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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Compilation of comments by Governments and international organizations

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* Submission of this note was delayed because of its late receipt.

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A. Comments received from Governments

Belarus

[Original: Russian]
[Date: 7 May 2010]

The Ministry of Foreign Affairs of Belarus and the International Arbitration Court of the Belarusian Chamber of Commerce and Industry have considered the draft revised UNCITRAL Arbitration Rules (hereinafter, "the Rules").

Overall, Belarus has no objection to the revision of the Rules, which are used on a mutual voluntary basis by economic actors who are parties to an arbitral dispute. At the same time, we wish to transmit a number of comments, which the Commission may choose to take into account when the text of the draft Rules is considered.

Concerning the definition in the draft model arbitration clause for contracts (paragraph 28 of A/CN.9/703/Add.1) of the appointing authority, the number of arbitrators, the place of arbitration and the language to be used in the arbitral proceedings, we recommend that these issues should be settled by agreement between the parties to the arbitral proceedings. Such an approach will allow the views of the parties to a dispute to be taken more fully into account when the arbitration clause is drafted.

We propose the following wording for article 17, paragraph 2: "The arbitral tribunal may not, after inviting the parties to express their views, extend or abridge the period of time prescribed under these Rules or agreed by the parties." It is reasonable to limit the authority of the arbitral tribunal in this manner, since a tribunal, by its very nature, acts solely at the will of the parties to a dispute and, that being the case, should not deprive them of the possibility of influencing the length of individual stages of the proceedings.

The second sentence of article 5 should read as follows: "The credentials of such persons (representatives) must be certified in due form in accordance with the private law of the country of arbitration, and their names and addresses must be communicated to all parties and to the arbitral tribunal".

We propose that, in article 27, paragraph 4, the words "materiality and weight" should be deleted. Where evidence is concerned, the formal characteristics of admissibility and relevance are sufficient. The very fact that the evidence will subsequently be evaluated during the arbitral proceedings presupposes that its materiality and weight will be examined in the context of the specific dispute.

In article 35, paragraph 1, the word "appropriate" should be replaced with "applicable", and, in paragraph 3 of the article, the second occurrence of the word "any" should be replaced with "the". Article 35 governs the procedure for the application of foreign law in arbitral proceedings. The application by the tribunal of appropriate law requires delimitation: as a rule, the tribunal must use a specific connecting factor to determine which law is applicable. Establishing such a

stipulation will make it possible to limit the subjectivity of the tribunal's approach to the dispute and to achieve greater objectivity in the application of rules of foreign law.

Malaysia

[Original: English]
[Date: 5 May 2010]

The Permanent Mission of Malaysia wishes to submit proposed amendments to draft article 34 (2).

The proposed amendment is as follows: "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 they may validly do so~~ By adopting these Rules, the parties waive their right to initiate any form of appeal, or review or recourse regarding an award to any court or other competent authority, as far as permitted under the applicable law, except for an application requesting the setting aside of an award, and proceedings regarding execution and enforcement of an award."

The justification for these amendments are as follows: (i) to state the structure and obligation of the said article to parties concerned in the arbitration proceeding more succinctly and (ii) to also ensure that the provision of the article safeguards the rights of those concerned and not be in opposition to domestic or applicable laws.

However, we would like to state that the proposed amendment is subject to views from other UNCITRAL members, if any, at the 43rd session of the Commission.

Netherlands

[Original: English]
[Date: 5 May 2010]

First of all, the Netherlands expresses its gratitude to the UNCITRAL Secretariat for its excellent work with regard to the present revised draft.

Only some articles will be commented on below. It concerns mainly provisions which have not been fully discussed or with respect to which disagreement remained after the Working Group session in New York last February.

Article 2 (1) (b): The phrase "is otherwise capable of being retrieved" might be deleted without any loss of power say, in the opinion of the Netherlands.

The same applies to the adjective "previously", which could even lead to a misunderstanding, slightly suggesting that notice to a former address designated by the addressee would be sufficient.

On the other hand, the phrase put in square brackets in the present draft ("for the purpose of receiving such a notice") can be useful. By this phrase addresses can be excluded as inappropriate if they are only designated for a specific purpose of another nature than communication in arbitration proceedings, which may include addresses of which the addressee is not conscious anymore.

