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Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules

Compilation of comments by Governments and international organizations

Contents

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

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II. Comments received from Governments and international organizations

A. Comments received from Governments

China

[Original: Chinese]
[Date: 30 April 2010]

Upon consideration, the Chinese delegation wishes to offer the following comments on the draft Rules for Arbitration of the Commission on International Trade Law.

1. We would suggest that the Permanent Court of Arbitration (PCA) in the Hague mentioned as a special example be deleted from paragraph 1, article 6 of the draft rules. This article in the draft rules has not been thoroughly discussed by the working group, and therefore can not represent the views of member States.

2. Paragraph 2, article 17 of the draft rules, which says that a court of arbitration can change the time limit agreed to by the parties to a dispute, gives rise to suspicion of violating the principle of autonomy of the will of the parties to a dispute. Paragraph 5, article 17 provides for incorporation of a third party. In accordance with the current text of the article, the incorporated third party does not have the right to choose arbitrators, which gives rise to suspicion of constituting an infringement on its rights. We would wish to draw attention to these issues which may appear during arbitrations.

3. Paragraph 3, article 23 of the draft rules states that an arbitration court shall continue to arbitrate and make awards while a court of law is still hearing the objection to the competence of the arbitration court. The fact that the court, and the court at the place of the arbitration in particular, is yet to make a ruling on the objection to the competence, but the arbitration court has made awards, may result in problems for executing the award. Our suggestion is that no rules will be laid down for this, and that the arbitration court would be left to decide in light of the actual developments in the proceedings of the case.

4. The provision in paragraph 2, article 34 of the draft rules on the parties to a dispute giving up prosecution of any form against the award may clash with the law of a country that should be applicable to the arbitration, such as the procedure for cancelling and executing an award under China Arbitration Law, etc. Our suggestion is that, whether the wording in the last square bracket in paragraph 2 of this article is to be kept or not to be kept, the following phrase should be inserted at the beginning of the last sentence of paragraph 2 of this article: “unless provided separately by the laws of a state that should be applicable in the arbitration,”.

El Salvador

[Original: Spanish]
[Date: 30 April 2010]

General comments

El Salvador recommends that the Spanish-language version of the document be revised for style, as it contains a number of editorial and spelling errors.

The document contains many articles with cross-references to other articles found elsewhere in the Arbitration Rules. These should be deleted or eliminated. Good legislative drafting practice calls for such citations to be avoided, as if an amendment should be made to some articles, it will no longer reflect the subject-matter being referred to.

El Salvador observes that there are instances where an article's subheading may not accurately or precisely reflect the article's subject-matter. In all such cases, the necessary changes should be made to prevent confusion.

There should also be a review made of all articles to change the word "procedimiento" to read "proceso", where applicable.

In all cases where the arbitral tribunal is given "facultades" ["powers"], El Salvador proposes that the term be replaced with "potestades", which would be more appropriate.

El Salvador observes that some articles have no subheadings. For the sake of consistency, it is recommended that the draft Arbitration Rules be standardized, so that either every article has a subheading or no article has a subheading. Accordingly, it is recommended that the following subheadings be added for the articles in question:

(i) Draft article 8: "Appointment of sole arbitrator"

(ii) Draft article 9: "Appointment of arbitrators"

(iii) Draft article 10 (new article): "Appointment of arbitrators in cases in which there are multiple parties"

(iv) Draft article 11: "Declaration of impartiality"

(v) Draft article 12: "Challenges to arbitrators"

(vi) Draft article 13: "Procedure for challenge to arbitrators"

(vii) Draft article 15: "Resumption of proceedings"

(viii) Draft article 17: "General provisions with respect to the proceedings"

(ix) Draft article 30: The subheading "Default" is not appropriate here, and should be changed to "Failure to appear"

(x) Draft article 32: "Forfeiting of the right to object"

Specific comments on the draft articles

Article 2: To make paragraph 1 clearer, El Salvador recommends that it be revised as follows: “For the purposes of these Rules, any notification, including a notice, shall be deemed received:”.

