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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

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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 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]

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, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1. The report of that session is contained in document A/CN.9/614.

3. At its forty-sixth session (New York, 5-9 February 2007), the Working Group discussed articles 1 to 21 of the draft revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and Add.1. At its forty-seventh session (Vienna, 10-14 September 2007), the Working Group continued its consideration of articles 22 to 37 of the draft revised Rules, as contained in document A/CN.9/WG.II/WP.145/Add.1. The reports of the forty-sixth and forty-seventh sessions are contained in documents A/CN.9/619 and A/CN.9/641, respectively.

4. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-seventh session and covers articles 22 to 37 of the UNCITRAL Arbitration Rules. Unless otherwise indicated, all references to deliberations by the Working Group in the note are to deliberations made at the forty-seventh session of the Working Group.

Notes on a draft of revised UNCITRAL Arbitration Rules

5. All suggested modifications to the UNCITRAL Arbitration Rules are indicated in the text below. Where the original text has been deleted, the text is struck through and new text is indicated by being underlined.

Section III. Arbitral proceedings

6. Draft article 22

Further written statements

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be

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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., A/62/17, part I, para. 174.

required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Remarks

7. The Working Group agreed to adopt article 22 in substance (A/CN.9/641, para. 19).

8. Draft article 23

Periods of time

Article 23

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

9. The Working Group agreed to adopt article 23 in substance (A/CN.9/641, para. 20).

~~**Evidence and hearings (Articles 24 and 25)**~~

10. Draft article 24

Evidence

Article 24

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

2. ~~The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence~~.

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

Title to articles 24 and 25

11. In order to reflect the decision of the Working Group to clarify that article 25 deals with witnesses, including expert witnesses appointed by the parties, whereas article 27 deals with experts appointed by the arbitral tribunal, the title of articles 24, 25 and 27 are proposed to be modified (see below, paragraphs 16

and 33) (A/CN.9/641, paras. 27 and 61). In the original 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 “Witnesses”.

Paragraph (1)

12. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 21).

Paragraph (2)

13. Paragraph (2) is deleted for the reason that it might not be common practice for an arbitral tribunal to require parties to present a summary of documents. The Working Group emphasized that deletion of paragraph (2) should not be understood as diminishing the discretion of the arbitral tribunal to request the parties to provide summaries of their documents and evidence on the basis of article 15 (A/CN.9/641, paras. 22-25).

Paragraph (3)

14. The Working Group agreed to adopt paragraph (3) in substance (A/CN.9/641, para. 26).

References to previous UNCITRAL documents

A/CN.9/614, para. 103
A/CN.9/WG.II/WP.143/Add.1, para. 15
A/CN.9/641, paras. 21-26, 64
A/CN.9/WG.II/WP.145/Add. 1, para. 23

15. Draft article 25

Witnesses

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.

1bis Witnesses 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 or expertise, whether or not that individual is a party to the arbitration.

2. If witnesses are to be heard, [at least fifteen days before the hearing] each party shall communicate to the arbitral tribunal and to ~~the~~ all other parties the names and addresses of the witnesses ~~he~~ it intends to present, the subject upon and the languages in which such witnesses will give their testimony.

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.

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 arbitration. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of either written statements signed by them or oral statements by means that do not require the physical presence of witnesses.

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

Remarks

Title

16. The Working Group might wish to consider whether a title should be provided for article 25, in order to clarify that it applies to witnesses presented by a party, including expert-witnesses (see paragraphs 11 above and 33 below) (A/CN.9/641, para. 27).

Paragraph (1)

17. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 28).

Paragraph (1bis)

18. Paragraph (1bis) (formerly numbered paragraph (2bis) in document A/CN.9/WG.II/WP.145/Add.1) 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 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 could be heard and the discretion of the arbitral tribunal in relation to the hearing of witnesses as currently laid out in paragraph (1bis), and only thereafter to expand on procedural details regarding witnesses (A/CN.9/641, para. 34).

19. 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).

Right of a party to present expert evidence on its own initiative

20. The Working Group agreed that the Rules should not cast doubt on the right of a party to present expert evidence on its own initiative irrespective of whether the

arbitral tribunal appointed an expert (A/CN.9/641, para. 61). The question is dealt with under draft article 15 (2) which provides that: "If, at an appropriate stage of the proceedings, ~~either~~ any party so requests ~~at any appropriate stage of the proceedings~~, 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."(A/CN.9/WG.II/WP.147/Add.1, para. 5). The Working Group might wish to consider whether that question is sufficiently addressed by draft article 15 (2) or whether provisions should be added, along the following lines: "A party may rely on a party-appointed expert as a means of providing evidence on specific issues."

Paragraph (2)

21. The Working Group might wish to consider whether the 15-day time period in paragraph (2) should be kept. It is recalled that it was suggested in the Working Group that that time period might be too long in some cases (A/CN.9/641, para. 34).

Paragraph (3)

22. The Working Group agreed to adopt paragraph (3) in substance (A/CN.9/641, para. 39).

Paragraph (4)

23. The words "save when the witness is a party to arbitration" are proposed to be added to the second 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).

Paragraph (5)

24. 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 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 the physical presence of witnesses (A/CN.9/641, para. 43).

Paragraph (6)

25. The Working Group agreed to adopt paragraph (6) in substance (A/CN.9/641, para. 45).

References to previous UNCITRAL documents

A/CN.9/641, paras. 27-45, 61
A/CN.9/WG.II/WP.145/Add.1, para. 24

26. Draft article 26

Interim measures

Article 26

~~1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.~~

~~2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.~~

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

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

(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) 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

temporarily ordering 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 request.

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 shall 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.

~~3~~ 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.

Remarks

Paragraphs 1 to 4, and 6 to 9

27. 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 on International Commercial Arbitration ("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).

Paragraph (5)

28. 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).

29. Paragraph (5) avoids terminology such as "preliminary order" as suggested in the Working Group (A/CN.9/641, paras. 53-60) and seeks to reflect the language of section 2 of chapter IV A of the Model Law.

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

Paragraph (10)

31. Paragraph (10) corresponds to the original text of article 26 (3), 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).

References to previous UNCITRAL documents

A/CN.9/614, paras. 104-105
A/CN.9/WG.II/WP.143/Add.1, para. 16
A/CN.9/641, paras. 46-60
A/CN.9/WG.II/WP.145/Add.1, paras. 25 and 26

32. Draft article 27

Experts appointed by the arbitral tribunal

Article 27

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 who 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 ~~either~~ 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 ~~either~~ 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

Title

33. 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).

Relation between experts appointed by the arbitral tribunal and the parties

34. The Working Group might wish to consider whether, in order to facilitate the hearing of the tribunal-appointed experts, it would be useful to add a provision stating that, before the hearing of the tribunal-appointed expert, the arbitral tribunal may require that any party-appointed expert produce a report determining the contentious issues.

References to previous UNCITRAL documents

A/CN.9/614, paras. 106-107
A/CN.9/WG.II/WP.143/Add.1, paras. 17-20
A/CN.9/641, para. 61

35. Draft article 28

Default

Article 28

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

(a) the claimant has failed to communicate ~~his~~ its statement of claim ~~without showing sufficient cause for such failure~~, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless the respondent has submitted a counter-claim;

(b) the respondent has failed to communicate ~~his~~ its statement of defence ~~without showing sufficient cause for such failure~~, 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 paragraph also apply to a claimant's failure to submit a defence to a counter-claim.

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

Remarks

Paragraph (1)

36. The Working Group agreed to add the words "unless the respondent has submitted a counter-claim" in article 28 (1). A consequence of that modification could be that arbitral proceedings would not terminate even if the claimant, after submitting the notice of arbitration, did not submit the statement of claim or if the claim was withdrawn, provided that a counter-claim had been submitted. In such a situation, the arbitral tribunal should continue to deal only with the counter-claim. To address that situation, the Working Group might 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 counter-claim. That proposal follows the structure of article 25 of the Model Law (A/CN.9/641, para. 62).

37. The Working Group agreed to add the words "without treating such failure in itself as an admission of the claimant's allegations", so as to reflect the language contained in article 25 (b) of the Model Law (A/CN.9/641, para. 63).

Paragraph (2)

38. The Working Group agreed to adopt paragraph (2) in substance.

Paragraph (3)

39. 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).

References to previous UNCITRAL documents

A/CN.9/641, paras. 62-64
A/CN.9/WG.II/WP.145/Add.1, para. 28

40. Draft article 29

Closure of hearings

Article 29

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

41. The Working Group agreed to adopt article 29 in substance (A/CN.9/641, para. 65).

References to previous UNCITRAL documents

A/CN.9/641, para. 65

42. Draft article 30

Waiver of ~~rules~~ right to object

Article 30

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

Remarks

Title

43. As agreed by the Working Group, the title of article 30 refers to "waiver of right to object" for the sake of conformity with the corresponding provision contained in article 4 of the Model Law and to better reflect the content of article 30 (A/CN.9/641, para. 66).

Article 30

44. 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).

References to previous UNCITRAL documents

A/CN.9/641, paras. 66 and 67

Section IV. The award

45. Draft article 31

Decisions

Article 31

1. *Option 1*: When there ~~are three~~ 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 ~~on his own~~ alone, subject to revision, if any, by the arbitral tribunal.

Remarks

Paragraph (1)

46. 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.

47. 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. It was cautioned in the Working Group that such an option could be understood by the parties to limit their choice to either majority or unanimity decision-making (A/CN.9/641, para. 73). In that option, the words “three arbitrators” are proposed to be replaced with the words “more than one arbitrator” to take account of the situation permitted under draft article 7bis 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/WG.II/WP.147, paras. 41 and 42) (A/CN.9/641, para. 76).

48. 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).

49. Depending on the solution retained, consequential amendments to article 32, paragraph (4), relating to the signing of the award might also need to be considered.

Paragraph (2)

50. The Working Group agreed to adopt paragraph (2) in substance.

References to previous UNCITRAL documents

A/CN.9/614, paras. 108-112
A/CN.9/WG.II/WP.143/Add.1, paras. 21-24
A/CN.9/641, paras. 68-77
A/CN.9/WG.II/WP.145/Add.1, paras. 30 and 31

51. Draft article 32

Form and effect of the award

Article 32

1. ~~In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.~~ 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.

2. ~~The~~ An award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award 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, save for their right to apply for setting aside an award, which may be waived only if the parties so agree.

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.

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

5. The award may be made public ~~only~~ with the consent of ~~both~~ 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.

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

7. ~~If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.~~

Remarks

Paragraph (1)

Form of the award

52. 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 (“LCIA Rules”) (A/CN.9/641, paras. 78-80).

Paragraph (2)

Final and binding

53. 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, para. 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” are 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.”.

Waiver of recourse to courts

54. 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).

Paragraph (3)

55. The Working Group agreed to adopt paragraph (3) in substance (A/CN.9/641, para. 93).

Paragraph (4)

56. The Working Group agreed to modify the first sentence of paragraph (4) for the sake of consistency with draft article 16 (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 draft article 7bis 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/WG.II/WP.147, paras. 41 and 42) (A.CN.9/641, para. 94).

Paragraph (5)

57. 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).

Paragraph (6)

58. The Working Group agreed to adopt paragraph (6) in substance (A/CN.9/641, para. 100).

Paragraph (7)

59. The Working Group agreed to delete paragraph (7) 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).

References to previous UNCITRAL documents

A/CN.9/614, paras. 113-121
A/CN.9/WG.II/WP.143/Add.1, paras. 25-29
A/CN.9/641, paras. 93-105
A/CN.9/WG.II/WP.145/Add.1, paras. 32-36

60. Draft article 33

Applicable law, amiable compositeur

Article 33

1. The arbitral tribunal shall apply the ~~law~~ 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 ~~determined by the conflict of laws rules which it considers applicable~~ [*variant 1*: with which the case has the closest connection] [*variant 2:* which it determines to be appropriate].

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.

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

Remarks

Paragraph (1)

61. 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).

62. 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 (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).

63. 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).

Paragraph (2)

64. The Working Group agreed to adopt paragraph (2) in substance.

Paragraph (3)

65. 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 (e.g., investor-State disputes), by referring to the words "any applicable" in relation to "contract" and "any" in relation to "usage of trade". The Working Group agreed to further consider that proposal in the context of discussions on the application of the Rules to investor-State disputes (A/CN.9/641, para. 113).

References to previous UNCITRAL documents

A/CN.9/614, paras. 122-124.
A/CN.9/WG.II/WP.143/Add.1, paras. 30-31.
A/CN.9/641, paras. 106-113
A/CN.9/WG.II/WP.145/Add.1, paras. 37-38

66. Draft article 34

Settlement or other grounds for termination

Article 34

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 ~~both~~ 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 ~~7~~, shall apply.

Remarks

Paragraph (1)

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

Paragraph (2)

68. The Working Group agreed to adopt paragraph (2) in substance.

Paragraph (3)

69. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

References to previous UNCITRAL documents

A/CN.9/641, para. 114

70. Draft article 35

Interpretation of the award

Article 35

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

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 ~~7~~, shall apply.

Remarks

Paragraph (1)

71. 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).

Paragraph (2)

72. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

References to previous UNCITRAL documents

A/CN.9/614, paras. 125-126
A/CN.9/WG.II/WP.143/Add.1, para. 32
A/CN.9/641, para. 115

73. Draft article 36

Correction of the award

Article 36

1. Within 30 days after the receipt of the award, ~~either~~ any party, with notice to the other ~~party~~ 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~~7~~, shall apply.

Remarks

Paragraph (1)

74. The Working Group agreed to adopt paragraph (1) in substance (A/CN.9/641, para. 116).

Paragraph (2)

75. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

76. 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 (2).

References to previous UNCITRAL documents

A/CN.9/614, para. 127
A/CN.9/WG.II/WP.143/Add.1, para. 33
A/CN.9/641, para. 116
A/CN.9/WG.II/WP.145/Add.1, para. 41

77. Draft article 37

Additional award

Article 37

1. Within 30 days after the receipt of the award, ~~either~~ a party, with notice to the other ~~party~~ 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 ~~and considers that the omission can be rectified without any further hearings or evidence~~, 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 ~~7~~, shall apply.

Remarks

Paragraph (1)

78. The Working Group agreed to adopt paragraph (1) in substance.

Paragraph (2)

79. 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).

Paragraph (3)

80. The deletion of the reference to paragraph (7) of article 32 is consistent with the decision of the Working Group to delete that paragraph (see above, paragraph 59).

References to previous UNCITRAL documents

A/CN.9/614, paras. 128-129
A/CN.9/WG.II/WP.143/Add.1, para. 34
A/CN.9/641, paras. 117-121
A/CN.9/WG.II/WP.145/Add.1, para. 42