All this leads to the following proposal for the text of article 2 (1) (b): “deemed to have been received if it is delivered at the habitual residence, place of business or at an address designated by the addressee for the purpose of receiving such a notice.”

Articles 11-14: The present heading of articles 11-13 reads “Disclosures by and challenge of arbitrators”. Users of the Arbitration Rules will not immediately think that in one of these provisions the event is dealt with in which an arbitrator fails to act or is de jure or de facto not able to perform, but still that is what article 12 (3) does. This problem can be solved very simply. The text of article 12 (3) can become a separate provision, notably article 13 (new) with a heading such as “Failure to act and impossibility to perform”; the present articles 13-14 on the replacement of an arbitrator can be combined into a new article 14.

Unlike the Arbitration Rules 1976, neither the present draft article 14, nor any other provision of the present draft does give an answer to the question which events can justify the replacement of an arbitrator. This problem can be solved, more or less, along the lines of article 15 of the Model Law. The first phrase of article 14, as it stands now, could be supplemented in such a way that it reads as follows: “Subject to paragraph (2), in any event where the mandate of an arbitrator terminates due to his or her death, challenge, failure to act or impossibility to perform, revocation of his or her mandate by agreement of the parties, his or her withdrawal from office or due to any other reason, a substitute arbitrator shall be appointed or chosen (…).”

Article 34 (2), third sentence: The text as it stands now provides a waiver insofar as the parties may validly do so “by adopting these Rules”. The quoted words might be deleted. On the other hand it may be useful to add according to which domestic law the question of the validity has to be considered, being the law of the place of arbitration.

Since the Working Group is of the opinion that the waiver should not also comprise the setting aside (see A/CN.9/688, paragraph 106), at least the first phrase of the passage in square brackets in the present draft article 34 (2), third sentence at the end, providing that the parties do not waive their right to an application for setting aside, deserves adoption. Linguistic problems can be met by using, in all official languages, the same words as in the respective authentic texts of article V (1) (e) of the New York Convention and article 34 of the Model Law.

For clarity’s sake it seems appropriate to explicitly mention the words “review” and “recourse” as has been done in square brackets in the present draft article 34 (2), third sentence. The second phrase of the passage in square brackets in the present draft article 34 (2), third sentence at the end, excepting procedures regarding execution and enforcement of an award as object of a waiver, does not seem to be useful. This kind of procedures cannot be considered as forms of appeal, review or recourse, so there is no need for an exception to the possibility of waiver in this respect.

All this leads to the following proposal for the text of article 34 (2), third sentence: “Insofar as the parties may validly do so under the law of the place of arbitration, they waive their right to any form of appeal, review or recourse against an award to any court or other competent authority except for an application for the setting aside of an award.”

Article 41 (3) and some other provisions: Although the Working Group decided to add the words "and expenses" to "fees" where it appeared in draft article 41 (see A/CN.9/688, paragraph 120) the question arises whether this would be appropriate in article 41 (3), where the arbitral tribunal is instructed, promptly after its constitution, to inform the parties as to "how it proposes to determine its fees and expenses". What does this mean for the expenses? Is there any special method meant and if so which one? For fees the question is less difficult due to the relationship with article 41 (2) and the reference to the rates in article 41 (3) itself.

In article 43 (3) and some other provisions a task is referred to the appointing authority. In article 43 (4) this allocation is given the addition that "if no appointing authority has been agreed upon or designated, the Secretary-General of the PCA is authorized to perform that task". This addition is a correct one, because, indeed, there is not always an appointing authority involved. But if that is true, then the question arises whether this addition should not also be included in article 41 (3) and some other provisions such as article 13 (4) and 14 (2).

Article 41 (4): In the last sentence, article 41 (4) of the present draft deals with the implementation of adjustments by the appointing authority of the PCA. It provides, among others, for implementation by correction of the award "pursuant to article 38". The adjustments which are at stake here can hardly be considered errors or omissions in the sense of article 38. Another problem is that not all provisions of article 38 can be applied here. Therefore the following substitution of the last sentence is proposed: "Any such adjustments (…) in its award. If the award has already been issued, the adjustments shall be implemented in a correction to the award. Article 38, paragraph 3, shall apply."

