51), save for the addition of the reference to the "order referred to in paragraph (5)", which has been inserted for the sake of consistency with the proposed new paragraph (5).

15. The Working Group noted that chapter IV A of the Model Law deals with preliminary orders and agreed to consider a draft paragraph expressing the notion that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure that has been requested and that may be ordered by the arbitral tribunal (A/CN.9/641, para. 60). It is recalled that the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15, paragraph (1), the Rules, in and

of themselves, did not prevent the arbitral tribunal from issuing preliminary orders (A/CN.9/641, para. 59).

16. Paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules which the Working Group agreed to retain in the Rules (A/CN.9/641, para. 52). A reference to "an application for an order referred to in paragraph 5" is proposed to be added for the sake of consistency with paragraph (5).

Experts appointed by the arbitral tribunal

Article 27 [17]

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

4. At the request of any party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing any party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

Remarks on draft article 27

17. The addition of the words "appointed by the arbitral tribunal" to the title of article 27 seeks to clarify that the focus of article 27 is on tribunal-appointed experts (A/CN.9/641, para. 61).

Default

Article 28

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause: **[18]**

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the respondent has submitted a counterclaim;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself

as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

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

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it. **[19]**

Remarks on draft article 28

18. The Working Group may wish to consider whether paragraph (1) should be restructured in two parts: subparagraph (a) deals with the failure of the claimant to submit its statement of claim; subparagraph (b) addresses the situation where the respondent has failed to communicate its statement of defence, and applies equally to the situation where the claimant has failed to communicate a statement of defence in response to a counterclaim. That proposal follows the structure of article 25 of the Model Law (A/CN.9/641, para. 62).

19. In paragraph (3), the word "documentary" is proposed to be replaced with the words "documents, exhibits or other" to reflect the decision of the Working Group to align wordings in articles 24 (3) and 28 (3) (A/CN.9/641, para. 64).

Closure of hearings

Article 29 [20]

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

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

Remarks on draft article 29

20. Article 29 is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, para. 65).

Waiver of right to object

Article 30 [21]

A party which knows that any provision of these Rules or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived its right to object.

Remarks on draft article 30

21. The modifications to article 30 reflect the decision of the Working Group to align the language contained in article 30 with that in article 4 of the Model Law (A/CN.9/641, para. 67).

Section IV. The award

Decisions

Article 31 [22]

1. *Option 1*: When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of the arbitrators.

Option 2, Variant 1: When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made by the presiding arbitrator alone. *Variant 2*: When there is more than one arbitrator and the arbitrators are not able to reach a majority on the substance of the dispute, any award or other decision shall be made, if previously agreed by the parties, by the presiding arbitrator alone.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Remarks on draft article 31

22. Given the absence of consensus on the issue of decision-making process by the arbitral tribunal, the Working Group requested the Secretariat to prepare alternative drafts. Option 1 follows the language contained in article 29 of the Model Law by referring to the majority approach with an opt-out provision for the parties (A/CN.9/641, paras. 73 and 76). Option 2, variant 1 provides that when there is no majority, the award will be decided by the presiding arbitrator alone (A/CN.9/641, para. 71). Variant 2 reflects the proposal that the presiding arbitrator solution should only apply if the parties agreed to opt into that solution (A/CN.9/641, para. 75).

Form and effect of the award

Article 32

1. The arbitral tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the arbitral tribunal. [23]

2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out all awards without delay. Insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree. [24]

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given. **[25]**

4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature. **[26]**

5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. **[27]**

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal. **[28]**

7. [Deleted] **[29]**

Remarks on draft article 32

23. As agreed by the Working Group, qualifications regarding the nature of the award such as "final", "interim", or "interlocutory" are avoided and paragraph (1) clarifies that the arbitral tribunal may render awards on different issues during the course of the proceedings. It is based on article 26.7 of the Rules of the London Court of International Arbitration (A/CN.9/641, paras. 78-80). The Working Group may wish to consider whether a more general statement would be preferable, along the following lines: "All awards shall have the same status and affect."