In paragraph 1, subparagraph (a), it is recommended that the text be revised as follows: “if it is has been physically delivered to the addressee;”.

In paragraph 1, subparagraph (b), in order to align the text with subparagraph (a), it is recommended that the first words be deleted so that this subparagraph reads as follows: “(b) ~~deemed to have been received~~ if it is delivered at the habitual residence or place of business;”.

In addition, paragraph 1, subparagraph (b), combines two different situations and therefore is not clear. Accordingly, it is recommended that a new paragraph 1, subparagraph (c) be added: “(c) if the addressee is capable of retrieving the notice at an address previously designated by said addressee”.

Lastly, paragraph 1, subparagraph (b), contains the phrase “[for the purpose of receiving such a notice]”. El Salvador does not consider that this phrase adds anything to the text, but would not oppose its inclusion if there is an agreement that it should be maintained.

Paragraph 3 uses the term “means of communication”. This could be confusing or give rise to misinterpretation given that the term “means of communication” normally refers to radio, television, newspapers and magazines. It is therefore proposed to amend paragraph 3 as follows: “3. Notice under paragraphs 1 (b), 1 (c) and 2 shall be delivered by any means ~~of communication~~ that provides a record of the information contained therein and of sending and receipt.”].

In paragraph 4, it is proposed that the phrase “attempted to be delivered” be changed to “received”, to make the text consistent with the situation described in paragraph 2. Thus, paragraph 4 would read as follows: “4. Notice shall be deemed to have been received on the day it is delivered under paragraph 1 or ~~attempted to be delivered~~ received under paragraph 2.”

Article 3: Paragraph 3, subparagraph (f), states that the notice of arbitration must include the relief or remedy sought. It is suggested that the word “relief” be replaced by the word “measure”, since the word “relief” has a specific technical connotation in respect of remedies, as reflected in Section IV, “The Award”.

Article 4: In paragraph 1, it is recommended that the phrase “which shall include” be changed to “which shall contain”, as the verb “contain” better captures the intent of the text. Thus, the paragraph would read as follows: “1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall ~~include~~ contain:”.

In paragraph 2, subparagraph (a), El Salvador proposes that the text be revised as follows: “(a) Any plea or defence claiming that an arbitral tribunal to be constituted under these Rules lacks jurisdiction or competence”. This revision is necessary for two reasons. First, the term “plea” is used as a mechanism of defence, so if it is not clarified, it could result in a restriction affecting the parties. For that reason it is recommended that the word “defence” be added, to cover a variety of circumstances. Secondly, while the word “jurisdiction” means competence in some

cases, that is not true in all cases; and this situation needs to be rectified. Thirdly, the words "to be" have been added before the word "constituted" as the arbitral tribunal is not yet constituted at this stage.

In addition, in paragraph 2, subparagraph (e), El Salvador recommends that the Spanish text be revised as follows: "(e) Una breve descripción de toda reconvención a la demanda o de toda pretensión que se vaya a presentar o hacer valer ~~de toda pretensión que se vaya a hacer valer~~ a efectos de compensación, indicándose también, cuando proceda, las sumas reclamadas, y el objeto de la demanda;" ["(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;"]. It is believed that altering the sentence in this way will make it simpler and easy to understand.

Article 6: As a matter of principle, El Salvador does not fully endorse this article because it would alter the responsibilities of the Permanent Court of Arbitration by giving it functions for which it was not created. Nevertheless, if the proposal enjoys broad support, we would be willing to consider it subject to the following revisions:

In the first sentence of paragraph 1, El Salvador proposes that, in the Spanish version, the word "ya" ["already"] be replaced by "previamente", as the latter is more technical.

In paragraph 4, it is suggested that in the phrase "a party's request to do so", the words "to do so" be deleted as they are not needed.