Norway

[Original: English]
[Date: 6 May 2010]

The Norwegian Ministry of Justice appreciates that the UNCITRAL Working Group II (Arbitration and Conciliation) has completed its work on the revision of the UNCITRAL Arbitration Rules, and hopes that the final review and adoption of the revised Rules can take place at the forty-third session of the Commission this summer. Norway has strongly supported the ongoing work of UNCITRAL Working Group II (Arbitration and Conciliation), and has also participated actively in its deliberations.

We have noted that the Secretariat has given a constant and precious support to the Working Group and would like to use this opportunity to commend the Secretariat for their support and work.

As a general comment, it should be confirmed that, in our opinion, the draft revision of the Arbitration Rules submitted to the Commission complies with the criteria contained in the mandate that was given to the Working Group II. Below follow some observations regarding specific articles that call for comments. Where no observations are made, the revised articles are deemed acceptable.

Article 2 (Notices and calculation of periods of time)

The proposed changes to article 2 have the main purposes of reflecting current practice regarding communication and of catering for the eventuality that notices may not be delivered to any of the named addresses. Both purposes deserve support. In particular, by avoiding a detailed list of the means of communications that are allowed for notices, the proposed wording opens for the use of new means that are unknown today but may become common practice in the future. This deserves support.

Paragraph 1 (b) permits, inter alia, to send notices to an address previously designated by the addressee, and it has a wording in square brackets specifying that the designation should be "for the purpose of receiving such a notice". It seems reasonable to specify the purpose of the designation. However, the proposed wording could be interpreted to mean that the designation is supposed to be made for every single notice. This would not be reasonable. A more general wording might avoid this interpretation, for example "designated for the purpose of receiving notices relating to the arbitral proceeding".

One concern is that the Arbitration Rules should not impose formal requirements that are stricter than necessary. It seems excessively strict to require that all notices (unless they have been physically delivered) shall be delivered by means that "provide a record of the information contained therein and of sending and receipt", such as paragraph 1 (b) regulates. This wording seems to exclude the two means that are mostly used in arbitration practice, registered mail and courier. This is because neither of these means provide a record of the information contained in the envelopes.

Furthermore, this wording does not cater for the eventuality that the addressee refuses to take delivery. This would permit a party to prevent the arbitral proceeding from continuing by simply refusing to accept receiving its correspondence.

To avoid the above mentioned consequences of the proposed language, paragraph 1 (b) could specify that notices shall be sent by means of communication "that provide a record of transmission or of the attempt to deliver the notice".

Article 16 (Exclusion of liability)

The main aim of this provision is to avoid exposing the arbitral tribunal and the institutions involved in the proceeding to claims against them based on their conduct during the proceeding. The risk of being exposed to such claims may result, inter alia, in undue influence; therefore, the principle underlying the proposed provision deserves support.

As a starting point, it must be noted that the existence of liability is regulated by the applicable law and not by the agreement between the parties. An agreement between the parties may to a certain extent (regulated by the applicable law) allocate the financial consequences between the parties. The Arbitration Rules are an agreement between the parties. Therefore, they may not regulate the existence of liability, but they may allocate its consequences between the parties. The proposed wording may give rise to differing interpretation and may necessitate coordination with the applicable law. In particular, the proviso "save for intentional wrongdoing" may be interpreted differently in the various jurisdictions. Also, this proviso may create the

impression that the Arbitration Rules create a liability for intentional wrongdoing even if there is no such liability under the applicable law.

These difficulties may be avoided by adopting a language such as: “The parties waive, to the extent permitted under the applicable law, any claim that they may have under that law against the arbitrators, [...]”.

Article 17 (General provisions)

Paragraph 5 of this article allows the arbitral tribunal to join a third party in the arbitration, under certain circumstances. It is reasonable to give the tribunal this power under the conditions mentioned in this provision. If a joinder would be of prejudice to any of the parties, the provision gives the tribunal the possibility to deny it.

It could be advisable to mention, as an additional reason for denying the joinder, the eventuality that the joinder may affect the validity or the enforceability of the award. Joining a third party may deprive that party of its fundamental right to participate in the constitution of the arbitral tribunal, and this may have consequences for the validity and enforceability of the award. The additional language proposed here would alert the arbitral tribunal that prejudice to the parties is not the only ground upon which a joinder may be denied.