24. The Working Group considered whether the first sentence of paragraph (2) should be amended to clarify that the word "binding" is used to refer to the obligation on the parties to comply with the award and that the award is "final" for the arbitral tribunal which is not entitled to revise it (A/CN.9/641, paras. 81-84). The Working Group might wish to further consider the following options (A/CN.9/641, para. 82): to retain the words "final and binding" as they are commonly used in almost all rules of arbitration centres and do not seem to have created difficulties; to omit the word "final", and provide that: "An award shall be made in writing and shall be binding on the parties", along the lines of the provision contained in article 28 (6) of the rules of arbitration of the International Chamber of Commerce; to explain the meaning of the word "final", by adopting wording along the following lines: "An award shall be made in writing and shall be binding on the parties. Once rendered, an award shall not be susceptible to revision by the arbitral tribunal, except as provided in article 26 (6) for interim measures rendered in the form of an award, article 35 and article 36."

In accordance with a proposal made in the Working Group, the language inserted in paragraph (2) seeks to make it impossible for parties to use recourse to courts that could be freely waived by the parties but not to exclude challenges to the award on grounds for setting aside the award, except if otherwise agreed by the parties (A/CN.9/641, paras. 85-92).

25. Paragraph (3) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, para. 93).

26. The Working Group agreed to modify the first sentence of paragraph (4) for the sake of consistency with article 16, paragraph (4) of the Rules which refers to the place where the award is "deemed" to be made. In the second sentence, the words "three arbitrators" are proposed to be replaced with the words "more than one arbitrator" to take account of the situation permitted under article 7 bis where parties may decide that the arbitral tribunal is to be composed of a number of arbitrators other than one or three (A/CN.9/641, para. 94).

27. Paragraph (5) has been modified to take account of the situation where a party is under a legal obligation to disclose (A/CN.9/641, paras. 95-99).

28. Paragraph (6) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group at its forty-seventh session (A/CN.9/641, para. 100).

29. Article 32, paragraph (7) of the 1976 version of the Rules has been deleted as agreed by the Working Group at its forty-seventh session for the reason that it was unnecessary to the extent it provided that the arbitral tribunal should comply with a mandatory registration requirement contained in the relevant national law (A/CN.9/641, para. 105).

Applicable law, *amiable compositeur*

Article 33

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [*variant 1*: with which the case has the closest connection] [*variant 2*: which it determines to be appropriate]. **[30]**

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. **[31]**

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of any applicable contract and shall take into account any usage of the trade applicable to the transaction. **[32]**

Remarks on draft article 33

30. The Working Group agreed that the arbitral tribunal should apply the rules of law designated by the parties and that therefore the words "rules of law" should replace the word "law" in the first sentence of article 33 (A/CN.9/641, para. 107). In relation to the second sentence of paragraph (1), diverging views were expressed as to whether the arbitral tribunal should be given the same discretion to designate "rules of law" where the parties had failed to make a decision regarding the applicable law. It was suggested that the Rules should be consistent with article 28, paragraph (2) of the Model Law which refers to the arbitral tribunal applying the "law" and not the "rules of law" determined to be applicable (A/CN.9/641, paras. 108 and 109). The Working Group expressed broad support for wordings along the lines of variants 1 or 2 contained in the second sentence of paragraph (1), which were said to offer the opportunity to modernize the Rules by allowing the

arbitral tribunal to decide directly on the applicability of international instruments. Variant 2 reflects a proposal made to provide the arbitral tribunal with a broader discretion in the determination of the applicable instrument (A/CN.9/641, paras. 106-112).

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

32. Paragraph (3) has been amended to ensure broader applicability of the Rules in situations where a contract was not necessarily the basis of the dispute by referring to the words "any applicable" in relation to "contract" and "any" in relation to "usage of trade".

Settlement or other grounds for termination

Article 34 [33]

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 6, shall apply.

Remarks on draft article 34

33. Consistent with its decision to encompass multi-party arbitrations, the Working Group agreed to replace the word "both parties" by "the parties" in paragraph 1 (A/CN.9/641, para. 114).

Interpretation of the award

Article 35

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award. **[34]**

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 6, shall apply.

Remarks on draft article 35

34. The modifications in paragraph (1) are consistent with the decision of the Working Group to encompass multi-party arbitrations (A/CN.9/641, para. 115).