Also in paragraph 4, two different ideas are being combined, and that makes the paragraph rather long and confusing. It is therefore recommended that the second half of the paragraph beginning "If the appointing authority refuses or fails to make any decision (…)" become a new paragraph immediately following paragraph 4. If the recommendation to transform the second sentence of paragraph 4 into a new paragraph is accepted, the numbering of subsequent paragraphs will need to be revised.

In paragraph 5, it is recommended that the text be revised as follows: ["5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and shall give grant the parties and, where appropriate, the arbitrators, an opportunity to present express their views in any manner they consider appropriate. (…)"].

In paragraph 7, the drafting should be improved by deleting "such" preceding the noun "considerations"; otherwise the term "considerations" appears to be limited.

Article 7: To improve the drafting of the Spanish-language version, it is recommended that paragraph 1 be revised as follows: "1. Si las partes no han convenido previamente ~~en~~ el número de árbitros y si, en el plazo de 30 días tras la fecha de recepción por el demandado de la notificación del arbitraje, ~~las partes~~ si aquellas no ~~convienen en~~ han acordado que haya un único árbitro, se nombrarán tres árbitros." ["1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration ~~the parties~~ they have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."].

Article 10: To improve the drafting of the Spanish-language version, it is recommended that paragraph 3 be revised as follows: "3. En caso ~~de que~~ no se ~~consiga~~ logre constituir el tribunal arbitral ~~con arreglo al presente Reglamento~~, la autoridad nominadora, a instancia de cualquiera de las partes, lo constituirá ~~el tribunal arbitral~~ y, al hacerlo, ~~podrá revocar~~ revocará todo nombramiento ya realizado y nombrará ~~o volver a nombrar~~ a cada uno de los árbitros y designará al que haya de ejercer las funciones de presidente." ["3. In the event of any failure to constitute the arbitral tribunal ~~under these Rules~~, the appointing authority shall constitute it, at the request of any party, ~~constitute the arbitral tribunal,~~ and in doing so~~, may~~ shall revoke any appointment already made, and shall appoint ~~or reappoint~~ each of the arbitrators and designate one of them as the presiding arbitrator."].

The preceding proposal is made with the purpose to avoid inequality in case a party appoints an arbitrator and the other not.

Article 11: To improve the drafting of the Spanish-language version, it is proposed that the prepositional phrase "de que" be changed to "que" in the first line of this article.

Article 13: It is recommended that paragraph 1 be revised as follows: "1. A party that intends to challenge ~~challenges~~ an arbitrator shall ~~send notice of its challenge~~ state its reasons for the challenge within 15 days after it has been notified of the appointment of the challenged arbitrator (…)". Since the stating of reasons for the challenge must be combined with the act of presenting the challenge, this requirement has to form part of paragraph 1 and consequently must be deleted from paragraph 2.

Article 14: To avoid cross-references, it is proposed that paragraph 1 be revised as follows: "1. Subject to paragraph (2), in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure ~~provided for in articles 8 to 11~~ that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply (…)".

The foregoing item also incorporates a revision of the Spanish-language version to change "procedimiento" ["procedure, or proceedings"] to read "proceso". The two words have a different legal connotation.

In paragraph 2, it is proposed that the expression "hacer valer" ["express"] be changed to "expresar" as it better captures the meaning in Spanish.

Article 15: Again, the same comment that applies in regard to article 14 also applies here, to the effect that "procedimiento" ["proceeding"] should be changed to "proceso".

Article 16: In the context of its domestic law, El Salvador has the expression "falta intencional" ["intentional wrongdoing"] as a term having a specific connotation. It would be useful to know what the specific connotation of "intentional wrongdoing" is in this case.

Article 17: In paragraph 2, it needs to be stated that the power of the arbitral tribunal to change "any period of time" does not include the power to extend the period of time for issuing the award, inasmuch as the period of time for issuing the award is substantive: it is not to be determined by the arbitral tribunal but rather by

the parties in establishing the arbitral tribunal's terms of reference. Accordingly, paragraph 2 should read as follows: "The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties, provided that this does not include the power to alter the period of time for issuing the award.".