Article 34 (Form and effect of the award)

The changes in the second paragraph of this article are meant to permit the parties to enter into exclusion agreements regarding appeal or review of the award that go beyond the grounds listed in the Model Law and in the New York Convention, such as the appeal on a point of law under section 69 of the English Arbitration Act. The revised article 34 should not, however, imply a waiver by the parties of any right to request a review of the award’s validity under article 34 of the Model Law or under a corresponding provision in the applicable arbitration law, nor a waiver of any right to resist enforcement of the award under article 36 of the Model Law or article V of the New York Convention. This principle was affirmed in the Working Group after long discussion and deserves support. It would, indeed, be quite inconsistent if the Arbitration Rules contained a waiver of judicial control as regulated in the Model Law and the New York Convention. In particular the Model Law, which has been reviewed as recently as in 2006, does not permit the parties to enter into such exclusion agreements. It would have been very surprising if the Arbitration Rules had implied an automatic exclusion agreement: they would have promised an exclusion that is not permitted under the Model Law, with which they are expected to be fully compatible.

The revised article 34, however, may still run the risk of promising something that may not be kept.

One concern is that a general waiver without any qualifications would be ineffective and misleading. In most legal systems (including the Model Law), the parties may not waive any right to recourse against the award. In the few systems where this may be waived, usually a general agreement is not sufficient and a specific agreement is needed. Therefore, it would not be correct to have an unqualified waiver in article 34.

Another concern is that a general qualification as in the proposed language ("In so far as they may validly do so") would not give sufficient guidance to the reader. The uninformed reader does not suspect that recourse may not be waived in most of the legal systems or that, in the few systems where a waiver is possible, various requirements have to be met for the waiver to be valid.

A third concern is that a list of the exceptions to the waiver as in the proposed language ("except for an application....") may be inaccurate, as it has to cover all forms for recourse that at any time during the time in which the Arbitration Rules are in force may not be waived in all potentially relevant legal systems. It is up to the applicable law to determine which remedies may be waived; therefore, it is not appropriate to write a list in the Arbitration Rules.

These concerns could be met by a wording that is more specific on what the parties are waiving, but at the same time avoids a list of the remedies that are not waived, along the following lines:

"The parties waive their right to any form of appeal, review or recourse against an award to any court or other competent authority that may be waived under the applicable law, and the waiver of which does not require a specific agreement."

Article 35 (Applicable law)

The changes proposed in the first paragraph of this article are meant to increase the parties' and the arbitral tribunal's flexibility regarding the applicable law. The first modification regards the parties' choice of law. While the parties earlier were expected to choose the "law" to be applied to the merits of the dispute, in the revision they are allowed to choose "rules of law". This is intended to extend the parties' choice, since "law" is usually interpreted to mean a state law, whereas "rules of law" are deemed to be any body of rules, not necessarily emanating from a state. Even under the 1976 language the parties could instruct the arbitral tribunal to apply rules of law to the merits of the dispute. By so doing, the parties would have incorporated these rules of law into their contract, and the arbitral tribunal would have had to apply them. In the revised version the parties' choice of rules of law is intended to have a higher rank in the hierarchy of the applicable sources: they should not be simply incorporated into the contract, but they should be elevated to the status of governing law. The other modification is in the second sentence of the provision and regards the arbitral tribunal's choice of the applicable law in case the parties have not made a choice themselves. While the original version instructed the tribunal to choose the governing law by applying conflict rules of a private international law that was deemed applicable, the revised version does not mention conflict rules or private international law. The arbitral tribunal seems to be completely free to determine on what basis the applicable law shall be selected. These two changes are meant to enhance flexibility under the Arbitration Rules. The parties should be free to decide whatever rules they want to see applied to their dispute, and the arbitral tribunal should be free to decide whatever law it wants to apply, subject only to a contrary will of the parties.

However, the Arbitration Rules are not in a position to create such an unrestricted flexibility regarding the applicable law. The validity and enforceability of the award depend on the applicable law and on the New York Convention. The UNCITRAL Model Law (articles 34 and 36) and the New York Convention (article V), thus, indirectly contain restrictions to the possibility of the parties and of the tribunal to

choose the applicable law. According to these UNCITRAL instruments, an award is invalid or unenforceable if one party to the arbitration agreement was under some incapacity under its law, if the award is on a matter that is not arbitrable under the court's law, or of it conflicts with the court's public policy. Case law shows that disregard of the applicable law in areas such as labour contracts, competition regulation, insolvency, corporate matters, property, agency or distribution may affect the validity and enforceability of an award. Notwithstanding the strong signals of the revised article 35, the law of each of the parties and the law of the court should be taken into consideration regarding legal capacity, arbitrability and public policy. Therefore, the parties and the arbitral tribunal are not completely free to choose the applicable law.