Correction of the award

Article 36 [35]

1. Within 30 days after the receipt of the award, any party, with notice to the other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors or omissions of a similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 6, shall apply.

Remarks on draft article 36

35. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 116). The Working Group might wish to consider whether paragraph (2) should include a time limit within which the arbitral tribunal should make corrections, along the lines of the provisions contained in article 35, paragraph (2).

Additional award

Article 37 [36]

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified, it shall complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make an additional award.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 6, shall apply.

Remarks on draft article 37

36. The modifications in paragraph (2) reflect the discussion of the Working Group for allowing the arbitral tribunal to hold further hearings and seek further evidence where necessary (A/CN.9/641, paras. 117-121).

Costs (articles 38 to 40)

Article 38 [37]

The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for representation and assistance of the parties if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the PCA.

Remarks on draft article 38

37. The Working Group agreed at its forty-eighth session to add the word "reasonable" in subparagraphs (b), (c), and (d) (A/CN.9/646, para. 18), to delete the word "legal", appearing before the word "representation" in subparagraph (e) and to replace the words "successful party" with the word "parties" in subparagraph (e) (A/CN.9/646, para. 19).

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority has issued or endorsed a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case. **[38]**

3. Promptly after its constitution, the arbitral tribunal shall communicate to the parties the methodology which it proposes to follow for the determination of the fees of its members. In its decision on the costs of arbitration pursuant to article 38, the arbitral tribunal shall set forth the computation of the amounts due, consistent with that methodology. **[39]**

4. Within 15 days from the date any proposal or decision is communicated by the arbitral tribunal to the parties, any party may refer the matter to the appointing authority, or if no appointing authority has been agreed upon or designated, to the Secretary-General of the PCA, for final determination in accordance with the criteria in paragraph (1). Any

modification to the fees decided by the appointing authority or the Secretary-General of the PCA shall be deemed to be part of the award. **[39]**

Remarks on draft article 39

38. The words "or endorsed" are proposed to be added after the word "issued" to cover situations where an appointing authority applies a schedule of fees defined by other authorities or rules, and that it has endorsed.

39. Paragraphs (3) and (4) were not contained in the 1976 version of the rules, and they constitute new rules on the question of fees and control by the appointing authority or the Secretary-General of the Permanent Court of Arbitration over the fees charged by arbitrators. The Working Group might wish to consider whether these provisions reflect the decision of the Working Group at its forty-eighth session (A/CN.9/646, paras. 20, 21 and 24-27).

Article 40 **[40]**

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. [Deleted]

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37. [The arbitral tribunal may charge the costs referred to in article 38 (b) to (f) relating to interpretation or correction or completion of its award under articles 35 to 37.] **[41]**

Remarks on draft article 40

40. In paragraph (1), the words "or parties" have been added to take account of multi-party arbitration. As decided by the Working Group at its forty-eighth session, paragraph (2) has been deleted (A/CN.9/646, paras. 28-36).

41. At its forty-eighth session, the Working Group agreed to further consider whether paragraph (4) should be kept. The second sentence of that paragraph in brackets reflects a proposal made in the Working Group that the scope of paragraph (4) should be limited to fees, without affecting the ability of the arbitral tribunal to charge other additional costs as listed in article 38 (A/CN.9/646, paras. 31-36).

Deposit of costs

Article 41 [42]

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Remarks on draft article 41

42. The Working Group adopted article 41 in substance at its forty-eighth session (A/CN.9/646, para. 37).

Draft additional provisions

General Principles [43]

Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Remarks

43. The Working Group agreed at its forty-eighth session to consider whether a gap-filling provision should be included in the Rules (A/CN.9/646, paras. 50-53).

Liability of arbitrators [44]

The members of the arbitral tribunal, the appointing authority, the Secretary-General of the PCA and experts appointed by the tribunal shall not be liable for any act or omission in connection with the arbitration, to the fullest extent permitted under the applicable law.

Remarks

44. The provision on liability seeks to address comments made in the Working Group at its forty-eighth session that the provision establishing immunity should cover the broadest possible range of participants in the arbitration process and preserve exoneration in cases where the applicable law allows contractual exoneration from liability, to the fullest extent permitted by such law (A/CN.9/646, paras. 38-45).