Article 18: In paragraph 1, it is recommended that the term "la sede" ["the place"] be used in Spanish in place of "el lugar", inasmuch as "la sede" is the appropriate term where court proceedings are concerned.

Article 20: In paragraph 1, the expression "in writing" is redundant. It is therefore recommended that the paragraph be revised as follows: "1. The claimant shall ~~communicate~~ present 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 (…)".

In paragraph 2, subparagraph (d), of this article, the same problem arises as in article 3, paragraph 3, subparagraph (f). It is therefore recommended that the word "recurso" ["relief"] be replaced with "prestación" ["measure"], which is the proper term here.

Article 21: In paragraph 1, El Salvador proposes that the text be revised as follows: "1. The respondent shall ~~communicate~~ submit its statement of defence ~~in writing~~ to the claimant and (…)".

In paragraph 2, the appropriate term instead of "particulars" is "subparagraphs". Thus, the paragraph should read as follows: "2. The statement of defence shall reply to the ~~particulars~~ subparagraphs (b) to (e) of the statement of claim (…)".

Article 23: In paragraph 1, it is recommended that the text be revised as follows: "1. The arbitral tribunal ~~may~~ has the power to 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~~ agreement 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 shall not entail automatically the invalidity of the arbitration ~~clause~~ agreement."

The replacement of the word "may" by the words "has the power to" is proposed as being more appropriate in describing the arbitral tribunal's functions. The change from "arbitration clause" to "arbitration agreement" reflects the fact that an agreement already exists between the parties to submit to arbitration. It is therefore inappropriate to refer to an "arbitration clause".

In paragraph 2, it is recommended that the word "réplica" be changed to "contestación" ["statement of defence"], which is the appropriate term where court proceedings are concerned.

Article 25: In keeping with the comments made in regard to articles 20 and 21, it is proposed that the word "communication" be replaced by the word "submission".

In the interest of concise drafting in the Spanish-language version, it is recommended that the last sentence of the article be revised as follows: "Sin embargo, el tribunal arbitral podrá prorrogar los plazos si estima que se justifica la prórroga lo estima justificado." ["However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified."].

Article 26: In paragraph 2, subparagraph (a), in the Spanish version, an extra "s" should be added to the word "statu" so that the expression reads "status quo" ["status quo"].

El Salvador does not understand paragraph 9. It seems to be referring to the right to appeal to a judicial tribunal, but in fact the article is referring to an arbitral tribunal.

Article 27: In paragraph 1, in the Spanish version, it is recommended that the term "acciones" ["claims"] be replaced by "pretensiones", as "pretensiones" is the correct term.

As a general comment on the rest of the article, the term "expert" should not be used on its own. Instead, the term should be "expert witness" ["testigo experto"] because an expert provides a statement concerned with scientific information, whereas here it is a case of a statement concerned with willingness to provide information; and the fact that a witness makes a statement concerned with specialized knowledge does not make that witness an expert.

It is consequently unacceptable for a party to make a statement as an expert because the nature of the evidentiary procedures are different, even though both a party and an expert may make a written statement and an appearance before the tribunal.

In addition, the English-language version of paragraph 4 makes reference to "materiality", while the Spanish-language version of the text makes no mention of this. It is proposed that the word "usefulness" be inserted so that the paragraph reads as follows: "4. The arbitral tribunal shall determine the admissibility, relevance, usefulness and weight of the evidence offered."

Article 28: In paragraph 2, it is recommended that the words "be heard" be replaced by the words "make statements", as the word "heard" has a particular connotation where court proceedings are concerned, and is distinct from the mere making of statements.

The same comment made previously in regard to replacing the term "expert" by "expert witness" ["testigo experto"] also applies here.

Article 29: In paragraph 3, the word "mercaderías" ["goods"] should be replaced by "objetos", as this term is more appropriate in Spanish.

Article 30: In paragraph 2, the word "may" should be replaced by "has the power to".

Article 32: The subheading for article 32 reads "Waiver of right to object". From the standpoint of procedural law, this is not a waiver but rather a forfeiting or preclusion of the right. Nevertheless, if there is a consensus on maintaining the term "waiver", El Salvador will not oppose it.

Article 34: In paragraph 2, it is important to include a proviso in reference to the context in which the provision is to be applied, so that there is nothing contrary to a State's domestic legislation. Consequently, it is proposed that the text be revised as follows: "All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay. In so far as permitted under the law applicable to the arbitration, the parties shall be deemed to (…)".

In the second part of paragraph 2, it is suggested that the word "initiate" be changed to "introduce". Also in the second part of paragraph 2, it is proposed that the square

brackets be deleted to make it clear that the parties do not waive the right to request the so-called setting aside or challenging of an award.

In paragraph 4, El Salvador reiterates its comment that the term “la sede” [“the place”] be used in Spanish in place of “el lugar”.

Article 35: In the subheading, the last two words “amiable compositeur” should be deleted.

Article 36: In paragraph 2, it is recommended that, in the Spanish version, the expression “estará facultado” [“shall have the power to”] be replaced with “tendrá la potestad”.

Also in paragraph 2, an editorial improvement is recommended consisting of revising the expression “the arbitral tribunal considers” in the last line and replacing it simply by “it considers”, given that further mention of the arbitral tribunal is made in the first sentence of paragraph 3.

In paragraph 3, it is recommended that the expression “Copies of the order” be revised to read “the order”, because the documents being communicated to the parties are originals of the order, not duplicates.

Article 37: In the interest of making the text clearer, it is recommended that paragraph 2 be revised to read as follows: “2. The interpretation that shall form part of the award shall be given in writing within 45 days after the ~~receipt~~ submission of the request. ~~The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply~~”.

To make paragraph 2 more concise, it is recommended that in the second sentence only the portion up to the words “of the award” be retained (and moved to the first sentence of the paragraph), with the remainder of the second sentence being deleted.

Article 38: In paragraph 1, in order to make the text consistent with the proposed revision to article 37, it is proposed that the second sentence be revised as follows: “If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request for correction.”

In paragraph 3, so as to delete the unnecessary cross-reference to article 34, it is recommended that the text be revised as follows: [“3. Such corrections shall be in writing, and shall form part of the award. ~~The provisions of article 34, paragraphs 2 to 6, shall apply~~.”].

Article 39: In the first sentence of paragraph 2, it is proposed that the expression “an award” be preceded by the words “issuing of”. It is a case here of a request for the issuing of an award, not a request for an award.

Article 40: In paragraph 2, subparagraph (e), mention is made of “legal (…) costs” in general terms. However, this expression is not defined and could give rise to confusion when the arbitral tribunal draws up its list of costs. To avoid that problem, it is proposed that the text be revised as follows: “(e) The costs of representation and legal assistance, and any other types of costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;”.

In paragraph 3, in keeping with the comment that cross-references should be avoided, it is recommended that the phrase "under articles 37 to 39" be deleted.

Article 41: El Salvador is fully in agreement that there should be a more transparent procedure for the determination of the arbitral tribunal's fees and expenses from the beginning of the arbitration so that the parties will not be affected. A procedure should be selected to deal with this situation aimed at preventing confrontation between arbitrators and parties over fees, and thus assuring impartiality.

Article 42: It is recommended that a new paragraph 2 be inserted to ensure that the autonomous will of the parties is upheld, inasmuch as this is an existing right and maintaining it will make costs foreseeable. The proposed text of the new paragraph 2 would read as follows: "2. The arbitral tribunal shall, in any case, abide by any stipulation upon which the parties may have agreed in regard to the allocation or prorating of costs."

The insertion of the new paragraph 2 will require the existing paragraph 2 to be renumbered as paragraph 3.

In the existing paragraph 2, El Salvador suggests that the words "may have to pay" be replaced by the word "payable".

Article 43: The editorial revisions set forth below are proposed with the aim of assuring clarity in regard to the distribution of the obligation to pay deposits as an advance for costs, and providing for the possibility of such deposits being paid by only one of the parties.

It is proposed that paragraph 1 be revised as follows: "1. The arbitral tribunal, on its establishment, may request the parties to deposit ~~an equal amount~~ a sum of money as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c)".

It is proposed that a new paragraph 4 be inserted as follows: "4. The deposits required by the arbitral tribunal shall be paid by the claimant and the respondent in equal parts. Either party may pay the total amount of the deposits required by the arbitral tribunal should the other party fail to pay the amount required of it".

The insertion of the new paragraph 4 will require the existing paragraph 4 to be renumbered as paragraph 5; and it is proposed that this renumbered paragraph 5 be revised as follows: "5. If the required deposits are not paid in full within 30 days after the receipt of the request for deposits has been sent, 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 unless the payment is made by the other party."

Annex to the Rules: In the subheading "Draft model arbitration clause for contracts", the expression "arbitration clause" should be changed to read "arbitration agreement" to standardize the terminology used in the Rules.

United States of America

[Original: English]
[Date: 3 May 2010]

Article 2: The U.S. delegation understands the concern, expressed by a number of other delegations, regarding the risk of parties' being served with notices without their knowing about it. However, we are not aware that this has been a significant problem under the 1976 Rules. Accordingly, we do not see a need for substantial changes in that text, and we support the retention of article 2 as it appears in A/CN.9/WG.II/WP.157, with one suggested clarification (noted below).

In addition, we have particular concerns regarding the language changes that have been proposed.

In paragraph 1 (b), the phrase "or is otherwise capable of being retrieved at an address previously designated by the addressee" does not provide a clear criterion. It is uncertain how the sender of the notice could determine whether this standard was satisfied.

In paragraph 3, the new requirement that the means of communication provide a record of its receipt — which we believe is unnecessary — seems inconsistent with the purpose of paragraphs 1 (b) and 2, for if there is a record of receipt then presumably there would be no reason to have deemed receipt. In addition, the requirement that the communication provide a record of the information contained therein would seem to rule out many commonly used methods of verifying that a communication was received, e.g., courier receipts.

In paragraph 4, the phrase "attempted to be delivered" seems incorrect, because the day of deemed receipt under paragraph 2 is the date that the notice is sent to the last known place of business or address (which is not an attempt), not the date or dates of unsuccessful delivery under paragraph 1.

Thus, we recommend sticking with the version of article 2 found in A/CN.9/WG.II/WP.157 with the phrase "designated address" in paragraph 2 clarified by replacing it with "other address previously designated by the addressee for this purpose".

Article 6: The scope of paragraph 4 has been broadened so that it now applies not only to situations where the appointing authority refuses to act or fails to appoint an arbitrator within 30 days of a party's request, but also to failure of the appointing authority to act within any other period provided by the Rules. (Refusal or failure to act under article 41 (4) is specifically addressed in the last sentence of paragraph 4.)

We reviewed the text for other instances in which the appointing authority is required to take certain action. articles 7, 8, and 9 deal with requests by a party that the appointing authority appoint an arbitrator, so those articles would seem to be covered by the 30 day time limit in article 6 (4).

Other articles that authorize action by the appointing authority include article 10 (3) (constituting an entire tribunal); article 13 (4) (resolving a challenge); and article 14 (2) (deciding whether a party forfeits its right to appoint a substitute arbitrator). In none of those provisions is a time period for action established. article 41 (3) requires that the appointing authority, within 45 days of receipt of a

request by a party, determine whether the arbitral tribunal's proposal regarding its method of determination of fees and expenses is reasonable, and make any necessary adjustments thereto. Thus, article 41 (3) appears to be the only provision in the Rules that is covered by the clause in draft article 6 (4) referring to the failure by the appointing authority "to act within any other period provided by these Rules."

Assuming that, in case of failure to act under article 41 (3), the desired consequence would be designation of a substitute appointing authority (rather than a request to the Secretary-General of the PCA to make a determination on the reasonability of the proposal), in article 6 (4) the phrase "or fails to act within any other period provided by these Rules" might be replaced with "or fails to make any decision on the proposal of the arbitral tribunal under article 41, paragraph 3, within the time limit specified".

Article 34: We understand the desire of some delegations to include new language in this article intended to clarify what the parties are waiving by virtue of accepting the UNCITRAL Rules. However, the debate in the Working Group has demonstrated that the language proposed has created ambiguity regarding the scope of the waiver — in particular with regard to whether the waiver encompasses the ability to resist enforcement of an award. But additional clarification on that point does not seem possible, as several delegations have strongly opposed efforts to preserve expressly that ability.

Therefore, we recommend that the third sentence of article 34 (2) be deleted in its entirety (retaining the first two sentences of that paragraph) — noting that this language does not appear in the existing UNCITRAL Rules, nor in the Swiss Rules or the ICDR/AAA Rules.

Alternatively, we suggest replacing the third sentence with a formulation along the lines of ICC Rule 28 (6) or LCIA Rule 16.8, i.e., the parties waive their rights insofar as such waiver can validly be made. This approach provides less transparency as to the specific things that are waived but it avoids the dilemma of crafting a clarification to the waiver that all delegations can accept. The commentary in the negotiating history might provide further details.

Article 41: We have no specific comments regarding the current text of article 41 (3) or (4). We can accept those provisions in their current form (including the bracketed text in 41 (4)).

B. Comments received from international organizations

1. International non-governmental organizations

Association of the Bar of the City of New York

[Original: English]
[Date: 29 April 2010]

The Association generally approves the proposed revisions to the Rules, subject to the following comments on certain individual provisions. The comments are not in the numerical order of the Rules, but are in the order of their importance, as judged by the Association.

Draft article 34. Form and effect of the award: While it may be that parties cannot exclude by contract or by adopting the UNCITRAL Arbitration Rules a right to oppose confirmation of an award pursuant to the New York Convention, or to move for a set aside pursuant to applicable law, including the Model Law, the Association does not approve a flat waiver of such rights within the body of the Arbitration Rules. All too often parties or their counsel are not sufficiently conversant with the applicability of legal instruments such as the New York Convention, the Model Law, or other applicable law, and might well believe that they have no recourse whatever against an award if the UNCITRAL Arbitration Rules say precisely that without qualification of any kind. At the least, such a rule would be misleading. In the Association's view, article 34 should contain a reference to the New York Convention, the Model Law, or other applicable law as possibly providing recourse, after a final award has been rendered, to a judicial or other competent authority on the basis of any of the grounds stated in those instruments or other applicable law. In the Association's view, should the parties wish to have a flat waiver, they should include it in the arbitration clause itself.

Draft article 41. Fees and expenses of the arbitrators: In the Association's view, the existing system governing arbitrators' fees, as structured in article 39 of the existing Rules, is sufficient for purposes of preventing abuse and bad faith on the part of UNCITRAL arbitrators. Expenses should also be addressed in the same manner as fees. In any event, the Association does not judge the problem to be serious. Further, article 39 of the current Rules provides a significant role for the appointing authority with respect to arbitrators' fees, if the appointing authority consents. The proviso "if the appointing authority consents" should be deleted from the clause in both instances in which it appears. In the Association's view, no further changes need be made except for the addition of expenses. The system works well as it stands. By its terms, the proposed draft article 41 could add two months to the proceedings just to settle the matter of arbitrators' fees. There is no sufficient reason for such delay.

Draft article 29. Experts appointed by the arbitral tribunal: Draft article 29 (5) provides that an expert appointed by the arbitral tribunal "may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert". In the Association's judgment, this provision is deficient. Parties should have a clearly stated and explicit right to question a tribunal-appointed expert at a hearing.

Draft article 4.2 (f). Assertion of a claim by respondent against a party to the arbitration agreement other than the claimant: The Association suggests adding to article 4.2 (f) "subject to the provisions of Article 17.5" to make it clear that a respondent may not add a third person without permission of the tribunal and subject to the procedures of article 17.5. In making the decision to add a third person, the tribunal can take into consideration and work with the parties to resolve such issues as the appointment of the arbitrators.

Draft article 17.5. Joinder and Consolidation: Article 17.5 as drafted limits the ability of the tribunal to add third persons to the case where "such person is a party to the arbitration agreement". In the Association's view, the draft rules should also give the tribunal the discretion to consolidate arbitration claims where they arise out of the same transaction. For example, where there are two or more agreements between the same or substantially the same parties that relate to the same

transaction, with common issues of law and fact, and the Claimant asserts a claim under one contract and Respondent asserts a claim under another contract, the claims could be consolidated at the discretion of the arbitral tribunal.

Draft articles 20, 21, and 27. Statements of claim, defence, and evidence: Articles 20 and 21 seem to require sequential submission of statements of claim and defence that are memorials and counter-memorials accompanied by submission of "all documents and other evidence relied upon" or contain references to them. But draft article 27 on evidence permits but does not require witness statements. This would seem to leave open the possibility of presenting oral testimony at the hearing that has not been part of the "evidence relied upon" to be submitted with the statements of claim and defence. The draft article should also include a clearly stated and explicit right to cross-examine a witness who has submitted a written statement.

Council of Bars and Law Societies of Europe (CCBE)

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The Council of Bars and Law Societies of Europe (CCBE) considers that, from a general standpoint, the Draft Rules meet the objective of maintaining the level of excellence of the current version of the rules, while adapting them to the current legal and economic context.

The CCBE considers that the draft rules reflect the current practice of international arbitration, and is confident that they will continue to be a widely used tool for dispute resolution around the world.

Against this background, the CCBE would like to take the opportunity to make the following remarks in relation to certain provisions of the Draft Rules:

Article 26: the CCBE welcomes the new provision on interim measures and considers it appropriate that the arbitral tribunal is entrusted with the power of issuing the interim measures that it sees as appropriate in order to effectively protect the rights of the parties. Yet, it should be pointed out that the enforcement of interim measures may be impossible in the light of the law of the country where the enforcement is sought. This circumstance may adversely affect the sound functioning of the procedure. Arbitral tribunals should receive appropriate guidance and ensure, when appropriate, that the requirements foreseen by the law of the country of enforcement are met, particularly with regard to the procedural safeguards that need to be observed and to the form of the act granting the interim measures.

Article 27, Section 2: the CCBE deems that this provision may need some clarification. It is not quite clear whether a witness having submitted a written witness statement will then be heard by the Tribunal and has to appear before the Tribunal. The general impression conveyed by reading this article seems to warrant the conclusion that the two questions raised must be answered in the affirmative. Yet it would be preferable if the text would be drafted in such way that no margin of doubt exists on this aspect. Article 4, Sect. 7 and 8 of the IBA Rules on the Taking of Evidence contain a clear and explicit clarification on this point and could be used as a reference.

Article 34, Section 2: the CCBE considers it preferable that the waiver of the right of appeal with the objective of setting aside the award be expressly agreed by the parties. The CCBE appreciates that this waiver be subject to the applicable law, being therefore invalid if the said law does not allow the parties to agree upon that. Yet, in the interest of the full and effective protection of the law and of due process, it should be presumed that the parties maintain the right to seek remedies against an award on procedural grounds unless they have expressly renounced it. It is therefore suggested that the brackets are removed before the word "except" and after the word "award".

Article 17, Section 5: the CCBE suggests that be placed in a separate chapter, given its importance.