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Settlement of commercial disputes: Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010

Compilation of comments by Governments

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

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II. Comments received from Governments

Thailand

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Comments and suggested text (if any)

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Paragraph 9

While it may be useful for the disputing parties if an arbitral institution were to indicate where its own text diverges from UNCITRAL Arbitration Rules, this may not be crucially necessary since the disputing parties are able to consider for themselves whether a certain set of institution rules are suitable. In addition, disputing parties may also agree among themselves to use different rules from that particular arbitral institution rules.

Paragraph 12 (i)

Where disputing parties wish to use an arbitral institution for their arbitration, the institution will act as the focal point between the disputing parties and the arbitral tribunal. Thus, any communication between the disputing parties is likely to be done via the arbitral institution. The claimant needs to file a notice of arbitration with the institution. Once received, the institution will forward a copy of the notification to the respondent. Therefore, the second alternative of the potential amendment to Article 3 (1) in paragraph 12 is preferred for its consistency with the actual practice of arbitration institution and its better accuracy to the first alternative.

Paragraph 13

The disputing parties may have stated in the arbitration provision in their agreement that an arbitration institution will manage their dispute. In which case, the arbitration institution will be the focal point in communicating documents, receiving and keeping statements and all kinds of documents in order to manage the dispute efficiently during the arbitration process. There should therefore be a way for the arbitration institution to set the means of communications that it will use, without placing too much burden on the institution.

Article 17 should therefore be amended as follows (with the added text underlined):

> "The arbitral tribunal, after having consulted with the parties, shall set the means of communications or telecommunications made by the parties. Except as otherwise permitted by the arbitral tribunal, all communications between the arbitral tribunal and any party shall also be sent to [name of the institution]."

Paragraph 15

This part facilitates the substitution of the reference to the "appointing authority" by the name of the arbitration institution. This will help reduce delays likely to occur where it is not clear in an arbitration institution's rules that it also performs the functions of an appointing authority. Thus, it is an important matter that should be given thorough consideration. In addition, the person authorized to act on behalf of the arbitration institution in fulfilling the functions of an appointing authority should be stated in a provision or in the footnote of a particular rule rather than in the annex of the rules (see paragraph 16).

Paragraph 16

It should also be provided that the organ performing the functions of an appointing authority shall be impartial and shall have no interest in the particular dispute concerned.

Paragraph 23 (a) and its footnote

For greater certainty, the maintenance of a file of written communications should also include the maintenance of communications in electronic forms which is becoming increasingly common in practice among arbitration institutions. In addition, the period of time that such communications are to be kept by an arbitration institution AFTER a case has come to an end should also be considered in order to ensure that it does not become unnecessarily too cumbersome upon the institution. For example, an arbitration institution may state that it will keep documents communicated to the institution for a period of 5 years from the date that the case has come to an end, unless otherwise agreed by the disputing parties or suggested by the arbitral tribunal.

Paragraph 24

The institution may want to consider publishing its fees or expenses of costs for its services in a general dispute and/or its methods in calculating fees or expenses. This is so that the disputing parties may be able to estimate their potential costs before litigation or use the information as a basis to their considerations in employing a particular institution's administrative service (in whole or in part). Additionally, Article 41 (4) of UNCITRAL Arbitration Rules 2010 should be referred to with regard to possible fees reviews.

Paragraph 25

The categorization is very useful as it means the disputing parties can now consider choosing an arbitration institution clearly on the basis of the fees for different types of services. Arbitration institution should also be able to review these fees. The basis for such review may include the cost and complexity of a certain dispute, as the arbitration institution may see fit.

Paragraph 26, first suggested model clause

An arbitration institution may fully administer any dispute under UNCITRAL Arbitration Rules 2010. It should therefore state clearly in the model arbitration clauses the particular rules that the institution shall adopt. For example, the model

clause under paragraph 26 where the institution fully administers arbitration under the UNCITRAL Arbitration Rules should read (with the additional text underlined):

> "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force administered by [name of institution]. [Name of institution] shall act as appointing authority".

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Paragraphs 38 and 44

Appointing authority should also consider informing the disputing parties, insofar as it is practicable, of the reasons for a particular arbitrator to be appointed. This is because the appointment of an arbitrator is one of the most important elements of the arbitration procedure.

Paragraph 49

An additional provision should be drafted for the consideration by the appointing authority regarding the refund of fees which have already been paid to an arbitrator who has been challenged or who has withdrawn — this should include whether such fees will be refunded and, if so, to what extent. Issues regarding the honesty of the challenged or withdrawn arbitrator may be called into question and awarding of damages, arising from such challenge or withdrawal, to disputing parties may also be considered.

Paragraph 58

The appointing authority and the Secretary-General of the Permanent Court of Arbitration may consider providing the general criteria that an arbitral tribunal may use in determining its fees and expenses in order to ensure that the requirement of reasonableness is adhered to.

Paragraph 61

In the event that the arbitral institution is also acting as an appointing authority, the arbitral institution may consider setting a criteria or guideline on how the amount of the deposits or supplementary deposits to be given by the disputing parties is determined. Such criteria or guideline may be based upon the institution's existing rules and guidelines in general.