Article 1.3 of the Arbitration Rules contains a general reservation stating that the Arbitration Rules may not derogate from mandatory rules of the law at the place of arbitration. Even assuming that a party had understood the relevance of this rule in context of the choice of law, article 1.3 is not necessarily sufficient to warn against the ineffectiveness of the award that may follow a free choice of the applicable law. This is because article 1.3 only reserves against mandatory rules of the law of the place of arbitration, whereas enforceability of the award is determined by the law of the place of enforcement. Both these laws, moreover, refer to the law of each of the parties when it comes to the validity of the arbitration agreement.

To prevent that the revised article 35 of the Arbitration Rules creates an unfounded appearance of full flexibility for the parties and for the arbitral tribunal, it would be advisable to add to each sentence of the first paragraph a language such as "taking into consideration the effects on the validity and enforceability of the award".

B. Comments received from international organizations

1. International non-governmental organizations

International Bar Association (IBA)

[Original: English]
[Date: 4 May 2010]

On behalf of the IBA Arbitration Committee, we respectfully offer our limited comments on particular articles of the draft revised UNCITRAL Arbitration Rules, as adopted by the Working Group at its 52nd session.

Draft Article 12-1: as a drafting matter, we suggest to replace "doubts as to the arbitrators' impartiality or independence" by "doubts as to his or her impartiality or independence".

Draft Article 17-1: although the 1976 Article 15-1's reference to a "full" opportunity may be seen as too demanding, the current draft may be criticized as providing insufficient protection to the parties' right to be heard. To that effect, it may be suggested to amend the first sentence of article 17-1 as follows: "is given a reasonable opportunity to present its case".

Draft Articles 20 and 21: we suggest that draft Articles 20 and 21 could provide that the Statement of Claim and the Statement of Defense may include any request for joinder pursuant to draft article 17-5.

Draft Article 22: likewise, we suggest that draft Article 22 could also make reference to the possibility for a party to amend or supplement its claim or defense by including a request for joinder.

Draft Article 23-1: although we understand the underpinning debate which led to the replacement of the previous wording of article 21 "shall have the power to rule" by "may rule", the latter wording may be seen as a step back with respect the 1976 rules, which have never caused major difficulties. In addition, "may" is a permissive word which could be interpreted as allowing the arbitral tribunal not to rule on its own jurisdiction even though it has such authority and the law applicable to the arbitration mandates it to do so. Finally, it can be submitted that draft article 1-3 suffices to address the hypothesis of a conflict between the rules and any mandatory provisions of the law applicable to the arbitration as far as the power of the arbitrators to decide on their own jurisdiction is concerned.

Draft Article 33-2: limiting the possibility of a decision made by the presiding arbitrator alone to questions of procedure is arguably not in line with the most advanced arbitration institutional rules and we submit that this provision should be modified to the effect that, in absence of majority, the award can be made by the presiding arbitrator alone.

Draft Article 35-1: the IBA Arbitration Committee understands that the language of Article 35-1 has already been extensively debated. However, we submit that the current reference in the second sentence to "the law which it determines to be appropriate" in absence of an express choice of the parties could be interpreted as excluding the arbitral tribunal's power to apply transnational rules of law, such as the UNIDROIT principles. Such an interpretation would not be in line with the more advanced solutions adopted by institutional rules (Art. 17-1 ICC rules, Art. 22-3 LCIA Rules, Art. 33 Swiss Rules, etc.). Such an interpretation would also appear to be at odds with the transnational nature of international arbitration. The IBA Arbitration Committee suggests that it is very important that the possibility of such an interpretation be avoided as it would make little sense to oblige the arbitral tribunal to apply a national law when the parties selected none (and indeed sought to avoid submitting their contract to the laws of a particular jurisdiction). In order to remove any ambiguity, the IBA Arbitration Committee suggests drafting the second sentence of Article 35-2 as follows: "Failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate".